No. _____

IN THE

Supreme Court of the United States

TRUE THE VOTE, INC.,

Petitioner,

v.

LOIS LERNER, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), this Court held that a damages remedy can be implied directly under the Constitution to vindicate a deprivation of constitutional rights by federal government officials.

Several Circuit Courts, including the D.C. Circuit in *Kim v. United States*, 632 F.3d 713 (D.C. Cir. 2011) and the Tenth Circuit in *Nat'l Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240 (10th Cir. 1989) (*"Gibbs"*), have held that a *Bivens* remedy is not available to taxpayers for alleged Due Process violations arising out of the conduct of IRS officials in the processing of tax returns. But in *Gibbs*, the Tenth Circuit reached a different conclusion with respect to the First Amendment, holding that an injured party may bring an action under *Bivens* against IRS agents and officials for First Amendment violations.

This case involves allegations of egregious violations by IRS officials of Petitioner's First Amendment rights, violations that would give rise to *Bivens* remedies in the Tenth Circuit. Nevertheless, the D.C. Circuit declined to follow the Tenth Circuit, ruling instead that "no *Bivens* remedy [is] available" for First Amendment claims "in light of the comprehensive remedial scheme set forth by the Internal Revenue Code." Pet.App. 8a. The issue presented is:

1. Did the D.C. Circuit, in conflict with the Tenth Circuit, err in holding that *Bivens* is not available against agents and officials of the Internal Revenue Service for egregious violations of the First Amendment?

PARTIES TO THE PROCEEDING

Petitioner: True the Vote, Inc. was the plaintiff in the District Court and the appellant in the Court of Appeals.

Individual Respondents: Lois Lerner, Steven Grodnitzky, Steven Miller, Holly Paz, Michael Seto, Douglas Shulman, Cindy Thomas, William Wilkins, Susan Maloney, Ronald Bell, Janine L. Estes, and Faye Ng in their individual capacities were defendants in the District Court and appellees in the Court of Appeals.

Institutional Respondents: The United States, the Internal Revenue Service, and John Koskinen in his official capacity as Commissioner of Internal Revenue, were also defendants in the District Court and appellees in the Court of Appeals but as to different claims than those presented by this petition. The Court of Appeals remanded several of those claims to the district court where they are currently pending.

CORPORATE DISCLOSURE

Petitioner True the Vote, Inc., is a tax-exempt entity under Section 501(a) of the Internal Revenue Code as a charity described in Section 501(c)(3). True the Vote, Inc., has no parent corporation and no publicly-held corporation has a 10% or greater ownership interest in it.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of United States Court of Appeals for the District of Columbia Circuit, which held that no remedy under *Bivens* is available against agents and officials of the Internal Revenue Service for violations of the First Amendment.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at 831 F.3d 551. Pet.App. 1a. The District Court's opinion dimissing Petitioner's *Bivens* claim is reported at 71 F. Supp. 3d 219. Pet.App. 27a.

STATEMENT OF JURISDICTION

The judgment below was entered on August 5, 2016. Pet.App. 25a. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291, and jurisdiction in the District Court over the *Bivens* claims was invoked under 28 U.S.C. § 1331.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment of the U.S. Constitution provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The scandal at the heart of this case is well known. Indeed, it has received national headline-level attention and been the subject of numerous congressional hearings since it first became public in 2013. And it has spawned numerous lawsuits, including this one.

Beginning back in 2010 and perhaps earlier, senior officials at the Internal Revenue Service began targeting applicants for non-profit status based on their perceived political ideology or conservative-sounding names (the "Targeting Scheme"), in "blatant violation of the First Amendment." *Z St. v. Koskinen*, 791 F.3d 24, 30 (D.C. Cir. 2015). These groups, including Petitioner here, had their applications slow-walked for years, and were subjected to extensive and intrusive demands for irrelevant and confidential information lest their application file be closed without action.

Lois Lerner, one of the Respondents here who has subsequently been exposed as instrumental in the development and execution of the Targeting Scheme, described the IRS's actions as "wrong…absolutely incorrect, insensitive, and inappropriate" when she first revealed them in response to a question she planted at a May 2013 American Bar Association event, shortly before the Targeting Scheme was about to be exposed by the Treasury Inspector General for Tax Administration.[1] The President himself, when the scandal

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[1] Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, May 14, 2013, *available at* https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf.

first broke, described the "intentiona[l] targeting [of] conservative groups" allegedly engaged in by IRS personnel as "outrageous," if true. "Obama: Alleged IRS political targeting 'outrageous'," CNN (May 14, 2013).[2] We now know that the allegations were in fact true.

The Inspector General found that 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." (Exhibit F to First Amend. Compl. (Dkt. 14-6) at 2.) Among the criteria used to target applicants were conservative-sounding names like "Tea Party" or "Patriots," or whether the case file included certain viewpoints and policy positions such as statements critical of how the country was being run or aimed at educating the public on how to "make America a better place to live." (*Id*. at 12.)

Despite the initial expressions of regret for the "outrageous" conduct, the perpetrators of the Targeting Scheme subsequently misled Congress about their activities under oath (and Respondent Lerner has even been cited for contempt of Congress[3]), destroyed documents and the computers on which they were

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[2] *Available at* http://www.cnn.com/2013/05/13/politics/irs-conservative-targeting/.

[3] H.Res.574, Recommending that the House of Representatives find Lois G. Lerner, former Director, Exempt Organizations, Internal Revenue Service, in contempt of Congress for refusal to comply with a subpoena duly issued by the Committee on Oversight and Government Reform, 113th Cong. (2013-2014).

stored,[4] and have been found by Congress to have continued to provide differential treatment to the targeted groups because of their viewpoints.[5] Yet to date, none of the perpetrators of the Targeting Scheme have been prosecuted or otherwise held to account for their unconstitutional misconduct.

Petitioner's dealings with the IRS are typical of those against whom the Targeting Scheme was directed. When Petitioner applied for tax-exempt status in July 2010, its name was "KSP/True the Vote." (First Amend. Compl. (Dkt. 14), ¶¶ 50-52.) "KSP" stood for "King Street Patriots," its affiliated Section 501(c)(4) social-welfare organization. (Exhibit B to First Amend. Compl. (Dkt. 14-2) at 18.) Thus, Petitioner was unwittingly thrust into the Targeting Scheme because its *name* included the word "Patriots," one of the words on the now infamous "Be on the Lookout," or "BOLO," list that IRS officials created to facilitate their Targeting Scheme.

For over three years, IRS officials involved in the Targeting Scheme deliberately delayed Petitioner's application while the IRS propounded numerous, unnecessary, and burdensome questionnaires seeking

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[4] Wall Street Journal, Video: Gasp at IRS Hearing Over Destroyed Hard Drive (June 20, 2014), available at http://blogs.wsj.com/washwire/2014/06/20/video-gasp-at-irs-hearing-over-destroyed-hard-drive/ (last visited Nov. 2, 2016).

[5] *See, e.g.*, House Ways and Means Committee, Boustany Opening Statement: Hearing on the Internal Revenue Service's Exempt Organizations Division Post-TIGTA Audit *(Remarks as Prepared)* (Sept. 18, 2013), available at http://waysandmeans.house.gov/hearing-on-the-internal-revenue-services-exempt-organizations-division-post-tigta-audit/ (last visited Nov. 2, 2016).

proprietary information about Petitioner's operations, activities, leadership, volunteers, associations, and affiliations. The IRS officials knew that the information sought was wholly unnecessary to the determination of Petitioner's tax-exempt status and was well beyond the scope of information normally sought from applicants. (Exhibit F to First Amend. Compl. (Dkt. 14-6) at 24.) Petitioner was required to disclose confidential information, because failure to cooperate would automatically result in its file being closed and its application dismissed. (Exhibit D to First Amend. Compl. (Dkt. 14-4) at 2.) The IRS then willingly inspected the wrongfully obtained information. That information is still in the IRS's possession and is now open to public inspection.

The IRS's conduct also cost Petitioner donors, time, and expenses in an amount exceeding $85,000. (First Amend. Compl. (Dkt. 14), Prayer for Relief, ¶ 6.) Petitioner filed suit in 2013, seeking pursuant to 26 U.S.C. § 7428 a decision on its application for tax exempt status that had been pending since July 2010; statutory and/or actual and punitive damages pursuant to 26 U.S.C. § 7431 for the IRS's unauthorized inspections of Petitioner's tax return information in violation of 26 U.S.C. § 6103; and declaratory and injunctive relief against the IRS from continuing violations of Petitioner's First Amendment rights. Petitioner also named the individual IRS officials involved in the Targeting Scheme, seeking damages under *Bivens* for the egregious violations of Petitioner's First Amendment rights they committed.

The IRS granted Petitioner's application for tax-exempt status shortly before its answer was due in this case (and before any discovery could occur). (True

the Vote's Opposition to the Government's Motion to Dismiss Counts I, II, IV and V, Exhibit A (Dkt. 65-1).) The district court thereafter dismissed all of the counts against the IRS under Rule 12(b)(1) as moot or under Rule 12(b)(6) for failure to state a claim. Pet.App. 58a. It also dismissed the *Bivens* claims against the individual IRS officials under Rule 12(b)(6) for failure to state a claim. Pet.App. 49a.

The D.C. Circuit reversed the district court's mootness determination and remanded the case against the IRS itself for further proceedings. The D.C. Circuit held that it was "plain" that the IRS "cannot defend its discriminatory conduct on the merits," and that it had not met its high burden of demonstrating that the supposed voluntary cessation of its illegal conducted had actually ceased and would not be repeated. Pet.App. 17a-24a.

But the D.C. Circuit affirmed the dismissal of the *Bivens* actions against the individual IRS officials, despite what one member of the panel described as their "egregious violations of the Constitution." *True the Vote v. IRS*, No. 14-5316, Transcript of Oral Argument at 28:4-5, April 14, 2016.[6] It held, in conflict with the Tenth Circuit and the District Court for the Southern District of New York, that *Bivens* remedies are simply not available against IRS officials even for the kind of egregious violations of the First Amendment that are alleged here. This petition for a writ of certiorari seeks review of the D.C. Circuit's final judgment affirming the dismissal of the *Bivens* claims

[6] Available at https://publicinterestlegal.org/files/TTVvIRS_ Oral-Argument-Transcript.pdf.

against the IRS officials who were named in their personal capacities.

REASONS FOR GRANTING THE WRIT

I. Whether a *Bivens* Remedy Should Be Available for First Amendment Violations Generally, and for the Egregious Violations By IRS Officials at Issue Here in Particular, Is An Important Issue that Has Not Been, But Should Be, Addressed by this Court.

In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), this Court held that a damages remedy can be implied directly under the Constitution to vindicate a deprivation of constitutional rights. That holding was founded on the uncontroversial "presum[ption] that justiciable constitutional rights are to be enforced through the courts." *Davis v. Passman*, 442 U.S. 228, 242 (1979). The *Bivens* Court declared that it is "'well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'" *Bivens*, 403 U.S. at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). Because "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," a *Bivens* action gives a plaintiff like True the Vote, which has no other adequate remedy to redress their constitutional injuries, the right to recover money damages from the responsible federal officials. *Bivens*, 403 U.S. at 395.

Although this Court has not yet *held* that *Bivens* is available to remedy violations of First Amendment

rights, *see Reichle v. Howards*, 132 S. Ct. 2088, 2093 n.4 (2012), it has signaled that such claims may be viable. In *Hartman v. Moore*, 547 U.S. 250, 256 (2006), this Court explained that "[o]fficial reprisal for protected speech offends the Constitution [because] it threatens to inhibit exercise of the protected right.… When the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*." (citations and quotations omitted). And on several occasions, this Court has "assumed without deciding that *Bivens* extends to First Amendment claims." *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014); *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). As stated in *Hartman*, there remains no sound reason to not extend *Bivens* to claims sounding in the First Amendment under circumstances such as those present here.

To be sure, this Court has counseled that "the decision whether to recognize a *Bivens* remedy may require two steps," *Wilkie v. Robbins*, 551 U.S. 537 (2007), but because both steps are met here, there is no impediment to this Court reaching the core issue whether *Bivens* is available for First Amendment violations in general, and First Amendment violations by IRS officials in particular. First, there is not an "alternative, existing process for protecting the [constitutionally-recognized] interest" that provides "a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'" *Minneci v. Pollard*, 132 S. Ct. 617, 621 (2012) (quoting *Wilkie*, 551 U.S. at 550) (brackets in original). Second, there are no "special factors counselling hesitation" before recognizing a *Bivens* remedy in the extraordinary circumstances presented by this case.

Id. Even if such "special factors" existed, their presence would not defeat a *Bivens* action where, as here, Congress has indicated that a *Bivens* remedy should be preserved. *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988).

Neither the Internal Revenue Code ("IRC") nor any other existing statutory scheme provides True the Vote an adequate, alternative remedy that would compensate it for the harms it suffered as a result of the egregious violations of its First Amendment rights committed by the individual IRS officials who are respondents here. In fact, Congress intended the IRC's remedies to complement, not supplant, a remedy under *Bivens*. *See infra,* p. 15. Far from counseling hesitation, therefore, the "special factors" present in this case—namely, the wide-spread and egregious nature of the IRS Targeting Scheme—weigh in favor of affording a *Bivens* remedy to True the Vote and other similarly-situated victims of the IRS Targeting Scheme. At the very least, the issue is an important one that has not been, but should be, addressed by this Court. Rule 10(c).

II. Certiorari Is Warranted to Resolve the Circuit Split on the Issue of Whether IRS Officials are Subject to *Bivens* Claims For First Amendment Violations.

In *Nat'l Commodity & Barter Ass'n, Nat'l Commodity Exch. v. Gibbs*, 886 F.2d 1240 (10th Cir. 1989) ("*Gibbs*"), the Tenth Circuit held that *Bivens* claims may be brought against IRS officials who have violated First Amendment rights, even while it rejected the use of *Bivens* to raise a Fifth Amendment challenge to the assessment of a tax penalty. *Id.* at 1248-

49.[7] That Court reaffirmed its holding in *Nat'l Commodity & Barter Ass'n, Nat'l Commodity Exch. v. Archer*, 31 F.3d 1521, 1527 (10th Cir. 1994) ("*Archer*"). The United State District Court for the Southern District of New York likewise recently allowed a *Bivens* claim against IRS officials for First Amendment violations arising out of the same Targeting Scheme at issue here, stating:

> Defendants' argument that plaintiff's claims are not cognizable in a *Bivens* action ignores the

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[7] The Tenth Circuit recognized that there is a legally cognizable distinction under *Bivens* between allegations of violations of the Fifth Amendment Due Process Clause and allegations of violations of the First Amendment, such that a *Bivens* remedy is appropriate under the latter, but not the former. Congress designed the Internal Revenue Code to provide taxpayers with due process to challenge the legality of tax penalties and assessments and other tax-related disputes. *Gibbs*, 886 F.2d at 1248. For example, Section 6703 of the IRS "sets forth the procedures by which a taxpayer may obtain review of the assessment of a penalty . . . relating to promotion of an abusive tax shelter," while Section 7429 does the same for penalties "collected by virtue of a jeopardy assessment." *Id*. Likewise, Congress enacted various provisions to resolve Petitioner's other causes of action against the IRS. *See* 26 U.S.C. § 7428 (providing applicants for tax-exempt status recourse to challenge a denial of their applications; 26 U.S.C. § 7431 (providing taxpayers recourse to seek damages for unlawful inspection and disclosure of their tax return information; *see also* 26 U.S.C. § 7433 (providing taxpayers recourse to seek damages for violations of the IRC in connection with the collection of any tax). Each of these provisions was designed to provide taxpayers with due process to resolve tax disputes in the normal course. Conversely, Congress did not design the Internal Revenue Code to deal with the unprecedented First Amendment injuries inflicted on Petitioner and other groups affected by the IRS Targeting Scheme.

> simple fact that constitutional rights, if they are to be rights at all, must have some discernible remedy. Indeed, the Supreme Court in *Hartman*, *Iqbal*, and *Davis* has implicitly recognized claims similar to those asserted here. Leaving plaintiff to pursue administrative remedies through the very agency he asserts has targeted him for retaliatory investigation would be, in essence, no remedy at all. Thus, plaintiff's claims are cognizable in a *Bivens* action.

Zherka v. Ryan, 52 F.Supp.3d 571, 580-81 (S.D. N.Y. 2014).

In contrast, the D.C. Circuit in this case summarily held that *Bivens* claims may not be brought against IRS officials for First Amendment violations. Pet.App 8a. The Second and Fourth Circuits have similarly rejected *Bivens* remedies in response to allegations that IRS officials launched tax audits in retaliation for the exercise of First Amendment rights. *Hudson Valley Black Press v. IRS*, 409 F.3d 106 (2d Cir. 2005);[8] *Judicial Watch v. Rossotti*, 317 F.3d 401

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[8] The District Court for the Southern District of New York distinguished its Circuit Court's decision in *Hudson Valley* when it allowed the *Bivens* action in *Zherka* to proceed, for several reasons. First, *Hudson Valley* was decided before this Court's "strong language in *Hartman* suggesting such claims are cognizable." *Zherka*, 52 F.Supp.3d at 579. Second, "w[]hile the legislative history of the Internal Revenue Code indicates Congress's desire to create a non-monetary scheme to challenge IRS employee misconduct, *Hudson Valley Black Press*, 409 F.3d at 112, Congress did not consider, nor could it have considered, the scenario plaintiff has alleged." *Zherka*, 52 F.Supp.3d at 580. Finally, the district court noted that "[u]nlike in *Hudson Valley*

(4th Cir. 2003). Significantly, the Fourth Circuit specifically recognized that the Tenth Circuit had, in *Archer*, allowed a *Bivens* action against IRS officials for First and Fourth Amendment violations, and that Ninth Circuit Judge Stephen Reinhardt, concurring in *Western Center for Journalism v. Cederquist*, 235 F.3d 1153, 1159 (9th Cir. 2000) (Reinhardt, J., concurring), likewise "believed a *Bivens* action did lie for damages resulting from a retaliatory audit." *Judicial Watch*, 317 F.3d at 412.[9]

The existence of a circuit split is thus clear, and broad enough to warrant review by this Court under Rule 10(a). Even if additional percolation could broaden the split further, review is warranted now because "egregious violations of the Constitution" of the sort at issue here are particularly troubling when committed by officials of an agency as powerful as the Internal Revenue Service.

Press, plaintiff is not alleging a mere retaliatory tax audit, but a retaliatory investigation involving potential criminal sanctions." *Id.*

[9] The Ninth Circuit panel did not reach the *Bivens* issue in *Western Center for Journalism* because it held that the claim was barred by the statute of limitations. 235 F.3d at 1157. It did note that whether *Bivens* was available to remedy alleged First Amendment violations from a retaliatory tax audit was "a question of first impression" in the Ninth Circuit, however, thereby implicitly recognizing that its prior decision in *Wages v. IRS*, 915 F.2d 1230 (9th Cir. 1990), denying a *Bivens* remedy in a tax collection case, was not controlling. That is the same line between ordinary taxpayer cases challenging tax assessments and extraordinary constitutional violation cases that the Tenth Circuit and Southern District of New York have drawn, but which the D.C. Circuit here declined to draw.

To be sure, this Court has declined to recognize a *Bivens* remedy when Congress has, by statute, "provided what it considers to be an adequate remedial mechanism for constitutional violations that may occur in the course of" administering a government program. *Schweiker*, 487 U.S. at 423. Following that authority, most of the circuit courts of appeal, including the Tenth and D.C. Circuits, have held that *Bivens* remedies are not available for the typical taxpayer suit challenging IRS actions surrounding the collection of taxes. *See Dahn v. United States*, 127 F.3d 1249, 1254 (10th Cir. 1997); *Kim v. United States*, 632 F.3d 713 (D.C. Cir. 2011); *see also Adams v. Johnson*, 355 F.3d 1179, 1181 (9th Cir. 2004) ("*Bivens* relief is unavailable for challenges to IRS partnership tax assessment and collection activities"); *Shreiber v. Mastrogiovanni*, 214 F.3d 148, 154 (3rd Cir. 2000) (*Bivens* not available to remedy alleged religiously-motivated bias that lead to tax assessment); *Fishburn v. Brown*, 125 F.3d 979, 983 (6th Cir. 1997) (no *Bivens* claim for alleged due process violations in property seizure for back taxes);[10] *Vennes v. Unknown Number*

[10] The Sixth Circuit has subsequently allowed *Bivens* claims for alleged retaliation against a prisoner for the exercise of First Amendment rights, *Hill v. Lappin*, 630 F.3d 468, 471 (6th Cir. 2010), and noted that it has "recognized that a *Bivens* remedy may be implied under the First Amendment" in other contexts as well, *Downie v. City of Middleburg Heights*, 301 F.3d 688, 696 (6th Cir. 2002). Whether the Sixth Circuit will extend that ruling to IRS officials in the Targeting Scheme litigation now pending in the District Court for the Southern District of Ohio remains to be seen. When the case was first before it on an interlocutory appeal dealing with a discovery order, it did not address the District Court's holding that *Bivens* was not available for First

of Unidentified Agents of the U.S., 26 F.3d 1448, 1454 (8th Cir. 1994) (no *Bivens* action for "overzealous tax assessment and collection activities"); *McMillen v. U.S. Dep't of Treasury*, 960 F.2d 187, 190 (1st Cir. 1991) (no *Bivens* remedy for "wrongful failure to release tax liens"); *Wages v. IRS*, 915 F.2d 1230, 1235 (9th Cir. 1990) (no *Bivens* action for alleged unconstitutional conduct in collection of taxes); *Baddour, Inc. v. United States*, 802 F.2d 801, 808-09 (5th Cir. 1986) (no *Bivens* action for wrongful levy); *Cameron v. IRS*, 773 F.2d 126, 127, 129 (7th Cir. 1985) (no *Bivens* remedy in "fairly typical 'tax protester' suit"; "Congress has given taxpayers all sorts of rights against an overzealous officialdom"). But this case is anything but ordinary, and it is not about the collection of taxes. It is, rather, about the fundamental right to associate to advance a common cause—and the ability of government officials to unilaterally, illegally, and unabashedly stymie that right across the nation for years on end.

The fact that the Tenth Circuit in *Dahn* is in agreement with the First, Third, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits in rejecting *Bivens* claims in ordinary taxpayer assessment and collection suits is particularly significant, because the Tenth Circuit did not in that case overrule its prior decisions in *Gibbs* and *Archer* recognizing *Bivens* claims for First Amendment violations. Instead, by leaving those decisions in place, it drew the very line

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Amendment violations committed by IRS officials. *In re U.S.*, 817 F.3d 953 (6th Cir. 2016); *NorCal Tea Party Patriots v. I.R.S.*, No. 1:13-CV-341, 2014 WL 3547369, at *7-*8 (S.D. Ohio July 17, 2014). The District Court did recognize the split of authority among the circuit courts, however. *Id.* at *8.

that the D.C. Circuit here (and the Second and Fourth Circuits in *Hudson Valley* and *Judicial Watch*, respectively) declined to draw: The Internal Revenue Code provides the exclusive remedy for ordinary taxpayer claims challenging assessment and collection activity but Congress did not thereby foreclose *Bivens* remedies for the kind of First Amendment violations at issue here. As the Tenth Circuit explained:

> [W]hile the comprehensive scheme of the Internal Revenue Code should not be indiscriminately disrupted by the creation of new remedies, certain values, such as those protected by the first and fourth amendments, may be superior to the need to protect the integrity of the internal revenue system. We therefore recognize that the NCBA may bring a *Bivens* action for violations of the first and fourth amendments.

Gibbs, 886 F.2d at 1248-49.

Indeed, the legislative history surrounding the adoption of the relevant provisions of the Internal Revenue Code strongly indicates that Congress did not provide a statutory damages remedy for constitutional violations by IRS officials of the sort at issue here because it recognized, in accord with testimony provided by the IRS Commissioner himself, that "*Bivens* suits are an available remedy for those whose Constitutional rights have been violated." Taxpayers Bill of Rights: Hearings on S. 579 and S. 604 Before the Subcommittee on Private Retirement Plans and Oversight of the IRS of the Senate Committee on Finance at 243, 100th Cong., 1st Sess. 177 (Apr. 10, 1987) (statement of IRS Commissioner Lawrence B.

Gibbs). Whether that is the case or not—and Petitioner believes it is—either the D.C. Circuit or the Tenth Circuit is not giving effect to Congress's intent. Review by this Court is warranted to resolve the conflict.

III. Those Who Committed the "Egregious" Violations of Constitutional Rights at Issue Here Need to be Held Accountable Under *Bivens*, Lest The Rule of Law Itself Be Irreparably Undermined.

"Among the most serious allegations a federal court can address are that an Executive agency has targeted citizens for mistreatment based on their political views," noted the Sixth Circuit in parallel litigation still pending in Ohio. *In re U.S.*, 817 F.3d 953, 955 (6th Cir. 2016). "No citizen—Republican or Democrat, socialist or libertarian—should be targeted or even have to fear being targeted on those grounds." *Id.*

One of the more troubling aspects of this case (and the several other similar cases) is that none of the perpetrators of the IRS Targeting Scheme have been held to account for their unconstitutional conduct. This conduct affected the fundamental rights of thousands of Americans and spanned across years. Yet no one has been prosecuted; no one appears even to have been disciplined; and no one has been held civilly liable. On the contrary, several of the IRS official involved continue in their positions, and those who have retired draw their pensions,[11] funded through the

[11] CNS NEWS, Lerner's Pension Could Be as Much as $102,600/Year, $3.96 Million Lifetime (Sept. 30, 2013), available at

taxes paid by the very citizens wronged by their Targeting Scheme and unencumbered by any liability for the harm caused by their unconstitutional conduct. Even those who lied under oath to Congress[12] and who appear to have obstructed justice by destroying and withholding[13] relevant documents that had been requested by Congress during its investigation of the

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http://www.cnsnews.com/commentary/pete-sepp/lerners-pension-could-be-much-102600year-396-million-lifetime (last visited Oct. 31, 2016).

[12] On March 22, 2012, Respondent Shulman—then IRS Commissioner—appeared before a congressional committee. Chairman Charles Boustany asked him, "Can you give us assurances that the IRS is not targeting particular groups based on political leanings?" U.S. House of Representatives, Committee on Oversight and Government Reform, *The [IRS's] Targeting of Conservative Tax-Exempt Applicants: Report of Findings for the 113th Congress* (Dec. 23, 2014), *available at* https://oversight.house.gov/wp-content/uploads/2014/12/December-2014-IRS-Report.pdf ("Oversight Report"). Shulman responded, "[Y]es, I can give you assurances…. There is absolutely no targeting." *Id*. at 57-58. Later, Shulman acknowledged that he was aware of the application delays and the IRS's use of inappropriate questions when he testified. *Id*. at 59. According to the Committee, Shulman's knowledge "suggests that he knowingly provided misleading testimony to Congress." *Id*. at 60.

[13] In August 2013, the House Oversight Committee subpoenaed from the IRS all correspondence sent or received by Lois Lerner since January 1, 2009. Oversight Report at 71. The IRS failed to provide the documents. *Id*. On March 26, 2014, IRS Commissioner Koskinen testified that the IRS would provide all of Lerner's emails. *Id*. But he knew then, and had since at least February 2014, that the IRS had "lost" Lerner's emails from January 1, 2009 to April 2011 due to an alleged "computer crash." *Id*. at 72. Yet he did not divulge that information. Not until June 13, 2014 did the IRS acknowledge the destruction of Lerner's emails.

scandal have avoided accountability, because Congress's citation for contempt has gone unenforced. *See*, *e.g.*, Evan Perez, "No contempt of Congress charges against Lois Lerner," CNN (April 1, 2015)[14]; Ronald C. Machon, Jr., U.S. Attorney for District of Columbia, Letter to John A. Boehner, Speaker of the House of Representatives (March 31, 2015) (announcing that he would not present the contempt citation to a grand jury); *see also* H.R. 737, Condemning and Censuring John A. Koskinen, the Commissioner of Internal Revenue, 114th Cong. (2015-16).

Such a lack of accountability is intolerable in any government agency, but particularly so in one as powerful and intrusive as the Internal Revenue Service. "The power to tax is . . . the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people." *Citizens' Sav. & Loan Ass'n v. City of Topeka*, 87 U.S. 655, 663 (1874); *see also*, *e.g.*, *U. S. v. Bisceglia*, 420 U.S. 141, 145-46 (1975) (noting that the IRS has "a broad mandate to investigate and audit" individuals and to

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Id. at 66. Even then, its admission was buried in a twenty-seven page letter to the Senate Committee on Finance sent on a Friday afternoon. *Id*. On June 20, 2014, Commissioner Koskinen testified that the IRS went to "great lengths" and made "extraordinary efforts" to recover Lerner's lost emails, and that the IRS "confirmed that [email] backup tapes from 2011 no longer existed." *Id*. at 75. Five months later, Commissioner Koskinen's testimony was proved false by the Inspector General, which easily located approximately 30,000 of Lerner's "lost" emails on back-up tapes located in West Virginia. *Id*. at 76. Contrary to Commissioner Koskinen's claims, the IRS did not even search all servers for the emails. *Id*. at 75.

[14] Available at http://www.cnn.com/2015/04/01/politics/lois-lerner-contempt-charges-congress/.

"examine" their "books, papers, records, or other data which may be relevant," without the constraints of "probable cause, in the traditional sense, despite the fact that "such investigations unquestionably involve some invasion of privacy"); *U.S. v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984) ("Congress has endowed the IRS with expansive information-gathering authority"). Indeed, this Court has frequently noted that "the power to tax is the power to destroy." *Citizens' Sav. & Loan Ass'n*, 87 U.S. at 663; *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819).

The Constitution was designed to offset the awesome powers of government by "oblig[ing] it to control itself." THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1961). *Bivens*—the mechanism through which citizens enforce those controls when none other is available—is a critical check on powerful government officials, holding them accountable for violations of the constitutional rights of citizens. *Carlson v. Green*, 446 U.S. 14, 20-21 (1980); *cf. Panhandle Oil Co. v. State of Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting) ("The power to tax is not the power to destroy while this Court sits"). The D.C. Circuit's determination that *Bivens* is not available here, where its necessity is perhaps most urgent, warrants this Court's review.

It is not enough that the IRS, after the fact, be ordered to now conduct itself in accordance with federal law. Declaratory and injunctive relief cannot make Petitioner and the hundreds of other targeted groups whole again. Nor will such a "remedy" effectively ensure that U.S. citizens are not again targeted for the beliefs they hold. After all, "[i]t must be remembered that the purpose of *Bivens* is to deter *the officer*."

FDIC v. Meyer, 510 U.S. 471, 485 (1994) (emphasis in original); *see also Carlson*, 446 U.S. at 20-21 ("the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose" and is "a more effective deterrent than [a] remedy against the United States" because it "is recoverable against individuals"). If government officials themselves are not held accountable for the kind of "egregious" violations of constitutional rights at issue here, others will undoubtedly be emboldened to trample constitutional rights in the future when it serves their political purposes, with grave consequence not only to the rights of citizens but to the rule of law itself. As Abraham Lincoln warned long ago, if the laws be continually disregarded with impunity, "the alienation of the American People's affections from the Government [will be] the natural consequence." A. Lincoln, "The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838), *reprinted in* 1 The Collected Works of Abraham Lincoln 108, 111-12 (R. Basler ed. 1953).

This case, therefore, certainly presents an important matter that has not been, but should be, resolved by this Court. Rule 10(c).

CONCLUSION

This Court has assumed, without deciding, that *Bivens* remedies are available for First Amendment violations by federal officials. The lower courts disagree on whether that assumption applies in the particular context of IRS officials. That split alone would warrants this Court's review, but in the context of the unprecedented and "egregious" violations of First Amendment rights at issue here, the case for granting

the petition for certiorari is even more compelling. The petition for writ of certiorari should be granted.

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