UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

NORCAL TEA PARTY PATRIOTS, et al., ON BEHALF OF THEMSELVES, THEIR MEMBERS, and THE CLASS THEY REPRESENT	:	Case No. 1:13cv00341
	:	Judge Michael R. Barrett
Plaintiffs,	:	
v.	:	
THE INTERNAL REVENUE SERVICE, et al.,	:	
Defendants.	:	

AMICUS CURIAE BRIEF OF THE STATE OF OHIO OPPOSING "CERTAIN FORMER INDIVIDUAL MANAGEMENT DEFENDANTS' MOTION TO SEAL" [DOC. 392]

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The State of Ohio respectfully submits this amicus brief in opposition to the "Motion to Seal" made by "Certain Former Individual [I.R.S.] Management Defendants" to conceal their filed deposition transcripts [doc. 392, PageID 18900].

I. Ohio has a strong amicus interest in ensuring that documents filed in a case involving grotesque abuses of public power by public officials whose targets included Ohio citizens are not hidden from public scrutiny.

The unhappy circumstances of this case strike at the core of our democratic system. Maintaining the "'opportunity for free political discussion to the end that government may be responsive to the will of the people'" is an imperative "'essential to the security'" of constitutional self-governance. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931). The State of Ohio has a very real interest in ensuring that government bureaucracies – especially those powerful entities charged with administering our tax collection systems – do not evolve into masked political actors dispensing favors and imposing costs on the basis of a regnant ideology. Ohio therefore has a strong interest in ensuring that its citizens, including those among some of the plaintiff groups here, are not "targeted" on the basis of their perceived political views: the State shares and benefits from "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times*, 376 U.S. at 270.

The federal government now has conceded that "there is no excuse for" the egregiously wrongful conduct in which I.R.S. officials engaged here, and the Attorney General of the United States has expressed the hope that the pending settlement "makes clear that this abuse of power will not be tolerated." *Attorney General Jeff Sessions Announces Department of Justice has Settled with Plaintiff Groups Improperly Targeted by IRS*, Dep't of Justice, (Oct. 26, 2017), https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-has-settled-plaintiff-groups. The I.R.S. itself has admitted that the targeting "was wrong," and "[f]or

such treatment, the IRS expresses its sincere apology." *See* Consent Order, doc. 140-1, adopted by Court doc. 141 (October 27, 2017), in contemporaneously settled *Linchpins of Liberty v. United States of America*, D.D.C. 1:13-cv-00777 (Judge Walton).

The Court in the *Linchpins of Liberty* case reaffirmed in this very context that "discrimination on the basis of political viewpoint in administering the United States tax code violates fundamental First Amendment rights. Disparate treatment of taxpayers based solely on the taxpayers' names, any lawful positions the taxpayers espouse on any issues, or the taxpayers' associations or perceived associations with a particular political movement, position, or viewpoint is unlawful." *Id.* at ¶ 51. The State of Ohio earlier had made the same fundamental point when the State was permitted to participate as amicus there in challenging the frightening contention of certain I.R.S. "Individual Management Defendants" that a reasonable person would not have known that governmental targeting of conservative groups because of their viewpoint violates the First Amendment. *See Linchpins of Liberty* doc. 85 (court-authorized amicus brief of April 3, 2014), contesting assertion in Individual Management Defendants' Motion to Dismiss that "Plaintiffs have failed to allege conduct that a reasonable person would know clearly violated Plaintiffs' First … Amendment rights" (doc. 67 at 10).

"Former Individual Management Defendants" Ms. Lerner and Ms. Paz, who now ask this Court "to completely seal the[ir] depositions and summary judgment materials quoting them," *see* doc. 392-1, Memorandum of Law in support of motion to seal at 13, PageID 18916, were among those I.R.S. defendants who made the extraordinary 'who would have known it was unconstitutional?' immunity defense to which Ohio responded. *See Linchpins of Liberty* motion doc. 67. They blithely ignored overwhelming precedent that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First

Amendment is all the more blatant …. Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995). And they ignored the lessons of Watergate that even the President of the United States acts "in violation of the constitutional rights of citizens" when he causes IRS "investigations to be initiated or conducted in a discriminatory manner." Article II, ¶ 1, Articles of Impeachment adopted by House Judiciary Committee (July 27, 1974), http://www.gpo.gov/fdsys/pkg/GPO-CDOC-106sdoc3/pdf/GPO-CDOC-106sdoc3-19-3.pdf.

In order to ensure that this sort of conduct does not recur, the State of Ohio and the public have a strong interest not only in a full, unvarnished public accounting of what was done, but also in ascertaining how it could be that I.R.S. officials at the center of this affair, *see, e.g.*, *Linchpins* Consent Order at ¶¶ 5, 11 (explicitly calling out then-Director of the IRS's Exempt Organizations Division, Ms. Lerner), could have deemed this sort of conduct appropriate and rationalized their actions. Ms. Lerner and her deputy Ms. Paz were acting as public officials, wielding public power. There is a strong public interest "in the citizen's desire to keep a watchful eye on the workings of public agencies," as well as in "a newspaper publisher's intention to publish information concerning the operation of government." *Nixon v. Warner Communications*, 435 U.S. 589, 597-98 (1978) (deferring to Congress's administrative procedure for processing and releasing presidential recordings to the public). *See also, e.g., FTC v. Standard Fin. Mg't Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) ("The appropriateness of making court files accessible is accentuated in cases where the government is a party."); *id.* at 412 ("It cannot be ignored that this litigation involves a government agency and …. matters of significant public concern. The threshold showing required for impoundment of the materials is correspondingly elevated."); *Gookin v. Altus Capital Partners, Inc.*, 2006 U.S. Dist. Lexis 97939

(E.D. Ky. Mar. 23, 2006) (factors for unsealing include "whether the matter involves public parties or issues of legitimate public concern").

Beyond peradventure, this is "a case in which the public has a keen and legitimate interest." *Cf. Shane Group, Inc. v. Blue Cross Blue Shield*, 825 F.3d 299, 302 (6th Cir. 2016). Yet in the memorandum supporting their motion to seal their depositions from public view for all time ("Memo Seeking Seal"), Ms. Lerner and Ms. Paz through counsel do not even attempt to assess the weighty public interests at stake. They assert in conclusory fashion that "The Parties Will Suffer No Prejudice From Sealing the Depositions," doc. 392-1 at 14, PageID 18917, but they address "the Public's Right to Access" only to dismiss it out of hand, *id.* at 10, PageID 18913. Ohio respectfully submits this amicus filing on behalf of the public interest that these "former individual management defendants" shortchange in this governmentally-acknowledged "abuse of power" case.

II. The fact that the federal government has provisionally settled these cases "for millions and an apology," *see* Memo Seeking Seal at 5, PageID 18908 n.5, only supports and does not begin to overcome the strict scrutiny that under binding precedent attaches to the former I.R.S. officials' request for non-disclosure.

In part because the public has an interest in "'the conduct giving rise to the case,'" the Sixth Circuit has made plain that "[s]hielding material in court records … should be done only if there is a 'compelling reason why certain documents or portions thereof should be sealed.' …. Even in such cases, 'the seal itself must be narrowly tailored to serve that reason,' and should 'analyze in detail, document by document, the propriety of secrecy….'" *Rudd Equip. Co. v. John Deere Constr.*, 834 F.3d 589, 593-94 (6th Cir. 2016), quoting *Shane Group*, 825 F.3d at 305 (interior quotation marks and citation omitted).

The Lerner-Paz Memo Seeking Seal acknowledges that the depositions they seek to hide were filed with this Court both by the plaintiff citizens groups and by the defendant federal

government in connection with a defense Motion for Summary Judgment on Class Action Claim. Memo Seeking Seal at 4-5, PageID 18907-08. Yet the Memo Seeking Seal relies on inapposite, out-of-circuit cases to argue that strict scrutiny standards do not apply because these deposition transcripts are not "judicial documents" invoked by the Court itself. The case with which they lead, *In re Providence Journal Co.*, 293 F.3d 1 (1st Cir. 2002), did find a First Amendment violation, noted that a constitutional right of access "extends to documents and kindred materials submitted in connection with the prosecution and defense of criminal proceedings," and said that "materials on which a court is meant to rely in determining the parties' substantive rights" are governed by common-law and First Amendment rights of access. *Id.* at 10-11 (also noting at 15 that "Courts have an obligation to consider all reasonable alternatives to foreclosing the constitutional right of access," while acknowledging at 17 that the right does not compel creation of new materials or formats that do not already exist). *Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 898 (D.C. Cir. 1996), involved FOIA-type public records questions relating to non-litigation documents of a Sentencing Commission advisory committee. And the same D.C. Circuit in *United States v. El-Sayegh*, 131 F.3d 158 (D.C. Cir. 1997), a case involving a sealed and then repudiated criminal plea agreement, acknowledged straightforwardly that its more restrictive view of judicial records conflicts with views expressed elsewhere that turn on "'whether a document is physically on file with the court.'" *Id.* at 161 (saying that broader view does not apply, "at least, not in this circuit").

The Lerner/Paz Memo Seeking Seal simply ignores the express language of the Sixth Circuit, which controls here. "'Secrecy is fine at the discovery stage, before the material enters the judicial record.' …. 'At the adjudication stage, however, very different considerations apply.' …. *The line between these two stages … is crossed when the parties place material in*

the court record." *Shane Group*, 825 F.3d at 305 (emphasis added; citations omitted). That is, "[u]nlike information merely exchanged between the parties, '[t]he public has a strong interest in obtaining the information contained in the court record.'" *Id.*, quoting *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983). "Moreover, the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access." *Id.* And the public's interest in access to court filings, here as in certain other cases that establish the need for drawing the disclosure line at the filing juncture, relates not only to the public interest in the outcome of the case (involving as it apparently does the payment of millions of taxpayer dollars and a commitment to reform), but also to "the conduct giving rise to the case. In those cases, 'secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption.'" *Id.* (citation omitted).

Tellingly, beyond a slight nod to *Shane Group* itself, the only reference to a case from this Circuit made in this part of the Memo Seeking Seal is to the District Court case of *Flagg v. City of Detroit*, 268 F.R.D. 279, 310 n. 9 (E.D. Mich. Jun. 24, 2010), where the Memo cites to (but does not quote) the very footnote in which the Court says that the deposition transcript at issue in the discovery phase "is not a 'judicial document,' because neither it nor any other sealed materials 'have been filed for the purpose of securing this Court's ruling on the merits of any substantive issue, claim, or defense.'" Here, by sharp contrast, the Lerner and Paz depositions were not ordered produced by the Court but were instead filed by both the United States and the plaintiff citizen groups in connection with the federal government's defense motion for summary judgment. Motion Seeking Seal at 4-5. The Memo Seeking Seal does not account for *Shane Group* at all, nor does it try to reckon with the Sixth Circuit's even more recent reiteration that the "line" triggering strict scrutiny for non-disclosure "'is crossed when the parties place material

in the court record,' and in this latter stage, 'very different considerations apply.'" *Rudd*, 834 F.3d at 593, quoting *Shane Group*, 825 F.3d at 305.

That rule now is well understood within the Circuit. *See, e.g., Hermiz v. Budzynowski*, 2017 U.S. Dist. Lexis 51621 (S.D. Mich. Apr. 5, 2017) (compelling interest test for sealing documents parties have placed in the court record; motion to seal denied); *Combs v. Twins Grp., Inc.*, 2017 U.S. Dist. Lexis 68238 (S.D. Ohio May 4, 2017) ("The Sixth Circuit 'recently clarified the 'stark difference' between court orders entered to preserve the secrecy of proprietary information while the parties trade discovery, and the sealing of the court's docket and filings,'" quoting *Rudd*; "Defendant fails to meet the burden to seal court records as required by the Sixth Circuit"); *4U Promotions, Inc. v. Excellence in Travel, LLC*, 2017 U.S. Dist. Lexis 127373 (S.D. Ohio Aug. 10, 2017) (line crossed; level of redactions "inconsistent with the 'strong presumption in favor of openness as to court records'" (citation omitted)); *Capital C Consulting LLC v. Ohio Care & Wellness LLC*, 2017 U.S. Dist. Lexis 188564 (S.D. Ohio Nov. 15, 2017) (higher standard at "'the adjudication stage,' which applies 'when the parties place material in the court record,'" quoting *Shane Group*). *Cf. Charter Oak Fire Ins. Co. v. SSR, Inc.*, 2014 U.S. Dist. Lexis 185876 at n. 1 (E.D. KY 2014) ("To the extent that a deposition transcript, whether in its entirety or excerpts, is being filed because it is being used in the proceeding – such as in relation to a motion for summary judgment or other motion filing or briefing – it becomes part of the public record and is no longer merely discovery exchanged between parties outside of the court record.").

Contrary to the Lerner/Paz position, the significance of the settlement here, with its considerable anticipated payments and the admissions as conceded by the United States and in the *Linchpins* Consent Order, weighs in favor of the high, "compelling interest" standard established by the Sixth Circuit for the post-filing litigation phase and especially where "the

conduct giving rise to the case" is of public concern along with the outcome. Indeed, the Joint Motion to Stay All Case Deadlines Pending Approval of Proposed Settlement, doc. 388, to which the Memo Seeking Seal points in arguing that there is no longer anything to see here, *see, e.g.*, doc. 392-1 at 5, PageID 18908, establishes yet another reason to reject the secrecy request when it advises that a "motion seeking approval of the settlement in accordance with Federal Rule of Civil Procedure 23(e) will be filed as soon as practicable" on behalf of "all Rule 23 class members." As the Sixth Circuit admonished in *Shane Group*, "[c]lass members cannot participate meaningfully in the process contemplated by Federal Rule of Civil Procedure 23(e) unless they can review the bases of the proposed settlement and the other documents in the court record." 825 F.3d at 309.

III. The Lerner/Paz request that this Court "completely seal the depositions" is not narrowly tailored to advance any compelling interest.

The "Joint Motion for Briefing Schedule on Issues Pertaining to Sealing of Court Filings and Related Materials," doc. 391, appeared to contemplate that by November 16, 2017, Ms. Lerner and Ms. Paz would "submit designations of their deposition transcripts" indicating those portions they seek to have sealed. *Id.* at ¶ 5a, PageID 18897. Instead, on that date the former I.R.S. officials asked "to completely seal the depositions," and claimed that absolute and total sealing "is by definition narrowly tailored" so as "to prevent public exposure from endangering individuals…." Memo Seeking Sealing at 13, PageID 18916. The proposition effectively rebuts itself.

"'Only the most compelling reasons can justify non-disclosure of judicial records.' …. And, even where a party can show a compelling reason why certain documents or portions thereof should be sealed, the seal itself must be narrowly tailored to serve that reason…. The proponent of sealing therefore must 'analyze in detail, document by document, the propriety of

secrecy, providing reasons and legal citations.'" *Shane Group*, 825 F.3d at 305-06 (citations omitted); *see also, e.g.*, *Hermiz*, 2017 U.S. Dist. Lexis 51621 at *5. Here, at least in those filings available at this stage to the public, former I.R.S. officials Lerner and Paz fail utterly to make any detailed document-by-document review identifying any specific reasons as to why any particular deposition passage should be shrouded in secrecy. "For efficiency," doc. 392-1 at 9, PageID 18912, they cite to an earlier motion for a protective order making a bare bones assertion that "dissemination of their deposition testimony would expose them and their families to harassment and threat of serious bodily injury or even death," doc. 330 at 1, PageID 11002, and they then repeat that mantra over and over without elaboration. Memo Seeking Seal at 1, 6, 9 (two virtually identical formulations), 10, 11, 12, 13, PageID 18904 et seq. But repetition does not strengthen their argument, and they understand that the public cannot contest any arguments (if such they be) that they might make under seal to keep hidden matters relating to their prior official conduct. And while they claim that "publicly disseminating information will lead to threats," they do not specify what sorts of information – other than *all* information, presumably, about their conduct and the agency abuses of power to which the government now admits – they contend could appropriately be redacted.

In sum, they do not present any sort of "narrowly tailored" approach designed to redact materials that might reveal personal security vulnerabilities or data on a claim that such redaction is warranted. They do not seek, for example, simply to shield personal information such as home addresses, Social Security numbers, any aliases now used, current daily routines, or the like – information that might or might not be properly concealed, depending in part on the showings they make and that in any event would not be likely to have great public utility. Rather, they endeavor to mask all of their testimony about their official actions or mindsets from the taxpayer

targeting abuses of years ago – information of entirely legitimate and significant public interest about events that the government concedes must never be allowed to happen again and for which the I.R.S. now has abjectly apologized.

Their lengthy list of citations to cases allowing plaintiffs to "proceed anonymously," or allowing government to avoid "disclosing the identities" of criminal informants, or to "redact the names" of C.I.s, or to eschew "releasing detainee names," and the like – *see* Memo Seeking Seal at 10-12, PageID 18913-15 – may fill pages, but it does not in any serious way reflect what Ms. Lerner and Ms. Paz demand of this Court. They do not ask for their *identities* or *locations* to be shielded: quite the contrary, Ms. Lerner and Ms. Paz apparently ask that their past official *conduct* and their asserted *rationales* and *motivations* for it as recited in their own words be placed off-limits to the I.R.S. targeting victims and to the public at large that paid Ms. Lerner's and Ms. Paz's salaries (even while investigations were ongoing) and that has a manifest interest in government reform.

Nor is this a case like *Signature Management Team, LLC v. Doe*, 2017 U.S. App. Lexis 23974,at *1, *8 (6th Cir. November 28, 2017), in which the Sixth Circuit addressed a post-judgment anonymity issue while reaffirming "the presumption in favor of open judicial records" and reiterated that even "where there is a compelling reason not to disclose certain information, the nondisclosure must be narrowly tailored to serve that reason."

An iron curtain does not permit narrow tailoring. The total seal that Ms. Lerner and Ms. Paz seek is contrary to law and to binding precedent in this Circuit.

IV. Even were the Court to disregard the "compelling interest" standard required to overcome what *Rudd* reaffirms as "the presumptive right of the public to inspect and copy" court files, there is not "good cause" to enshroud the depositions of these former I.R.S. officials in this case involving abuse of I.R.S. power.

This Court already has established that "the Sixth Circuit requires litigants seeking to seal court documents to overcome a high burden. Any seal order must set forth 'why the interests in support of nondisclosure are *compelling*, why the interests supporting access are less so, and why the seal itself is no broader than necessary.'" Order of May 18, 2017, doc. 345, 2017 U.S. Dist. Lexis 91205 at *7, quoting *Shane Group*, 825 F.3d at 306 (emphasis added). Ms. Lerner and Ms. Paz disagree, for the unconvincing reasons assessed above. *See* Memo Seeking Seal, *passim*. But even the "good cause" test they advocate would not support the blanket seal they seek to obscure their own story as told in their own depositions.

The claim for complete sealing seems predicated on the asserted view of Ms. Lerner and Ms. Paz that they will be at some risk should the public become familiar with the details of their testimony. *See, e.g.*, Memo Seeking Seal at 9, PageID 18912 ("the public dissemination of their deposition testimony would expose them and their families to harassment and a credible risk of violence and physical harm"). In effort to establish that argument, they apparently cite (under seal) to alleged communications from people who are not familiar with their deposition testimony. *Id.* The Court is fully equipped to assess the former I.R.S. officials' posture here, but Sixth Circuit precedent speaks to this issue too.

Brown & Williamson underscores the important if self-evident point that "when the legal system is moving to vindicate societal wrongs, members of the community are less likely to act as self-appointed law enforcers or vigilantes. 'The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner." 710 F.2d at 1178, quoting *Richmond*

Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980). "Sunlight is said to be the best of disinfectants," to quote Justice Brandeis.

The concerted efforts by the former I.R.S. officials to conceal their own words – not only to walk away from an opportunity to tell their version of events to the public, but to hide away the accounts that they already have provided – are hardly likely to quell public commentary over what the government now admits were the I.R.S. abuses. *Wall Street Journal* columnist William McGurn, for example, already has assessed the Memo Seeking Seal: "That's quite an argument. So enraged would the American public become upon learning what Ms. Lerner and Ms. Paz said that they and those around them would be in physical peril. Which probably makes most people wonder what the heck must the two have said that would get everyone so agitated?" *Lois Lerner Doesn't Trust You*, Wall Street Journal (Nov. 20, 2017), https://www.wsj.com/articles/lois-lerner-doesnt-trust-you-1511219152 (adding "what a crippling precedent it would be if government officials from powerful agencies such as the IRS were permitted to keep their abuses secret on grounds they fear that the people whom they are supposed to serve might be upset if they found out"). "Covert" treatment of court files, to use the wording adopted by the Sixth Circuit, does seem unlikely to dispel suspicion.

And the former I.R.S. officials are simply wrong in contending that "[r]eleasing [the deposition transcripts] now would serve no legitimate function." *Cf.* Memo Seeking Seal at 1, PageID 18904. *Shane Group*, which also involved a proposed class action settlement, explicitly observed that in various cases, "the public's interest is focused not only on the result, but also on the conduct giving rise to the case. In those cases, 'secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption.'" 825 F.3d at 305, quoting *Brown & Williamson*, 710 F.2d at 1180. *Cf. Signature Management*, 2017 U.S. App. Lexis

23974 at *9 (“‘The greater the public interest in the litigation’s subject matter, the greater the showing necessary to overcome the presumption of access.’”) (quoting *Shane Group,* 825 F.3d at 305).

The public’s profound interest here in how the I.R.S. has functioned with regard to citizen groups and how the admitted abuses came to pass extends to strengthening the fabric of our democracy. What Ms. Lerner and Ms. Paz say they did, and what they say they did not do, all in their official, taxpayer-funded capacities with regard to matters now concluding, should not be a state secret. Neither should expressed rationales or rationalizations be obscured without foundation, and the reform process can only benefit from any documented confusion expressed over the reach of constitutional preclusions against viewpoint discrimination by the federal government.

CONCLUSION

The State of Ohio respectfully submits that the Court should deny the request of Ms. Lerner and Ms. Paz to seal, completely and forever, the transcripts of their depositions as filed with the Court in this action. Ohio takes no position on the propriety of any particular redactions that might be made to shield personal or taxpayer identifying materials including addresses, tax returns, aliases, Social Security numbers, or the like, should parties to the action appropriately establish the basis for such narrowly tailored requests. But this unquestionably is “a case in which the public has a keen and legitimate interest,” *cf. Shane Group, Inc. v. Blue Cross Blue Shield,* 825 F.3d at 302, and the rights of the public should not be thwarted by the blanket seal that the former I.R.S. officials seek.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November 2017, the foregoing proposed amicus brief was filed electronically as an exhibit to Ohio's motion seeking leave of Court. Notice of this filing therefore will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system, and Parties may access this filing through the Court's system.

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