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September 14, 2016

Honorable Rep. John C. Fleming, M.D.
U.S. House of Representatives
2182 Rayburn HOB
Washington, D.C. 20515

Re: Free Speech Coalition Supports H.Res. 828 to Impeach IRS Commission John Koskinen

Dear Dr. Fleming:

The Free Speech Coalition hereby announces its support for H. Res. 828, and expresses our deep thanks to you for your continuing effort to force a House vote to impeach IRS Commissioner John Koskinen.

The Free Speech Coalition, Inc. ("FSC") was founded in 1993 and is tax-exempt under section 501(c)(4) of the Internal Revenue Code ("IRC"). FSC is a nonpartisan group of nonprofit organizations and the for-profit organizations which help nonprofits raise funds and implement programs. FSC's purpose is to help protect the First Amendment rights of those organizations through the reduction or elimination of excessive federal, state, and local regulatory burdens which have been placed on the exercise of those rights.

The Political Weaponization of the IRS

FSC and its members have worked for years to shed light on abuses by former IRS Exempt Organizations Director Lois Lerner and her participation in delaying applications for tax-exempt status by dozens of tea party and/or conservative organizations.[1] In some cases, those applications were delayed by the IRS for up to five years solely because of the ideology of the organizations. We have been shocked that Commissioner John Koskinen has worked to evade legitimate Congressional requests for information about the corrupt deeds of former IRS employee Lerner, as well as others who are likely still with the Service.

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[1] *See, e.g.*, G. Will, "Impeach the IRS Commissioner," National Review (Sept. 10, 2016).

Although the Free Speech Coalition was not in existence when President Richard Nixon attempted to use the Internal Revenue Service to punish those he wanted placed on his "enemies" list,[2] that earlier attempt demonstrates that the risk the Internal Revenue Service will be misused for political purposes is real, and continuing. The problem is not partisan in nature — it is bipartisan, and members of both parties should join in supporting impeachment of Commissioner Koskinen.

Further Reason For Impeachment

However, in addition to the reasons cited in your House Resolution, there is another critically important reason that FSC believes that Congress should press its case for impeachment. Commissioner Koskinen is guilty of nonfeasance insofar as he has failed to take any steps to protect confidential federal taxpayer donor records from compelled seizure and disclosure by California Attorney General Kamala Harris.

Attorney General Harris, and the California Department of Justice which she heads, revolutionized charitable solicitation filings by charities in California by promulgating an illegal rule[3] of requiring disclosure of the identities of contributors to charities soliciting contributions in California.[4] This change mandated that charities wanting to comply with California charitable solicitation law must file with the state unredacted Schedules B to the organizations' Form 990 — the annual federal information tax return for charities. The California Attorney General's new disclosure requirement is the subject of widespread protests and at least three pending legal challenges.[5]

Moreover, even though the Harris regulations are being challenged in court, many charities believed that their donor lists would be protected, and they have entrusted their Schedules B to Attorney General Harris. Attorney General Harris has not lived up to their

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[2] The Nixon Administration's use of the IRS figured prominently in the impeachment proceedings against President Nixon. *See* Statement of Information, Hearings before the House Judiciary Committee on Resolution to Impeach Richard Nixon, Book VIII "Internal Revenue Service" (May-June 1974), https://archive.org/details/statementofinfor08unit.

[3] *See* California Department of Justice, New Regulations Adopted Pursuant to the Supervision of Trustees and Fundraisers for Charitable Purposes Act, effective January 1, 2016, https://oag.ca.gov/charities/notice-adoption-amend.

[4] The organizations from which California demands disclosure of contributor information are those exempt from federal income taxation under IRC § 501(c)(3).

[5] New York Attorney General Eric Schneiderman is guilty of a similar illegal unauthorized access regime collecting Schedules B, but for simplicity sake, this letter focuses on facts dealing with California Attorney General Harris.

confidence. There has been substantial reckless disclosure, by California, of this Schedule B contributor identity information, as described below. Schedule B is "tax return information" protected from public disclosure under IRC § 6103. The penalties for violation of this federal statute are severe. *See* IRC §§ 7213 and 7431.

The IRS under Commissioner Koskinen has allowed these unlawful demands to continue, without even an investigation, much less any determination of unauthorized disclosure, or imposition of the sanction that no federal tax records will be shared with the State of California, or any recommendation to the U.S. Department of Justice for prosecution of Attorney General Harris.

Internal Revenue Code and IRS Form 990

Under the federal tax system, donor information is reported by tax-exempt organizations confidentially to the Internal Revenue Service ("IRS") on Schedule B to IRS Form 990, which is filed annually with the IRS.[6] Such information includes the names, addresses, and contribution amounts of certain large donors — generally those contributing over $5,000 during the tax year. Clearly, the contributor information provided to the IRS in a charity's Form 990 Schedule B is tax return information, *see* IRC § 6103(b)(2)(A), which is expressly protected from disclosure.[7] *See* IRC § 6104(d)(3). Even the IRS itself may not disclose such donor information to those who request to inspect the charity's Form 990. *See* IRC § 6104(b).

Absent the Secretary of Treasury's determination of cause (*i.e.*, non-compliance with certain state law) in a particular case, *see* IRC § 6104(c)(2)(D), there is no authorization for disclosing such donor information to state officials. Although the Internal Revenue Code provides a specific mechanism for state officials to inspect confidential tax return information of certain exempt organizations by direct request to the Secretary of the Treasury (*see* IRC § 6104(c)(3)), IRC § 501(c)(3) charities are explicitly exempted from that provision. The confidentiality of such tax return information is strongly protected under IRC § 6103, which forbids officers and employees of the United States from disclosing returns or return information unless authorized by the statute.

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[6] The House passed H.R. 5053 on June 14, 2016, which would prohibit the IRS from requiring the filing of donor information with an exempt organization's Form 990.

[7] Federal law requires that an exempt organization's Form 990 must be made available to the public upon request, but the statute authorizes Schedule B donor name and address information to be redacted from the Form 990 to create the charity's "public Form 990." (*See* IRC § 6104(d)(3).) The public Form 990 is the version that must be provided (by the charity or by the IRS) to members of the public, who are entitled to inspect such returns of charities and other tax-exempt organizations.

New Regulatory Requirement Imposed by California Attorney General

To support their activities, many charities exempt from federal income tax under IRC § 501(c)(3) solicit charitable contributions nationwide, including in California. In order to legally solicit tax-deductible contributions in California, entities must first register with the California's Registry of Charitable Trusts, which is administered by California's Department of Justice under the supervision and leadership of the California Attorney General (also "CAG" herein).[8] Until recently, such organizations required to register with the State of California submitted to the CAG their most recent "public" IRS Form 990 **redacted** to exclude donor information on the Form's Schedule B. Recently, the CAG changed the California system to require charities to submit **unredacted** Schedules B.[9] If such information is not provided, the charity in question will not be registered to conduct fundraising solicitations in California.[10]

No California statute calls for charities to file unredacted Schedule B donor information; the CAG is requiring their filing on her own. The CAG will withhold authorization to conduct charitable fundraising in California from any charity that does not provide an unredacted Schedule B. Moreover, the CAG does so without any corollary state legal requirement imposing a duty of confidentiality on the State and its agents with respect to such confidential, proprietary information.

Certain public charities have challenged the new California requirement in at least three separate federal lawsuits, and the cases are pending. In the meantime, however, many public charities desiring to conduct fundraising in California have registered with California's Registry of Trusts and have been required to provide unredacted Form 990 Schedule B with their registration applications, subject to the CAG's promise that such information will be kept confidential.

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[8] Generally, such a registration system for charities seeking to solicit public contributions in a state is required by 40 of the 50 States. In the other 10, no registration is required.

[9] The New York Attorney General has adopted requirements similar to those adopted by the California Attorney General demanding that nonprofit organizations seeking to register there for authorization to conduct charitable solicitations must submit an unredacted Form 990 as part of the registration or registration renewal package. FSC is unaware of any other State making such a demand.

[10] *See* California Department of Justice, New Regulations Adopted Pursuant to the Supervision of Trustees and Fundraisers for Charitable Purposes Act, effective January 1, 2016, https://oag.ca.gov/charities/notice-adoption-amend.

The CAG's Wrongful Disclosure of Confidential Taxpayer Information

In one of the federal cases challenging the CAG's Form 990 Schedule B forced-disclosure policy — Americans for Prosperity Foundation v. Harris, No. 2: 14-cv-09448-R-FFM (C.D. Cal) — discovery in the district court revealed that the California Registry of Charitable Trusts has improperly posted many hundreds of unredacted Form 990 Schedules B publicly on the Registry's website — in obvious violation of the CAG's purported confidentiality policy and promise. Moreover, discovery revealed that the Registry does not employ a programmer on its staff whose job it is to prevent such breaches. *See* Response of Plaintiff-Appellee to Defendant-Appellant's Motion to Stay Trial Proceedings Pending Appeal,[11] Americans for Prosperity Foundation v. Harris, Case No. 15-55446 (9th Cir.), pp. 17-18.

According to plaintiff-appellee Americans for Prosperity Foundation, more than 1,400 unredacted Schedules B have been improperly disclosed to the public on the Registry's website thus far. Presently, the scope of the harm that has occurred as a result of those wrongful disclosures is unknown, but certainly donors to charities can no longer rely on representations from the CAG that their identities are being or will be protected. Moreover, the insult visited by the CAG on the First Amendment rights of public charities and their supporters is ongoing and substantial.

Apparent Violations of Federal Law

IRS Commissioner John Koskinen has a duty to ensure that federal tax laws are being enforced. He should have investigated, or recommended that the U.S. Department of Justice investigate, California Attorney General Kamala Harris for the following matters:

First, the Internal Revenue Code makes it a felony to solicit "any return or return information" in exchange for "any item of material value." Such a violation is punishable by up to five years in prison, fines up to $5,000, or both. *See* IRC § 7213(a)(4). The CAG is offering approval of charitable fundraising applications only in exchange for applying charities' "return or return information," and is withholding approval for those charities who choose not to provide it. The CAG has also completed a rulemaking which will authorize it to threaten such charities with administrative fines. The CAG's actions are in violation of the prohibition against solicitation in IRC § 7213(a)(4), and should have been investigated by the IRS and/or the Justice Department.

Second, the CAG is obviously attempting an end-run around the strictures of IRC § 6103 in demanding from public charities what the CAG is not entitled to obtain from the IRS. As discussed above, a public charity's Form 990 Schedule B, including the information

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[11] http://freebeacon.com/wp-content/uploads/2015/11/afpf-motion.pdf.

therein, constitutes a "return" under IRC § 6103(b)(1), and donors' identities and addresses also constitute tax "return information" under IRC § 6103(b)(2). Such tax return information was collected and filed for federal purposes, not to comply with any State requirement. And, in the absence of an actual law-enforcement purpose, the CAG is not able to obtain such information from the IRS, either under IRC § 6103 or § 6104.

In order to obtain such tax return information, therefore, the CAG is essentially extorting it from those public charities wishing to solicit charitable contributions in California. Once such information has been forced from the charities, moreover, it appears that the CAG is not protecting the information from public disclosure. In addition to the wholesale disdain for the First Amendment rights of U.S. public charities and their supporters, all of the protections for such return information envisioned by Congress in enacting IRC § 6103 are being thrown to the wayside by the CAG, who has discovered what she hopes is a loophole in the law protecting tax return information. Clearly, this is a matter that deserves the attention of the IRS — and even the U.S. Department of Justice — as a state regulatory agency attempts to circumvent the strict requirements of federal law.

Federal law also clearly prohibits the CAG's willful unauthorized inspection of donor names and addresses. IRC § 7213A(a)(2) reads: "State and other employees -- It shall be unlawful for any person (not described in paragraph (1)) willfully to inspect, except as authorized in this title, any return or return information acquired by such person or another person under a provision of section 6103 referred to in section 7213(a)(2) or under section 6104(c)."[12] [13]

Also, IRC § 7213A(b)(1) states, "[a]ny … violation of subsection (a) shall be punishable upon conviction by a fine in any amount not exceeding $1,000, or imprisonment of not more than 1 year, or both, together with the costs of prosecution." Clearly, the CAG's

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[12] IRC § 7213A(c) states, "For purposes of this section, the terms "inspect," "return," and "return information" have the respective meanings given such terms by section 6103(b)." IRC § 6103(b) states, "The terms 'inspected' and 'inspection' mean any examination of a return or return information."

[13] IRC § 7602, "Examination of books and witnesses," reads in part:

> For the purpose of **ascertaining the correctness of any return**, making a return where none has been made, **determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability**, the Secretary is authorized-
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry. [Emphasis added.]

effort to end-run the proscription of IRC § 7213A — by extorting from charities donor information that could not be obtained directly from the IRS pursuant to a legitimate investigative demand — should have compelled Commissioner Koskinen to act.

Conclusion

The IRS under Commissioner Koskinen has furthered the IRS-Lois Lerner scandal by failing to guard confidential tax return information of nonprofit organizations. Commissioner Koskinen has been derelict in ensuring that the IRS protects confidential data under its unique statutory jurisdiction, and has therefore contributed to violations by General Harris of the post-Watergate unauthorized access laws.

We urge all members of the House of Representatives to support your Resolution to impeach Commissioner Koskinen.

Sincerely yours,

William J. Olson
Legal Counsel