

**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 SEEK TO REPRESENT, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
THE INTERNAL REVENUE SERVICE, et al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

Case No. 1:13-cv-00341

Judge Michael R. Barrett

**PLAINTIFF TEXAS PATRIOTS TEA PARTY’S REPLY  
IN SUPPORT OF ITS MOTION TO CLARIFY PRELIMINARY INJUNCTION**

In its response, the IRS again reverses position. Three weeks ago, after it insisted it would deny TPTP unless it responded within 30 days, emergency relief was needed just to allow the current motion. Yet now, the IRS professes bewilderment: had TPTP only asked, its request would have been granted. This claim is stunning. Just a week before TPTP moved for relief, TPTP stated its position in a conference with the Court. A far from “amenable” IRS adamantly opposed it. The IRS rewrites history, perhaps, to obscure the true reason for its last-minute change of heart: it wants this Court to pronounce that the IRS’s new position is a benevolent accommodation of TPTP, outside of the “ordinary course.” This plea for the Court’s blessing is the sole remaining issue now that the IRS agrees to TPTP’s request, but this Court should deny it. The IRS’s latest bob and weave is another effort to avoid accountability. It cynically trades “accommodation” of TPTP for judicial approval of its continuing use of “neutral” policies that exacerbate the targeted groups’ injuries. Most depressingly, it shows that 42 months into this case, the IRS remains more focused on saving face than unwinding the harms it has caused.

**Argument and Authorities**

The IRS's newest position purports to accede to both points of TPTP's requested clarification (albeit as a special accommodation), but this Court should not accept for an instant the IRS's explanation: that it is doing TPTP a favor, and would have done this all along had TPTP only made its wishes known. Doc. 309, PageID #10248. The IRS's key claim, that TPTP failed to disclose its requested relief, is simply wrong. The IRS asks this Court to rely on the IRS's incorrect recollection of a mid-November call among counsel, but apparently forgets that TPTP informed the IRS of its position in an earlier motion and during the argument on that motion, more than a week before TPTP filed the pending motion.

**A. The IRS's Response Reflects A Welcome Change in Position**

On November 21, 2016, TPTP filed an emergency motion to stay the IRS's impending denial of TPTP's application. The IRS had stated the "ordinary course" would not allow delaying TPTP's deadline for answering its September 2016 development letter—even though the delay was for determining the letter's propriety. Doc. 301. TPTP's motion precisely stated its position:

This demand [the September 26, 2016 letter] would require that four years of new activities be placed into TPTP's public application file, aggravating its existing constitutional injury. But as recently as September 12, 2016, the IRS represented to the Court that the only information it needed was complete responses to its prior requests, the last of which were made in January 2013 and answered the following month . . . . The only proper remaining step is to determine what information the IRS believes TPTP did not previously provide in that response.

*Id.* at PageID #9959, n.1. The next day, during oral argument on that motion, this Court asked both parties their position on TPTP's forthcoming motion. *See* Transcript, Doc. 304, PageID #10027. As the following exchange shows, TPTP stated its position that it should only have to respond to any questions remaining from the 2013 development letters, as of that time, and the IRS stated its opposition, arguing that TPTP must provide information for the entire time period:

The Court: ...[I]n fairly short order after the application, they would take a look at it, they'd start processing, they'd say, "Oh, we need additional information," they'd send a letter out. So that period of time that would have been covered would have been substantially more compact than the period of time now because, since the letter is coming out in 2016, it covers a lot more ground. Am I missing something on that, or is that an accurate statement?

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Mr. Greim: ...I think you are right...[I]f you look at the Internal Revenue Manual... they would look at our last response to their second letter and they'd say, "What's missing?"... We asked for X, but they gave us Y and a half... So, please, TPTP, tell us—you didn't quite answer this." So we then respond as of that time.

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Ms. Beckerman: ...[T]he problem with looking just back at the information requests that are issued in 2013 is that TPTP is asking for a declaration of tax-exempt status that relates back and covers the whole period...

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Ms. Beckerman: ...[T]he IRS would... look at the activities of the organization that have occurred from the application until a determination is issued.

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Ms. Beckerman: You do have to look at the activities over the whole time period, because if they don't meet the standard today, then they can't receive tax-exempt status today... And so that would be the case here. The IRS would need to look at the activities back in 2013 or 2012 when they applied and analyze over the entire period to make sure that they meet the statutory requirement. Because if they don't meet the statutory requirement for the total activities up until today, then they don't qualify... because the... benefit of being declared receiving tax-exempt status would cover the entire period. And so that is why the IRS would actually have to look at the activities over the whole period.

*See* Trans. Status Conf. at 6:16-7:17; 8:2-9:23 (Nov. 22, 2016). Before this Court, the IRS was hardly "amenable" to TPTP's proposal. *Compare* Response, Doc. 309 PageID #10248. In fact, it unequivocally opposed it, asserting that if TPTP does not prove that it meets the standard for tax-exemption *today*, the IRS cannot grant its application. Notwithstanding the IRS's different recollection of counsel's telephone discussion on November 14, 2016, the IRS openly disclosed its true position—adamant opposition to TPTP's proposal—on the record to this Court eight days before TPTP filed the instant motion.

The veracity of the IRS's explanation for its recent about-face matters. The IRS states that it is willing to meet TPTP's exact request. Doc. 309, PageID #10248. But it does so only in the face of TPTP's Motion, and even then, explicitly seeks a gratuitous declaration that this result is an "accommodation" to TPTP. Such a finding would only serve to rubber-stamp the IRS's use of policies purported to be "neutral" and generally applicable (like the litigation hold) regardless of the manner in which it applies those policies. The IRS wants it both ways because it knows that in this case, its explanation—its motivation—is everything. Either the IRS is treating TPTP neutrally, as it now claims, or it is treating TPTP in a way that it knows will aggravate the injuries it has already caused.

**B. The Court Should Order the Requested Relief, But Not as an "Accommodation"**

The most critical aspect of the IRS's Response is its failure to meaningfully refute any portion of TPTP's argument regarding the meaning of "ordinary course." To the contrary, the IRS's new affidavits only further confirm TPTP's core arguments. First, the IRS now admits that TPTP's assigned specialist recommended approval in both 2013 and 2014. At worst, it was a "close case" about a small group, but there is no basis for the IRS's recent effort to devise entirely new areas of inquiry unexplored in the first two, early 2013 development letters. The fact remains that the IRS easily could have finished processing the application in 2013, but as each year passed, the growing body of specialists who re-reviewed the file devised more and more areas of inquiry, culminating in the most expansive of all: the September 2016 "template," which pretended that TPTP had never provided substantial information to the IRS.

The IRS's shifting approach to TPTP, from 2013 to 2016, shows that TPTP has never been treated—and is still not being treated—in the ordinary course. Like the initial targeting, justified at the time by a purported need for centralization, and like the litigation hold (which the

IRS still claims was completely separated from the targeting despite rulings from this Court and D.C. Circuit), each new treatment of TPTP has been justified by reference to some “neutral” policy. The latest example is the IRS’s myopic focus on the propriety of its new template questions, which were developed for new applicants, not groups like TPTP who were already subjected to several rounds of questioning. Each time, the IRS misses the forest for the trees. Regardless of the policy cited, the facts have shown that the treatment was driven either by the targeting itself, the continuing effects of the targeting, or, increasingly, the need in litigation to deny that the targeting occurred or caused injury.<sup>1</sup> As this Court found—and as the IRS continues to dispute—the IRS’s targeting cannot be “neatly separated from” the litigation hold and other delay “that has now continued for three years.” Doc. 302, PageID #10012.

All of this is the opposite of the “ordinary” process TPTP outlined in its main brief. The IRS’s new affidavits mean it can no longer dispute that: (1) TPTP failed to receive the “ordinary course” during the IRS-caused delay; and (2) the IRS’s “tough luck” insistence on the September 2016 questions places TPTP in a far worse position than had the IRS finished “ordinary course” processing in 2013 (or reverted to it soon after, instead of using the “litigation hold” to delay).

Although these points should now be settled, and the IRS says it would be willing “accommodate” TPTP’s request, a Court order is still necessary because the IRS continues to maintain that a Court order is *required* for any departure from what the IRS views as “ordinary

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<sup>1</sup> In a surprising move, the IRS waives the attorney-client privilege over portions of recently-produced documents, claiming this was “compelled” by the “severity of [TPTP’s] accusations.” Doc. 309, PageID #10250. Although those portions of the formerly-privileged documents that the IRS now decides to reveal might well be “banal,” this partial disclosure can hardly be said to conclusively establish, as the IRS tries to claim, that litigation considerations did not affect the handling of TPTP. *Id.* Even more importantly, the IRS’s decision to mount a lengthy defense of its counsel—hardly a focus of TPTP, and certainly not an “accusation” against any attorney—leaves TPTP’s broader points undisturbed.

course.” Thus, this Court’s order should specifically clarify that the IRS must allow processing to conclude in the ordinary course as it would have in 2013<sup>2</sup> but for the IRS’s wrongful conduct. It should reject the IRS’s new position that it would have granted TPTP’s requested relief, did not do so because of TPTP’s mistake, and will *now* do so as a benevolent “accommodation” outside of the ordinary course. The Court should not endeavor to protect the IRS, but instead, should protect the entity caught within an unconstitutional scheme that continues to cause it harm.

### Conclusion

The IRS begrudgingly says that it will “finish developing TPTP as it was prepared to do in 2013 with any additional inquiry limited to (1) what the IRS had then identified as new issues raised in, or still to be clarified from, TPTP’s response to the second development letter; and (2) facts regarding TPTP’s activities on or before March 2013.” Doc. 309, PageID #10248. But the IRS’s claim that this is a “special process” outside of the ordinary course, and its new suggestion that this Court’s order should so provide, is not only wrong, it invites the IRS to find new ways to punish TPTP in the IRS’s forthcoming (hopefully final) development letter.

For that reason, this Court should enter an order clarifying that the “ordinary course” for TPTP requires the IRS to withdraw the September 2016 questions, and instead, finish developing TPTP as it was prepared to do in 2013 with any additional inquiry limited to (1) what the IRS had then identified as new issues raised in, or still to be clarified from, TPTP’s response to the second development letter; and (2) facts regarding TPTP’s activities on or before March 2013.

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<sup>2</sup> This Court should reject the IRS’s attempt to place the burden on TPTP to guess what the IRS may believe is relevant. *See* Response, PageID #10266. The ordinary course involves the IRS committing its development questions to writing, and then with prompt turn-around, funneling any material unanswered questions until a determination can be made. It was nearly complete in March 2013, and should be finished now on those terms—not based on new templates looking back over several years, or on a “guess what I think is important” approach.

Dated: December 19, 2016

Respectfully submitted,

**GRAVES GARRETT, LLC**

*/s/ Edward D. Greim*

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**Certificate of Service**

The undersigned attorney hereby certifies that, on December 19, 2016, the foregoing document was served the Court's CM/ECF electronic notification system to all counsel of record.

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