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

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| NORCAL TEA PARTY PATRIOTS, et al., ON BEHALF OF THEMSELVES, THEIR MEMBERS, and THE CLASS THEY REPRESENT,<br><br>Plaintiffs,<br><br>v.<br><br>THE INTERNAL REVENUE SERVICE, et al.,<br><br>Defendants. | Case No. 1:13-cv-00341<br><br>Judge Michael R. Barrett |

**PLAINTIFFS' STATEMENT OF MATERIAL FACTS AND RESPONSE TO IRS'S STATEMENT OF PROPOSED UNDISPUTED FACTS**

Plaintiffs NorCal Tea Party Patriots, et al. (collectively, "Plaintiffs"), hereby submit their Statement of Additional Material Facts and their response to the IRS's Statement of Proposed Undisputed Material Facts in Support of its Motion for Summary Judgment on Class Action Claim (Doc. #357).

**Plaintiffs' Statement of Additional Material Facts**

Plaintiffs submit the following Statements of Additional Material Facts, which provide a comprehensive description of all material facts pertinent to the IRS's targeting of Tea Party groups:

## I. History and Background

P1. A core part of the IRS's mission is to "enforce the law with integrity and fairness to all." Pls.' Ex. 1, Charting a Path Forward at the IRS: Initial Assessment and Plan of Action, at pg. 4. The IRS failed that mission based on its treatment of Plaintiffs and members of the class when they applied for recognition of tax-exemption. *See* Pls.' Ex. 1, IRS 30(b)(6) Merits Dep. at 115:13-116-6 (Aug. 11, 2017).

P2. The basic principles and requirements for tax exemption have existed for decades. For decades, the governmental body responsible for applying those rules has been the Internal Revenue Service. *See* Arnsberger, Ludlum, Riley, & Stanton, A History of the Tax-Exempt Sector: An SOI Perspective, available at https://www.irs.gov/pub/irs-soi/tehistory.pdf.

P3. From 2009 through 2014, the IRS received over 450,000 applications for tax-exemption ("Applications") seeking exemption under 26 U.S.C. § 501(c).

P4. A determination of tax-exempt status provides valuable benefits to an entity. For § 501(c)(3) organizations, donors and contributors generally may rely on an organization's favorable determination letter when making deductions. *See* Pls.' Ex. 3, Donor Reliance on Favorable Determination, Instructions for Form 1023-EZ (Rev. 2017). Even for § 501(c)(4) organizations, a determination of tax-exempt status provides certain incidental benefits such as public recognition of tax-exempt status; exemption from certain state taxes; and nonprofit mailing privileges. *See* Pls.' Ex. 4, Purpose of Form, Instructions for Form 1024 (Rev. 1998).

P5. The IRS division primarily responsible for processing Applications is Exempt Organizations Determinations ("EOD"), which is within the Tax Exempt/Governmental Entities ("TE/GE") Rulings & Agreements branch of the IRS.

P6. Although much of IRS Exempt Organizations is located in Washington, D.C., including EO Management, EOD is located in Cincinnati, Ohio. This geographic separation was intended to help keep politics out of the tax-exempt process. Pls.' Ex. 5, Marks Dep. at 108:18-110:20.

P7. The IRS processes Applications using what it calls the Determination Letter Program. *See* Pls' Ex. 6, IRM § 7.20, Exempt Organizations Determination Letter Program.

**A. The Ordinary Process for Applicants under the Determination Letter Program**[1]

P8. Under the Determination Letter Program, once an Application is scanned and sent to EOD, it sits in "unassigned inventory" until pulled by an EOD Screener for Technical Screening. Pls.' Ex. 7, IRS 30(b)(6) Doc. Mgmt. Dep. at 139:21-140:13.

P9. Technical Screening is the first level of review for all applicants. It is not challenged by Plaintiffs.

P10. Once assigned for Technical Screening, EOD Screeners review the Application to make one of five decisions: (1) approve the case on merit; (2) return the case if the Application is substantially incomplete; (3) provide accelerated processing to correct minor errors; (4) designate the case for full development; or (5) flag the case for secondary screening. Pls.' Ex. 8, IRM § 7.20.2.3; Pls.' Ex. 9, IRS 30(b)(6) Class Dep. at 63:10-66:1; Pls.' Ex. 10, Bell Class Dep. at 34:12-35:2; Pls.' Ex. P11, Exempt Organization Determination Process Flowchart.

P11. A case is designated for full development if more information is needed from the organization before a determination can be made. Pls.' Ex. 12, Defs' Resp. to Pls' Interrog. No. 7.

P12. Once a case is designated for full development, the process for developing the case is straightforward. The case is assigned to centralized unassigned inventory until assigned to an EOD agent on a first-in-first-out basis. Pls. Ex. 9, IRS 30(b)(6) Class Dep. at 63:10-64:3; Pls.' Ex. 8, IRM § 7.20.2.2. To obtain additional information, the EOD agent must send a "development letter" within five days of being assigned the case. Pls.' Ex. 8, IRM § 7.20.2.4.1-.2. Once the additional information is received, the specialist will review the response and, if

[1] These procedures were in place through the entire class period, February 2010 through June 2013. The IRS substantively revised its procedures in 2014 to eliminate the technical screening process, specialty groups, and other processes described here.

sufficient, close the case within five days. *Id.*; Pls.' Ex. 9, IRS 30(b)(6) Class Dep. at 103:16-104:14. In its training titled "Protecting Federal Tax Information for Government Employees," the IRS instructs its employees to "[d]iscuss confidential federal tax matters only with those personnel who have a need to know the information for a tax administrative purpose." Pls.' Ex. 75, "Protecting Federal Tax Information for Government Employees," at NorCAL_015738.

P13. To close the case, the assigned IRS agent must determine whether, based on the facts and circumstances of the case, the entity is entitled to tax-exemption. The determination can be favorable, adverse, withdrawal, or if the applicant fails to respond to a development letter, failure to establish ("FTE"). *See* Pls.' Ex. 11, Exempt Organizations Determination Process Flowchart.

P14. Regardless of the determination, the decision is based on the activities of the entity or, if there are not yet any activities, the representation of planned activities made by the entity. Pls.' Ex. 9, IRS 30(b)(6) Class Dep. at 53:8-17; 54:20-55:7. The IRS is not supposed to predict or guess about what an organization might do. *Id.* at 53:9-58:11; Pls.' Ex. 13, Kindell Class Dep. at 78:12-19; 92:20-93:4. In this regard, the Determination Letter Program is representational and is not tantamount to an audit or investigation. Pls.' Ex. 14, Kastenberg Dep. at 90:2-18; 92:13-93:1.

P15. The option for Secondary Screening involves a narrow category of cases designated as "Reserved Inventory." *See* Pls.' Ex. 15, IRM § 7.20.1.3, Reserved Inventory Cases for Designated Groups (09-23-2011); Pls.' Ex. 8, IRM § 7.20.2.3, Technical Screening Overview (7-22-2011). These cases involve technical issues that are handled by a specialty group of EOD agents with experience in that area. Pls.' Ex. 9, IRS 30(b)(6) Class Dep. at 27:17-30:2. This

process is often referred to as "centralization." *See* TIGTA Report, at PageID #5017 (Doc #193-22); Pls.' Ex. 16, Hofacre Class Dep. at 175:24-176:2.

P16. The Reserved Inventory cases first receive a "Secondary Screening," the purpose of which is to ensure that the case in fact meets the technical issue designated for that group. Pls.' Ex. 9, IRS 30(b)(6) Class Dep. at 27:17-30:2; 66:2-67:8; *see also id.* at 39:20-40-6. The secondary screening is generally performed by a designated coordinator within the specialty group. *Id*. at 106:10-107:7; *see also* Pls.' Ex. 17, Bell Merits Dep. at 32:14-33:5.

P17. If the case has been correctly routed, the secondary screener then makes a decision on whether the case can be approved on merit, whether it needs intermediate levels of processing, or whether it needs full development. Pls.' Ex. 18, IRM 7.20.2.3(6), Technical Screening Overview (07-22-2011). If it is determined that the case needs development, it is developed by the specialty group on a first-in-first-out basis, not unlike the process for developing other cases. Pls.' Ex. 9, IRS 30(b)(6) Class Dep. at 28:20-30:2.

P18. In certain instances, EOD agents may elevate issues up the chain-of-command if a case involves a new, unusual, or sensitive matter. Pls.' Ex. 19, IRM § 1.54.1.2.2(1) Elevating Issues (Jan. 1, 2006). This includes "[s]ituations that are newsworthy" or have the "potential to become newsworthy." Pls.' Ex. 20, IRM § 1.54.1.4(2)(p) (2006). The elevation of an issue serves to provide general awareness to IRS superiors in Washington, D.C., but elevation does not result in transfer of the case or any additional review. Pls.' Ex. 2, IRS 30(b)(6) Merits Dep. at 125:24-127:18.

P19. A case may be transferred for development by EO Technical in Washington, D.C. if it fits within certain standards. These standards are: (1) cases that cannot be resolved by established precedent; (2) cases that are not covered by clearly established precedent and may

have a significant regional or national impact; or (3) technical advice cases or technical assistance requests. Pls.' Ex. 6, IRM § 7.20.1.4, Identification of EO Technical Cases (Sept. 23, 2011). Cases transferred to EO Technical are worked by Tax Law Specialists with additional expertise. *Id.*

P20. Under ordinary procedures of the Development Letter program, the average case processing time in 2011 for a determination under 501(c)(4) was 104 days. Pls.' Ex. 2, IRS 30(b)(6) Merits Dep. at 248:14-249:9.

P21. In addition, as the IRS represented to the U.S. Senate Permanent Subcommittee on Investigations, the number of cases closed during the Technical Screening process was 59% in 2008, 57% in 2009, 56% in 2010, 60% in 2011, and 70% in 2012. Pls.' Ex. 21, June 4, 2012 Letter from S. Miller to C. Levin, at NorCal_015853.

P22. Of the more than 450,000 Applications the IRS received between 2009 and 2014, the IRS denied exemption to only 0.28% of those applicants. *Compare* Pls.' Ex. 22, IRS Data Book, 2009, at 55, *with* IRS Data Book, 2010, at 55, *with* IRS Data Book, 2011, at 55, *with* IRS Data Book, 2012, at 55, *with* IRS Data Book, 2013, at 55, *with* IRS Data Book, 2014, at 57.

**B. Precedent on Political Campaign Intervention by 501(c)(3)-(4) Entities**

P23. In the course of processing Applications, EOD agents apply the standards for exemption set forth in 26 U.S.C. § 501(c) and applicable regulations, including the standards for political campaign intervention under §§ 501(c)(3) and (c)(4). *See* P24-27, *infra*.

P24. The standards for political campaign intervention have existed since at least 1969 and apply to every Applicant seeking exemption under §§ 501(c)(3)-(c)(4). Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 424. Similarly, for decades, the IRS has processed Applications for exemption under §§ 501(c)(3) or (c)(4) that have engaged or plan to engage in political activities.

P25. The IRS has issued regular guidance and precedent regarding the standard for political campaign intervention, how it applies to exemption under §§ 501(c)(3)-(c)(4), and how it interacts with other standards for exemption. These materials include Revenue Rulings. *See* Pls.' Ex. 23, Rev. Rule 67-71; Pls.' Ex. 24, Rev. Rule 76-456; Pls.' Ex. 25, Rule 78-248; Pls.' Ex. 26; Rev. Rule 80-282; Pls.' Ex. 27, 2004-6; Pls.' Ex. 28, Rev. Rule 2007-41; Pls.' Ex. 29, 1993 EO CPE ("Election Year Issues"); Pls.' Ex. 30, 1995 EO CPE ("Political Orgs and 501(c)(4)"); Pls.' Ex. 31, 1996 EO CPE ("Election Year Issues"); Pls.' Ex. 32, 2002 EO CPE ("Election Year Issues"); Pls.' Ex. 33, 2003 EO CPE ("Political Campaign Activities").

P26. The IRS also educates EOD agents on the application of Rosenberg's Rules. These rules are an instructional tool or guide that attributes percentages to the definitions for primarily (51%), substantial (20%), and insubstantial (5%). Pls.' Ex. 34, Rosenberg's Rules. These definitions apply to exemption standards for 501(c)(3) and (c)(4) organizations, including the permissible amounts of political campaign intervention. Pls.' Ex. 35, Exempt Organizations Determinations Unit 1a, Instructor Guide, at USA_NorCAL_RFP_0055331; Pls.' Ex. 36, Def.'s Resp. to Pl.'s Req. for Admis. No. 61. IRS employees have used Rosenberg's Rules since at least the 1980's, and EO Technical Tax Law Specialists received training and copies of the rules in 2009. *See id.* In addition, IRS training materials for new hires included the use of Rosenberg's Rules through at least June 2012. Pls.' Ex. 1, IRS 30(b)(6) Merits Dep. at 257:7-258:20; 296:7-297:8.

P27. The standard for political campaign intervention differs from advocacy or other forms of speech by an organization, which is permissible, constitutionally protected activity. Political campaign intervention only concerns the "direct or indirect participation or intervention

in *political campaigns* on behalf of or in opposition to any *candidate for public office*." 26 C.F.R. § 1.501(c)(4)-1(a)(ii)(2) (emphasis added).

**II. The IRS's Targeting of Applicants within the "Tea Party Movement"**

P28. In late 2009 and early 2010, EOD recognized three Tea Party cases as qualifying for tax-exemption under § 501(c)(3). Pls.' Ex. 37, Minutes of Group Meeting—Group 7838, April 14, 2010, at pg. 2. These applicants were processed under the ordinary procedures of the IRS's Determination Letter Program.

P29. However, on January 21, 2010, the U.S. Supreme Court issued its decision in *Citizens United v. FEC*, 558 U.S. 310 (2010). President Obama openly criticized the decision in his 2010 State of the Union address just six days later. Barack Obama, President of the United States, Address Before a Joint Session of the Congress on the State of the Union (January 27, 2010), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=85753.

P30. Senior IRS officials, including EO Director Lois Lerner, immediately began discussing the decision. Lerner emailed her superior, TE/GE Commissioner Sarah Ingram, to discuss EO's position on the decision. *See* Email from S. Ingram to L. Lerner, Political Activity by Corporations (Jan. 24, 2010), at PageID #6667-6669 (Doc. #194-39). Ingram questioned by asking whether IRS should cooperate with groups wanting to take "the test of the tax-exemption issue to the courts." *Id.* This idea was "not . . . greeted with enthusiasm at any level." *Id.*

P31. Lerner and various TE/GE staff continued to discuss the impact of *Citizens United* and the issue of money in politics, including political activities by § 501(c)(4) entities. Pls.' Ex. 38, May 13, 2010 Email from Buller to Lowe discussing taxability of political expenditure made by 501(c) entities.

P32. Lerner nonetheless knew that § 501(c)(4) organizations can do political activity so long as it is not their primary activity. *See* Lois Lerner Discusses Political Pressure on IRS in 2010, at PageID #4967 (Doc. #193-15). She recognized that the IRS will not know "whether they have done more than their primary activity as political or not" until the organizations file their annual Form 990s. *Id.*

### A. Senior IRS Officials in Washington Ordered EOD to Segregate and Hold Cases within the Tea Party Movement

P33. The IRS flagged the first Tea Party case in February 2010 on the ground that it was a "high profile" case due to "[r]ecent media attention to this type of organization." Pls.' Ex. 39, Email from Thomas to Shafer and Camarillo Regarding High Profile Case.

P34. EOD Screening Manager John Shafer elevated the case to EOD Area Manager Sharon Camarillo. *Id.* In his email, Shafer correctly described the standard pertaining to political campaign intervention by § 501(c)(4) organizations, including that it "may intervene in political campaigns as long as its primary activity is the promotion of social welfare . . . ." *Id.* The organization, Albuquerque Tea Party, had indicated that it was considering spending 20% of its budget on campaign intervention. *Id.* at 0021554.

P35. Camarillo in turn elevated the case to EOD Program Manager Cindy Thomas. *Id.* at 0021552-53. Camarillo asked Thomas to let "Washington" know about the case, which she described as "potentially politically embarrassing." *Id.*

P36. The next day, on February 26, 2010, Thomas referred the case to EOT Director Holly Paz, who is located in Washington, D.C. *Id.* Paz indicated that EOT would accept the case given the "potential for media interest." *Id.*

P37. In March 2010, EOD Screening Manager Shafer approached EOD Screener Gary Muthert and directed him to research the Tea Party. Pls.' Ex. 40, Muthert Dep. at 27:9-28:21.

Muthert searched the IRS's information systems, EDS and TEDs, for all applicants with the name "Tea Party" *Id.* at 32:1-16. Muthert later expanded his search for the names "Patriot" and "9/12" because those names were frequently mentioned by Tea Party groups. *Id.* at 37:5-25.

P38. By March 16, 2010, Muthert had performed research on the Tea Party movement and various other ideological variants. In a March 16, 2010 email, EOD Screener Muthert informed EOD Screening Manager Shafer about a Tea Party protest and about how it "appears the TEA party is a Republican based entity." Muthert informed Shafer that there was an equal "Democratic 'tea party' type entity, called 'Emerge.'" Pls.' Ex. 44, March 16, 2010 Email from Shafer to Muthert regarding "TEA PARTY".

P39. Based on his research, Muthert informed Shafer that hundreds of Tea Party chapters were forming throughout the country. *Id.* at 38:1-39:25. These chapters consisted of individuals organizing together who had similar viewpoints and ideology. *Id.*; *see also* Pls.' Ex. 40, Muthert Dep. at 41:8-17.

P40. On March 17, 2010, Thomas informed Paz that EOD had identified a total of 10 Tea Party cases that had applied for exemption. Pls.' Ex. 39, March 17, 2010 Email from Thomas to Shafer and Camarillo Regarding High Profile Case, at 0021551. Paz instructed Thomas to send two more Tea Party cases to EOT and "hold the rest until we get a sense of what the issues may be." *Id.*

P41. The same day, on March 17, 2010, EOT Supervisor Ronald Shoemaker circulated an email throughout EOT stating to "[b]e on the lookout for a tea party case. If you have received or do receive a case in the future involving an exemption for an organization having to do with tea party [sic] let me know." Pls.' Ex. 41, March 17, 2010 Email from Shoemaker to Berrick et al regarding "lookout".

P42. Shortly afterward, EOT specialists began to discuss the Tea Party cases. When EOT Acting Manager Steven Grodnitzky inquired about the activities of the Tea Party organization, Tax Law Specialist Donna Elliot-Moore responded that "it looks more educational but with a republican slant obviously. Since they're applying under (c)(4) they may qualify." Pls.' Ex. 43, April 5, 2010 Email from Muthert to Shafer & Shoemaker regarding "Tea Party Cases – ACTION". Grodnitzky replied that the cases "deal with the Tea Party so there may be media attention." *Id.* Elliot-Moore agreed, stating that the "Tea Party movement is covered in the Post almost daily. I expect to see more applications." *Id.*

P43. Grodnitzky instructed that a "Sensitive Case Report" ("SCR") be prepared for Tea Party cases. He noted that "you can't turn on the television news without hearing about the movement." Pls.' Ex. 44, Email Thomas to Grodnitzky regarding "two cases". SCRs are informational reports used to notify higher-level IRS officials in Washington, D.C. regarding the progress of sensitive cases. Pls.' Ex. 45, Hull Class Dep. at 24:22-25:5; *see also* Pls.' Ex. 46, Lerner Dep. at 87:3-17.

P44. EO Director Lois Lerner—an IRS executive-level official—was informed about the IRS's segregation of Tea Party cases by April 2010. Specifically, on April 28, 2010, Grodnitzky emailed Lerner and informed her about the addition of Tea Party cases to the SCR. Pls.' Ex. 47, April 28, 2010 Email from Grodnitzky to Lerner regarding SCR Chart. Grodnitzky identified that two Tea Party cases were transferred to D.C. and that EOD had 13 Tea Party cases in Cincinnati. *Id.* The Director of IRS Rulings & Agreements, Robert Choi, was also copied on the email. *Id.*

P45. On May 13, 2010, Grodnitzky emailed Lerner "highlights and stats" regarding cases in EOT, including the Tea Party cases. Pls.' Ex. 48, May 13, 2010 Email from Grodnitzky

to Lerner regarding EO Tech Highlights and Stats. Lerner responded, inquiring about the applications filed by Tea Party cases. *Id.* Grodnitzky informed Lerner about the two cases in D.C. and that he "asked the [Tax Law Specialist] and front line manager to coordinate with [Cincinnati] as to how to develop their cases, but not resolve anything until we get clearance from you and Rob [Choi]. *Id.* Lerner acknowledged the information, stating "Thanks." *Id.*

P46. Lois Lerner asserts that she does not remember the April 28, 2010 or May 13, 2010 emails. Pls.' Ex. 46, Lerner Dep. at 90:12-93:15; 100:14-104:15; 106:12-109:18.

P47. On May 27, 2010, Grodnitzky circulated another SCR report to Lerner with a description for Tea Party cases. Pls.' Ex. 49, May 27, 2010 Email from Grodnitzky to Lerner regarding SCR Chart for May.

**B. The Targeting Criteria and the Class**

P48. Less than a month after IRS officials in D.C. instructed EOD to identify, segregate, and hold case Tea Party cases, EOD commenced training on the issue. *See* P49, *infra*.

P49. On April 14, 2010, EOD Screening Manager Shafer held a screening group meeting in which Muthert gave a presentation on "Tea Party Cases." Pls.' Ex. 37, Minutes of Group Meeting—Group 7838, April 14, 2010. The meeting minutes noted that "[w]e are [a]waiting guidance from HQ on these cases. John Shafer is houlding [sic] these cases in his office if you identify one." *Id.*

P50. EOD Screening Group developed four sets of criteria to identify and flag groups falling within the Tea Party movement:

a. A reference in the case file to "Tea Party," "Patriots," or "9/12 Project";
b. A reference in the case file to government spending, government debt, or taxes;
c. A reference in the case file to education of the public by advocacy or lobbying to "make America a better place to live"; or
d. A statement in the case file criticizing how the country is being run."

Pls.' Ex. 50, Email from Thomas to Lowe and Seto regarding Group of Cases.

P51. These criteria, referred to as "Targeting Criteria,"[2] now form the definition of the "Principal Class" certified by the Court. *See* Order, Jan. 1, 2016 (Doc. #223).

P52. Every member of the Principal Class had their application flagged by the IRS using the Targeting Criteria. *See id.* (defining the class as every entity "flagged by the IRS as an 'Advocacy' case using the [Targeting Criteria.]"); *see also* Pls.' Ex 2, IRS 30(b)(6) Merits Dep. at 24:8-26:2 (agreeing that class members are those who were flagged using the four above-identified criteria).

P53. The IRS has identified members of the Principal Class in a list titled "Principal Class Members." IRS 30(b)(6) Dep. Pls.' Ex. 3 (Doc. # 256) (filed with the Court). According to the IRS and the Department of Justice, each of these entities meets the class definition certified by the Court. Pls. Ex. 2, IRS 30(b)(6) Merits Dep. at 20:5-21:6.

P54. The IRS applied the Targeting Criteria to flag organizations from February 2010 through at least June 2013. *Id.* at 95:20-96:1-25 (beginning); 97:16-19 (end point); 36:4-92:7 (discussing application of Targeting Criteria to nineteen groups); *see also* Pls.' Ex. 10, Bell Class Dep. at 169:20-170:22 (criteria in use through at least June 2013).

P55. The Targeting Criteria focused on the organization's names and policy positions instead of the activities permitted under the Treasury Regulations. Pls.' Ex. 51, Defs.' Resp. to Pls.' Req. for Admis. No. 66; *see* Pls.' Ex. 16, Hofacre Class Dep. at 123:14-124:13 (Tea Party cases were not screened based on their activities, but instead based on their name).

P56. Although the IRS tried to argue in this litigation that the Targeting Criteria are relevant to a determination of tax-exempt status, it now concedes that they are in fact irrelevant.

[2] The Court used the term "Targeting Criteria" to refer to the four criteria used to define the Principal Class. Order, at PageID #8417.

*Cf.* IRS Resp. to Rog. No. 15 ("[T]he criteria are relevant to the question of whether an entity has engaged in political campaign intervention . . . .") *with* Pls.' Ex. 2, IRS 30(b)(6) Merits Dep at 120:17-121:7 (the Targeting Criteria are irrelevant and have no bearing on whether an organization qualifies for exemption).

P57. The Targeting Criteria resulted in cases being held back primarily because of their perceived political ideology or political party affiliation rather than any actual political activities. Pls.' Ex. 52; Pls.' Ex.14, Kastenberg Dep. at 52:19-55:22; Pls.' Ex. P53 ("[T]he list contained organizations that appeared to be of a particular political ideology.").

P58. The Targeting Criteria operated to identify and segregate "organizations operated by conservatives" and groups that were "[v]ery conservative right leaning, a lot of mention of Tea Party." Pls.' Ex. 14, Kastenberg Dep. at 65:21-66:9; 68:18-69:5; *see also* Pls.' Ex. 53; *see also* Pls.' Ex. 45, Hull Dep. at 115:178-116:3 (describing the cases as "mainly conservative types."); Pls.' Ex. 54, Paz Class Dep. at 143:16-23 (Paz has no recollection of Democrat or left-leaning organizations being flagged).

P59. Indeed, the names "Tea Party," "Patriots," and "912" reflect a certain set of ideologies. Pls.' Ex. 14, Kastenberg Dep. at 67:8-15. The Targeting Criteria consisted of "political labels." Pls.' Ex. 2, IRS 30(b)(6) Merits Dep. at at 123:6-13.

P60. The IRS now admits that there is no permissible or valid purpose for using the Targeting Criteria to examine an Application. *Id.* at 121:8-11.

P61. It is inappropriate and improper to use political labels like the Targeting Criteria to review an entity's Application file. *Id.* at 123:10-13. The Targeting Criteria are widely recognized as inappropriate. *See* TIGTA Report, at PageID #5017 (Doc #193-22); Pls.' Ex. 2, IRS 30(b)(6) Merits Dep. at 26:3-16.

P62. Although the IRS formally refused to admit that it is improper for it to conduct additional reviews of an entity because of its viewpoint, the IRS has conceded in its deposition that it is wrong to treat organizations differently based on their viewpoint. *Cf.* Pls.' Ex. 55, Defs.' Resp. to Pls.' Req. for Admis. No. 32 *with* Pls. Ex. 2, IRS 30(b)(6) Merits Dep. at 121:16-122:7.

P63. Beyond additional processing, it is improper for the IRS to consider the viewpoint of an organization in determining whether the organization is or is not entitled to tax-exemption. Pls.' Ex. 2, IRS 30(b)(6) Merits Dep. at 121:12-15.

P64. The IRS admits that Plaintiffs and members of the Class received additional scrutiny because of its use of the Targeting Criteria. *Id.* at 118:7-119:23; Pls.' Ex. 1, Charting a Path Forward at the IRS: Initial Assessment and Plan of Action (the inappropriate screening criteria "resulted in the improper targeting of a number of applicants for additional scrutiny."). This additional scrutiny came in the form of additional development for Plaintiffs and members of the class Pls.' Ex. 2, IRS 30(b)(6) Merits Dep. at 118:7-119:23.

P65. The additional development received by Plaintiffs and members of the Class inherently involved inspections of their Applications and associated taxpayer information. *Id.* at 118:12-119:23.

P66. Plaintiffs and members of the Class were segregated and received additional scrutiny even if their application warranted an approval based on merit. Pls.' Ex. 56, Thomas Class Dep. at 108:8-13.

P67. The IRS admits that there is no tax administration purpose for applying the Targeting Criteria. Pls.' Ex. 2, IRS 30(b)(6) Merits Dep. at 125:4-12.

P68. Ultimately, IRS employees received training on the appropriate handling of Applications. *Id.* at 123:14-22. This training included whether employees should treat organizations differently based on their viewpoint. *Id.* at 123:23-124:18.

P69. The IRS agrees that IRS employees should know that organizations cannot be treated differently based on their viewpoint. *Id.* at 124:19-22.

P70. Excluding the Tea Party advocacy cases, the IRS did not screen and centralize other cases based on their viewpoint. *Id.* at 125:19-23.

P71. As of July 2017, only nine (9) of the 428 entities it targeted for additional scrutiny were denied recognition of tax-exempt status. Pls.' Ex. 57, Class Members Current Status (July 14, 2017).

**C. The Holding Pen: Poked and Prodded Because of Ideology**

P72. The cases meeting the Targeting Criteria were centralized and assigned to EOD specialist Elizabeth Hofacre.

P73. EOD agent Elizabeth Hofacre was designated as the "Tea Party Coordinator," a role she assumed on April 25, 2010. Pls.' Ex. 58, Email from Paz to Seidell and Medina regarding Document Request. In addition, the IRS transferred Hofacre from EOD Group 7823 to Group 7822, which served as the specialty group for Tea Party cases. Pls.' Ex. 2, IRS 30(b)(6) Merits Dep. at 66:15-67:23, August 11, 2017.

P74. On May 9, 2010, EOD Manager Thomas approved CPE training materials that announced the use of an Excel workbook that tracked various issues in EOD. Pls.' Ex. 59, Email from Melahn to Herr regarding Emerging Issue Follow-Up. The CPE materials identified Tea Party cases, stating that they were "referred because of the number of applications, high profile, and inconsistent requests between 501(c)(3) and (c)(4)." *Id.*

P75. On May 11, 2010, EOD Group Manager Joseph Herr and Group Manager Jon Waddell exchanged revisions on the Excel workbook. Pls.' Ex. 60, Email from Herr to Waddell regarding Updated Workbook. The excel document contained an Issue Name of "Tea Party," and an "Issue Description" stating: "These cases involve various local organizations in the Tea Party movement are [sic] applying for exemption under 501(c)(3) or 501(c)(4)." *Id.* The "Disposition" column stated that such cases "should be sent to Group 7825. Liz Hofacre is coordinating. These cases are currently being coordinated with EOT." *Id.*

P76. The next day, on May 12, 2010, Waddell circulated the worksheet, stating that it had been "officially vetted" and was to be provided to other managers and employees at the upcoming CPE event. Pls.' Ex. 61, May 12, 2010 Email from Waddell to Abner et al.

**1. *Secondary Screenings by the Tea Party Coordinator***

P77. As the Tea Party Coordinator, Hofacre presented at a Screening Workshop held for the EOD Screening Group on July 28, 2010. Under the topic of "Tea Parties and th[e] like—regardless of the type of application," Hofacre stated that "applications with Key Names and/or Subjects should be transferred to [Group] 7822 for Secondary Screening." Pls.' Ex. 62, Screening Workshop Notes, at pg. 2. The reference to "Key Names and/or Subjects" meant the Targeting Criteria. Pls.' Ex. 10, Bell Class Dep. at 89:20-90:10). Furthermore, although Muthert had expressed interest in "Emerge" and "Progressive" cases earlier in the workshop, Hofacre emphasized that "Progressive" applications were not considered "Tea Parties." Pls.' Ex. 62, Screening Workshop Notes, at pg. 2.

P78. As Tea Party cases were sent to her, Hofacre would conduct the secondary screening of the Application to ensure the case met the viewpoint-based Targeting Criteria. Pls.' Ex. 16, Hofacre Class Dep. at 95:24-96:25 (secondary screening performed using criteria "the

management and the screeners developed to determine if these cases were, in fact, Tea Party cases.").

P79. If the case satisfied the Targeting Criteria, Hofacre would add it to an Excel spreadsheet sent to her by EOD Screener Muthert that was used to track the cases. *Id.* at 101:3-9. If the case did not satisfy the Targeting Criteria, Hofacre would return the case to general inventory. *Id.* at 100:7-25; Pls.' Ex. 62, Screening Workshop Notes, at pg. 9. Consistent with her presentation at the Screening Workshop, Hofacre would return any Emerge or Progressive cases she received back to general inventory, as well as any other case that not a Tea Party or similar organization. *See* Pls.' Ex. 16, Hofacre Class Dep. at 119:23-120:3; *see also* Pls.' Ex. 63, Defs' Resp. to Pls' Interrog. No. 7 (coordinator received applications from "across the political spectrum," but would only "kept applications for Tea Party and similar organizations for coordination . . . .").

P80. Every member of the Class had their Application subjected to secondary screening. Pls.' Ex. 63, Defs.'Resp. to Pls.' Req. for Admis. No. 76.

P81. Because the purpose of the Secondary Screening was to ensure an entity was correctly segregated using the viewpoint-based Targeting Criteria, it served no purpose other than to discriminate against Plaintiffs and members of the class. Pls. Ex. 64, Defs.' Am. Resp. to Pls.' Interrog. No. 7.

P82. Secondary Screening is the First Wave of Unlawful Inspection the IRS performed on Plaintiffs and members of the class. *Id.*

**2. *The Unprecedented, Multi-Tiered Development Process***

P83. In August 2010, the IRS finalized what became the first "BOLO" (i.e., "Be on the Lookout") list. The BOLO served as a routing document that contained an "Issue Name," a

generalized "Issue Description," and the routing or "Disposition" column. Pls.' Ex. 56, Thomas Class Dep. at 35:8-36:2 ("The BOLO . . . provided a routing list . . . issues were notated on the BOLO, and it was so that the determinations specialist could look at it and see where cases needed to be routed.").

P84. The BOLO sanctioned the segregation of Tea Party cases in Group 7822, identifying the issue as "Tea Party" and describing the issue as "various local organizations in the Tea Party movement [that] are applying for exemption under 501(c)(3) or 501(c)(4). Pls.' Ex. P46, Email from Grodnitzky to Lerner et al re EO Tech Highlights and Stats; Hofacre circulated the BOLO list to the entire TE/GE branch of the IRS. Pls.' Ex. 16, at 127:24-128:2.

P85. As a routing document, the BOLO only identified the name of the "issue" and did not incorporate the actual Targeting Criteria used by EOD Screeners. Pls.' Ex. 17, Bell Merits Dep. at 114:24-116:12; Pls.' Ex. 66, Thomas Merits Dep. at 149:18-150:11; Pls.' Ex. 65, Paz Merits Dep. at 236:16-237:19. Hofacre admiteted that she did not include the Targeting Criteria explicitly within the BOLO because she "was really concerned with the terminology it was us[ing]" and "didn't want my name attached to anything else that . . . could bring further scrutiny[.]" Pls.' Ex. 16, Hofacre Class Dep. at 137:15-139:10.

P86. During this point in time, Hofacre was told to develop the cases by sending development letters. *Id.* at 190:5-10. Although development letters generally obtain information needed to make a determination of tax-exempt status, Hofacre was prohibited from making determinations on the cases. *Id.* at 196:2-16; Pls.' Ex. 67, Email from Buller to Hull regarding Political Issues ("There are a number of similar cases that are open in Cincinnati that are being suspended…."; Pls.' Ex. 68, Email from Grodnitzky to Thomas et al regarding From 1023

Application (unable to resolve Tea Party cases without approval from Rob Choi, Director of IRS Rulings & Agreements).

P87. Hofacre coordinated development of the cases with EOT tax law specialist Chip Hull, who was also working the test cases transferred to EOT. Pls.' Ex. 45, Hull Class Dep. at 32:1-15. Hofacre would inspect the Application, prepare a development letter, and send draft and application file to Hull for his review. *Id.*; *see also* Pls.' Ex. 16, Hofacre Class Dep. at 99:4-23. Furthermore, on October 18, 2010, IRS officials in D.C. began circulating a memorandum authored by Carter Hull regarding this process. *See* Pls.' Ex. 69, Email from Paz to Seidell et al regarding Coordination of Tea Party Cases Update Memorandum.

P88. On October 26, 2010, EOD Manager Thomas emailed EO Guidance Manager Paz, expressing "concern with the approach being used to develop the tea party cases we have here in Cincinnati." Pls.' Ex. 70, Email from Bowling to Bell regarding Political Cases--Information. After detailing the multi-tier process in place, Thomas expressed that she "didn't know why Chip needs to look at each and every development letter." *Id.* Thomas later recounted the conversation she had with Paz, informing her EOD Area Managers that Washington is "finding that not all of the tea party cases have the same issues. This is why they have not been able to prepare a template letter with additional information questions." *Id.* Thomas expressed that if "[Tax Law Specialist] Judy [Kindell] does not believe they have a basis for denial for the egregious situations, then they will most likely recommend all cases be approved." *Id.* Despite the uniform up/down treatment proposed for the Tea Party cases, Thomas instructed that, "[i]n the meantime, the specialist(s) need to continue working the applications as they have and will need to advise applicants that the cases are still under review." *Id.*

P89. All told, Hull performed inspections on at least 40 members of the Class, including Class Representatives NorCal Tea Party Patriots and San Angelo Tea Party. *Id.*; Defs.' Resp. to Pls.' Class Interrog. No. 19.

P90. Hofacre had never engaged in this multi-tiered process before, had never heard anyone else engage in this process, and considered it very unusual. Pls.' Ex. 16, Hofacre Class Dep. at 106:17-108:12; 187:12-189:16.

P91. Similarly, Mr. Hull testified that, in his 48-years of experience at the IRS, it was unusual for organizations to go through this type of multi-tiered review. *See* House Report, July 18, 2013 at Page ID #5256 (Doc. #193-38).

P92. According to Hofacre, Tea Party cases "were treated differently than everything we were trained in—yes, they were definitely treated differently." *Id*; Pls.' Ex. 16, Hofacre Class Dep. at 189:20-22.

P93. The designation of Tea Party cases as full development cases without the ability to approve them on merit, including at the initial Technical Screening stage or otherwise, is unprecedented. *See* Pls.' Ex. 15, IRM § 7.20.1.3 (09-23-2011) (designated reserved inventory cases may still be closed on merit during Technical Screening); Pls.' Ex. 18, IRM § 7.20.2.3(6) (July 22, 2011) (secondary screening cases "can be approved on merit with no contact" or, if warranted, receive other levels of development); Pls.' Ex. 2, IRS 30(b)(6) Merits Dep.at 160:12-161:16 (confirming application of IRM to typical reserved inventory cases). Unlike other issues listed on the BOLO, Tea Party cases meeting the Targeting Criteria were referred for full development. Pls.' Ex. 66, Thomas Merits Dep.at 194:24-195:25.

P94. Despite being centralized with a reserved or specialty group, Tea Party cases were never added to the IRM list of cases designated as "Reserved Inventory." Pls.' Ex. 2, IRS Merits

30(b)(6) at 160:12-164:19, August 11, 2017.) Similarly, Tea Party cases were never added to the IRM list of cases designated for Secondary Screening. *Id.*

P95. Because the Tea Party cases were developed on the basis of the viewpoint-based Targeting Criteria regardless of their actual activities, the inspections performed to develop these organizations and prepare development letters is the Second Wave of Unlawful Inspections challenged by Plaintiffs and members of the class.

P96. Hofacre eventually requested to transfer from 7822 because of her frustration with being unable to proceed with the cases and being "stonewalled" by EOT. Pls.' Ex. 16, Hofacre Class Dep. at 190:5-193:4.)

P97. Meanwhile, IRS Officials in D.C. were discussing an article about Citizens United, a "secret donor" theme for 501(c)(4) entities, and President Obama's remarks on that issue. *See* Pls. Ex. 73, Email from Ingram to Lemmons et al regarding New York Times Article.

### 3. *The Second Tea Party Coordinator in Cincinnati*

P98. Ronald Bell became the next Tea Party Coordinator in November 2010. Pls.' Ex. 17, Bell Merits Dep. at 95:21-23.

P99. Bell was assigned the Tea Party cases even though he was fully occupied with "two or three drawers full" of auto-revocation cases, which was a "full plate" of hundreds of cases. *Id.* at 98:2-99-17.

P100. Bell's existing caseload was not an issue, because his manager ordered him to simply hold the 50-100 Tea Party cases without developing them. Pls.' Ex. 10, Bell Class Dep. at 69:5-70:23; 71:7-16; Pls.' Ex. 12, Defs.' Resp. to Pls.' Interrog. No. 7.

P101. When a Tea Party applicant would call Bell to check on the status of its Application, Bell would say that it was "under review." Pls.' Ex. 10, Bell Class Dep. at 71:7-22.

This frustrated many Applicants, some of whom called about their status eight to ten times. *Id.* at 71:7-73:15.

P102. As Tea Party Coordinator, Bell took over responsibility for performing Secondary Screenings of Tea Party cases. Similar to Hofacre, Bell ensured that the case met the Targeting Criteria and, if so, would add it to the Excel listing used to track Plaintiffs and members of the Class. *Id.* at 77:19-78:3. Also similar to Hofacre, Bell sought to screen out any non-Tea Party cases, including Progressive cases, that would be sent to him. *Id.* at 98:7-16; 137:25-138:6.

P103. Bell understood that the centralization of Tea Party cases and his role as the Tea Party Coordinator were "focused only on conservative groups." *Id.* at 136:3-22.

P104. If Bell received a case that that had indications of political activity but that was not a Tea Party case, the case "was returned to the Screening Group to add to unassigned inventory, or to the agent who referred him the case, unless he was able to determine that the exemption was allowable, in which case he would process the application and close it with his manager's approval." Pls.' Ex. 64, Defs.' Am. Resp. to Pls.' Interrog. No. 7, at 11; *see also* Pls.' Ex. 10, Bell Class Dep. at 147:21-148:7 (Bell would approve or re-route cases that had advocacy or potential lobbying so long as it was not a Tea Party –type case).

P105. Bell testified that Plaintiffs and members of the Class were treated differently than other applicants:

> Q. In your experience, was there anything different about the way that the Tea Party 501(c)(4) cases were treated that was as opposed to the previous 501(c)(4) applications that had some level of political engagement?
> A. Yes.
> Q. And what was different?
> A. Well, they were segregated. They seemed to have been more scrutinized. I hadn't interacted with EO technical in Washington on cases really before. . . . not as a whole group of cases.

*Id.* at 178:6-24; *see also* Pls.' Ex. 74, Email from Seto to Paz regarding Tea Party – Email for TAS. Bell elaborated on what he meant by the term "segregated":

> Q. What did you mean when you stated that they were segregated?
> A. Well, they had been – they weren't in the general inventory, they were in a drawer in my file cabinet.
> Q. Just sitting there?
> A. Yeah. Received an order, you know.
> Q. You stated they seemed to have been more scrutinized, is that correct?
> A. Yes.
> Q. As compared to what?
> A. I hadn't heard about people having to send their development letters to Washington to get them preapproved to be sent out.
> Q. You have never seen that before?
> A. No.

Pls.' Ex. 10, Bell Class Dep. at 179:5-17.

#### 4. *The Pursuit for Political Intelligence by Washington and Whistleblowing by EOT Staff*

P106. While Bell maintained a holding pattern in Cincinnati, IRS officials in Washington planned their next steps for Plaintiffs and the Class. *See* P107, *infra.*

P107. On February 1, 2011, EOT Manager Michael Seto emailed EO Director Lois Lerner another monthly SCR Table. Pls.' Ex. 76, Email from Fish to Seto regarding SCR Table for Jan. 2011 and SCR Items. Lerner responded, "Tea Party Matter very dangerous. This could be the vehicle to go to court on the issue of whether Citizen's United overturning the ban on corporate spending applies to tax exempt rules. Counsel and Judy Kindell need to be in on this one please needs to be in this [sic]. Cindy should probably NOT have these cases—Holly [Paz] please see exactly they have please [sic]." *Id.*

P108. Paz responded that "[c]ases in Determs are being supervised by Chip Hull at each step – he reviews info from TPs, correspondence to TPs, etc. No decisions are going out of Cincy

until we go all the way through the process with the c3 and c4 cases here. I believe the c4 will be ready to go over to Judy [Kindell] soon." *Id.*

P109. Lerner responded, saying "Thanks—even if we go with a 4 on the Tea Party cases, they may want to argue they should be 3s, so it would be great if we can get there without saying the only reason they don't get a 3 is political activity." *Id.*

P110. By March 2011, EOT specialist Hull had determined whether the test cases in EOT qualified for exemption. Pls.' Ex. 52, Email from Kstenberg to Shoemaker et al regarding Cases. He provided his memorandum to EOT Manager Michael Seto, his supervisor Elizabeth Kastenberg, and EOT Manager Ronald Shoemaker. *Id.* Seto then forwarded the memo to Thomas. *Id.*

P111. On April 1, 2011, Kastenberg emailed Seto, Shoemaker, and Hull, to express her concern about how the cases had been "held back":

> [A]s a general matter, of the (c)(3) cases, unlike cases involving certain types of activities—credit counseling, charter schools, housing, etc., ***these cases are held back primarily because of the political party affiliation rather than specifically any political activities***. As such, these are not cookie cutter cases and there is no bright line test.

*Id.*; *see* Pls.' Ex. 14, Kastenberg Dep. at 74:10-75:8 (Kastenberg raised her concerns about the flagging of cases based on ideology to her superiors). Seto responded, "I understand. Cindy also understands . . . ." Pls.' Ex. 52, Email from Kastenberg to Shoemaker et al regarding Cases. Kastenberg confirmed in her deposition that, based on her review of the cases, Cincinnati "had selected the case[s] because of language in their activity description that talked about a political party or an ideology. It was not because of the description of their activity itself." Pls.' Ex. 14, Kastenberg Dep. at 56:1-13.

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P112. Kastenberg confirmed in her deposition that, based on her review of the cases, Cincinnati "had selected the case[s] because of language in their activity description that talked about a political party or an ideology. It was not because of the description of their activity itself." Pls.' Ex. 14, Kastenberg Dep. at 56:1-13.

P113. Kastenberg recognized that Tea Party cases were all separate organizations that were affiliated based on a broader ideological movement. *Id.* at 78:17-79:10.

P114. Unlike Tea Party cases, which were flagged based on their names and ideologies, cases concerning charter schools, credit counseling, and housing were flagged based on their actual activities. *Id.* at 56:1-20.

P115. Kastenberg had never before seen IRS select cases for review based on their ideology. *Id.* at 64:17-20.

P116. Hull and Kastenberg met with senior TLS Judith Kindell on April 7, 2011 to discuss the Tea Party cases. Despite the development of the cases and the recommendations provided by Hull—and consistent with Lerner's expression that it would be great if a denial could be made on a basis other than political activity Pls.' Ex. 76, Email form Fish to Seto regarding SCR Table for Jan. 2011 and SCR Items. Kindell recommended that "they develop the private benefit argument further and that they coordinate with Counsel." Pls.' Ex. 77, Email from Paz to Lerner et al regarding Sensitive (c)(3) and (c)(4) Applications.

P117. Lerner agreed with Kindell, stating that "these could blow up like crazy if the Determs folks let one out incorrectly . . . . Can we have all of them assigned to one or two folks who don't make a move without Counsel/Judy involvement?" *Id.*

P118. In response, Paz once again reassured Lerner that "[t]hey are currently being assigned to one group. They consult with Chip on all development. They have been told not to issue determs until we work through the test cases we have here." *Id.*

P119. In May 26, 2011, Lerner asked Thomas about an entity called Crossroads GPS based on questions she received from Steve Miller, then the IRS Deputy Commissioner for Services and Enforcement. Thomas informed Lerner that it had been screened and sent to Bell as a Tea Party case. Pls.' Ex. 78, Email from Thomas to Bowling and Esrig regarding Application Info.

P120. On June 1, 2011, Acting Director of EO Rulings and Agreements Paz emailed Thomas and asked that she send to her a copy of the Application filed by Crossroads GPS. Ex. Pls.' 79, Email from Paz to Thomas Regarding Group of Cases. Lerner wanted a copy of the Application. *Id.* Paz also asked "[w]hat criteria are being used to label a case a 'Tea Party case'? We want to think about whether those criteria are resulting in over-inclusion." *Id.* Paz indicated that Lerner wanted to be briefed on the Tea Party cases. *Id.*

P121. In her deposition, Paz contended that she asked about the criteria because she was concerned that Cincinnati was capturing cases that did not include campaign intervention issues. Pls.' Ex. 65, Paz Dep. at 119:17-120:3. However, in a contemporaneous email sent to Thomas, Paz stated that Washington was "curious because Crossroads is associated with the Republican party, not necessarily the Tea Party." Pls.' Ex. 78, Email from Thomas to Bowling and Esrig regarding Application Info.

P122. Indeed, Thomas confirmed that Washington was concerned "that there was a third political party being formed, the Tea Party, beyond the Democratic and Republican Party, that they thought that was a Tea Party that was being formed." Pls.' Ex. 56, Thomas Class Dep. at

144:21-145:23. Thomas recognized that Washington was concerned that "these cases were not just Tea party cases but that there were more cases in that net." *Id.*; *see also id.* at 145:24-146:6 (". . . Crossroads was more associated with the Republican Party, not the Tea Party, and so there was a question about what all cases are you putting tin this batch of cases? It's apparently not just Tea Party cases."). Thomas had separately expressed to EOD Group Manager Bowling that Washington "think[s] Crossroads is associated with the Republican Party, not necessarily the Tea Party." Pls.' Ex. 79, Email from Paz to Thomas regarding Group of Cases

P123. Thomas asked EOD Screening Manager Shafer to provide her the criteria used to identify Tea Party cases, and he provided her with the list of Targeting Criteria. Pls. Ex. 80, Email from Thomas to Paz and Seto regarding Coordination Question, at pg. 2.

P124. Thomas provided the Targeting Criteria to Paz and made it clear that, "[i]f we don't want the screening group to include all of these type issues as 'tea party cases,' they would have no problem including or excluding certain cases. However, they need to be given the criteria to use." *Id.*; *see also* Pls.' Ex. 78, Email from Thomas to Bowling and Esrig regarding Application Info(informing EOD Area Manager Bowling the same).

P125. After receiving the Targeting Criteria, EOT specialist Hull explicitly questioned their use. He emailed Bell, the Tea Party Coordinator, and asked "how the cases on your list were identified to be included in your list" and "[d]id any particular person in EO indicate that these types of cases should be set aside and included o the list?" Pls.' Ex. 80, Email from Thomas to Paz and Seto regarding Coordination Question. Hull stated that "***the list contained organizations that appeared to be of a particular political ideology***. Were any other political ideology cases included (e.g., liberal, conservative, well-known, particular people or identifying particular people or affiliations)?" *Id.*

P126. Hull never received a response to his email. Instead, EO Group Manager Steven Bowling—who managed the specialty group overseeing Tea Party cases—forwarded Hull's email to Thomas, with Bell copied, and instructed Bell to "hold off on this." Pls.' Ex. 81, Email from Thomas to Bowling, Esrig, and Bell regarding Coordination Question. Thomas then forwarded Hull's email to EOT Manager Michael Seto, informing him about the email and letting him know that Paz had asked for more information the week prior. *Id.*.

P127. Furthermore, in an untitled email addressed to Elizabeth Kastenberg, the author described to Kastenberg:

> Here's what they have. Basically, they appear to look at the names and check[] the file for the words Tea Party, Patriots, or 9/12 Project. This would not necessarily exclude various "liberal" groups, and it not aimed solely at "conservative" organizations. That said, I haven't yet seen any case other than organizations operated by Conservatives.

Pls.' Ex. 53, Email from Unknown Sender to Kastenberg regarding Coordination Question.

P128. Kastenberg agreed with this summary, stating that it was consistent with her understanding. Pls.' Ex. 14, Kastenberg Dep, at 68:9-69:2. Likewise, Hull admitted that the "ideology" he had written about in his email was "conservative," and that Tea Party groups were conservative. Pls.' Ex. 45, Hull Class Dep. at115:17-116:6.

### 5. *The Lerner Briefing, the Decision to Continue Heightened Scrutiny, and the Initial Traces of Concealment*

P129. Consistent with Lerner's request for briefing regarding the Tea Party cases, IRS officials in EOT and EOD began preparing a briefing paper. Hull prepared the first draft, which was then revised and completed by EOT specialist Justin Lowe. Pls.' Ex. 14, Kastenberg Dep. at 76:19-77:9; *Id*; 85:8-20.

P130. Seto emphasized that the briefing paper needed to describe how the Tea Party cases "differ from organizations that have supported the two national political parties (if

possible)." Pls.' Ex. 82, Email from Seto to Paz regarding 501(c)(4) Political/Lobbying Cases – Briefing for EO Director.

P131. The Lerner briefing paper, titled "Increase in (c)(3)/(c)(4) Advocacy Org Applications," contained background information on the Tea Party and test cases, listed the Targeting Criteria, and proposed options for next steps. Pls.' Ex. 83, Memo: Goehausen to Seto regarding Notes from Meeting. The paper also included cautions, including that "[t]he determinations process is representational, therefore it is extremely difficult to establish that an organization will intervene in political campaigns at that stage." *Id.*

P132. The Lerner briefing occurred on July 5, 2011, which included Goehausen, Hull, Kastenberg, Kindell, Lowe, Paz, Seto, and Thomas. Pls.' Ex. 84, Seto Dep. at 166:21-171:9; Pls.' Ex. 85, Email from Paz to Seto regarding Briefing for EO Director; Pls.' Ex. 86, Lowe Dep. at 58:8-60:6. During the meeting, Lerner directed that the label "Tea Party" be changed for "Advocacy" within the BOLO listing. Pls. Ex. 56, Thomas Class Dep. at 165:4-8; Pls.' Ex. 87, Email from Jefferson-White to Brooks et al regading Emerging Issue Cases. Lerner also directed that Chip Hull be removed from working on the cases. Pls.' Ex. 56, Thomas Class Dep. at 164:24-25:3.)

P133. Paz conceded that part of the discussion at the briefing was whether "using either names or issues could lead you to only focus on one ideology." Pls.' Ex. 54, Paz Class Dep. at 160:17:161:6.However, she contended that "[w]e did not make that determination at that point in time." *Id.* at 161:7-10. Paz claimed that she does not remember whether the alarm raised by Hull (i.e., the groups consisting of one ideology) concerned her or not. *Id.* at 160:11-16. Despite the issue being raised in the meeting, Paz claimed that she does not remember whether she wanted to know if Hull's findings were true or not. *Id.* at 161:-11-16.

P134. In a summary memo circulated the next day, EOT specialist Goehausen summarized the next steps to be taken for the Tea Party or Advocacy cases. These included: (a) developing a checksheet for Cincinnati to use; (b) have EOD send 15-20 cases to EOT to review; (c) require the "advocacy organizations" to make representations on "certain issues (i.e., they won't politically intervene) in order to pin them down in the future if they engage in prohibited activities"; and (d) see if the organizations were "registered with the FEC and if so, . . . ask additional questions." Pls.' Ex. 86, Memo from Goehausen to Seto regarding Notes from Meeting. In her deposition, Lerner said that she does not recall any other directives from the meeting. Pls.' Ex. 46, Lerner Dep. at 164:12-166:12.

P135. Consistent with Lerner's directives, Thomas changed the reference from "tea party cases" to "advocacy orgs" on the BOLO. Pls.' Ex. 87, Email from Jefferson-White to Brooks et al regarding Emerging Issue Cases.

P136. The changes to the "label" used in the BOLO were superficial and did not alter or stop the IRS's use of the Targeting Criteria. Pls.' Ex. 66, Thomas Dep. at 35:8-36:2 (the BOLO is a routing document); Pls.' Ex. 2, IRS 30(b)(6) Merits Dep. at 175:25-184:4; Pls.' Ex. 87, Email from Jefferson-White to Brooks et al regarding Emerging Issue Cases.. This is because the BOLO only identified the name of the "issue" and never incorporated the actual criteria used by EOD Screeners. Pls.' Ex. 10, Bell Class Dep. at 114:23-116:7; Pls.' Ex 2, IRS 30(b)(6) Merits Dep. at 175:25-184:4; Pls.' Ex. 87, Email from Jefferson-White to Brooks et al regarding Emerging Issue Cases.

P137. IRS officials knew from their investigation that the BOLO did not contain the actual four Targeting Criteria and knew that new criteria would be needed to change the screening process in place for Tea Party cases, but they never provided new or different criteria

for EOD Screeners to apply. Pls.' Ex. 56, Thomas Class Dep. at 170:4-171:2; Ex. 2, at 183:4-184:4; Pls.' Ex. 87, Email from Jefferson-White to Brooks et al regarding Emergin Issues Cases.

P138. The change to the "label" for Tea Party cases was designed to obfuscate their continued application of the Targeting Criteria. Pls.' Ex. P67, Thomas Class Dep. at 183:7-185:6. Thomas stated that the change was based on Lerner's "concern with the 'label' we assigned to these cases. Her concern was centered around the fact that these type things can get us into trouble down the road when outsiders request information[.]" Pls.' Ex. 87, Email from Jefferson-White to Brooks et al regarding Emergin Issues Cases..

P139. Indeed, on or around the July 5, 2011 meeting, Lerner expressed that she "want[ed] everyone to know that we are handling the cases as we should . . . ." *Id.* Based on this remark, Thomas understood that the screening group should continue to do what it had been doing in the past with respect to the Tea Party cases. Pls.' Ex. 56, Thomas Class Dep. at 170:10-13. Thus, after the July 5, 2011 meeting, EOD Screeners continued to screen for Tea Party cases as they had in the past. *Id.* at 171:10-13 ("Q: [T]he screening group, the way that they . . . screened for Tea Party cases continued as well; is that right? A: Yes, it continued."). The test cases also continued their slow development; before his removal, Hull, a 30-year veteran of the IRS, testified he had never before had to run cases by Judith Kindell, Lerner's Senior Technical Advisor (Pls.' Ex. 45, Hull Class Dep. at 126:3-7), and that he was "shocked" that several months after this, Chief Counsel still believed Hull should request more information from his test cases. *Id.* at 157:24-158:19.

P140. By the end of the summer, Paz was not only aware the viewpoint-based criteria used to segregate what the IRS now called the "Advocacy Cases," she had actually gained personal knowledge of some of the applications by making her own trip to Cincinnati to review

files. She reported by email to David Fish and Andy Megosh, officials in the Guidance Unit, that "it is clear to me" that the IRS had "held up cases that have nothing to do with lobbying or campaign intervention (e.g., distributing educational material on the national debt)." Pls.' Ex. P59,at 185:15-187:9; Pls. Ex. 88, Email from Megosh to Paz, Fish, and Seto regarding Advocacy Cases.

P141. Further, Lerner and Paz openly admitted to attorneys in the Office of Chief Counsel their understanding that the cases did not have cookie-cutter activities and the legal issue was not new, but even then, they continued to insist on the intensive, centralized development they had ratified in the early July 2011 meeting. *See* Pls.' Ex. 89, Cook Dep. at 198:8-199:22; Pls.' Ex. 90, Email chain between counsel Janine Cook and Don Spellman regarding Paz report on her and Lerner's case development plans in preparation for July 26, 2011 meeting between Lerner and counsel; Paz reports that she and Lerner "suspect we will have to approve the majority of the c4 applications," admits this was "not a new issue (just an increase in frequency of the issue)," and discloses the plan to "get representations re: the amount of political activity"); Pls.' Ex. 89, Cook Dep. at 215:19-217:9; Pls.' Ex. 91 (Janine Cook notes from July 26, 2011 meeting between Lerner and, from Chief Counsel's Office, Nan Marks and Cook, reporting Lerner admission that the cases weren't "cookie cutter" and "can't do templates," but also reflecting Lerner's claim that while some cases had "tea party," they were from "both sides," and said that her plan was to send even "some favorable to the ROO [Review of Operations]").

P142. The IRS never took steps to de-segregate Plaintiffs and the Class—now called "Advocacy cases"—despite knowing that they did not present cookie-cutter activities or novel issues, and had instead been segregated and scrutinized on the basis of their ideology. Pls.' Ex. 2,

IRS 30(b)(6) Merits Dep. at 199:6-201:12. Instead, Lerner and other senior IRS officials decided to develop new and increased forms of scrutiny for Plaintiffs and the Class. *See* P134-139.

P143. Hull was removed from working on the Tea Party cases after he had alerted his superiors that the Tea Party cases had been scrutinized based on their ideology. Pls.' Ex. 46, Lerner Dep. at 165:13-16 ("I told Holly to take Chip Hull off the cases.").

**D. The Segregation Continues: New Demands and Inspections between Summer 2011 and Early 2012**

P144. The IRS moved forward with the plans Lerner and Paz had set, and in November 2011, Stephen Seok became the third Coordinator for the Tea Party or Advocacy Cases. Unlike Bell, who had a full plate of auto-revocation cases, Seok had more capacity to work on the Tea Party or Advocacy cases. Pls.' Ex. 17, Bell Dep. at 84:5-18. Bell testified that he was "happy to hand the baton off and move on" when informed of his reassignment. Pls.' Ex. 10, Bell Class Dep. at 181:1-12.

P145. As of December 16, 2011, Seok noted that there were "[a]bout 172 cases so far and counting," which he described as "[m]ostly Advocacy with strong or some political activities, ***at least implied.***" Class Mot. Ex. GG, Doc 193-47 (PageID #5324).

P146. Meanwhile, in Washington around November 2011, EOT assigned a new tax law specialist, Hilary Goehausen, to perform a "triage" on the Tea Party cases. Goehausen had only been at the IRS since April of that year. Pls. Ex. 92, Defs.' Am. Resp. to Pls.' Interrog. No. 4; Pls.' Ex. 93, Goehausen Class Dep. at 26:13-23. Goehausen's triage resulted in an Excel spreadsheet that contained her comments on 161 groups, including characterizations as to whether the groups had used "inflammatory" or "emotional" language. EOD Political Advocacy Cases – Screened by EO Technical at Page ID#5327 (Doc. #193-48). The IRS has admitted that

the Triage process was pointless. Pls.' Ex. 56, Thomas Class Dep. at 173:19-176:7; Advocacy Team Meeting Minutes (12/16/11) Page ID#5324 (Doc. #193-47).

P147. During the triage, Goehausen inspected return information for at least 161 entities. Pls.' Ex. 71, Defs.' Resp. to Pls.' Class Interrog. No. 18. The Goehausen triage is the Fifth Wave of Unlawful Inspections challenged by Plaintiffs and members of the class.

P148. Back in Cincinnati, Seok became the leader of an "Advocacy Team" developed by EOD Management specifically for the Tea Party cases. Pls.' Ex. 94, Seok Dep. at 23:20-24:5.

P149. The Advocacy Team began scrutinizing the Applications and associated information submitted by Plaintiffs and the Class. The Advocacy Team inspected return information for at least 133 entities. Pls.' Ex. 71, Defs.' Resp. to Pls.' Class Interrog. No. 19. Seok also scrutinized and inspected information contained on tracking spreadsheets for the Tea Party or Advocacy cases, which had grown to 258 cases. *Id.*

P150. The Advocacy Team was formed to provide new and increased forms of scrutiny for Plaintiffs and the Class. It was composed of higher-graded "Grade 13" agents assigned under Seok and his manager Steven Bowling. *See* Pls.' Ex. 95 (Lerner 3-1-12 email to D. Fish remarking with a "smiley face" that it looked good to appear that the "cases are dispersed all around--no 'task force' (-:"). These inspections are the Sixth Wave of Unlawful Inspections challenged by Plaintiffs and the Class.

P151. In addition, EOT provided Seok with an "Advocacy Org Guide Sheet" that the Advocacy Team used to prepare and issue development letters to Plaintiffs and members of the Pls.' Ex. 64, Defs.' Resp. Pls.' Interrog. No. 7; Email from Seok to Bell et al regarding Advocacy Org Guide Sheet at PageID #5344 (Doc. #193-50).; Pls.' Ex. 94, Seok Dep. at 65:23-66:7; 68:16-19; 94:8-16; 95:18-96:16.

P152. Shortly after the letters were sent, groups began to report about abusive questions they received from the IRS. Pls.' Ex. 94, Seok Dep. at 103:21-23.)

P153. The Advocacy Team had sent Plaintiffs and the Class questions concerning:

a. The names of any donors;
b. A list of all issues that are important to the entity and an indication of its position regarding such issues;
c. Information about the roles of non-member participants in activities by the entity and the types of conversations and discussions had by members and participants during the activity;
d. Whether any officer, director, or member of the entity has run or will run for public office;
e. The political affiliation of any officer, director, member, speaker, or candidates supported or other questions regarding any relationship with identified political parties;
f. Information regarding the employment of any officer, director, or members other than by the entity, including but not limited to the number of hours worked; or
g. Information regarding the activities of other entities beyond solely the relationship between the applicant and such other entities.

Pls.' Ex. 96, Email from Thomas to Paz regarding Questions from TIGTA.[3]

P154. The IRS has admitted that these questions are the "most troubling questions" of those sent by the Advocacy Team. Pls.' Ex. 97, Email from Paz to Kindell regarding Greeting from Cincinnati; Pls.' Ex. 65, Paz Dep. at 183:14-17.)

P155. These questions seek information that is unnecessary for determining tax-exempt status, and the IRS has admitted that they are overbroad and non-probative. Pls.' Ex. 98, Email from Marks to Paz and Lerner regarding Comments on TIGTA's Analysis; Ex. 2, IRS 30(b)(6) Merits Dep. at 26:3-16.

P156. These Unnecessary Requests form part of the definition for the Unnecessary Requests Subclass certified by the Court. *See* Order at PageID #8436.

[3] These sets of questions are referred to as the "Unnecessary Requests."

P157. There are 33 entities that provided information in response to the Unnecessary Requests, including Plaintiff NorCal Tea Party Patriots. Pls.' Ex. 99.

P158. IRS knew that the Unnecessary Requests were unnecessary for determining tax-exempt status, yet asked for the information anyway. For example, Paz informed Thomas that "[i]f TPs call and say I don't want to give you a list of my donors, we should allow them to instead provide information about the size and categories of their support instead of donor names." Email Paz to Thomas regarding Advocacy Cases – Action Required, at Page ID #5077 (Doc. #193-24); Pls.' Ex. 9, IRS 30(b)(6) Class Dep. at 277:1-279:13.).

P159. Donor identifying information is ordinarily submitted in annual Form 990 tax filings that the IRS must keep confidential. Pls.' Ex. 100, National Taxpayer Advocat at pg. 11292. However, the IRS would have made this information public if it had been submitted as part of the application process. TIGTA Report, at Page ID #5017 (Doc. # 193-22

P160. Paz sought to obtain this information despite knowing that the organizations already qualified for exemption, stating that "[w]e should not be sending out favorable yet," although "[w]e can identify them . . . ." Pls.' Email from Paz to Thomas regarding Advocacy Cases – Action Required, at Page ID # 5077 (Doc. #193-24).

P161. In order to prepare and send these Unnecessary Requests, the IRS performed inspections of the Applications filed by Plaintiffs and the Class. These inspections are part of the Sixth Wave of Unlawful Inspections challenged by Plaintiffs and members of the Class.

P162. Furthermore, upon receipt of the responses to the Unnecessary Requests, the IRS inspected that information. These inspections pertain to the Unnecessary Requests subclass and are the Seventh Wave of Unlawful Inspections challenged by Plaintiffs and members of the Class.

### E. The IRS Reacts to Congressional and TIGTA Investigations: The Discriminatory Impact of the IRS's Efforts to Create a New Narrative

#### 1. *Steven Miller Ordered a Review of Files in Cincinnati to Help Officials Create a Storyline for Rebuffing TIGTA and Congressional Inquiries*

P163. As of early 2012, EO had implemented a multi-tier review for cases. This required at least the following:

a. Review by EOT (Hilary Goehausen) and her manager;
b. Review by Guidance (Justin Lowe);
c. Michael Seto was to schedule a meeting with Cindy Thomas (Determinations) and Donna Abner (Quality Assurance) to provide an update on the analysis and recommendation;
d. The file, analysis, and recommendation would go to Counsel for review, with a notification to Holly Paz; and
e. After Counsel's comments were received, there would be a meeting with Lerner, Paz, and the Guidance Manager.

Pls.' Ex. 101, Email from Thomas to Abner et al regarding Processing Procedures.

P164. The backlog resulting from this process was known to the IRS. Pls. Ex. 46, Lerner Dep. at 236:14-238:12. Lerner's superiors knew of a growing backlog of applications before February of 2012 (*Id.*), but did not direct the Marks Review until April of 2012, by which time Congress had begun to demand meetings and testimony, and the IRS had learned that TIGTA would be conducting an investigation. *See* P167-173, *infra*.

P165. Lerner had kept Steven Miller, the Deputy Commissioner for Services and Enforcement (and one level below the Commissioner) "informed about the backlog all along, because we had… monthly meetings where each division and subsection in divisions reports to the commissioner and deputy commissioner about status. So we had been reporting about the backlog for quite some time." Pls.' Ex. P44b, Lerner Dep. at 236:14-238:12.

P166. Lerner admits that the information she was giving her superiors about the situation in Cincinnati appeared inconsistent with the information that "was coming in from the public." *Id.* at 273:22-274:16.

P167. Even today, Lerner still claims, including through testimony at her June 2017 deposition in this case, that she first heard that certain types of organizations, like the Tea Party, were being singled out for greater scrutiny from "the news" or "perhaps" from Congress. *Id.* at 241:19-242:8.

P168. By February 2012, Lerner's superiors had begun to hear more about the issues with the targeted groups through public and Congressional interest, and turned to Lerner for more in-depth information. To prepare for and follow up on a February 24, 2012 meeting with Congressional staff, Lerner began to gather information from EO and report it to Joseph Grant, her immediate superior, and others. *See, e.g.*, Pls.' Ex. 102, Lerner 2-29-12 email to Nikole Flax, Senior Technical Advisor to Joseph Grant, with a copy to Grant, reporting on case assignment guide, alleged uptick in cases, and guidance); Pls.' Ex. 46, Lerner Dep. at 221:19-226:21).

P169. After the February 24, 2012, meeting, Lerner had many other meetings and interactions with Congress about the targeted groups. Pls.' Ex. 46, Lerner Dep. at 247:20-248:3.

P170. No later than March 23, 2012, the IRS knew that it would be audited by the Treasury Inspector General for Tax Administration ("TIGTA"). Pls.' Ex. 5, Marks Dep. at 56:11-57:18 (stating that by the time of her meeting with Steven Miller, she knew a TIGTA audit would be initiated, but expressing uncertainty as to whether it was requested by Landmark Legal Foundation or the IRS itself); *Id.* at 54:18-56:7 (Marks herself was interviewed by TIGTA in July 2012, and had spoken with Holly Paz "about TIGTA various times starting back when I was first getting into this in March 2012."); Pls. Ex. 103, Flax Dep. at 116:2-117:22 (IRS was surprised to get engagement letter in June 2012 because it had started investigating in March 2012).

P171. Lerner knew that TIGTA information requests were coming no later than April 4, 2012. *See* Pls.' Ex. 104 (April 4, 2012 email to Joseph Grant, "Cincinnati Visit," unsuccessfully arguing that because of the impending TIGTA audit and "c4 Congressional inquiries" it was "NOT a good time to be asking them for anything or to be talking to them about issue [sic] in their work."); Pls.' Ex. 46, Lerner Dep. at 275:2-284:5 (explaining why she asked her superior, Joseph Grant, to either limit the upcoming Cincinnati visit or allow her and Holly Paz to attend).

P172. Marks conferred with TIGTA about her Cincinnati visit, and knew she was coming in advance of TIGTA; TIGTA "came down after" Marks to Cincinnati. Pls.' Ex. 5, Marks Dep. at 55:11-56:7. Then, Marks met with TIGTA in Cincinnati to ensure that it interviewed the same employees Marks had interviewed. Pls.' Ex. 103, Flax Dep. at 50:14-51:7.

P173. Marks' file review not only reached Cincinnati in advance of TIGTA, but was also intended to help IRS officials prepare a narrative for Congressional testimony. *See* Pls.' Ex. 105 (Paz 4-24-12 email to Abner stating that "The goal is to walk through the history of this particular bunch of applications…in order to prepare for the coming Congressional hearing on the allegations that we are unfairly treating Tea Party organizations;" containing references to the visit as "last-minute;" and Cindy Thomas 4-20-12 email stating that the purpose of the visit is "the hearings involving advocacy cases in which Steve Miller will need to testify" and "in order to prep Steve for the hearings"); Pls.' Ex. 106 (Marks 4-20-12 email to her team, with a cc to Judith Kindell, author of a worksheet, noting that Kindell was adjusting a worksheet for keeping track of "what we are seeing so we can report accurately on process for purposes of testimony prep."). Miller's senior technical advisor, Nikole Flax, admits that one reason Marks was sent to Cincinnati was because of Congressional inquiries. Pls.' Ex. 103, Flax Dep. at 44:2-7.

P174. Marks relied on Paz as a key member of her 5-person review team. Pls.' Ex. 5, Marks Dep at 58:17-59:17. For example, she relied on Paz, who had known that Tea Party groups were being selected as early as the spring of 2010 and had approved the centralization process at its outset, for a review of non-BOLO cases to "see what it may indicate re effectiveness and evenhandedness of screening criteri[a] and standards of review." Pls.' Ex. 107, Email from Marks to Paz regarding Addition (c)(4) Information; Pls.' Ex. 5, Marks Dep. at 143:9-144:8. She also relied on Paz, who had been supervising the process, to provide information in a pre-visit meeting in Washington, DC. Pls.' Ex. P122, Paz Dep. at 211:8-213:22; Pls. Ex. 108, Meeting Notes, April 15, 2012"; *See also* Gov't Ex. 12 (Doc. 354-12, Page ID# 11408) (Paz emailing Marks and rest of team on 4-20-12 with four Targeting Criteria and claiming that this was "how the advocacy cases were described on the BOLO list back in June 2011").

P175. The other members of her team were Joseph Urban, Holly Paz, Sharon Light, and Rob Malone. Pls.' Ex. 5, Marks Dep. at 58:10-59:17.

P176. Even before Marks began her review, the worksheet that had been prepared for the team's review had pre-set columns suggesting Marks' team already knew what they were looking for: "Words in Name," "Words in Narrative," "Website check?" and "Words on Website." *See* Pls.' Ex. 109 (April 20, 2012 email from Lois Lerner's Senior Technical Advisor, Sharon Light, to Kindell, attaching spreadsheet listing 162 groups' names and tax information, and entitled "Determinations Research.").

P177. Marks' team had "all the files put in a room," and "went in as a team" to "each take a batch and go through it and look at the entire file." The team "one by one by one, went through the files." Pls.' Ex. 5, Marks Dep. at 132:8-1. Marks' team intended to finish all of the

files, and either finished all of the files or "came pretty close." *Id.* at 133:12-134:8. Team members recorded return information on a worksheet that had been developed for the review. *Id.* at 135:4-137:12. This was not added to groups' application files. *Id.*

P178. Marks' review purported to discover the same thing the TIGTA report observed one year later, and the same thing Lerner and Paz had learned at least one year earlier: that groups' viewpoints had been used, and were being used, as the basis for segregating them for additional development. *Id.* at 86:19-88:17 (Marks' conclusions); *Id.* at 98:11-101:10 (Marks noting that Paz did not seem surprised, and said she had raised the issue of the criteria with Lerner the year before).

P179. Marks herself had met with Lerner almost a year earlier, in July 2011, and Marks had received a July 19, 2011 memo explaining that over 100 cases of applicants "advocating on issues related to government spending, taxes, and similar matters" were on hold, even though Lerner and Paz already "suspect[ed] we will have to approve the majority of the c4 applications." *Id.* at 111:7-117:19. Reviewing the files herself almost a year later on her review in Cincinnati, Marks agreed with the assessment she had first heard from Paz in July 2011, and concluded that a "healthy percentage of them would qualify." *Id.*

P180. Marks claims to remember that upon hearing her report that the IRS was flagging cases for closer scrutiny based on name and ideology, Miller responded by throwing his pencil across the room, and exclaiming, "oh, shit." *Id.* at 86:19-87:3; 87:19-88:6. Miller said that he wanted "the inventory to get on the right track and the cases looked [at] properly, and get people the rulings that they requested if…that was appropriate for the organization, and that he wanted that accomplished as quickly as possible, consistent with doing it right." *Id.* at 111:7-117:19.

P181. However, the IRS used Marks' review only for plotting its defense, as the resulting analysis was not actually disclosed in response to the Congressional inquiries that had provoked the review. On June 19, 2012, over a month after Miller's alleged "oh, shit" moment, Democratic staff asked the following three questions: "How many applications were from Tea Party affiliated groups (if you have this)? How many questionnaires were sent to Tea Party affiliated groups? Was the questionnaire specific for Tea Party groups or just a general questionnaire that goes to all groups seeking exemption?" *See* Pls.' Ex. 110, Email from McAfee to Glenn and Norton regarding Section 501(c)(4) Organizations.

P182. The request was forwarded to Lois Lerner, Holly Paz, Nan Marks, David Fish, Sarah Hall Ingram, Catherine Barre, Justin Lowe, Andy Megosh, and Joseph Grant, among others—all of whom either worked on Marks' purportedly independent review, or received its results. *Id*. That same day, the request was also forwarded to Nikole Flax, Miller's assistant. Pls.' Ex. 111, Email from Urban to Glenn regarding Section 501(c)(4) Organizations. Flax participated with Sarah Hall Ingram in crafting a response. *Id*.

P183. Ultimately, after learning that the information was to go directly to a Member, who wanted an answer, the IRS decided to respond via a phone call stating that it did not "break down" its information in a way that would allow it to answer the questions. *Id*. In writing, the IRS followed up by stating that "The IRS does not classify organizations based on the specific political views of the organization." *Id*. This calculated response not only hid the results of Marks' review, it directly contradicted the results of her review. This was the Ninth Wave of Unlawful Inspection.

### 2. *Review of Return Information Solely to Tally Data on Inappropriate Questions and Defend against TIGTA and Congressional Inquiries*

P184. In addition to Judith Kindell's work in preparing the worksheet that was to be used for file review in Cincinnati, Marks had also tasked Judith Kindell with reviewing and tabulating data from letters in the application files. Pls.' Ex. 5, Marks Dep. at 130:17-132:7; Pls.' Ex. P185 (Light April 18, 2012 email to Marks regarding attachments that appear to be additional information letters).

P185. Paz emailed Kindell from Cincinnati on April 24, 2012, asking her to "create a list of what you consider to be the 5-10 most troubling questions, the name of each org that got those questions as well as the agent who sent the letter" *See* Pls.' Ex. 97, Email from Paz to Kindell regarding Greetings from Cincinnati (also observing that Susan Cundiff would be helping Kindell).

P186. Workers in Cincinnati retrieved copies from the files and sent them to Judith Kindell in Washington, D.C. Pls.' Ex. 5, Marks Dep. at 134:9-135:3.

P187. Kindell only looked at the development letters from her office in Washington, D.C., to catalog and tally the length of the letters and the types of questions that were asked. Pls.' Ex. 13, Kindell Dep. at 134:5-138:3.

P188. Kindell responded with a list of questions that she and another exempt organization specialist "used to doing this kind of thing" felt were "overreaching in almost any context." Pls.' Ex. 5, Marks Dep. at 128:11-130:14.

P189. Kindell's work product included a list of seven questions, as well as a spreadsheet designating which entities received which unnecessary questions. *See* Pls.' Want Dep. Ex. 112, at 99:7-100:18; Ex. 113 (Kindell April 25, 2012 email to Want and Paz with attached spreadsheet).

P190. On April 26, 2012, Light forwarded the spreadsheet and list of questions to Nan Marks. Pls' Ex. 114, Email from Light to Marks regarding Questions to Review. April 26, 2012, was the first of two days on which Marks briefed Stephen Miller regarding her findings. Pls.' Ex. 5, Marks Dep. at 67:17-68:20.

P191. Kindell's review of development letters was not used in the later bucketing or development of cases, which independently reviewed development letters. *See, e.g.*, *id.* at 180:11-181:12. Much later, Holly Paz, who had asked Kindell for her review, designed a new process under which files had to be reviewed again to actually decide which outstanding questions could be withdrawn, and whether taxpayer responses could be expunged from the files; Kindell's review was not used for those purposes. *See* P215-218, *infra*.

P192. Kindell's review played no role in instructions to correct or discontinue the letters, which had already been issued. Orders to stop using the challenged letters had already been issued by March 1, 2012. *See* Government Ex. 28 (Steven Bowling 3/1/12 email to Cindy Thomas forwarding an email chain reflecting a hold on sending the challenged development letters that arose from Lerner's meeting with Congressional staff on February 24, 2012); Pls.' Ex. 65, Paz Dep. at 178:5-179:7.

P193. By March 8, 2012, over six weeks before Kindell's review project, the IRS was already allowing applicants who complained about donor questions to respond with more generalized information (although it would only do this for applicants who complained, and kept this policy a secret). *Id.* at 187:7-190:1; Pls.' Ex. 115, Email from Paz to Thomas regarding Letters.

P194. Kindell's analysis was not actually disclosed in response to Congressional inquiries. Kindell had found in April 2012 that specific types of questions were repeatedly used,

had tallied the number of each type of inappropriate question asked on a taxpayer-by-taxpayer basis, and had recorded which entities received each question. But the IRS kept this secret when Congress asked these very questions in June 2012. *See* Pls.' Ex. 22 at pp. 6, 13 (letter from Steven Miller claiming that the IRS could not answer Congress' questions about what questions were asked because its systems "do not track the specific types of questions asked in the development letters for these cases"; that agents handling c4 political cases craft "individualized questions and requests for documents relevant to the application"; that "there is no standard questionnaire used to obtain information about political activities").

P195. Rather than disclosing Kindell's review to Congress, IRS officials instead maintained and used her analysis over the next year only to assist them in defending themselves from criticism. *See, e.g.*, Pls.' Ex. 116 (May 13, 2013 email from Paz to Flax, issued after Lerner's public apology in an ABA meeting in advance of the TIGTA report, forwarding Kindell email in which Kindell used her initial analysis to quantify how many recipients of each question had "Tea Party," "9/12," or "Patriots" in their names). This was the Eighth Wave of Unlawful Inspection.

### F. 2012 Forward: Additional Inspections from Bucketing for Applicants Known to Have Been Culled Based on their Viewpoint

#### 1. *Bucketing was Re-Screening, Not Development*

P196. In May 2012, a process for organizing the pending cases into four buckets, called "bucketing," was approved by Steven Miller, Joseph Grant, and Lois Lerner. Pls.' Ex. 5, Marks Dep. at 145:2-13 (approval). This is Plaintiffs' Unlawful Inspection 10. Paz and Marks were also involved in discussion that led to the bucketing plan. Pls.' Ex. P65, Paz Dep. at 165:2-13. By this time, all of these officials knew that the groups subject to bucketing had been targeted for heightened scrutiny based entirely on their names and viewpoints. *See* P134-139.

P197. Bucketing itself was not development of the cases; it was simply a rescreening of the cases into four categories for later development. Pls.' Ex. 5, Marks Dep. at 163:12-164:20.

P198. The four categories were as follows: Bucket 1 (approvals); Bucket 2 (limited development needed); Bucket 3 (general development needed); Bucket 4 (cases that looked like denials). Pls.' Ex. 117, at pg. 2 (notes from Holly Paz summary to EOT group describing bucketing process), Pls.' Ex. 118, at 222:1-13; 75:5-77:14.

P199. Most of the bucketing, or re-screening, of the cases was accomplished by the team of approximately ten senior-level employees working in Cincinnati. Ex. 65, at 212:12-214:8.

P200. Each bucketing review of a file actually involved two separate reviews: one review by two different reviewers. Each filled out a worksheet. Any conflicts in the worksheets were resolved by Sharon Light, and if she could not resolve it, the issue would come to Holly Paz. *Id. See also* Preliminary Injunction Findings of Fact, Doc 302 (PageID #10005) (explaining bucketing process applied to TPTP, and citing Doc 212-11 at PageID 8602, 8141, and 8144). Only a few cases, at most, reached Paz. Ex. 54, at 214:2-8.

P201. In making bucketing judgments starting in May 2012, EOD and EOT employees "were instructed for purposes of that review to facilitate that review to assume over 50 % threshold" for social welfare activities of 501(c)(4) applicants. Ex. 54, Paz Class Dep. at 47:4-22.

### 2. *Despite Bucketing, New Process Called for More Inspections to Create Development Letters*

P202. Further, the process required additional file reviews by Hilary Goehausen, Andy Megosh, or Matthew Guiliano, for every question drafted by an EOD agent in "bucket 2" and "bucket 3" cases. Pls.' Ex. 119, Email from Paz to Thomas, et al regarding Advocacy Cases – Next Steps - Revised.

P203. This extra layer of review was required even in bucket 2, where only minor follow-up was needed, the bucketers had already proposed questions, and a pre-set group of EOD agents who had gained experience in the bucketing process (Faye Ng, Carly Young, Grant Herring, Jodi Garuccio, and Janine Estes) would be drafting the questions. *Id*. at 2. Indeed, as the Case of AAOL shows, the review caused multi-month delays, and was sometimes undertake by more than one EOT employer. The delays themselves caused cases to remain open, causing further waves of inspection that were specially conceived for the targeted groups. *See* Pls.' Resp. to the Gov't's Prop. Undisputed Facts 185-190.This was the Eleventh Wave of Unlawful Inspection.

### 3. *Additional Inspections by IRS Quality Assurance*

P204. The bucketing process separately required mandatory review of application files by Quality Assurance ("QA") for "bucket 1," or recommended favorable. *See* Pls.' Ex. 120, (5-22-12 email chain among Paz, Kindell, Marks, and Light regarding checklist for QA review form). This was not discontinued until over 81 groups had been subjected to review by QA. *See* Pls.' Ex. 121 (6-7-12 email outlining next steps); Pls.' Ex. 119 (revised email on next steps from 6-8-12, explaining that groups in bucket 1 are listed on page 1 and total 81 groups; the QA process is described under "Quality Review" on page 2).

P205. Mandatory review by QA also extended to all bucket 2 cases, "just like a regular mandatory review case," even though these cases were not otherwise subject to mandatory review. *Id.* at pg. 2 (under "Bucket 2").

P206. Ultimately, mandatory QA reached 108 of the entities on the TIGTA 298 list. (See Plaintiffs' Motion for Class Certification, Ex. PP, 7-14-15 Email from L. Beckerman, Doc 193-56, PageID # 5388.) This was the Twelfth Wave of Unlawful Inspection.

#### 4. *Additional Inspections for ROO Referrals*

P207. Bucketers were also asked to give their opinion about whether groups should be referred to the ROO. Ex. 54, at 174:6-21. A ROO is simply a review of an organization's file or other publicly available information without contacting that organization itself, and was performed by a special unit with the Examinations Unit called the "Review of Operations." *Id*. at 38:22-39:10.

P208. Even though the IRS later discontinued the ROO (Review of Operations), it continued the process of post-approval reviews by using a referral to the EO Classifications Unit on Form 5666. Pls.' Ex. 118, Biss Dep. at 214:8-216:13.

P209. Bucketers reviewed no fewer than 45 applications solely for this purpose, as 45 entities were referred to the ROO. *See* Pls.' Mot. for Class Cert., Ex. PP, 7-14-15 Email from L. Beckerman, Doc 193-56, PageID # 5388. This was the Sixteenth Wave of Unlawful Inspection.

#### 5. *Additional Inspections on the Tracking Spreadsheets*

P210. Finally, Paz's plan required the creation of a new tracking spreadsheet, which was to combine the earlier tracking sheet EOD had prepared, as well as the spreadsheet prepared by Sharon Light for the April 2012 Cincinnati file review, and "add new columns as cases move through the process." Pls.' Ex. 119, at 3. Agents were to notify the custodian, Ron Bell, when a case was sent to a manager for closing. *Id*.

P211. This plan guaranteed that EO employees would conduct multiple reviews of applicants' return information that would be maintained within the spreadsheet's columns until all of the hundreds of cases were worked. *Id*. This was the Seventeenth Wave of Unlawful Inspection.

#### 6. *Bucketing Increased the Inspections Performed and Further Delayed Processing*

P212. Groups who should never have been subjected to heightened review were actually subject to additional delay and scrutiny due the bucketing process and related procedures. For example, NorCal Tea Party Patriots had applied for exempt status on April 2010 (Pls.' Ex. 122, NorCal Application), was screened as a Tea Party on May 26, 2010, and was subject to two substantial reviews (Pls.' Ex. 123, Letter from IRS regarding Request for Additional Information; Pls.' Ex. 124, Letter from IRS regarding Request for Additional Information.), submitting hundreds of pages of responses. On March 26, 2012, EOD agent Carly Young prepared a 3-page memorandum summarizing all of this. Pls.' Ex. 125, March 26, 2012, Carly Young Notes. She concluded as follows: "They have been totally forthcoming with all information asked of them during the development process. Although some of their events do touch on political subjects, such as opposing Obamacare, or a politician may make a speech at an event, these activities are insubstantial in relation to their primary activities in promotion of their core principles and support of/opposition to legislation germane to their exempt purposes… In summary, the organization appears to qualify for exemption under IRC section 501(c)(4)." *Id.* That same day, Young sent her write-up to her coordinator. *See* Pls.' 126 (NorCal Tea Party Patriots Case Chronology Record).

P213. Nonetheless, NorCal was bucketed anyway, having its file re-reviewed by two different employees, Matthew Giuliano and Andrew Megosh, on May 17, 2012, almost two months after Young's recommendation. *See* Pls.' Ex. P213d, NorCal Tea Party Patriots CCR. Giuliano reviewed donor names, noting that NorCal's donors were reported under the "Income Received" tab in the file. *Id.* Like Young, both Giuliano and Megosh recommended approval with no further development. *Id.*

P214. However, under the special bucketing process, several more reviews occurred. First, the application went to QA. It was first assigned to a reviewer on May 25, 2012, and then reviewed by a manager in QA on May 31, 2012. *See* Pls.' Ex. 127, NorCal Quality Assurance Document.

P215. The QA review led to yet another recommendation for review—a ROO referral—even though neither Young nor Giuliano nor Megosh had recommended a ROO referral. *Id.*

P216. Making the referral—regardless of whether ROO actually took the case or the Examinations Unit further scrutinized NorCal after ROO was disbanded, which is unclear from the documents—itself required further inspection and consideration. *See* Pls.' Ex. 128 (form filled out July 9, 2012, now stating that "Based on the Form 1024 and other materials, M appears to be formed for a social welfare purpose at this point…").

P217. Ultimately, the IRS did not send NorCal's exemption letter until August 2, 2012, over four months after Young's memo. (Pls.' Ex. 129, NorCal Approval Letter). For NorCal, bucketing was a direct result of being designated a "Tea Party" back in 2010, and meant further delay and reviews instead of a prompt determination in March 2012. *Id.*

P218. By June 7, approximately 282 groups, NorCal included, had been bucketed into the four categories. Ex. 54, at 214:18-215:12; Paz Class Ex. 121; Pls.' Ex. 121, Email from Paz to Thomas, et al regarding Advocacy Cases – Next Steps - Revised.

P219. Even if bucketing had been useful, Paz, who helped design it, admits there was no reason it couldn't have been performed the prior year, before 2012. Ex. P59, at 214:13-17.

### 7. *Bucketing and Post-Bucketing Procedures Continue into 2013, Resulting in More Inspections*

P220. Senior officials involved in the review of files during the summer 2012 once again recognized that it was "difficult to give EOD templates because the activities of

organizations were so different." Pls.'Ex. 117, at pg. 2. Nonetheless, under the direction of Holly Paz and other senior officials, the IRS persisted in its program of centralized processing and multiple reviews of the targeted groups. *See infra* P219-229.

P221. Even after the bucketing on the initial backlog of cases had been performed in May of 2012, and into early 2013, groups that were targeted as Advocacy Cases were automatically sent to both secondary screening and bucketing, which were two steps of additional review before the "Case Assignment/Development Process." Pls.' Ex. 130, Waddell Dep. at 171:14-174:3; Pls.' Ex. 131 (Jon Waddell January 28, 2013 email to Stephen Seok, "Outline of Advocacy Process"). *See also* Pls.' Ex. 132, at 139:8-14; Pls.' Ex. P122, at 284:21-287:21; Pls.' Ex. 133, (Light 8-17-02 email to Paz and Thomas on chain discussing working of old bucket cases, new bucketing, and new secondary screening, and stating, "Will this ever end???"); Pls.' Ex. P122, at 340:16-341:12.

P222. Similar to the overlapping inspections used under the May 2012 bucketing process, the post-May 2012 bucketing process automatically required review of each new case by Mitchell Steele and Joseph Herr. Pls.' Ex. 119, Email from Paz to Thomas, et al regarding Advocacy Cases – Next Steps – Revised, at pg 3. If they did not agree, a third employee, Sharon Light, would review the case file and hold a "reconciliation meeting." *Id.*

P223. Holly Paz was involved in designing the new post-bucketing inspection process, and gave a background history of the processing of the cases to the team of EOT staff who were to be involved, including Hilary Goehausen, Susan Cundiff, Patricia Thomas, and Emily Mangrum. Pls.' Ex. 118, Biss Dep. at 75:5-77:14; Pls.' Ex. 117, Biss "Notes for Melissa".

P224. Paz and Light instructed EOT agents that while there was "no percentage test for activities" for 501(c)(4) organizations, the IRS was "unofficially using 51/49%." Ex. P198, at 3; Pls.' Ex. 118, Biss Dep. at 102:18-104:5.

P225. Post-bucketing, review of the application files not bucketed as "1" or "2" intensified. Under the new process, one EOT agent was assigned to assist an EOD agent in reviewing outgoing determinations letters. Pls.' Ex. 131 (Point 4, Case Assignment/Development Process).

P226. The post-bucketing review was a "start over," making a case-by-case review of "what letters to throw out, what letters to keep, what letter to pull some questions from." Pls.' Ex. 112, Want Dep. at 114:1-20; Pls.' Ex. 134, Email from Light to Paz regarding Advocacy Case – Bucket 4 – Extension Request.

P227. The EOT agent would re-review the entire file, "the 1023 or 1024 [i.e., application for recognition of exempts status] along with material submitted in support for the application, along with any development letters already sent to the organization and the information that the organization sent back in response." Pls.' Ex. 118, Biss Dep. at 84:14-85:10. *See also id.* at 108:9-110:13 (In re-reviewing files, EOT agents came upon questions from prior development letters where it was hard to see why the question was asked, or what facts in the application prompted it).

P228. The EOT agent would then prepare a draft development letter, which would in turn be given to Sharon Light, and which would then be reviewed by another agent in EOT. *Id.* at. 85:16-10.

P229. There would ultimately be three levels of review of the letter before it went to a separate part of the IRS, Determinations, for transmittal to the taxpayer. *Id.* at 89:7-18; 113:3-17.

P230. Further, under the new process, EOT could revisit the determinations already made in bucketing, recommending approval or denial. Pls.' Ex. 117, Biss "Notes for Melissa"(notes at bottom of page 2).

P231. For cases being developed after bucketing that had outstanding development letters, new letters devised by EOT would supersede the old development letters; Paz was selected to draft language to taxpayers explaining why the old letters would be superseded. *Id.* at 2. *See also* Pls. Ex. 112, Want Dep. at 111:9-113:22; Pls.' Ex. 135 (Paz 6-25-12 email to S. Light attaching text where new development letters might supersede old letters).

P232. Many groups for whom approval was already warranted had outstanding development letters. Paz also drafted a phone script for those groups explaining that they did not need to answer the pending letters. Ex. 65, at 195:3-196:21; Pls.' Ex. 136 (Email to TIGTA forwarding a 5-24-12 email from Paz to Thomas, explaining that the script was "approved").

P233. The script contained misleading language for agents to use in case taxpayers asked "why it took so long." *Id.* "We received an increased number of applications for 501(c)(4) status that were different form [sic] what we had seen in the past. We needed to understand the activities being conducted so we could make sure those activities are consistent with what the tax law allows." *Id.* *See also* 65, at 199:3-201:11.

P234. During this time, other application file inspections occurred exclusively to the members of the Plaintiff class, although Plaintiffs do not challenge them as part of their Section 6103 claims. For example, Judith Kindell was among a group of IRS employees who reviewed application files before turning them over to Representative Camp, who had lawful access to unredacted files, and who was investigating the IRS in July and August 2012. Pls.' Ex. 13, Kindell Class Dep. at 140:17-141:2. In the summer of 2012, Kindell reviewed the bucketed

entities to classify them based on the ideology of each bucket. *See* Government Ex. 33, Kindell email to Lerner. Though Kindell does not provide further analysis, the inspection was never used for any tax administration purpose and appears to have been part of an attempt to tease out conclusions from the data to support a later argument to TIGTA or Congress that targeting had not occurred. *Id.*

### G. The IRS Continues to Target Groups While Trying to Recast the Narrative with TIGTA, Congress, and the Public

P235. While centralized processing continued, Lerner and Paz lobbied TIGTA to re-cast its inquiry in a way that would find no wrongdoing. *See* Pls.; Ex. 199, Biss "Notes for Melissa" (typed notes at end reflecting Paz, Lerner, and TIGTA comments in January 13, 2013 meeting).

P236. Judith Kindell, along with Hilary Goehausen, reviewed individual case files in 2013 solely for the purpose of attempting to contest TIGTA's conclusions. Pls.' Ex. 13, Kindell Class Dep. at 140:8-16.

P237. A meeting took place between Lerner, Paz, Biss, and several TIGTA employees on January 13, 2013, to discuss TIGTA's initial findings and tentative conclusions from its last ten months of investigation. *See* Ex. P199a, at 369:1-370:13; Pls.' Ex. 117, Biss "Notes for Melissa" (handwritten and typewritten notes of meeting).

P238. Paz attempted to convince TIGTA that the IRS had "cast a broad net in order to understand the big picture," and then had been "able to narrow it down" later. *See id.* at USA-NorCal_RFP_0043593 (mid-page).

P239. Next, Paz tried to change TIGTA's focus from the actual criteria she knew had been used, the four Targeting Criteria, to the "language in BOLO," which she admitted was incorrect, but then claimed had been "corrected." *Id.* (bottom of the page).

P240. Finally, Paz tried to convince TIGTA that when screeners noted "Tea Party" on screening worksheets, they did not really mean Tea Party, since "party" is a "term of art" and, to some screeners, could have been used to refer to any section 527 organization. *See id.* at USA-NorCal_RFP_0043594 (top of page).

P241. When she made her statement to TIGTA, Paz knew: (a) the actual four Targeting Criteria being used; (b) that two whistleblowers, Hull and Kastenberg, had worked on the cases for the first year, had indicated that this led the groups to be selected based on ideology, and were subsequently moved off of the project; and (c) that after her own review in Cincinnati in September 2011, (as she contemporaneously admitted to the Guidance Unit), groups had been selected for extra scrutiny that should not have been. P54; P58; P132; P140.

P242. The result of Lerner and Paz's decision to change only the BOLO list issue description and not the underlying Targeting Criteria was that even during the TIGTA review and Congressional investigations (that is, after May 2012), the Targeting Criteria continued to be applied to cull new groups based on their viewpoints. *See* P54; *see also* Pls.' Ex. 137 (Examples of EO Determination Screening Sheets).

P243. Based on her argument, Paz tried to get TIGTA to "acknowledge that we did not target one side or the other." *See* Pls.' Ex. 117, Biss "Notes for Melissa" at USA-NorCal_RFP_0043594 (top of page).

P244. After a discussion on specific cases that TIGTA and Lerner and Paz's team had reviewed, Lerner then spoke directly with TIGTA about the TIGTA investigation itself. *See id.*, at USA-NorCal_RFP_0043599, top of page. Lerner tried to convince TIGTA that its audit was not judging the mere "targeting of organizations," but instead, was supposed to test whether "there was a political bias" that had demonstrably motivated the actions of Lerner's group. *Id.*

P245. The unspoken corollary was that if TIGTA found no direct proof of politically-motivated retaliation against conservative groups, it must attribute the IRS's conduct to accidents or mistaken choices. To support this argument, she suggested that TIGTA's audit should consider "where the allegations have come from, and the allegations of political bias for one side or the other." *Id.*

P246. Lerner also repeated some of Paz's contentions. Like Paz, Lerner tried to focus TIGTA on the BOLO list itself, claiming that while the "list was bad," "we have fixed the BOLO list issue." *Id.*

P247. Similar to Paz, Lerner characterized the screeners as simply "err[ing] on the side of caution," and said she was "not unhappy with our screeners for being cautious." *Id.*

P248. When TIGTA confronted her with evidence that an individual searched for names or beliefs in TEDS, Lerner said, "that may have been one individual but there was never institutional IRS bias." *See id.*, at USA-NorCal_RFP_0043599, top of page. Lerner again tried to raise the bar to require evidence of political "bias" by screeners, asserting that "there is a big difference between bad judgment and bias." *Id.*

P249. Further, Lerner tried to draw a sharp line between screening and development, asking "whether the whole process was bad if it flowed from one poor choice." *Id.*

P250. Lerner did not disclose in this meeting that in July 2011, she herself had been told the four Targeting Criteria that were actually being used, and that instead of dissolving the group, she ordered more of the same. P142-43.

P251. TIGTA worked to finalize its report in the coming months. On May 10, 2013, five months after her January 2013 meeting with TIGTA, Lerner reversed course and admitted what

she had known but not admitted to TIGTA in January 2013: that names and beliefs had in fact been used to segregate groups, and not just as a descriptive label. *See* P252-259, *infra.*

P252. Lerner's comment came in response to a question about the IRS's handling of the Tea Party cases at an ABA meeting. Pls.' Ex. 138, Election Law Blog Article Transcript of Lois Lerner's Remarks at ABA Tax Meeting.

P253. First, Lerner stated that "line people in Cincinnati . . . did what we call centralization of these cases." *Id.* According to Lerner's response, "[t]hey do that for efficiency and consistency." She further offered that "centralization was perfectly fine." *Id.*

P254. Next, Lerner told the group "the way they did the centralization was not so fine. Instead of referring to the cases as advocacy cases, they actually used case names on this list. They used names like Tea Party or Patriots and they selected cases simply because the applications had those names in the title." *Id.* Lerner told the group "That was wrong, that was absolutely incorrect, insensitive and inappropriate—that's not how we go about selecting cases for further review." *Id.*

P255. Lerner further offered that "in some cases, cases sat around for awhile." *Id.*

P256. She further stated that "They also sent some letters out that were far too broad, asking questions of these organizations that weren't really necessary for the type of application. In some cases you probably read that they asked for contributor names. That's not appropriate, not usual." *Id.*

P257. Although she was unable to confirm that the IRS segregated "anyone on the other side of the political spectrum," (Pls.' Ex. 139, Email from Lerner to Flax et al regarding Proposed Answers) she nonetheless told the group that "They didn't do this because of any

political bias." Pls.' Ex. 138, Election Law Blog Article Transcript of Lois Lerner's Remarks at ABA Tax Meeting.

P258. Lerner closed with an apology: "So I guess my bottom line here is that we at the IRS should apologize for that, it was not intentional, and as soon as we found out what was going on, we took steps to make it better and I don't expect that to reoccur." *Id.*

P259. The IRS had hoped Lerner's answer to a planted question would get out in front of the TIGTA report and give a version of the facts that would minimize follow-up questions from the public about its conduct. Pls.' Ex. 103, Flax Dep. at 177:6-179:4; 184:3-185:3.

P260. However, litigation was filed against the IRS in May 2013, including this case.

### H. 2013 Forward: Discrimination to Protect the IRS in the Form of an "Optional Expedited Process" and "Litigation Hold" Policies

P261. In early June 2013, after the TIGTA report had issued, Lerner had been replaced, and lawsuits had been filed, Meghan Biss and Hilary Goehausen, both tax law specialists in EOT, conducted another re-inspection of applications in order to understand whether groups needed more development letters or modifications to development letters. Pls.' Ex. 118, Biss Dep. at 217:16-220:17.

P262. In one of the cases Biss reviewed on June 6, 2013, Biss later saw that her suggested questions, which were focused on one issue, were laid aside later in 2013. Instead, EOT and Chief Counsel had approved a broader range of questions related to political issues. *Id.* at 224:6-225:20; 229:17-230:11; *see also* Pls.' Ex. 117, Biss "Notes for Melissa, at pg. 7 (upper left-hand corner for questions).

P263. Biss's original, June 6th notes had said, "But need to talk to Sharon [Light] b/c I think we could perhaps go favorable given fact that this is representational process."). Pls.' Ex.

199, at USA_NorCAL_RFP_0043607. The case involved conservative actor Gary Sinise and his group, Friends of Abe. Pls.' Ex. 118, Biss Dep. at 224:20-225:10.

P264. In her June notes, Biss explained, "Think this was screened because it says it will look at issues from a conservative perspective. Don't see anything on screening sheet that indicates political. Am of the opinion that if going through screening today this would be approved without development. Why did this case get pulled?" Pls.' Ex. 140, Biss Triage of Fact Track Folder, at USA_NorCAL_RFP_0043607; Pls.' Ex. 118, Biss Dep. at 225:11-227:20. Biss reported her concerns to the Acting Director of Rulings and Agreements, Rob Malone (the replacement for Holly Paz), in late 2013 or early 2014. Pls.' Ex. 118, Biss Dep. at 225:11-227:20.

P265. Biss's review was during a time when the IRS was considering quickly developing or "do[ing] something else on the cases," but this idea was scrapped a few weeks later in favor of a brand new procedure. *Id.* at 217:16-220:17.

P266. That brand new procedure was called the "optional expedited process," and was rolled out on June 25, 2013. *See* Pls.' Ex. 141 (Memorandum from Director of Exempt Organizations Kenneth Corbin entitled, "Interim Guidance on Optional Expedited Process for Certain Exemption Applications Under Section 501(c)(4)").

P267. The optional expedited process was announced in a memorandum issued by the replacement for Lois Lerner, Kenneth Corbin, but was actually designed by Janine Cook, Casey Lothamer, and Preston Quesenberry from Chief Counsel's office, and Meghan Biss and Sharon Light from EO. Ex. 142, Lothamer Dep. at 88:1-89:12; 92:8-19.

P268. As shown above, Cook had been advised regarding Lerner and Paz's plan to centralize and scrutinize the targeted cases in July 2011 (P141). Cook had been informed that

even though Paz and Lerner suspected they "would have to approve" most of the c4 applicants, and that the cases were "not cookie-cutter" and that the IRS "couldn't do templates," there was still a plan to refer approvals to the ROO and extract "representations re:amount of political activity." *Id*. For their part, Light and Biss had been involved in reviewing the targeted cases since the summer of 2012. *See* P210.

P269. The IRS claimed the process was available to applicants for (c)(4) status with applications pending for more than 120 days as of May 28, 2013 and that "indicate the organization may be involved in political campaign intervention or issue advocacy ("identified pending applications"). *Id*. In practice, however, it appears that the process was actually applied to the group of cases already being held as advocacy cases, which had been selected using the Targeting Criteria and which therefore, like Friends of Abe, did not necessarily have indications of "political campaign intervention or issue advocacy" sufficient to warrant development.

P270. The Optional Expedited Process called for several rounds of new review:

a. All applications would be reviewed for a single issue: "to ensure the case does not indicate any private inurement."
b. A letter would be sent to the applicant offering a special grant of status. Under the deal, recognition would be granted within two weeks if the applicant responded to the letter within 45 days binding itself to certain representations about its past and future activities.
c. While waiting for the applicants' response during the 45-day period, EOT and Chief Counsel would review the applications for purposes of making a proposed recommendation in the event the applicant did not agree to bind itself to the heightened representations. If the group did not accept the optional process, the case would be transferred to EO Technical in Washington, DC, from EO Determinations in Cincinnati.
d. Development of the cases would require review by EO Technical, the office of Chief Counsel, and a Review Committee of more senior officials to resolve opposing recommendations from EOT and Chief Counsel. The Review Committee was also to review adverse determinations and favorable recommendations that EOT and Counsel agreed were "difficult cases."
e. The Review Committee could recommend referral to Review of Operations ("ROO") for any case, and even applicants who accepted the optional expedited process were subject to a ROO.

*See* Pls.' Ex. 141 (Memorandum from Director of Exempt Organizations Kenneth Corbin entitled, "Interim Guidance on Optional Expedited Process for Certain Exemption Applications Under Section 501(c)(4)").

P271. The process, which Cook helped design, incorporated the plan that Lerner and Paz had communicated to Cook in July 2011 to extract "representations" regarding c4s' political activity, even for those for whom approval seemed likely. *See* P141. By its terms, the new Process would require c4s to bind themselves to representations about past and future conduct that incorporated heightened legal standards, including, among other things, (i) an expanded definition of what counts against c4s as political campaign intervention; and (ii) a lower threshold of tolerance of 40%, rather than 49%, to these activites. Opinion and Order on TPTP's Motion for Preliminary Injunction (Doc. 302, Page ID #10006-7); *see also* Pls. Ex. 143, AAOL000045-51 (example of an expedited processing letter to Plaintiff AAOL).

P272. In the first stage of the expedited process, several agents in EO Technical reviewed approximately 130 groups who were slated to receive the optional expedited offers. Pls.' Ex. 140, Biss Triage of Fast Track Folder, at USA_NorCAL_RFP_0043625-0043626. (Thirteenth Wave of Unauthorized Inspection.)

P273. A new round of review, or "triage," was implemented under the optional expedited process, as many organizations had responded to new developments asked during the post-bucketing "start over," and the IRS believed that this new information needed to be reviewed to make new recommendations. Pls.' Ex. 118, Biss Dep. at 191:21-193:1.

P274. This triage required at least two independent re-reviews of the file: one by a TLS from EOT assigned to the case, and one by Preston Quesenberry, an attorney in Chief Counsel's office. *Id.* at 199:16-201:19; 203:5-205:20. (The Fourteenth Wave of Unauthorized Inspection is

the triage that occurred before groups had decided whether to accept the offer of expedited processing; the Fifteenth Wave of Unauthorized Inspection is the triage that continued to occur after groups had declined expedited processing.) Regardless of what EOT recommended—whether it was approval, denial, or simply additional review—Chief Counsel "had to concur with everything." *Id.* at 205:7-20.

P275. Before 2012, it was not typical to require Chief Counsel to review approvals, even in cases that reached EOT; in the "vast majority" of EOT cases, only the EOT reviewer and manager needed to approve. *Id.* at 122:18-123:11.

P276. The IRS only eliminated mandatory Chief Counsel review of additional information requests and approvals in a December 2013 revision to the process for groups not caught in the initial program as of the summer of 2013, when it was obvious that Chief Counsel was concurring with EOT "on a regular basis." *Id.* at 205:21-207:20. Still, the IRS required that the originally-caught groups who were processed under the summer 2013 plan be subject to mandatory Chief Counsel review, even into 2014. *Id.* at 208:6-14.

P277. Under the summer 2013 process, groups who failed to choose expedited processing were subject to the "triage" processing. A disagreement between EOT and Chief Counsel would be resolved by a Review Committee. But there was little disagreement, and few cases ever reached the Review Committee. *Id.* at 213:20-214:7.

P278. In practice, the Review Committee did not immediately review cases, as required by the new memorandum, where there was a difference of opinion between EOT and Chief Counsel. Instead, if EOT and Chief Counsel could not agree, they would meet or email, several times if necessary, to try to reach agreement on the case. *Id.* at 315:2-318:17.

P279. Indeed, groups subjected to development under this new system were in reality subjected to multiple reviews at once, with far closer scrutiny than regular cases. Multiple employees could be involved in reviewing applications "in a very small space together" to "spitball issues and summations off of each other to try to come to the right answer." Pls.' Ex. 142, Lothamer Dep. at 172:19-176:5.

P280. It was common for EOT personnel working on a case to be subject to questioning from multiple attorneys in the Office of Chief Counsel. The case of Emily Mangrum, who had originally recommended approval for Plaintiff TPTP before it became a litigant, is instructive. Mangrum changed her August 13, 2013 recommendation and acceded to a finding of "needs further development" the following month after being questioned separately by both Preston Quesenberry and Casey Lothamer, employees in the Office of Chief Counsel. *Id.* at 178:2-181:18. *See also* Mangrum Affidavit (Doc. 309-3, PageID#10277, paragraphs 6-16, noting communications with Quesenberry but not emails involving Lothamer).

P281. In 2013, EOT agents continued to fill out worksheets after re-reviews of files of cases that had not yet been approved because they were in litigation. Pls.' Ex. 144. (September 6, 2013 email chain among Emily Mangrum, Preston Quesenberry, and Meghan Biss regarding re-review of TPTP, a case that has been reviewed earlier in the summer before the IRS learned TPTP was suing it); Pls.' Ex. 145 (August 2013 email in which Mangrum tells Biss and Quesenberry that she had reviewed a missing part of the file and could now make a recommendation, which turned out to be approval).

P282. The re-review of litigant files continued into 2014. *See* Mangrum Affidavit, (Doc. 309-3, PageID#10277, paragraphs 13-16).

P283. In the case of TPTP, Mangrum in 2014 recommended approval, as she had in 2013. However, after reviewing two memoranda arguing for development, one of which was prepared by counsel Quesenberry and one of which was prepared by her superior, Meghan Biss, she later affirmed that she "did not disagree" with a proposed finding that more development was required. *Id.*; *See also* Pls.' Ex. 146 (Mangrum's 9-5-2014 worksheet for TPTP that now recommends "additional development")..

P284. The re-review of TPTP in 2014 was undertaken at the request of DOJ for litigation purposes. *See* Biss 8-18-14 Email, Doc 309-7, PageID # 10335 (DOJ's August 2014 request to re-review TPTP's file).

P285. TPTP was also re-reviewed in 2015, again at the request of DOJ. This time, it was so that DOJ "could represent to the court [the District Court in this case] on Wednesday [October 21, 2015] what the next step is for processing the application (i.e., development letter or adverse determination)." Lothamer 10-16-15 Email, Doc 309-7, Page ID# 10339.

P286. As a result of the DOJ's 2015 request, a new agent, Joseph Herr, was assigned by the IRS to re-review the file in place of Mangrum and prepare a new draft development letter to replace the draft development letters Mangrum had prepared in 2013 and 2014. Quesenberry 10-19-15 Email, Doc 309-07, PageID# 10337. No new information had been added to the file since TPTP had responded to the IRS's last development letter in March 2013..

P287. As applicants were held over time pursuant to the litigation hold policy or other procedures, the IRS referred new agents to the pending cases, causing successive rounds of re-review of applicants' files, and development letters that backtracked or covered new ground. Pls.' Ex. 118, Biss Dep. at 366:9-368:12.

P288. The DOJ's decision to cause the multiple re-reviews of TPTP's file between 2013 and 2015, but not to actually allow processing, was based on litigation strategy, not tax administration purposes. Ex. 142, at 209:7-211:10.

P289. The IRS and DOJ purported to stop processing TPTP's application on September 16, 2013, after counsel for TPTP objected to the IRS's direct contact with TPTP to offer the optional expedited processing. *See* Preliminary Injunction Findings of Fact (Doc. 302), Page ID #10009 (citing Doc. 245-3 at PageID 8955).

P290. On TPTP's Motion for Preliminary Injunction, this Court found as follows: "Nineteen months later, the Government was told that its purported understanding was incorrect. The Government took the Rule 30(b)(6) deposition of TPTP on April 15, 2015. TPTP requested during the deposition that the IRS process its application despite the fact that the lawsuit was pending. (TPTP Dep., Doc. 197-15 at PageID 7392). The IRS continued to delay the processing after this explicit request." See Preliminary Injunction Findings of Fact (Doc. 302), Page ID #10009.

P291. This Court further found:

> "Five months after [TPTP's 30(b)(6)] deposition, during a September 24, 2015 court conference, the Government reiterated its position that Plaintiffs' counsel had instructed them to stop processing TPTP's application. (Tr., Doc. 210 at PageID 7744). Plaintiffs' counsel responded that the purpose of the cease and desist letter was to have the Government direct all communications with TPTP through counsel, not to stop the processing of tax-exempt applications. (*Id.* at PageID 7748–49.) Plaintiffs' counsel requested at the conference that the IRS process TPTP's application. (*Id.* at PageID 7749.) However, the IRS continued to delay processing the application after the conference."

*See* Preliminary Injunction Findings of Fact (Doc. 302), Page ID #10009.

P292. DOJ trial counsel, who were aware by September 2015 of TPTP's and its attorneys' requests that TPTP's application be processed through counsel, advised Casey

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Lothamer, who was in the IRS Office of Chief Counsel, that the reason for DOJ's decision not to process TPTP was that it would "require communication between the service and the taxpayer." Ex. 142, at 278:2-281:12 (referring to conversation with Joseph Sergi and Laura Beckerman).

P293. The decision not to process TPTP and others was not made only once, and was not set in stone. DOJ and the IRS both revisited the litigation hold several times between 2013 and 2016. *Id.* at 106:5-107:16. The IRS and DOJ were aware they could process TPTP by simply issuing letters through counsel, and discussions on this point occurred, but DOJ made the final decision. *Id.* at 114:17-115:4, 116:1-119:12 (referring to discussions among IRS officials about the possibility of sending development letters through counsel), 242:3-16 (decisions on whether to send letters was a collaborative process between DOJ, Chief Counsel, and the IRS), 245:13-21 (no recollection of dispute between IRS and DOJ on sending out letters). Ultimately, DOJ decided not to process applications at all, even through counsel. *Id.* at 160:15-161:16.

P294. The month after appearing before the District Court and learning beyond a doubt that TPTP's only objection was to direct party-to-party communication, DOJ and IRS filed an affidavit in the District Court that did not disclose the internal discussions about the possibility of processing applications through counsel to avoid direct party-to-party contact. *See* Doc 212-12 (PageID8146), Declaration of Casey Lothamer. Also, the declaration did not disclose that the IRS had actually re-reviewed TPTP's file in 2013, 2014, and 2015, and had prepared and been ready to send new development letters each time. *Id.* Instead, DOJ and the IRS represented that once TPTP had filed suit, "the IRS no longer [had] jurisdiction of the subject matter being litigated." *Id.* at ¶ 3. This made it appear as if the IRS was no longer reviewing TPTP's application, and that TPTP's lawsuit had triggered a jurisdictional hold that was actually the cause of the delay.

P295. In fact, TPTP's application was re-reviewed and then delayed based on the decision of DOJ, and based on DOJ's litigation considerations rather than tax law requirements or tax administration purposes. Pls.' Ex. 142, Lothamer Dep. at 209:7-211:10.

P296. The DOJ and IRS decided to resume processing of TPTP's file in September 2016 as a result of a highly critical Court of Appeals oral argument and decision in the Linchpins of Liberty case. *Id.* at 252:20-253:9; *see also* Jeffrey Cooper Affidavit, ¶ 3 ("In response to a federal court order in early August 2016," the IRS, "in consultation with the Department of Justice," abandoned the litigation hold policy with respect to still-pending plaintiff applications).

## III. Lerner Believed Conservatives Were a Malevolent Influence in Politics and the Law and that Belief Impacted Her Scrutiny of Tea Party Cases

P297. Lerner's candid, fortuitously preserved communications show malice toward those with Republican and conservative views. For example, in an email exchange on November 9, 2012, [redacted] referred to the "whacko wing of the GOP." Pls.' Ex. 147, Email from Lerner to [redacted] regarding Suspension of Retention. In response, Lerner wrote: "Maybe we are through if there are that many assholes." *Id.* In a later response, she stated: "So we don't need to worry about alien teRrorists [sic]. It's our own crazies that will take us down." *Id.*

P298. In a March 6, 2014 email to [redacted], Lerner described Lincoln as "our worst president not our best." Pls.' Ex. 148, Email from Lerner to [redacted] regarding Press Follow Up. She believed "[h]e should be [sic] let the south go" because "we really do seem to have 2 totally different mind sets." *Id.*

P299. Lerner continued, describing Texas voters expected to support Republican gubernatorial candidate Greg Abbott: "They seem to 'forgive' their own, but don't cut anyone outside the clan even a tiny break." *Id.*

P300. In another exchange about the 2012 election, [redacted] wrote that "we got elected a democrat seat in the senate… Joe Donnelly, which was a small feat." Pls.' Ex. 149, Email from [redacted] to Lerner regarding Voting. Lerner responded: "WooHoo! I [sic] was important to keep the Senate. If it had switched, it would be the same as a Rep president!" *Id.*

P301. Lerner even considered—whether jokingly or not—leaving the IRS to work for a 501(c)(4) organization founded by President Obama. In a January 24, 2013, exchange about Organizing for Action, a 501(c)(4) organization created by President Obama, Lerner wrote to Sharon Light: "Oh—maybe I can get the DC office job!" Pls.' Ex. 150, Email from Lerner to Light regarding EO Tax Journal 2013-15.

P302. Lerner tended to yell at the office. Pls.' Ex. 132, Kindell Dep. at 144:18-144:20.

P303. Kindell, who worked on the same office floor as Lerner, believed that Lerner was liberal based on Lerner's expression of political views. *Id.* at 141:18-142:2.

P304. Lerner believed the Tea Party groups to be conservative. Ex. 46, at 127:4 to 127:15.

P305. Lerner's political views coincided with her views on tax-exempt organizations and political speech. On July 10, 2012, Sharon Light sent Lerner an article titled "Democrats Say Anonymous Donors Unfairly Influencing Senate Races Pls.' Ex. 151, Email from Lerner to Light regarding This Morning on NPR. The article stated that the Democratic Senatorial Campaign Committee planned to file a complaint with the FEC accusing three social welfare groups of "actually being political committees." *Id.* In response to the article, Lerner wrote: "Perhaps the FEC will save the day." *Id.*

P306. Lerner expressed strong feelings about the Supreme Court's 2010 *Citizens United v. FEC* decision. In a June 1, 2012, email exchange with [redacted], Lerner wrote that "*Citizens United* is by far the worst thing that has ever happened to this country." Pls.' Ex. 152.

P307. Later in the same email exchange, Lerner expanded on her views of *Citizens United*:

> We are witnessing the end of "America." There has always been the struggle between the capitalistic ideals and the humanistic ideals. Religion has usually tempered the selfishness of capitalism, but the rabid, hellfire piece of religion has hijacked the game and in the end, we will all lose out. it's all tied together—money can buy the Congress and the Presidency, so in turn, money packs the SCt. and the court backs the money—the "old boys" still win."

*Id.*

P308. Lerner sought to reverse the impact of *Citizens United*. In a June 11, 2012, email exchange with Robert Stern about Stern's report discussing states' responses to *Citizens United*, Lerner wrote: "I like it! Very easy to find specific information, as well as get the big picture—you done good! Now, if you can only fix the darn law!" Pls.' Ex. 153, Email from Lerner to Stern regarding My Report. In a February 13, 2012, email exchange among Lerner and various of her subordinates about federal legislation that would require tax-exempt organizations to disclose their donors, Lerner wrote: "Wouldn't that be great? And I won't hold my breath." Pls.' Ex. 154, Email from Lerner to Urban et al regarding Legislation .

P309. Lerner began to worry that applicants for exemption would rely on *Citizens United* to challenge the IRS's regulations on political activities by (c)(3) and (c)(4) organizations. Ex. 46, at 53:5 to 53:15.

P310. Lerner particularly worried that Tea Party groups would seek to challenge IRS regulations. In an email exchange concerning the February 1, 2011, SCR, Lerner told Paz and others: "Tea Party Matter very dangerous." She went on: "This could be the vehicle to go to

court on the issue of whether Citizen's United [sic] overturning the ban on corporate spending applies to tax exempt rules. Counsel and Judy Kindell need to be in on this one please needs to be in this. Cincy should probably NOT have these cases—Holly please see what exactly they have please." Pls.' Ex. P309b, Email from Lerner to Fish re SCR Table for Jan. 2011 and SCR Items.

P311. Later in that exchange, Lerner directed her subordinates to find a reason *other than political activity* to deny the Tea Party applicants exemption under § 501(c)(3) to prevent them from challenging the exemption rules based on *Citizens United*: "Thanks—even if we go with a 4 on the Tea Party cases, they may want to argue they should be 3s, so it would be great if we can get there without saying the only reason they don't get a 3 is political activity." *Id.* Lerner believed that if the cases could be decided on the "private benefit" basis, they would not implicate *Citizens United*. Pls.' Ex. 46, Lerner Tr. at 114:13-114:22. She expected that Paz and Seto would follow her instructions. *Id.*

P312. Two years later, in April 2013, Lerner's attitude had not changed, even after having gained complete knowledge of the Targeting Criteria, unnecessary questions, and the IRS's multiple rounds of scrutiny, and even after having been confronted with TIGTA's initial conclusions. *See* Pls.' Ex. 155 (March 29, 2013 to April 1, 2013 email exchange between Lerner, Marks, Paz, and David Fish). Lerner began the exchange by asking counsel, Nan Marks, for ways to get the facts and analysis of proposed c4 denials out to the public, perhaps through designating the cases for litigation. *Id.* at USA_NorCal_RFP_0001072. After Marks expressed uncertainty that c4s would actually litigate, opening up their records to public scrutiny, Lerner disagreed. "Sorry," she said. "These guys are itching for a Constitutional challenge. Not you [sic] father's EO." *Id.* at USA_NorCal_RFP_0001071.

P313. When Lerner learned that a Tea Party group had formed specifically to keep the IRS from "targeting the Tea Party," Lerner asked her subordinates for a "plan" to respond. Pls.' Pls.' Ex. 156, Email from Lerner to Urban regarding Some Background Information. She asked them whether the group was "already C4 or is it applying?" *Id.*. Lerner later said that she was "just curious" when she asked her staff to inspect the group's information. Pls.' Ex. P44b, Lerner Dep. at 270:3-270:8).

P314. Other senior officials shared Lerner's concerns about the Tea Party groups. David Fish, a senior manager at the IRS, characterized the Tea Party as a "loud group" because of "[t]he amount of commentary that we seem to be getting from Tea Party groups." Pls.' Ex. 157, Fish Dep. at 51:9-52:3.

P315. Lerner recognized that in segregating the "Tea Party cases," the IRS had segregated groups from only one side "of the political spectrum." In a May 10, 2013, email exchange concerning a draft response to a request for comment from a reporter, Nikole Flax, who at best, had heard that only a "few" non-conservative groups may have slipped into the group of cases, asked whether the IRS could add the capitalized language to its statement: "It is important to recognize that all centralized applications WHICH INCLUDE ORGANIZATIONS FROM ALL PARTS OF THE POLITICAL SPECTRUM received the same, even-handed treatment, and the majority of cases centralized were not based on a specific name." Pls.' Ex. 139, Email Lerner to Flax et al regarding Proposed Answers.

P316. Lerner responded: "I can't confirm that there was anyone on the other side of the political spectrum." *Id.* Her explanation does not mention Tea Party groups by name, but reflects her animosity: "I think that sentence presumes we keep track of which side of the aisle an org

falls—we don't. The one with names used were only known because they have been very loud in the press. I think the line is dangerous." *Id*.

**IV. Approval of TPTP after Seven Years**

P317. On September 6, 2017, after nearly five years, TPTP received a Determination Letter from the IRS recognizing that it qualified for tax-exemption under § 501(c)(4). Its exempt status was retroactive to its date of formation in September 2010.

**Plaintiffs' Response to the IRS's Statement of Proposed Undisputed Facts**

Plaintiffs hereby respond to each of the IRS's Proposed Undisputed Facts:[4]

1. From 2010 to 2013, the IRS received over 290,000 applications from entities seeking tax exempt status under 26 U.S.C. § 501(c), almost 262,000 of which were from entities seeking exempt status under § 501(c)(3) and (c)(4). Processing applications for tax exempt status is one of many tax administration functions performed by the Internal Revenue Service. The Exempt Organizations Unit (EO) of the Internal Revenue Service Tax Exempt/Government Entities Division (TE/GE) is responsible for processing these applications and determining whether entities qualify for tax exempt status under the law. (Gov't Ex. 1, Declaration of Stephen A. Martin, ¶¶ 3-5; Gov't Ex. 7, United States' Response to Plaintiffs' Class Discovery Interrogatories Nos. 1-2, p. 5.)

**Undisputed.**

2. Under § 501(c)(3) of the Internal Revenue Code, entities "organized and operated exclusively for" religious and charitable purposes, among others, are exempt from taxation, and taxpayers may deduct donations made to § 501(c)(3) entities from their income. Along with this benefit come certain restrictions. In order to qualify for § 501(c)(3) status, the statute provides that "no part of the net earnings" of the entity may "inure[] to the benefit of any private shareholder or individual" and that the entity may not attempt to influence legislation or participate in any political campaign on behalf of or in opposition to any candidate for public office. 26 U.S.C. § 501(c)(3).

**Undisputed.**

[4] Where the support for Plaintiffs' response is found in a specific paragraph within Plaintiffs' Statement of Additional Material Facts, Plaintiffs cite the relevant paragraph with the prefix, "P." For example, Paragraph 10 is "P10."

3. Under § 501(c)(4), entities "not organized for profit but operated exclusively for the promotion of social welfare . . . the net earnings of which are devoted exclusively to charitable, educational, or recreation purposes" are exempt from tax. As is the case with § 501(c)(3) entities, the earnings of § 501(c)(4) entities cannot "inure[]" to the benefit of private individuals. 26 U.S.C. § 501(c)(4). Unlike § 501(c)(3) entities, however, donations to § 501(c)(4) entities are not tax deductible.

**Undisputed.**

4. Although the statute defines a § 501(c)(4) entity as operated *exclusively* for the promotion of social welfare, the applicable Treasury Regulations provide that this requirement is met if the entity "is *primarily* engaged in promoting in some way the common good and general welfare of the people of the community." 26 C.F.R. § 1.501(c)(4)-1(a)(ii)(2) (emphasis added). The regulation further states that "the promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." *Id.*

**Undisputed.**

5. Thus, in practice, § 501(c)(3) organizations are statutorily prohibited from engaging in any political campaign intervention, while § 501(c)(4) organizations may engage in political campaign intervention so long as those activities are not the organization's "primary" activity. In addition, neither type of entity may have its earnings inure to the benefit of an individual.

**Undisputed.**

6. Within IRS, Exempt Organizations, the office of Rulings & Agreements is responsible for applying § 501(c) and the accompanying Treasury Regulations to the entities

applying for tax exempt status to determine whether they meet the legal requirements for tax exemption. This work includes processing applications for tax exempt status, providing technical interpretations of laws and procedures relating to exempt organizations, and participating in the development and issuance of regulations and other published guidance of general applicability. (Gov't Ex. 1, Declaration of Stephen A. Martin, ¶ 6.)

**Undisputed.**

7. A component of Rulings & Agreements, the Exempt Organizations Determinations Unit (EO Determinations), processes and reviews applications for tax exempt status and issues determination letters to applicants once a decision on their application is made. (Gov't Ex. 1 ¶¶ 6-7.)

**Undisputed.**

8. During the relevant time period, employees in EO Determinations were organized into several work groups. Each of these work groups had topical specialties and were responsible for processing applications that fell within those specialties. For example, the Emerging Issues work group focused on applications for which there is no established case law, issues arising from significant current events, and issues arising from changes to tax law or other significant world events. The Touch and Go (TAG) group focused on abusive tax avoidance transactions. Management believed that the work group approach promoted consistency in results and fostered greater efficiency, since no agent was required to be an expert in all issues. (Gov't Ex. 1 ¶ 12.a; Gov't Ex. 42, Bipartisan Senate Finance Committee Report, pp. 67, 69.)

**Disputed; prior EO Determinations working groups were for specific topical specialties, which management believed promoted efficiency. While employees in EO Determinations were organized into several work groups, based on specific tax law issues, no prior work groups were ever formed based on certain applicants' viewpoint. P69. Rather, work groups were formed based on specific legal issues related to tax law or groups where applicants all engaged in similar conduct. Unlike those working groups, Group 7822**

**was formed to segregate applicants based on viewpoint. P54-59. It is improper to use the viewpoint of an applicant to determine whether it is entitled to tax exemption. P60-64; IRS 30(b)(6) Merits Dep., at 121:12-15. This is because unlike focusing on an applicant's conduct or common tax law questions, there is no such thing as specializing in a particular viewpoint. An applicant's viewpoint has nothing to do with what the actual activities of the organization are. *Id.* at 121:12-122:7; P56-63. In fact, no conduct linked the applicants. Applicants were grouped based on ideology. *Id.* Four main "issues" were used to indicate that a case should be "considered a potential 'tea party' case and sent to group 7822 for secondary screening." P50. Those issues were related to viewpoint and included applicants that referenced Tea Party, Patriots, or 9/12 Project; applicants who referenced government spending, government debt and taxes; applicants who wanted to "make America a better place to live;" and applicants who were critical of how the country was being run. *Id.* Also, Plaintiffs object to the IRS's citation to statements in the Senate Finance Committee Report regarding facts. Senate Finance, in turn, cites to emails, but the statements in the Report are hearsay and are merely the Senate's opinions and conclusions about the underlying evidence that exists in this case. The IRS must rely on competent evidence from the business records and other IRS material it produced, from depositions, or affidavits.**

9. The work groups were staffed by EO Determinations Revenue Agents and supervised by managers. Managers were responsible for supervising around 12 EO Determinations Agents. Manager responsibilities typically included ensuring applications are timely and accurately processed as well as addressing related personnel issues. EO Determinations managers are required to review application files being worked by the employees of that manager when consulting with the employees or reviewing their determinations. (Gov't Ex. 1 ¶ 12.b.)

**Undisputed with the clarification that in order to isolate applications into work groups, there must be a lawful tax administration purpose in the first place. There was no lawful tax administrative purpose for grouping applications based on ideology and viewpoint. See Pls.' Resp. to Paragraph 8. Put simply, it is improper to screen and isolate cases based on viewpoint. *Id.* Further, the IRS trains its employees in how to appropriately handle application for tax exemption and reasonable IRS employees would know that the IRS cannot discriminate against certain applicants based on viewpoint. *Id.*; P68-69. Further, the required review by Determinations managers in regular work groups is immaterial, as none of Plaintiffs' 17 challenged waves of inspection involve review by a Determinations work group manager of application-related work by a work group member.**

10. The Exempt Organizations Technical Unit (EO Technical) was also a component of Rulings and Agreements. EO Technical provided assistance to other IRS offices, including EO Determinations, on issues involving exempt organizations. It also processed exempt organization applications that were referred by EO Determinations. (Gov't Ex. 1 ¶¶ 6, 10.)

**Undisputed.**

11. During the relevant time period, when an organization mailed its application for tax exempt status and user fee payment to the IRS, the application would be delivered to the IRS's Covington, Kentucky office where IRS employees registered receipt of the application in a computer system and processed the user fee payment. Then, the applications were forwarded to the IRS's Cincinnati office. (Gov't Ex. 47, Merits Discovery Deposition of Cindy Thomas, Tr. 16:23-17:2.)

**Undisputed.**

12. During the relevant time period, the front line IRS employees in Cincinnati who reviewed the bulk of applications for tax exempt status were EO Determinations Screeners. Screeners were responsible for the front-end review of newly received applications for tax exempt status. The review consisted of applying tax law to the facts represented in the application to determine if the application (1) could be approved, (2) required minor additional information, or (3) required further development before a determination could be made. In the last case, the screener forwarded the application to other specified work groups for future processing. (Gov't Ex. 1 ¶ 12.a.i.)

**Undisputed that EO Determinations Screeners in Cincinnati reviewed the majority of applications. However, this fact suggests that during the technical screening process, EO Determinations Screeners first decided whether development of an application was needed, and only if development was necessary an application was sent to the Tea Party Group. In reality, all cases that met the Targeting Criteria were sent regardless of any prerequisite for further development. P10; P55. They were subjected to scrutiny merely because they**

**were Tea Parties. P48-56, 65-67. Similar groups, with different names and viewpoints, did not receive the same level of scrutiny. P77, P92, P102.**

13. This initial review covered all applications seeking tax exempt status under § 501(c) and was not limited to just those applications seeking tax exempt status under § 501(c)(3) or § 501(c)(4). (Gov't Ex. 1 ¶ 12.a.i; Dkt. 212-8, PageID 8067, Excerpt from file of Plaintiff Americans Against Oppressive Laws, Inc. (AAOL).)

**Undisputed. However, it is immaterial that technical screening was applied outside of the 501(c)(3) and (c)(4) context. Plaintiffs do not challenge technical screening, they challenge the targeting of their class members based on viewpoint.**

14. Cases requiring minor additional information or development were sent to an EO Determinations Revenue Agent for further work. Revenue Agents were responsible for reviewing and processing applications for tax exemption. Through this review, the agent developed the facts and applied established tax law to those facts to reach a determination of whether the applicant is organized for a tax exempt purpose. The Revenue Agents processed applications submitted under Internal Revenue Code subsections § 501(c)(3), § 501(c)(4), and § 501(c)(6), among others. When the need arose, management would assign EO Revenue Agents to participate in projects or group efforts designed to facilitate the processing of applications and provide assistance to other agents in cases that required their expertise in a particular subject matter. In order to perform their duties, EO Revenue Agents were required to review the application files assigned to them or about which they were being consulted. (Gov't Ex. 1 ¶ 12.a.)

**Undisputed that this was the general process that applied to applicants who were not members of the Plaintiff Class. Plaintiffs provide more detail at P10-P17. Disputed, for the reasons set forth in Plaintiffs' Responses to Paragraphs 8, 9, and 12, that this was the process applied to Plaintiffs, who were segregated and subject to multiple additional rounds of scrutiny based on their viewpoints, instead of for any tax administration purpose. That process, which spanned years, is explained in greater detail at P30-P296.**

15. When EO Determinations Screeners observed multiple applications that were either coming in from a single practitioner or had similar issues, EO Determinations would designate a work group within EO Determinations to consolidate those cases and, if needed, to seek guidance from EO Technical. To facilitate this process, an EO Revenue Agent could be designated as a coordinator. (Gov't Ex. 1 ¶ 12.a.ii; Gov't Ex. 44, Merits Discovery Deposition of Lois Lerner, Tr. 150:5-15.)

**Undisputed that this was the general process that applied to applicants who were not members of the Plaintiff Class. Disputed, for the reasons set forth in Plaintiffs' Responses to Paragraphs 8, 9, and 12, that this was the process applied to Plaintiffs, who were segregated and subject to multiple additional rounds of scrutiny based on their viewpoints, instead of for any tax administration purpose. That process, which spanned years, is explained in greater detail at P30-P296.**

16. "Coordinator" was not an official position. Rather, it was a term used informally to refer to an EO Revenue Agent assigned to shepherd applications associated with a particular technical issue. Responsibilities included (1) performing secondary screening of cases from the initial screener to ensure technical accuracy of the initial assessment, (2) conducting meetings with designated agents assigned to the technical issue, and (3) assisting in tracking statistics associated with applications involving the particular issue—such as credit counseling, political campaign intervention, potentially abusive schemes, etc. (Gov't Ex. 1 ¶ 12.a.ii.)

**Undisputed in that the "coordinator" was not an official position in EO Determinations and that Defendant generally describes the coordinator's duties. However, the Tea Party Coordinator played an integral role in the Exempt Organization hierarchy during the relevant time period and ensured the applications were improperly targeted based on viewpoint. P73-106 (describing the role and purpose of the Tea Party Coordinator). Further, disputed that the selection and isolation of Tea Party groups based on ideology was an "issue" similar to other centralized issues, such as credit counseling and potentially abusive schemes, as the latter involved common activities and were not isolated and selected based on viewpoint. *See* Plaintiffs' Response to Paragraphs 8 and 9.**

17. An issue coordinator reviewed the application files identified by screeners as presenting the issues that they were responsible for coordinating to ensure that the initial screener

had correctly identified the application as being within their issue specialty. This process was referred to as "secondary screening." (Gov't Ex. 47, Thomas Merits Tr. 21:15-24 (describing how, "where the Washington office was involved in a group of cases and provided some guidance or direction," EO Determinations specialists who were subject-matter experts were "identified to do a secondary screening to make sure that the initial screener put the case in the right bucket").)

**Undisputed that this generally describes the secondary screening process as it applies to applicants who are not members of the Plaintiff Class. Plaintiffs provide more detail at P15-17. With respect to the Plaintiff Class, the criteria used by screeners to select and segregate applications were groups' political viewpoints, not activities such as credit counseling or potentially abusive schemes that form the basis of legitimate tax law issues for coordination. *See* Plaintiffs' Response to Paragraphs 8 and 9.**

18. Plaintiffs allege that the secondary screening conducted by the coordinators was an unauthorized inspection. (Gov't Ex. 8, Plaintiffs' Amended Response to Interrogatory No. 4, Inspection No. 1.)

**Undisputed. *See* P73-83.**

19. Prior to 2012, EO Determinations Screeners largely relied on email notices to keep up-to-date on what applications and issues were to go to specialty work groups. However, this system became cumbersome, because there were many types of consolidated cases assigned to different work groups. (Gov't Ex. 44, Lerner Tr. 150:12-21.)

**Undisputed.**

20. To make the system less cumbersome, managers in Cincinnati created a spreadsheet to consolidate the information previously sent in email notices. The spreadsheet was originally referred to as the "TAG" list, as the TAG work group was the first to have its cases listed on the spreadsheet. The spreadsheet grew to have additional tabs for specialties covered by other EO Determinations work groups. (Gov't Ex. 42, pp. 67-70.)

**Undisputed.**

21. In 2010, EO Determinations managers consolidated several lists of current and past issues into a single document, called the BOLO list, an acronym for "be on the look out." (Gov't Ex. 44, Lerner Tr. 150:16-151:2.) (Use of the BOLO is detailed in paragraphs 87-89, below.)

**Undisputed.**

22. From August 2010 until it was permanently discontinued on June 20, 2013, the BOLO was updated frequently and distributed to EO Determinations personnel. (Gov't Ex. 12; Dkt. 245-7, PageID 8965, 8971, Treasury Inspector General for Tax Administration (TIGTA) Report: Status of Action Taken to Improve the Processing of Tax exempt Applications Involving Political Campaign Intervention, May 27, 2015) ("What TIGTA Found: . . . First, the IRS eliminated the use of Be On the Look Out (BOLO) listings, which TIGTA determined had contained inappropriate criteria regarding political advocacy cases. TIGTA conducted interviews with a random sample of employees, who confirmed that BOLOs or similar listings were no longer being used.")

**Disputed. The BOLO list was only a spreadsheet indicating titles of issues and issue description; actual criteria were not included on the BOLO list. P84-86. Moreover, the use of the BOLO and changes to the BOLO list were independent of actual criteria that were being used for screening. *Id.* Further, Plaintiffs object to the IRS's citation to the TIGTA report as evidence of what the IRS actually did with respect to the BOLO, since TIGTA's comments are inadmissible hearsay for this purpose.**

23. Where the coordinated cases presented new issues or uncertain legal questions, EO Determinations would ask EO Technical for assistance. (Gov't Ex. 1 ¶ 10.)

**Disputed. EO Determinations asked EO Technical for assistance for other reasons as well, including media attention. P18-19. That is why EOT accepted the first Tea Party case. P34-37. Further, EOD did not wait to ask EOT for assistance until after EOD had independently decided to group and coordinate cases; the IRS's affiant, Stephen Martin, seems to imply that this is true, but the only authority he cites are IRM sections that do not**

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**actually provide that EOD first coordinates, and then asks for advice on difficult issues. Affiant Martin provides no other basis for his assertion, and Plaintiffs note that Martin only assumed his current position in EO on March 5, 2017, and provides no other basis for having any personal knowledge. In fact, in this case, EOD asked Holly Paz in EOT for assistance, and it was EOT that decided to coordinate all Tea Party applications in a process run from Washington, DC. P41-48.**

24. EO Technical was staffed by Tax Law Specialist (TLSs). TLSs were responsible for providing technical guidance to the field, processing private letter ruling requests, teaching technical workshops, and assuming review of applications for tax exemption from EO Determinations. When the need arises and as assigned by management, TLSs are permitted to participate in projects or group efforts designed to facilitate the processing of applications, to ensure consistency in approach and the correct application of law, and to provide guidance in areas of law that may be unclear. TLSs assigned to provide assistance will often need to see all or a part of an application file in order to provide the assistance, and a TLS assigned to make a determination is required to review the application file in order to perform that duty. (Gov't Ex. 1 ¶ 12.d.)

**Undisputed, but immaterial. The question in this case is not whether superiors assigned TLSs to review applications or whether TLSs actually had application review as part of their job duties. Instead, it is whether a particular inspection was required for tax administration purposes.**

25. EO Determinations coordinated cases on a range of issues including Credit Counseling, Health Care, Foreclosure Assistance, and 26 U.S.C. § 509(a)(3) Supporting Organizations. EO Determinations coordinated these cases to ensure that similar issues were treated consistently. (Gov't Ex. 9, United States' Response to Plaintiffs' Interrogatory No. 17; *see also* Gov't Ex. 43, Paz Merits Tr. 325:3-326:22.)

**Undisputed, but not material. Although EO Determinations coordinated cases on a range of issues in the past, those cases were selected after examining an applicant's activities, whereas Tea Party organizations were coordinated based on the viewpoint of the applicant. *See* Plaintiffs' Responses to Paragraphs 8, 9, and 12.**

26. For example, from 2002 to 2014, EO Determinations coordinated a group of over 4,000 applications as part of the IRS's Credit Counseling Compliance Project focused on abuse by tax exempt credit counseling organizations. EO Determinations sought guidance from EO Technical with respect to the issues presented by these applications, and several applications were transferred to EO Technical to be worked. Most, if not all, of these cases received additional development letters from the IRS seeking information not provided by the original application. Once coordinated, the applications waited, on average, over 435 days for a determination of tax exempt status. *Id.*

**Immaterial. Although EO Determinations coordinated cases on a range of issues in the past, those cases were selected after examining an applicant's activities, whereas Tea Party organizations were coordinated based on the viewpoint of the applicant. *See* Plaintiffs' Responses to Paragraphs 8, 9, and 12. Further, Defendants rely exclusively on their own interrogatory response rather than evidence that is admissible against Plaintiffs. (The Paz Transcript section cited in the previous paragraph does not address these facts.)**

27. Similarly, starting in the spring of 2008, EO Determinations noticed an increase in applications from organizations providing relief to homeowners in foreclosure. EO Determinations worked with EO Technical to coordinate over 1,300 cases. The applications were logged on a spreadsheet, and EO Technical along with the Guidance Unit assisted in creating a template development letter to be sent to applicants. Once identified for coordination, the applications waited, on average, 585 days for a determination of tax exempt status. *Id.*

**Immaterial. Although EO Determinations coordinated cases on a range of issues in the past, those cases were selected after examining an applicant's activities, whereas Tea Party organizations were coordinated based on the viewpoint of the applicant. *See* Plaintiffs' Responses to Paragraphs 8, 9, and 12. Further, Defendants rely exclusively on their own interrogatory response rather than evidence that is admissible against Plaintiffs. (The Paz Transcript section cited in the previous paragraph does not address these facts.)**

28. If EO Determinations failed to coordinate applications that presented similar issues, problems stemming from inconsistency could arise. (Gov't Ex. 43, Paz Merits Tr. 325:3-

326:22.)

**Undisputed that inconsistency could occur where applications presenting similar issues are not coordinated. Immaterial here, though, as the Tea Party cases were not coordinated based on an issue, but rather, based on shared viewpoints. See Plaintiffs' Responses to Paragraphs 8, 9, and 12.**

29. For example, from 2004 to 2008, the IRS processed and approved five applications for § 501(c)(4) tax exemption from entities affiliated with Emerge, including the main umbrella organization Emerge America (Gov't Ex. 42, SFC Report, p. 110-111.) [Fn. Emerge and its affiliated chapters are organizations that train Democratic women to run for political office. (Gov't Ex. 42, SFC Report, p. 107.)]

**Objection. The IRS cites the Senate Finance Committee Report for the truth of a matter regarding the IRS's own conduct. As such, it is hearsay. Plaintiffs also state that the Emerge matter is immaterial, as the IRS admits it involved an activity that was overtly targeted to help one political party, and the IRS took steps to keep the Emerge cases out of the Advocacy Case group. P80.**

30. In 2008, the IRS began to review the similarities of the Emerge cases and determined that they should be subject to mandatory review by EO Technical due to their partisan nature. (*Id.*)

**Objection. The IRS cites the Senate Finance Committee Report for the truth of a matter regarding the IRS's own conduct. As such, it is hearsay. Plaintiffs also state that the Emerge matter is immaterial, as the IRS admits it involved groups formed exclusively to engage in an activity that was overtly targeted to help one political party, and the IRS took steps to keep the Emerge cases out of the Advocacy Case group. P80. In contrast, the Tea Party groups were engaged in disparate activities but were processed together anyway based on their common ideology. See Plaintiffs' Responses to Paragraphs 8, 9, and 12.**

31. At this point, EO Determinations transferred open Emerge cases to EO Technical where they were held until the IRS received a ruling in a related court proceeding. Following that ruling, EO Technical determined that the Emerge organizations did not qualify for § 501(c)(4) status, and the pending applications were denied. The IRS did not finalize the denials until 2011, resulting in delays of over 3 years. (*Id.*)

**Objection. The IRS cites the Senate Finance Committee Report for the truth of a matter regarding the IRS's own conduct. As such, it is hearsay. Plaintiffs also state that the Emerge matter is immaterial, as the IRS admits it involved groups formed exclusively to engage in an activity that was overtly targeted to help one political party, and the IRS took steps to keep the Emerge cases out of the Advocacy Case group. P80. In contrast, the Tea Party groups were engaged in disparate activities but were processed together anyway based on their common ideology. See Plaintiffs' Responses to Paragraphs 8, 9, and 12.**

32. In addition, the IRS revoked the approvals from the previously granted Emerge entities, as the applicants' activities showed that they did not qualify for tax exempt status. (*Id.*)

**Objection. The IRS cites the Senate Finance Committee Report for the truth of a matter regarding the IRS's own conduct. As such, it is hearsay. Plaintiffs also state that the Emerge matter is immaterial, as the IRS admits it involved groups formed exclusively to engage in an activity that was overtly targeted to help one political party, and the IRS took steps to keep the Emerge cases out of the Advocacy Case group. P80. In contrast, the Tea Party groups were engaged in disparate activities but were processed together anyway based on their common ideology. See Plaintiffs' Responses to Paragraphs 8, 9, and 12.**

33. In February 2010, EO Determinations agent John Koester brought the application of Albuquerque Tea Party to the attention of his manager. Summarizing the conversation in an email, Mr. Koester wrote: "[r]ecent media attention to this type of organization indicates to me that this is a 'high profile' case." He goes on to state that information on the entity's application "indicates possible future political candidate support." (Gov't Ex. 11, Email from John Koester to John Shafer, pp. 3-4.)

**Disputed; Koester brought Albuquerque Tea Party to the attention of his manager because of media attention. *See* P34. Further, the cited material provides no indication that it summarizes any prior conversation.**

34. At the time, the Internal Revenue Manual directed agents to bring to the attention of a manager applications presenting issues that were "newsworthy" or had the "potential to become newsworthy." (Gov't Ex. 39, Internal Revenue Manual 1.54.1.4(2)(p) (2006).)

**Undisputed.**

35. Koester's manager, John Shafer, discussed the issue with his manager, Cindy Thomas. Ms. Thomas discussed Albuquerque Tea Party's application with management in EO Technical. EO Technical's management decided that, because of "recent media attention" and because the application "indicates possible future political candidate support," the application might indicate an "emerging issue" and should be brought to the attention of EO Technical for guidance. (Gov't Ex. 11, pp. 2, 4.)

**Disputed; as the cited material shows, Shafer corresponded not with Cindy Thomas, but with Sharon Camarillo, the EO Determinations Manager. *See* P35. Camarillo elevated the matter to EOD Program Manager Cindy Thomas. *See* P36. Camarillo asked Thomas to let "Washington" know about the case, which she described as a "potentially politically embarrassing case involving a 'Tea Party.'" *See* P36.**

36. As EO Determinations Program Manager Cindy Thomas explained, this followed the typical process for identifying potential emerging issues: "[w]hen the screening group starts seeing new type of cases that have similar issues, they meet and come up with criteria to identify 'emerging issues' and elevate information. 'Emerging issue' cases are sent to Group 7822 (Steve Bowling's group) and we start coordinating with EOT to seek guidance." (Gov't Ex. 12, Email from Cindy Thomas to Holly Paz, dated June 2, 2011, p. 2.)

**Disputed; the cited material does not indicate that there was anything "typical" about the process the IRS used here. Further, under the IRM, media attention only allows giving heads up to supervisors; it is not a reason for more scrutiny or centralization. 30(b)(6). *See* Merits 30(b)(6) 126:12-127:18.**

37. Having identified a potentially emerging issue, Thomas brought the application to the attention of EO Technical Acting Manager Holly Paz in February 2010. Paz stated that this case was brought to her attention because EO Determinations sought guidance "based on concerns with a particular application that indicated that it was going to engage in a certain amount of campaign intervention activity." (Gov't Ex. 43, Merits Discovery Deposition of Holly Paz, Tr. 308:13-20.)

**Disputed; there is no citation for the first sentence, and nothing in the later cited material supports the claim that Thomas "identified a potentially emerging issue." Further, Paz indicated that EOT would accept the case given the "potential for media interest." *See* P37.**

38. So that EO Technical could review the issue, Paz instructed EO Determinations to transfer the case to EO Technical. When Paz later learned that EO Determinations had identified a group of 10 similar cases presenting issues of political campaign intervention, she decided to have EO Determinations transfer a few of the cases that presented issues of political campaign intervention to EO Technical to be worked as "test cases." Paz stated that she did this because she believed EO Technical's work on the test cases "would help sort through legal issues and that would be potentially applicable to other cases." (Gov't Ex. 43, Paz Tr. 116:16-21.)

**Disputed. There are no citations for the first two sentences, and nothing in the later cited material supports the facts alleged. Rather, on February 26, 2010, Paz instructed EO Determinations to transfer the case to EO Technical because of the "potential for media interest." *See* P37. On March 17, 2010, Thomas informed Paz that EOD had identified a total of 10 Tea Party cases that had applied for exemption. *See* P41. Paz instructed Thomas to send two more Tea Party cases to EOT and "hold the rest until we get a sense of what the issues may be." *Id.* In fact, EOT recognized that the tea party cases did not present similar issues. *See* P89; P112-114; P141-P144. Further, the Sensitive Case Reports identified Tea Party movement as the reason for scrutiny—not similar tax law issues. P44-P48. No one in EO Determinations found that the 10 cases presented similar tax law issues. Hull, Kastenberg, and others repeatedly told Paz that the issues were different, which Paz knew. P140-141.**

39. While the rules and regulations regarding how much political campaign intervention tax exempt organizations could engage in had been in place for many years, this area nonetheless presented challenging issues for EO. Figuring out how to quantify the portion of an entity's activities that constitute political campaign intervention in order to determine whether the entity was within the legally allowable amount was a complex task and a challenging problem for EO. (Gov't Ex. 43, Paz Tr. 307:15-308:8.)

**Undisputed that the rules and regulations regarding how much political campaign intervention tax exempt organizations could engage in had been in place for many years.**

***See* P23-P25. Disputed that determining how to quantify how much of an entity's activities constituted political campaign intervention was difficult or challenging. The IRS has issued regular guidance and precedent regarding the standard for political campaign intervention and how it applies to exemption under §§ 501(c)(3)-(c)(4). *See* P25. The IRS also educates agents on the application of Rosenberg's Rules, an instructional tool or guide that attributes percentages to the definitions used in the exemption standards. P26. IRS employees have applied Rosenberg's Rules since at least the 1980's, and EO Technical Tax Law Specialists received training on and copies of the rules in 2009. P27. There was never new guidance developed in order to process these applications. Lerner Tr. at 149:7-149:9.**

40. EO managers explained that, because of these challenges, they were concerned that EO Determinations needed guidance in order to correctly apply the law to the facts presented by each case. (Gov't Ex. 44, Lerner Tr. 122:2-10) ("What I knew was that the issues related to advocacy, which is very, very difficult, is not a black and white issue; it is a gray issue. Cincinnati folks were used to dealing with very black and white set of law issues. My concern was that these cases were similar enough in terms of getting my folks to understand the rules on advocacy, that they should be worked in one or two groups with oversight and coordination with Counsel.")

**Disputed; Lerner testified that she could not recall when she had been told that the cases involved lobbying and advocacy. Lerner Tr. at 123:6-126:5. In addition, as stated, there was never any new guidance issued. Lerner Tr. at 149:7-149:9.**

41. As the then-Acting Manager of EO Technical, Ms. Paz assigned the "test cases" to EO Technical in order to further tax administration. She believed that having EO Technical work "test cases" would "result in tools that would assist Determinations in reaching the right conclusions on cases and also work cases more quickly." (Gov't Ex. 43, Paz Tr. 311:1-6.)

**Disputed; there is no citation to the first sentence, and the later cited material does not support the argument alleged that Paz assigned the test cases to EO Technical to "further tax administration." The test cases were segregated based on viewpoint, not common tax issues. P44-48, P89; P112-114; P141-P144. Further, disputed in that the paragraph misquotes the transcript. Paz actually says that "it was also a possibility in my mind that having Technical work the test cases *could* result in tools that would assist Determinations in reaching the right conclusions on cases and also work cases more quickly." Paz. Tr. at 311:2-311:6.**

42. While concerned that EO Determinations needed guidance in order to properly apply the law to the complicated issue of political campaign intervention, EO managers did not transfer all the cases to EO Technical. Lerner testified that this decision was due to concerns regarding resources. EO Technical had far fewer staff than EO Determinations and could not handle as many cases. (Gov't Ex. 44, Lerner Tr. 120:1-7) ("we didn't have enough people to" work the cases directly out of the DC office).

**Undisputed that EO managers did not transfer all cases to EO Technical, but otherwise disputed. There is no authority, as required, for the proposition that EO managers were "concerned that EO Determinations needed guidance in order to properly apply the law to the complicated issue of political campaign intervention" or the proposition that Lerner testified that the decision was due to concerns regarding resources. In fact, Lerner was not concerned about limited resources; she sought to have all Tea Party cases "assigned to one or two folks who don't make a move without Counsel/Judy involvement" because she was worried "these could blow up like crazy if the Determs folks let one out incorrectly." P118.**

43. While EO Technical worked the test cases, EO Determinations would begin to identify and coordinate the cases presenting similar issues so that an agent assigned to the cases could work with the EO Technical Tax Law Specialist and receive guidance on how to correctly apply the law to the issues presented. (Gov't Ex. 11.)

**Disputed; the cases had been segregated based on viewpoint and did not present similar tax issues. P44-48, P89; P112-114; P141-P144. Further, no guidance was ever developed. Lerner Tr. at 149:7-149:9. Further still, it would have been pointless for EO Determinations to review cases until EO Technical finished with the test cases, because IRS management had forbidden EO Determinations to make a decision. P41; P89; P97; P101; P109.**

44. For purposes of creating guidance, it was not necessary that the *facts* of the cases be similar so long as the cases presented examples of how to apply the law with regard to the issue of political campaign intervention:

> Q: How did you [Lois Lerner] gain the understanding not just that [the coordinated cases] both had advocacy issues, but that they had advocacy issues

> that were similar enough that guidance developed from working the two test case would be useful in developing the Cincinnati cases?
>
> A: Oh, actually, they didn't have to be similar enough. What we were trying to do was give our staff a range of the kinds of cases they might see that would have these political activity or advocacy issues in them, and an understanding that in case A there was a whole lot of political activity and because of the facts and circumstances there, it wouldn't be approved. In case B, same kind of activity, but the amount was such that it could be approved. Those were very difficult questions to parse out.
>
> So the facts and circumstances of the cases didn't have to be the same. The issues that the cases—that arose in the case needed to be the same, and then we needed to give our staff guidance on how to gauge those issues.

(Gov't Ex. 44, Lerner Deposition Tr. 138:20-139:19.)

**Disputed; while EO Determinations may have begun to identify and coordinate the cases presenting similar issues, there were already Revenue Ruling in place to apply to the facts of these cases. P25. Nothing in the cited material indicates that the Tea Party cases were different in a way that distinguished them from the Revenue Rulings. There were no new activities that required new "examples." Further, no guidance was ever developed. Lerner Tr. at 149:7-149:9.**

45. EO Determinations Manager Cindy Thomas assigned Revenue Agent Elizabeth Hofacre to coordinate what EO Determinations started referring to as the "Tea Party" cases, because she was from a group that had experience coordinating emerging issues. (This group of cases was later referred to as the "advocacy cases.") As part of this job, Hofacre began keeping a list of the coordinated advocacy cases. (Gov't Ex. 47, Merits Discovery Deposition of Cindy Thomas, Tr. 94:19-95:6.)

**Undisputed, but clarified that during her Secondary Screening of the Tea Party cases, Hofacre would remove cases that did not meet the viewpoint-based Targeting Criteria. P78-P80.**

46. Plaintiffs allege that review of the list of advocacy cases, later referred to as "tracking sheets," by IRS employees, was unauthorized. (Gov't Ex. 8, Inspection No. 17.)

**Undisputed that NorCal contends that the IRS's inspection of the Case Tracking Spreadsheets was unauthorized. Disputed as to the characterization of the list as a "list of advocacy cases." Although the IRS now characterizes the segregated Tea Party cases as "advocacy cases," the cited material does not support that characterization. The IRS**

**denoted the segregated cases as "Tea Party cases" until Lerner directed that the BOLO be changed to refer to the cases as "Advocacy Cases." P133-P137. The Targeting Criteria continued to refer to "Tea Party" and the IRS never changed the criteria. P137-P139. The purpose of the change in the label from "Tea Party cases" to "Advocacy Cases" was to obfuscate the continued application of the Targeting Criteria.**

47. When Koester brought the application of Albuquerque Tea Party to the attention of his manager, he did so for two reasons. First, he believed the case might be "high profile" due to media stories he had seen. Second, the application indicated that the entity planned to spend 20% of its resources on supporting political candidates. (Gov't Ex. 11.)

**Disputed; Koester brought the Albuquerque Tea Party to the attention of his manager on the basis of media attention alone. *See* P35 and response to 33, *supra*.**

48. When Paz decided to have EO Technical work the "test cases," she testified that she understood the issue to be political campaign intervention and she wanted EO Technical to provide EO Determinations with tools to correctly and quickly resolve the cases. (Gov't Ex. 43, Paz Merits Tr. 308:16-20, 311:1-6.)

**Undisputed that Paz directed Technical to work the "test cases." Disputed that she did so for the reasons stated; as discussed in detail, the referral to EOT began as a single "Tea Party" case based on media attention, and when it grew to 10 cases, Paz knew they did not have the same tax law issues. P89; P112-114; P141-P144.**

49. EO then began to use the term "tea party" to refer to cases presenting issues similar to those of the test cases, which were originally transferred to EO Technical because the applications showed plans to engage in political campaign intervention. (*Id.*; Gov't Ex. 11.)

**Disputed. The "Tea Party cases" were cases segregated based on the perceived conservative viewpoint of the applicant organization; as discussed at length, EO knew that the Tea Party cases did not present similar tax issues. P43-P48; P51-P52; P56; P58; P89; P112-114; P141-P144. Similar groups, with different names and viewpoints, did not receive the same level of scrutiny. P78. Further, Lerner sought further scrutiny of the Tea Party cases because she believed that the Tea Party could rely on *Citizens United* to challenge current IRS regulations. P310-P311.**

**As cited above, the test cases were transferred from EOD to EOT because of media attention to the Tea Party movement. *See* P35 and response to 33, *supra*. At the time, EOT**

**did not even know what the issues were: "I think we should take a few more cases (I'd say 2) and would ask that you hold the rest *until we get a sense of what the issues may be*." Paz Dep. Exhibit 2 at 21551. The similar issues were similar ideology, not any actual activities or plans.**

50. Throughout 2010, Paz testified that she was not concerned about the use of the "tea party" label, because she understood it as describing a group of cases presenting the issue of political campaign intervention. (Gov't Ex. 43, Paz Merits Tr. 329:8-15.)

**Disputed. First, the cited material does not support the proposition. Paz testified that "I understood this to be a group of cases that presented a campaign intervention issue I had been made aware of by EO Determinations back in February of 2010." Nowhere in the cited response does Paz testify that "she was not concerned about the use of the 'tea party' label," nor does the cited material support the assertion that she held such a concern "throughout 2010."**

**Second, as described at length above, the "tea party label" described a group of applicants with similar viewpoints, not a group of cases presenting similar tax issues. P43-P48; P51-P52; P56; P58-P60; P89; P112-114; P141-P144.**

**Third, Paz recognized that "Tea Party" connotes a viewpoint. On June 1, 2011, she asked Thomas to provide her a copy of the Crossroads GPS application. P121. She stated that Washington was curious about the targeting criteria because "Crossroads is associated with the Republican party, not necessarily the Tea Party." P122.**

51. Paz explained that her understanding came, in part, from a list of coordinated cases that she received in October 2010. She described that these cases "ran the gamut," meaning that many of the entities did not have the term "tea party" in the name and that she could not determine their political leanings from simply looking at their names. (Gov't Ex. 43, Paz Merits Tr. 330:6-15.)

**Disputed. First, the assertion misquotes Paz's testimony insofar as it asserts that she meant that "many of the entities do not have the term 'tea party' in the name and that she could not determine their political leanings from simply looking at their names." Paz actually said that "*some* of them have "Tea Party" in the name, others do not, and the names don't convey any particular activities or political affiliation." Paz tr. at 330:6-15.**

**Second, the Targeting Criteria focused on the organization's names and policy positions instead of activities permitted under Treasury Regulations. P56; P58-P59. The**

**Targeting Criteria, by definition, would segregate organizations for their names as well as their policy positions. P55-P56; P58-P60.**

**Third, prior to Paz's review in the cited material, Hofacre had begun a secondary screening to remove cases that did not meet the Targeting Criteria from the segregated cases. P78-P80.**

**Fourth, Paz recognized that "Tea Party" connotes a viewpoint. On June 1, 2011, she asked Thomas to provide her a copy of the Crossroads GPS application. P121. She stated that Washington was curious about the targeting criteria because "Crossroads is associated with the Republican party, not necessarily the Tea Party." P. 122.**

52. By the spring of 2011, Paz testified that she grew concerned that EO Determinations was using criteria to flag cases for coordination that resulted in the "over-inclusion" of applications. Specifically, she was concerned that EO Determinations might be including in the advocacy cases organizations whose applications referenced lobbying, rather than political campaign intervention. As discussed below, this concern led her to assign an EO Technical agent to "triage" the cases in an attempt to issue more speedy approvals. (Gov't Ex. 43, Merits Paz Tr. 330:16-331:16.)

**Objection to the cited material as leading cross-examination of the DOJ's own client that mischaracterized the witness's prior testimony. *See* Rule 611(c), Advisory Committee Notes (leading questions improper "when the cross-examination is cross-examination in form only and not in fact, as for example the 'cross-examination' of a party by his own counsel after being called by the opponent (savoring more of re-direct)[.]").**

**Disputed. First, the assertion mischaracterizes Paz's testimony insofar as it suggests that her only concern about "over-inclusion" was that EOD might be including advocacy cases whose applications referenced lobbying. In fact, Paz said that "I was concerned that, perhaps, Determinations might be including in the group of cases organizations whose applications did not indicate campaign intervention and that, *for example, just referenced lobbying*, which would be permissible for a 501(c)(4) organization." Paz. Tr. 330:11-16.**

**Second, there is no support in the cited material for the qualifying date "by the spring of 2011." Paz did not qualify her statement as to the time.**

**Third, Paz's emails reveal that she understood that "Tea Party" connotes a viewpoint. In an email questioning whether the "criteria are resulting in over-inclusion," Paz also asserts that Washington was curious about Crossroads GPS "because Crossroads is associated with the Republican party, not necessarily the Tea Party." P121-P123.**

53. EO Technical began the work of creating guidance for EO Determinations by assigning two "Tea Party" test cases, Prescott Tea Party LLC and Albuquerque Tea Party, Inc., to Tax Law Specialist Carter Hull on April 5, 2010. (Gov't Ex. 31, Email from Carter Hull to Holly Paz, Subject: Procedures, dated July 24, 2012.) [Footnote: On May 26, 2010, Prescott Tea Party, a § 501(c)(3) applicant, was closed as FTE (failure to establish) after not responding to Mr. Hull's development letters. (Gov't Ex. 31.) Public records reveal that Prescott Tea Party filed Articles of Termination with Arizona Secretary of State on January 26, 2010. (Gov't Ex. 13, Arizona Corp. Comm. History Inquiry, Prescott Tea Party.) Following Prescott's dissolution, Hull requested that another § 501(c)(3) applicant be assigned to him as a replacement test case. He was assigned American Junto on June 30, 2010. (Gov't Ex. 31.)

**Undisputed that EOT assigned two Tea Party tests cases to Carter Hull. Disputed that the purpose was to "beg[i]n the work of creating guidance." The cited material does not support this proposition.**

54. In April 2010, EO Technical began including the test cases on Sensitive Case Reports (SCRs). The Exempt Organizations unit used Sensitive Case Reports (SCRs) to keep upper-level management appraised of noteworthy cases and issues. (Gov't Ex. 42, p. 33.)

**Objection. The IRS cites the Senate Finance Committee Report for the truth of a matter regarding the IRS's own conduct. As such, it is hearsay. Also clarified that the IRS abbreviates Significant Case Report as SCR. *See* Govt. Ex. 15.**

55. The Internal Revenue Manual (IRM) instructed EO Technical that cases "likely to attract media or Congressional attention" should be considered for inclusion on SCRs. (IRM 7.29.3.2(c), available at https://www.irs.gov/irm/part7/irm_07-029-003.html.)

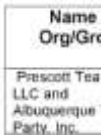
**Undisputed, but not material. The Tea Party cases were included on the SCR because the Tea Party was a "movement." P44.**

56. In the first such SCR entry for the test cases, dated April 28, 2010, Mr. Hull noted: "Currently there are 13 Tea Party cases out in EO Determinations and we are coordinating

with them to provide direction as to how to develop those cases based on our development of the ones in DC." (Gov't Ex. 14, April 28, 2010 Email Attaching SCR.)

**Undisputed.**

57. The relevant entry in the April 28, 2010 SCR is as follows:




(Gov't Ex. 15, April 28, 2010 SCR.)

**Undisputed.**

58. The April 28, 2010 SCR contained information on 17 categories of "sensitive" cases, including, for example, entries for "Emerge Maine," "EPM Civil Rights Funds," and "Tennessee Pooled Assets." (Gov't Ex. 15, April 28, 2010 SCR.)

**Disputed insofar as the April 28, 2010 SCR is actually entitled "Significant Case Report." *See* Govt. Ex. 15. There is no reference to "sensitive" to support the assertion. The other listed categories of cases are immaterial because, unlike Tea Party cases, they were flagged for improper activities, not their ideology, and were processed accordingly. P77, P80.**

59. Initially, EO Determinations continued to work on the "Tea Party" cases with guidance from EO Technical. As part of this process, Ms. Hofacre, the coordinator for the cases at that time, consulted with Mr. Hull before sending out development letters. (Dkt. 212-5, PageID 7878-80, Excerpts, NorCal Application file; Gov't Ex. 52, Class Discovery Deposition of Elizabeth Hofacre Tr. 99:4-23.)

**Undisputed, but clarified that Hofacre was designated the "Tea Party Coordinator." P74. Further clarified that Hofacre's consultation with Hull involved sending him the entire application file for each Tea Party applicant. Pls.' Ex. P15a, Hofacre Class Dep. at 99:15-23.**

60. For example, after Plaintiff NorCal Tea Party Patriots submitted its application to the IRS in late April 2010, the application was assigned to Ms. Hofacre for development. Ms. Hofacre reviewed the file and worked with Mr. Hull to draft a letter requesting that NorCal submit additional information in support of its application. (Gov't Ex. 52, Hofacre Tr. 221:8-222:6.)

**Disputed insofar as the IRS asserts that the letter "request[ed]" additional information. In fact, the letter required NorCal to submit additional information within 21 days or the IRS would consider its application withdrawn. Class Hofacre Ex. 15 at 2.**

61. Plaintiffs identify Carter Hull's review of NorCal's development letter in his role providing guidance to EO Determinations as an "unauthorized inspection." (Gov't Ex. 8, Inspection No. 4.)

**Disputed insofar as Hull reviewed NorCal's development letter "in his role providing guidance"; nothing in the cited material supports the assertion that Hull reviewed NorCal's development letter "in his role providing guidance."**

**Hull's review was unnecessary and undertaken solely because the groups were subjected to full development because of their viewpoint. The IRS segregated NorCal and other class members based on their views. P43-P48; P51-P52; P56; P58-P60; P89; P112-114; P141-P144. The IRS then assigned a Tea Party Coordinator to screen Plaintiffs' cases again. P78-P83. Following this additional screening, the Tea Party Coordinator sent the Plaintiffs' casefile to Hull, who would inspect it. P87-P90. The IRS subject Plaintiffs to this multi-tiered development process solely because of their views. P84-P93.**

62. On July 6, 2010, Hofacre sent an initial development letter to NorCal Tea Party Patriots seeking 16 specific requests for information. The requests included, for example, "Provide a copy of your bylaws," "Provide a list of your board members and provide resumes," and "You list amounts in item three (gross amounts derived from activities related to your exempt activities) on your income statement. Please indicate what composes this." (Dkt. 212-5, PageID 7880, Excerpts, NorCal Application file.)

**Undisputed, but incomplete. The letter requires NorCal to:**

**1. Provide a copy of your bylaws.**

**2. Indicate the name, area code and telephone number of an officer whom we may contact during business hours if we need to discuss your application.**

**3. Provide a list of your board members and provide resumes.**

**4. Enclosed is information obtained from the website** http://www.nctpp.net/ **dated 7/6/2010. Please verify that this is your website.**

**5. Provide copies of your meetings' agendas for the past year.**

**6. Provide copies of promotional materials used for your educational events.**

**7. Provide copies of materials distributed at your meetings and at your educational events.**

**8. Are you on Facebook? If yes provide a copy of your pages available on Facebook.**

**9. Provide examples of legislative matters discussed at meetings.**

**10. Provide a list of legislators who have presented at your meetings.**

**11. Explain your relationship with the Tea Party Patriots and provide copies of any agreements with the Tea Party Patriots.**

**12. Provide copies of all agreements with third parties that you have entered into or plan to enter into.**

**13. You list as an asset on your balance, [sic] sheet inventories. Please indicate what this consists of.**

**14. You list amounts in item three (gross amounts derived from activities related to your exempt activities) on your income statement. Please indicate what composes this.**

**15. Provide copies of literature from your leadership conference on 6/19/10.**

**16. Provide a copy of promotional materials from the fair.**

**Class Hofacre Ex. 15, pp. 3-4. Most of these requests are targeted to NorCal's exercise of its right to speak and associate with others—none of them are targeted to reveal potential campaign intervention. As stated above, the IRS subjected NorCal to this development requirement because of its views. *See* P43-P48; P51-P52; P56; P58-P60; P89; P112-114; P141-P144.**

63. Plaintiffs have identified the review of NorCal's file that Hofacre conducted prior to sending the July 6, 2010 development letter, any review conducted by Hull as part of his

assistance to Hofacre in drafting the letter, and Hofacre's review of NorCal's responses to the letter as unauthorized inspections. (Gov't Ex. 8, Inspections Nos. 3-4.)

**Undisputed, but incomplete. The IRS segregated NorCal because of its views. *See* P43-P48; P51-P52; P56; P58-60; P89; P112-114; P141-P144. It then subjected it to seventeen different inspections because of its views. Those inspections are described at length in Plaintiffs' Proposed Undisputed Facts.**

64. Hofacre followed this procedure with other entities, including Plaintiff San Angelo Tea Party. Hofacre was assigned San Angelo's application in June 2010. She conducted internet research and drafted a development letter in July 2010, which she faxed to Chip Hull for review. Mr. Hull responded to her in September 2010, and her notes reflect that she discussed the letter "in detail with Chip" and "made changes to the letter." Hofacre also responded to a call from the taxpayer to "explain the process." Hofacre mailed the development letter to San Angelo on September 28, 2010. (Gov't Ex. 74, Excerpts, San Angelo Application file, IRS_Norcal_0000085297.)

**Disputed insofar as the assertion twice misstates the cited material. First, according to the cited material, Hofacre did not fax the letter to Hull; she faxed the application and emailed the letter. Second, the assertion misquotes the cited material, which says: "Tax payer called-explained process." Govt Ex. 74.**

65. San Angelo did not respond to the letter, and it later informed the IRS that its Board decided in January 2011 to withdraw its application and "go with a simple corporation format" instead. (Gov't Ex. 74, at IRS_Norcal_0000085294-95.)

**Undisputed with the clarification that San Angelo only decided to pursue a taxable simple corporation format after being subjected to unprecedented scrutiny by the IRS as a result of its viewpoint. *See* P48-71.**

66. During this time period, as a backlog of cases began to pile-up, EO Determinations Program Manager Cindy Thomas requested multiple status updates from EO Technical. (Gov't Ex. 36, Email string from Cindy Thomas, "Re: Political Cases—Status?")

**Undisputed.**

67. Long waits for guidance from EO Technical were, unfortunately, not unusual. Ms. Thomas testified that, when EO Determinations was waiting for guidance from EO's DC offices, it was not unusual to have to request multiple status updates. She recalls a similar process occurring for credit counseling cases and charter schools. (Gov't Ex. 47, Thomas Merits Tr. 128:20-129:20.)

**Disputed; nothing in the cited material supports the assertion that "[l]ong waits for guidance from EO Technical were, unfortunately, not unusual." Thomas testified that it was not unusual to have to request status updates. Pls.' Ex. P83, Thomas Dep. at 129:1-15. She did not testify that long waits for guidance were unusual.**

68. As Director of EO, Lois Lerner received 300-500 emails each day and did not have time to read all of them. When an email was also sent to an employee who reported to Lerner, she generally relied on that employee to raise any issues with her that needed her attention. (Gov't Ex. 44, Lerner Tr. 89:6-16).

**Disputed. Nothing in the cited material supports the assertion that Lerner "did not have time to read all of them." Lerner testified that "I probably had three to five hundred e-mails a day." She did not testify about her time.**

**Also immaterial. Lerner was both interested and heavily involved in directing the segregation of the Tea Party cases. Responding to an SCR sent to her by email, Lerner wrote: "Tea Party Matter very dangerous." P108; P311. She feared that a Tea Party organization would rely on *Citizens United* to challenge the IRS's regulations about political campaign intervention. P108; P310-P312. She directed her subordinates to find a way to resolve the Tea Party cases "without saying the only reason they don't get a 3 is political activity." P110. She intervened directly in the assignment of the Tea Party cases in Cincinnati: "these could blow up like crazy if the Determs flks let one out incorrectly . . . . Can we have all of them assigned to one or two folks who don't make a move without Counsel/Judy involvement?" P118. Lerner sought specific information about Crossroads GPS by email. P120.**

69. The first time Lerner recalls reviewing an SCR with the entry for "American Junto and Albuquerque Tea Party, Inc." was on January 31, 2011. (Gov't Ex. 44, Lerner Tr. 90:12-93:15, 100:14-104:15, 106:12-109:18.)

**Undisputed, but immaterial. Lerner received monthly SCRs containing Tea Party cases starting in April 2010. P46. Lerner read and responded to these emails. On May 15, 2010, Grodnitsky sent Lerner an email concern the "April highlights for EO Technical." Lerner responded less than two hours later: "I like this format. . . . Tea Party cases—applications for c3? What's their basis? . . . All cases on your list should not go out without a heads up to me please." Lerner Exhibit 11. Lerner's first memory of receiving an SCR is irrelevant.**

70. The January 31, 2011 SCR chart contained entries for twenty-three different case Categories, including the following entry:

| | Name of Org/Group | Group #/Manager | EIN | Received | Issue | Tax Law Specialist | Estimated Completion Date | Status/Next action | Elevated to TEGE Commissioner? |
|---|---|---|---|---|---|---|---|---|---|
| 1. | American Junto and Albuquerque Tea Party, Inc. | T2/Ron Shoemaker | 27-0484865 and 90-0513502 | 4/2/2010 | Whether a tea party organization meets the requirements under 501(c)(3) and is not involved in political intervention | Chip Hull | 3/31/2011 | Developing both a (c)(3) and (c) (4) cases. Proposed favorable being drafted on (c)(4). Proposed denial being drafted on (c)(3).Coordinating with Cincy as to helping to develop their cases. | No |

(Gov't Ex. 21, January 31, 2011 SCR Chart.)

**Undisputed with the clarification that the first "significant" cases are the two Tea Party cases.**

71. After reviewing this SCR Chart, Lerner wrote an email to EO managers commenting on nine of the categories of cases listed in the chart. Regarding the test cases, she wrote: "Tea Party Matter very dangerous. This could be the vehicle to go to court on the issue of whether Citizen's United overturning the ban on corporate spending applies to tax exempt rules. Counsel and Judy Kindell need to be in on this one please needs to be in this [sic]. Cincy should probably NOT have these cases—Holly please see what exactly they have please." (Gov't Ex. 20, Email from Lois Lerner, dated February 1, 2011.)

**Disputed; the assertion misrepresents the cited material by qualifying the quote with "[r]egarding the test cases." Lerner is not talking about only the test cases; she is talking about all segregated Tea Party cases. The SCR (quoted in paragraph 70) states: "Coordinating with Cincy as to helping to develop their cases." Lerner is responding to this statement when she says: "Cincy should probably NOT have these cases—Holly please see what exactly they have please." Govt. Ex. 20. In response to Lerner's directive, Paz states: "Tea Party - Cases in Determs are being supervised by Chip Hull at each step – he reviews info from TPs, correspondence to TPs, etc. No decisions are going out of Cincy until we go all the way through the process with the c3 and the c4 cases here. I believe the c4 will be ready to go over to Judy soon." *Id.* Lerner responds: "Thanks—even if we go with a 4 on the Tea Party cases, they may want to argue they should be 3s, so it would be great if we can get there without saying the only reason they don't get a 3 is political activity." *Id.***

72. Lerner's email refers to the two test cases described on the attached SCR chart, not to a general category of "Tea Party" cases or to criteria on the BOLO:

> Q: What did you mean by "Tea Party matter very dangerous?"
> A: Well, that's really in relation to the next sentence, that the Tea Party case could be the vehicle to go to the Supreme Court, in which case, we had to be very careful that we had developed the case correctly, dotted all the I's, crossed all the T's, and made sure that we had a good case to take to court if that's what was going to happen.

(Gov't Ex. 44, Lerner Tr. 110:10-18.)

**Disputed; as discussed above, Lerner's comments in the email contradict her self-serving statement. Lerner is not talking about only the test cases; she is talking about all segregated Tea Party cases. The SCR (quoted in paragraph 70) states: "Coordinating with Cincy as to helping to develop their cases." Lerner is responding to this statement when she says: "Cincy should probably NOT have these cases—Holly please see what exactly they have please." Govt. Ex. 20. In response to Lerner's directive, Paz states: "Tea Party - Cases in Determs are being supervised by Chip Hull at each step – he reviews info from TPs, correspondence to TPs, etc. No decisions are going out of Cincy until we go all the way through the process with the c3 and the c4 cases here. I believe the c4 will be ready to go over to Judy soon." *Id.* Lerner responds: "Thanks—even if we go with a 4 on the Tea Party cases, they may want to argue they should be 3s, so it would be great if we can get there without saying the only reason they don't get a 3 is political activity." *Id.***

73. Lerner stated that she did not have a particular result in mind regarding the potential court case:

> Q: And when you mentioned the vehicle to go to court, was that with a particular result from the Court in mind?
> Mr. Greim: Objection. Vague.
> A: No. Whenever we're going to court on a case, we want to make sure that we have done everything we can to have the best case possible because if you don't have a good record, the results can often be—put you in a more difficult position or the Court can't make the appropriate determination because the record isn't very well—what's the word—laid out."

(Gov't Ex. 44, Lerner Tr. 385:1-12.)

**Disputed. Lerner wrote that "*Citizens United* is by far the worst thing that has ever happened to this country." P307. She expanded on her views on the case:**

> **We are witnessing the end of "America." There has always been the struggle between the capitalistic ideals and the humanistic ideals. Religion has usually tempered the selfishness of capitalism, but the rabid, hellfire piece of religion has hijacked the game and in the end, we will all lose out. it's all tied together—money can buy the Congress and the Presidency, so in turn, money packs the SCt. and the court backs the money—the "old boys" still win."**

**P308. She advocated reversal of the impact of *Citizens United*. P309. When asked whether she eventually had a concern that applicants would use *Citizens United* to challenge the IRS's regulations on political activities by (c)(3)'s and (c)(4)'s, she said yes. P310.**

**As discussed at length above, Lerner believed the "Tea Party Matter" to be "very dangerous" specifically because Tea Party organizations might rely on the *Citizens United* decision to challenge the IRS's regulations on political activities. P311. She even directed her subordinates to find an alternate way to deny the organizations tax-exempt status under § 501(c)(3) in order to preempt a challenge under *Citizens United*. P312.**

**For Lerner to suggest, on cross-examination by her counsel, that she had no particular result in mind concerning any potential challenge by a Tea Party organization is incredible and deserves to be tried.**

74. In an April 7, 2011 email, Lerner followed up regarding her concern that: "these [cases] could blow up like crazy if the Determ[ination]s folks let one out incorrectly—think MN firefighters."[5] (Gov't Ex. 15, Email String Holly Paz and Lois Lerner, dated July 7, 2011.)

**Undisputed, except insofar as the quoted language is from Govt. Ex. 22, not Govt. Ex. 15.**

[5] "MN firefighters" was a reference to a prior case and it did not involve § 501(c)(4) entities. (Gov't Ex. 44, Lerner Tr. 120:17-20.)

75. Lerner explained that in this email, she was describing the concern that:

> If [EO] determinations were to release the case either approval or a denial and had done it incorrectly, it could have a large impact on a bigger group of cases. And so my concern was, we don't want to have one of these done incorrectly and go out the door because it would happen before we'd know it, and [we'd] have to deal with it afterwards. I would prefer to be conservative and deal with them internally and make sure they were correct before they go out the door.

(Gov't Ex. 44, Lerner Tr. 121:6-19.)

**Disputed. Lerner undermined this explanation over the course of the next several pages of her deposition. Although she claims here that EOD's release of one case could have "a large impact on a bigger group of cases," she later explained that she believed this because "I had been told that the issues in the cases were potential political advocacy or lobbying." Lerner Tr. at 122:17-123:2, 124:6-124:22. At the time, Lerner wrote that the "Tea Party Matter" was "very dangerous" because of the threat that a Tea Party organization might rely on *Citizens United* to challenge IRS regulations. P108-P110; P311-P312. Lerner understood that the matter that the "Tea Party cases" had in common was not "potential political advocacy or lobbying" but rather their views. This self-serving testimony is not credible. In addition, politically active groups with other ideologies were not treated similarly. P77, 102-103, P111.**

76. In October 2010, Ms. Hofacre transferred to EO Quality Assurance, and EO Determinations Agent Ronald Bell took over her work as coordinator. Mr. Bell understood his role to be to wait for guidance from EO Technical, and accordingly, he only developed one of the pending cases from October 2010 to November 2011. (Gov't Ex. 55, Class Discovery Deposition of Ronald Bell, Tr. 53:14-54:15, 64:21-66:20.)

**Undisputed.**

77. The "test case" approach ultimately dragged on for nearly two years and was not successful in providing guidance to help EO Determinations address the growing backlog of coordinated advocacy cases. (Gov't Ex. 42, SFC Report, pp. 39-40, 92.)

**Objection. The IRS cites the Senate Finance Committee Report for the truth of a matter regarding the IRS's own conduct. As such, it is hearsay. Further, disputed to the extent that the assertion suggests that EOD needed additional "guidance" to "help" address advocacy cases. The IRS has issued regular guidance and precedent regarding the**

**standard for political campaign intervention and how it applies to exemption under §§ 501(c)(3)-(c)(4). *See* P25. The IRS also educates agents on the application of Rosenberg's Rules, an instructional tool or guide that attributes percentages to the definitions used in the exemption standards. P26. IRS employees have applied Rosenberg's Rules since at least the 1980's, and EO Technical Tax Law Specialists received training on and copies of the rules in 2009. P27. There was never new guidance developed in order to process these applications. Lerner Tr. at 149:7-149:9.**

78. During the time that EO Determinations was holding coordinated cases and awaiting guidance from EO Technical, several Plaintiffs submitted their applications for tax exempt status: San Angelo Tea Party (San Angelo) in March 2010, South Dakota Citizens for Liberty (SD Citizens) in August 2010, and Americans Against Oppressive Laws, Inc. (AAOL) in October 2011. (Gov't Ex. 74, IRS_SanAngelo000019; Dkt. 212-10, PageID 8088, Excerpts from SD Citizens Application file; Dkt. 212-8, PageID 8066, Excerpts from AAOL Application file.)

**Undisputed.**

79. Plaintiffs submitted their applications for tax exempt status voluntarily, and Plaintiffs understood that IRS employees would review the materials they submitted. (Gov't Ex. 68, NorCal Rule 30(b)(6) Deposition, Merits Discovery Tr. 14:19-15:9; Gov't Ex. 69, San Angelo Rule 30(b)(6) Deposition, Merits Discovery Tr. 38:15-19; Gov't Ex. 70, SD Citizens Rule 30(b)(6) Deposition, Merits Discovery Tr. 15:10-18; Gov't Ex. 71, AAOL Rule 30(b)(6) Deposition, Merits Discovery Tr. 38:16 39:12; Gov't Ex. 72, TPTP Rule 30(b)(6) Deposition, Merits Discovery Tr. 37:2-9.) [Footnote: While a § 501(c)(3) organization must have prior approval of its status to function, the same is not true of § 501(c)(4) entities. *See* 26 U.S.C. § 508 (providing for application procedure to be recognized as a § 501(c)(3) group.) Rather, § 01(c)(4) entities *may* apply for express recognition of their status, but they are not required to do so before operating with all of the advantages of that status.]

**Undisputed in the main text, but immaterial. Plaintiffs do not challenge the technical screening. P9. The IRS segregated and scrutinized Plaintiffs' return information because of Plaintiffs' views, not because Plaintiffs requested additional screening. P51-P67.**

**Disputed as to the assertion in the footnote that organizations may operate "with all the advantages of" tax exempt status under § 501(c)(4) by self-declaring rather than seeking express recognition from the IRS. Self-declarers are subject to year-round voluntary compliance checks, and if an organization refuses to submit, it can be referred for mandatory examination. If a check or audit finds that an organization is not operating under the applicable exemption based on all the facts and circumstances, the organization will face a crippling and unexpected tax and penalty. For organizations like the Plaintiffs, such a tax and penalty would effectively end the organization's operations, including its expressive activities. The risk of such an unpredictable penalty compelled Plaintiffs to seek recognition of their 501(c)(4) status. The IRS's recognition provides certainty that, so long as the organization is not run in a materially different way than that originally disclosed to the IRS, it will not face a surprise death penalty.**

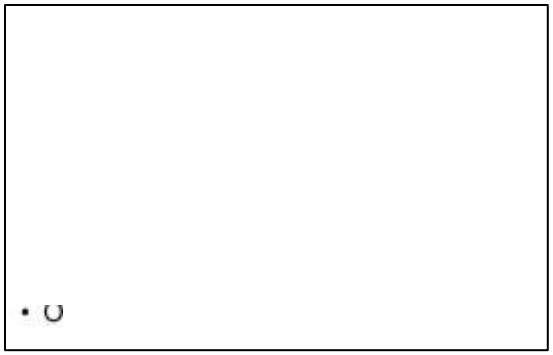
80. In July 2010, EO Determinations provided Continuing Professional Education training to EO agents. At this training, agents were advised that they would soon receive an expanded TAG spreadsheet to enable them to identify and route cases to the appropriate groups. (Gov't Ex. 16, EO Determinations CPE, Instructor Guide: *Heightened Awareness Issues*.)

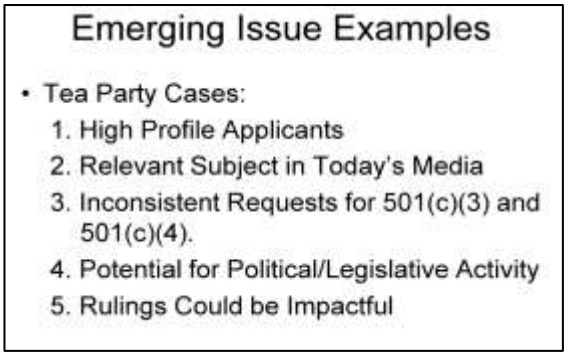
**Disputed and immaterial. The cited material does not support any of the assertions made It does not support the assertion that the events described occurred in July 2010; it says only "2010." It does not support the assertion that EOD provided the training to any agents. It further does not support the assertion that agents were advised they would soon receive an expanded TAG spreadsheet.**

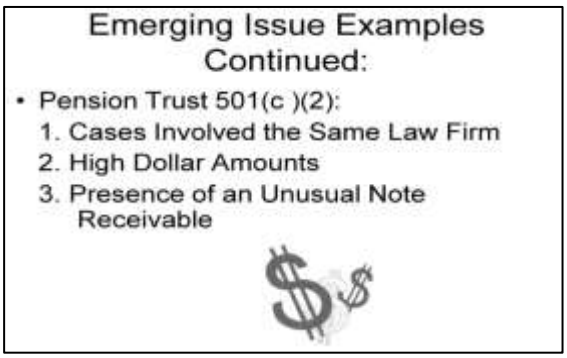
81. EO Determinations informed agents that the new spreadsheet would contain the following tabs: "Emerging Issues," "Watch List," "TAG [touch-and-go] (or "Potential Abusive"), "TAG Historical (or "Potential Abusive Historical"), and "Coordinated Processing." This spreadsheet was later named the be-on-the-look-out (BOLO) list. (*Id.*; Gov't Ex. 17, CPE PowerPoint Presentation.)

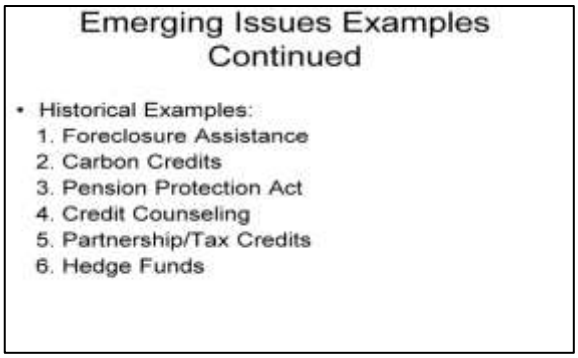
**Undisputed.**

82. During the training, agents were shown a PowerPoint presentation that contained the following slides:



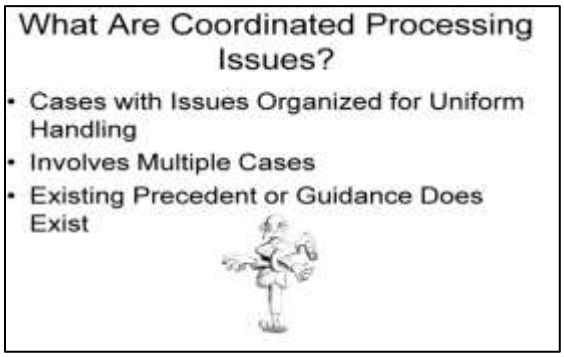




(Gov't Ex. 17, PowerPoint Presentation from CPE Training, at USA_NorCAL_RFP-0002619-22.)

**Undisputed.**

83. The training also covered coordinated processing of cases involving similar issues. Here, agents were taught:





(Gov't Ex. 17, at USA_NorCAL_RFP_0002623-24.)

**Undisputed, but immaterial.**

84. From the beginning there was confusion regarding what to look for when coordinating the cases. As the notes from the July 28, 2010 training reflect, IRS employees gave conflicting accounts of the types of entities that should be coordinated under the "Tea Party" entry on the Emerging Issues tab. (Gov't Ex. 18, Minutes from July 28, 2010 Training.)

**Disputed; the cited material does not support the assertion that "[f]rom the beginning there was confusion regarding what to look for when coordinating the cases." The cited material does not support the assertion that "IRS employees gave conflicting accounts of the types of entities that should be coordinated under the 'Tea Party' entry on the Emerging Issues tab." Hofacre, the Tea Party Coordinator, educated (and corrected) EOD agents on what to screen, and then performed secondary screenings to ensure only Tea Party cases were segregated. P.73-80.**

85. Screener Gary Muthert explained that entities with "the following names and/or titles were of interest and should be flagged for review: 9/12 Project, Emerge, Progressive, We The People, Rally Patriots, and Pink-Slip Program." (*Id.*)

**Undisputed as to the statement, but disputed as misleading to the extent it suggests application of other criteria. The IRS applied the Targeting Criteria to select organizations for segregation and additional scrutiny. P51-P68. Hofacre, the Tea Party Coordinator, educated (and corrected) EOD agents, including Muthert, on what to screen, and then performed secondary screenings to ensure only Tea Party cases were segregated. P.73-80.**

86. After Muthert's discussion, the Meeting Minutes reflect that Hofacre informed agents that "applications with Key Names and/or Subjects should be transferred to [group] 7822 for Secondary Screening. Activities must be primary. 'Progressive' applications are not considered 'Tea Parties.'" (*Id.*)

**Undisputed with the clarification that, in practice, the Targeting Criteria focused on names and viewpoints; the organization's activities were irrelevant. P58. Hofacre, the Tea Party Coordinator, educated EOD agents on what to screen, and then performed secondary screenings to ensure only Tea Party cases were segregated. P.73-80.**

87. Shortly after the July 2010 training, EO Determinations distributed the newly named BOLO list, containing the five tabs discussed during the training, to EO personnel. The

BOLO list was implemented to help EO Determinations personnel stay up-to-date on what to look for when reviewing applications and on where to route cases presenting specialty issues. (Gov't Ex. 47, Thomas Merits Tr. 35:3-15.)

**Disputed. The cited material does not support the assertion that "Shortly after the July 2010 training, EO Determinations distributed the newlynamed [sic] BOLO list, containing the five tabs discussed during the training, to EO personnel." Further disputed to the extent the assertion suggests that EOD personnel applied the BOLO to segregate Tea Party cases. The BOLO was only a routing document; the IRS applied the Targeting Criteria to select organizations for segregation and additional scrutiny. P51-P68; P136.**

88. For example, one entry on the November 23, 2010 version read: "Medical Marijuana. Email dated 7/5/10. Look for cases involving Medical Marijuana. Forward cases to processing who will forward the cases to Denise Tamayo, group 7888." (Gov't Ex. 19, November 23, 2010 BOLO List, "TAG" tab.)

**Undisputed, but immaterial.**

89. The entry regarding the "Tea Party" cases was listed on the emerging issues tab of the BOLO list. From August 12, 2010 to February 1, 2011, this tab appeared as follows: [Footnote: From August 12, 2010 to November 15, 2010, the fifth column referred to coordinator Elizabeth Hofacre, rather than Ronald Bell.]


(Gov't Ex. 19, "Emerging Issues" tab.) [Footnote: This was not the only entry on the BOLO list that concerned political activity. The BOLO list also contained an entry on the "TAG Historical" tab that read: "Progressive. Common thread is the word 'Progressive.' Activities appear to lean

towards a new political party. Activities are partisan and appear as anti-Republican. You see references to 'blue.'" In addition the "Watch List" contained an entry for "ACORN Successors" that instructed such cases to be forwarded to the TAG group. (Gov't Ex. 19.)]

**Disputed and immaterial to the extent it refers to matters (Progressive and ACORN cases) that were not segregated based on their viewpoint like the Tea Party cases. The IRS screened for Tea Party cases, not Progressive cases. P77-102. Progressive cases were listed in the BOLO as "closed" and were removed from the list of cases flagged as Tea Party cases to be processed along with the general inventory. *Id.* In addition, ACORN cases were flagged based on their activities, not their viewpoints. IRS Merits 30(b)(6) at 227:21-229:24.**

90. On June 1, 2011, EO Technical Manager Holly Paz asked EO Determinations: "What criteria are being used to label a case a 'Tea Party case'? We want to think about whether those criteria are resulting in over-inclusion." (Gov't Ex. 12, Email String, p. 3.)

**Undisputed.**

91. In order to answer Paz's questions, screening group manager John Shafer polled the screeners to ask what criteria they have been using when looking for the cases identified by the "Tea Party" entry on the "Emerging Issues" tab of the BOLO list. He responded: "The following are issues that could indicate a case to be considered a potential 'tea party' case and sent to Group 822 for secondary screening. (1) 'Tea Party, Patriots or '9/12 Project' is referenced in the case file. (2) Issues include government spending, government debt and taxes. (3) Educate the public through advocacy/legislative activities to make American a better place to live. (4) Statement in the case file that are critical of the how the country is being run." (Gov't Ex. 12, p. 2.)

**Undisputed, but clarified that Shafer requested that EOD Screeners provide to him the criteria previously developed and being applied by them to flag Tea Party cases. *See, e.g.*, P85.**

92. Forwarding Shafer's email to Paz, EO Determinations Program Manager Cindy Thomas wrote: "I guess what I am trying to say is that it doesn't matter what the cases are called or how they are grouped, EOD needs guidance to ensure consistency." (Gov't Ex. 12, Email string from Holly Paz to Nancy Marks, et. al., "Fw: Coordination Question – For meeting tentatively scheduled for 6/13.")

**Undisputed, but incomplete. Thomas wrote:**

> **The email below from John Shafer, Screening Manager, outlines the criteria the screening group is using to identify cases as "tea party cases." This is criteria the screening group came up with based on cases they were seeing. If we don't want the screening group to include all these type issues as "tea party cases," they would have no problem including or excluding certain cases. However, they need to be given criteria to use. And, if we don't want certain cases included, then EOD still needs to know how the cases should be processed. I guess what I am trying to say is that it doesn't matter what the cases are called or how they are grouped, EOD needs guidance to ensure consistency.**

**Further, the asserted facts are immaterial. The IRS applied the Targeting Criteria to select organizations for segregation and additional scrutiny. P51-P68.**

93. On July 5, 2011, Lois Lerner convened a meeting with EO employees to discuss the Tea Party applications and options for processing those applications. Holly Paz, Michael Seto, and Justin Lowe attended in person and Cindy Thomas attended by phone. (Gov't Ex. 43, Paz Tr. 333:1-7; Gov't Ex. 24, Email from Cindy Thomas to EO Determinations Managers, dated July 5, 2011.)

**Disputed; Hull, Kastenberg, Kindell, and Goehausen also attended. P133.**

94. In advance of the meeting, EO Technical employee Justin Lowe prepared a briefing paper for Lerner that stated: "EOD Screening has identified an increase in the number of (c)(3) and (c)(4) applications where organizations are advocating on issues related to government spending, taxes and similar matters. Often there is possible political intervention or excessive lobbying." The briefing went on to cover the criteria gathered by Shafer, state that over 100 cases

were identified as part of this emerging issue, and mention the test cases pending in EOT. (Gov't Ex. 23, Email from Justin Lowe to Holly Paz, et. al., dated June 27, 2011 and attached Briefing Paper; *see also* Gov't Ex. 49, Merits Discovery Deposition of Nancy Marks Tr. 95:6-10 ("You know, what the [EO Determinations] folks we interviewed said was that they were starting to see a lot of cases with this issue, and that was new to them. Whether that meant they had never seen another case, I can't tell you.").

**Object to Marks's retelling of what others told her as hearsay. Also disputed. Hull prepared the first draft of the report; Lowe revised and completed it. P130. Political campaign intervention by tax-exempt organizations was not an "emerging issue"; the standard has existed since 1969 and the IRS has issued regular guidance about it through Revenue Rulings and election-year training. P23-P28.**

95. Lerner expressed surprise and alarm when she learned, at the July 5, 2011 meeting, that EO Determinations was referring to cases as "Tea Party" cases. She "directed everybody to quit referring to the cases as Tea Party cases" because "they were using it as a shorthand for a much broader group and cases and it could be misunderstood." The "Tea Party" label was "incorrect," because EO "should be focusing on the issues in the cases, not who the organizations were." (Gov't Ex. 44, Lerner Tr. 163:4-9, 165:5-12.)

**Disputed. Lerner had known that EOD was referring to a group of cases as "Tea Party cases" since April 2010. P44-P46. In May 2011, Lerner approved the heightened scrutiny of the Tea Party movement. P45, 47. In February 2011, Lerner told her staff: "Tea Party Matter very dangerous." P108. She then used the phrase "Tea Party cases"—that she now finds shocking—herself: "Thanks—even if we go with a 4 on the Tea Party cases, they may want to argue they should be 3s, so it would be great if we can get there without saying the only reason they don't get a 3 is political activity." P110.**

**Further, disputed that Lerner believed that "Tea Party cases" was a "shorthand for a much broader group of cases and it could be misunderstood." According to Lerner's own testimony, in February 2011 she referred to "Tea Party cases" and meant only the two test cases on the SCR. Lerner Tr. 110:10-18; see also paragraph 72 *supra*.**

**Further, although NorCal does not dispute that Lerner understood that labeling the cases "Tea Party cases" had bad optics, Norcal disputes that Lerner intended her subordinates to change the Targeting Criteria. On or around the time of the July 5, 2011,**

**meeting, Lerner expressed that she "want[ed] everyone to know that we are handling the cases as we should." P137-P140.**

96. Lerner further ordered EO Determinations to change the BOLO list to reference and describe cases as advocacy cases, as that description indicated the type of *activity* that the BOLO list entry was trying to coordinate. (*Id.*)

**Disputed. The cited material does not support the proposition asserted. Nowhere in the cited material does Lerner say that she ordered EOD to change the BOLO list to reference and describe cases as advocacy cases. Further, nowhere in the cited material does Lerner say that "advocacy cases" indicates a type of "*activity*."**

**As discussed above, changing the BOLO listing was a superficial change because the IRS continued to apply the Targeting Criteria even after changing the BOLO. P137-P140. The BOLO was only a routing document; the IRS applied the Targeting Criteria to select organizations for segregation and additional scrutiny. P51-P68; P136. Lerner and other senior IRS officials knew that the BOLO was a routing document and did not contain the actual viewpoint-based criteria. P111, P125, P136-138. On or around the time of the July 5, 2011, meeting, Lerner expressed that she "want[ed] everyone to know that we are handling the cases as we should." P139. Thus, the EOD screeners continued to screen for cases as they had in the past. *Id.***

97. EO management intended this change to encompass much more than just the label used to refer to the cases or the wording in the BOLO entry. Rather, Ms. Paz understood it to mean that EO Determinations would change both the label and the criteria. Under the new criteria, applications would be identified based on the *activities* (i.e. political campaign intervention) that the entity planned to engage in, not because of its name or policy positions. (Gov't Ex. 43, Paz Tr. 336:22-337:17.)

**Objection that cited testimony came from improper questioning that was compound and leading by cross-examination of DOJ's own client that was inconsistent with the witness's proper testimony. *See* Rule 611(c), Advisory Committee Notes (leading questions improper "when the cross-examination is cross-examination in form only and not in fact, as for example the 'cross-examination' of a party by his own counsel after being called by the opponent (savoring more of re-direct)[.]").**

**Further, disputed. There is no citation to support the first sentence or second sentence. On redirect, Ms. Paz further explained that when she referred to "a change of criteria," she was referring to the issue description in the BOLO spreadsheet. Tr. at 364:4-**

**10. She admitted that she had no communication with screeners about the purported change in criteria.**

**In fact, the change in "label" was designed to obfuscate the continued application of the Targeting Criteria. P137-P139. As discussed above, on or around the time of the July 5, 2011, meeting, Lerner expressed that she "want[ed] everyone to know that we are handling the cases as we should." P139-P140. Paz learned on a personal visit to Cincinnati that "it is clear to me" that the IRS had "held up cases that have nothing to do with lobbying or campaign intervention (e.g., distributing material on the national debt)." P141. Lerner and Paz openly admitted their understanding that the cases did not have cookie-cutter activities and the legal issue was not new. P142-P143. There was no reason to segregate these cases based on "activities" as asserted, because the organizations' activities differed. *Id.* The IRS never took steps to de-segregate Plaintiffs and the Class despite knowing that they did not present cookie-cutter activities or novel issues, and had instead been segregated and scrutinized on the basis of their ideology." P143.**

98. The managers also decided to have EO Technical take a three-pronged approach to providing guidance and speeding cases to resolution. First, EO Technical would continue to work the "test cases," but Carter Hull would be taken off the cases.[6] Second, EO Technical would "triage" the existing backlog of cases to try to identify and speed to resolution cases that had been "over-included:" that is, entities erroneously grouped with the advocacy cases because of their name or policy positions, whose application did not present significant political campaign intervention issues. Finally, EO Technical would work on a guidesheet in order to create an additional guidance tool, besides the test cases, to help guide EO Determinations. (Gov't Ex. 43, Paz Merits Tr. 311:18-21, 336:16-19, 337:18-338:2.)

**Objection to the cited material as the witness provided the answer after a leading question.**

**Further, disputed. The cited material does not support the proposition asserted. Nothing in the cited material supports the assertion that "[t]he managers decided to have EOT take a three-pronged approach to providing guidance and speeding cases to resolution." Nothing in the cited material supports the assertion that EOT would continue to work the "test cases," but Carter Hull would be removed. Nothing in the cited material**

[6] The managers were concerned that Hull worked too slowly, so he was replaced by Hilary Goehausen, who managers believed would work more quickly. At that time, no EO Technical agent with more experience in the area of political campaign intervention had time available for the cases. (Gov't Ex. 43, Paz Merits Tr. 312:8-13, 338:3-22.)

**supports the assertion that EOT would triage the existing backlog "to identify and speed to resolution cases that had been 'over-included:' that is, entities erroneously grouped with the advocacy cases because of their name or policy positions, whose application did not present significant political campaign intervention issues."**

**As discussed above, on or around the time of the July 5, 2011, meeting, Lerner expressed that she "want[ed] everyone to know that we are handling the cases as we should." P139-P140. Paz learned on a personal visit to Cincinnati that "it is clear to me" that the IRS had "held up cases that have nothing to do with lobbying or campaign intervention (e.g., distributing material on the national debt)." P141. Lerner and Paz openly admitted their understanding that the cases did not have cookie-cutter activities and the legal issue was not new. P142-P143. There was no reason to segregate these cases based on "activities" as asserted, because the organizations' activities differed. *Id.* The IRS never took steps to de-segregate Plaintiffs and the Class despite knowing that they did not present cookie-cutter activities or novel issues, and had instead been segregated and scrutinized on the basis of their ideology." P143.**

**The IRS has since admitted that the triage was pointless. P147.**

**As to the footnote, disputed: Hull—and Kastenberg—were shifted off their positions after they alerted their superiors that the Tea Party cases had been scrutinized based on their ideology. P144.**

99. The managers also discussed referring applications that presented concerns regarding political campaign intervention, but which had little history of activities to examine, to the Review of Operations (ROO) Unit for follow-up after the application was approved. (Gov't Ex. 43, Paz Merits Tr. 334:14-335:10.)

**Objection to the cited material as the witness provided the answer to a question that called for speculation.**

**Further, disputed. The Tea Party cases were segregated based on viewpoint, not based on activities or common tax issues. P44-48, P89; P112-114; P141-P144. The ROO referrals were designed to extract representations about the amount of political activity in which the group intended to engage. P269-P271.**

100. During the relevant time period, the ROO was authorized to review an organization's activities to determine whether those activities were consistent with its stated tax exempt purpose and whether the organization was adhering to applicable reporting requirements.

The ROO did not contact entities; rather, it would look at an application file and conduct internet research.[7] (Dkt. 309-6, Declaration of Tamera Ripperda ¶ 18.)

**Disputed; the cited material does not support the assertion that the ROO would "look at an application file and conduct internet research." Further, in this case, the referral to the ROO was designed to extract representations about the amount of political activity in which the group intended to engage. P269-P271.**

101. At that time, the Internal Revenue Manual provided that a "Review of Operations (ROO) follow-up referral is prepared when a determination specialist has concerns about the past, present, or future activities of the organization but does not have sufficient cause to deny exemption." Referring applications to the ROO on a case-by-case basis, and following that normal process, as provided for by the IRM, was what those in the July 5, 2011 meeting envisioned. (Gov't Ex. 37, IRM 7.20.1.5(2)(b) (2011); Gov't Ex. 18, Lerner Tr. 172:18-173:10, 188:5-10.)

**Undisputed that the IRM states as quoted in the first sentence.**

**Disputed that those in the July 5, 2011 meeting "envisioned" referring applications to the ROO on a case-by-case basis and following the normal process as provided by the IRM. Lerner's transcript is located at Govt. Ex. 44, not Govt. Ex. 18.**

**As discussed above, nothing about the process of referring Tea Party cases to the ROO was "normal." Those referrals were designed to extract representations about the amount of political activity in which an organization planned to engage. P269-P271.**

## IX. Unfortunately, the Changes Ordered by Lerner Were Misinterpreted by EO Determinations Personnel, and the Advocacy Cases Continued to Pile Up.

102. Days after the July 5, 2011 meeting, EO Determinations changed the BOLO list entry to eliminate the reference to "Tea Party" and replaced it with the term "Advocacy Orgs." This entry read: "Organization involved with political, lobbying, or advocacy for exemption

[7] The ROO no longer preforms this function. On September 10, 2013, the ROO ceased accepting referrals from EO Determinations. As of October 4, 2015, the ROO's only responsibility is to review hospital organizations' compliance with the Affordable Care Act. (Dkt. 309-6 ¶ 18.)

under 501(c)(3) or 501(c)(4)." (Gov't Ex. 32, Email from Holly Paz, BOLO Descriptions, dated May 13, 2013.)

**Undisputed, but immaterial. The IRS continued to segregate Tea Party organizations based on viewpoint using the unchanged viewpoint-based Targeting Criteria. P138-P140. The change in "label" was designed to obfuscate the continued use of the Targeting Criteria. *Id.* Lerner expressed that she "want[ed] everyone to know that we are handling the cases as we should." P140.**

103. Although the BOLO list entry changed, EO management did not effectively communicate the extent and purpose of the change to EO Determinations agents, nor did they follow-up to ensure effective communication. (Gov't Ex. 42, SFC Report, pp. 58-59.)

**Objection. The IRS cites the Senate Finance Committee Report for the truth of a matter regarding the IRS's own conduct. As such, it is hearsay.**

**Further, disputed. As noted above, EO management changed the BOLO list entry but not the Targeting Criteria. P137-P140. They did not intend for EOT or EOD personnel to change the process by which they segregated Tea Party cases for additional scrutiny. *Id.* EOD and EOT personnel continued segregating the Tea Party cases using the Targeting Criteria after the BOLO 'label' was chaged. *Id.***

104. Rather, EO Determination Program Manager Cindy Thomas's email to the EO Determinations group managers soft-pedaled Lerner's criticism. Thomas's email focused on changing the label used to refer to cases rather than the need to change the criteria to focus on an organization's activities rather than its name or policy positions. (Gov't Ex. 24) ("Lois expressed concern with the 'label' we assigned to these cases. Her concern was centered around the fact that these type things can get us into trouble down the road when outsiders request information and accuse us of 'picking on' certain types of organizations even though we all know that isn't what is taking place. . . . Lois did want everyone to know that we are handling the cases as we should, i.e., the Screening Group starts seeing a pattern of cases and is elevating the issue.")

**Undisputed that Thomas's email states as quoted. Further undisputed that Thomas's email focused on the changing the label used to refer to the cases, rather than changing the Targeting Criteria.**

**Disputed that Thomas's email "soft-pedaled Lerner's criticism." Nothing in the cited material supports that proposition. Rather, in her contemporaneous written correspondence, Thomas correctly summarized Lerner's direction at the meeting. P138-140. Lerner and Paz openly admitted to attorneys in the Office of the Chief Counsel their understanding that the cases did not have cookie-cutter activities and the legal issue was not new, but they continued to insist on the centralized development they had ratified in the July meeting. P142. Further, the IRS never took steps to desegregate Plaintiffs and the Class despite knowing that they did not present cookie-cutter activities or novel issues and that they had been segregated based on their views. P143.**

105. Accordingly, despite the change to the BOLO list, EO Determinations' coordination of the advocacy cases did not substantively change at this time.

**Undisputed, but clarified that EOT also continued to segregate cases for additional scrutiny. *See, e.g.*, P147-P164.**

106. Further, EO Determinations screeners found the "Advocacy Orgs." BOLO entry too vague and general to be helpful to their task. So, on January 2012, EO Agents changed the BOLO entry again to the label "Current Political Issues" with the description:

> Political action type organizations involved in limiting/expanding government, education on the constitution and bill of rights $ocial economic reform/movement. Note: typical advocacy type issues that are currently listed on the Case Assignment Guide (CAG)[8] do not meet these criteria unless they are also involved in the activities described above.

(Gov't Ex. 32.)

**Undisputed that the BOLO was changed to state as quoted, although it stated "educated" rather than "education."**

**Otherwise disputed. The cited material does not support the assertion that "EO Determinations screeners found the 'Advocacy Orgs.' BOLO entry too vague and general to be helpful to their task." The cited material does not discuss the beliefs of EO Determinations screeners one way or the other. The cited material does not state who changed the BOLO entry or for what purpose.**

**The EOD screeners continued to rely on the Targeting Criteria to segregate Tea Party cases for additional scrutiny; the change in the BOLO entry was superficial and not relevant to their task. P55; P137-P140.**

[8] The Case Assignment Guide was a chart that EO managers used to assist in determining how to assign applications to agents based on their grades (and experience levels).

107. When EO management learned of this change, which included references to policy positions rather than to activities, management again ordered the entry changed and ordered that no further changes be made without management approval. (Gov't Ex. 42, SFC Report, p. 84.)

**Objection. The IRS cites the Senate Finance Committee Report for the truth of a matter regarding the IRS's own conduct. As such, it is hearsay.**

**Further, disputed. As Director of EOD, Thomas is "EO management" and, having helped develop the revised BOLO entry, knew about it from its inception. *See* Govt. Ex. 42 at 82-83; Govt. Appendix A, Dkt. 357-1.**

108. The new, EO management-sanctioned BOLO entry read:

> 501(c)(3), 501(c)(4), 501(c)(5), and 501(c)(6) organizations with indicators of significant amounts of political campaign intervention (raising questions as to exempt purpose and/or excess private benefit). Note: advocacy action type issues (e.g., lobbying) that are currently listed on the Case Assignment Guide (CAG) do not meet this criteria.

(Gov't Ex. 32.)

**Undisputed.**

109. No further changes were made to this entry of the BOLO list. The BOLO list was permanently discontinued on June 20, 2013. (*See* ¶ 22.)

**Disputed. There is no material cited in this paragraph. To the extent this paragraph purports to incorporate material cited in paragraph 22, NorCal objects to the use of the TIGTA report as evidence of what the IRS actually did with respect to the BOLO, since TIGTA's comments are inadmissible hearsay for this purpose. The other material cited in paragraph 22, Government Exhibit 12, does not support the proposition asserted.**

**Further, the later changes or lack thereof to the BOLO are immaterial. The BOLO list was only a spreadsheet indicating titles of issues and issue description; actual criteria were not included on the BOLO list. P84-P86. Moreover, the use of the BOLO and changes to the BOLO list were independent of actual criteria that were being used for screening. *Id.* The IRS used the Targeting Criteria, not the BOLO list, to segregate the Tea Party cases for additional scrutiny. P55; P137-P140.**

**X. Faced with a Significant Backlog of Applicants, EO Technical Undertook, Ultimately Unsuccessfully, a Three-Pronged Approach to Resolve Cases and Prove Guidance to EO Determinations.**

110. Following the July 5, 2011 meeting with EO Director Lerner, EO Technical began its multi-pronged approach to provide guidance to EO Determinations while trying to speed cases to resolution. Each prong ultimately proved unsuccessful.

**Disputed. There are no materials cited to support the assertions in this paragraph. The intent of the additional screening was not to provide guidance or to speed cases to resolution. Instead, after the July 5, 2011 meeting, EOT developed a multi-tier system of additional scrutiny that added delay and burden to the Class members; each "prong" was successful in that mission. *E.g.*, P135, P143, P145-P163.**

*First Prong: Test Cases*

111. After Goehausen replaced Hull, work on the test cases proceeded more quickly. One case was closed after a representative of the entity informed Goehausen that it would not be responding to the IRS's information request. For the other entity, Goehausen reviewed its responses to information requests and wrote a proposed denial of its application. (Gov't Ex. 42, SFC Report, p. 91.) (The second entity is neither a Plaintiff nor class member in this case.)

**Objection. The IRS cites the Senate Finance Committee Report for the truth of a matter regarding the IRS's own conduct. As such, it is hearsay.**

**Disputed. The cited material does not support that "work on the test cases proceeded more quickly." That one organization withdrew and that Goehausen proposed denial of the other's application does not show that "work on the test cases proceeded more quickly." In fact, the material indicates that Goehausen repeated work that Hull had already completed, extending the time to resolve the test cases. Govt. Ex. 42 at 91.**

*Second Prong: Triage Review*

112. As detailed in paragraphs 52, 90, and 98, above, Paz was concerned that the criteria EO Determinations had been using to flag advocacy cases for coordination had resulted in the "over inclusion" of applicants who were involved in lobbying but not political campaign

intervention. The "triage" review was designed to identify any such applications and speed them to approval.

**Disputed. This paragraph cites no material to support its assertions.**

**To the extent it purports to rely on the Paz's testimony at 330:16-330:17, NorCal restates its objection that this testimony was provided in part following a leading question on cross-examination that mischaracterized prior testimony. This testimony does not support the assertion that the "triage" was designed to identify these applications and "speed them to approval."**

**To the extent it purports to rely on Govt. Ex. 12 at page 3, nothing in that material supports the assertion that the "triage" review was designed to identify applications and "speed them to approval."**

**To the extent it purports to rely on Paz's testimony at 311:18-21, 336:16-19, 337:18-338:2, NorCal restates its objection that this testimony was provided in part following a leading question on cross-examination. None of this testimony supports the assertion that the "triage" was designed to identify applications and "speed them to approval." None of it mentions the "triage" at all.**

**Paz was not concerned about over-inclusion; she knew that the IRS had segregated the Tea Party groups for additional scrutiny based on their views and that the groups did not have cookie-cutter activities or present new legal issues. P141-P142.**

**The IRS has admitted that the triage was pointless. P147.**

113. Paz assigned EO Technical Tax Law Specialist Hilary Goehausen to review the pending 501(c)(3) and (c)(4) advocacy applications to see whether, after reviewing the file, she could recommend the application for approval, possible denial, or whether it needed more development. (Gov't Ex. 2, Deposition of Hilary Goehausen Tr. 100:11-23.)

**Hilary Goehausen's deposition transcript is Exhibit 45, not Exhibit 2.**

**Disputed that Paz assigned Goehausen to conduct the triage. Seto assigned her the project. Tr. at 102:2-6. Paz could not recall how Goehausen's assignment was made. Paz Tr. at 312:4-7.**

**Disputed also to the extent the assertion suggests that Paz gave guidance or supervision. Goehausen was instructed to "go through and review the application to see if we could make a recommendation for approval or possible denial, or if there's more development that needed to be in the case. It wasn't specifically an in-depth review of each**

**case, but more of when we first did the triage." Tr. at 100:15-23. Goehausen stated that in the three months she worked on the triage, she had only one meeting about it. Tr. at 101:15-19, 102:5-10.**

**The IRS has admitted that the triage was pointless. P147.**

114. As the then-Acting Manager of EO Rulings & Agreements, Paz explained that her goal in instituting the triage review was to "identify[] applications that had been included within the advocacy group of cases that did not actually present campaign intervention issues that were of concern and that those applications would then be approved." (Gov't Ex. 43, Paz Merits Tr. 313:1-13.)

**Objection that the testimony provided in the cited material was offered after a question calling for a legal conclusion.**

**Disputed. Paz was not concerned about over-inclusion; she knew that the IRS had segregated the Tea Party groups for additional scrutiny based on their views and that the groups did not have cookie-cutter activities or present new legal issues. P141-P142.**

**The cited material does not support the implication that Paz ever made this goal known to Goehausen. Goehausen was instructed to "go through and review the application to see if we could make a recommendation for approval or possible denial, or if there's more development that needed to be in the case. It wasn't specifically an in-depth review of each case, but more of when we first did the triage." Tr. at 100:15-23. Goehausen stated that in the three months she worked on the triage, she had only one meeting about it. Tr. at 101:15-19, 102:5-10. She did not indicate that she ever spoke to Paz about the project.**

**The IRS has admitted that the triage was pointless. P147.**

115. Goehausen testified that her "understanding of the purpose [reviewing the applications] was to help move some of these outstanding applications." She was to see if a favorable determination letter could be issued based on the information already in the application file, or, if not, whether the organization likely did not qualify for 501(c) status or more information was needed to determine whether it qualified. (Gov't Ex. 45, Goehausen Tr. 101:4-14.)

**Disputed. The IRS has admitted that the triage was pointless. P146.**

116. As part of this assignment, Goehausen reviewed the applicants' electronic application files (housed in the IRS's TEDS software system) and input notes regarding her recommendations on a spreadsheet. (Gov't Ex. 26, Goehausen Triage Review Spreadsheet; Gov't Ex. 45, Goehausen Tr. 118:8-21.)

**Undisputed. Goehausen's notes also included her assessments that groups had used "inflammatory" or "emotional" language. P146. Immaterial that Goehausen reviewed the applications "[a]s part of this assignment." The assignment was pointless, P146, and ultimately the result of segregation based on viewpoint. P43-47, P55; P67; P88; P111-113; P140-P143.**

117. Plaintiffs NorCal Tea Party Patriots and San Angelo Tea Party were reviewed by Ms. Goehausen as part of this effort. (Gov't Ex. 26, Lines 12 and 20.)

**Undisputed.**

118. Plaintiffs have identified Goehausen's review of San Angelo's electronic application file as an "unlawful inspection." (Gov't Ex. 8, Inspection No. 5.)

**Undisputed.**

119. Ultimately, Goehausen's work did not achieve the desired result of helping EO Determinations resolve pending cases. (Gov't Ex. 46, Thomas Class Tr. 153:24-154:21.)

**Disputed. The cited material does not support the assertion that "helping EO Determinations resolve pending cases" was a "desired result" of the triage. Considering the "triage," Thomas did agree that she "did not think it was very helpful." Tr. 153:24-154:4. She stated that the information on Goehausen's spreadsheet did not prove useful. Tr. at 152:23-24. She did not state what the "desired result" was or give any indication that the triage was intended to resolve cases at all. Further, the IRS has admitted that the triage process was pointless. P146.**

120. EO Determinations Program Manager, Cindy Thomas, described Goehausen's comments as less than definitive. This was due, in part, to the fact that Goehausen only had access to the electronic version of the application file housed on the IRS' TEDS electronic file

system. At this time, the TEDS system did not always contain the entity's full application file because responses to development letters were kept in the paper file and not always imaged into the TEDS system. In addition, Ms. Goehausen lacked experience in the area of political campaign intervention and some of her review reflected that inexperience. (Gov't Ex. 26; Gov't Ex. 46, Thomas Class Tr. 154:14-21.)

**Undisputed. Further answering, the IRS knew that Goehausen was inexperienced when it selected her to conduct the triage. P146. To the extent her inexperience contributed to the uselessness of her work product, that result was easily predictable at the time she was assigned. Further, that she would only have access to TEDs data was similarly predictable at the moment she was assigned to conduct the triage. The triage was pointless from its beginning. P146.**

121. For example, with regard to Plaintiff San Angelo, Ms. Goehausen notes: "Appears to be mostly engaging in primarily political campaign activity; no apparent educational or legislative activities." But, the notes do not contain a clear recommendation for what action EO Determinations should take on this application. (Gov't Ex. 26, Line 12) (emphasis in original.)

**Undisputed. Further answering, Thomas considered the document and agreed that she "did not think it was very helpful." Tr. 153:24-154:4. She further stated that the information on Goehausen's spreadsheet did not prove useful. *Id.* 152:23-24.**

122. At the time Goehausen was assigned to conduct the "triage" review, Paz did not anticipate that reviewing only the TEDS file would result in a less-than-useful product. (Gov't Ex. 43, Paz Merits Tr. 312:14-22.)

**Objection that the witness provided this answer following a question without foundation.**

**Further, disputed. The material cited does not support the proposition asserted. Paz actually stated that "at the time the triage idea was developed, I did not have concerns about TEDS." Tr. at 312:19-21. This is not the same as saying that she did not anticipate a problem; she may have anticipated it and discounted it because the triage project was designed to appear to show progress, rather than to actually show progress. This is consistent with the decision to appoint Goehausen, an inexperienced new hire by the IRS, to conduct a review of materials that were already under review by the EOD. P146.**

*Third Prong: Guidesheet*

123. Guidesheets were regularly used by EO personnel to assist in review of an application and to create relevant questions to develop the case. Attorneys in the IRS Office of Chief Counsel, whose role is to provide legal advice to the IRS, regularly review draft guidesheets. (Gov't Ex. 6, Declaration of Janine Cook ¶ 2; Gov't Ex. 52, Hofacre Tr. 205:6-206:12.)

**Disputed. There is no material cited to support the first sentence, and it is not supported by the later cited material.**

**Further, immaterial. The relevant question is whether the guidesheet purportedly developed in this case would be useful where, as described above, the IRS recognized that the Tea Party cases had been segregated for additional scrutiny not because of common issues but because of their views. P43-45, P55; P58-P59; P67; P88; P111-113; P140-P143. Whether or not the IRS develops guidesheets "regularly" with the assistance of the Counsel is irrelevant.**

124. Lois Lerner testified that the purpose of the guidesheet was two-fold: "one purpose was to provide it to our staff so that they could work the cases. And the other purpose was to put it on our website so that people who were applying would understand what the rules were." Making information public was important "particularly in areas where there was confusion, because oftentimes applications were held up for development because the applicant didn't understand what was okay under that subsection and what wasn't okay under that subsection." (Gov't Ex. 44, Lerner Tr. 234:18-235:6.)

**Disputed. The quoted material omits material facts. Lerner went on to say that "in this case, we were getting letters from congress people about the fact that these applications were being held up, and the main reason they were being held up was because *we needed the guidance sheet* so that we could start working the cases." Lerner Tr. at 235:13-20. Even according to her own testimony, the cause for delay was the IRS, not the applicants.**

**Further, the IRS had already developed a guidance sheet and provided it to EOD, who used it. P151. In any event, there was no need for a guide sheet because the Tea Party cases presented different issues. P43-45, P55; P58-P59; P67; P88; P111-113; P140-P143.**

125. Similarly, then-Acting Director of Rulings & Agreements, Holly Paz, testified that the tax administration purpose of the guidesheet was to "assist the agents in working the issues such that they would know which issues were of concern and which issues were not of concern and how to develop those issues and reach conclusions on the applications." (Gov't Ex. 43, Paz Merits Tr. 315:20-316:9.)

**Objection that the witness provided this response after a question that called for a legal conclusion. Further, disputed. The IRS had already developed a guidance sheet and provided it to EOD, who used it. P151. In any event, there was no need for a guide sheet because the Tea Party cases presented different issues. P43-45, P55; P58-P59; P67; P88; P111-113; P140-P143.**

126. In November 2011, EO Technical provided a draft guidesheet to EO Determinations. However, a final guidesheet was never created. Despite much work and several revisions, work on the guidesheet ultimately stalled because EO Technical was unable to come to an agreement with attorneys from the IRS Office of Chief Counsel, Tax exempt/Government Entities Division (TE/GE Counsel) on the language of the document. It was not unusual for EO Technical to consult with TEGE Counsel on such matters, especially matters involving legal guidance in areas with little precedent. (Gov't Ex. 6, Cook Dec. ¶ 2; Gov't Ex. 27, Draft Guidesheet; Gov't Ex. 57, Deposition of Janine Cook, Merits Discovery Tr. 50:9-19, 55:1-12, 57:5-19, 90:18-91:3, 132:13-22, describing discussions on draft guidesheet between TE/GE Counsel and EO Technical.)

**Disputed. No material is cited to support the first, second, or third sentences. The later cited material does not support that EOT provided a "draft" guidesheet to EOD in November 2011. Nothing in the cited material discusses EOT providing a "draft" guidesheet to EOD at any time.**

**In November 2011, EOT did provide an "Advocacy Org Guide Sheet" to the Advocacy Team that the Team used to prepare and issue development letters to Plaintiffs and Members of the Class. P151. The Advocacy Team relied on this Guide Sheet to draft the Unnecessary Questions, which Paz, Lerner, and the Commissioner's Office approved. P151-P162.**

**In early 2012, EOT and Counsel attempted to create a second guide sheet but could not agree on the legal standard that applied. Cook Tr. 90:18-91:3.**

127. In November of 2011, EO Determinations Program Manager Cindy Thomas continued to be concerned about the growing backlog of advocacy cases. Responding to a November 3, 2011 email from Lerner asking for input on how to prioritize work, Thomas emphasized the backlogged advocacy cases: "We've been waiting for EO in D.C. to get us a guidance/reference document with lessons learned from the c4 and c3 cases they worked and coordinated with Judy Kindell and Counsel." (Gov't Ex. 25, Email from Cindy Thomas to Lois Lerner, "Re: R&A Priorities.")

**Undisputed. Further answering, in the same email Thomas detailed how the IRS sent development letters in response to taxpayers' statements that they would call their Congressman:**

> **We're getting calls from POAs wanting to know who has put the halt on working these cases and threatening to contact their Congressional offices. Just today, I instructed one of my managers to get an additional information letter out to one of these organizations—if nothing else to buy time so he didn't contact his Congressional Office.**

128. On November 22, 2011, EO Technical Manager Michael Seto sent Thomas a spreadsheet containing the results of Goehausen's "triage" and asked Thomas to use Goehausen's work product along with the draft version of the guidesheet to begin developing the backlogged advocacy cases. (Gov't Ex. 26, Email from Steven Bowling to Cindy Thomas, "Fw: Advocacy Orgs" and Attachments.)

**Disputed infosar as the "triage" spreadsheet was useless. The cited material does not support the assertion that "helping EO Determinations resolve pending cases" was a "desired result" of the triage. Considering the "triage," Thomas agreed that she "did not think it was very helpful." Thomas Class Tr. at 153:23-154:4. The IRS had admitted that the triage was pointless. P146. In fact, the spreadsheet did not have any recommendations on what to do with the cases. *Id.***

129. The day after she received Seto's email with the draft guidesheet and Goehausen spreadsheet, Thomas contacted EO Determinations Group Manager Steve Bowling to "come up with a game plan for working these cases." Thomas asked Bowling to identify an EO Determinations Agent to coordinate the effort. (*Id.*)

**Undisputed.**

130. Thomas wanted to put together a team to develop the cases similar to what the IRS had done with credit counseling and health care cases. Her idea was to:

> Put[] somebody in charge of having an action plan put together, putting someone in charge to coordinate all of these cases similar to what we did with credit counseling cases and what we were doing or at some point in time did with healthcare cases. In those situations, we had individuals from EO Technical along with EO Determinations and EO Quality Assurance. We formed a team, and we had individuals reviewing cases. Ultimately, template letters were prepared, and when responses came in, those responses would be shared with the other individuals on the team, so that everyone would be on the same page and then to bring the cases to closure."

(Gov't Ex. 47, Thomas Merits Tr. 131:9-23.)

**Undisputed that this was Thomas's idea. Disputed to the extent the proposition asserts that the Tea Party cases were similar to the credit counseling and healthcare cases. The Tea Party cases were segregated for additional scrutiny based on the views of the organization, not their activities. P43-45, P55; P58-P59; P67; P88; P111-113; P140-P143. Unlike Tea Party cases, credit counseling cases were segregated based on activities, not viewpoint. P114.**

131. Thomas instructed Bowling to form a team with "a representative from each group . . . in the Determination program along with a Quality Assurance individual and individuals from the Washington office to provide some technical guidance similar to the process that we handled in the past with credit counseling cases and healthcare-type cases." (Gov't Ex. 47, Thomas Merits Tr. 189:22-190:3.)

**Undisputed that this was Thomas's instruction. Disputed to the extent the proposition asserts that the Tea Party cases were similar to the credit counseling and healthcare cases. The Tea Party cases were segregated for additional scrutiny based on the**

**views of the organization, not their activities. P43-45, P55; P58-P59; P67; P88; P111-113; P140-P143. Unlike Tea Party cases, credit counseling cases were segregated based on activities, not viewpoint. P114.**

132. While no official title was given to members of the team, the EO Revenue Agents and Tax Law Specialists that participated in this effort were informally referred to as the "Advocacy Team Members." In this role, Advocacy Team Members were responsible for reviewing applications for tax exemption that involved potential political campaign intervention activities. They developed and processed cases with potential political campaign intervention activities, attended technical meetings, and worked with designated EO Technical or EO Determinations employees when the need arose. (Gov't Ex. 1 ¶ 12.a.iii.)

**Undisputed that the IRS referred to this group as the Advocacy Team and that the Team reviewed Class members' applications. *See* P148-P150. Disputed to the extent the proposition asserts that the IRS segregated these applications based on political campaign intervention. The applications did not all involve potential political campaign intervention. The IRS segregated these applications for additional scrutiny based not on the organizations' activities but instead on their viewpoints. P43-45, P55; P58-P59; P67; P88; P111-113; P140-P143.**

133. Bowling chose Revenue Agent Stephen Seok to head up the effort to develop the cases by setting up and heading the Advocacy Team. Bowling met with Seok and told him to "set up a team" to "review questions that could be used in additional information letters." The team was comprised of senior agents, because they were "experience[d], seasoned." (Gov't Ex. 50, Bowling Tr. 120:20-21, 121:22-123:10.)

**Undisputed, except that Bowling testified that he instructed Seok to "review *possible* questions that could be used in additional information letters." Bowling Tr. at 120:20-21.**

134. Bowling chose Seok for this role because Seok "did a really good job" with a project involving credit counseling cases. So, Bowling believed that Seok's "approach, his thinking, you know, being reasonable, go-getter" would help him "keep [the] team focused, keep the team on point." (Gov't Ex. 50, Bowling Tr. 122:13-123:6.)

**Undisputed that this was Bowling's testimony.**

135. Seok met with the members of the Advocacy Team and started assigning cases to the agents. Seok prepared template development letters, which the team issued to their assigned advocacy cases, with the goal of issuing determinations and closing the pending cases. (Gov't Ex. 47, Thomas Merits Tr. 190:17-21.)

**Disputed. The cited material does not support that the Seok prepared or that the Team used "template" letters or that the Team issued template letters to their assigned cases," or that the goal was "issuing determinations."**

**Thomas's testimony indicates that the cases were assigned so that the Team members could develop them: "Stephen met with the individuals that were on his team and started ensuring cases were being assigned to the individuals and that they were preparing development letters and sending the letters out and getting cases closed." Thomas Merits Tr. at 190:17-21.**

**As discussed, template letters would have been useless because the Tea Party cases were segregated based on viewpoint, not on common tax issues. *See* P88, P141, P220; *see also* P43-45, P55; P58-P59; P67; P88; P111-113; P140-P143. This fact was known. *Id.* The IRS admitted that these included questions that are "troubling," overbroad, and non-probative. P155. The IRS knew that the requests sought information that is unnecessary for determining tax-exempt status. P155, P158.**

**Thomas also testified that: "I'm not sure if any cases were actually closed." Thomas Merits Tr. at 190:25-191:1. The plan was not to issue determinations but to protect the IRS by giving the appearance of processing applications. *See* P88; P134; P136-P142.**

136. Plaintiffs NorCal and SD Citizens were among the applications assigned to Advocacy Team members for review and development as part of the process instituted by Thomas and overseen by Seok. Development questions were sent to both NorCal and SD Citizens. (Dkt. 212-6, PageID 8003-10, Except, NorCal's Application File; Dkt. 212-10, PageID 8082-86, Excerpt, SD Citizens Application File.) Determinations were still not allowed. P142.

**Undisputed.**

137. Plaintiffs allege that the review of the file prior to sending development questions and the review of the responses the entities submitted to those questions were both unauthorized inspections. (Gov't Ex. 8, Inspection No. 6-7.)

**Undisputed. *See* P160-P161.**

138. As part of the Advocacy Team's work, NorCal received a letter requesting additional information sent by EO Agent Carly Young on January 27, 2012. The letter contained nineteen requests, some with several sub-parts. (Dkt. 212-6, PageID 8003-9.)

**Undisputed. Further answering, the Advocacy Team's "work" was to further develop applications from organizations that had been segregated for additional scrutiny based on their views, not on any common tax issue. P43-45, P55; P58-P59; P67; P88; P111-113; P140-P143.**

139. Because NorCal had received no contact from the IRS about its application for nearly two years, it was understandably frustrated to receive a lengthy request for additional information with the standard turn-around time of three weeks. (Dkt. 212-6, PageID 8003-9; Gov't Ex. 68, NorCal Merits Tr. 44:8-17.)

**Undisputed.**

140. NorCal received two of the information requests later identified to be unnecessary: Question 16(c) and Question 18. (Dkt. 212-6, PageID 8003-9; *see* Dkt. 228, PageID 8478-79, list of questions in definition of Unnecessary Requests Subclass.)

**Undisputed.**

141. Question 16(c) asked: "If you have a board member or officer who has run or will run for a public office, please describe fully. If none, please confirm by answering 'None' to this question." In response, NorCal wrote: "None." (Dkt. 212-6, PageID 8008.)

**Undisputed.**

142. Question 18 requested, among other things, the names of NorCal's donors. NorCal did not provide donor names to the IRS, as NorCal's Rule 30(b)(6) representative, Ginny Rapini, has repeatedly and adamantly maintained, both in public statements and in her sworn deposition testimony. Rather, NorCal provided a printout from its Paypal.com account, which listed donation amounts. This print out did not contain donor names or other identifying information, and no names or identifying information was provided in responses to Question 18. (Dkt. 212-6, PageID 8008 (no handwritten response); Dkt. 197-11, PageID 7216, NorCal Rule 30(b)(6) Deposition, Class Discovery Tr. 36:16-37:4; Dkt. 197-11, PageID 7230-31, NorCal Class Tr. 93:21-94:5) (Ms. Rapini testifying that she provided paypal.com information but refused to provide donor names); Dkt. 208 (electronic media submitted with notice of filing.)

**Disputed. NorCal did send donor information to the IRS. NorCal testified through Virginia (Ginny) Rapini, the person who produced documents to the IRS on behalf of NorCal. She testified that she submitted documents to the IRS both in 2010 and 2012. Rapini Tr. 66:10-67:10. She testified that she pulled a PayPal report, thinking it had only dollars and dates, but upon later review, realized it also had donor names. Rapini Tr. 66:14-68:18. She testified that she logged on to PayPal after getting the 2012 information request. Rapini Tr. 67:11-22; 68:14-69:3.**

**First, the Government showed Rapini the set of documents the IRS claimed to have found in its file of expunged materials, and Rapini could not locate a "donor list" in those materials. Rapini Tr. 77:3-93:1. However, the materials did show the identity of at least one group that had donated to NorCal via a grant, Tea Party Patriots. Rapini recalled this in NorCal's class discovery deposition on April 7, 2015. *See* Doc 197-11 (PageID#7216), Rapini Tr. 36:22-37:25. Further, Rapini identified items not within the expunged materials that identified donors. See Rapini Tr. 72:20-73:25.**

**Second, in its Interrogatory Response 8, NorCal stated that "NorCal coordinator Ginny Rapini identified categories of materials she submitted to the IRS as "Fundraising," "Grant Application and Receipt," and "Income and Expenses," which she furnished in NorCal's February 10, 2012 response to the IRS's 'development letter.' See IRS_NorCalTeaParty001127-28. It appears the fundraising and donor information submitted by Ginny Rapini, which was expunged by the IRS from NorCal's application file, is contained in the documents Bates numbered NorCal_011353-13501, which will be produced upon entry of a protective order. These materials are undated. Furthermore, some donor information is contained in the application file, including at Bates Nos. IRS_NorCalTeaParty000606, 001224, 002032, and 000080…"**

**At her deposition, the Government marked a set of documents NorCal produced in discovery (actually, NorCal_011353-13416) as Exhibit 131. Rapini Tr. 97:14-98:6. Rapini was first shown a section following a label that said, "PayPal" on it. Rapini Tr. 99:2-14. The Government asked her whether this section was what she had provided to the IRS "back in February 2012." *Id.* Rapini answered, "I believe these are the other pages that I provided." Rapini Tr. 99:15-21. The section contained redactions for donor names and addresses and had been redacted pursuant to an agreement between counsel. Rapini Tr. 100:6-101:2. Government counsel then asked Rapini to examine the documents more closely, and showed her that a superscript in the upper right-hand corner of the PayPal print-outs bore the date March 2, 2010. Rapini Tr. 101:3-102:17. After further questioning by counsel, Rapini then agreed that she had not, in fact, downloaded the files in 2012 to submit to the IRS in February 2012:**

18 **Q. Thinking back to when you received the**
19 **information request from the IRS in January 2012 and you**
20 **went on PayPal, downloaded stuff from PayPal in 2012.**
21 **That would not be this document here? This documents is**
22 **dated 2010, right?**
23 A. Probably.
24 **Q. If you can flip through the rest of this**
25 **section which goes through page 12915.**
1 MR. GREIM: I will get that for you.
2 MS. BECKERMAN: I am looking at the date in the
3 top right-hand corner. They all represent dates in
4 2010, right?
5 THE WITNESS: Yes.
6 BY MS. BECKERMAN:
7 **Q. These documents here from NorCal 12830 to**
8 **NorCal 12914, these are not part of the documents that**
9 **you downloaded from the PayPal website after receiving**
10 **the IRS information request, right?**
11 A. Right.

**Rapini Tr. 102:18-103:11. However, NorCal had sent information to the IRS in February 2012 other than the information Rapini remembered downloading from PayPal in 2012, and further, NorCal had also sent the IRS information in 2010. Further, Rapini testified that she had run multiple PayPal printouts and had submitted them all to the IRS (Rapini Tr. 74:1-75:23). Accordingly, Government counsel then concluded by asking Rapini the broader question of whether she had nonetheless sent Exhibit 131 (and the particular PayPal printout it contained under the "PayPal" tab) in response to an IRS information request. After looking through both volumes of the entire exhibit on the record, Rapini reaffirmed her interrogatory response and answered, "Yes."**

1 BY MS. BECKERMAN:
2 **Q. Looking at Exhibit 131, is it your testimony**

3 **that these documents in Exhibit 131 were documents that**
4 **you, NorCal Tea Party, produced to the IRS in response**
5 **to the IRS information request?**
6 A. I have not had a chances to look at all of
7 these. Did you want me to look at every page?
8 **Q. Well, I want to -- I want you to do what you**
9 **need to do to get an understandings of the document so**
10 **you can answer the question.**
11 MR. GREIM: That is a fair question. This is
12 the production that we made to the IRS in this case. I
13 will tell you in response to their request for this and
14 it's each one of the covered sections is in each one of
15 these tabs. You can look through here to satisfy
16 yourself. Or you can just do whatever you need to do.
17 THE WITNESS: We just went through that one.
18 That is my leaders manual. Okay.
19 MR. GREIM: Okay. Then this is the --
20 THE WITNESS: First volume. That is the
21 freedom ride, that was so fun. We definitely have been
22 busy. Yes.
23 BY MS. BECKERMAN:
24 **Q. Okay. That's all we have.**

**Rapini Tr. 104:1-24. The IRS's own records (*see* Pls.s' Ex. R163g, IRS Records), indicate that "Yes," NorCal provided donor names. Further, the IRS stated that "[t]he information regarding donors was not used" and that it "expunged such information and it will not become part of your application file." *Id.* In conclusion, both Exhibit 131 and other documents leave no doubt that Rapini produced donor names to the IRS in response to its questions.**

143. Plaintiffs allege that the review of the information that NorCal provided in response to Question 16(c)—consisting of the word "none"—constituted an "unauthorized inspection." (Gov't Ex. 8, Inspection No. 7.)

**Undisputed. The IRS admits that the information "none" was a response to an Unnecessary Requets. P157.**

144. Starting in February 2012, IRS managers began to hear complaints from the media and Congress regarding delays and burdensome information requests. (Gov't Ex. 42, SFC Report, p. 99.)

**Objection. The IRS cites the Senate Finance Committee Report for the truth of a matter regarding the IRS's own conduct. As such, it is hearsay.**

145. On March 5, 2012, due to concerns raised about lengthy and intrusive requests for information, Paz instructed EO Determinations to stop sending out development letters. (Gov't Ex. 28, Email string from Steven Bowling to Cindy Thomas, "Re: Congressional Follow Up – updated instructions and need for info.")

**Disputed. The material cited does not support the proposition asserted. Although the cited emails bear the quoted subject, there are no emails in Govt. Ex. 28 from March 5, 2012. The cited material does show Paz instructing Thomas on February 29, 2012 that "Lois did not want anymore letters going out until we changed the template letter." Lerner, Paz, and the Commissioner's Office had all previously approved the development letters that contained the Unnecessary Questions and caused the congressional backlash. P151-P162. As noted above, a template development letter would have been useless because the Tea Party cases had been segregated based on viewpoint, not on any tax issue. P43-45, P55; P58-P59; P67; P88; P111-113; P140-P143.**

146. By March of 2012, Steve Miller, then the Deputy Commissioner for Services and Enforcement, became aware of concerns about the backlog of advocacy applications and the congressional inquiries regarding delays and burdensome information requests. (Gov't Ex. 48, Nicole Flax Deposition Tr. 35:14-18; Gov't Ex. 49, Nancy Marks Deposition Tr. 27:14-19.)

**Disputed to the extent that Steve Miller became aware before March of 2012. In fact, Lerner kept Miller informed regarding the backlog before February of 2012. See P165-P170.**

147. Miller's Deputy Chief of Staff, Nikole Flax, testified that Miller sent Senior Technical Advisor Nancy Marks to Cincinnati to conduct an "independent review so that Steve Miller had a clear sense of what was happening on the cases." (Gov't Ex. 48, Flax Tr. 36:13-17.)

**Disputed. By February 2012, IRS officials had begun meeting with Congress, and no later than March 23, 2012, the IRS knew TIGTA was investigating it. P169-171. Marks' review was timed not only so that she would speak with Cincinnati employees in advance of TIGTA talking with those same employees (P173), but also to prepare a storyline for the IRS in time for Miller's anticipated testimony before Congress. P174. Flax herself testified that this was one reason Marks was sent to Cincinnati. Flax Tr. 44:2-7. Further, Marks' review was not independent, because she relied heavily on Holly Paz, who had been at the**

**center of, and a key decision-maker in, the very problem Marks was investigating. For example, Paz had known that Tea Party groups were being selected as early as the spring of 2010 and had approved the centralization process at its outset, and Marks asked her to review of non-BOLO cases to "see what it may indicate re effectiveness and evenhandedness of screening criteri[a] and standards of review." (Marks Ex. 11; Marks Tr. 143:9-144:8). This was essentially asking Paz to review her own conduct. Further, Marks relied on Paz to provide information to the review team in a pre-visit meeting in Washington, DC. Paz Tr. 211:8-213:22. ("Meeting Notes, April 15, 2012"). P175-176. *See also* Gov't Ex. 12 (Doc. 354-12, Page ID# 11408) (Paz emailing Marks and rest of team on 4-20-12 with four Targeting Criteria and claiming that this was "how the advocacy cases were described on the BOLO list back in June 2011"). Consistent with this, the worksheet that had been prepared for the team's review had pre-set columns suggesting Marks' team already knew what they were looking for before they left for Cincinnati: "Words in Name," "Words in Narrative," "Website check?" and "Words on Website." *See* Kindell Ex. 14 (April 20, 2012 email from Lois Lerner's Senior Technical Advisor, Sharon Light, to Kindell, attaching spreadsheet listing 162 groups' names and tax information, and entitled "Determinations Research."). P177.**

148. As a Senior Technical Advisor, Marks had primary responsibility for policy-level analysis and coordination of tax law issues with other functions within the IRS, as well as at other federal agencies. During the relevant time periods, Senior Technical Advisors were assigned to review applications for tax exempt status and, based on that review, to advise and assist EO Determinations Revenue Agents and Tax Law Specialists in the classification and analysis of cases involving indications of potential political campaign intervention. (Gov't Ex. 1 ¶ 12.f.)

**Undisputed that this is what certain Senior Technical Advisors were eventually ordered to do with the Tea Party cases, but disputed that it was normal for Senior Technical Advisors, only one or two of whom were assigned to each member of IRS senior management in Washington, D.C., to review individual files and directly assist EOD or EOT agents in working on any kind of cases, let alone cases involving political campaign intervention. Judith Kindell was the primary Senior Technical Advisor to Lois Lerner and was EO's subject matter expert on political activity by exempt organizations. Kindell Tr. 9:13-10:17. She testified that other than dealing with the Advocacy Cases at issue here, she "didn't" work cases. Kindell Tr. 20:8-22. Aside from "working" cases, it was not even usual for her to actually take a given case and review it. *Id.*; 20:2-6. The same was true of Marks, who had generally served in Chief Counsel's office for many years before coming to work as Joseph Grant's senior technical advisor in the summer of 2011. Marks Tr. 14:21-15:22. In that capacity, Marks did not help process any cases, "Not in the sense of ever seeing a case file and doing anything to process a case file." Over the years, her office**

**would be asked a legal question on something to do with a case, "one of the attorneys who worked for [Marks] might see all or part of [the case file], and issues requiring executive-level attention could be "briefed up to [Marks]," but "as to actually holding them and looking in them when I was chief counsel, no." Marks Tr. 18:11-19:5. As Senior Technical Advisor for Joseph Grant between the summer of 2011 through her retirement, "the bulk of" Marks' time was spent on "guidance drafting and working with Treasury to publish it," and there was "a much smaller amount of exempt org guidance." Marks Tr. 23:14-24:21. Grant had only one Senior Technical Advisor. Marks Tr. 25:6-9. Marks' only review of application files was on her trip to Cincinnati. Marks Tr. 219:8-220:7; 220:15-221:8.**

149. Marks was chosen for this task because of her many years of experience and because she did not work in EO and would therefore be independent. (Gov't Ex. 48, Flax Tr. 52:7-11.)

**Disputed. Less than a year before, Marks had left the Office of Chief Counsel, which is independent of the IRS, to become the Senior Technical Advisor for Joseph Grant, who was the direct superior of Lois Lerner and was one level below Steve Miller, who himself had a Senior Technical Advisor and would have been further removed from Lerner than Grant. Marks Tr. 21:1-21. Further, Marks had actually been briefed by Lerner and Paz, along with Chief Counsel, in July of 2011 regarding the handling of the cases, and had provided them advice. P179. Marks also testified that she viewed Lerner as a "coworker" after she "became senior technical advisor," and that even before this, when Marks was counsel, she might have worked with Lerner and Paz from time to time. Marks Tr. 35:13-37:9.**

150. Marks understood her assignment to be to "get to the root" of what is going on with the backlog of advocacy applications in Cincinnati and "if there was a problem, let's get it on the right track." (Gov't Ex. 49, Marks Tr. 29:7, 16-17, 35:7-11.)

**Disputed. Marks testified that in their initial conversation, Miller told her he wanted her to "get to the root of it and see if there was a problem," and that he "wanted to know if there was a problem, let's get it on the right track," but on this point, she did not state whether she agreed that this was ultimately her assignment. The Government's other citation (page 35) does not contain relevant discussion. The cited discussion on Page 29 does disclose that both Miller and Marks shared an understanding on a different point: an "instinct" that TIGTA "should look at this." Marks Tr. 29:3-17. Further, Marks did not testify in any of the cited materials that Miller's directive was limited to the "backlog of advocacy applications in Cincinnati," as the Government claims. The rest of the evidence supports the fact that the true purpose of Marks' review was to get in front of the TIGTA investigation and help prepare a storyline for upcoming testimony Miller would need to make to Congress. See Response to Paragraph 147.**

151. Marks put together a team consisting of Technical Advisor Joseph Urban, Senior Technical Advisor Sharon Light, and Tax Law Specialist Rob Malone, assisted by Paz, to help her investigate. (Gov't Ex. 49, Marks Tr. 59:9-11.)

**Disputed to the extent that this suggests Paz was not an integral part of the team. See Response to Paragraph 147. Further, Lois Lerner's Senior Technical Advisor Judith Kindell, who had been intimately involved in the execution of Lerner and Paz's plan, was used to prepare a worksheet in advance of the Cincinnati trip, and to review application files for "unnecessary questions." See P185-196.**

152. Paz understood that the purpose of the review by Marks and her team was to look into the concerns that had been expressed by taxpayers and determine if the concerns were valid. (Gov't Ex. 43, Paz Merits Tr. 318:12-17.)

**Disputed. Paz was asked by Government counsel of what her understanding had been of the "tax administration purpose of [Paz] assisting Nan Marks with this review of cases." Paz. Tr. 318: 5-8. Plaintiffs objected and maintain their objection that this improperly called for a legal conclusion. Paz Tr. 318:9-10. Paz then answered, "I don't recall exactly the tax administration purpose of her review. Generally, she was trying given the concerns that had been elevated from various applicants, Steve Miller the then acting IRS commissioner had tasked her to look into the concerns that had been expressed and determine if they're valid." Paz Tr. 318:11-17. This was nonresponsive to the question asked, which had inquired into what Paz thought at the time. The rest of the evidence supports the fact that the true purpose of Marks' review was to get in front of the TIGTA investigation and help prepare a storyline for upcoming testimony Miller would need to make to Congress. See Response to Paragraph 147.**

153. Marks and her team reviewed some of the relevant files using the TEDS electronic system and then travelled to Cincinnati to review complete files and speak with the EO Determinations employees who had been involved in screening and coordinating the cases. (Gov't Ex. 49, Marks Tr. 59:13-61:2.)

**Undisputed that Marks and her team reviewed files using TEDS, and then reviewed complete files in Cincinnati. However, the Government's cited transcript section does not state that Marks did speak with the EO Determinations employees who had been involved both with screening and coordinating cases. Later in the deposition, Plaintiffs tried to understand more about the employees with whom Marks had talked, but Marks could only remember that she had asked to speak with all employees who "worked on these cases in any capacity," including a screening group and a "couple of groups that reviewed cases**

**that came out of the screening group." Marks Tr. 63:12-65:1. The Government withdrew an exhibit from the witness and issued her cautionary instructions, and from that point, she could not remember other than to state she had spoken. See generally Marks Tr. 64:3-67:15. However, there is reason to believe that Marks failed to interview all of the key employees, including Steven Bowling, the manager of Group 7822, which was the group of the Tea Party Coordinator (later the Advocacy Coordinator) and handled the cases. Bowling Tr. 10:2-16; 25:11-26:6; 57:25-58:12. Bowling had no memory of any meeting in Cincinnati asking about how the cases had been developed; had no memory of Marks ever coming to Cincinnati; and had no memory of Paz asking questions of how processing had been completed in Cincinnati. Bowling 252:4-253:14.**

154. In order to better understand the types of questions being asked of applicants and the number of questions in development letters, Sharon Light[9] and Judith Kindell reviewed the development letters sent to advocacy organizations with pending applications for tax exempt status. (Gov't Ex. 53, Merits Discovery Deposition of Judith Kindell, Tr. 136:19-137:5.)

**Undisputed that Kindell originally reviewed development letters and recorded which groups received long letters and multiple letters. Kindell Tr. 134:8-138:6. She later was asked by Paz to tally inappropriate questions. See P185-191. Plaintiffs believe Susan Cundiff (whom they also believe was named Susan Brown) also participated in this review. Kindell Tr. 135:6-14. Plaintiffs dispute that this review was for any tax administration purpose, since it was not used in later development procedures (or even in bucketing); it played no role in halting the inappropriate questions or dealing with donor or other information; it was not disclosed to Congress two months later when Congress asked questions about who was receiving development letters and what types of questions they were asked; and it was not resurrected until 2013 when the IRS was trying to build an argument that not all of the inappropriate questions went to groups with "Tea Party" or related terms in their names. P191-196.**

155. Plaintiffs identify this review as an unlawful inspection. (Gov't Ex. 8, Inspection No. 8.)

**Undisputed. The factual basis of Plaintiffs' claim that this was undertaken to protect IRS officials, and without a tax administration purpose, is at P185-196.**

156. Based on this review, Marks' team concluded that EO Determinations had been issuing some questions that were burdensome or not well tailored to the facts presented by the individual applications. (Gov't Ex. 28.)

[9] Sharon Light's name is now Sharon Want.

**The Government's Exhibit 28 is an email chain predating Marks' review by almost two months, and the top email from Stephen Bowling, who may not have been interviewed by Marks, seems to contradict her conclusions. It cannot support the Government's proposed fact. Plaintiffs' proposed facts show that the team concluded that the IRS was flagging cases for closer scrutiny based on name and ideology; that this was not new information and mirrored TIGTA's conclusions; and that the IRS failed to disclose it when Congress asked questions to which the information would have been responsive. P179-184.**

157. In addition, some entities had received a question asking for a list of their donor's names. While donors' information is relevant in some cases, particularly when an application raises concerns regarding private inurement, the use of the question raised concerns in this context. (Gov't Ex. 43, Paz Merits Tr. 345:20-346:20.)

**Undisputed that some entities received questions asking for a list of donor names and that at the very least, the use of the question was inappropriate in this context. Plaintiffs objected to the Government's counsel eliciting testimony from Paz about cases where donor names could be relevant, as calling for the witness to speculate. Paz Tr. 345:20-346:20. The witness was presented with no information about whether any particular Plaintiff's application materials disclosed a sufficient probability of personal inurement to justify asking for donor names, nor did the Government present evidence that questions were based on an actual need to know information, as opposed to template questions. *Id.* Further, the Government did not produce evidence that these questions "raised concerns," either to Paz or anyone else. *Id.* To the contrary, the Government seemed to have elicited Paz's belief that donor questions could be appropriate. *Id.* As Plaintiffs' own facts show, the "Advocacy Team" that sent these questions did so because they were using an Advocacy Org Guide Sheet from EO Technical. P152. It was only after complaints surfaced that the IRS reacted, and now it admits that donor requests are among the "most troubling questions" of those sent by the Advocacy Team. P152-155. Indeed, the IRS knew the requests were unnecessary but asked for the information anyway. P159.**

158. In short, the IRS was concerned that donor names, which § 501(c)(4) entities are not required to disclose, would become subject to public disclosure due to § 6104. [Footnote: Tax-exempt entities are required to disclose their donors to the IRS as part of their yearly tax return filing, and that information is listed on the Form 990, Schedule B. While Form 990s are subject to public disclosure, the donor information found on Schedule B is not. (*See* Instructions, IRS Form 990, p. 5, available at https://www.irs.gov/pub/irs-pdf/f990ezb.pdf.) However, pursuant to § 6104, information that is submitted as part of the tax-exempt application process

and that the IRS considers in making the determination, is made public if the application is approved. Thus, if an entity submitted donor names and the IRS considered that information in approving the entity, the donor names would be part of the file subject to public disclosure under § 6104. As detailed in paragraphs 159-163, once EO managers realized this problem existed, they took steps to quickly cure the issue.

**Objection. The IRS fails to support this assertion with any record evidence as required under Rule 56. In contrast, the record demonstrates that the IRS sought to obtain this information and make it public as part of its targeting of the Plaintiff Class. P139-153 (after learning of criteria, seeking to extract more sworn statements from the organizations and forming Advocacy Group to develop inappropriate questions that would be added to the application file). The IRS only reversed course after its conduct in this regard was questioned. *See id.* Plaintiffs agree that the IRS should have been concerned about the information being public, including during the time it affirmatively sought that outcome.**

159. In order to address this concern, the IRS determined that donor names submitted by organizations seeking tax exempt status were not considered part of the determination of tax exempt status for these entities. As such, the information could be expunged from the file and therefore not subject to public disclosure. (Gov't Ex. 29, Email from Margo Stevens to Lois Lerner.)

**Undisputed that the Office of Chief Counsel, including attorneys Margo Stevens, Kirsten Witter, and Beth Levine advised that the donor information could be "destroyed or returned" because TEGE had "reviewed those files and determined that such information was not needed across-the-board and not used in making the agency's determination on exempt status." The Government has produced no evidence that Lerner, Paz, or other decision-makers had a "concern" about Section 6104 disclosure, either when they first learned the questions had been asked or after the IRS was subject to severe criticism. To the contrary, Paz was content to allow taxpayers to respond to the questions unless they complained about it. *See* P159-161.**

160. IRS employees reviewed the files in order to expunge any donor information. The IRS sent letters to the organizations notifying them that any donor information had been expunged and would not be publicly available, and inserted a memorandum into the files from which information had been expunged—memorializing the process. (Gov't Ex. 54, Merits

Discovery Deposition of Meghan Biss, Tr. 404:12-405:1; *see, e.g.*, Gov't Ex. 73, IRS_NorCalTeaParty000172.) [Footnote: Due to preservation orders, the IRS could not permanently destroy this information. Rather, it was "expunged" from the entity files and sent to a secure holding facility in West Virginia where it could not be accessed by Services and Enforcement employees and could not be disclosed in response to a request for public disclosure under § 6104. (Gov't Ex. 54, Biss, Tr. 404:12-405:1.)]

**Undisputed with the clarification that the IRS only sent letters to the organizations it thought had actually provided the donor information.**

161. As part of their effort to ensure that the files were scrubbed of any donor information, the IRS interpreted this to cover "a much broader group of people" than just lists of donors. (Gov't Ex. 54, Biss Tr. 406:19-407:3.)

**Disputed. Biss gave one example regarding the redactions of individuals listed on a Facebook page for TPTP because she remembered that she supervised Emily Mangrum, who was actually responsible for the redactions, but Biss did not explain whether the IRS had a policy of scrubbing all Facebook postings based on the donor issue. Further, the other examples Biss gave included "grantors" of an organization. Biss Tr. 405:8-408:16. Additionally, to the extent the IRS asked for information that would include the personal identities of supporters or other individuals who shared the same beliefs as applicants, those questions would be inappropriate for the same reasons as donor questions.**

162. For example, Plaintiff TPTP was not asked for a list of donor names and did not submit any such list as part of its application for tax exempt status. But, the IRS redacted the Facebook page printouts found in TPTP's application file as part of the IRS's effort to expunge donor information. As EO employee, Meghan Biss, explained:

> TPTP had Facebook information contained in their application and we had made the decision that if an individual cared enough about an organization, was interested enough in an organization to be participating on their Facebook page, to be commenting on their information in their Facebook page, that it was entirely possible that, that individual was also a donor to the organization, and so without any information to the contrary we would go ahead and treat them as such and redact their information so that their Facebook, their names and their profile

photos, that information was not publicly disclosed of who it was that was commenting on their Facebook page.

(Gov't Ex. 54, Biss Tr. 406:4-18.)

**Undisputed that the IRS took the actions it did with TPTP. But for the reasons set forth in Plaintiffs' response to Paragraph 161, disputed that there is any evidence that this was done with other Plaintiffs or that TPTP is an "example" of a broader practice. Additionally, to the extent the IRS asked for information that would include the personal identities of supporters or other individuals who shared the same beliefs as applicants, those questions would be inappropriate for the same reasons as donor questions.**

163. Similarly, although the IRS sent NorCal a letter notifying it that "donor information" had been expunged, Rapini, NorCal's Rule 30(b)(6) deponent, confirmed that there are no lists of donor names in the materials expunged from its file. (Gov't Ex. 68, NorCal Merits Tr. 77:12-79:3.) [Footnote: In discovery, Plaintiffs identified documents Bates Nos. NorCal_011353-13416 as "fundraising donor information submitted by Ginny Rapini." (Gov't Ex. 41, Plaintiff NorCal's Response to Document Request No. 8.) But, at Ms. Rapini's deposition, she confirmed that the list of donor names contained in Bates Nos. NorCal_011353-13416, consisting of a print-out from NorCal's PayPal account was a different document from the PayPal print out she submitted to the IRS. She confirmed that the date the PayPal list found in NorCal_011353-13416 (which does list donor names) was downloaded did not match the date she recalls downloading the PayPal list sent to the IRS (which contained only donation amounts, not names of donors). (Dkt. 197-11, PageID 7232-33, NorCal Class Tr. 101:15- 103:11.)].

**Disputed. NorCal sent donor information to the IRS and the IRS expunged it from the donor file. NorCal testified through Virginia (Ginny) Rapini, the person who produced documents to the IRS on behalf of NorCal. She testified that she submitted documents to the IRS both in 2010 and 2012. Rapini Tr. 66:10-67:10. She testified that she pulled a PayPal report, thinking it had only dollars and dates, but upon later review, realized it also had donor names. Rapini Tr. 66:14-68:18. She testified that she logged on to PayPal after getting the 2012 information request. Rapini Tr. 67:11-22; 68:14-69:3.**

**First, the Government showed Rapini the set of documents the IRS claimed to have found in its file of expunged materials, and Rapini could not locate a "donor list" in those materials. Rapini Tr. 77:3-93:1. However, the materials did show the identity of at least one group that had donated to NorCal via a grant, Tea Party Patriots. Rapini recalled this in NorCal's class discovery deposition on April 7, 2015. *See* Doc 197-11 (PageID#7216), Rapini Tr. 36:22-37:25. Further, Rapini identified items not within the expunged materials that identified donors. See Rapini Tr. 72:20-73:25.**

**Second, in its Interrogatory Response 8, NorCal stated that "NorCal coordinator Ginny Rapini identified categories of materials she submitted to the IRS as "Fundraising," "Grant Application and Receipt," and "Income and Expenses," which she furnished in NorCal's February 10, 2012 response to the IRS's 'development letter.' See IRS_NorCalTeaParty001127-28. It appears the fundraising and donor information submitted by Ginny Rapini, which was expunged by the IRS from NorCal's application file, is contained in the documents Bates numbered NorCal_011353-13501, which will be produced upon entry of a protective order. These materials are undated. Furthermore, some donor information is contained in the application file, including at Bates Nos. IRS_NorCalTeaParty000606, 001224, 002032, and 000080…"**

**At her deposition, the Government marked a set of documents NorCal produced in discovery (actually, NorCal_011353-13416) as Exhibit 131. Rapini Tr. 97:14-98:6. Rapini was first shown a section following a label that said, "PayPal" on it. Rapini Tr. 99:2-14. The Government asked her whether this section was what she had provided to the IRS "back in February 2012." *Id.* Rapini answered, "I believe these are the other pages that I provided." Rapini Tr. 99:15-21. The section contained redactions for donor names and addresses and had been redacted pursuant to an agreement between counsel. Rapini Tr. 100:6-101:2. Government counsel then asked Rapini to examine the documents more closely, and showed her that a superscript in the upper right-hand corner of the PayPal print-outs bore the date March 2, 2010. Rapini Tr. 101:3-102:17. After further questioning by counsel, Rapini then agreed that she had not, in fact, downloaded the files in 2012 to submit to the IRS in February 2012:**

18 **Q. Thinking back to when you received the**
19 **information request from the IRS in January 2012 and you**
20 **went on PayPal, downloaded stuff from PayPal in 2012.**
21 **That would not be this document here? This documents is**
22 **dated 2010, right?**
23 A. Probably.
24 **Q. If you can flip through the rest of this**
25 **section which goes through page 12915.**
1 MR. GREIM: I will get that for you.
2 MS. BECKERMAN: I am looking at the date in the
3 top right-hand corner. They all represent dates in
4 2010, right?
5 THE WITNESS: Yes.
6 BY MS. BECKERMAN:

7 **Q. These documents here from NorCal 12830 to**
8 **NorCal 12914, these are not part of the documents that**
9 **you downloaded from the PayPal website after receiving**
10 **the IRS information request, right?**
11 A. Right.

**Rapini Tr. 102:18-103:11. However, NorCal had sent information to the IRS in February 2012 other than the information Rapini remembered downloading from PayPal in 2012, and further, NorCal had also sent the IRS information in 2010. Further, Rapini testified that she had run multiple PayPal printouts and had submitted them all to the IRS (Rapini Tr. 74:1-75:23). Accordingly, Government counsel then concluded by asking Rapini the broader question of whether she had nonetheless sent Exhibit 131 (and the particular PayPal printout it contained under the "PayPal" tab) in response to an IRS information request. After looking through both volumes of the entire exhibit on the record, Rapini reaffirmed her interrogatory response and answered, "Yes."**

1 BY MS. BECKERMAN:
2 **Q. Looking at Exhibit 131, is it your testimony**
3 **that these documents in Exhibit 131 were documents that**
4 **you, NorCal Tea Party, produced to the IRS in response**
5 **to the IRS information request?**
6 A. I have not had a chances to look at all of
7 these. Did you want me to look at every page?
8 **Q. Well, I want to -- I want you to do what you**
9 **need to do to get an understandings of the document so**
10 **you can answer the question.**
11 MR. GREIM: That is a fair question. This is
12 the production that we made to the IRS in this case. I
13 will tell you in response to their request for this and
14 it's each one of the covered sections is in each one of
15 these tabs. You can look through here to satisfy
16 yourself. Or you can just do whatever you need to do.
17 THE WITNESS: We just went through that one.
18 That is my leaders manual. Okay.
19 MR. GREIM: Okay. Then this is the --
20 THE WITNESS: First volume. That is the
21 freedom ride, that was so fun. We definitely have been
22 busy. Yes.
23 BY MS. BECKERMAN:
24 **Q. Okay. That's all we have.**

**Rapini Tr. 104:1-24. The IRS's own records (Pls.' Ex. R163g, IRS Records), indicate that "Yes," NorCal provided donor names. Further, the IRS stated that "[t]he information regarding donors was not used" and that it "expunged such information and it will not become part of your application file." *Id.* In conclusion, both Exhibit 131 and other**

**documents leave no doubt that Rapini produced donor names to the IRS in response to its questions.**

**In response to the last sentence of the Government's footnote 21, NorCal states as follows. First, the Government cites Rapini's Class Discovery Transcript for the proposition that the PayPal pages did not contain donor names. (The Government's citation is in error, but Plaintiffs believe the Government meant to cite Doc. 197-11 PageID # 7216 (Rapini Tr. 36:12-37:25)). Rapini testified that she printed out a PayPal report that only contained dates and amounts, but not names. *Id.* Such a report exists. However, as noted above, document review and discovery proved this was not the only report Rapini sent the IRS; NorCal's Interrogatory Response 8 identifies at least one other set of PayPal documents NorCal is certain it produced, and Rapini's testimony affirms that NorCal did produce this to the IRS.**

164. Plaintiffs identified the review of application files by Marks and her team as part of their work to determine what had gone wrong and get the process on the right track to be an unlawful inspection. (Gov't Ex. 8, Inspection No. 9.)

**Undisputed that Plaintiffs identify the Marks inspections and the Kindell inspections as unlawful inspections. Plaintiffs identify them as unlawful because they were used only to help the IRS craft its storyline in preparation for the TIGTA audit and Congressional hearings; were not actually used to make operational changes; and their results were not actually disclosed to Congress when Congress asked questions to which the information would have been responsive soon after the inspections were completed. P169-196.**

165. On May 3, 2012, Marks presented her team's finding to Miller at a meeting. (Gov't Ex. 48, Flax Tr. 47:6-14.)

**Undisputed.**

166. Marks reported to Miller that EO Determinations was flagging cases for coordination based on name and ideology and that there were 250-300 cases awaiting determination. Miller was very upset by this information and "made it clear that he wanted the inventory to get on the right track, and get the cases looked [at] properly" and get applications the "rulings that they requested." Miller "wanted that accomplished as quickly as possible, consistent with doing it right." (Gov't Ex. 49, Marks Tr. 86:19-87:13.)

**Undisputed that Marks reported to Miller that EO Determinations was flagging cases for coordination based on name and ideology and that there were 250-300 cases awaiting determination. Undisputed that Marks remembers Miller making these remarks; but disputed that this is what Miller actually intended, as the IRS did not disclose the results of his findings to Congress (P180-183), and despite Marks recognizing that "a healthy percentage of them would qualify," (P179), the groups were still subjected to centralization and a brand new process of inspection called bucketing. P197-235.**

167. In order to resolve the mounting backlog of cases, Marks recommended to Miller that EO Technical staff provide in-person assistance to EO Determinations by reviewing and "bucketing" each pending advocacy application. (Gov't Ex. 42, SFC Report, p. 102.)

**Objection. The Government cites a sentence in a Senate Report that is apparently drawing a conclusion from the Senate Finance Committee's interview of Steve Miller. Plaintiffs do not have the report and cannot judge its accuracy. This is hearsay upon hearsay and would be inadmissible at trial. The facts show that the bucketing plan was devised by several individuals, including both Lerner and Paz. *See* P197.**

168. As part of the bucketing triage, Marks assembled a team of EO Technical agents to go to Cincinnati and work alongside EO Determinations agents to review the cases (the "bucketing team"). The object of this review was to determine which "bucket" the case fell into:

a. Bucket 1: Information in case file is sufficient to conclude that entity should receive a favorable determination,

b. Bucket 2: Some information is lacking from case file but only a small number of questions need to be addressed to resolve application.

c. Bucket 3: Information in case file is lacking and case needs significant work to develop and determine whether it qualifies for status.

d. Bucket 4: Based on information in case file, entity likely does not qualify for tax exempt status.

(Gov't Ex. 49, Marks Tr. 148:17-149:20.)

**Undisputed that this accurately describes the bucketing process. The cited testimony from Marks simply describes the buckets and does not support the Government's**

**additional contention that it was she who "assembled a team of EOT agents to go to Cincinnati to work alongside EOD agents." Accordingly, this part of the paragraph is not a properly supported undisputed fact. A more complete explanation of the division of labor is at P198-202.**

169. From mid-May to early June 2012, Mark's team worked in Cincinnati to bucket all the pending advocacy cases. As part of this process, each pending case was reviewed by two members of the bucketing team. They used a "Bucketing Worksheet" to record their notes and make a recommendation regarding which "bucket" the entity fell into. If the two reviewers disagreed, then the case would be reviewed a third time to break the tie. (Gov't Ex. 30, Email string, "Advocacy Cases – next steps – revised.")

**Undisputed that Government Exhibit 30 accurately describes the bucketing process at this stage. Disputed that this was "Marks' team" or that Marks had operational control, and nothing in Government Exhibit 30 supports this conclusion. *Id.* In fact, Paz had leadership, as shown by the fact that Government Exhibit 30 is from Paz to Cindy Thomas, and copies Lois Lerner, Sharon Light, and Donna Abner. *Id.* Marks is not even copied on the email. *Id.***

170. Plaintiffs have identified the bucketing review as an unauthorized inspection. (Gov't Ex. 8, Inspection No. 10.)

**Undisputed. The factual basis for Plaintiffs' legal claim is at P197-P235.**

171. Following the bucketing process, and according to EO's normal procedures, the advocacy cases were to be reviewed by EO Quality Assurance. At the time, the Internal Revenue Manual directed that "[a]pplications that present sensitive political issues, including . . . activities that may appear to support or oppose candidates for public office" were subject to mandatory review by EO Quality Assurance. The EO Determinations Quality Assurance Office was staffed by revenue agents who were responsible for reviewing applications after EO Determinations had completed their work on the application. (Gov't Ex. 38, IRM 7.20.5.4(3)(x) (2008); Gov't Ex. 1, ¶ 9.)

**Disputed that Quality Assurance Review was mandated by normal procedures. While IRM 7.20.5.4 may at the time have required review for activities that may appear to support or oppose candidates for political office," the officials who designed the bucketing knew that this was not true of all of the Tea Party groups, who had been selected based on their ideology instead of their common activities. See P29-106. The QA review is the perfect example of an additional inspection the IRS claims to be part of a "fix," but that was actually based on the same viewpoint-based targeting that began with Secondary Screening and continued throughout the segregation of those cases.**

172. In the hopes of speeding Quality Assurance's review and streamlining the process, EO managers included Quality Assurance agents on the bucketing team. (Gov't Ex. 43, Paz Merits Tr. 324:1-10.)

**Undisputed that this was Paz's testimony. However, the Government led its own witness (purportedly on cross with a wholly friendly witness) to this answer. Paz Tr. 324:7-10. Further, that QA employees had already reviewed applications once during bucketing only underscores that the secondary review later in the process was superfluous.**

173. Plaintiffs identify the Quality Assurance mandatory review as an unauthorized inspection. (Gov't Ex. 8, Inspection No. 12.)

**Undisputed. The reasons for this are set forth in Plaintiffs' response to Paragraph 171 as well as in P205-207.**

174. The bucketing team worked from mid-May through early June to review each of the 282 pending advocacy cases. In her June 8, 2012 email, Paz summarized the results as follows:

| | § 501(c)(3) entities | § 501(c)(4) entities |
|---|---|---|
| Approval (Bucket 1) | 16 | 65 |
| Limited Development (Bucket 2) | 16 | 48 |
| General Development (Bucket 3) | 23 | 56 |
| Likely Denial (Bucket 4) | 28 | 30 |
| **Total** | **83** | **199** |

(Gov't Ex. 30, Email from Holly Paz to Cindy Thomas, June 8, 2012.) [Footnote: In a separate email, Kindell noted that, "Of the 84 (c)(3) cases, slightly over half appear to be conservative leaning groups based solely on the name. The remainder do not obviously lean to either side of the political spectrum" and that, "Of the 199 (c)(4) cases, approximately 3/4 appear to be conservative leaning while fewer than 10 appear to be liberal/progressive leaning groups based solely on the name. The remainder do not obviously lean to either side of the political spectrum." (Gov't Ex. 33, Email from Judith Kindell to Lois Lerner, "Bucketed cases.")

**Undisputed, except that the Government's Exhibit 33 (referenced only in its footnote to Paragraph 174) is another example of the IRS re-scrutinizing applicants solely as part of its effort to protect itself by creating a new narrative. Kindell attempted to categorize the bucketed cases by ideology solely using their names (and not using the whole applications, which EOD would have had), as if this could help to show that groups were on both sides of the political spectrum were equally mistreated.**

175. Following completion of the bucketing, priority was given to assigning organizations that fell into buckets one and two to EO Agents so that the files moved quickly towards resolution and that any minor documents necessary to complete the application file of bucket 2 entities could be requested. (Gov't Ex. 43, Paz Merits Tr. 321:21-322:5.)

**Undisputed. Nonetheless, this was cold comfort because even the minor followup questions required for bucket 2 entities required that another EOT agent review and inspect the file (P203-204); QA review was still necessary for many of the cases, even though they would not have been subject to that review at all had they not been targeted as Tea Party cases (P205-207); bucketing required inspections for purposes of deciding whether to make ROO referrals, which again was the result of the groups' initial targeting as Tea Party groups (P208-210); and all of these groups were subject to having their return information continually reviewed on tracking spreadsheets kept of all of the groups (P211-212). The case of NorCal, a bucket 1 case that had been ready for review before bucketing, shows how the bucketing process actually triggered additional review and delay for groups merely because their ideology caused them to be branded as "Tea Party" groups. P213-218.**

176. Plaintiffs NorCal, AAOL, and SD Citizens were reviewed as part of the bucketing process. On May 17, 2012, EO Agent Matthew Giuliano reviewed NorCal's file and completed a bucketing worksheet indicating that NorCal fell into bucket 1. EO Agent Andrew Megosh

concurred with this recommendation. On May 31, 2012, EO Quality Assurance reviewed NorCal's file and also concurred with the recommendation that the application be approved. (Dkt. 212-6, PageID 8039-48.) [Footnote: As detailed above, NorCal did not submit a list of donor names in response to the relevant information request. (*See* ¶ 163.)]

**Disputed insofar as NorCal received additional scrutiny and delay due to the bucketing; it caused further inspections and delay, not the contrary. P212-219. Plaintiffs further respond that as shown in their responses cited above, NorCal did submit donor names in response to a relevant information request.**

177. As a bucket 1 entity, NorCal was among the first group of files assigned to an EO Agent after bucketing. On June 8, 2012, NorCal was assigned to EO Agent Faye Ng, who reviewed the case file, responded to a pending inquiry from the Taxpayer Advocate Office,[10] expunged "donor information" found in the file, and finished sorting and organizing the case file to ready it for closure. On August 12, 2012, the IRS issued a letter to NorCal approving its application for tax exempt status. (Dkt. 212-6, PageID 8011, 8038.)

**Undisputed that these actions occurred, but disputed that this is a complete recounting of the actions that were taken as part of bucketing. See P212-219 (extra delay and scrutiny due to bucketing).**

178. Plaintiffs identify Ng's final review to ready the file for approval and closing as an unauthorized inspection. (Gov't Ex. 8, Inspection No. 2.)

**Disputed. Plaintiffs identify Faye Ng as having completed inspection No. 2, "Inspections for Development," and relates to Ng's review of the case for 1.5 hours on June 19 and 20, 2012, which could only have been for development and does not state that it includes any of the close-out tasks outlined above. As Plaintiffs disclosed in discovery, Inspection Wave 2 consisted of "repeated inspections for the ostensible purpose of drafting development letters or otherwise gathering more information about the Tea Party Movement." See Plaintiffs' Answers and Objections to United States' Fourth Interrogatories, Interrogatory 27 (Doc. 354-8, Page ID#11340). The IRS's case files indicate**

[10] NorCal had contacted the Taxpayer Advocate Office regarding the delay in its application. Thus, Ms. Ng had to respond to the inquiry from the Taxpayer Advocate's Office prior to closing NorCal's file. Congress created the Taxpayer Advocate Office to assist taxpayers in resolving their problems with the IRS. **Plaintiffs object that this explanation appears nowhere in the record.**

**that Elizabeth Hofacre also performed Inspection Wave 2 on NorCal on June 3, 2010 ("Reviewed case…"). IRS_NorCalTeaParty002215-2217 (Case Chronology Records).**

179. South Dakota Citizens for Liberty was reviewed by Daniel Dragoo, Sharon Light, and Hilary Goehausen, who agreed that it fell into bucket 1. (Gov't Ex. 75, IRS_SDCitizens000281-82, 294.)

**Undisputed that all three reviewed SDCL's return information and that the end result was agreement to place SDCL in bucket 1.**

180. The bucketing worksheet, completed on May 31, 2012, further recommends that, for SD Citizens, the "ROO [Review of Operations Unit] should look at activities at end of 2012 to see whether political activities became primary for the year because of the election." (Gov't Ex. 75, IRS_SDCitizens000285.)

**Undisputed.**

181. Janine Estes filled out a Referral to Review of Operations Unit form on June 18, 2012 marking the box next to "political/legislative activities." (Gov't Ex. 75, IRS_SDCitizens000280.)

**Undisputed.**

182. Plaintiffs identify the ROO referral form completed by Estes as an unauthorized inspection. (Gov't Ex. 8, Inspection No. 16.) [Footnote: The purpose of the ROO and the rationale behind these referrals is discussed at ¶¶ 100-102.]

**Undisputed. Estes' inspection solely for purposes of making a ROO referral was an unauthorized inspection.**

183. While several Plaintiffs have a ROO referral form in their files, the ROO did not act on those referrals, so the ROO unit did not work on the Plaintiffs' files. [Footnote: While many of the 428 class members have a ROO referral form in their file, the ROO unit did not act on the vast majority of these referrals. In fact, only seven of the class members, and none of the

Plaintiffs, had their files reviewed by the ROO unit following a referral. (Gov't Ex. 9, Response to Interrogatory No. 6.)

**Undisputed as to the named Plaintiffs, but Plaintiffs are challenging the inspection for purposes of the ROO referral, not any additional inspection performed by ROO or a successor entity. That the ROO unit fortuitously disbanded as part of a larger reorganization of the Exam Unit does not make proper the initial inspections for purpose of making a ROO referral. As to the footnote, Plaintiffs respond that they challenge the separate inspections undertaken for purposes of making a ROO referral, not the ROO reviews themselves. ROO was discontinued, and its agents moved into the regular Examination function. Plaintiffs have no information about the new of Plaintiff classmembers who later underwent review by Examinations under a process that was not technically referred to as a ROO.**

184. On June 20, 2012 SD Citizens received a letter notifying it of approval of its tax exempt status. (Gov't Ex. 75, IRS_SDCitizens000227.)

**Undisputed.**

185. AAOL was reviewed by bucketing team members Justin Lowe and Andrew Megosh, both of whom identified it as a bucket 3 case. The review revealed that more information was needed to consider AAOL's application due to lack of information and inconsistencies in the available information. As Megosh wrote on the bucketing worksheet, "Organization's description of activities appears to promote social welfare" but "description of the organization contained on the trademark sites [for the trademarked organization name] includes the following: 'promoting the interests of a political organization. . . ." (Dkt. 212-8, PageID 8068-71, Excerpts, AAOL's Application File.)

**Undisputed that Lowe and Megosh both inspected AAOL's application file during bucketing and identified it as a bucket 3 case, and undisputed that Megosh wrote the quoted words. For the reasons below, disputed that more information was needed to consider AAOL's application. The IRS's selective and incomplete history of AAOL, including its truncation of AAOL's Form 1024, omits the most information about how and why AAOL was treated as it was. As shown below, the treatment of AAOL is a perfect example of how the IRS's viewpoint-based targeting caused delay, additional and unnecessary rounds of questioning and unlawful inspection, further delay, and further questioning, in a feedback effect.**

**First, AAOL's application was filed October 7, 2011. *See* AAOL000062-75. The application contains no reference whatsoever to intervention in candidate campaigns, and explicitly states, "The organization will not be participating in any political campaign activities." AAOL000062. However, by taking the view regarding a "majority of the oppressive laws that have been passed and are being passed," and "laws and bills that [are] affecting US citizens' freedoms," it drew the IRS's attention. *Id. See also* AAOL000090 (screening checksheet where box was checked for "political activities—Sensitive Issues."). This occurred on November 15, 2011. *See* Case Chronology, IRSAAOL000105-107. Half a year passed, and then Ron Bell performed secondary screening on May 6, 2012, confirming that it should be held under him in Group 7822, the group holding the Tea Party (what the IRS had by then begun to call "Advocacy") Cases. *Id.* At this point, no person had yet identified any reason to further develop AAOL or to believe it was involve in candidate campaigns.**

**Solely because AAOL had been targeted for inclusion in the Advocacy Cases (Group 7822) based on its viewpoint, it was subjected to the "bucketing," which required multiple reviews by Washington, D.C., non-EOD staff who not only scrutinized AAOL, but performed outside internet research in an attempt to find materials that could contradict its application. *See* AAOL000092-95. One of the two bucketers' additional internet research showed "hits" including a phrase from AAOL's trademark application. The description of goods and services associated with the trademark was "Promoting the interests of a political organization; Promoting public awareness of the interests of a non-profit political activist organization; Promoting public awareness of oppressive laws and the need to curtail them." *Id.* It was this special "bucketing" internet research performed by one of the bucketers half a year after AAOL's application, and not anything in the facially complete application itself, which caused the recommendation for full development. The other bucketer, Justin Lowe, suggested getting copies of any printed materials produced "so far" during the IRS-caused delay, and suggested finding out how AAOL "determined" laws would be oppressive. *Id.***

**Because of the bucketers' conclusion, Faye Ng was assigned the case for full development after a three-month delay. See AAOL000105. Ng again inspected the application file and performed more internet research into AAOL. Id. She then drafted a development letter focusing on the trademark, and sent it to Andy Megosh, in the Washington, D.C. office, for approval. *See* AAOL000106. The following week, she reviewed the file yet again, and drafted another letter, sending it to Megosh again. *Id. See also* AAOL000096-101 (September 26, 2012, 7-page fax of return information, the last of which is a draft development letter, from Ng to Megosh).**

**The draft development letter was never sent. Nothing happened on AAOL's file for the next 8 months, and 2012 turned into 2013. *See* AAOL000106. In the meantime, the IRS scandal broke. Abruptly, on May 22, 2013, Ng received a brand new draft development letter from Hilary Goehausen (Andrew Megosh's Washington, D.C., colleague, and at least the third Washington, D.C., specialist to now inspect this simple file), and sent the draft that same day. *Id.* The letter demanded a 21-day response, by June 10, 2013. *See* AAOL000076-78 (the IRS's May 22, 2013 response for information). Within the deadline,**

**on June 10, 2013, AAOL provided the requested information on its trademark. AAOL000084-AAOL00088. Muxlow simply reiterated the information in AAOL's Application 1024, and made clear what should have been obvious from the fact of the trademark registration: that the service descriptions' reference to "political activist organization" did, and had to, apply to AAOL itself. AAOL000085. He repeated that the organization was not involved with political parties or candidates. *Id.* And he attached the only brochure that AAOL had gathered the funds to produce. *Id.* In no uncertain terms, Muxlow told the IRS precisely why he no longer had a website and had no other brochures:**

> **I'm sorry but because of the delay by the IRS in obtaining the tax exempt approval, I was forced to shut the web site down and therefore can no longer have the educational content of the site. I cannot financially take any chances to set up a web site again until this approval is granted. It has been nearly 2 years since the application was sent. However, the information on the website was basically the same as the information included in our one brochure, which we have attached.**

***Id.***

186. As a bucket 3 case, AAOL was assigned to an EO Agent for further development in September of 2012. EO Agent Faye Ng reviewed the file and prepared a development letter, which she sent to EO Technical for review and approval.

**Undisputed.**

187. Plaintiffs identified the development letter review by EO Technical as an unauthorized inspection. (Gov't Ex. 8, Inspection No. 11.)

**Undisputed. The factual basis for Plaintiffs' claim is set forth in Plaintiffs' response to Paragraph 185, as well as in P202-203.**

188. On May 22, 2013, Ng issued the development letter to AAOL. This letter contained two questions, which were foused on concerns raised by AAOL's application. For example, one question reads:

> The description associated with the trademark [of the AAOL name] describes the purpose of your organization as "Promoting the interests of a political organization; Promoting public awareness of the interests of a non-profit political activist organization; Promoting public awareness of oppressive laws and the

need to curtain them." . . . "Please explain how you are a political organization or a political activist organization."

(Gov't Ex. 76, IRS_AAOL000077-80.)

**Undisputed that Ng asked this question. Based on the record and facts as outlined in Plaintiffs' Response to Paragraph 185, disputed that it "focused on" issues raised by AAOL's application or was somehow triggered by the application. Instead, it appears that AAOL was targeted based on its viewpoint; internet searches by one of two bucketer-inspectors half a year later disclosed a trademark application; and then this triggered further inquiry, which the IRS did not send out until a year after the bucketing. AAOL resolved the question, which itself was unnecessary and resulted from AAOL's having been targeted and then bucketed, within 21 days.**

**Adding insult to injury, the IRS's delay in asking the bucketing questions for eight months had caused AAOL to be subject to multiple additional rounds of review as part of the ironically-named "optional expedited process," which offered quick recognition but forced groups to bind themselves to heightened legal requirements, and was implemented in May and June of 2013. *See* AAOL000045-51.**

**AAOL is a prime example of how the initial decision to fully develop an application—to investigate a group—leads to new questions, which lead to new questions, which causes delay and itself triggers extra rounds of inspection. See Plaintiffs' Response to Paragraph 185.**

189. AAOL responded to Ng's development letter and received an approval of its tax exempt status on July 16, 2014. (Dkt. 212-9, PageID 8075-79.)[11]

**Undisputed. Plaintiffs also note that the IRS's and DOJ's purported "litigation hold" policy delayed AAOL's application for over a year after AAOL's 2013 response, even though an approval would not have required further direct inquiry of the taxpayer.**

[11] The delay in issuance of AAOL's determination letter occurred because, in accordance with the IRS's longstanding policy, entities who initiated litigation regarding their applications were placed in a litigation hold. Accordingly, AAOL's application was placed in a litigation hold in June 2013. However, in order to speed as many applications as possible to resolution while avoiding contact with represented parties, in 2014, the IRS commenced processing the applications of litigants where that processing did not require contact with the taxpayer. Further contact with AAOL was not necessary, so the IRS finished processing the application and issued a determination letter in June 2014. (*See* Dkt. 309, PageID 10254-55 for discussion of litigation hold policy and application to this litigation.) **Plaintiffs respond as follows. In reality, the "litigation hold" policy was discretionary with DOJ and hinged on DOJ's strategic litigation decisions. See P284-296. The litigation hold policy was severely criticized by the Court of Appeals for the District of Columbia Circuit, and for that reason alone, DOJ finally abandoned it. P296. It is reasonable to conclude that the litigation hold was nothing other than retaliation against groups who had the temerity to sue to protect their rights.**

190. During the bucketing process, EO management worked to expedite normal postreview procedures so that organizations bucketed as deserving of a favorable determination would receive notice of their determination as quickly as possible and that they would be notified that they did not need to respond to any outstanding development requests. (Gov't Ex. 34, Email from Holly Paz to Lois Lerner, "Re: Next Steps.")

**Disputed. The cited email deals only with QA Review and closing documents. As noted above in Plaintiffs' Response to Paragraph 171, QA Review was itself unnecessary and outside of the IRS's process for "mandatory" QA review of certain applications. See also P204-206. Further, the bucketing led to extra inspections and delay even for groups like NorCal who had been recommended for approval pre-bucketing, and who were bucketed as group 1. See P212-217. Finally, bucketing and post-bucketing triggered many subsequent reviews for groups like AAOL. See P220-234; P261-274.**

191. By December 17, 2012, EO had issued approvals to 108 of the backlogged entities. (Dkt 197-4, PageID 7046, 2013 TIGTA Report.)

**Undisputed.**

192. In June 2012, the Treasury Inspector General for Tax Administration (TIGTA) notified EO that it was commencing an audit regarding "Consistency in Identifying and Reviewing Applications for Tax exempt Status Involving Political Advocacy Issues." (Gov't Ex. 35, Email from Lois Lerner to Richard Daly, et al., "Re: 201210022 Engagement Letter," p. 2.)

**Disputed. In fact, the audit commenced far earlier, in March 2012. *See* P170-173.**

193. After receiving notice of the upcoming TIGTA audit, Lois Lerner wrote: "It is what it is. Although the original story isn't as pretty as we'd like, once we learned thi[ng]s were off track, we have done what we can to change the process, better educate our staff and move the cases. So, we will get dinged, but we took steps before the 'dinging' to make things better and we have written procedures. So, it is what what [sic] it is." (Gov't Ex. 35, p. 1.)

**Undisputed that Lerner so stated. However, Lerner's statement is not an accurate statement of what actually happened. Instead, it is an attempt to recast the facts in a way that she believed would exonerate her. As set forth above, Lerner learned that Tea Party cases were being specially developed in 2010 and called the matter "very dangerous" in February 2011. P310. She learned the four Targeting Criteria (P119-128) were being used in July 2011 (P129-133) and that the because the groups' activities were all different, template-based development would not work. P141. Instead of releasing the Tea Party groups from their holding pen so that they could be treated like all of the other applicants not targeted based on their viewpoint, she doubled down on centralized development (P134, P139, P141), failed to change the Targeting Criteria (P132-139), and ensured that many more rounds of inspection over several years would continue. P142. The first immediate result of this decision was the formation of the Advocacy Team and the promulgation of the most extreme examples of intrusive and burdensome questions. P144-162. The inspection and approval process had grown even more complex and labyrinthine by early 2012. P163. Even as the backlog grew, the first stirrings of concern from Lerner and her superiors did not occur until Congressional and public scrutiny began in early 2012. P164-P173.**

194. On May 14, 2013, TIGTA released its report entitled: *Inappropriate Criteria Were Used to Identify Tax exempt Applications for Review*. In this report, TIGTA concluded:

> The IRS used inappropriate criteria that identified for review Tea Party and other organizations applying for tax exempt status based upon their names or policy positions instead of indications of potential political campaign intervention. Ineffective management 1) allowed inappropriate criteria to be developed and stay in place for more than 18 months, 2) resulted in substantial delays in processing certain applications, and 3) allowed unnecessary information requests to be issued.

(Dkt. 14-1, PageID 123, Exhibit A to First Amended Complaint, 2013 TIGTA Report.)

**Undisputed that the TIGTA report so states. However, TIGTA's conclusions regarding what the IRS did, and its opinions regarding why the IRS engaged in this conduct, is hearsay, opinion, and inadmissible to prove the question of whether that conduct actually occurred, or the reasons for it. It is not evidence. The function of this Court is to determine the facts based on the underlying documents and sworn testimony of witnesses, resources that TIGTA did not have.**

195. TIGTA further found the use of the criteria gave the impression that the IRS was not impartial, and that ineffective management and lack of procedures for tracking requests for guidance contributed to unwarranted delay in processing these applications. (*Id.* at PageID 133.)

**Undisputed that the TIGTA report so states. However, TIGTA's conclusions regarding what the IRS did, and its opinions regarding why the IRS engaged in this conduct, is hearsay, opinion, and inadmissible to prove the question of whether that**

**conduct actually occurred, or the reasons for it. It is not evidence. The function of this Court is to determine the facts based on the underlying documents and sworn testimony of witnesses, resources that TIGTA did not have.**

196. The TIGTA report also determined that ineffective management and a lack of training resulted in IRS agents sending the affected organizations requests for additional information. Some of these requests were later determined to have not been necessary to process the applications. (*Id.* at PageID 145.)

**Undisputed that the TIGTA report so states. However, TIGTA's conclusions regarding what the IRS did, and its opinions regarding why the IRS engaged in this conduct, is hearsay, opinion, and inadmissible to prove the question of whether that conduct actually occurred, or the reasons for it. It is not evidence. The function of this Court is to determine the facts based on the underlying documents and sworn testimony of witnesses, resources that TIGTA did not have.**

197. Based on the findings in its report, TIGTA issued nine recommendations to the IRS aimed at reforming the screening and review processes to ensure that proper criteria were being used, ensuring the delivery of timely and appropriate guidance to the IRS employees doing the reviewing, developing additional training for the reviewers on identifying applications where political campaign intervention activities may require additional scrutiny, and ending the backlog of unprocessed applications and ensuring that future applications would be processed in a timely manner. (*Id.* at PageID 137-148.)

**Undisputed that the TIGTA report so states. However, TIGTA's conclusions regarding what the IRS did, its opinions regarding why the IRS engaged in this conduct, and its opinion about what measures would be effective in remedying this conduct is hearsay, opinion, and inadmissible to prove the question of whether that conduct actually occurred, or the reasons for it. It is not evidence. The function of this Court is to determine the facts based on the underlying documents and sworn testimony of witnesses, resources that TIGTA did not have.**

198. The TIGTA report on which Plaintiffs rely in their complaint did not characterize the IRS's conduct as "targeting." In fact, Michael McCarthy, TIGTA's Chief Counsel, specifically expressed concern over the use of the word "targeting" because, "[T]argeted has a

connotation of improper motivation that does not seem to be supported by the information presented in the audit report." (Dkt. 197-3, PageID 7043, Senate PSI Report, *IRS and TIGTA Management Failure Related to 501(c)(4) Applicants Engaged in Campaign Activity*.)

**TIGTA's conclusions regarding what the IRS did, its opinions regarding why the IRS engaged in this conduct, and its opinion about what measures would be effective in remedying this conduct is hearsay, opinion, and inadmissible to prove the question of whether that conduct actually occurred, or the reasons for it. It is not evidence. Objection to the hearsay comments and opinion of Michael McCarthy, who was merely expressing his own opinions about the TIGTA report's hearsay and opinions. Setting aside the opinions of outsiders, Plaintiffs' party-opponent, the IRS, itself admitted that its conduct was "improper targeting of a number of applicants for additional scrutiny" in the report of its Commissioner, Daniel Werfel. See P65.**

199. Following issuance of the TIGTA report, various Congressional committees and subcommittees began their own investigations into the IRS. For example, on September 5, 2014, the United States Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, issued a report entitled, "IRS and TIGTA Management Failures Related to 501(c)(4) Applicants Engaged in Campaign Activity," S. Rpt. 113-26, available at https://www.gpo.gov/fdsys/granule/CPRT-13SPRT89800/CPRT-113SPRT89800/content-detail.html. *See also* S. Rep. No. 114-119, at 77 (2015). Similarly, on August 5, 2015, the Senate Finance Committee released Senate Report 114-119, The Internal Revenue Service's Processing of 501(c)(3) and 501(c)(4) Applications for Tax exempt Status Submitted by "Political Advocacy" Organizations From 2010-2013 (Gov't Ex. 42.) The bipartisan investigative reports did not find that the mismanagement and delays were due to political animus or bias.

**Objection. The conclusions of these reports are mere opinions, recite hearsay, are not truly "bipartisan," and are not evidence. The function of this Court is to determine the facts based on the underlying documents and sworn testimony of witnesses given under questions from true adversaries, resources that these committees did not have. Further, "political animus" or "bias" is not a usual element of viewpoint discrimination, and the search for it is a red herring intended to exonerate the IRS. In fact, ample evidence exists of**

**the bias of Lois Lerner. P297-315. And there is no genuine dispute that Lerner, Holly Paz, and other top officials approved continued delay and intrusive questioning after knowing that the Tea Party groups had been selected based on the Targeting Criteria—that is, their ideology and not their activities. P129-142. The IRS has now admitted that there is no tax administration purpose for applying the Targeting Criteria. P67. The IRS has admitted that Plaintiffs and Members of the Class received additional scrutiny because of its use of the Targeting Criteria, and that this additional scrutiny came in the form of additional development letters. P64. This inherently involved inspections of their applications and associated taxpayer information. P65. Finally, the IRS has further admitted that IRS employees should know that organizations cannot be treated differently based on their viewpoint. P69. This applies from Lois Lerner down to individual agents. At trial, Plaintiffs will ask for judgment in their favor.**

200. On May 14, 2013, Attorney General Eric Holder announced that the Department of Justice's Criminal and Civil Rights Division, in collaboration with the FBI and TIGTA, was pursuing an investigation into the matters described in the TIGTA report. On October 23, 2015, Assistant Attorney General Peter Kadzik advised Congress that it was closing its investigation and confirmed it would not recommend criminal charges against Lois Lerner or any IRS official. He stated that the joint investigation, "found no evidence that any IRS official acted based on political, discriminatory, corrupt, or other inappropriate motives that would support a criminal prosecution." Instead, the investigation found "substantial evidence of mismanagement, poor judgment, and institutional inertia, leading to the belief by many tax exempt applicants that the IRS targeted them based on their political viewpoints" but concluded that "poor management is not a crime." (Letter from Peter J. Kadzik, Assistant Attorney General, to Hon. Bob Goodlatte, Chairman, Committee on the Judiciary, U.S. House of Representatives and Hon. John Conyers, Jr., Ranking Member, Committee on the Judiciary, U.S. House of Representatives, dated Oct. 23, 2015, available at http://online.wsj.com/public/resources/documents/IRS1023.pdf.)

**Objection. The conclusions and beliefs of former Attorney General Eric Holder or the rest of the Obama Administration that there were no crimes are not evidence. Nothing in the Federal Rules of Civil Procedure or Federal Rules of Evidence can support a reasonable belief by the Department of Justice that it can ask this Court to adopt the**

**statements of DOJ's former political leadership as evidence in this case. See also Plaintiffs' response to Paragraph 200.**

201. On May 20, 2013, Plaintiffs filed their Complaint in this case, citing liberally to the findings of the 2013 TIGTA Report and attaching the Report to their First and Second Amended Complaints. (Dkt. 1; Dkt. 14-1; Dkt. 63-1.)

**Plaintiffs do not dispute the contents of their own pleadings, but this is not a material fact.**

202. On June 25, 2013, EO Director Kenneth Corbin instituted an Optional Expedited Process[12] for organizations who submitted § 501(c)(4) applications that had been pending for more than 120 days as of May 28, 2013 and that indicate the organization may be involved in political campaign intervention or issue advocacy. (Gov't Ex. 40, Interim Guidance on Optional Expedited Process, June 25, 2013.) [Footnote: The alleged unauthorized review as part of the Optional Expedited Process took place after Plaintiffs filed their complaint. Plaintiffs have not amended their complaint to include these allegations, nor have they sought leave to do so. Thus, the United States maintains that these facts are not relevant as they were not pled in the complaint. However, because Plaintiffs included them in their allegations of unauthorized inspections in response to Interrogatory No. 4, the United States will briefly address them.]

**Plaintiffs do not dispute the contents of the Corbin Memo. However, it apparently applied only to the targeted groups, rather than literally to all groups described in the memorandum. P269. As to the footnote, Plaintiffs respond that they filed their Second Amended Complaint on January 23, 2014, but the IRS's ongoing conduct only came to light in discovery. It is part and parcel of the viewpoint discriminatory scheme applied by the IRS to the Plaintiff Class. The fact that it continued after filing of the lawsuit demonstrates its egregiousness.**

203. By this point, many of the bucketed cases had been resolved, but the IRS wanted to resolve the remaining pending cases as quickly as possible.

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**The Government cites no support for these proposed facts, and so they are improper under Rule 56. Plaintiffs' facts about the Government's true purpose for instituting the Optional Expedited Process, including the Government's desire to implement an earlier plan to require groups to bind themselves to representations about future political activity that included heightened requirements, are at P268, 270-271.**

204. The Optional Expedited Process offered pending § 501(c)(4) applicants the option to represent that their past, current, and anticipated future political campaign intervention would not exceed 40% of their organization's activities. For organizations who opted to make this representation, the IRS would issue a favorable determination letter within two weeks. (Gov't Ex. 40, at Step 2.)

**Undisputed that these are among the terms of the deal the IRS offered applicants who are still waiting. For a more complete recitation of the process, see P270-282.**

205. Starting on June 25, 2013, the IRS began reviewing entities to determine whether they were eligible for the Optional Expedited Process and notifying eligible entities of this new option via letter. TE/GE Counsel attorneys worked with EO Technical employees to execute this process. (Gov't Ex. 6, Cook Dec. ¶¶ 4-8; Gov't Ex. 40, at Step 1.)

**Undisputed.**

206. In order to be eligible for the Optional Expedited Process, the organization could not present issues of potential private inurement, as that may disqualify the organization from tax exempt status. Thus, the IRS first had to review the applications to determine whether each organization had issues concerning improper inurement before notifying it that it was eligible for the Optional Expedited Process. (Gov't Ex. 40, at Step 1.)

**Undisputed that the IRS accurately states the law regarding private inurement, and undisputed that the IRS first re-inspected all pending applications solely to review the issue of private inurement. However, review for a single issue this late in the process was repetitive and unnecessary and imposed burdens on the Plaintiffs merely because they had already been targeted based on their viewpoints. *See* P269 (only groups that had met the Targeting Criteria were subjected to the Optional Expedited Process).**

207. As part of the Optional Expedited Process and the simultaneous processing of applications, all of the pending advocacy applications were resolved except for two. However, court orders requested by those two applicants enjoin IRS from processing the pending applications. (Dkt. 303, PageID 10021, staying processing of Plaintiff TPTP); (Order Granting Plaintiffs' Motion for Preliminary Injunction, *Freedom Path, Inc. v. Lois G. Lerner, et al.*, Case No. 3:14-cv-1537, Dt. 79, Sept. 7. 2016 (N.D. Tex.).)

**Disputed. The processing of TPTP and other groups was restarted only because the United States Court of Appeals for the District of Columbia Circuit sharply criticized the IRS and DOJ's purported litigation hold policy (P296), and because of this Court's Preliminary Injunction finding that TPTP had made a "strong showing of a likelihood of success on the merits" regarding its First Amendment claim for political viewpoint discrimination and injunctive relief. Doc. 302. PageID #10011 ("TPTP has put forward evidence demonstrating that the IRS targeted TPTP's application for special scrutiny and delayed processing because it met the political advocacy criteria found to be inappropriate in the 2013 TIGTA Report."). The Preliminary Injunction ordered the IRS to beign processing TPTP's application "in the ordinary course of business." *Id.* Because the IRS issued a development letter that would have further punished TPTP (Doc. 295-1), and the IRS suggested that it would not extend TPTP's response date to let this Court determine whether the IRS's letter complied with the Preliminary Injunction, TPTP moved the Court to Clarify its preliminary injunction and stop the IRS from forcing TPTP to respond to the development letter on pain of denial. *See* TPTP's Emergency Motion to Clarify Preliminary Injunction, November 21, 2016, Doc. 301). This Court stayed the IRS's action. *See* Doc. 303. TPTP and the IRS recently agreed to a revised process that comports with processing in the ordinary course, clarifying the preliminary injunction, withdrawing the IRS's 2016 development letter, and as a result, allowing the removal of this Court's stay against the IRS. *See* Doc. 362. TPTP was granted exempt status on September 6, 2017. As a result, TPTP has neither had to bind itself to the heightened representations and restrictions the Optional Expedited Process (explained in the Opinion and Order Granting Preliminary Injunction, Doc. 302, Page ID #10006-7), nor has it had to answer the intrusive and burdensome questions in the IRS's purported "ordinary course" development letter of 2016.**

208. Plaintiffs identify the review of applications provided for by the Interim Guidance instituting the Optional Expedited Process as unauthorized inspections. (Gov't Ex. 8, Inspection Nos. 13-15.)

**Undisputed. The factual basis for Plaintiffs' claim is at P261-282.**

209. Many of the IRS employees whose actions are at issue in this case were unaware of the political leanings of the "Tea Party" groups or of the political context of the "Tea Party movement." For example, EO Tax Law Specialist Elizabeth Kastenberg testified:

> Q: Is the name "Tea Party" a reflection of ideology in itself?
> A: When I first was looking at the cases, it did not flag in my mind, because that's not how I reviewed cases, but it does for other folks; but, for me, it was just a concentration on the activities that the organization did.

(Gov't Ex. 51, Merits Discovery Deposition of Elizabeth Kastenberg Tr. 66:13-19)

**Disputed. As an initial matter, it is not credible that any media-consuming adult would be unaware of the Tea Party's political leanings. See Plaintiffs' Response to Paragraph 210, below. Kastenberg's quoted statement does not support the position the Government attributes to her. In fact, Kastenberg recognized that the Tea Party cases shared a common ideology and on this basis emailed to Seto, Shoemaker, and Hull her concern that this had been the basis for holding them back:**

> **[A]s a general matter, of the (c)(3) cases, unlike cases involving certain types of activities—credit counseling, charter schools, housing, etc., *these cases are held back primarily because of the political party affiliation rather than specifically any political activities*. As such, these are not cookie cutter cases and there is no bright line test.**

**(*Id.*; *see* Kastenberg Dep. at 74:10-75:8 (Kastenberg raised her concerns about the flagging of cases based on ideology to her superiors). Seto responded, "I understand. Cindy also understands . . . ." (Kast. Dep. Ex. 5.)**

**See also P112-115. Also, Kastenberg agreed with this statement: "Here's what they have. Basically, they appear to look at the names and check[] the file for the words Tea Party, Patriots, or 9/12 Project. This would not necessarily exclude various "liberal" groups, and it not aimed solely at "conservative" organizations. That said, I haven't yet seen any case other than organizations operated by Conservatives." P127-128.**

210. Similarly EO Technical Tax Law Specialist Carter Hull testified that he did not remember any coverage in the media about the positions that the Tea Party was taking. Nor was he aware of any political party alignment:

> Q: Was your understanding from the media coverage that [the Tea Party movement] was aligned with the democratic party?
> A: I don't remember any particular alignment, either democratic or republican.

Q: Do you remember it being aligned with calling for limiting government?

A: I think that may have been a recollection from later years but not at that point.

Q: Do you have any recollection of it -- the Tea Party talking about taxes?

A: No. I have no — no memories in that regard.

Q: The Constitution or the Bill of Rights?

A: No, sir.

Q: Do you have any recollection that the Tea Party espoused general political ideology?

A: No, I do not.

(Gov't Ex. 67, Class Discovery Deposition of Carter Hull Tr. 50:10-25) (*see also* Gov't Ex. 60, Merits Discovery Deposition of Gary Muthert Tr. 39:17-25, 63:20-65:24.)

**Disputed. Early in Carter Hull's 2015 deposition, he testified that he could remember reading about the Tea Party in the Washington Post (Hull Tr. 47:1-8), but claimed he could not remember what the paper had reported about the Tea Party's positions. *Id.*; 50:10-25. However, when shown his contemporaneous, June 2011 email to Ron Bell stating that he and Liz Kastenberg had noted that the list of organizations being held "appeared to be of a particular ideology," (found also as Thomas Ex. 20) he admitted that the ideology he had observed and was referring to in his memo was "conservative."**

**Hull Tr. 114:7-116:6.**

**17 Q. (BY MR. GREIM) Sure. I'm going back to your**
**18 statement where you say, "We noted that the list**
**19 contained organizations that appeared to be of a**
**20 particular political ideology." And so my question is,**
**21 did that particular ideology -- was that democrat**
**22 leaning organizations?**
**23 A. I think we saw mainly conservative types.**
**24 Q. Did you see mainly types that were -- and so**
**25 when you say "conservative," are you referring to the --**
**1 well, let me just ask you. Would a fair description of**
**2 those types be the four items that you see back on**
**3 Page 2 of Mr. Shafer's report?**
**4 A. Only the first, Tea Party. I had been reading**
**5 the Post, the Tea Party was becoming a -- a topic, and**
**6 Tea Party probably meant conservative.**

**Hull Tr. 115:17-116:6. Further:**

**Q. (BY MR. GREIM) Well, let's -- like looking at**

**16 the very last one, it says, "Statements in the case file**
**17 that are critical of how the country is being run."**
**18 Okay. Let me -- was the Tea Party movement critical of**
**19 how the country is being run or were they supportive of**
**20 how the country is being run based on your review of**
**21 the -- of the Washington Post and the news media?**
**22 A. My personal -- but I thought they were probably**
**23 being critical of how the country was being run, but,**
**24 again, I didn't care about what they thought in that**
**25 regard. Were they being political or were they being**
**1 educational? Educational is fine. That's a -- that's a**
**2 (c)(3) purpose.**

**Hull Tr. 116:16-117:2.**

**Q. (BY MR. GREIM) Mr. Hull, do you have any**
**19 reason to believe that the statement that you made in**
**20 your e-mail to Mr. Bell, June 8, 2011, saying "We noted**
**21 that the list contained organizations that appeared to**
**22 be of a political ideology" is incorrect?**
**23 A. "Appeared to be" -- because I know there were a**
**24 lot of organizations that were called Tea Party**
**25 organizations. The other criteria -- I never -- I never**
**121**
**1 saw it all. I remember seeing a lot of Tea Party**
**2 organizations, and the Tea Party organizations were**
**3 being characterized in the paper and in every -- and**
**4 wherever as conservative organizations.**

**Hull Tr. 120:18-121:4.**

**As for Gary Muthert, he performed research on the Tea Party movement and various other ideological variants. In a March 16, 2010 email, EOD Screener Muthert informed EOD Screening Manager Shafer about a Tea Party protest and about how it "appears the TEA party is a Republican based entity." P38. Based on his research, Muthert informed Shafer that hundreds of Tea Party chapters were forming throughout the country. *Id.* at 38:1-39:25. These chapters consisted of individuals organizing together who had similar viewpoints and ideology. *Id.*; *see also id.* at 41:8-17. P41. Not surprisingly, then, Muthert was able to testify as follows:**

**1 Q. To your understanding, does this Tea**
**2 Party movement include just people organizing, not**
**3 necessarily applicants for tax exemption?**
**4 A. Yeah. I would go with just organizing, a**
**5 step to, basically, the Bill of Rights, the values of**
**6 the United States Constitution.**

**7 Q. So, really, is it correct to say the Tea**
**8 Party movement refers to just groups of people that are**
**9 having the same views or expressions regarding those**
**10 views?**
**11 A. Yes.**
**12 Q. What is your understanding of the term**
**13 "912 project"?**
**14 A. I don't recall anymore. I believe it has**
**15 to do with the values of the United States, the values**
**16 of being an American.**
**17 Q. Is that also kind of a similar**
**18 description for your understanding of the use of the**
**19 word "patriots"?**
**20 A. Yes.**
**21 Q. Do you recall what specific activities**
**22 any organizations that were Tea Parties were having at**
**23 that point in time?**
**24 A. No.**

**Muthert Tr. 65:7-16**

211. Throughout class and merits discovery, Plaintiffs took depositions of twenty-two current and former IRS employees, some of whom were deposed multiple times. Each of these employees who viewed Plaintiffs' tax return information confirmed that they: (1) were familiar with the rules regarding § 6103 and authorized access of tax return information; (2) received training each year to help prevent unauthorized access of return information; and (3) believed that they were authorized to view the Plaintiffs' return information at the time they viewed the information because they believed that doing so was part of their job:

a. Ronald Bell (Gov't Ex. 56, Bell Merits Tr. 198:20-201:18.)

b. Meghan Biss (Gov't Ex. 54, Biss Tr. 414:11-419:6.)

c. Steven Bowling (Gov't Ex. 50, Bowling Tr. 259:22-261:24.)

d. Janine Cook (Gov't Ex. 57, Cook Tr. 310:3-313:15.)

e. David Fish (Gov't Ex. 64, Fish Tr. 238:9-242:1.)

f. Nikole Flax (Gov't Ex. 48, Flax Tr. 246:3-10.)

g. Hilary Goehausen (Gov't Ex. 3, Goehausen Declaration ¶¶ 3-7.)

h. Joseph Herr (Gov't Ex. 58, Herr Tr. 151:22-154:12.)

i. Elizabeth Hofacre (Gov't Ex. 4, Hofacre Declaration ¶¶ 3-7.)

j. Carter Hull (Gov't Ex. 5, Hull Declaration ¶¶ 3-5.)

k. Elizabeth Kastenberg (Gov't Ex. 51, Kastenberg Tr. 108:19-111:5.)

l. Judith Kindell (Gov't Ex. 53, Kindell Merits Tr. 151:10-155:11.)

m. Lois Lerner (Gov't Ex. 44, Lerner Tr. 387:13-389:15.)

n. Casey Lothamer (Gov't Ex. 59, Lothamer Tr. 268:5-276:12.)

o. Justin Lowe, (Gov't Ex. 66, Lowe Tr. 186:7-193:10.)

p. Nancy Marks (Gov't Ex. 49, Marks Tr. 217:14-224:5.)

q. Gary Muthert (Gov't Ex. 60, Muthert Tr. 175:4-178:22.)

r. Holly Paz (Gov't Ex. 43, Paz Merits Tr. 359:1-12.)

s. Stephen Seok (Gov't Ex. 2, Seok Declaration ¶¶ 2-7.)

t. Michael Seto (Gov't Ex. 65, Seto Tr. 288:19-291:21.)

u. Mitchell Steele (Gov't Ex. 61, Steele Tr. 157:5-161:11.)

v. Lucinda (Cindy) Thomas (Gov't Ex. 47, Thomas Merits Tr. 219:23-222:1.)

w. Jon Waddell (Gov't Ex. 62, Waddell Tr. 203:7-206:23.)

x. Sharon (Light) Want (Gov't Ex. 63, Want Tr. 162:22-164:9.)

**Disputed. In none of the cited transcript sections did the Government establish the content of the training, and it failed to establish whether employees were instructed in that training regarding inspections that evidenced viewpoint discrimination. At its 30(b)(6) deposition, the IRS admitted that: (1) there is no tax administration purpose for applying the Targeting Criteria (IRS Merits 30(b)(6) 125:4-12); (2) Plaintiffs and members of the Class received additional scrutiny because of its use of the Targeting Criteria (IRS Merits 30(b)(6) at 118:7-119:23); (3) additional development received by Plaintiffs and members of the Class inherently involved inspections of their Applications and associated taxpayer information. (IRS Merits 30(b)(6) at 118:12-119:23); (4) it is wrong to treat organizations differently based on their viewpoint (IRS Merits 30(b)(6) Dep. at 121:16-122:7); (5) it is**

**improper for the IRS to consider the viewpoint of an organization in determining whether the organization is or is not entitled to tax-exemption (IRS Merits 30(b)(6) at 12112:15); and (6) IRS employees should know that organizations cannot be treated differently based on their viewpoint. *Id.* at 124:19-22. *See generally* P48-70.**

Dated: September 8, 2017

Respectfully submitted,

**GRAVES GARRETT, LLC**

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**Certificate of Service**

The undersigned attorney hereby certifies that, on September 8, 2017, the foregoing document was served the Court's CM/ECF electronic notification system to all counsel of record.

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