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

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

UNITED STATES' BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON CLASS ACTION CLAIM

Pursuant to Rule 56, the United States submits this memorandum of law in support of its Motion for Summary Judgment on the Class Action Claim (Count III).

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SUMMARY OF ARGUMENT

The sole claim presented is Plaintiffs'[1] allegation that IRS employees unlawfully inspected their tax return information. Neither the IRS's "delayed processing" of certain applications for tax exempt status nor the substance of its "information requests" to those applicants is at issue here. (See Treasury Inspector General for Tax Administration ("TIGTA") Report at 2 (Mar. 27, 2015)). Rather, to prevail and to obtain damages under § 7431,[2] Plaintiffs must show that the IRS's mere inspection of their applications for tax exempt status was unlawful. However, the actions that Plaintiffs challenge in this case — reviews of applications for tax exempt status and supporting materials by IRS employees in the IRS office charged with determining and regulating tax exempt entities — are clearly authorized by statute. Liability under § 7431 depends on the conduct of the individual IRS employee who actually performed the alleged inspection, not the state of mind of management. Thus, the relevant inquiry is whether the employees who reviewed Plaintiffs' applications for tax exempt status and supporting materials did so in the course of their tax administration-related job duties.

This Court, in its Order on the Government's Motion to Dismiss, recognized that Plaintiffs faced a "difficult burden" and must establish that the IRS employees inspected information *knowing* that the inspections were not necessary for tax administration. (Dkt. 102, PageID 1677.) The Court recognized that the government could present evidence that the

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[1] The five named plaintiffs represent a Principal Class of 428 entities. Plaintiff NorCal represents the Subclass of 33 entities.

[2] Section 7431(a) allows taxpayers to recover statutory or actual damages against the United States if any officer or employee of the United States inspects or discloses tax return information in violation of § 6103. However, there is no liability if the inspection or disclosure is the result of a "good faith, but erroneous, interpretation of section 6103" or is "requested by the taxpayer." 26 U.S.C. § 7431(b).

employees were authorized to view the materials as well as evidence concerning statutory defenses to liability. (*Id.*) Furthermore, this Court found the determination to be "more appropriate at the summary judgment stage than at the pleadings stage" as Plaintiffs would have had an opportunity to take discovery and marshal evidence. (*Id.*) This case is now at the summary judgment stage following extensive discovery by Plaintiffs, including production of over 50,000 pages of documents, depositions of 22 individual IRS employees, and two separate Rule 30(b)(6) depositions of the IRS.[3] Discovery confirmed that Plaintiffs cannot, in fact, meet their "difficult burden" described in this Court's Order on the Motion to Dismiss. Rather, the extensively developed, undisputed material facts demonstrate that all IRS employees[4] who actually reviewed Plaintiffs' application files were authorized to do so, because they were acting within their job duties in the administration of the Internal Revenue Code. Nor is there any evidence that the reviewing employees inspected materials *knowing* that the inspections were not for the purposes of tax administration.

This is not to say that the IRS did its job well with respect to the Plaintiffs in this case. To the contrary, from February 2010 to May 2012, the Exempt Organizations Division of the IRS ("EO"), which is responsible for processing applications by organizations seeking tax exempt status, failed to properly coordinate the processing of applications with indicia of impermissible political campaign intervention ("advocacy cases"). As TIGTA found, this mismanagement resulted in the use of inappropriate criteria to coordinate these applications for tax exempt

[3] Plaintiffs have noticed a third Rule 30(b)(6) deposition of the IRS, which is scheduled for August 11, 2017.

[4] References to "IRS employees" encompass employees of the IRS Office of Chief Counsel.

status.[5] As a result of the inappropriate criteria, the delays impacted many entities that self-identify as politically conservative. The IRS learned subsequently of the inappropriate criteria and mounting backlog of advocacy cases and took steps to address both problems and revamp and reform the procedure for handling applications for tax exempt status.

While Plaintiffs suffered delays in the determinations of their applications for tax exempt status in this litigation, they have not brought a claim based upon delay. Rather, their sole class action claim in this case is for unlawful inspection of tax return information under § 7431. Plaintiffs allege that the IRS employees who reviewed Plaintiffs' applications for tax exempt status as part of their efforts to process cases involving challenging legal issues and, later, to resolve the backlog of those cases violated the taxpayer privacy rules found in § 6103 when they looked at Plaintiffs' application materials. Plaintiffs' claim — that IRS employees whose job duties included processing applications for tax exempt status broke the law by looking at those very application materials — defies logic and is contrary to the statute. Here, for example, Plaintiffs' claim would render unlawful the steps the IRS eventually took to remedy the backlog of applications, including the very steps that led to the favorable resolution of four of the five Plaintiffs' applications. Accepting such claim would significantly interfere with the IRS's ability to conduct day-to-day tax administration.

Plaintiffs' claims are contrary to the plain language and statutory structure of § 6103 and are not supported by the applicable case law or the legislative history of § 7431, the statute pursuant to which Plaintiffs seek damages. Rather, these authorities confirm that IRS employees

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[5] TIGTA did not find that the inappropriate criteria or delays was the result of bias or discriminatory intent. (Facts ¶¶ 194-198.)

are authorized to view materials in the course of their tax administration-related job duties. Indeed, the proscription against unauthorized inspections was intended to stop IRS employees from browsing tax return information that has no relationship to their work. No "browsing" is alleged in this case.

Furthermore, § 7431 only provides a cause of action for inspection or disclosure of material that is a return or return information and, here, some of the information at issue is not, as a matter of law of the case, a return or return information. Finally, good faith is a defense to liability for unlawful inspection, and here, even assuming the IRS employees were not authorized to view Plaintiffs' materials, the IRS employees acted with good faith, as they believed they were authorized to view Plaintiffs' materials, and there is no evidence to the contrary. The undisputed material facts establish that Plaintiffs cannot meet the "difficult burden" to prevail on their claim for unlawful inspection, and judgment in the United States' favor is appropriate.

ARGUMENT

I. Plaintiffs Cannot Meet their "Difficult Burden," And the Case Is Ripe for Summary Judgment Adjudication.

In this Court's Order on the Government's Motion to Dismiss, the Court detailed the Plaintiffs' burden to prevail on their claim for unlawful inspection, and cautioned that this "will be a difficult burden for Plaintiff Groups to meet."[6] (Dkt. 102, PageID 1677.) To meet this

[6] In fact, the same claims for unlawful inspection made in three related cases were dismissed at the pleadings stage. In the two cases filed in the D.C. District Court, the court dismissed the inspection claims, finding plaintiffs failed to state a claim where they alleged wrongful inspection of "unnecessary" information. *Linchpins of Liberty v. U.S.*, 71 F. Supp. 3d 236, 249-50 (D.D.C. 2014) (consolidated with *True the Vote* on appeal); *True the Vote v. IRS*, 71 F. Supp. 3d 219, 233-34 (D.D.C. 2014), *aff'd in part, rev'd in part* 831 F.3d 551 (D.C. Cir. 2016) (affirming dismissal of inspection claim). Similarly, in *Freedom Path v. Lerner*, the District Court for the Northern District of Texas (continued...)

difficult burden, Plaintiffs must "establish that the IRS officials who inspected or disclosed the return information did so *knowing* that the information was not necessary for tax administration purposes, regardless of whether the IRS officials who requested the information knew or believed it was necessary for the § 501(c)(4) application." (*Id.*) (emphasis added) Concluding that such a determination was "more appropriate at the summary judgment stage than at the pleadings stage," the Order further stated that the government "will have the opportunity to establish with evidence" that "the inspections or disclosures were allowed for tax administration purposes pursuant to § 6103(h), that they acted on a good faith interpretation of § 6103 such that the § 7431(b)(1) exception applied, or that the inspections were requested by the Plaintiff Groups such that the § 7431(b)(2) exception applied." (*Id.*)

In general, summary judgment is appropriate when the moving party demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As this Court stated in *Richardson v. Leis*, 2010 WL 518177, at *2 (S.D. Ohio Feb. 3, 2010), "[a] party may move for summary judgment on the basis that the opposing party will not be able to produce sufficient evidence at trial to withstand a motion for judgment as a matter of law."

Here, summary judgment is appropriate because the undisputed facts show that Plaintiffs cannot meet their "difficult burden" to establish that the IRS employees assigned to process Plaintiffs' applications for tax exempt status inspected the material "knowing that the information was not necessary for tax administration purposes, regardless of whether the IRS

(… continued)
found that the unlawful inspection claim was "threadbare" and failed to state a plausible claim for relief. *Freedom Path, Inc. v. Lerner, et. al.*, 2015 WL 770254, at *14 (Feb. 24, 2015 N.D. Tex.).

officials who requested the information knew or believed it was necessary for the § 501(c)(4) application." (*Id.*)[7] Furthermore, the undisputed facts establish that the inspections were authorized by § 6103(h)(1) and the employees who inspected the application materials did so with the good faith belief that § 6103 authorized the inspections. As a result, there can be no liability under § 7431, and summary judgment in favor of the United States is appropriate.

II. The IRS Did Not Violate § 6103 by Reviewing Plaintiffs' Materials.

The undisputed facts demonstrate that no unauthorized inspection of Plaintiffs' tax return information occurred. Plaintiffs allege that each time an IRS employee looked at Plaintiffs' application files, with the exception of the initial screening, whether for development, triage, to respond to an inquiry from the Taxpayer Advocate's Office initiated by the entity, or to ready the file for approval and closure, the IRS employee broke the law. (*See* Gov't Ex. 8, Plaintiffs' Disclosure of Claimed Inspections, Inspections Nos. 1-17.) Indeed, Plaintiffs even claim that IRS employees violated § 6103 when they took actions that directly led to the approval of their applications for tax exempt status. Plaintiffs assert that, because inappropriate criteria were originally used to coordinate their applications, which resulted in delay, any subsequent IRS actions cannot be "tax administration" regardless of whether employees were performing their duties. Under Plaintiffs' theory, once the IRS began to use inappropriate criteria to screen applications, any subsequent inspection performed by IRS employees, regardless of the purpose, was unlawful, including the inspections performed to rectify and end the delay in processing. This theory does not withstand scrutiny.

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[7] The undisputed facts show, however, that the requests were made by employees trying to perform their tax administration-related job duties. (Facts ¶¶ 127-135.) The reviews were not motivated by animus, political or otherwise. (Facts ¶¶ 208-210.)

As discussed below, § 6103(h)(1) authorizes IRS employees to inspect tax returns and return information as part of their duties in administering the Internal Revenue Code. All the inspections of the Plaintiffs' application materials were made to process the applications for tax exempt status, and all were authorized by § 6103(h)(1).

A. Section 6103(h)(1) authorizes IRS employees to view information relevant to their tax administration-related job duties.

The text and statutory structure of § 6103(h)(1), the case law interpreting it, and the legislative history surrounding the Taxpayer Browsing Protection Act, which added a cause of action for unlawful inspection to § 7431, demonstrate that there is no cause of action when IRS employees inspect tax return information in the course of performing their tax administration-related job duties.

1) Text. The plain text of § 6103(h)(1) permits IRS employees to inspect tax return information when it is part of their job. Although § 6103(a) requires that returns and return information generally be kept confidential, § 6103(h)(1) provides that "[r]eturns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes." 26 U.S.C. § 6103(h)(1). Section 6103 defines "tax administration" extremely broadly. It includes "the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws. . . ." *Id*. § 6103(b)(4). Thus, under § 6103(h)(1), an inspection is authorized as long as:

> (1) the IRS employee who inspects a taxpayer's information does so in the course of his or her "official duties;" and

(2) those duties involve tax administration.[8]

The purpose of this exception is readily apparent: IRS employees cannot do their jobs if they are precluded from inspecting tax returns and return information. When a revenue agent audits a tax return, it is § 6103(h)(1) that allows that agent to inspect the tax return at issue. When a special agent investigates a tax preparer for filing fraudulent income tax returns, it is § 6103(h)(1) that allows the agent to obtain and examine the tax returns that preparer filed. In other words, every time an IRS employee looks at tax return information in order to do his or her job, that employee is relying on the authorization provided by § 6103(h)(1).

2) The Structure of § 6103(h). As shown above, the statutory language of § 6103(h)(1) provides that IRS employees are authorized to inspect information during the course of their job duties, and the structure of § 6103(h) specifically confirms that, because viewing returns and return information is crucial to the daily work of the IRS, (h)(1)'s requirements are not supposed to be difficult to meet. Rather, § 6103(h)(1) authorizes IRS employees to view information germane to their job duties.

Subsection 6103(h) creates a series of exceptions authorizing inspection and disclosure of return information for tax administration. Critically, this subsection is structured on a sliding scale. Subsection (h)(1) authorizes any IRS employee to inspect tax return information "without written request" as long as he or she does so in the course of his or her duties and those duties concern administration of the internal revenue laws. By contrast, the requirements of (h)(2), (3), and (4) are increasingly stringent. Subsection (h)(2) authorizes disclosures to a Department of Justice official only if he or she is "personally and directly engaged in" a legal case and the

[8] Not all IRS employees have jobs that involve tax administration. For example, the IRS employs individuals whose job duties cover areas such as physical security, building maintenance, and human resources.

information sought falls within one of three carefully defined categories. Subsection (h)(3) further requires that disclosure of return information to the Department of Justice occur only if the Secretary of the Treasury refers a case to the Department of Justice or the Attorney General makes a written request to the Secretary of the Treasury "setting forth the need for the disclosure." The requirements of (h)(4), for disclosures in judicial proceedings, are the most demanding. Under this provision, disclosure is allowed only if the information falls within one of three categories, each of which is far narrower than the ones set forth in (h)(2). *Compare, e.g.*, § 6103(h)(2)(C) (the "return information *relates or may relate* to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer *which affects, or may affect*, the resolution of an issue in such proceeding or investigation") (emphasis added), with § 6103(h)(4)(C) (the "return information *directly relates* to a transactional relationship between a person who is a party to the proceeding and the taxpayer *which directly affects* the resolution of an issue in the proceeding") (emphasis added).

Consequently, the structure of § 6103(h) confirms the plain text reading of the statute. An IRS employee is broadly authorized to inspect tax return information in order to perform his or her tax administration-related job duties.

3) Case Law Involving Unlawful Inspection. While only a few cases have addressed the inspection of return information under § 6103(h)(1), these cases confirm that when IRS employees inspect tax return information in the course of their official duties and those duties involve administration of the internal revenue laws, § 6103(h)(1) authorizes the inspection. *See United States v. Monumental Life Ins. Co.*, 440 F.3d 729, 734 (6th Cir. 2006) (finding that § 6103(h)(1) allowed IRS employees involved in one investigation to share taxpayer information with IRS employees on another, related investigation); *Barnard v. United States*, 1981 WL 1754,

at *2 (S.D. Fla. Mar. 5, 1981) (stating that § 6103(h)(1) allows inspections or disclosures "for the purpose of facilitating a current employee's official duties"). Put another way, § 6103(h)(1) authorizes inspection by, or disclosure to, all IRS employees who are engaged in processing a taxpayer's case. In *Gardner v. United States*, for example, the D.C. Circuit explained that the § 6103(h)(1) exception is "readily applicable to the daily work that IRS employees do in auditing or otherwise checking taxpayer returns and tax information." 213 F.3d 735, 738 (D.C. Cir. 2000); *compare McGinley v. U.S. Dep't of Treasury*, 2002 WL 1058115, at *4 (C.D. Cal. Apr. 15, 2002) (finding that, because an IRS employee was "no longer working on the case relating to the documents at issue," and because "he provide[d] no other basis for finding that his official duties as a staff economist require him to review the requested materials," § 6103(h)(1) did not apply).

In addition, at least one court has rejected the idea that an IRS employee's subjective, improper motive could render improper an otherwise authorized inspection. In *Kenny v. United States*, 489 F. App'x 628, 631 (3d Cir. 2012), the plaintiff alleged that employees in the Treasury Department's Office of Professional Responsibility (OPR) had wrongfully inspected his tax returns. According to the plaintiff, "the OPR employees acted with a retaliatory motive," and so "they could not have acted within the scope of their official duties." The Third Circuit firmly rejected this argument, emphasizing that "[t]he plain text of § 6103 does not provide such a limitation" and concluding that these inspections were authorized under (h)(1). *Id.* at 631 n.4. As *Kenny* demonstrates, the employee's subjective intent is not material under (h)(1). Rather, an inspection is authorized as long as it takes place in the course of the employee's official duties and those duties involve the administration of the internal revenue laws.

Although this Court chose not to dismiss the case under *Kenny*, the Court found that subjective intent is wholly immaterial. The Court held that Plaintiffs face a "difficult burden" and that the issue is more ripe for adjudication at the summary judgment stage. To meet this burden, Plaintiffs must prove that "the IRS officials who inspected or disclosed the return information did so knowing that the information was not necessary for tax administration purposes, regardless of whether the IRS officials who requested the information knew or believed it was necessary for the § 501(c)(4) applications." (Dkt. 102, PageID 1677.) As detailed below, despite extensive discovery, there is simply no evidence that any IRS employee inspected information knowing it was not necessary for tax administration. Consequently, Plaintiffs cannot meet their burden.

4) Legislative History of the Taxpayer Browsing Protection Act. The proscription against unauthorized inspections was never intended to address review of materials germane to an IRS employees' job duties. Instead, its focus is on stopping IRS employees from browsing tax return information that has no relationship to their work.

Before the enactment of the Taxpayer Browsing Protection Act in 1997, there was no cause of action against the government for unauthorized inspection — as opposed to unauthorized disclosure — under § 7431. Spurred by reports that IRS employees had examined taxpayers' records out of sheer curiosity, Congress enacted the Taxpayer Browsing Protection Act, which added the word "inspection" to § 7431. *See, e.g.*, 143 Cong. Rec. H1464 (statement of Rep. Camp, referring to reports of "IRS employees even browsing the records of celebrities like Tom Cruise"). This legislation was exclusively aimed at preventing IRS employees and contractors from looking at tax records that had no connection to their job duties. *See* H. Rep. No. 105-51, 1997 WL 183944, at *3 (1997) (listing the reason for legislation as "[w]idespread

indications of browsing"). During the hearings prior to the passage of the law, Representative William Archer, Jr., the lead sponsor of the bill, stated that its purpose was to deter those who "browse and snoop" in personal taxpayer records maintained by the IRS. 143 Cong. Rec. H1461-08, 1997 WL 179139 (Apr. 15, 1997); *see also* Statement by President William J. Clinton Upon Signing H.R. 1226 (Taxpayer Browsing Protection Act), 33 Weekly Comp. Pres. Doc. 1226 (Aug. 11, 1997), 1997 WL 806823 ("This is a bipartisan issue on which everyone can agree: 'browsing' taxpayer information is wrong and we all condemn it.").

As this history indicates, the proscription against unauthorized inspections was not intended to prevent IRS employees from viewing information relevant to their job duties; instead, its focus is on stopping IRS employees from "act[ing] on impulses based upon curiosity" to "peek" at tax return information that has no relationship to their work. 143 Cong. Rec. H1461-08, 1997 WL 179139 (Apr. 15, 1997) (statement of Rep. Neal that "[b]rowsing is unauthorized opportunities to peek at tax returns."). In addition, the committee report cites the facts underlying *United States v. Czubinski*, 106 F.3d 1069 (1st Cir. 1997), as the paradigmatic example of an unauthorized inspection. *See* H.R. Rep. 105-51, 1997 WL 183944, at *3-4. In that case, the government brought criminal charges against Czubinski, an IRS employee who viewed tax return information of various political candidates, a local district attorney, and a woman he had once dated, out of idle curiosity. The court found that these inspections were "outside the scope of his duties." As the committee report explains, this is precisely the conduct that § 7431's penalties for unauthorized inspection are designed to prevent and punish. H.R. Rep. 105-51, 1997 WL 183944, at *3-4 (citing *Czubinski*).

Congress intended to sanction the actions of IRS employees only when they inspect tax return information outside the course of their work duties. Because those inspections do not

further tax administration in any way, they are an improper violation of taxpayers' privacy and can subject the United States to civil damages. But as the legislative history makes clear, Congress did not create liability under § 7431 when IRS employees inspect return information as part of their official work.

B. All inspections at issue in this case were authorized, because they occurred as part of the IRS processing of applications for tax exempt status.

Plaintiffs allege 17 categories of unlawful inspection of return information.[9] None of these categories, however, involve allegations that the IRS employees browsed information unrelated to their job duties, nor are there any allegations that employees peeked at information unrelated to their job out of curiosity. [10] To the contrary, each of these alleged inspections involved IRS employees acting within the course of their job duties as they worked to coordinate, review, and process applications. The fact that, due to mismanagement, IRS employees used inappropriate criteria to initially identify applications for coordination does not

[9] The seventeen alleged inspections are as follows:

1	Secondary Screening	10	Bucketing Process
2	Inspections for Development	11	EOT Development Letter Review
3	Review of Development Letter Responses	12	Quality Assurance Review
4	Review by Carter Hull	13	EOT Review for Fast Track Eligibility
5	H. Goehausen Triage (Oct.-Nov. 2011)	14	EOT/Counsel Review of Fast Track Cases Pending Response
6	Advocacy Team Review (Jan.-Feb. 2012)	15	Review of Case Following Fast Track Election/Declination
7	Review of Responses to Unnecessary Questions	16	Review of Operations ("ROO")
8	Review for Unnecessary Questions	17	Review of Case Tracking Spreadsheets
9	Nancy Marks Team Review (April 2012)		

(Gov't Ex. 8.)

[10] Plaintiffs voluntarily submitted their applications and supporting materials to the IRS with the understanding that IRS employees would review the submissions. (Facts ¶ 79.) To the extent this constitutes a request by Plaintiffs to the IRS to review their materials, no liability may arise from that inspection. § 7431(b)(2) ("No liability shall arise under this section with respect to any inspection or disclosure—which is requested by the taxpayer.").

mean that the processing of the applications was no longer a tax administration purpose.[11] Furthermore, processing applications for tax exempt status is one of the IRS's tax administration functions. (Facts ¶ 1.) Thus, where IRS employees whose job duties involve processing applications for tax exempt status review such information in the course of their job, they are authorized to do so under § 6103(h)(1).

Plaintiffs' position, that once IRS employees used inappropriate criteria all further inspections of their materials were unlawful, is unsupported by law and would lead to an absurd result. If an IRS employee makes a mistake in processing an application and the employee cannot legally review the application any further, such employee would have no ability to cure the mistake. This is particularly problematic here, where the initial inappropriate criteria led to a backlog of pending applications. Under Plaintiffs' theory, once the backlog was created, the IRS could not legally review any of the applications, giving it no options to attempt to cure the backlog.

Nor are Plaintiffs able to meet their "difficult burden" to show, not only that the IRS employees lacked a tax administration purpose, but that they viewed the materials "*knowing* that the information was not necessary for tax administration." (Dkt. 102, PageID 1677.) Following extensive discovery, it is clear that Plaintiffs have no evidence to meet this burden. Throughout discovery, Plaintiffs took the depositions of 22 individual IRS employees, several of whom Plaintiffs deposed twice. Each of the IRS employees that Plaintiffs chose to depose during discovery confirmed that they believed they were authorized to view Plaintiffs' materials

[11] However, as TIGTA found, the criteria used to coordinate was inappropriate, because the criteria focused on names or policy positions rather than on whether the entity's activities constituted political campaign intervention. (Facts ¶¶ 194-196.) Due to mismanagement, however, the inappropriate criteria were not fixed until 2012.

because doing so was within their job duties. (Facts ¶ 210a-v.) The evidence does not support Plaintiffs' claim that the IRS employees who conducted the reviews did so because they harbored bias against Plaintiffs. Despite extensive discovery in this case, Plaintiffs have no evidence to meet their burden. Thus, this case is now ripe for summary judgment, and the United States is entitled to summary judgment.

With regard to Inspection Category No. 17, Case Tracking Spreadsheets, review of this material also cannot give rise to a claim for unlawful inspection, because the Sixth Circuit has already ruled that these specific documents are not protected by § 6103. In its Opinion Denying the Government's Application for a Writ of Mandamus ("Mandamus Order") in this case, the Sixth Circuit rejected the United States' argument that certain documents were protected from disclosure by § 6103, instead finding that the information contained in those documents was not tax return information and ordering the production of those documents "without redactions." (Dkt. 254, PageID 9204-5, *In re United States of America*, 817 F.3d 953, 961, 965 (6th Cir. 2016) ("[A]pplications for tax exempt status are not 'returns.'") ("[W]e hold that the names, addresses, and taxpayer-identification numbers of applicants for tax exempt status are not 'return information' under § 6103(b)(2)(A).")

Among the documents at issue in the Mandamus Order, which the government produced in full immediately following issuance of the Order, were the "case tracking sheets." Now, Plaintiffs claim that review of these same case tracking sheets by the IRS employees assigned to review and process applications for tax exempt status constituted an unauthorized inspection. (Gov't Ex. 8, Inspection No. 17.) The Sixth Circuit opinion determined that these materials, which contain the names and EINs of applicants for tax exempt status as well as information from the application file, are not tax return information, and thus not protected by § 6103. The

Sixth Circuit's ruling is law of this case, and Plaintiffs cannot now claim that the very information that the Sixth Circuit found not to be return information for purposes of discovery in this case was return information for purposes of stating a claim for unlawful inspection. In addition, the facts establish that the IRS employees who reviewed the case tracking sheets did so in the course of their official duties and were not browsing taxpayer information in violation of § 6103. (Facts ¶ 45.)

The undisputed material facts demonstrate that the IRS employees at issue only reviewed materials that directly relate to their job duties. As their job duties concerned processing or overseeing the processing of applications for tax exempt status, those duties concern tax administration. Thus, the employees involved were each authorized, under the plain language of § 6103(h)(1), to view Plaintiffs' application materials. Despite extensive discovery in this case, Plaintiffs have no evidence to meet their burden. Thus, this case is now ripe for summary judgment, and the United States is entitled to summary judgment.

III. The IRS Employees Acted Under a Good Faith Belief That They Were Authorized to View Plaintiffs' Return Information, as It Fell Within Their Job Duties.

Even if the Court finds that IRS employees lacked a tax administration purpose when reviewing Plaintiffs' application files, and therefore violated § 6103, the good faith exception in § 7431(b) precludes liability, because the employees *believed* they were acting within their job duties. *See Coplin v. United States*, 952 F.2d 403, 1991 WL 270831, at *6 (6th Cir. 1991) (unpublished opinion), *cert. denied* 504 U.S. 974 (1992). Section 7431(b) provides that no liability shall arise with respect to any inspection or disclosure that results from a "good faith, but erroneous, interpretation of section 6103." Thus, as a defendant in a suit alleging violation of § 6103, the United States is entitled to immunity unless the agent or employee in question has acted in bad faith. *See Davidson v. Brady*, 732 F.2d 552, 553 (6th Cir. 1984).

In determining what constitutes good faith, the Sixth Circuit applies the objective standard set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Coplin v. United States*, 952 F.2d at *6 (*citing Davidson v. Brady*, 732 F.2d at 553); *Rueckert v. Gore*, 587 F. Supp. 1238, 1242 (N.D.Ill. 1984), *aff'd* 775 F.2d 208 (7th Cir. 1985). Under this standard, a public official acts in good faith if her "conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. A finding of bad faith requires a showing that the government official "took the action with malicious intention to cause" a deprivation of constitutional or statutory rights. *Harlow*, 457 U.S. at 815. Furthermore, those rights must be "clearly established" such that a "reasonable person would have known" that their conduct violated those rights. *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (discussing the good faith standard in the analogous context of qualified immunity). The good faith standard protects from liability inspections or disclosures that are the result of "reasonable but mistaken judgments." *See id.*

Here, the IRS employees at issue acted in good faith when reviewing the materials that their job duties necessitated that they review. They reasonably believed that they were entitled to inspect the application materials in order to process the applications, and processing applications was part of their job. No case law supports the notion that an IRS employee cannot lawfully inspect an application for tax exempt status to which he or she was assigned. Under these circumstances, there is no basis to conclude that a reasonable IRS employee would know that his or her conduct was improper. Furthermore, each of the 22 IRS employees that Plaintiffs noticed for deposition confirm that they knew the rules against unlawful inspection and disclosure of return information and that, when they viewed the materials at issue in this case, they believed they were lawfully entitled to do so because viewing the materials was part of their job duties.

(Facts ¶ 210a-v.) Despite voluminous discovery in this case and multiple investigations by TIGTA, DOJ, and Congress,[12] there is no evidence that any IRS employee inspected Plaintiffs' materials knowing that the inspections were unauthorized. (Facts ¶¶ 208-210a-v.)

Rather, most of the alleged "unauthorized inspections" occurred during efforts to address the backlog and speed applications towards resolution or to review the applications to understand the basis for the entities' complaints about delay and burdensome questions. (*See generally* Facts ¶¶ 110-191, 201-206.) While some of these efforts were ineffective, this simply supports TIGTA's finding that the use of inappropriate criteria and the resulting delays were due to gross mismanagement. (Facts ¶ 194.) And the conduct that can be categorized as mismanagement does not include the actual review of the applications and is therefore not an appropriate predicate to liability under the statute. Accordingly, in the event the Court finds that tax return information was unlawfully inspected, the good faith exception applies to prelude liability for those inspections.

CONCLUSION

For the reasons detailed above, the United States respectfully requests that the Court grant its Motion for Summary Judgment on Count III of this action.

[12] *See* Facts ¶¶ 194-**Error! Reference source not found.** for discussion of the TIGTA, DOJ, and congressional investigations.

Dated: August 2, 2017

Respectfully submitted,

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