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LAWS AND ENFORCEMENT GOVERNING THE POLITICAL ACTIVITIES OF TAX-EXEMPT ENTITIES

HEARING

BEFORE THE

SUBCOMMITTEE ON TAXATION AND IRS OVERSIGHT

OF THE

COMMITTEE ON FINANCE

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LAWS AND ENFORCEMENT GOVERNING THE POLITICAL ACTIVITIES OF TAX-EXEMPT ENTITIES

WEDNESDAY, MAY 4, 2022

U.S. SENATE,
SUBCOMMITTEE ON TAXATION AND IRS OVERSIGHT,
COMMITTEE ON FINANCE,
Washington, DC.

The hearing was convened, pursuant to notice, at 2:08 p.m., via Webex, in Room SD–215, Dirksen Senate Office Building, Hon. Sheldon Whitehouse (chairman of the subcommittee) presiding.

Present: Senators Stabenow, Menendez, Cortez Masto, Warren, and Thune.

Also present: Democratic staff: Dan Smith RuBoss, Senior Economic Policy Advisor to Senator Whitehouse; and Claire Kim, Counsel to Senator Whitehouse. Republican staff: James Williams, Tax and Trade Advisor to Senator Thune; and Jason Van Beek, General Counsel to Senator Thune.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM RHODE ISLAND, CHAIRMAN, SUBCOMMITTEE ON TAXATION AND IRS OVERSIGHT, COMMITTEE ON FINANCE

Senator WHITEHOUSE. Welcome, everyone. I will call the hearing to order and express my gratitude to the witnesses for being here, and to Senator Stabenow for being here. Ranking Member Thune is on his way, and if somebody could do something about my volume control—I have to whisper because, otherwise, I will blow the doors off the room—that would be a big help.

We are here to consider what is going on with enforcement of the political activities of tax-exempt organizations. And I will make an opening statement and then, if Senator Thune is here, I will invite him to make an opening statement. If no one is here but Senator Stabenow, I will invite her to say a few words, and then we will get on to the witness testimonies. And I want to thank Ms. Ravel, who is here also, but electronically, so she is not in the room with us.

Twelve years ago, the Supreme Court rested its decision in *Citizens United* on the false predicate that effective disclosure—their words—effective disclosure would let voters know who was speaking to them. That was important, because it was the means by which it would dispel corruption.

Well instead, a torrent of dark money, a "tsunami of slime," it has been called, washed into our politics. That torrent washed into our politics from behind a veil of organizations formed under section 501(c)4 of the Internal Revenue Code.

Unlike most groups spending money in elections, 501(c)4 organizations are not required to disclose their donors. The statute governing these organizations states they must be operated exclusively for the promotion of social welfare, but the IRS muddied those waters with a regulation that allowed social welfare organizations to devote up to 49.9 percent of their spending to political activities and still qualify for 501(c)4 status.

Predictably, these organizations became a conduit for the secret political spending that *Citizens United* said was "corrupting." In the decade preceding *Citizens United,* 501(c)4 organizations spent $103 million on political expenditures. In the decade following it, they spent over $1 billion. It was a hell of a tsunami.

The dark money flowing through the 501(c)4s has gotten darker. As soon as the IRS sought to review the explosion of these political groups after *Citizens United,* dark money interests whipped up a scandal, claiming the IRS was unfairly targeting conservative groups for scrutiny.

Let's set the record straight. This is false. An exhaustive 2017 report from the Treasury Inspector General for Tax Administration found no such unfair targeting of conservative groups, as did a bipartisan investigation from this very committee. And I ask unanimous consent that the Treasury Inspector General report [1] and the Committee on Finance, U.S. Senate, report [2] be put into the record here.

The damage was nevertheless done. The fake scandal cowed the IRS, and an appropriations rider in place in 2015 blocked the IRS from promulgating regulations to clarify political rules for 501(c)4 organizations. This means groups flout limits on political activity with little risk to their tax-exempt anonymized status.

As early as 2012, a ProPublica investigation found that roughly 3 in 10 of the 501(c)4 organizations they surveyed reported to the FEC that they had spent money on electioneering, but reported to the IRS that they had spent no money to influence elections either directly or indirectly. It is hard to see how both statements could be true.

A report out last week from the Citizens for Responsibility and Ethics in Washington describes several recent examples of this problem. [3] One example is the NRA. And I ask unanimous consent that the CREW report I am referring to be put into the record, and without objection.

CREW says, and I will quote them here: "Between 2008 and 2013, the NRA reported to the FEC, the Federal Election Commission, that it spent nearly $11 million in independent expenditures out of its 501(c)4. In 2012, it reported making $7,448,385 dollars in independent expenditures, more than half of which were spent

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[1] *https://www.tigta.gov/sites/default/files/reports/2022-02/201710054fr.pdf.*
[2] *https://www.finance.senate.gov/imo/media/doc/CRPT-114srpt119-pt1.pdf.*
[3] *https://www.citizensforethics.org/reports-investigations/crew-reports/the-irs-is-not-enforcing-the-law-on-political-nonprofit-disclosure-violations/.*

opposing Barak Obama or supporting Mitt Romney in that year's presidential race."

Remarkably, the NRA told the IRS, under penalty of perjury, that it spent absolutely nothing on political campaign activities between 2008 and 2013, nor did it file a Schedule C disclosing details of its political spending.

Despite all this open and notorious predication for investigating whether there were false statements made, there is no sign that the IRS is doing much enforcement. A 2018 Treasury Inspector General for Tax Administration Report estimated that over 1,000 cases of impermissible political activity by 501(c)4s weren't even forwarded to the agency's committee tasked with recommending audits, despite meeting the IRS criteria.

According to a 2020 GAO review, the IRS between 2010 and 2017 conducted only 226 examinations involving impermissible political campaign intervention. Of those, only 6 percent, a total of 14—14 examinations—involved 501(c)4s. That is fewer than two per year in the middle of that dark money tsunami.

We cannot tolerate a system that lets 501(c)4 groups operate without oversight, not when they spend tens, even hundreds of millions of dollars per election cycle without disclosing their donors. Citizens are denied that most basic right to know what is going on around them in their democracy.

First, we should free the IRS to promulgate clear rules for 501(c)4 organizations—all of them.

Second, the IRS should use the tools and resources it already has to crack down on blatant abuse. Lax enforcement sends a message that rules don't matter.

Third, referrals need to be made of likely false statements so that the right officials in law enforcement, who prosecute false statements as a matter of regular bread and butter, can do their jobs and investigate. We are aware of no referrals at all to DOJ despite years of CREW, ProPublica, and press reporting of these flagrant discrepancies.

I hope my colleagues will join me in untying the IRS's hands and providing them the tools and resources to enforce its most basic rules. The premise of transparency in *Citizens United* has been violated for far too long.

With that, let me recognize my distinguished ranking member Senator Thune.

[The prepared statement of Senator Whitehouse appears in the appendix.]

OPENING STATEMENT OF HON. JOHN THUNE, A U.S. SENATOR FROM SOUTH DAKOTA

Senator THUNE. Thank you, Chairman Whitehouse. It is a pleasure to work with you on this subcommittee. The Subcommittee on Taxation and IRS Oversight is uniquely positioned to oversee the activities of the Internal Revenue Service, the executive branch agency charged with tax matters.

It is my hope that we can use this hearing as a foundation to conduct appropriate oversight of the IRS and ensure that Americans' private tax-related information is protected.

Today we are here to discuss the laws and enforcement as they apply to the political activities of tax-exempt entities and, by extension, how those laws and any proposed reforms impact Americans' freedom of speech, association rights, and ability to privately give to caucuses that they care about.

Free speech is not just good in theory. It is a key driver of a healthy democracy. And allowing Americans to privately give to causes they care about is a fundamental component of protecting free speech and the First Amendment.

Partisan legislation to force tax-exempt groups to choose between spreading their message and protecting donors' privacy runs a real and potentially corrosive risk of chilling speech. A few words about the scope of 501(c) organizations and the IRS.

Section 501(c) of the Internal Revenue Code describes 28 different categories of organizations that generally are exempt from Federal income tax. And we are going to focus much of today's discussion around four categories. These include 501(c)3 charitable organizations, 501(c)4 social welfare organizations, 501(c)5 labor organizations, and 501(c)6 trade associations and business leagues—in other words, a wide range of entities that represent diverse constituencies and causes across the country, and include churches, charities, nonprofit foundations, advocacy groups, unions, and trade associations.

The chairman has a particular interest in 501(c)4 organizations and their impact on campaigns. And according to a recent *New York Times* analysis, the impact is anything but small, particularly for politicians on the left. *The Times* stated that in the last election, the left raised and spent more money from 501(c)4 donors than the right. The report showed that 15 of the most politically active nonprofit organizations that generally align with the Democratic Party spent more than $1.5 billion in 2020, hundreds of millions of dollars more than a comparable sample group aligned with the Republican Party.

There was a deep bench of well-funded 501(c)4 organizations aligned with the Democratic Party that expressly support progressive policies and causes. Of course, there are plenty of related organizations on the right as well.

The Senate Finance Committee has a long history of oversight in the 501(c) tax-exempt entities and the IRS's treatment of such organizations. Just a few years ago, the committee conducted a 2-year bipartisan investigation into the IRS's inappropriate targeting of 501(c)3 and 501(c)4 applications for tax-exempt status.

The investigation, which culminated in 2015, found that the IRS grossly mismanaged applications filed by Tea Party and other conservative organizations. The report showed that the IRS improperly disclosed taxpayer information from numerous conservative organizations, and that the agency systematically selected conservative organizations for heightened scrutiny in a manner wholly different from how it processed applications from left-leaning organizations.

Indeed, the unifying factor for how Tea Party applicants were handled at the IRS was not specific political activities, but rather an underlying political philosophy.

Americans, regardless of political affiliation, deserve to have an IRS that will administer the tax code with fairness and integrity

and safeguard their private taxpayer information. Regrettably, recent history and current developments show the agency is falling short.

Since last year's massive IRS leak or hack of taxpayer information, which the left-leaning ProPublica obtained and then used to publicize confidential taxpayer details, there has been no meaningful follow-up from the agency or the administration. Perhaps that is because the unauthorized disclosure of private taxpayer data by ProPublica conveniently advanced a preferred political narrative on tax policy.

More fundamentally, the apparent leak, or hack, of private taxpayer information was a serious breach of trust between Americans and their government. And it puts everyday citizens at risk of intimidation or harassment by ideological foes. Americans have a right to know that the personal information they provide to the IRS remains confidential and will not be used to target them or to advance partisan political agendas.

Americans are justifiably concerned about the IRS or, for that matter, any regulatory agency collecting more sensitive taxpayer and donor information than is necessary, and how that collection could impact their lives and their freedom of speech. Policymakers would be wise to heed their concerns.

We have an excellent panel before us today. Thank you all for being here, and I look forward to hearing your testimony.

Thank you, Mr. Chairman.

[The prepared statement of Senator Thune appears in the appendix.]

Senator WHITEHOUSE. Thank you very much, Senator Thune.

I will also give Senator Stabenow a chance to say a few opening words. The bombshell that dropped out of the Supreme Court the night before last has put a lot of turbulence into our lives and has caused a lot of unexpected meetings and things to happen. So, Senator Stabenow is facing, as a member of the Democratic leadership, a lot of activity, so I am delighted that she is here and would like to have her have this opportunity.

OPENING STATEMENT OF HON. DEBBIE STABENOW, A U.S. SENATOR FROM MICHIGAN

Senator STABENOW. Thank you very much, Mr. Chairman and Ranking Member. First, I would say I would hope that one of the things that comes out of all of the work on this would be to recommend that we pass the DISCLOSE Act, which would basically get rid of dark money on either side by requiring 501(c)4 groups and super PACs and corporations spending substantial sums in elections to report significant donors. And transparency is what we really need.

I wanted to just take a moment in the opening to bring this to something that, beyond elections and so on, really impacts all of us, so many people in our daily lives, and just in one area. And that is the cost of medicine, the cost of prescription drugs, and the impact of the pharmaceutical and health products industry right now.

We know that they spent $354 million in lobbying. That was what happened last year, far more than any other industry, doubling the spending of the second highest industry. They have

enough lobbyists—they have about 17 lobbyists for every member of the United States Senate. We know this. But what we don't know is what else is going on.

Imagine how much undisclosed money is being spent by the pharmaceutical industry to defeat policies to drive down drug prices and health-care costs. We know there is much of that going on, but we don't know the numbers on that.

And there are well-funded dark money efforts that not only influence, or attempt to influence members of Congress, but also each of us in our daily lives. For example, well-funded organizations with innocuous names like the American Chronic Pain Association, Americans for Patient Access, shape the news for doctors and patients when it comes to opioid medications, for example. And there are many, many, many examples of this, information going out by groups with these names, and we do not know who they are. We do not know where the money is coming from.

And we all know the tragic consequences in this particular area. These groups were cited in a 2020 Grassley-Wyden report in this committee on the opioid industry's use of tax-exempt organizations.

So, Mr. Chairman, I just want to say "thank you" for doing this really important hearing today. There are so many ways that this impacts our lives directly and indirectly, and I think it is important that we shine some sunshine on the groups and the money so that we understand what is going on.

Senator WHITEHOUSE. It is famously the best disinfectant.

Let me now introduce our witnesses. Our first will be Philip Hackney, associate professor of law at the University of Pittsburgh. His scholarship focuses on the tax laws that govern the nonprofit tax-exempt sector, and he brings to us the particular practical experience of having served at the IRS in the Office of the Chief Counsel.

We will then hear from Bradley Smith, the chairman and founder of the Institute for Free Speech. He is also the Josiah H. Blackmore II/Shirley M. Nault professor of law at Capital University, and previously served as a Commissioner and Chair of the Federal Election Commission.

We will then hear from Ann Ravel. Ms. Ravel served as Commissioner of the Federal Election Commission from 2013 to 2017, including time as Chair. And she formerly chaired the California Fair Political Practices Commission. She is currently a lecturer on ethics and campaign finance at Berkeley Law School.

And our final witness will be Scott Walter, the president of Capital Research Center, who previously served in the George W. Bush administration as Special Assistant to the President for Domestic Policy, and was vice president at the Philanthropy Roundtable.

Mr. Hackney, your full statement will be put into the record, and if you can give us your 5-minute summation, we would appreciate it very much.

STATEMENT OF PHILIP HACKNEY, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW, PITTSBURGH, PA

Mr. HACKNEY. Chair Whitehouse, Ranking Member Thune, distinguished members of the subcommittee, thank you for inviting

me to speak with you about the tax laws and IRS enforcement related to the political activities of tax-exempt entities.

I am an associate professor of law at the University of Pittsburgh. I specialize in the Federal tax treatment of nonprofit organizations. From 2006 to 2011, I worked with the IRS Chief Counsel in DC overseeing the tax-exempt sector. Today this sector is my research focus.

Our overall legal structure for political activities of nonprofits is imperfect but not bad; it is justifiable. Where we fall down is enforcement. That failure is a combination of a failed IRS budget, but also a failure for the IRS to pursue clear violations.

These failures do not favor one party over the other, but favor those interests with the means and the willingness to abuse that legal structure. I want to focus on two fundamental points.

First, the IRS budget is not sufficient to ensure the laws are equally and fairly enforced. The 2022 budget improved matters, but there is a hole to dig out from.

Second, enforcement. Though the IRS can definitely blame the budget in part on its failure to enforce these laws, there are simple things that it could do to enforce the law that it is not doing.

The budget. Congress shrank the IRS budget over the past decade. CBO reports the IRS budget fell by 20 percent in real dollars between 2010 and 2018.

The IRS went from over 94,000 employees in 2010 to about 73,500 employees in 2019—the fewest employees IRS has had since 1970. How has this impacted the exempt organizations group? The workforce shrank from 889 employees in 2010 to around 550 in 2019. As annual exempt organization applications increased, annual rejections decreased. In 2019, with over 101,000 applications for exempt status, 66 rejections. Comparatively in 2010, with over 65,000 applications, 517 rejections.

What about audits? In 2010, IRS data suggests about a .38-percent examination rate. In 2019, TEGE accounted that rate at .13 percent. While the IRS shrank, the tax-exempt sector grew. In 2010, charitable organizations reported $2.9 trillion in assets and $1.6 trillion in revenue. In 2017, charitable organizations reported over $4.3 trillion in assets, and almost $2.3 trillion in revenue. It continues to grow.

When compared to the size of the sector, the idea the IRS might be able to use human resource-heavy examinations to ensure compliance is laughable.

Enforcement. Efforts such as those recommended by GAO for the IRS to make better use of data available are the only way the IRS in this current environment can make headway against tax abuse. Robust information reporting thus needs to be the norm.

Is the IRS using information reporting in the exempt organizations sphere dealing with political activities? Unfortunately, it appears the answer to that question is "no." First, the IRS recently chose less information, even though it recognizes information reporting matters in stopping tax abuse. The IRS ended the collection of substantial donor information for dark money organizations. That information matters for a range of tax laws, including those that govern political activity.

Second, the IRS appears to not make use of relevant public information. CREW documents many occasions where a social welfare organization represents to the FEC that it made independent expenditures but reports nothing to the IRS. This situation cannot and should not abide.

Thank you for inviting me to speak. The tax laws are built fairly well to prohibit the deduction of campaign expenditures, to promote a strong nonprofit sector, and to not subsidize politically related contributions. But the current anemic IRS budget, the lack of enforcement action by the IRS, and the failure to collect substantial donor information from dark money organizations creates a crisis.

These factors undermine confidence in the tax system, the equal enforcement of the law, and our ability to operate a fair democratic system.

I urge Congress to increase the budget to allow the IRS the ability to properly enforce the laws, but institutionally, I believe the IRS needs to be pushed and given support to enforce these laws. Additionally, I hope Congress considers ending the prohibition on the IRS enacting sensible rules in this area. It promotes transparency both in government and outside, and allows folks to know when they are going to step over the line.

I believe the IRS can do that now, but these hindrances to the IRS are significant and need to stop. Thank you.

[The prepared statement of Mr. Hackney appears in the appendix.]

Senator WHITEHOUSE. Thank you very much, Mr. Hackney.

Mr. Smith?

STATEMENT OF BRADLEY A. SMITH, CHAIRMAN, INSTITUTE FOR FREE SPEECH, WASHINGTON, DC

Mr. SMITH. Thank you, Mr. Chairman, Ranking Member Thune.

Under the Internal Revenue Code, a 527 organization exists to influence elections. And under Supreme Court precedence, it is only when that purpose of influencing elections is the major purpose of an organization that it can be required to register as a political action committee or PAC under the Federal Election Campaign Act, with the full donor disclosure that that entails.

A 501(c)3 organization, on the other hand, is precluded from electoral activity as that term is defined by law. There must then be some category for organizations that engage in limited political activity—that is, organizations that do not have a major purpose of influencing elections but may have a lesser purpose of doing so. And these are primarily 501(c)4 organizations. (c)4 organizations are required by statute to be operated exclusively for the promotion of social welfare. And it has become common in recent years to criticize the IRS because, despite this exclusive language, the agency's regulations allow (c)4s to engage in political activities so long as that is not their primary function. Anything more than a *de minimis* exception, these people argue, violates the statute.

But this argument overlooks the fact that the statute does not define "social welfare" at all, leaving that entirely up to the IRS. There is no serious reason I can think of why social welfare should not include political activity.

You who have devoted much of your lives to electoral politics and public service should know that as well as anyone, and I wonder if anyone on the committee would wish to say here today that members, their staffs, and their election campaigns operate contrary to the social welfare of the American people.

The IRS regulations say that social welfare does not include political activity but that groups can meet the exclusive requirement if they engage in some political activity as long as they primarily engage in other activities. That is just a roundabout way of recognizing that political activity has to be defined at some level as including a social welfare function. Because otherwise, again, there is no spot for groups in America that do not engage in primarily electoral activity but want to engage in some electoral activity.

From the revenue standpoint, (c)3 charities cost the government money because donors receive a tax deduction. Thus, the government indirectly subsidizes these (c)3 organizations and, for that reason, Congress has chosen to prohibit (c)3 organizations from engaging in electoral politics.

(c)4s, on the other hand, have no meaningful impact on revenue, and in fact they generate tax revenue when they spend money on political campaigns because their campaign spending is then taxed to the lesser of those expenditures or their net investment income. Otherwise, donations are from after-tax dollars. Thus, whether a group is to classify as a political committee under section 527 of the Code, or as a social welfare group under 501(c)4, it has no meaningful effect on Federal revenue, and thus there is no need for the IRS to be investigating these organizations to deny or reclassify their (c)4 status.

If they engage in too much political activity—*i.e.,* it becomes their primary focus—then they are subject to the campaign finance laws and penalties under the Federal Election Campaign Act, which is administered by the bipartisan, independent Federal Election Commission. An FEC determination would trigger an automatic reclassification of the group by the IRS to a section 527 organization, but again, this would have no effect on revenue, at least no meaningful effect.

This is what IRS's National Taxpayer Advocate recommended in her report to Congress in 2013, that it, quote, "may be advisable to separate political determinations from the function of revenue collection," and the IRS could rely on the determination of political activity from the FEC.

Whether one believes the IRS in 2010 to 2012 was targeting conservative groups, or really making a whole bunch of errors, it was not a good thing. And when that happened, they were removed from this process of trying to determine who was engaged in political activity.

Why this ongoing effort to embroil the IRS in the enforcement of political rules? The cynical reason is that some actually want the potential for partisan abuse of the agency. And though this is an inherently abusive power and almost always harms the IRS's revenue-collecting mission by sowing public distrust, a more serious but still urgent reason is that this would be unconstitutional if done directly under the Federal Election Campaign Act, because Supreme Court decisions have limited disclosure to organizations

that have, again, the major purpose of electing candidates, or to contributions to groups only if those contributions are earmarked for elections.

So this attempted end-run of the constitution is bad policy and, as indicated by the phrase "end run," is probably unconstitutional.

Let me conclude by noting that, in any case, the problem of so-called "dark money" is probably much less than it seems. Depending on how one defines it—and there is no legal definition of the term, and people use different definitions—you find that between 0.6 percent and 7.4 percent of all political spending in the 2020 election cycle was so-called dark money. This is down from approximately 15 percent back in 2000, long before *Citizens United*.

Furthermore, most so-called dark money groups, such as the National Association of Realtors and related conservation advocates, are well known to the public. Those that are less well known are hardly unknowable. For example, Majority Forward was the third largest dark money spender in 2020. In less than 10 seconds, a person can do a Google search and learn that Majority Forward is a Democratic Party-aligned advocacy group that campaigns against Republicans and conservative causes. It is literally the first link, and you do not even have to click through to read that description.

Finally, while the courts have recognized an informational interest in disclosure, that interest is not about helping people to evaluate the quality of an argument, let alone holding people, quote, "accountable" for their speech. Its sole purpose is to assist voters—and this is us describing *Buckley*—in predicting the actions of elected officials. Otherwise, this is a limited exception to the general rule that it is not the government's business to investigate or track the memberships' political views and affiliations of American citizens.

Thank you very much for your time.

[The prepared statement of Mr. Smith appears in the appendix.]

Senator WHITEHOUSE. Thank you very much, Mr. Smith.

Now we turn, I hope, electronically to Ms. Ravel, Commissioner Ravel.

STATEMENT OF HON. ANN RAVEL, FORMER CHAIR, FEDERAL ELECTION COMMISSION, LOS GATOS, CA

Ms. RAVEL. Thank you, Chairman Whitehouse, Ranking Member Thune, and distinguished members of the subcommittee. I too am honored to be here today to discuss the significance to our democratic process of the issues that this subcommittee is considering. Special tax benefits for nonprofit organizations were enacted by Congress to encourage social welfare organizations to operate exclusively for the promotion of the common good and the general welfare of the community. And an IRS decision subsequently was clear that if an organization is primarily political, it cannot be a 501(c)4 or 501(c)6.

Federal tax law, enforced by the IRS, governs the extent to which those organizations may engage in activities supporting candidates without jeopardizing their tax-exempt status, and deciding if such activity requires public disclosure or the payment of tax.

On the Form 990, expenditures for political purposes must be disclosed, and the IRS can and should remove tax-exempt status for violators of the law.

Due to the *Citizens United* decision, lack of enforcement by the IRS, and the new IRS rule eliminating donor reporting requirements to the IRS, 501(c)4s are now a major source of anonymous and very large political contributions. This anonymity has exacerbated dark money, and it opens the avenue to allow foreign donors to interfere illegally in the United States' elections. And it has emboldened 501(c)4s to violate the law with impunity.

In the *Citizens United* decision, eight members of the Supreme Court insisted on the importance of disclosure of political contributions, with Justice Kennedy going so far as to say, quote, "that citizens, with transparency, can see whether elected officials are in the pocket of so-called 'money interests,' and also transparency enables the electorate to give proper weight to different speakers and messages."

Additionally and notably, both *Citizens United* and *Buckley v. Valeo* said that a full Federal disclosure doesn't impose a chill on speech or expression. Shockingly, and as was just mentioned, according to the GAO report from February 3rd in 2020, the IRS doesn't even check nonprofit tax records for signs of illegal foreign money in our elections.

And the CREW report also mentioned that for much of the time since *Citizens United,* the IRS doesn't revoke section 501(c)4 groups' 501(c)4 status for violating the law's limits on political spending, partly because they do not even review the ethics of filings to assure that political efforts of 501(c)4s are consistent and truthful in their filings. CREW's report also mentioned that groups which had disclosed political spending to the FEC told the IRS, under penalty of perjury, in their tax returns that they did not engage in any political activity, or else they misrepresented the amount that they spent.

The Federal agencies such as the FEC, the IRS, and DOJ that have overlapping missions regarding political spending do not work very often together. They do not consult—and I saw this when I was on the FEC—or coordinate information regarding violations of Federal law.

Congress should not accept this barrier to enforcing the law that is violated by organizations that do receive special tax benefits that were intended by Congress for social welfare and not as conduits for political spending.

The IRS and the Treasury Department should update the social welfare regulations to provide clarity around the standards to determine if an organization has operated exclusively for the promotion of social welfare. To do this, Congress needs to repeal and stop including a rider in must-pass appropriations that has prevented the IRS and Treasury from taking this important step. This dark money rider has kept voters in the dark as to who is behind political spending that influences elections. And the regulations that were enacted decades before *Citizens United* must be updated to preserve the voter's right to know who is influencing elections.

Thank you.

[The prepared statement of Ms. Ravel appears in the appendix.]

Senator WHITEHOUSE. Thank you, Commissioner Ravel.

And our final witness is Mr. Walter.

STATEMENT OF SCOTT WALTER, PRESIDENT, CAPITAL RESEARCH CENTER, WASHINGTON, DC

Mr. WALTER. Chairman Whitehouse, Ranking Member Thune, distinguished members of the subcommittee, thank you for the honor of addressing you and for addressing this critical topic of political activity by tax-exempt groups, which Capital Research Center has studied for decades.

I have numerous agreements with the witnesses selected by the chairman. For instance, I agree multiple types of exempt groups must be considered, not just (c)4 dark money groups, and the groups across the political spectrum, as Ms. Ravel observed, that behave similarly. I second Professor Hackney's concerns, stated elsewhere, about the dangers of elite donors working against the common good. But we have significant disagreements.

First, I agree with Professor Smith that donor disclosure is no cure. This supposed remedy presumes that money to a (c)4, like the chairman's friends at the League of Conservation Voters, is bad if government doesn't coerce the donors into the limelight. But I don't think the League's dark money has captured the chairman. I think he receives it because he and the League have shared views of what the social welfare requires. So disclosure brings little help but often causes great harm, especially when mobs threaten Americans across the spectrum. That is why the leading constitutional case in this area is one that protected the NAACP in Jim Crow Alabama. To this day, the NAACP defends donor privacy, as does the ACLU, and the Nation's largest LGBT advocacy group. This principle is so important that those left-leaning groups joined with a major Koch-funded group to oppose California's effort to abuse the Schedule B donors' list then required on IRS forms.

Disclosure is a weapon, as even your witnesses, Mr. Chairman, at the hearing last year where I had the honor to testify, tacitly admitted. They said if I thought the left had more dark money than conservatives, I should want disclosure. Their logic? Donors in the groups they support are hurt by disclosure, so I should seek it to hurt the left. But I do not wish to harm donors and groups I disagree with, and I respectfully urge you to end your campaign to harm donors and groups you disagree with.

Another way I disagree with the witnesses today is the excessive emphasis on (c)4 groups, misplaced for several reasons.

First is the supposed threat of foreign intervention. Professor Hackney spins out ingenious possibilities, but is skimpy with actual examples. When I testified to the IRS in its decision to drop Schedule B donor lists for (c)4s and other groups, I observed how little evidence exists. I despise foreign interference in our elections, but most likely that rarely happens this way, because no rational villain abroad would look at our political system and think (c)4s hold the keys to the kingdom.

Look at the money. Statistics can be sliced many ways, but let's take the largest dark money number I can find, the more than $1 billion Ms. Ravel mentioned. She likely was citing a report from the left-leaning OpenSecrets which estimated $1.05 billion in 2020. OpenSecrets also gave total election spending as $14.4 billion. So dark money is about 7 percent. But this ignores the even larger

money in the (c)3 world raised by groups active in political activity in its broadest sense, as Professor Hackney helpfully puts it.

Capital Research Center doesn't have complete 2020 data, but for the 2018 cycle we estimated public policy (c)3 money at around $20 billion, compared to around $5 billion for hard political dollars. Dark money is a distant third.

We should focus much more on (c)3s. I am a Catholic not a Manichee, so I do not think the political spectrum divides all good on one side, all evil on the other. But alas, abuses among (c)3s have a strong partisan tilt, leftward toward the Democratic Party.

Just this week, Capital Research Center found another example of (c)3 abuse in a report from Vox, revealing emails from a Democratic super PAC. Writing donors, the super PAC describes the 2020 cycle's, quote, "single most effective tactic for ensuring Democratic victories, namely (c)3 voter registration focused on underrepresented groups in the electorate," close quote.

The super PAC even explains the tax advantages. Well-designed (c)3 voter registration is, on a pre-tax basis, quote, "two to five times more tax-effective at netting additional Democratic votes than the tactics that campaigns will invest in. Because 90 percent of the contributions we are recommending for voter registration and get-out-the-vote efforts will go to (c)3 organizations and hence are tax deductible," after taxes, "such programs are closer to four to 10 times more cost-effective. They are also eligible recipients of donations from donor-advised funds and private foundations."

I ask my fellow witnesses, do we want this in the (c)3 world? These schemes are the culmination of decades of left-wing (c)3 voter registration abuse. Liberal reporter Sasha Issenberg in his book *The Victory Lab* describes the Carnegie Foundation's registration and turnout drives as, quote, "a backdoor approach to ginning up Democratic votes outside the campaign finance laws that apply to candidates, parties, and political action committees."

Here let me apologize for a mistake in my written testimony. I said Karl Rove had not used (c)3s to do registration and get out the vote, only (c)4s, but I was wrong. He only used 527 groups and party committees, never (c)3 or (c)4 money.

Mr. Chairman, let me plead with you to find a way to have the Ford Foundation and its (c)3 allies rise to the level of Karl Rove's political morality and end their partisan registration work.

[The prepared statement of Mr. Walter appears in the appendix.]

Senator WHITEHOUSE. Does that conclude your testimony?

Mr. WALTER. Yes.

Senator WHITEHOUSE. Thank you, Mr. Walter.

Mr. Hackney, in the wake of the original look at the IRS into the 501(c)4 abuse, there was a battering that the agency took, a storm of right-wing disapproval by politicians, media outlets, dark money groups, charges to bring criminal referrals against one employee, efforts to impeach the IRS Commissioner. Did that storm of abuse have any effect, do you believe, on enforcement motivation within the agency?

Mr. HACKNEY. I absolutely believe it did. It impacted the way the employees of the IRS feel, the way the institution of the IRS feels. It put both the employees at risk in operating within that space,

and it put the mission of the IRS at risk within that space. And I don't think it was fairly done. I agree with the bipartisan report.

Senator WHITEHOUSE. Well, the reports afterwards appear to have confirmed that it was not fair. But never mind. We talked about the FEC reporting being inconsistent with the IRS reporting. To your knowledge, has the IRS ever inquired into that discrepancy, or asked the Department of Justice to look into whether those discrepancies under oath amounted to false statements?

Mr. HACKNEY. To my knowledge, from observing outside, I have never seen that take place. I've never seen them move in those ways.

Senator WHITEHOUSE. And with respect to foreign use of these dark money avenues, have you ever seen the IRS take any investigative action to explore foreign use of dark money influence channels?

Mr. HACKNEY. I have not, and I believe Commissioner Rettig recently testified that he does not know of any of that order.

Senator WHITEHOUSE. So, let's say that we start with the 49.9 percent, and just round it to 50 for the sake of doing the math. If you give it to one—let's say you give $8 million. You give it to organization one, and organization one can spend $4 million on politics, and then it can give the rest of its money to organization two, which having received $4 million, can then spend $2 million on politics and give the rest of its money to organization three, which can then spend $1 million on politics and give the remainder to organization four, which can spend half a million dollars on politics and, at the end of the day, 93.75 percent of the money has been spent on politics because of coordination among the groups.

And if you really wanted to play your cards right, you could give, let's say, a million dollars to each of five groups that coordinated to spend half and give half to the next one, spend half, give half to the next one. You would have a closed circle of spin-cycle donations. And at the end of the day, the donor would have achieved the goal of getting 93.75 percent—actually with five, it would be another cut, so it would be more like 96 percent—of this money into politics, notwithstanding the 50-percent restriction.

Setting aside the merits of the 50-percent restriction, which I think is idiotic, has the IRS ever inquired into some systematic attempts to get around that rule by these sort of spin-cycle donations among coordinating entities?

Mr. HACKNEY. To my knowledge, they have not. I believe it is something that could be attacked. But in this current environment, I do not see it happening. I do not see them having the information to take that kind of situation on.

Senator WHITEHOUSE. Ms. Ravel, you have been in the Federal Election Commission seat yourself. You are aware of the concern of foreign money trying to influence our elections. In fact, we have seen Facebook political advertisements paid for, denominated in rubles, which apparently was something that the geniuses at Facebook could not figure out was potentially a problem.

What should we be doing? How big a risk is foreign money coming through these avenues of influence? And what should we be doing about it?

[Pause.]

Senator WHITEHOUSE. You may still be on mute.

Ms. RAVEL. Okay.

Senator WHITEHOUSE. You're there.

Ms. RAVEL. There is a really big risk of foreign money. And I saw it when I was at the Federal Election Commission. We knew that there was foreign money that was being spent in these avenues. And despite what people have said about OpenSecrets, while they are a data group, they are very good at analyzing these issues. And they themselves have seen evidence of foreign money coming into the United States' elections. And I think it is a huge risk. We know it is illegal. We know that foreign actors are not supposed to have influence on our electoral process.

So it is a failure not to have better disclosure in this situation that is really significant.

Senator WHITEHOUSE. And what——

Ms. RAVEL. And they——

Senator WHITEHOUSE. Go ahead.

Ms. RAVEL. I was going to go a little bit off script, if that is okay, and refer to the issue that you asked Mr. Harper——

Senator WHITEHOUSE. Mr. Hackney, you mean?

Ms. RAVEL. Yes.

As the Chair——

Senator WHITEHOUSE. Talking about the coordination among groups, and their limit?

Ms. RAVEL. Yes.

Senator WHITEHOUSE. Have you actually seen that happening?

Ms. RAVEL. I had seen it happen when I was Chair of the California Fair Practices Commission. We knew that there was a group, the Center to Protect Patients' Rights, that was a Koch-related organization. And a lot of their money went to 501(c)4s, and it was exactly what you described. And so the amount of money that was ultimately spent to influence a ballot measure election was in the millions of dollars—$16 million, to be precise.

Senator WHITEHOUSE. And to your knowledge, there has never been a single ounce of effort expended by the IRS to inquire into the problem of how a coordinated spin cycle of donations can defeat the 50-percent exemption so that actually they all end up spending way more than 50 percent, but just go through the charade of giving each other the money.

Ms. RAVEL. That's correct.

Senator WHITEHOUSE. Thank you.

Senator Thune?

Senator THUNE. Thank you, Mr. Chairman.

Mr. Walter, I appreciate your candor in stating that, while many of the (c)4 groups utilizing donations through the tax-exempt process don't align with your political views, your respect for confidentiality for everyday Americans holds more value than your political leanings.

Could you elaborate on some of the left-aligned, Democrat-aligned organizations that oppose increased donor disclosure proposals, and what concerns those groups have raised?

Mr. WALTER. Certainly, Senator. As I said, the three most important left-wing groups which have happily worked in court to fight Schedule B disclosure, for instance—which is the donors' list on an

IRS 990 form—are the NAACP, whose name is enshrined in the leading constitutional case in the whole area; the ACLU; and the Human Rights Campaign, which is the largest LGBT group. And obviously they believe that their members and their organizations need their donors' privacy respected.

And since, from the beginning of the republic we have had anonymous speech, I think that is not unreasonable.

Senator THUNE. Mr. Smith, you state in your prepared testimony that the DISCLOSE Act is problematic as both a matter of policy and constitutional law because it would, among other things, focus attention on the individuals and donors associated with sponsoring organizations rather than on the communications message, exacerbating the politics of personal destruction and further coarsening political discourse.

Could you explain a little more in depth what you mean when you say that the DISCLOSE Act will "exacerbate the politics of personal destruction and further coarsen political discourse"?

Mr. SMITH. One of the problems that has influenced American politics in recent years I think is well known to everyone in this room, which is the tendency to engage in *ad hominem* attacks on individuals, overheated rhetoric, and so on. And I think by placing an emphasis on disclosure—and this is even aside from the constitutional issues, just as a policy matter—this emphasis on who is speaking, who is really speaking, is probably poisonous to our system.

I also reject the notion that if, for example, a 501(c)4 group, the Sierra Club, spends the money, or the National Rifle Association spends the money or something, that somehow it is not their money. They are the groups spending the money, and it is their money. And unless the donations they have received are earmarked for something, the person who gave them some money no longer has any control over it.

So, this kind of essential focus on who is speaking, I think is quite wrong, and it is one of the reasons why the Supreme Court has long protected Americans in their affiliations, in their memberships, and in their political views. And it does not only go to joining groups. It has gone to all the great cases from the Red Scare of the 1950s to the Hollywood Seven. The effort was to not make it so that people could not speak publicly lest they be blacklisted and blackballed and harassed by people. That is not good for, not healthy for our politics.

Senator THUNE. Mr. Hackney, since last year's massive IRS data leak, or hack, of private taxpayer information, with which the left-leaning ProPublica went on to publicize confidential taxpayer details, there has been no meaningful follow-up from the administration.

My Republican colleagues and I on this committee have repeatedly pressed the administration for accountability, and the response has essentially been silence.

You are a former IRS employee. How do you think this unauthorized disclosure of private taxpayer information and the total lack of accountability from the administration impacts trust between everyday Americans and the IRS?

Mr. HACKNEY. So, it is a troubling disclosure. We don't know where it came from. I hope there is an investigation into it. So I appreciate that that may take some time, and it is a significant matter, and I hope the administration is giving it great care.

Senator THUNE. Mr. Walter, you write in your prepared statement, and I quote, that "no (c)3 entity should be allowed to fund or execute voter registration and get-out-the-vote, or GOTV," end quote. You further write that "failing that, it should be clearly permissible to all, and the uncertainty that surrounds it leads reds to fear the next Lois Lerner if they dare try it, while blues use fig leaves like civic participation to cover their naked partisanship as they pursue it with gusto." That is a quote.

Can you elaborate on that point, particularly as it relates to political activity of foundations? And what other types of political activities are the (c)3s engaged in?

Mr. WALTER. Thank you, Senator.

Well, as I said, and I believe demonstrated rather thoroughly, there is massive (c)3 voter registration funded by (c)3 private foundations, conducted by (c)3 public charities. Now the governing rule in the IRS world for this is that that sort of thing is permissible only on a nonpartisan basis. And the IRS further spells out that you can't just have the intention not to be partisan in your voter registration and get-out-the-vote. You have to have an effect that is nonpartisan, that does not assist one candidate or party.

Well, that sadly is not remotely the case. I quoted for you a Democratic super PAC that is gleeful about how this is better than giving money to campaigns, they very clearly say—multiple times better, more bang for the buck.

The most extreme example, I would say, is in the 2020 election when one billionaire, Mark Zuckerberg's family, took money out of donor-advised funds at the Silicon Valley Community Foundation, gave it to two (c)3s that were run by (c)4 Democratic veterans, who then distributed that money to over 2,000 government election offices in almost every State. And as we have been very careful to document—and all our data is publicly available; you can download it and crunch the numbers yourself—that money went with great disproportion to Democrat vote-rich areas, and in those areas made a tremendous difference for the Democratic Party's presidential candidate.

So I think this was a serious scandal that needs to be addressed, and I am certainly not aware of any activities by the IRS to enforce these regulations.

Senator THUNE. Thank you, Mr. Chairman.

Senator WHITEHOUSE. I am informed that Senators Menendez and Warren are trying to get here, so to give them a little bit of time to do that, and with the ranking member's permission, I will ask about the Trump administration's repeal of the disclosure requirement to the IRS, and what the absence of that information to the IRS does to the ease and fairness of enforcement by the IRS, and particularly with regard to the sort of coordinated network example that I gave. I will ask Mr. Hackney that first, and then if Ms. Ravel wants to add anything, I will invite her, and with any luck Senators Warren or Menendez will be here by then. And if not, I will give Senator Thune a chance for another question, just

in the spirit of fair play. And if none of that has happened, then we will conclude the hearing.

Mr. HACKNEY. Thank you. Great question. So this is the Schedule B to the Form 990 that folks file. And the IRS has long requested this information. Since 1943 or 1942 it has requested this information—since the form began—and received it. And the IRS had kept that in place over 70-some odd years, and then suddenly decided they no longer needed the information.

I think they are wrong on that. I think it actually matters to tax collection. I think it matters to ancillary laws. I think it has an enormous impact.

One of the things I pointed out in a recent article is there was a prosecution going on in Ohio, and one of the bits of testimony was, "Hey, by the way, you can get away with bribery today because no one will know whether this thing is happening." It is of significant concern.

IRS knows information reporting matters. It collects information from all sorts of folks—from low-income, from international transactions—but suddenly in this space it thinks it is okay to turn off the information collection? I think it is going to have a significant, problematic effect on the collection of revenue, on the equal enforcement of the laws, and people's belief that the laws are being equally enforced. Because, as I stated in my opening statement, this thing redounds to wealthy interests who are willing to skirt the law. I think it is a problem. I hope that they reconsider.

Senator WHITEHOUSE. In this space of entities that also enjoy enormous anonymous political influence, it is kind of interesting that that is the space that gets carved out.

Ms. Ravel, did you have anything to add?

Ms. RAVEL. I think he said it very well. And what it really impairs is an already somewhat dysfunctional process that the IRS has in not identifying those people who are violating the law. And it is impossible for them to increase the ability to enforce the law, as was said previously, and I think that that is their function. They were meant to do that under the IRS regs, and so that is a really bad idea that unfortunately came about recently to make it difficult for the IRS, even more difficult than it has been, to enforce the law.

Senator WHITEHOUSE. Thank you.

Senator Thune?

Senator THUNE. Thank you, Mr. Chairman.

Mr. Smith, in your prepared testimony you state that perhaps the most important feature of the FEC's design is its equal-sized blocs of Commissioners, three from each party. One of the Democrats' key initiatives in S. 1, the so-called "For the People Act," was to change the structure of the FEC from a six-member body to a five-member body, subject to, and designed for, partisan control.

Could you explain to the committee why it would be a mistake to restructure the FEC into an agency designed for partisan control?

Mr. SMITH. Sure. We need to understand that the FEC was created in the wake of Watergate and abuses of the IRS by the Nixon administration. And at the time, it was agreed by leaders in both parties and Congress that it was vitally important to avoid that

type of executive branch control of an organization that directly regulates political campaigns and political speech.

You know, obviously any agency can have a sort of a partisan bent to the policies it adopts, but they typically are very indirect. We don't have that kind of thing where one agency can just come in and say, no, you Democrats, you can't do that, but you Republicans can. So this degree that the agency had to be bipartisan, that was the fundamental point of the agency, the fundamental issue on which all agreed in setting up the agency.

And I note that, in the modern era, whenever the FEC is attacked as partisan, the first response of others is to say that it takes four votes. You have to have a majority that in some degree is bipartisan. And I think that that is in fact true, and I think it would very greatly damage the credibility of the FEC to have a partisan majority, or a single director appointed by the President.

Senator THUNE. Do we still have people coming, Mr. Chairman?

Senator WHITEHOUSE. I can't guarantee it. We have a whole array—we have 28 votes stacked up, and again we have the repercussions of the Alito hand grenade. So, it is a very busy day, and I cannot guarantee that anybody else will come.

So, we will leave the hearing open for 2 weeks. You may get other questions that come in in that first week, and we would be delighted if you would give us the favor of your responses to those questions.

By way of a closing statement, I will say that we have now entered a political era in which dark money groups funded by powerful special interests now on occasion actually out-spend the political campaigns of the actual candidates. And whatever communication goes on behind the scenes between whoever is behind the outside spending, whether it is a super PAC or another group, and the candidates themselves, is completely unregulated. But the notion that information doesn't travel in politics is an idiotic notion, spectacularly disproved by history.

So the idea that there really are firewalls is simply not credible in practical reality. The result is advertisements paid for by entities that do not really exist, and that hide whoever it is that really exists who is behind them, because there is not accountability for what they say; hence the degeneration of American political speech and the arising of the phrase "tsunami of slime" to describe political speech. It was *Citizens United* itself, the decision that I have violent disagreements with on many angles—but they did say that there is a nexus between secrecy and corruption in politics. And they specifically made that a predicate of the case in order to allow the unlimited money in.

Then of course, that did not prove true, and they did not have the chance to rebuild. So repeatedly, I have gone to the Supreme Court to say, "Hey, you were wrong." You were factually wrong that there will be effective disclosure. I think we are up to how many billions of dollars in dark money spent—$6 billion since that decision, something like that. So there is $6 billion of proof that the Supreme Court got it wrong in its reliance on effective disclosure. And on several occasions, I have gone to the court and said, "You got it wrong."

On one case, I went in bipartisan fashion with Senator McCain, who was a legendary advocate for honest elections, and in our bipartisan brief we said, "Hey, what you said was going to happen is not happening. You were wrong. You need to correct."

And the fact that the Supreme Court never corrected, even when the newspapers, the FEC filings, and bipartisan briefs coming into it told them that they had been wrong, I think is a blot on the Court.

So I intend to continue to work to try to clean up this mess. And just to be clear, the efforts that I will undertake to clean this up will apply to both sides. So the conversation about whether Democrats do better, or Republicans do better, whether Democrats are guilty or Republicans are guiltier, who is playing fair, or who is not, it all needs to stop to restore decency and accountability in American politics.

And I will note a recent decision in my United States Court of Appeals for the First Circuit—Rhode Island is part of the First Circuit—where a very distinguished Rhode Islander, Judge Bruce Selya, recently just upheld a Rhode Island law requiring disclosure, using these very arguments.

The Supreme Court declined to review it, and I think that is the argument that makes the better case here. We are citizens of the United States. And as citizens of the United States, we have responsibilities. And in order to discharge those responsibilities, we need information. And a very important piece of the information that we require to be good citizens of the United States is who the hell is behind the megaphone that is blaring at us. Because you might very well discover that you can discount the voice, once you know who it is.

If somebody sets up Rhode Islanders for peace and puppies and prosperity, and comes and smears me all over the place in Rhode Island, that is one thing. If it is Marathon Petroleum, or Exxon, that is a very different thing. And Rhode Island voters will sort that information out very quickly. In fact, it may be to my advantage to have negative ads run against me in Rhode Island by Exxon Mobil. So they hide. And I do not think that is a fair way to go.

Senator Menendez has arrived, and I would be delighted to recognize him for a period of questioning.

Senator MENENDEZ. Thank you, Mr. Chairman. And thank you for holding the hearing, as well as keeping it going.

For 151 years, the National Rifle Association of America, commonly known as the NRA, has operated as a tax-exempt social welfare organization. In order to receive the privileges of being a tax-exempt organization, namely not paying tax on its revenues, the NRA must follow the same laws that apply to all tax-exempt social welfare organizations.

One, the organization must be focused on its stated mission or primary purpose.

Two, the organization's resources must be used to benefit society, not for self-enrichment or private benefits.

And three, the organization must, under penalty of perjury, file annual reports with the IRS showing that they are not violating principles one and two.

Since at least 2008, the NRA has repeatedly and flagrantly violated each of these three principles, a trifecta of bad behavior. Their stated primary purpose is to, quote, "protect the Second Amendment, promote public safety, provide marksmanship and gun safety training, promote competitive shooting, and improve hunter safety."

But in recent years, the organization has spent less than 10 percent of its budget on this mission. Instead, while mass shootings have ravaged communities across the country, killing 2,500 children and teens each year, the organization became a fear-mongering political media company promoting a lifestyle of loving assault rifles equipped with high-capacity magazines, and calling anyone who questioned it a socialist or just simply trying to, quote, "take them away."

The pinnacle of the NRA's diversion from its stated purpose was its launch of NRA TV in 2016, which had little to do with upholding the Second Amendment. Instead, it pandered in culture war tropes, including calling then-President Obama language that I would not use here; blaming the Manchester Arena bombing on multiculturalism, socialism, and gender bending; and perpetuating former President Trump's deep state conspiracies.

The NRA itself, in its suit against its PR company that ran NRA TV, later called this content, quote, "a dystopian cultural rant that veered into distasteful and racist territory" at a tune of $20 million a year.

So my question, with that preface, Professor Hackney, is, would the NRA spending only 10 percent of its budget on its primary purpose, and instead spending on items like NRA TV, warrant close scrutiny, maybe even an investigation by the IRS?

Mr. HACKNEY. Well, pretty significantly about the NRA, particularly as the judge was considering dissolving them, I think the NRA is a great example of an organization that shows why we need good regulation in this area.

The secrecy promotes corruption. The ability of their folks to operate outside of the light has encouraged significant problematic actions. And the folks who care about the NRA's mission should care about that.

So, having a good IRS there to do that, I do believe there should be a closer look at the NRA—and I have stated so in news articles before—by the IRS.

Senator MENENDEZ. Well, thank you. Now let me say, the relationship between the NRA and its public relations firm, Ackerman McQueen, that ran NRA TV, is also problematic.

The New Yorker, in its exposé on the financial dealings of the NRA, describes the relationship between the NRA and its PR firm as, quote, "so intertwined that it is difficult to tell where one ends and the other begins." The article details overall payments to the public relations firm of $40 million each year, including payments of millions of dollars to figureheads on NRA TV. It also claims that Oliver North, the NRA's president, was paid through Ackerman McQueen.

Lastly, it says that, quote, "Many NRA employees have long suspected Ackerman of inflating the cost of services that it provides."

Professor Hackney, if these allegations are true and the NRA has been paying inflated costs to its PR firm, would this warrant an investigation or even close examination by the IRS? What about the claims that the president of the NRA was paid through an outside contractor?

Mr. HACKNEY. So I will focus in on the fact that, through that arrangement, there has been a lot of taking of things from the NRA. It is trying to carry out its actual mission, but much money has moved outside of it to people who control the organization and have found that it is not appropriate.

I believe there should be a closer look at that as a result of those. That is, to protect the folks who care about this mission from self-dealing and other acts by those who control the organization.

Senator MENENDEZ. And finally, if I may, over the past 5 years the Attorney General of New York, Letitia James, has alleged that the NRA diverted millions of dollars from the NRA to pay for its executives' rides on private planes; travel to Africa, Lake Cuomo, the Bahamas, Budapest; designer suits purchased on Rodeo Drive; gifts to friends; memberships at golf clubs; and golden parachute arrangements, which included million-dollar mansions and seven-figure salaries.

So, Professor, would the NRA's spending on these items violate the organization's requirement to protect against private inurements, and if true, would this warrant an investigation or even a closer examination by the IRS?

Mr. HACKNEY. The Attorney General has put forth a substantial allegation that should be taken very seriously. There has been copious reporting in this regard. I think any organization—Democrat, Republican, whatever interests—that engaged in such transactions should have a closer look by the IRS.

Senator MENENDEZ. I appreciate your insights, and I yield to my distinguished colleague from Massachusetts.

Senator WARREN. Thank you very much, Senator Menendez. And thank you all for being here.

So, giant companies and billionaires are drowning our political system in cash, corrupting our democracy. And a big way they do this is by funneling cash anonymously through so-called dark money groups.

These tax-exempt groups do not disclose their donors, even if they spend hundreds of millions of dollars to influence our elections. As the tiniest of guard rails, these groups are supposed to spend less than half of their money on politics. But poor enforcement allows them to get away with a whole lot more than that.

Professor Hackney, you not only study these issues as an academic, you spent 5 years at the IRS working on them. So I want to work through just a hypothetical here. Let's say there is an anti-tax billionaire who wants to spend unlimited amounts of cash on an anonymous political campaign to slash IRS funding. An under-resourced IRS will struggle to catch him even if he cheats on his taxes. And if his dark money groups illegally spend over half their cash on political campaigns, the under-resourced IRS is not likely to find it.

So, Professor Hackney, say one of the billionaires channels millions through one group, and then has that group donate over 50

percent of the cash into another group, which then spends all of it, 100 percent of it, lobbying against the IRS funding.

Does that kind of simple shell game, one-two, actually trick the IRS into thinking that the first group is apolitical?

Mr. HACKNEY. Because there has been so little enforcement in this area, I think the only answer is "yes," they are not seeing this, and they recently got rid of information reporting regarding that. So I think the answer is "yes."

Senator WARREN. Wow! It is just a huge gap in our enforcement. So we have this billionaire who can use a simple shell game to trick the IRS. But then the billionaire is also supposed to report political spending to the Federal Election Commission.

Ms. Ravel, I understand you are online with us. You were Chair of the FEC, so let's say this billionaire's political nonprofit reports over $15 million in election spending to the FEC. If the same nonprofit told the IRS that it spent less than $10 million on elections—the same amount of money, they just give two different reports in two different places—would they get away with it?

Ms. RAVEL. Yes, they have been getting away with it. And we had some conversation about the CREW report that spoke of a number of situations where that has happened, including relating to the NRA, by the way, that we were just talking about. But one of their reports related to, in 2018, a Federal PAC called Conservative Alliance, that ran ads and mailed pieces, and they told the FEC about how much money—they did it through Prosperity Alliance, a Virgina 501(c)4 that made political contributions. And the FEC got that information, but they told the IRS on their tax return, under penalty of perjury, that they had not engaged in any political activity, and they did not file a Schedule C report.

And then subsequently it happened again, and 78.4 percent of the nonprofit's money was spent on political ads and the like again, and they also then filed a report with the FEC and failed to file a report on Schedule C with the IRS, and yet said to the IRS that they also did not engage in political activity.

And the IRS never did anything about that.

Senator WARREN. So what I described as a hypothetical, you are telling me has not only happened, but that it has happened repeatedly, basically.

And, Mr. Hackney, I see you shaking your head as well.

There is a lot we need to do to fix the issue of big money in politics. For one, Congress needs to give the IRS the resources that it needs to go after tax-cheating dark money groups and eliminate the appropriations riders that prevent the IRS from clarifying the rules in this area.

But while we are working to try to pass some legislation here in Congress, the IRS needs to think about what it can do right now to start shining some light on this ocean of dark money.

Professor Hackney, are there steps that the IRS can take right now, without a change in the law, to stop illegal political spending by nonprofits, such as looking at public FEC data and reinstating high-dollar donor reporting requirements for 501(c)4 organizations?

Mr. HACKNEY. I know of no reason that they could not use such publicly readily available information that the taxpayers themselves have reported. And absolutely I believe the IRS needs to re-

instate the requirements that 501(c)4 organizations disclose their substantial donors. I think it makes a big difference in tax collection, and it makes a big difference in our belief that the laws are being equally enforced.

Senator WARREN. So we need to change the law to give them more tools. We need to fund them to give them more tools. But the IRS needs to step up as well and make pretty basic comparisons like this.

There is a lot we need to do to defend our democracy, but the IRS can and should take these concrete steps to limit the role of big money and try to get it out of politics, to ensure that the government is working for everyone. These billionaires and giant corporations, they think they can buy our elections, and I think it is time to stand up and demand a government that is truly a government of the people, by the people, and for the people.

Thank you very much for being here. And I now recognize Senator Cortez Masto, and virtually hand the gavel to you, Senator Cortez Masto.

Senator CORTEZ MASTO. Thank you, Senator Warren.

Let me follow up on this question by Senator Warren. And, Ms. Ravel, let me talk with you about it. Recently—and this is very disturbing to me as a former Attorney General—I read an article in *The New York Times,* and it is titled "Donations Steered to Trump Super PAC by Canadian Are Found To Be Illegal." And it describes how a Canadian billionaire helped steer $1.75 million in donations to the America First Action super PAC, and the FEC found this to be an illegal foreign contribution. They fined this Canadian billionaire—and this is $975,000 this billionaire was fined. It's the largest in the history of the Commission, and yet despite it being illegal, this billionaire may get that $1.75 million back because, as a part of the settlement agreement with the FEC, they gave the America First Action PAC the option to return the money to the donor who committed the illegal donation, or to donate it to a nonprofit, or redirect it to the U.S. Treasury.

So, this does not make sense to me. Does it make sense to you that with a massive illegal donation made to a PAC by a foreign donor somehow there is the ability to send that money back to that donor instead of disgorging that to the U.S. Treasury and holding them accountable and penalizing them for the illegal activity?

Ms. RAVEL. It does not make sense, but for the FEC this is groundbreaking, that they were even able to find that there was impropriety there, because it is so difficult to have four votes.

It seems to me that the FEC, what they should have been doing is potentially uniting with DOJ and utilizing the DOJ Criminal Division that has the ability to look at issues like this and potentially bring some kind of a criminal action. But unfortunately, there is not a lot of connections and conversations between the DOJ and the FEC either on these issues.

Senator CORTEZ MASTO. Well, let me ask you this, because it seems to me, even in the statutory enforcement provisions that the FEC has, just on the fines and disgorgement, they have the ability to mandatorily ensure that that money did not get returned back to that donor. And it should have been disgorged to the U.S. Treasury as a penalty.

Does that require us to change, Congress to change the law to make it mandatory so there is no such discretion to allow this type of return of capital to somebody who violates the laws here in the United States?

Ms. RAVEL. It will take that action. And I think it is important for it to happen. Because now that we know, in particular because this was a foreign donor, it is illegal, patently, and so it is something that needs to be looked at by Congress to provide that ability to the FEC.

Senator CORTEZ MASTO. Thank you. I could not agree more. And I am looking at legislation. I just think it is so outrageous that this foreign donor was able to get the funds back, and we do have to hold people accountable and penalize them for violating our laws, particularly when it comes to civil fines like this.

We need more transparency and accountability in our campaign finance laws at all levels. So, thank you.

I am going to yield the remainder of my time. I am not sure if there are any other of my colleagues, either in person or in the room, who would like to go next.

HEARING CLERK. Senator, there are no members in the hearing room, so you are free to close the hearing. The record is open for 2 weeks.

Senator CORTEZ MASTO. All right; thank you.

So, thank you to the panelists, everybody who joined us today. The record will be open for a 2-week period for any of my colleagues who want to submit any additional questions to the panelists.

And thank you so much for this incredible conversation and hearing today, and this committee hearing is adjourned.

Thank you, everyone.

[Whereupon, at 3:32 p.m., the hearing was concluded.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF PHILIP HACKNEY, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

Chair Whitehouse, Ranking Member Thune, members of the committee, thank you for inviting me here today to speak with you about a matter of great importance to the operation of the democratic order of the United States. I understand you have asked me to speak to the issue of Federal income tax laws and IRS enforcement related to the political activity of tax-exempt entities.

I am an associate professor of law at the University of Pittsburgh School of Law where I primarily teach tax law courses. I specialize in the Federal tax treatment of nonprofit organizations. From 2006–2011, I worked in the Office of the Chief Counsel of the IRS in Washington, DC overseeing the tax-exempt sector. There I helped to oversee the drafting of regulations, the overall program of auditing tax exempt organizations, and IRS litigation on matters related to tax laws applicable to nonprofits and government entities. That work necessarily interacted in a robust way with politics. The IRS oversees dark money organizations, section 527 political organizations, and charities that engage in politics in its largest sense. Today, I write, research, and speak about these organizations and the regulatory regime applicable to them.[1]

I understand the committee is interested in whether the tax laws and IRS enforcement are up to the task of overseeing the tax issues associated with the political activities of tax-exempt organizations. While from my writing you can see that I think the tax laws governing the tax-exempt realm are wanting, our overall legal structure is not bad. It is justifiable at least. Where we fall down as a Nation in this space is in the enforcement. As I will discuss below, we do not allocate enough resources to this arena, and we do not institutionally offer the support necessary to enforce these laws. These failures do not favor one party over the other but favor those interests in the country with the means and the willingness to abuse that structure. Primarily that redounds to certain wealthy interests.

Within the tax structure of politics in its broadest sense it is worth noting that neither political campaign expenditures nor lobbying expenditures are deductible under the Internal Revenue Code ("Code").[2] In effect, Congress sees these as personal expenditures that ought not receive a subsidy through the income tax. Indeed, Congress forces the contributor of appreciated property, such as corporate stock, to a section 527 political organization to recognize gain on that transfer under the Code.[3] This is distinctly different from most contributions of property. Gifts of appreciated property in general do not trigger an income tax gain.[4]

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[1] I note that in addition to my experience at the IRS, this testimony is informed in significant part by articles I have written, including Philip Hackney, "Political Justice and Tax Policy: The Social Welfare Organizations Case," 8 *Tex. A&M L. Rev.* 271 (2021) [hereinafter "Political Justice"] and Philip Hackney, "Dark Money Darker? IRS Shutters Collection of Donor Data," 25 *Fla. Tax Rev.* 140 (2021) [hereinafter "Dark Money Darker"]. I also rely in small part on testimony I provided to the Pennsylvania House Committee on Oversight February 7, 2022.

[2] 26 U.S.C. § 162(e). The U.S. Supreme Court upheld the prohibition on deducting political campaign expenses in *Cammarano v. United States,* 358 U. S. 498 (1959).

[3] 26 U.S.C. § 84.

[4] *See* Boris I. Bittker and Lawrence Lokken, "Federal Taxation of Income, Estates and Gifts," ¶ 40.3 (2021, WG&L). I have argued Congress ought to subject contributions of appreciated as-

Continued

In this testimony, first, I will describe the tax law that applies to these organizations and then I will discuss the enforcement environment including both a description of the resources available to the IRS and a discussion of the institutional challenges faced by the IRS. As you will see in part III, the IRS does not have the budget to enforce the tax laws on the books, but also often fails to make use of simple information to enforce these laws that matter both in collection of the revenue and our democratic order.

I. TAX-EXEMPT ORGANIZATIONS AND POLITICS INTRODUCTION

The IRS tax-exempt division oversees a range of nonprofit entities that engage in various types of political activity in its broadest sense. Some of the activities of these organizations is also overseen by the FEC. The entities I will focus upon include section 527 political organizations, section 501(c)(3) charitable organizations, section 501(c)(4) social welfare organizations, and section 501(c)(6) business leagues.[5]

When I say political activity in its broadest sense, I am referring to a combination of intervention in a political campaign, lobbying, and activities close to both, sometimes referred to as issue advocacy.

In tax law, intervention in a political campaign has its most salient meaning with respect to charitable organizations.[6] This *political campaign intervention* prohibition is colloquially referred to as the "Johnson Amendment." It means the exempt organization cannot participate or intervene, "directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office."[7] In other words, in campaigns for public office (Federal, State, and local) the charity itself cannot directly or indirectly encourage the public to vote for or against candidates. I use that definition when I refer to political campaign intervention.

Lobbying refers to efforts to encourage members of a legislative body to propose, support, or oppose legislation.[8] Finally, there is *issue advocacy.* In issue advocacy, an organization may educate the public broadly about a political topic with the intention of swaying the public toward a particular political solution. In its most specific context, issue advocacy involves advocating about a political solution while simultaneously identifying a candidate for office. Typically, these communications let the reader or viewer draw their own conclusion about whether to vote for or against that candidate. This sometimes leads to political campaign intervention.

II. TAX-EXEMPT ORGANIZATIONS AND POLITICS, THE LAW

This part II will describe section 527 political organizations, section 501(c)(3) charities, section 501(c)(4) social welfare organizations, section 501(c)(6) business leagues, and then discuss information return obligations of tax-exempt organizations.

a. Section 527 Political Organizations

Prior to the 1970s, the IRS mostly ignored the tax implications of political committees or organizations.[9] It saw the contributions to a political committee as a gift and therefore non-taxable to the entity or individual.[10] Congress enacted section 527 of the Code in 1975 to manage the taxable matters created by these political committees and organizations.[11] In 2000 and 2002, Congress amended the statute to re-

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sets to social welfare organizations to the income tax on the gain just as it does to section 527 organizations under 26 U.S.C. § 84. *See* "Political Justice," *supra* note 1, at 328.

[5] Section 501(c)(5) labor unions might be listed here as well, but because of robust regulation and disclosure regarding their activity via other regulatory bodies, the IRS role in oversight of these organizations is much less significant. *See, e.g.,* Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401–531 (2012). Extensive reports about the financial activities of many labor unions are available on the Department of Labor website, at *https://www.dol.gov/agencies/olms/public-disclosure-room.*

[6] 26 U.S.C. § 501(c)(3).

[7] Treas. Reg. § 1.501(c)(3)–1(c)(3)(iii).

[8] Treas. Reg. § 1.501(c)(3)–1(c)(3)(ii).

[9] IRS, I. IRC 527—Political Organizations, Exempt Organizations CPE Text (1989), *https://www.irs.gov/pub/irs-tege/eotopici89.pdf.*

[10] *See, e.g.,* Rev. Proc. 68–19, 1968–1 C.B. 810.

[11] Act of January 3, 1975, Pub. L. No. 93–625, § 10, 88 Stat. 2108, 2116–19 (codified as amended at § 527); *see also* Congressional Research Service, "Political Organizations Under Section 527 of the Internal Revenue Code" (2008), *https://crsreports.congress.gov/product/pdf/RS/RS21716/4.*

quire disclosure of donors from section 527 organizations that did not specifically come within the FEC's jurisdiction.[12]

Political organizations are organized and operated primarily for what is called an "exempt function." An exempt function includes the "function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization."[13] A section 527 organization still maintains a tax-exempt status, but is subject to a complicated tax, primarily on its investment income. A section 527 organization that anticipates receiving gross receipts in excess of $25,000 a year generally must give notice to the IRS within 24 hours of its establishment.[14] Unlike a social welfare organizations, a section 527 organization must publicly disclose substantial information about its receipts of contributions and expenditures.[15] Congress considered extending these same disclosure obligations to social welfare organizations as well, but never has.[16] The IRS has provided guidance as to when certain activity is considered an exempt function activity under section 527 for social welfare organizations as well as business leagues and labor unions.[17] If a social welfare organization, business league or labor union engages in activities categorized as exempt function activity, the organization is subject to the tax under section 527(f). An organization described in section 501(c) could alternatively create a segregated fund to operate as a political organization under section 527.[18]

b. Charitable Organizations

Charitable organizations are exempt from tax under section 501(a) of the Code as described in section 501(c)(3) of the Code.[19] A charitable organization must be organized and operated exclusively for religious, charitable, scientific, or educational purposes, provided no part of the organization's net earnings inures to the benefit of any private shareholder or individual.[20] A charitable organization may not engage in more than an insubstantial amount of lobbying and is completely prohibited from intervening in a political campaign.[21] Finally, the organization cannot violate public policy.[22]

An organization that qualifies as a charitable organization obtains a number of important benefits. The first is that it is able to accept tax-deductible contributions from its donors.[23] Though generally only relatively high-income donors are today able to make use of the charitable contribution deduction,[24] where a donor is able to take advantage of the deduction, the government effectively makes a big part of the contribution to the charity—equal to the top marginal tax rate of the donor.[25] In other words, if a donor had a 40 percent top marginal tax rate and made a $1,000 contribution to a charitable organization, the government contributes $400 to the organization and the donor contributes $600. Contributions to charitable organizations

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[12] Pub. L. 106–230; Pub .L. 107–276; *see also* Congressional Research Service, "Political Organizations Under Section 527 of the Internal Revenue Code" (2008), *https://crsreports.congress.gov/product/pdf/RS/RS21716/4.*

[13] 26 U.S.C. § 527.

[14] They must file with the IRS a Form 8871 found here: *https://www.irs.gov/forms-pubs/about-form-8871.*

[15] 26 U.S.C. § 527(j). Note that Political Committees that already have the obligation to file with the FEC do not have to comply with the section 527(j) disclosure requirements. *See also* Form 990, Return for Organization Exempt from Income Tax, Schedule B Schedule of Contributors Instructions; Form 8872, *https://www.irs.gov/forms-pubs/about-form-8872.*

[16] *See, e.g.,* Donald Tobin, "Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing," 10 *Election L.J.* 427, 430 and FN 21 (2011) (citing H. Rep. No. 106–702, at 9–11 and H. Rep. No. 106–702, at 40–41).

[17] Rev. Rul. 2004–6, 2004–1 C.B. 328.

[18] 26 U.S.C. § 527(f)(3).

[19] 26 U.S.C. § 501(a) and (c)(3).

[20] 26 U.S.C. § 501(c)(3).

[21] *Id.*

[22] *Bob Jones Univ. v. U.S.,* 461 U.S. 574 (1983) (holding organization not exempt from income tax as a charitable organization because it violated public policy by racially discriminating against students by restricting dating among students of different races).

[23] 26 U.S.C. § 170.

[24] This is because Congress significantly raised the standard deduction in the 2017 Tax Act, sec. 11021, Pub. L. 115–7 (December 22, 2017). The Tax Policy Center for instance estimates that it reduced the number of households deducting their charitable contributions from 21 percent of households to about 9 percent of households, *https://www.taxpolicycenter.org/briefing-book/how-did-tcja-affect-incentives-charitable-giving.*

[25] *See* Joint Committee on Taxation, "Present Law and Background Relating to the Federal Tax Treatment of Charitable Contributions," JCX–2–22, 34 (March 17, 2022), *https://www.jct.gov/publications/2022/jcx-2-22/* (making this essential point: "the value of the tax deduction to the taxpayer is the amount of the donation multiplied by the taxpayer's marginal tax rate").

are also deductible from the trust, gift, and estate taxes.[26] Additionally, a charitable organization generally owes no tax on its earnings unless it operates an unrelated trade or business.[27] Charities are allowed to issue tax-exempt bonds.[28] There are many other benefits that come with the charitable designation at the Federal, State and local level including exemptions from property tax and State and local income tax.

Though occasionally charitable organizations intervene in a political campaign in a way that is clear,[29] many charitable organizations engage in political activity in its broadest sense. In the political sphere, most charitable organizations rely upon either a religious or educational purpose to support their claim to exemption. Religious organizations will often assert that they are speaking from a religious perspective to lobby, engage in issue advocacy, or sometimes to advocate for a candidate in a political campaign. Educational organizations rely upon the fact that charitable educational organizations can educate "the public on subjects useful to the individual and beneficial to the community."[30] There are many think tank advocacy groups that today qualify under section 501(c)(3) by educating the populace about important ideas to our governance. For instance, Heritage Foundation, the conservative think tank, is recognized by the IRS as a charitable organization,[31] as is Center for American Progress, the progressive think tank.[32] While I am not arguing that either of these organizations engages in political campaign intervention, they are examples of organizations involved in the broad sense of political activity.

As noted above, a charitable organization that seeks to maintain its exempt status may not intervene in a political campaign.[33] This means that the organization's representatives *when speaking for the charity* may not directly or indirectly encourage the public to vote for or against a candidate for political office. This definition is broader than the election activity overseen by the FEC.[34] Notably, if the charity were able to intervene in a political campaign, donors would have a means to deduct their political campaign activity. More problematically, those in the highest tax brackets would be most advantaged by such a system. In effect, this would mean the government would support the political interests of the wealthy at 40 cents on the dollar and most everyone else at 0 cents on the dollar. The IRS has tools in the Code to apply a tax on a charity, and its management, when the charity violates this limitation.[35]

Congress also limits the amount of lobbying in which a charity can engage.[36] The Code provides that "no substantial part of the activities" can consist in "carrying on propaganda, or otherwise attempting, to influence legislation."[37] The regulations suggest that lobbying involves "contacting legislators or urging the public to contact them to propose, support, or oppose legislation, or advocating the adoption or rejection of legislation."[38] It is not clear how much lobbying is too much to become a "substantial part."[39] Part of the challenge is determining how to think about activities. Similar to political campaign intervention, should activities be measured in time, expenditure, or something else? There is some guidance, as Congress has implicitly set that amount at not greater than 20 percent of expenditures when it enacted section 501(h) of the Code.[40] This allows charities to elect this regime such that the charity will know beforehand whether or not it will be complying with the

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[26] 26 U.S.C. §§ 642, 2055, and 2522.
[27] 26 U.S.C. § 511.
[28] 26 U.S.C. § 145.
[29] *See, e.g.,* Eugene Scott, "Pastors Take to Pulpit to Protest IRS Limits on Political Endorsements," CNN (October 1, 2016).
[30] Treas. Reg. § 1.501(c)(3)–1(d)(3).
[31] Heritage Foundation, Form 990 (2019), *https://projects.propublica.org/nonprofits/display_990/237327730/02_2021_prefixes_23-25%2F237327730_201912_990_2021021717708700.*
[32] Center for American Progress, Form 990 (2019), *https://projects.propublica.org/nonprofits/display_990/300126510/02_2021_prefixes_27-31%2F300126510_201912_990_2021021917725620.*
[33] 26 U.S.C. § 501(c)(3).
[34] The best statement from the IRS of what it views as a violation of this limitation is found in Rev. Rul. 2007–41, 2007–25 I.R.B. 1421.
[35] 26 U.S.C. § 4955. Additionally, in egregious situations, the IRS can take immediate action under 26 U.S.C. §§ 6852 and 7409.
[36] 26 U.S.C. § 501(c)(3).
[37] *Id.*
[38] Treas. Reg. § 1.501(c)(3)–1(c)(3). It also notes this applies as well to an organization whose purpose can only be attained via legislation.
[39] *Haswell v. United States,* 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied,* 419 U.S. 1107 (1975) (finding a range between 16.6 percent and 20.5 percent of total expenditures over 4 years to be a substantial part).
[40] 26 U.S.C. §§ 501(h) and 4911(c)(2).

law. But charities who have not elected the section 501(h) regime are still governed by the "substantial part" of activities language.

These limitations have passed constitutional muster. For instance, the U.S. Supreme Court upheld the constitutionality of the limitation on lobbying under the First Amendment and the Equal Protection clause in *Regan v. Taxation with Representation*.[41] In an opinion by Justice Rehnquist, the Court stated: "[w]e held that Congress is not required by the First Amendment to subsidize lobbying. In these cases, as in *Cammarano,* Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying."[42] The Court highlights that those who run a charity have the option of also operating a section 501(c)(4) social welfare organization in order to engage in substantial lobbying, simply without the ability for donors to deduct their contributions.[43] In a footnote, the Court notes that the IRS allows the same people who control the charity to also control the social welfare organization, as long as the organizations scrupulously account for the monies and ensure no monies intended for the charity are used to support the social welfare organization's activity.[44] This theme of the flexibility of the tax exempt organization structure to accomplish various purposes related to politics was relied upon by the D.C. Circuit Court of Appeals to uphold the Constitutionality of the prohibition on political campaign activity of a church in *Branch Ministries v. Rossotti.*[45]

In addition to the political aspects of charities, much of the regulatory architecture found in section 501(c)(3) works simultaneously to prevent fraud on charity and prohibit evasion of income tax. For instance, Congress prohibits the inurement of the earnings of the charity to a private shareholder or individual.[46] This both protects funds set aside for charitable purpose and ensures that the organization is not operating a tax shelter for the individuals who control the organization. The Code is designed to only provide the benefits given to charitable organizations that are engaged in benefitting the public and not avoiding the income tax.[47] In addition to the inurement prohibition, Treasury regulations require that charities be operated for a public purpose and not a private one.[48] This limits the amount of private benefit that a charity can provide.[49] For instance, a charity cannot be set up to dredge a waterway where the primary beneficiaries are private homeowners rather than the public at large.[50] Again, generally this is designed to prevent abuse of charities by directing them away from working to help private individuals and businesses instead of and towards helping charitable beneficiaries. One more provision is worth noting here, Congress prevents certain charities from engaging in what are known as excess benefit transactions.[51] In general, this provision imposes a tax upon an individual who has some control over a charity and uses that control to take from that charity something of value to which they are not entitled.[52]

In order to hold charities accountable for proving their exemption, to ensure the proper collection of tax revenue, and to provide important information to the public, charities must annually file a Form 990 with the IRS.[53] I discuss this more below in part II(d).

c. Dark Money Organizations

What are "dark money organizations" and how do they relate to tax and political activities of tax-exempt organizations? Dark money organizations refer to tax-exempt organizations that engage in political advocacy that may rise to the level of political campaign intervention. The moniker "dark" means that the public has

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[41] *Regan v. Taxation with Representation,* 461 U.S. 540 (1983) (citing *Cammarano v. United States,* 358 U.S. 498, 513 (1959)).
[42] *Id.* at 546.
[43] *Id.* at 544.
[44] *Id.* at 544 FN 6.
[45] *Branch Ministries v. Rossotti,* 211 F.3d 137, 143 (D.C. Circuit Ct. of Apps. 2000) (noting that the section 501(c)(3) church leaders could form a section 501(c)(4) organization, which in turn could form a Political Action Committee to speak about a campaign).
[46] 26 U.S.C. § 501(c)(3); Treas. Reg. §§ 1.501(c)(3)–1(c)(2) and 1.501(a)–1(c) (defining private shareholder or individual).
[47] *See* Treas. Reg. § 1.501(c)(3)–1(d)(1).
[48] Treas. Reg. § 1.501(c)(3)–1(d)(1)(ii).
[49] *Id; see also* Treas. Reg. § 1.501(c)(3)–1(d)(1)(iii) examples.
[50] *See Ginsberg v. Commissioner,* 46 T.C. 47 (1966).
[51] 26 U.S.C. § 4958. This provision applies to public charities (not private foundations) and social welfare organizations. Congress subjects private foundations to a more restrictive regime including significant limitations on self-dealing under 26 U.S.C. § 4941.
[52] *Id.*
[53] 26 U.S.C. § 6033.

little access to knowledge about who funds these organizations because the organization typically does not publicly disclose contributions received under campaign finance laws, nor publicly disclose via the IRS as a section 527 political organization. Social welfare organizations, described in section 501(c)(4), and business leagues, described in section 501(c)(6), are the common tax-exempt organizations that fit in the dark money category. Each of these organizations is exempt from the income tax under section 501(a). Though the IRS used to require dark money organizations to file information about substantial donors with the IRS on Schedule B to the Form 990, in 2020, the IRS recently ended the requirement.[54]

What is the benefit of being a tax-exempt social welfare organization or business league? These organizations are unable to accept charitable contributions deductible by the donors under section 170 of the Code. However, just like a charity, money earned in one of these exempt organizations is not subject to the Federal income tax as long as the activity is consistent with the organization's exempt purpose.[55] Those who contribute to a social welfare organization, or a business league may be able to deduct contributions to the organization if the expense qualifies as a business expense,[56] as it typically does in the case of business league dues, or if the expense qualifies for some other deduction. Additionally, a donor can contribute appreciated property like stock and not trigger gain for tax purposes. Conversely, when such property is contributed to a section 527 political organization, gain is triggered to the donor.[57] This provides a way of obtaining a deduction of a sort and makes the dark money organization a more desirable destination for such assets than a political organization. Finally, Congress has clarified that the gift tax does not apply to contributions to either a social welfare organization or a business league.[58]

One other commonality of these two organizations is that if either engages in exempt function activity as that term is defined in section 527 then as noted above in part II(b), the exempt organization owes a tax under section 527(f).[59] The amount of that tax is set at the lesser of net investment income or the expenditure on the exempt function activity.[60] If there is no discernible expense to point to, there is no tax; similarly, if there is no net investment income in the year there is no tax as well. In Revenue Ruling 2004–6 the IRS provided guidance on when social welfare organizations, business leagues and labor unions engage in too much exempt function activity and become subject to the disclosure rules of section 527.[61]

i. Social welfare organizations

Social welfare organizations include "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare . . . and no part of the net earnings of such entity inures to the benefit of any private shareholder or individual."[62] The regulations suggest a social welfare purpose is furthered through "bringing about civic betterments and social improvements."[63] One court suggested that such a purpose is found in "a community movement designed to accomplish community ends."[64]

Studies suggest political organizations in number make up a small part of the social welfare sector.[65] Social welfare organizations also include health maintenance organizations, civic social clubs like Kiwanis and Rotary clubs, homeowners' associations, and kid's sports clubs.[66] Still, social welfare organizations participate in political activity in its broadest sense and inject substantial dollars into that world. Some of that political work furthers a social welfare purpose. For instance, lobbying

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[54] 85 Fed. Reg. 31959 (May 28, 2020) (codified at 26 CFR 56) T.D. 9898. *See also* "Dark Money Darker," *supra* note 1.
[55] 26 U.S.C. § 501(a), (c)(4), (6). An exempt organization that operates an unrelated business is subject to the unrelated business income tax though under 26 U.S.C. § 511.
[56] 26 U.S.C. § 162.
[57] *Cf.* 26 U.S.C. § 84 (donor who contributes appreciated property to 26 U.S.C. § 527 political organization owes income tax on the gain associated with the appreciated property).
[58] 26 U.S.C. § 2501(a)(6).
[59] 26 U.S.C. § 527.
[60] 26 U.S.C. § 527(f).
[61] Rev. Rul. 2004–6, 2004–1 C.B. 328.
[62] *Id.*
[63] Treas. Reg. § 1.501(c)(4)–1(a)(2).
[64] *Erie Endowment v. United States,* 316 F.2d 151, 156 (3d Cir. 1963).
[65] Jeremy Khoulish, "From Camps to Campaign Funds: The History, Anatomy and Activity of 501(c)(4) Organizations," Urban Institute, 6 (2016).
[66] *Id.*

can further a social welfare purpose.[67] However, a social welfare organization does not further its purpose when it intervenes in a political campaign.[68]

Though the statute uses the term "exclusively" when describing how much a social welfare organization must further its exempt purpose, Treasury regulations state that a social welfare organization must "primarily" further a social welfare purpose.[69] When the U.S. Supreme Court interpreted similar "exclusively" language in the context of a charitable organization and social security it stated: "an organization must be devoted to [its exempt] purposes exclusively. This plainly means that the presence of a single non-[exempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purposes."[70] The Second Circuit Court of Appeals in a social welfare organization case, *Contracting Plumbers,* explicitly rejected the idea that the regulation by using the term "primarily" had liberalized the exclusively standard for a social welfare organization.[71] The court stated: "we adhere to the rule that the presence of a single substantial non-exempt purpose precludes exempt status regardless of the number or importance of the exempt purposes."[72] In fact, when the IRS rejects the application of a charity or a social welfare organization and issues a denial letter, it typically uses this formulation, *i.e.,* "you are operated for a *substantial* non-exempt purpose."[73] How is the statutory and regulatory language operationalized? In other words, what does it mean to be exclusively operated for a social welfare purpose? How do you measure that? Some attorneys have operated on the belief that if an organization can maintain its exempt status if it makes sure to engage in more than fifty percent of expenditures that further its exempt purpose annually.[74] A corollary to this would be that a social welfare organization can spend 49 percent of its time and expenditures on political campaign intervention, as long as the other 50 + .1 percent is focused on social welfare activity. This position seems to cut against the language of the Court in *Better Business Bureau:* an activity that makes up 49 percent of an organizations purpose would seem to "substantial in nature."

It can be difficult for the IRS to make the call between activity that might be considered issue advocacy and activity that crosses the line into political campaign intervention.[75] In 2013, the IRS issued proposed regulations with the intent to make it clearer when such lines are crossed in the social welfare organization context.[76] But, in Consolidated Appropriations Acts since 2016 Congress has blocked the IRS from implementing rules to clarify this space. In the Consolidated Appropriations Act of 2022, for example, Congress prohibited the IRS and the Treasury Department

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[67] Rev. Rul. 68–656, 1968–2 C.B. 216.

[68] Treas. Reg. § 1.501(c)(4)–1(a)(2)(ii).

[69] *Id.*

[70] *Better Business Bureau of Washington D.C. v. U.S.,* 326 U.S. 279, 283 (1945). This decision predates the implementation of the unrelated business income tax. Ellen P. Aprill, "The IRS's Tea Party Tax Row: How 'Exclusively' Became 'Primarily,'" *Pac. Standard* (June 7, 2013), *http://www.psmag.com/politics/the-irss-tea-party-tax-row-how-exclusively-became-primarily-59451/*.

[71] *Contracting Plumbers Co-op. Restoration Corp. v. United States,* 488 F.2d 684, 686 (2d Cir. 1973).

[72] *Id.*

[73] *See, e.g.,* Letter 202216018, *https://www.irs.gov/pub/irs-wd/202216018.pdf* (emphasis added).

[74] *See* Ellen P. Aprill, "Examining the Landscape of Section 501(c)(4) Social Welfare Organizations," 21 *N.Y.U. J. Legis. and Pub. Pol'y* 345, 346–47 (2018) (noting that some practitioners take this position); *see also* James Fishman, Stephen Schwarz and Lloyd Mayer, *Nonprofit Organizations,* 496 (5th Ed. 2015) (noting that the question is a facts and circumstances test but that many practitioners take the position that as long as the organization does less than 50 percent non-social welfare purpose activity it should still qualify). The IRS in 2013 after the Tea Party controversy created Letter 5228. In it, the IRS adopted a safe harbor of a sort for a certain set of organizations where it used a 60-percent threshold. The IRS would approve an application of an organization that could represent it would spend 40 percent or less in time and expenditures on "on direct or indirect participation or intervention in any political campaign." IRS Letter 5228 (Rev. 9–2013), *https://www.irs.gov/pub/irs-tege/letter5228.pdf.*

[75] The IRS consideration of the application for exemption of the major political social welfare organization associated with Karl Rove, Crossroads GPS, is a good example. Though the IRS initially proposed denying social welfare status to the organization because many of the ads it ran appeared to be political campaign intervention, the IRS Appeals Office granted the organization status after Crossroads filed an appeal with the IRS Appeals Office. *See* Robert Maguire, "How Crossroads GPS Beat the IRS and Became a Social Welfare Group," OpenSecrets (February 12, 2016) *https://www.opensecrets.org/news/2016/02/how-crossroads-gps-beat-the-irs-and-became-a-social-welfare-group/*.

[76] Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, (REG–134417–13) 78 FR 71535–01, 2013–52 I.R.B. 856, (November 29, 2013).

from issuing rules about section 501(c)(4) organizations.[77] It fixes the status of the law regarding these organizations with the "standard and definitions as in effect on January 1, 2010, which are used to make such determinations . . . for purposes of determining status under section 501(c)(4) of such Code of organizations created on, before, or after" the Act.[78]

Like charities, a social welfare organization cannot allow its earnings to inure to the benefit of a private shareholder or individual.[79] Additionally, the private benefit limitation discussed with regard to charities in part II(b), and the tax under section 4958 on excess benefit transactions applies to social welfare organizations like described above with respect to charities.[80]

After legislation in 2015, any organization that intends to operate as a social welfare organization must provide notice to the IRS of its intention within 60 days of its formation.[81] The organization files a Form 8976 to meet this notice requirement. Social welfare organizations must file a Form 990 just like a charity.[82] I will discuss this requirement more below in part II(d).

ii. Business leagues

Business leagues present many of the same issues as do social welfare organizations. They are exempted from the income tax under section 501(c)(6) and include "[b]usiness leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues."[83] A business league must promote a common business interest and direct its activities towards the improvement of business conditions in one or more lines of business as distinguished from the performance of particular services for individual persons.[84] These organizations broadly support various industries or professions through education, advertising, networking, lobbying.[85] Similarly to social welfare organizations, a business league is prohibited from allowing its earnings to inure to a private shareholder or individual. Though the term is not expressly used in the Treasury regulations or the Code, it is understood that a business league must primarily operate for its exempt purpose.[86]

As with social welfare organizations, lobbying is a permissible purpose of a business league.[87] The Office of the Chief Counsel has determined that political campaign intervention does not further a business league purpose.[88] The practical result of this regime is that business leagues can do unlimited lobbying, assuming it furthers the organization's purpose, and can under tax law intervene in a political campaign as long as that is not the business league's primary purpose.[89]

d. Information Reporting Requirements

Most organizations exempt from income tax under section 501(a) of the Code must file an annual information return "stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying

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[77] H.R. 2471, Div E, title I, sec. 123 (2022) *https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR2471SA-RCP-117-35.pdf.*

[78] *Id.*

[79] 26 U.S.C. § 501(c)(4).

[80] 26 U.S.C. § 4958(e) (applicable tax-exempt organization includes "any organization which . . . would be described in paragraph (3), (4), or (29) of section 501(c) and exempt from tax under section 501(a)").

[81] 26 U.S.C. § 506.

[82] 26 U.S.C. § 6033.

[83] 26 U.S.C. 501(c)(6).

[84] Treas. Reg. § 1.501(c)(6)–1.

[85] For a detailed discussion of the activities and types of business leagues, *see* Philip Hackney, "Taxing the Unheavenly Chorus: Why Section 501(c)(6) Trade Associations Are Undeserving of Tax Exemption," 92 *Den. U. L. Rev.* 265 (2015).

[86] *See, e.g., American Auto Ass'n v. Comm'r,* 19 T.C. 1146, 1159 (1953) ("petitioner was *primarily* a service organization. Its principal activities, as disclosed by our findings of fact, consisted of performing particular services, and securing benefits of a commercial nature for its members) (emphasis added); *see also,* John Francis Reilly, Carter Hull, and Barbara Allen, *IRC 501(c)(6) Organizations,* IRS EO CPE Text, K–20 (2003), *https://www.irs.gov/pub/irs-tege/eotopick03.pdf* ("the activities of the organization cannot be primarily directed to the performance of particular services for individual persons").

[87] Rev. Rul. 61–177, 1961–2 C.B. 117.

[88] *See* IRS Gen. Couns. Mem. 34,233 (December 3, 1969). Campaign finance law also significantly impacts the operation of business leagues in the political campaign sphere. For instance, a business league, as a corporation, is subject to the law that they use "separate segregated funds" as controlled political action committees to make contributions to candidates for Federal political campaigns. 52 U.S.C. 30118; 11 CFR §§ 114.1(a)(2)(iii) and 114.5.

[89] Inspector Gen. for Tax Admin., *Review of the Processing of Referrals Alleging Impermissible Political Activity by Tax-Exempt Organizations,* Ref. Num. 2019–10–006, 3 (October 4, 2018).

out the internal revenue laws."[90] This is the Form 990, the annual information return for IRS tax purposes.[91] The return both serves a means of ensuring the organization complies with its tax status, by providing information that could allow the IRS to detect if there is any avoidance of tax and provides the public information to hold these organizations publicly accountable.

The Form 990 in generally available to the public pursuant to the Code,[92] and has been publicly accessible since 1950.[93] The public disclosure of the returns arguably brings "some measure of organizational accountability to various constituencies, including current and prospective donors, organization employees and patrons, other exempt entities, and the citizenry at large."[94] The Joint Committee on Taxation has suggested "[d]isclosure of information regarding tax-exempt organizations also allows the public to determine whether the organizations should be supported—either through continued tax benefits and contributions of donors—and whether changes in the laws regarding such organizations are needed."[95] The Independent Sector suggests the unique role of nonprofits in our society as *voluntary organizations* requires more public disclosure.[96]

Up until recently, most exempt organizations were required to disclose to the IRS, but not the public, the substantial donors to the organization during the taxable year.[97] That requirement to disclose substantial donors was required in the first Form 990 for the 1941 tax year.[98] Congress later statutorily required this donor information from charitable organizations in the 1969 Tax Act.[99] Today, the information is collected on Schedule B to the Form 990 and requires the disclosure of substantial donors generally meaning those who donated the greater of $5,000 or 2 percent of total donations to the nonprofit during the year.[100] Congress prohibits the public disclosure of the names and addresses of contributors of all but private foundations and political organizations.[101] Though the Treasury Department and IRS long required other exempt organizations to disclose this information via regulation and the Form 990, in 2020, the Treasury Department and the IRS finalized regulations ending that requirement for all but charitable organizations.[102]

The ending of the collection of this information was a mistake on the part of the IRS. The IRS needs the information regarding substantial donors from not just charitable organizations, but also the dark money organizations in order to protect the revenue and as a means to deter tax avoidance. The ending of the collection of that information also likely impacts the integrity of the campaign finance system as individuals can contribute to social welfare organizations with the knowledge that there is no information going to any part of the government regarding these contributions.

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[90] 26 U.S.C. § 6033.

[91] IRS, Form 990, Return of Exempt Organization Exempt From Income Tax, *https://www.irs.gov/pub/irs-pdf/f990.pdf.* The IRS and the Treasury Department enacted a regulation in 1942 requiring tax-exempt organizations to file a Form 990 for tax years beginning in 1941. T.D. 5125 (IRS TD), 1942–1 C.B. 101, 1942. Congress followed that regulation up in 1944 with a requirement for a tax information return for certain tax-exempt organizations. The Revenue Act of 1943, Pub. L. No. 78–235, 58 Stat. 28 implementing then § 54.

[92] 26 U.S.C. § 6104(b).

[93] Revenue Act of 1950, H.R. 8920, 81st Cong. § 341 (1950).

[94] Caroline K. Craig, "The Internet Brings 'Cyber-Accountability' to the Nonprofit Sector," 13 *J. Tax'n Ex. Org.* 82 (2001).

[95] Staff of the Joint Comm. on Taxation, 106th Cong., Study of Disclosure Provisions Relating to Tax-Exempt Organizations, at 5 (2000); *see also* Lloyd Hitoshi Mayer, "The Promises and Perils of Using Big Data to Regulate Nonprofits," 94 *Wash. L. Rev.* 1281, 1297–98 (2019).

[96] Evelyn Brody, "Sunshine and Shadows on Charity Governance: Public Disclosure as a Regulatory Tool," 12 *Fla. Tax Rev.* 183, 212 (2012).

[97] IRS, Form 990, Return of Organization Exempt from Tax, *https://www.irs.gov/pub/irs-pdf/f990.pdf.*

[98] *See* Form 990 EO CPE text describing how the 1941 Form 990 required disclosure of substantial donors (those donating $4,000 or more) on Form 990. Done initially in 1943 to develop the information needed to determine whether the organizations at hand ought to be exempt from taxation. *See* Senate Finance Committee Report in the Revenue Bill of 1943, p. 21, *https://www.finance.senate.gov/imo/media/doc/SRpt78-627.pdf.* The Revenue Act of 1943 was not enacted until February 1944 because of a Presidential veto, *https://www.loc.gov/law/help/statutes-at-large/78th-congress/session-2/c78s2ch63.pdf.* Pub. L. No. 235, 78th Cong., 2d Sess. (February 25, 1944).

[99] Tax Reform Act of 1969, Pub. L. No. 91–172, 83 Stat. 487.

[100] Schedule B, Form 990, *https://www.irs.gov/pub/irs-pdf/f990ezb.pdf.*

[101] 26 U.S.C. § 6104(b).

[102] Guidance Under section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31959 (May 28, 2020) (codified at 26 CFR 56) T.D. 9898.

To police the inurement provision, the IRS needs to know substantial contributors because these are individuals who can control the organization.[103] The IRS has no reliable way to know this information without the exempt organization directly disclosing it to the IRS. Substantial donors are not public facing in the way officers and directors of a nonprofit corporation are public facing. The same goes for enforcing the excess benefit transaction tax imposed for charities and social welfare organizations. The IRS needs to know the individuals who control the organization and substantial contributors fall into this category.[104] The IRS cannot truly enforce this tax Congress imposed without the information. Substantial contributor information can aid the IRS in enforcing the private benefit limitation as well. Finally, if the IRS wants to keep track of related dark money organizations that might try to avoid the primarily test by working in tandem to maximize the amount of money they can use to engage in political campaign intervention, Schedule B can provide essential information to see such relationships.[105]

Requiring disclosure to the IRS acts as a deterrent to tax avoidance as well.[106] The Treasury Department notes that tax noncompliance is highest where there is no third-party reporting.[107] The Treasury Department highlights the need to "strengthen reporting requirements,"[108] and notes that enforcement activity itself is not a driver of reducing the tax gap.[109] In its 2001 study, the IRS found that about 45 percent of compliance has to do with information reporting.[110] Given the significant lack of enforcement of the tax laws from the IRS as discussed below in part III, ending this requirement to disclose substantial donors becomes even more damaging.

The tax law in the exempt organization space works in part as a back-up to campaign finance law. In addition to tax law, Congress regulates many nonprofit organizations to the extent they are engaged in campaign finance.[111] Nonprofits have long been involved in the electoral system,[112] and the United States has tried to regulate the campaign finance of corporate entities since 1907 when Congress enacted the Tillman Act under President Theodore Roosevelt.[113] This system of law focuses on expenditure limits, contribution limits, and disclosure. Though a series of cases over the years has struck down certain parts of the system enacted by Congress, it re-

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[103] The Supreme Court recently struck down as facially unconstitutional under the First Amendment a State law in California requiring charities soliciting donations in the State of California to disclose substantial donors identified on Schedule B to the IRS Form 990. *Americans for Prosperity Foundation v. Bonta,* 141 S.Ct. 2373 (2021). I submitted an amicus brief in *Americans for Prosperity* along with 11 other nonprofit scholars supporting the State of California in its effort to protect its ability to require this donor information from charities. Brief of Amici Curiae Scholars of the Law of Non-Profit Organizations in Support of Respondent, *Americans for Prosperity Foundation v. Bonta,* 141 S.Ct. 2373 (2021) (Nos. 19–251 and 19–255). The Court was careful to note that its opinion applied to neither campaign finance nor to tax law. *Id.* at 2389.

[104] 26 U.S.C. § 4958(c)(3)(B)(i) (including "substantial contributor" in the group of individuals who can violate the excess benefit transaction tax).

[105] The idea here is a donor could contribute $1 million to a social welfare organization. That first social welfare organization could spend 49 percent on political campaign intervention and send 50 percent of the money to another social welfare organization. That second organization does the same thing. Via this strategy, the organization theoretically is accomplishing social welfare organization purposes through contributing to another social welfare organization but is indeed almost exclusively accomplishing political campaign activity. It is hard to see how such a scheme could be considered to qualify under section 501(c)(4), but without the donor information on Schedule B it should be much more difficult for the IRS to detect such transactions. Schedule I to the Form 990 helps in part but the Schedule B combined with the Schedule I would enable the IRS to see such transactions quicker and more reliably.

[106] *See* "Dark Money Darker," *supra* note 1, at 170–75.

[107] *See* Office of Tax Policy, U.S. Dep't of Treasury, "A Comprehensive Strategy for Reducing the Tax Gap," 8 (2006), available at *https://www.irs.gov/pub/irs-news/comprehensive_strategy.pdf.*

[108] *Id.* at 9.

[109] *Id.* at 13.

[110] *See* IRS, "Tax Year 2001 Tax Gap Update," 2 (2007); *see also* Leandra Lederman, "Essay: Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted?", 78 *Fordham L. Rev.* 1733, 1738 (2010).

[111] Federal Election Campaign Act of 1971, Pub. L. No. 92–225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431–455).

[112] Lloyd Hitoshi Mayer, "When Soft Law Meets Hard Politics: Taming the Wild West of Nonprofit Political Involvement," 45 *J. Legis.* 194, 196 (2019).

[113] Ch. 420, 34 Stat. 864 (1907). *See Federal Election Commission v. Beaumont,* 539 U.S. 146 (2003) (holding that the corporate political contribution ban applied to nonprofit corporations).

mains in force today.[114] Knowledge of donors to nonprofits is relevant to the enforcement of that law. For instance, the system prohibits foreign actors from contributing to campaigns for public office or making expenditures for political campaigns.[115] To the extent a social welfare organization takes money from foreign operators to influence a campaign, the FEC cares. Some argue indeed that the lack of public disclosure of substantial donors to social welfare organizations is making nonprofits a disclosure shelter, and thereby undermining the nonprofit sector's credibility.[116]

The IRS in its final regulations eliminating the disclosure requirement suggested that neither campaign finance nor State nonprofit law was part of its mission. It argued, thus, that it need not consider comments suggesting that it was important for the IRS to maintain the requirement to help States enforce nonprofit law and campaign finance laws. I have argued that the IRS was wrong that it need not take other law into consideration. Congress has designed the tax law to work in tandem with other enforcement agencies both Federal and State and local.[117]

What penalties does the IRS have at hand to manage failures to file Form 990s or false information on Form 990s?

Section 6652 penalizes either a failure to file an information return or to file a complete return.[118] The penalty on the organization is $20 a day with a maximum for smaller organizations of $10,000 and of larger organizations at $50,000.[119] The IRS has stated that a return that leaves out material information is an incomplete return that can be penalized.[120] The IRS has suggested that "materiality depends upon what the Service requires to administer the tax laws."[121] Additionally there are criminal penalties, such section 7206 which applies when someone "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter."[122] These criminal charges require a high burden of proof and are not often used by the IRS except typically in egregious cases.

III. IRS ENFORCEMENT

What resources does the IRS have at its disposal to ensure taxpayers are complying with the law? A review of the trend over the past 10 years suggests the IRS does not have the resources, human or capital, needed to enforce the current tax law.[123] Furthermore, the IRS places low budget priority on the exempt organization sector likely because it delivers little in tax revenue.[124]

While the economy grew, Congress shrunk the IRS budget over the past decade. The Congressional Budget Office ("CBO") reports that the IRS budget fell by 20 percent in real (inflation-adjusted) dollars between 2010 and 2018.[125] This resulted in a 22-percent decrease in employees working at the agency, and a 30-percent decline

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[114] *Citizens United v. FEC,* 558 U.S. 310 (2010); *SpeechNow.org v. FEC,* 599 F.3d 686 (D.C. Cir. 2010) (en banc), cert. denied, 562 U.S. 1003 (2010).

[115] 52 U.S.C. § 30121; 11 CFR § 110.20. *See* Norman I. Silber, "Foreign Corruption of the Political Process through Social Welfare Organizations," 114 *NW. U. L. Rev. Online* 104 (2019).

[116] Roger Colinvaux, "Social Welfare and Political Organizations: Ending the Plague of Inconsistency," 21 *N.Y.U. J. Legis. and Pup. Pol'y* 481 (2018).

[117] For example, Congress enhanced 26 U.S.C. § 527 in 2000 to augment the FEC's roll in overseeing campaign finance by creating an IRS reporting regime for those political organizations that did not need to file reports with the FEC. Congress directs the IRS to work with State agencies as they revoke exemption from charitable organizations in 26 U.S.C. § 6104. As a practical matter the IRS works regularly with other agencies such as the Federal Bureau of Investigation, the Department of Justice, the Federal Communications Commission, and the Department of Labor to ensure that the Federal laws are enforced.

[118] 26 U.S.C. § 6652(c).

[119] *Id.*

[120] IRS Office of Chief Counsel, PMTA 01357, Memorandum from James Brokaw to David Fish, November 2, 2007, *https://www.irs.gov/pub/lanoa/pmta01357_7359.pdf.* Rev. Rul. 77–162.

[121] *Id.*

[122] 26 U.S.C. 7206.

[123] *See, e.g.,* Paul Keil and Jesse Eisinger, "How the IRS Was Gutted," ProPublica (December 11, 2018). *See also* Leandra Lederman, "The IRS, Politics, and Income Inequality," *Tax Notes,* 1329 (March 14, 2016).

[124] Much of this part II(d) comes from "Dark Money Darker," *supra* note 1, at 175–79.

[125] Congressional Budget Office, "Trends in the Internal Revenue Service's Funding and Enforcement," 1 (2020).

in enforcement employees.[126] IRS Data Books show the IRS went from over 94,000 full time equivalent ("FTEs") employees in FY 2010 to 73,554 FTEs in FY 2019.[127] Furthermore, some of the most specialized employees in the enforcement sphere saw declines of 35 percent for revenue agents and 48 percent for revenue officers.[128] Individual examinations fell by 46 percent in that period with only 0.6 percent of individuals facing an examination by the end of that period.[129] While high income individuals were generally audited at a rate higher than other individuals, the audits of high-income individuals fell at a greater rate than all other individuals.[130] Corporate examinations fell by 37 percent.[131]

What happened to the IRS in its tax-exempt organization group? The Government Accountability Office ("GAO") in 2014 recognized that the budget cuts at the IRS led to less enforcement in the tax-exempt sector.[132] The IRS workforce on exempt organization matters shrank about 5 percent from 2010 (889 FTEs) to 2013 (842 FTEs).[133] That workforce then shrank significantly to around 550 FTEs by FY 2019.[134] There was a change in the exempt organizations group at the IRS after the Tea Party controversy of 2013[135] where many employees of exempt organizations moved over to the Chief Counsel to manage guidance projects from that office. In 2014, it was reported that around 45 employees from the IRS were being moved over to the Office of Chief Counsel of the IRS in a realignment.[136] However, even if 45 moved over, that does not explain the precipitous drop.

The main functions of the exempt organizations group are running an application system called the determinations process, and an examination program. In determinations, as annual applications have increased annual rejections from the IRS have significantly decreased.[137] In FY 2019, the IRS reviewed over 101,000 applications for exempt status, it rejected only 66 of those applications.[138] Comparatively, in FY 2010, the IRS reviewed over 65,000 of such applications and rejected 517.[139] Admittedly, a large number of applicants withdraw their applications before denial and this statistic has the potential to be misleading. When looking at examinations, it is impossible to have a perfect figure given the way the data is reported in the IRS Data Book, but of all the returns filed and all the returns examined in 2010, which likely includes some double counting of organizations (and includes sizable employment tax returns), the IRS had about a .38 percent examination rate.[140] In 2019, comparatively, even with the double counting problem, the examination rate

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[126] *Id.*

[127] Internal Revenue Service, Data Book, 74 Table 31 (2019); Internal Revenue Service, Data Book, 66 Table 29 (2010).

[128] *Id.*

[129] *Id.* at 2.

[130] *Id.*

[131] *Id.*

[132] GAO, "Better Compliance Indicators and Data, and More Collaboration with State Regulators Would Strengthen Oversight of Charitable Organizations," 19 (2014).

[133] *Id.*

[134] IRS, TEGE, Fiscal Year 2019 Accomplishments, Pub. 5329 (2020).

[135] For more on this matter *see* Philip T. Hackney, "Should the IRS Never 'Target' Taxpayers? A Consideration of the IRS Tea Party Affair," 49 *Val. L. Rev.* 453 (2015). The Treasury Inspector General for Tax Administration (TIGTA) later concluded that the IRS treated both conservative and liberal groups in the same way in the IRS determination process. Inspector Gen. for Tax Admin., *Review of Selected Criteria Used to Identify Tax-Exempt Applications for Review,* Ref. Num. 2017–10–054 (September 28, 2017), *https://www.treasury.gov/tigta/auditreports/2017reports/201710054fr.pdf.* The Senate Finance Committee's Bipartisan Investigative Report concluded similarly in 2015. Senate Finance Committee, *The IRS's Processing of 501(c)(3) and 501(c)(4) Applications for Tax-Exempt Status Submitted by "Political Advocacy" Organizations from 2010–2013,* Sen. Rep. 114–119 (August 5, 2015), *https://www.congress.gov/congressional-report/114th-congress/senate-report/119/1.*

[136] Diane Freda, "Move of 45 IRS TE/GE Employees to Chief Counsel's Office Slated for FY 2015," *Bloomberg Law News* (May 14, 2014). Some of those 45 came from employee plans. One article from the time suggests it was only 22 employees from the exempt organizations group that moved over. Lauren Simpson, "IRS Controversy and Restructuring," *Nonprofit Law Blog* (May 29, 2014), *https://www.pbwt.com/exempt-org-resource-blog/nonprofit-law-blogirs-controversy-changes-tege.*

[137] Philip Hackney, "The Real IRS Scandal Has More to do with Budget Cuts than Bias," *The Conversation* (April 15, 2018).

[138] IRS, Data Book, 27, Table 12 (2019).

[139] IRS, Data Book, 56, Table 24 (2010).

[140] IRS, Data Book, 4, Table 2, 33, Table 13 (2010).

shrinks to 0.15 percent at best.[141] TIGTA counted the rate in 2019 at 0.13 percent.[142]

This erosion of the IRS workforce and enforcement happened while the tax-exempt sector grew. Though a comparison of IRS data between 2010 and 2019 seems to suggest that total tax-exempt organizations shrunk,[143] the sector has grown in size of assets. It is difficult to get good current statistics on nonprofits. There are many problems with the data from the IRS including the fact that not all organizations file returns[144] or do not file returns that provide any significant data,[145] and we have no reason to believe all organizations file their returns accurately. Nevertheless, a look at IRS data from Forms 990 suggests assets and revenue have increased quite a bit in the sector over the decade.[146] In 2010, with a little over 186,000 charitable organization Form 990s filed, the charitable sector held over $2.9 trillion in assets and almost $1.6 trillion in revenue.[147] In comparison, in 2017 over 217,000 charitable organizations filed Form 990s reporting over $4.3 trillion in assets and almost $2.3 trillion in revenue.[148] Using that same data, again from reporting on Forms 990, for exempt organizations including 501(c)(4)–(9) in 2010 there were approximately $547 billion in assets and $360 billion in revenue.[149] In 2017, those amounts grew to approximately $767 billion in assets and $387 billion in revenue.[150]

Thus, the enforcement environment for the IRS is poor both at the IRS in general and at the division that oversees tax-exempt organizations in particular. When compared to the size of the sector the IRS is reviewing, the idea that the IRS might be able to use human resource heavy examinations to ensure compliance is laughable. It is not going to work. Though I will not go into this here, State enforcement is even more anemic. Efforts, such as those recommended by GAO, for the IRS to make better use of data available is going to be the only way the IRS in this current environment can make headway against tax abuse. Robust information reporting thus needs to be the norm.

As noted above, the IRS often has given short shrift to the tax-exempt organization enforcement side of its house. This is likely in part because the sector simply does not generate revenue, and it comes with enforcement that has potential political danger if not handled with care. Nevertheless, it seems possible and important for the IRS to do more in this space with publicly available campaign spending reports filed with the FEC. Many cases noted by Citizens for Responsibility and Ethics in Washington where social welfare organizations represent one thing to the FEC regarding making independent expenditures and then reporting nothing to the IRS on the Form 990 are troubling. Such cases seem to present prima facie cases of substantial political campaign intervention that at the least ought to be investigated. They also present questionable statements on Form 990s.

IV. CONCLUSION

Thank you for inviting me to speak about the laws and enforcement governing the political activities of tax-exempt organizations. The tax laws are built fairly well to prohibit the deduction of campaign expenditures and to promote a strong nonprofit sector. There are problems with that architecture. For instance, Congress could consider requiring donors to recognize gain on the contribution of appreciated assets to a dark money organization. This would end an indirect means of deducting political activity. Additionally, it would help if the IRS were permitted to issue rules clarifying the boundaries of political campaign activity for social welfare organizations. However, the legal architecture works reasonably well in theory to ensure the government is not subsidizing campaign-related contributions through the Code and to ensure a well-ordered nonprofit sector. That said, the current anemic IRS budget,

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[141] IRS, Data Book, 4, Table 2, and 54 Table 21 (2019).
[142] Inspector Gen. for Tax Admin., *Obstacles Exist in Detecting Noncompliance of Tax-Exempt Organizations,* Ref. No. 2921–10–013, 6 (2021).
[143] IRS, Data Book, 56, Table 25 (2010); IRS, Data Book, 30 Table 14 (2019).
[144] After Congress added 26 U.S.C. §6033(h) to the Code in 2006, and the IRS implemented what it calls the Form 990–N (e-Postcard), churches are likely far and away the largest group of charities that file no IRS return.
[145] Form 990–N provides little in the way of information regarding the organization.
[146] IRS, SOI Tax Stats—Charities and Other Tax-Exempt Organization Tax Statistics, Form 990—Balance Sheet and Income Statement Items.
[147] *Id.* 2010.
[148] *Id.* 2017.
[149] *Id.*
[150] *Id.*

the lack of enforcement action by the IRS, and the failure to collect substantial donor information from dark money organizations creates a crisis. There is good reason to believe that taxpayers are able to take advantage, and indeed are taking advantage, of this system. These factors undermine confidence in the tax system, the equal enforcement of the law, and our ability to operate a fair democratic system. Therefore, I urge Congress to increase the IRS budget to a level that allows the IRS the ability to properly enforce the tax laws. But, institutionally, I believe the IRS needs to be pushed and given support to enforce these laws that help work toward a more fair democratic order.

QUESTIONS SUBMITTED FOR THE RECORD TO PHILIP HACKNEY

QUESTIONS SUBMITTED BY HON. JOHN THUNE

Question. How does the IRS determine whether voter registration and related activities that are funded by 501(c)(3) private foundations, or executed by 501(c)(3) public charities, violate the legal requirement of nonpartisanship? If violations occur, how is the IRS supposed to respond?

Answer. Though nonpartisanship plays a role in this particular question, the legal issue the IRS must consider is the prohibition on intervening in a political campaign, often colloquially called the Johnson Amendment. Under section 501(c)(3) a charity may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." As I noted in my testimony, this means that the organization's representatives when speaking for the charity may not directly or indirectly encourage the public to vote for or against a candidate for political office. The most direct guidance the IRS provides on this question is found in Revenue Ruling 2007–41. Notably, a charity can further its charitable purposes through voter education activity and through get out the vote work if "conducted in a non-partisan manner." As Rev. Rul. 2007–41 states: "voter education or registration activities conducted in a biased manner that favors (or opposes) one or more candidates is prohibited." In the two examples the IRS provides in that revenue ruling, the key factor that seems to come out is that the IRS needs to assess whether the organization is taking actions in conducting this work that biases voters toward or away from one candidate or another. As long as an organization is registering everyone, and not pushing a particular position that is well identified with particular candidates running, then most of this type of work will satisfy the requirements Congress set forth in the Code. Technically, there is no amount of intervention in a political campaign that is allowed. However, the IRS has taken an approach that education of nonprofits is an important value. Congress implicitly accepts that the IRS can take this more lenient approach to the issue as it has provided tools to the IRS to apply excise taxes under section 4955 in lieu of or in addition to revocation. It thus typically will assess the egregiousness of the violation and enter into agreements with charities that violate the norm to not engage in such conduct again and to adopt procedures that will help prevent such violations in the future. In egregious situations the IRS can also take immediate action under 26 U.S.C. §§ 6852 and 7409.

Question. The 2015 Senate Finance Committee bipartisan investigation into the targeting of taxpayers resulted in a number of findings. One of the findings was that a contributing factor to the IRS's management problems was the decentralization of its employees, including some who worked from home as often as 4 days per week, and managers who remotely supervised employees 2,000 miles away. This was several years before COVID.

Do you think such a decentralized organizational structure has inhibited IRS performance for taxpayers, or for that matter, increased the likelihood of data leaks or hacks of private taxpayer information?

Answer. As I said in my testimony, I believe that the number one thing that has negatively impacted IRS performance is a deficient budget. I believe the deficient budget is more likely to cause such challenges than a move to modern work styles.

Question. TIGTA recently reported that the IRS destroyed tens of millions of unprocessed returns in 2021.

While the IRS has since stated there were "no negative taxpayer consequences as a result of this action," how do you think the IRS's decision to destroy taxpayer information impacts trust between taxpayers and the agency, particularly for tax-

payers who meet their filing obligations only to see the agency selectively destroy filed documents?

Answer. Anytime the IRS is considering how to deal with taxpayer information, it needs to bring the utmost care to the issue. The deficient budget the IRS faces and the deficient information technology system at its disposal make these problems likely to occur and cause the trust issues you suggest.

Question. Is it correct that Lois Lerner was exonerated in the later investigations of the targeting controversy?

Answer. No one has brought charges in the matter. An exhaustive review I conducted of the matter showed no laws prohibited the actions taken by the IRS in these initial determinations of tax-exempt status. Indeed, I have argued and still contend that the choice to centralize review of these organizations made good sense. It allowed the IRS to get the right decision on all of these cases and apply the law with as little bias as possible. This committee's own report, and a later TIGTA report, indeed showed that the IRS did not act in a biased manner. Many organizations both conservative and liberal were treated to similar procedures. The matter could have been managed by that office much better than it was. Some of the questioning of applying organizations was poorly designed and the IRS took much too long to come to a decision. But, I don't believe you need exoneration from poor management.

PREPARED STATEMENT OF HON. ANN RAVEL, FORMER CHAIR, FEDERAL ELECTION COMMISSION

Chairman Whitehouse, Ranking Member Thune, and distinguished members of the subcommittee:

Special tax benefits for non-profit organizations, including 501(c)(4)s and 501(c)(6)s, were intended by Congress to encourage organizations promoting and operating exclusively as social welfare organziations or business leagues and other associations not organized for profit. Since 1959, the IRS regulations provided that an organization is operated exclusively for the promotion of social welfare if it's engaged in promoting in some way the common good and general welfare of the community. And an IRS decision held that if an organization is primarily political, it cannot be a 501(c)(4) or a 501(c)(6) trade association.

Because Federal tax law governs the extent to which tax-exempt organizations may engage in activities to support candidates without jeopardizing the organization's tax exempt status and whether such activity requires public disclosure or payment of tax, political expenditures and activities must be reported on the Form 990.

Due to the *Citizens United v. FEC* decision, a lack of enforcement, and a new IRS rule enacted in 2020 which eliminated donor reporting requirements to the IRS for 501(c)(4) organizations, organizations that have tax-exempt status are a major source of anonymous large political contributions, because donors are not required to identify themselves either to the IRS or to the public. As a consequence of these factors, some groups that receive tax benefits for "social welfare work" have been emboldened to engage in excessive political spending.

The lack of disclosure requirements has undermined some of the basis tenets of the law relating to campaign contributions and expenditures and the importance of full disclosure of the money in politics. In the *Citizens United* Supreme Court decision, Justice Kennedy upheld disclosure requirements in campaign finance, stating that disclosure "provides the electorate with information" to ensure "that voters are fully informed about the person or group who is speaking," and also ensures that "people are able to evaluate the arguments to which they are being subjected." Notably, Justice Kennedy, supported by seven other Justices, held that "the transparency enables the electorate to give proper weight to different speakers and messages," and "citizens can see whether elected officials arein the pocket of so-called moneyed interests." (*Citizens United v. Federal Election Commission,* 130 S. Ct. 876, 916 (2010).)

After the *Citizens United* decision, there was a surge in the formation of politically focused organizations seeking to obtain IRS approval as (c)4s. In 2012, at least $250 million passed through the (c)4s into efforts to elect candidates, an 80-fold increase from 8 years prior. (Maya Miller, "How the IRS Gave Up Fighting Political Dark Money Groups," ProPublica, April 18, 2019.)

Since the IRS rule enacted in 2020 eliminated donor reporting requirements to the IRS, the problem of political dark money has been exacerbated.

While the flood of money began and continued after *Citizens United,* more than $1 billion in dark money flooded the 2020 elections. The lack of disclosure to the IRS of 501(c)(4)donors has also had a significant impact on the rise of political dark money. Because donors are aware that there will be no IRS enforcement of the law relating to political money, they know that they have free rein to violate the law. This dramatic increase in spending by financiers whose identities remain hidden from the very public they are paying to influence poses a serious threat to America's autonomy and the public's right to know who is influencing our elections and the policy decisions that come along afterwards.

In 2021, based on what has been reported to the FEC, there has already been $115,817,584 million spent by 501(c)s in outside political spending, according to Anna Massoglia at OpenSecrets. This figure does not include information from the recent FEC deadline.

And, more likely will be spent soon, according to a recent article in *Axios. Axios* reported that The Common Sense Leadership Fund, a 501(c)(4) which does not disclose donors, has already "steered half a million dollars" to its new political action committee, the Eighteen Fifty-Four Fund, anticipating that its new group will spend in excess of $10 million—and potentially much more—on midterm contests."[1]

In 2015, the political director, Carl Forti, of American Crossroads, which is the "sister Super PAC" to Crossroads GPS, admitted the reason for the establishment of Crossroads GPS, a 501(c)(4). He was quoted on a panel at the Annenberg Public Policy Center of the University of Pennsylvania remarking that "disclosure was very important for us, which is why the 527 [American Crossroads] was created. But some donors didn't want to be disclosed, and therefore, a (c)(4) [Crossroads GPS] was created."[2]

Similarly, the biggest donor to Future Forward USA was its own 501(c)(4) nonprofit group which doesn't disclose its donors.

The IRS rule eliminating donor reporting requirements has not only encouraged dark money, but the clear prohibition of foreign money influencing United States' elections will also be circumvented by foreign donors contributing to 501(c)(4)s, knowing that the IRS will make it easier for them to expend unlimited sums of money to influence our elections with no consequence. The regulation has provided an easy opportunity for foreign actors to secretly funnel money to elections through such 501(c)s. This is happening at a time when our democracy is at risk, and when we know that there are ongoing campaigns by foreign actors to undermine public confidence in our democratic institutions.

A report from the Government Accountability Office, dated February 3, 2020, "Campaign Finance: Federal Framework, Agency Rules and Responsibilities, and Perspectives," found that the IRS doesn't even check nonprofit tax records for signs of illegal foreign money in United States elections. The government oversight office was told by IRS officials that "examiners do not review the national origin of sources of donations" in non-profit annual tax returns, claiming that the IRS "plays no role in enforcing" campaign finance rules governing foreign money in elections.[3]

The money spent on campaigns from undisclosed sources is an increasingly significant problem in the United States' civic life. Dark money from anonymous sources has seeped into all levels of government and political processes, from Federal and State elections, to spending to support politicians' agendas, judicial nomination processes, redistricting, voting rights and other issues impacting America.

According to a new report by Matt Corley and Adam Rappaport at CREW, entitled "The IRS Is Not Enforcing the Law on Political Nonprofit Disclosure Viola-

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[1] Lachlan Markay, "First Look: New GOP Group's 'Eight Figure' Midterm Blitz," *Axios,* April 20, 2022, *https://www.axios.com/gop-group-midterm-blitz-b939b84e-25d5-4f90-ae9a-0f45cee07262.html.*

[2] Peter Overby, "Group Behind Election Ads Weighs in on Tax Deal," NPR, December 14, 2010, *https://www.npr.org/2010/12/14/132060878/Conservative-Group-Wades-Into-Tax-Debate.*

[3] *See also,* OpenSecrets, "'Dark money' groups steering millions to support elections," Anna Massoglia, February 7, 2020, *https://opensecrets.org/news/2020/02/dark-money-steers-millions-to-super-pacs-2020/.*

tion,"[4] their investigation found that for much of the time since *Citizens United,* "the IRS didn't revoke any section 501(c)(4) group's tax-exempt status for violating the law's limits on their political spending."

The CREW report concluded that: "The IRS appears to have been notably lenient in enforcing the basic rules on disclosure and transparency by section 501(c)(4) groups engaged in politics. CREW and others have identified dozens of these kinds of violations, many of which were brought directly to the IRS's attention through complaint letters to the agency. Some section 501(c)(4) groups, for example, disclosed their political spending to the Federal Election Commission (FEC) and other government agencies, but told the IRS under penalty of perjury in their tax returns that they did not engage in any political activity or misrepresented the amount they spent. Others simply failed to file their tax returns or filed them only after complaints were filed against them."

The CREW report made clear that the IRS has shirked its duty to review the FEC filings to assure that the filings of politically active 501(c)(4s) are consistent and truthful. There should be greater coordination between the IRS, the FEC, and also the DOJ, to assure that the law they each agency has responsibility to enforce is not being evaded. As the Chair and Commissioner of the Federal Election Commission from 2013–2017, I was concerned that Federal agencies that have overlapping missions such as the FEC, IRS and DOJ did not consult or coordinate on information regarding violations of Federal law. This unwillingness to work together to enforce the law continues to today, and the resulting negligence is detrimental to the American people.

It is wrong for the IRS to allow partisan political operatives to establish phony social welfare organizations that to not have to pay their fair share of tax and instead collectively expend hundreds of millions of dollars from secret sources into our elections. Rather than carry out their election spending through section 527, which was enacted for this purpose, but requires donor disclosure, political groups are masquerading as 501(c)(4)s solely to keep political spenders anonymous.

Congress never intended that social welfare organizations should exist as conduits for secret political spending. In exchange for the tax exemption, the law requires these non-profits to engage exclusively in the promotion of social welfare.[5] The IRS has said that social welfare activities do not include political campaign intervention.[6]

No bright line IRS standard exists as to how much and by what measure the IRS should evaluate a social welfare organization's furtherance of its primary purpose. Together with a lack of enforcement, this circumstance has provided the path for political organizations on the right and the left to pose as social welfare organizations and to spend enormous amounts of money from undisclosed sources on elections. The lack of a bright line standard, however, is not a justification for not enforcing the law. The IRS can and should enforce the law where there is clear and substantial information (such as from the FEC disclosures) to find a violation. To entirely abstain from enforcement is not acceptable.

Americans of both parties have consistently agreed that there is too much money in politics—and that much of that money comes from a tiny, highly unrepresenative segment of the population that purchases outsized influence over government decisions. And, there is an increasing distrust in government.

This is why we should expect the IRS to do its job and enforce the law. Impartial and consistent enforcement of the law governing nonprofit political spending is squarely within the IRS's mandate and authority. The IRS should hold political groups on all sides accountable if they misappropriate the privileges of the social welfare organization's structure.

Furthermore, donor disclosure should be reinstated on the Form 990, both for (c)(4)s, but also for (c)(6)s.

Some have observed that (c)(3) money has been granted to (c)(4)s for "general support" but is actually ultimately used for electoral activity. Consequently, there

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[4] Matt Corley and Adam Rappaport, "The IRS Is Not Enforcing the Law on Political Nonprofit Disclosure Violations," April 28, 2022, *https://www.citizensforethics.org/reports-investigations/crew-reports/the-irs-is-not-enforcing-the-law-on-political-nonprofit-disclosure-violations/*.

[5] 26 U.S.C. section 501(c)(4).

[6] 26 CFR 1.501(c)(4)–(1)(a)(2)(ii).

should be better oversight over how funds from 501(c)(3) organizations are ultimately used by recipients.

Finally, the IRS and Treasury Department should update the social welfare regulations to provide clarity around the standard to determine whether an organization is operated exclusively for the promotion of social welfare. To do this, Congress would need to repeal and stop including a rider in must-pass appropriations that has prevented the IRS and Treasury Department from taking this step. This dark money rider has kept voters in the dark as to who is behind political spending that influences elections. The regulations that need to be updated were written decades before the Supreme Court decided *Citizens United* and changed how corporations, including nonprofit corporations can spend money in political campaigns, including by contributing to super PACs. These social welfare organizations were never intended to operate as de facto political committtees, and the regulations need to be updated to preserve voters right to know who is influencing elections.

Most critics of the IRS acknowledge that the task can be nuanced and difficult. But it is important for the IRS to do its job and provide oversight.

QUESTIONS SUBMITTED FOR THE RECORD TO HON. ANN RAVEL

QUESTIONS SUBMITTED BY HON. JOHN THUNE

Question. Since last year's massive IRS leak or hack of private taxpayer information, in which the left-leaning ProPublica went on to publicize confidential taxpayer details, there has been no meaningful follow-up from the Biden administration.

How do you think this unauthorized disclosure of private taxpayer information—and the lack of accountability from the administration—impacts trust between taxpayers and the IRS?

Answer. The unauthorized disclosure of private taxpayer information is the subject of an investigation by the IRS and DOJ. This investigation, as I understand it, remains underway. Consequently, before commenting on the impact on trust between taxpayers and the IRS, it is necessary to have a better understanding from the investigation of the facts of the ProPublica matter.

Question. How would you compare the concerns over political activity engaged by 501(c)(3) organizations to 501(c)(4) organizations?

Answer. Political activity by 501(c)(3)s and (c)(4)s raise concerns over the same underlying issues—social welfare groups or charitable nonprofits which are engaging in activity for political purposes, including supporting or opposing a candidate for public office, and directly or indirectly participating or intervening in any political campaign on behalf of or in opposition to any candidate for elective public office, while receiving tax benefits. Since the large amount of undisclosed money that is spent on these direct or indirect political activities through the mechanism of (c)(4)s is greater than with (c)(3)s, this activity creates a lack of trust in the integrity of our electoral process. While some are concerned with (c)(3)s engaging in voter education activity, and actively encourage people to participate in the electoral process by voter registration and get out the vote, such activity is not prohibited if it is conducted in a nonpartisan manner, because 501(c)(3)s have an important role in helping to educate the public.

Question. What do you find to be the greatest dangers of donor disclosure for 501(c)(3) and 501(c)(4) organizations and their donors? What historical examples of harm do you find most disturbing?

Answer. The greatest issue with donor disclosure for these organizations and their donors is the concern that disclosure of their contributions will lead to threats, harassment, or reprisals. The concerns about this are only meritorious when the threats, harassment, or reprisals could lead to violence. As Justice Scalia wrote in *Doe v. Reed,* "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." Most of these concerns have been found by the courts to be unfounded, and some organizations are primarily concerned that such disclosure will deter contributions, which is hardly a danger.

Historically, in the case of *NAACP v. Alabama* (1958), the State Government in Alabama demanded that the NAACP turn over the names of the rank and file members of the organization. The NAACP refused to do so because, as one of the only active civil rights organizations in the South, the members of the organization were

exposed to violent attacks. For years there had been a history of physical attacks and violence inflicted on Black civil rights groups in the South, so their concerns about such violence were not solely an assumption, and there was an acute threat of harm if they were required to turn over such information to the State. For that reason, the Supreme Court determined that they did not have to disclose the information about their members.

PREPARED STATEMENT OF BRADLEY A. SMITH, CHAIRMAN,
INSTITUTE FOR FREE SPEECH

Chairman Whitehouse, Ranking Member Thune, and members of the subcommittee, on behalf of the Institute for Free Speech, thank you for inviting me to testify at this hearing on "Laws and Enforcement Governing the Political Activities of Tax-Exempt Entities."

The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization focused on promoting and protecting the First Amendment's political rights of speech, press, assembly, and petition. I founded the Institute in 2005, after completing my term as Commissioner at the Federal Election Commission (FEC), because it had become clear to me, both as an academic and then in my time as a Commissioner, that the public is greatly misinformed about laws regulating political speech, including the extent and content of such laws, their real-world effects, and their enforcement. The Institute has worked tirelessly to bring an honest, nonpartisan approach to these issues.

I. INTRODUCTION

For many reasons, the enforcement of campaign finance and other laws regulating political speech is a highly complex issue. Most importantly, such laws must be carefully crafted in order to avoid infringing on First Amendment rights. Unfortunately, too often these laws have not been carefully written, and when such laws are combined with criminal penalties, they provide a breathtakingly powerful tool for elected officials and government employees to use to try to silence or hinder political opposition.

Ironically, the last time I was asked to testify at a hearing dedicated to political activity by tax-exempt organizations was in 2013 before the Senate Judiciary Committee's Subcommittee on Crime and Terrorism, then chaired by Senator Whitehouse. At that hearing, a witness called by the majority Democrats noted that he was "optimistic" about the ability of the Internal Revenue Service to regulate political speech, praising the agency as "scrupulously fair and nonpartisan" and singling out the then-Director of the Exempt Organization Division, Lois Lerner, for particular praise. (Committee on the Judiciary, Subcommittee on Crime and Terrorism, 113th Cong., April 9, 2013, p. 70–71 (Supplemental Statement of Gregory L. Colvin).) One month later, Ms. Lerner "told a stunned audience of tax attorneys in Washington that the IRS had delayed and obstructed the tax exemption applications from conservative-sounding organizations," and later that month, the U.S. Treasury Inspector General made public a report confirming and detailing the nature of the targeting. (Michael Wyland, "Whatever Happened to the IRS Tax Exemption Scandal?", *Nonprofit Quarterly,* August 22, 2017.) Now here we are again, with another Democratic Senate majority facing fierce political headwinds, and it appears that a small group of Senators is looking to respond by trying to further involve the IRS in regulating political speech.

The temptation to use regulation and enforcement for political advantage is bipartisan. Let's begin by considering the very first prosecution brought under the Federal Election Campaign Act of 1971: A suit against the National Committee for Impeachment, brought by the Justice Department under then-President Richard Nixon.

On May 31, 1972, a 2-page ad appeared in *The New York Times* that featured the headline "A Resolution to Impeach Richard Nixon as President of the United States." The ad, which cost $17,850, was paid for by a group consisting of several lawyers, at least one law professor, a former United States Senator, and several other citizens of modest prominence, calling themselves the National Committee for Impeachment. In addition to criticizing President Richard Nixon, the ad recognized an "honor roll" of several Congressmen who had introduced a resolution that called for the President's impeachment. In response, the United States Department of Justice moved swiftly, getting a Federal district court to enjoin the National Committee

for Impeachment and its officers from engaging in further political activity. Even though the ad did not discuss the upcoming election or urge anyone to vote in any particular manner, the government argued that the Committee was violating the Federal Election Campaign Act of 1971 because its efforts had the potential to "affect" the 1972 presidential election, and the Committee had not properly registered with the government to engage in such political activity.

Ira Glasser, who was an executive director of the American Civil Liberties Union, noted that the government "wrote a letter to *The Times* threatening them with criminal prosecution if they published such an ad again. . . . Soon after, the ACLU itself sought to purchase space in *The Times* in order to publish an open letter to President Nixon, criticizing him for his position on school desegregation. The letter made no mention of the election and indeed, until many decades later, the ACLU never supported or opposed any candidate for elective office. Fearful of government reprisal based on the government's threatening letter from the previous case, *The Times* refused to publish the ad."

In both cases, these groups' First Amendment rights were eventually vindicated. However, during the time it took to win these cases, much speech about elected officials and public affairs was thwarted. Further, fighting the prosecutions came at great expense and much anxiety for those who simply sought to speak out about their government.

The history of criminal and tax enforcement of campaign finance law had largely been one of political prosecutions that should serve as a warning to this body. The first case in which the U.S. Supreme Court clearly accepted the idea that regulation of political speech could be constitutional—which it did over the vigorous dissents of Justices William O. Douglas and Earl Warren—was *United States v. Auto Workers,* 352 U.S. 567 (1957). That case, as legal historian Allison Hayward has shown, was brought by the Eisenhower administration to seek to quash union political power after the merger of the AFL and the CIO. Fortunately, though the Supreme Court refused to quash the prosecution before trial as unconstitutional, the government was unable to get a conviction. *See* Allison R. Hayward, "Revisiting the Fable of Reform, 45 *Harv. J. Legis.* 421 (2008).

The Eisenhower administration was merely following its predecessor, the Truman administration, which had engaged in a series of political prosecutions aimed at auto dealers in Michigan in the late 1940s. In those cases, the U.S. Attorney prosecuted only reluctantly, viewing the violations as minor (in the case of some defendants) to non-existent (in the case of others), and as raising serious constitutional issues. But politicians in Washington insisted—apparently, like today, for political reasons—on "aggressive enforcement." Like today, the major news columnists of the day, most notably Drew Pearson, were enlisted to whip up public fervor, with Pearson presumably benefiting from a stream of leaks from the Attorney General's office in Washington. Nevertheless, perhaps foreshadowing such prosecutions as that of John Edwards, "once in court, prosecutors could not win a conviction, and jurors expressed distaste for enforcing this criminal statute against this kind of activity." Indeed, the entire series of prosecutions was based on the belief of large-scale violations "that, as it turned out, did not exist." But the prosecutions were directed from Washington because "chilling auto dealers and other corporate managers from making contributions to Republicans served the administration's political agenda." *See* Allison R. Hayward, "The Michigan Auto Dealers Prosecution: Exploring the Department of Justice's Mid-Century Posture Toward Campaign Finance Violations," 9 *Election L. J.* 177 (2010).

The IRS has frequently been the tool of choice to harass political opposition. President Franklin Roosevelt used it to harass newspaper publishers, including William Randolph Hearst and Moses Annenberg (publisher of *The Philadelphia Inquirer*). He also used the IRS investigations to harass political rivals including Huey Long and Father Coughlin, and prominent Republicans including former Treasury Secretary Andrew Mellon.

In the 1960s, President Kennedy's IRS Commissioner Mortimer Caplin, who later founded the law firm of Caplin and Drysdale, established the "Ideological Organizations Audit Project" for the express purpose of auditing and harassing conservative opponents of the President. In a letter to Treasury Secretary Henry Fowler, Caplin noted, "We recognized the sensitivity of just going after [the] right wing, so we wanted to add both left- and right-wing groups for balance." Illustrating the bipartisan nature of partisan abuse of the IRS, Caplin noted that adding left-wing groups was dicey because many, "had already been given a difficult time during the Eisen-

hower years." The agency also requested investigations of corporate backers of various nonprofits involved in civic discussion.

Under the Nixon administration, the IRS was given a list of Nixon's "enemies" and thousands of groups were targeted. It was because of this long chain of abuses that Congress finally made it illegal to use the IRS for political intelligence gathering and gain in the 1970s. *See* John A. Andrew, *The Power to Destroy: Political Uses of the IRS From Kennedy to Nixon* (Ivan R. Dee 2002); John A. Andrew, *The Other Side of the Sixties* (Rutgers Univ. Press 1997); David Burnham, *A Law Unto Itself: The IRS and the Abuse of Power* (Random House 1990).

Given this history, and additional structural problems discussed below, the Institute for Free Speech believes that the IRS should not be engaged in the minutiae of regulating political or politically related speech at all.

If an entity with a social welfare purpose is deemed a political committee ("PAC") under Federal or State law, it ought to be regulated by the IRS as a 26 U.S.C. ("IRC") § 527 organization. If it is not a political committee, its election campaign speech would not be its primary purpose and thus such a social welfare group would fall under 26 U.S.C. § 501(c)(4). This straightforward approach would harmonize the IRS's rules with those of the Federal Election Commission, the body entrusted by Congress with "exclusive jurisdiction" for civil enforcement of the nation's campaign finance laws. 52 U.S.C. § 30106(b)(l).

This approach would also recognize that in a democracy, political education and the discussion of public affairs not only should but must fall within the definition of "social welfare" and "educational" activities that constitute exempt activities under § 501(c)(4). Nothing in the statute requires exclusion of these functions from the definition of social welfare. Finally, and most importantly, this straightforward approach offers real clarity without dragging the IRS further into the thicket of political speech regulation, a tangle from which it—and the Service's reputation for the neutral, nonpartisan collection of revenue—might never recover.

In a 2013 special report to Congress following the IRS targeting scandal, then-National Taxpayer Advocate Nina Olson feared that the scandal came about because "[t]he IRS, a tax agency, is assigned to make an inherently controversial determination about political activity that another agency may be more qualified to make." *See* Nina Olson, *Special Report to Congress: Political Activity and the Rights of Applicants for Tax-Exempt Status* (2013). As she wrote in her report:

> It may be advisable to separate political determinations from the function of revenue collection. Under several existing provisions that require non-tax expertise, the IRS relies on substantive determinations from an agency with programmatic knowledge.
>
> Potentially, legislation could authorize the IRS to rely on a determination of political activity from the Federal Election Commission (FEC) or other programmatic agency. Specifically, the FEC would have to determine that proposed activity would not or does not constitute excessive political campaign activity.

In fact, no legislation is needed. The IRS could today rely on FEC determinations. The FEC is more qualified to make such determinations not only because of its expertise but also because of its structure, which poses less of a risk of partisan enforcement.

II. THE NATURE OF THE FEC VERSUS THE IRS

Understanding the FEC and its design is important to understanding the problems of using another agency designed for one thing—say, the smooth functioning of securities markets, regulation of broadcasting, or tax collection—for another purpose, such as regulation of campaign spending and speech about politics and public affairs.

Perhaps the most important feature of the FEC's design is its bipartisan makeup. Most Federal independent agencies are directed by a board or commission with some guaranteed level of bipartisan makeup. Only the FEC and the U.S. International Trade Commission have equal size blocks of commissioners, with 3 from each major party, and only the FEC requires four votes of out six commissioners for most actions.

The reason for the FEC's unique design should be obvious. If some measure of guaranteed bipartisanship is viewed as a valuable thing in most independent agencies, this bipartisanship would seem essential for an agency whose core mission is

to regulate political speech in ways that can determine who wins and who loses elections. This is a question both of preventing actual abuse of the agency for partisan gain and preventing the appearance that the agency's decisions are motivated for partisan gain. In short, there is a strong argument for why the FEC is structured as it is, which is to prevent one party from changing the regulatory regime or using the enforcement process for partisan gain.

The FEC also has an enforcement process that aims to resolve matters through conciliation rather than fines or litigation. This, too, has drawn much criticism from those seeking "stronger" enforcement. But this process also exists for a reason. The overwhelming number of complaints submitted to and violations found by the FEC are not due to corruption but inadvertent violations of the law. Many are nothing more than administrative violations against the state.

The cost to a political candidate of having been found to have "violated the law," however, can be great; the rewards to a zealous prosecutor or even FEC Commissioner or General Counsel who is seen to be crusading for "clean elections" are perhaps even greater in the other direction. Therefore structuring the system around voluntary conciliation agreements is an intentional means to depoliticize the complaint process. Again, placing primary enforcement responsibility with the Justice Department, the IRS, or another agency whose process is geared to leveling direct sanctions dramatically alters the balance in the direction of partisan enforcement, and does so in a way that may reward overly aggressive prosecution by government officials in this sensitive First Amendment area.

Thus, while it is true that almost all government agencies have structural features to insulate them from politics, the FEC has more political safeguards than most agencies, and it has them for very compelling reasons.

The IRS faces far fewer situations regarding election speech in its everyday business than does the FEC. Its culture and expertise are therefore quite different from that of the FEC, which regularly faces these issues. Indeed, one reason for the frustration some express with the FEC has been the critics' unwillingness to accept the constitutional restraints under which the FEC operates. Those who seek to push regulation onto other agencies often do so precisely because they seek to bypass such constitutional sensitivities that are, and ought to be, a hallmark of the FEC—the agency charged by Congress with "exclusive civil enforcement" of campaign finance laws.

III. PROBLEMS OF ENFORCEMENT

Vague election laws combined with criminal penalties are a recipe for abusive political prosecutions. It is a threat both to the First Amendment and to honest government. In the case of the Michigan auto dealers, which I discuss above, prosecutors were unable to gain convictions in cases that went to trial; but the threat of prison time convinced many defendants to plead no contest and pay fines.

Similarly, as the unsuccessful prosecution of John Edwards proved, much of campaign finance law is vague, complicated, or both. Because of the potential infringement on civil liberties, Congress should avoid adding criminal penalties to existing or new campaign finance laws. Arguably, there are already too many provisions that provide for criminal penalties. The Bipartisan Campaign Reform Act of 2002 extended the statute of limitations for many criminal violations of campaign finance laws, made more provisions of the law subject to criminal sanctions, and required the United States Sentencing Commission to issue guidelines for campaign finance law violations. Other recent high-profile political prosecutions for vague allegations of campaign finance laws have similarly come apart at the seams, as in the prosecution of Ted Stevens. Unfortunately, far too often the damage is done by the time the law catches up to the hysteria. Stevens was convicted just days before the election, which he lost by less than 1 percent of the vote, and only vindicated posthumously after a plane crash.

The message we should send to the American people is that political participation is a good thing, not a bad thing. For half a century, the message of those who advocate for stricter campaign finance laws has been that political participation is bad, that people who donate are only out for themselves, and that political speech is, quite literally, dangerous. It is no wonder that the confidence in democratic institutions has declined.

The Need for Campaign Finance Law Simplification

The Federal election laws and regulations now contain over 376,000 words. But this just scratches the surface of election law. There are over 1,900 advisory opin-

ions and 7,900 enforcement actions that provide guidance on what these vague laws might mean. As the Supreme Court noted in *Citizens United,* "Campaign finance regulations now impose 'unique and complex rules' on '71 distinct entities.' These entities are subject to separate rules for 33 different types of political speech. The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations." (Citing brief for seven former Chairmen of FEC.)

Congress's vague laws often can't even be interpreted by the FEC. For example, in August 2012, the FEC considered an Advisory Opinion Request for the National Defense Committee, filed by our organization asking whether seven proposed ads would trigger FEC regulation. The FEC said three of the ads would not trigger FEC regulation, but it could not render an opinion on the other four ads, and could not decide on whether the group had to register with the FEC. Last year, the FEC considered 13 Advisory Opinion Requests but failed to provide an opinion in three of those requests. In one Advisory Opinion rendered by the agency, it agreed the proposed activity was allowed by the law but could "not agree on a rationale for this conclusion." And yet most practitioners will tell you—correctly, in my view—that the FEC regulations are clearer than the regulations that the IRS already applies when examining political activity by nonprofit organizations. The problem is not the FEC; it is the law.

The most pressing need for Congress is to make campaign finance law a lot simpler. How can we expect the FEC or Justice Department to fairly enforce laws no one can understand? It is literally impossible to navigate campaign finance laws without a lawyer, and even then, your lawyer might not be able to give you a straight yes or no answer. Worse, many lawyers without campaign finance expertise will give incorrect answers.

As a result, well-meaning citizens often stumble into breaking these laws, in part because the thresholds on regulated speech are absurdly low. For example, current law requires reporting of all independent expenditures over just $250.

IV. CONSTITUTIONAL CONSIDERATIONS

In *Buckley v. Valeo,* the Supreme Court noted that "a major purpose of . . . [the First] Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates." (*Buckley v. Valeo,* 424 U.S. 1, 14 (1976) (quoting *Mills v. Alabama,* 384 U.S. 214, 218 (1966)).)

The Federal Election Campaign Act (FECA) and its subsequent amendments sought to regulate such First Amendment activity. In an effort to clarify First Amendment boundaries of regulable political activity, *Buckley* set the standard for regulation of political speech and association. Consequently, *Buckley's* examination of FECA provides an essential guide.

In *Buckley,* the Court expressed concern about the effects vague laws have upon the freedom of speech. Not only may a vague law be applied inconsistently or arbitrarily, but such a law might also "operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone." (*Id* at 41 n. 8.) Thus, a speaker may "hedge and trim" before speaking. (*Id.* at 43.) The First Amendment needs "breathing space to survive, [and so] government may regulate in the area only with narrow specificity." (*Id.* (quoting *NAACP v. Button,* 371 U.S. 415, 433 (1963)).) In the political arena, the specificity requirement is particularly important, because discussion of public policy issues frequently overlaps with discussion of political candidates:

> For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest. (*Id.* at 42.)

Of course, FECA attempted to divine this difficult distinction, but the *Buckley* court found that it failed to avoid the vagueness problem.

FECA originally attempted to impose an expenditure cap: "[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which . . . exceeds $1,000." (*Id.* at 39.) In addition to constitutional problems with the $1,000 cap, the Court found that the phrase "relative to a clearly identified candidate" was vague. (*Id* at 44.)

The Court crafted an elegant solution. Because the phrase "relative to a clearly identified candidate" left speakers with no opportunity to know in advance whether their conduct was regulated political speech or unregulated issue speech, the Court was compelled to narrow the interpretation of the phrase. To avoid vagueness, FECA had to "be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." (*Id.*) To provide clarity to this phrase, the Court included the highly influential footnote 52, which limited regulable speech to "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support, 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" (*Id.* at 44 n. 52.)

The key, then, is recognizing that the line between discussion of issues and discussion of candidates is, at best, blurry. The harm of vague regulation is its potential to cause a would-be speaker to keep silent due to uncertainty about how the law will be applied. Thus, to remain within the bounds of the *Buckley* decision, regulation should err on the side of avoiding such chill, by providing objective rules that can be uniformly applied and providing clarity in a manner that maximizes the free exchange of ideas guaranteed by the First Amendment. As Chief Justice Roberts has noted, in such cases "the tie goes to the speaker, not the censor." (*FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449, 474 (2007) (*"WRTL II"*) (Roberts, C.J., concurring).)

In addition to drawing a line between issue speech and political speech, the Supreme Court has recognized the need to protect freedom of association from undue and excessive disclosure, most recently in *Americans for Prosperity Foundation v. Bonta.* 594 U.S. __, 141 S.Ct. 2373 (2021); *see also, e.g., Gibson v. Florida Legislative Comm.,* 372 U.S. 539 (1963); *Shelton v. Tucker,* 364 U.S. 479 (1960); *Bates v. Little Rock,* 361 U.S. 516 (1960); *NAACP v. Ala. ex rel. Patterson,* 357 U.S. 449 (1958).

Indeed, *Buckley* also has much to say about protecting the freedom of association in the campaign finance context. Disclosure of information about individuals who seek to involve themselves with a group—or even with a politician—implicates the freedom of association protected by the First Amendment. (*Buckley,* 424 U.S. at 75.)

The iteration of FECA considered by the *Buckley* Court required regular reporting and disclosure by "political committees"—organizations that made "contributions" and "expenditures." (*Id.* at 79.) The definition of "expenditures," however, was vague and implicated the confluence of spending money on issues and spending money to support candidates. (*Id.*) Fortunately, *Buckley* had already carefully crafted an interpretation of FECA to ensure that issue speech was not unnecessarily entangled with the regulation of political speech. (*Id.* at 44.)

To prevent the disclosure requirement from reaching groups that merely mentioned candidates in the context of issue speech, the *Buckley* court construed the relevant provisions to apply only to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." (*Id* at 79.) Expenditures by groups under the control of a candidate or with "the major purpose" of supporting or opposing a candidate "are, by definition, campaign related." (*Id.*) This language, now known as "the major purpose test," narrowed the reach of FECA's disclosure provisions to protect the associational freedoms of individuals.

As applied to individuals and groups that did not have "the major purpose" of political activity, the *Buckley* court narrowed the definition of "expenditures" in the same way—"to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." (*Id.* at 80.) To describe the term "expressly advocate," the Court simply incorporated the examples already listed in footnote 52. (*Id.* at 80 n. 108 (incorporating *Id.* at 44 n. 52).)

V. INVOLVING THE IRS IN POLICING SPEECH MAY THREATEN TAX COMPLIANCE

It is particularly important that the IRS not be converted into a campaign finance enforcement agency. The IRS is responsible for the tax code, and the history of presidential abuse of the IRS and the tax code—discussed above—to target political opposition, through both Democratic and Republican administrations, make it important that Congress not look to the IRS to address perceived issues in campaign finance.

The collection of trillions of dollars in taxes each year is based on what the IRS calls the self-assessment feature of the tax laws, where citizens and businesses calculate and pay their taxes. If the agency develops a reputation as a partisan lapdog of the party in power, that could lead to more citizens cheating on their taxes, or

simply failing to file, with potentially disastrous implications for the budget deficit. If the level of compliance with individual income tax laws alone were to drop just one percentage point due to a decline in the Service's reputation for fairness, that could cost the government over $250 billion in tax collections over a 10-year period.

Contributions to 501(c)(4) organizations are not tax deductible, and the tax liability of existing 501(c)(4)s wouldn't significantly change if they were reclassified as political committees. Since the IRS's regulation of these groups has essentially nothing to do with tax collection, efforts to increase IRS regulation of political speech make little sense and are unrelated to the Service's mission of impartial revenue collection.

This dual regulatory scheme between the FEC and IRS has created confusion among nonprofit groups and the public. It would be a mistake to continue to ask the IRS to play any role—let alone an even greater role—in the enforcement of campaign finance laws.

VI. THE NATURE AND EXTENT OF THE SUPPOSED "DARK MONEY" ISSUE

The decisions of the United States Supreme Court in *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010) (allowing corporations and unions to make independent expenditures in political campaigns from general treasury funds) and of the United States Court of Appeals in *SpeechNow.org v. Federal Election Commission,* 599 F.3d 686 (en banc, 2010) (allowing independent expenditures to be made from pooled funds not subject to PAC contribution limits) have brought a renewed focus to the issue of disclosure of political spending. The claim has largely been that the public lacks information on the sources of vast amounts of political independent spending. This concern, while serious if true, has been artificially ramped up by many mistaken comments in the media about "secret" contributions to campaigns, as well as a widely held but mistaken belief that under *Citizens United,* corporations and unions may now contribute directly to candidate campaigns. In any case, information about political donors, it is believed, can help guard against officeholders becoming too compliant with the wishes of large spenders, and provide information that might be valuable to voters in deciding for whom to vote and how to evaluate political messages.

There have been concerns that nonprofit organizations formed under section 501(c)(4) of the Internal Revenue Code have been engaging in extensive political campaigns using "secret money." This issue, however, is not new. Express advocacy in favor of or against candidates was allowed for certain types of 501(c)(4) organizations even before *Citizens United,* as a result of the Supreme Court's ruling in *Federal Election Commission v. Massachusetts Citizens For Life ("MCFL"),* 479 U.S. 238 (1986). That decision allowed qualified nonprofit corporations to conduct express advocacy through independent expenditures. These groups were significant and growing before the *Citizens United* decision and included groups such as the League of Conservation Voters and NARAL. In addition, even groups that did not qualify for the exemption pursuant to *MCFL* could and did run hard-hitting issue campaigns against candidates.

For example, in 2000, the NAACP Voter Action Fund, a nonprofit social welfare group organized under section 501(c)(4) of the tax code, ran the following ad:

> *Renee Mullins (voice over):* I'm Renee Mullins, James Byrd's daughter. On June 7, 1998 in Texas my father was killed. He was beaten, chained, and then dragged 3 miles to his death, all because he was black. So when Governor George W. Bush refused to support hate-crime legislation, it was like my father was killed all over again. Call Governor George W. Bush and tell him to support hate-crime legislation. We won't be dragged away from our future.

This 30-second TV spot, featuring graphic reenactment footage, began running on October 25, 2000, just a few days before the 2000 presidential election. *See* Bradley A. Smith, "Disclosure in a Post-*Citizens United* Real World," 6 *U. St. Thomas J.L. and Pub. Pol'y* 257 (2012).

This ad was perfectly legal to run at any time before 2003, with no donor disclosure and remained legal to run under current disclosure laws more than 30 days before a primary or 60 days before a general election between 2003 and 2007. It probably also could have been run, with no donor disclosure, at any time after the Supreme Court's 2007 decision in *Wisconsin Right to Life v. Federal Election Commission,* 551 U.S. 449 (2007).

It should also be noted that neither the *Citizens United* nor *SpeechNow.org* decisions struck down any disclosure laws; nor has Congress or the FEC loosened any disclosure rules in place at the time those two decisions were issued in the spring of 2010. There has been no change in the laws governing disclosure of political spenders and contributors.

Despite the focus on "dark money," "secret money," and "undisclosed spending," in fact, the United States currently has more political disclosure than at any time in its history. Candidates, political parties, PACs, and Super PACs disclose all their donors beyond the most *de minimis* amounts. This disclosure includes the name of the group, individual, or other entity that is contributing, the date on which it occurred, and the amount given. Indeed, these entities also report all their expenditures.

Current law also requires reporting of all independent expenditures over $250, and of "electioneering communications" under 2 U.S.C. § 30104(f). 501(c)(4) social welfare organizations must disclose donors who give money earmarked for political activity. All this information is freely available on the FEC's website.

All broadcast political ads (like, in fact, all broadcast ads, political or not) must include, within the ad, the name of the person or organization paying for the ad. Thus, it is something of a misnomer to speak of "undisclosed spending." Rather, more precisely, some ads are run with less information about the spender, and contributors to the spender, than some might think desirable. This recognition is important to understanding the scope of the issue and the importance of measures that seek to require more disclosure.

Furthermore, despite record campaign spending, 2020 saw less "dark money" than any election since *Citizens United.* After peaking in 2012 with an all-time high of $312.5 million (still under 5 percent of that year's total spending on Federal campaigns), "dark money" has dwindled, bottoming out in the 2020 cycle at roughly $102 million. That equals merely 0.73 percent of the election campaign's estimated $14 billion price tag. It equates to less than 4 percent of independent spending in the 2020 cycle.

VII. CERTAIN NONPROFITS PROPERLY ENGAGE IN LIMITED POLITICAL SPEECH

Under *Buckley,* an organization becomes a political committee only if its "major purpose" is the election or defeat of candidates, as indicated by expenditures expressly advocating the election or defeat of a candidate. These political committees operate under section 527 of the Internal Revenue Code. Meanwhile, 501(c)(3) organizations are restricted from any candidate advocacy.

There must be, therefore, some other category for organizations that do some candidate advocacy, but for which it is not the group's "major purpose." These are, indeed, 501(c)(4), (c)(5), and (c)(6) organizations—specifically, social welfare organizations, unions, and trade associations. To attempt to regulate such organizations as political committees, or to prohibit them from all candidate advocacy, would be unconstitutional, forcing advocacy groups to either have political advocacy as their major purpose or to engage in none at all.

VIII. THE DISCLOSE ACT WOULD CHILL FIRST AMENDMENT-PROTECTED ACTIVITY AND VIOLATE THE PRIVACY OF NONPROFIT ORGANIZATIONS AND THEIR SUPPORTERS

Since 2010, members of Congress have introduced various iterations of the DISCLOSE Act, advertised as a solution to the alleged "flood" of "dark money" unleashed by *Citizens United.* The bill has failed in every session of Congress for the past decade largely because groups across the ideological spectrum consistently speak out against its constitutional infirmities. Yet, the latest version the bill would burden freedom of speech and association *more* broadly than most of the previous, failed versions.

The bill would greatly increase the already onerous legal and administrative compliance costs, liability risk, and costs to donor and associational privacy for civic groups that speak about policy issues and politicians. Organizations and their supporters will be further deterred from speaking or be forced to divert additional resources away from their advocacy activities to pay for compliance staff and lawyers. Some groups will not be able to afford these costs or will violate the law unwittingly. Less speech by private citizens and organizations means politicians will be able to act with less accountability to public opinion and criticism. Consequently, citizens who would have otherwise heard their speech will have less information about their government.

The DISCLOSE Act would unconstitutionally regulate speech that mentions a Federal candidate at any time under a vague, subjective, and dangerously broad standard that asks whether the speech "promotes," "attacks," "opposes," or "supports" ("PASO") a candidate. This standard is impossible to understand and would likely regulate any mention of an elected official who hasn't announced their retirement.

Notably, the PASO standard comes from a provision in the 2002 Bipartisan Campaign Reform Act (a.k.a. "McCain-Feingold") that regulates the funds State and local party committees may use to pay for communications that PASO Federal candidates. The Supreme Court upheld the PASO standard against a challenge that it is unconstitutionally vague on the basis that it "clearly set[s] forth the confines within which potential *party speakers* must act" because "actions taken by the political parties are presumed to be in connection with election campaigns" (emphasis added). Thus the DISCLOSE Act would apply a standard written to apply to party communications to most nonprofits despite the fact that the presumption that expenditures are for election campaigns is inapplicable to communications by nonprofit groups.

Numerous other components of the DISCLOSE Act are problematic, as both a matter of policy and constitutional law. Specifically, these provisions would:

- Compel groups to declare on new, publicly filed "campaign-related disbursement" reports that their ads are either "in support of or in opposition" to the elected official mentioned, even if their ads are neither. This form of compulsory speech forces organizations to declare their allegiance or opposition to public officials, provides false information to the public, and is unconstitutional.
- Force groups to file burdensome and likely duplicative reports with the FEC if they sponsor ads that are deemed to PASO the President or members of Congress (except those who are not running for Federal office again) in an attempt to persuade those officials on policy issues.
- Force groups to publicly identify certain donors on reports for issue ads and on the face of the ads themselves. In many instances, the donors being identified will have provided no funding for the ads. Faced with the prospect of being inaccurately associated with what, by law, would be considered (unjustifiably, in many or most instances) "campaign" ads in FEC reports and disclaimers, many donors will stop giving to nonprofits and many of these groups will self-censor.
- Focus public attention on the individuals and donors associated with the sponsoring organizations rather than on the communications' message, exacerbating the politics of personal destruction and further coarsening political discourse.
- Force organizations that make grants to file their own reports and publicly identify their own donors if an organization is deemed to have "reason to know" that a donee entity has made or will make "campaign-related disbursements." This vague and subjective standard will greatly increase the legal costs of vetting grants and many groups will simply end grant programs.

Conclusion

Tax-exempt organizations operating under sections 501(c)(4), (5), and (6) of the Internal Revenue Code have a statutorily and constitutionally valid role to play in the discussion of both electoral politics and, more broadly, public affairs. Experience has shown that the Internal Revenue Service is not an appropriate vehicle to attempt to regulate the political activity of these organizations, and that efforts to involve the IRS in the enforcement of regulations of political speech has led to abuse and scandal—from the administration of Franklin Roosevelt through the IRS targeting scandals of this past decade.

QUESTIONS SUBMITTED FOR THE RECORD TO BRADLEY A. SMITH

QUESTIONS SUBMITTED BY HON. JOHN THUNE

Question. What do you find to be the greatest dangers of donor disclosure for 501(c)(3) and 501(c)(4) organizations and their donors? What historical examples of harm do you find most disturbing?

Answer. To take the second part of the question first, the story of the harms of donor disclosure in the modern era must highlight harassment of the NAACP. In the 1950s, Alabama attempted to force the NAACP to provide State authorities with a list of the names and home addresses of all of the group's members in the State. The NAACP was highly controversial at the time and seen by southern State governments as the enemy. If its individual members were identified to State officials at the height of Jim Crow, the risk of harassment and intimidation—or worse—was self-evident.

The State's demand for donor information was clearly meant to intimidate supporters of the organization. By exposing large supporters to the NAACP, Alabama could then use the other levers of regulatory power at its disposal to inflict economic harm as reprisal for supporting the NAACP, or count on private action—including possibly illegal actions—to accomplish the same. Had the State succeeded in obtaining a list of NAACP supporters, efforts to secure civil rights in Alabama and all across America would have faced yet another huge hurdle.

But in its 1958 decision in *NAACP v. Alabama,*[1] the Supreme Court saved the Nation from that fate. Recognizing the inextricable link between privacy, freedom of association, and free speech, the Court unanimously ruled that the government could not force groups to surrender their member lists. Such "exposure," as the high court termed it, would greatly damage organizations' ability to fulfill their missions. In the words of the Court, Alabama's demand restricted free association rights because it "may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs. . . ."

The harms that the segregationist South could inflict on an organization like the NAACP represent the most severe danger that can come from disclosure laws. But it is neither the only risk, nor the only time that courts have recognized that disclosure laws cause harm. In the campaign finance context, the court recognized in 1976's *Buckley v. Valeo* that:

> compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment . . . significant encroachments on First Amendment rights or the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest.[2]

The Court has ruled that the harm of disclosure laws outweighed the benefit in other contexts, too. *Brown v. Socialist Workers '74 Campaign Committee*[3] upheld the rights of an unpopular minority party to keep the names of its members, donors, and vendees private in order to avoid both "governmental and private hostility." In *McIntyre v. Ohio Elections Commission,*[4] the Court struck down an Ohio statute requiring political handbills advocating the passage or defeat of a school tax to list the names of those "responsible therefor." We should note that in both of these instances, the speech at issue was directly related to campaigns, elections and politics, and yet, even in such circumstances, the Court saw the harms of disclosure as too high.

Just last year, in *Americans for Prosperity Foundation v. Bonta,*[5] the Court ruled that 501(c)3 charities have the right to keep their major supporters private from State Governments. The Court ruled that California's attempt to mandate donor reporting was not narrowly tailored to an important government interest for the State. It also found that the threats of reprisal and harassment presented at trial against AFPF were real.

There are, of course, other cases where disclosure rules have been upheld, typically relating to public reporting of large donations to candidates, political parties, and groups with a major purpose of supporting or opposing candidates in elections. But the Court has deeply scrutinized efforts to expand disclosure laws beyond their current bounds and has long recognized that any disclosure rule brings with it real harms to First Amendment rights.

Critics respond that we are not living in 1950s Alabama anymore, so why worry? Perhaps the best way to see the threat is to look at specific examples of harm caused by (a) legally allowable disclosures, or (b) illegal disclosures of donations to

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[1] *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958).
[2] *Buckley v. Valeo,* 424 U.S. 1, 48 (1976).
[3] *Brown v. Socialist Workers '74 Campaign Comm.* (Ohio), 459 U.S. 87 (1982).
[4] *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334 (1995).
[5] *Americans for Prosperity Foundation v. Bonta* 141 S. Ct. 2373 (2021).

nonprofit organizations (through either outside hacking or government malfeasance.) Any law that extends disclosure rules would increase the likelihood of events like these.

In 2022, Tammy Giuliani made a lawful $250 donation to the Canadian trucker's convoy, the movement that briefly paralyzed Canada's capital and garnered international attention for its protest against COVID–19 mandates.[6] Hackers leaked information about her donation and thousands of others, leading to widespread threats and harassment against the donors. The threats forced the café to close.

In 2021, Sgt. William Kelly, a police officer in Virginia, and Craig Shepherd, a paramedic in Utah, made lawful $25 and $10 donations, respectively, to the legal defense fund of Kyle Rittenhouse, who was on trial for homicide after fatally shooting two men and wounding another during a night of riots and unrest in Kenosha, WI. Both Kelly and Shepherd became targets for harassment after hackers exposed donations to Rittenhouse's legal fund and additional details were published in *The Guardian.*[7] Kelly was fired from his job as a Virginia police officer. An ABC News reporter showed up at Shepherd's house with a camera in tow to harass him in the name of "reporting." In both cases, the donors had done nothing illegal and were targeted simply for exercising their First Amendment rights.

In 2021, Cara Dumaplin, a registered neonatal nurse, created a successful Internet business helping parents of newborns with parenting and child-rearing advice. A business competitor shared screen shots of Dumaplin's political contributions showing that she had made donations to the reelection campaign of Donald Trump. Dumaplin made 36 donations between $25 and $35 to the Trump campaign—not exactly huge money.[8] The screen shots of the Federal Election Commission report were widely shared across social media platforms. Given the vast unpopularity of Dumaplin's political association among her clientele, the result was no surprise: boycotts of her website, merchandise, and consulting services ensued.

In 2019, Congressman Joaquin Castro tweeted out the names of 44 of his constituents in San Antonio who made lawful contributions to Donald Trump's reelection, accusing them of "fueling a campaign of hate."[9] Donors immediately began receiving threatening phone calls, boycotts of the businesses where they worked, and a pressure campaign to ostracize them for donating to a candidate their congressman disagreed with. A similar story occurred in New York, where Congressman Tom Suozzi threatened to name and shame donors who gave to candidates that had a position different from his own on the SALT tax deduction.[10]

Stories like this are too numerous to catalogue. Yet many never come to light because the harassment is carried out privately and has its desired effect: the person stops supporting or associating with the group and stops speaking out about the issue. Given the ease of finding and spreading donor information on the Internet, disclosure-fueled harassment is likely to become more, not less, common over time. If politicians are ready to threaten donors over differences in tax policy, and if people are organizing boycotts and threatening individuals and businesses over $25 donations to candidates they don't like, then imagine the harms inflicted if every Planned Parenthood donor, every National Rifle Association member, and every Black Lives Matter supporter were forcibly published on a government website. That is the danger of creating new, more expansive disclosure laws.

Question. The Biden administration recently announced that it is setting up a "Disinformation Governance Board" within the Department of Homeland Security.

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[6] Blair Crawford, "Threats close Stella Luna Gelato Café after owner's name appears in GiveSendGo data leak," *Ottawa Citizen.* February 17, 2022. Available at: *https://ottawacitizen.com/news/local-news/threats-close-stella-luna-gelato-cafe-after-owners-name-appears-in-givesendgo-data-leak.*

[7] Jason Wilson, "US police and public officials donated to Kyle Rittenhouse, data breach reveals," *The Guardian.* April 16, 2021. Available at: *https://www.theguardian.com/us-news/2021/apr/16/us-police-officers-public-officials-crowdfunding-website-data-breach.*

[8] Rebecca Jennings, "What happened when a beloved mom influencer donated to Trump," *Vox.* January 27, 2021. Available at: *https://www.vox.com/the-goods/22252360/taking-cara-babies-trump-instagram-donation-drama.*

[9] Caitlin Oprysko, "Joaquin Castro doubles down amid backlash over tweeting names of Trump donors," *Politico.* August 6, 2019. Available at: *https://www.politico.com/story/2019/08/06/joaquin-castro-trump-donors-1450672.*

[10] Tiffany Donnelly, "All I Want for Christmas Is Lawmakers to Respect Privacy," Institute for Free Speech. December 16, 2020. Available at: *https://www.ifs.org/blog/christmas-lawmakers-respect-privacy-suozzi-disclosure/.*

As an expert on free speech, do you think the Federal Government establishing a "Disinformation Governance Board" is consistent with the principles of the First Amendment?

Answer. No. It is a terrible idea that would do tremendous harm to public trust and is wildly inconsistent with both the First Amendment and the spirit of free inquiry that the amendment is meant to protect. It is fortunate that, after significant backlash, the Department halted the program. I fear, however, that the administration has made its intentions clear, and the Disinformation Governance Board's work may already be continuing through other means, both inside the Department and in other Federal agencies. On June 16th, less than a month after the Board was paused, the White House announced a new Internet policy task force led by Vice President Kamala Harris that aims, among other things, to protect "public and political figures, government and civic leaders, activists, and journalists" from "disinformation."

It seems that while the administration got the message that something called a "Disinformation Governance Board" housed inside DHS was both controversial and unpopular, they have failed to understand the reason why: it is not the job of the government to police the truth.

The Supreme Court has consistently ruled that false speech, even deliberate lying, is generally protected by the Constitution. It has done so not because it thinks that purposeful misinformation is good, but because the enforcement of laws against such speech are far worse. As Justice Kennedy put it:

> Permitting the government to decree [deliberate false statements] to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth.[11]

Of course, there are some narrow exceptions where lying is not constitutionally protected speech—in cases of fraud and perjury, for example. But all such exceptions have clear limits. They all have immediate and definable harms and they are all deeply rooted in both our constitutional and common law traditions. A general warrant by the Federal Government to police speech it has deemed "disinformation" is quite the opposite.

This is not a new problem. From the antebellum south fearing the "misinformation" of abolitionist literature to calls to restrict communist speech for fears it contained false kompromat from the Soviet Union, there have always been some who thought the threat of divisive or untrue speech was worth compromising our First Amendment principles. And there have always been others who seek to capitalize on such fears in order to gain the power to punish their critics and political opponents. Yet even when government efforts to police truth start off well-intentioned, they carry a tremendous risk of abuse, bias, and simple error. Tolerating some false speech is the price we pay as a society for maintaining the free and robust exchange of ideas that is essential to our democracy. Luckily, throughout our history, the people's speech rights have eventually prevailed over attempts at restriction.

To those members of the committee who think that the government does have a role to play in "fighting disinformation," whether through this ill-thought-out program in the Department of Homeland Security or in legislation passed by this body, I would remind them that any such program or law will eventually be controlled or enforced by your fiercest political opponents. It would be extremely shortsighted for any administration or political party to embrace policies in the name of fighting "disinformation" that could one day transform into government censorship of political speech.

And it is worth remembering that much speech that was very recently widely considered disinformation is now widely considered to be true. Look only at the recent pandemic for myriad examples. It was disinformation to say that the new coronavirus was airborne;[12] disinformation to suggest that it was the result of a lab

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[11] *United States v. Alvarez*, 567 U.S. 709 (2012).

[12] Dyani Lewis, "Why the WHO took 2 years to say COVID is airborne," *Nature.* April 6, 2022. Available at: *https://www.nature.com/articles/d41586-022-00925-7.*

leak in China;[13] disinformation to promote masks as an effective barrier to transmission;[14] and disinformation to believe that a vaccine would be developed in less than a year.[15] Now, all of these are widely believed by "experts." In the years to come, it may be the case that some of these facts are once again upended and will once again be considered false. That's okay; such is the nature of free discourse. Knowledge is evaluated and challenged and reevaluated again.

When you add in explicitly partisan and political "facts," such as the debacle surrounding the private censorship of the Hunter Biden laptop story as "false," it becomes quickly apparent that government enforcement of "disinformation" carries far greater risk of harm than of potential benefit.

Clearly the government, and its officials, have a right to express their own views. But the idea of a government board making pronouncements on the truth or falsity of disputed issues, and pressuring private entities to censor disfavored speech is unconstitutional and rife for abuse.

Question. Is it correct that Lois Lerner was exonerated in the later investigations of the targeting controversy?

Answer. No, that is incorrect.

Final investigations by the Treasury Inspector General for Tax Administration (TIGTA)[16] and the Senate Finance Committee[17] both concluded that the initial assessments of political targeting by the IRS were, in fact, correct. The IRS under Lois Lerner targeted conservative and Tea Party groups specifically because they were conservative and Tea Party groups.

A counter-narrative has emerged that downplays the IRS scandal by claiming that because a few progressive groups also had their applications for tax-exempt status flagged and delayed, it is wrong to say the IRS was targeting based on the political speech of the groups. This narrative ignores the evidence about both the scale and the severity of the targeting against groups on the right as opposed to groups the left.

First, this counter-narrative relies on a 2017 TIGTA audit report[18] that indicated IRS review of applications for tax exemption included other types of suspected political activity besides conservative. But that report covered a time period that began in 2004, 6 years before the 2010 inception of the "tea party cases" activity by the IRS. The Treasury press release accompanying the 2017 report noted numerous problems associated with attempting to compare the 2017 TIGTA audit report with the seminal 2013 TIGTA audit report. Citing this report to argue that the IRS did not disproportionately target conservative groups starting in 2010 is a bit like arguing that the United States was not a major world power after World War II because its economy was in a depression in the 1930s.

The numbers for the actual period of the scandal are what count—not the numbers for the period before the IRS began targeting conservative groups. And what are those numbers? The IRS itself found that among those groups targeted by the IRS starting in 2010:

> Of the 84 (c)(3) cases, slightly over half appear to be conservative-leaning groups based solely on the name. The remainder do not obviously lean to either

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[13] "WHO 'open' to probing 'new evidence' of COVID–19 lab leak origin theory, accepts 'key pieces of data' still missing," CBS News. June 10, 2022. Available at: *https://www.cbsnews.com/news/covid-19-origin-who-china-lab-leak-theory-open-to-new-evidence/*.

[14] John Bacon, "'Seriously people—STOP BUYING MASKS!': Surgeon general says they won't protect from coronavirus," *Florida Times-Union.* March 2, 2020. Available at: *https://www.jacksonville.com/story/news/healthcare/2020/03/02/seriously-people---stop-buying-masks-surgeon-general-says-they-wont-protect-from-coronavirus/112244966/*.

[15] Jane C. Time, "Fact check: Coronavirus vaccine could come this year, Trump says. Experts say he needs a 'miracle' to be right," NBC News. May 15, 2020. Available at: *https://www.nbcnews.com/politics/donald-trump/fact-check-coronavirus-vaccine-could-come-year-trump-says-experts-n1207411.*

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

[17] "Bipartisan Investigative Report as Submitted by Chairman Hatch and Ranking Member Wyden," United States Senate Committee on Finance. August 5, 2015. Available at: *https://www.finance.senate.gov/imo/media/doc/CRPT-114srpt119-pt1.pdf.*

[18] "Review of Selected Criteria Used to Identify Tax-Exempt Applications for Review," Treasury Inspector General for Tax Administration. September 28, 2017. Available at: *https://www.treasury.gov/tigta/auditreports/2017reports/201710054fr.pdf.*

side of the political spectrum. Of the 199(c)(4) cases, approximately ¾ appear to be conservative-leaning, while fewer than 10 appear to be liberal/progressive-leaning groups based solely on the name.[19]

Thus, while it is true that IRS screening to detect political activity (including the infamous BOLO list) did occasionally capture non-conservative groups, the large majority—and clear purpose—of the program was the targeting of conservatives. Hundreds of right-leaning groups were affected compared to fewer than 10 left-leaning groups.

That alone should settle the debate, and yet it still does not capture the full extent of the IRS's mistreatment of conservative groups. The initial targeting, after all, was only the first step. The real damage done was in the lengthy delays in approving groups' tax-exempt status. Here, too, the IRS found that liberally-coded groups and conservative-coded groups received vastly different treatment. The 2017 TIGTA report found that most groups on the left who were "targeted" still had their tax-exempt status approved within 2 years, and the majority were approved in the first year. The opposite was true for groups on the right: the overwhelming majority were not approved in 2 years, according to the 2013 TIGTA report.

As the Sixth Circuit Court of Appeals put it, "the IRS used political criteria to round up applications for tax-exempt status filed by so-called tea-party groups; . . . the IRS often took four times as long to process tea-party applications as other applications; . . . the IRS served tea-party applicants with crushing demands for what the Inspector General called 'unnecessary information.'"[20]

Lois Lerner herself admitted the IRS's behavior was inappropriate, both in the question she planted at a public tax forum in an attempt to get ahead of the IRS audit, and in her statement to Congress before invoking her Fifth Amendment right against self-incrimination. Lerner, of course, was found guilty of contempt of Congress. While the Department of Justice declined to prosecute Ms. Lerner in 2015, the evidence is overwhelming that the IRS Exempt Organizations Unit purposefully discriminated against conservative groups while she was director.

QUESTIONS SUBMITTED BY HON. ELIZABETH WARREN

Question. Your organization—the Institute for Free Speech, formerly known as the Center for Competitive Politics—has criticized proposals that would require companies to disclose their political spending to shareholders and the public.[21] In your testimony before this subcommittee, you reiterated those views.[22]

How is free speech best served by withholding this information from the public? Do you believe shareholders in public companies should be denied information that allows them to make informed investment decisions?

Answer. It's important when considering any question of disclosure to take a holistic view. Every disclosure law violates one group's right to privacy and free association in exchange for a hoped for informational benefit to the public. But the calculus for whether the informational benefit outweighs the violation cannot be done in a vacuum, because the more information already publicly available, the less valuable each additional disclosure becomes.

So what disclosure laws do public companies already face for their "political" spending? First, public companies may form a political committee (PAC), which can both donate directly to candidates and other committees and also make expenditures directly advocating for the election or defeat of Federal candidates. All contributions to that committee come from employees of the company, not the company itself, and all (over a *de minimis* amount) are publicly disclosed. All contributions from that PAC to other committees are publicly disclosed. All expenditures (above a *de minimis* amount) by that committee are publicly disclosed. These include contributions to candidates, political parties, and super PACs—and in all cases, expenditures made by those candidates or super PACs are also publicly disclosed. Expendi-

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[19] *Id.* at Appendix IV.

[20] *U.S. v. NorCal Tea Party Patriots (In re United States),* 817 F.3d 953 (6th Cir. 2016).

[21] The Center for Competitive Politics, "Silencing Business: How Activists Are Trying to Hijack the Public Policy Debate," June 2014, *https://web.archive.org/web/20140821011018/http://www.proxyfacts.org/wp-content/uploads/2014/06/CCP-White-Paper-6.2.pdf.*

[22] Testimony of Bradley Smith before the Senate Finance Committee, Subcommittee on Taxation and IRS Oversight, May 4, 2022, *https://www.finance.senate.gov/imo/media/doc/2022-05-04_Smith%20Testimony_US%20Senate.pdf.*

ture disclosures for all of these entities include independent expenditures (any ad that expressly argues for the election or defeat of a candidate) and electioneering communications (any broadcast, cable, or satellite ad that merely mentions a candidate close to an election.) If a corporation donates directly to a nonprofit and directs the nonprofit to engage in independent expenditures or electioneering communications, that too is publicly disclosed.

Corporations are prohibited from giving directly to candidates at the Federal level, but in every State where such contributions are permitted, those contributions are also disclosed. If a corporation engages in lobbying, that too is disclosed through an equally rigorous and extensive set of lobbying regulations.

The additional disclosures that some wish to impose on companies beyond this regime concern things that, until relatively recently, were not considered political at all: things like trade association dues, support for think tanks, research organizations, and other charities. To the extent these activities can influence politics, they do so indirectly, and the connection between the two is often tenuous. Yet the threat of harassment and reprisals against donors whose identities are publicly exposed can deter support for worthy causes. It's worth noting at this point that mandatory disclosure laws reaching beyond traditional forms of political activity have often been ruled unconstitutional by the Supreme Court. A line of cases dating back to the Court's landmark holding in *NAACP v. Alabama,* where Alabama sought to force the NAACP to expose its members, makes clear that Americans have a First Amendment right to support social causes privately.[23] Just last year, in *Americans for Prosperity Foundation v. Bonta,* the Court held that a State's uniform demand for donor lists from charities was a burden on free association.[24] The Court was unconvinced that the donor information was necessary for the State to ferret out fraud—a more substantial concern than any small informational benefit to shareholders of proposed new disclosure requirements.

Setting aside how the Court may view hypothetical new compelled disclosure laws affecting corporate donations to nonprofits, there is already so much disclosure regarding how corporations involve themselves in the political process as to make additional disclosure immaterial from an investment standpoint. Simply put, anyone who wants to invest in a company already has the capacity to learn how that company engages in politics. More importantly, the amounts involved are small enough so as to have little impact on—that is, they are "immaterial" to—investment decisions. For an investor who wants to make a profit, new laws would be like adding an additional pixel to a photograph that is already high-resolution—the human eye couldn't tell the difference. Perhaps this is why investors have regularly voted down proposals for added disclosures of spending related to public affairs and politics, usually by very large margins.[25]

In fact, new disclosure laws may be harmful to shareholder value, and thus to prospective investors. A 2019 paper in *Business and Politics* found that firms in the United Kingdom did not benefit from the adoption of new corporate shareholder disclosure laws but instead "suffered a decline in value in the months and years that followed." Noting that their study's results upended the conventional wisdom, the authors concluded that "greater oversight of corporate political behavior appears to hurt rather than help shareholders by increasing stock volatility, especially for higher-risk firms, and we find some evidence that it also reduces firm value."[26]

So, what's really going on here? Given that so much corporate political activity is already disclosed, and additional disclosures are unlikely to help and may even hurt investors, why do some continue to push for more? The answer is twofold. One, claiming there is some secret cabal of public corporations hindering or halting one's political agenda is an easier excuse than admitting that one's policies are unpopular or that one's strategies were ineffective. Two, politicians, particularly Senators, can use their bully pulpit to pressure companies with threats of boycotts, protests, or other abuses into backing their preferred agenda or, failing that, to stay out of the policy debate altogether.

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[23] *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 462–463 (1958).

[24] *Americans for Prosperity Foundation v. Bonta,* 141 S. Ct. 2373 (2021).

[25] *See* Proxy Monitor at *https://www.proxymonitor.org/ScoreCard2022.aspx* (showing 27 of 29 proposals for more disclosure of "lobbying" or "political" activity were defeated by shareholders so far in 2022, with an average pro-disclosure vote of just 31.6 percent).

[26] Saumya Prabhat and David M. Primo, "Risky business: Do disclosure and shareholder approval of corporate political contributions affect firm performance?", 21 *Bus. and Politics* 205 (2019) (Professor Primo is an Academic Advisor to the Institute for Free Speech, but this paper was not written for or in conjunction with the Institute).

Examples of this type of behavior are frankly too numerous to detail in full, but here are just a few examples of the not-so-subtle threats against corporations who exercise their speech rights. Last year, Senator Cruz suggested that corporations who oppose election reform bills in the States "need to be called out, singled out, and cut off."[27] He has also sought information on corporate donations to the Black Lives Matter movement.[28]

Some of the most prominent attempts to silence disfavored corporate speech have come from Senator Whitehouse, who has attempted to pressure large investment firms into divesting from corporations that donated to what he termed "climate denier groups"—think tanks and charities that disagree with the Senator on climate science and/or policy.[29] He also, with some regularity, threatens the Chamber of Commerce over policy disagreements. During one recent effort, Senator Whitehouse called for an investigation into the Chamber because, in his view, their efforts "to defeat passage of the Build Back Better plan"[30] were not adequately disclosed.

Senator Warren herself is not immune to the use of her station to punish speakers with whom she disagrees. In addition to joining Senator Whitehouse's call for an investigation into the Chamber of Commerce for not supporting Democratic proposals, Senator Warren has also used donor information from the Brookings Institute to disparage a report from one of their senior fellows, ultimately leading to the scholar's resignation because there was "discomfort with Warren's letter" at the liberal think tank.[31] And just one day after her preferred policies were criticized in a prominent editorial by a moderate think tank,[32] Senator Warren responded not to the substance of the critique, but by calling on banks to disclose all contributions to think tanks.[33] The message to corporations was clear: support an organization that criticizes me or my policies, face the consequences.

In such an environment, it would be irresponsible of corporations to publicly expose contributions to charities, nonprofits, and trade associations. Shareholders and the general public would glean little information from such disclosures, while politicians are anxious to use them to make enemies lists and punish companies that oppose their agendas. These efforts to drive voices out of the arena threaten corporate profitability and the investments of millions of small shareholders, and would reduce the flow of information available to the public on important political issues. Preventing politicians from retaliating against those who don't support their ideas is one of the fundamental purposes of the First Amendment.

PREPARED STATEMENT OF HON. JOHN THUNE,
A U.S. SENATOR FROM SOUTH DAKOTA

Thank you, Chairman Whitehouse. It is a pleasure to work with you on this subcommittee.

The Subcommittee on Taxation and IRS Oversight is uniquely positioned to oversee the activities of the Internal Revenue Service, the executive branch agency

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[27] Senator Ted Cruz, "Your Woke Money Is No Good Here," *Wall Street Journal.* April 28 2021. Available at: *https://www.wsj.com/articles/your-woke-money-is-no-good-here-11619649421?mod=opinion_lead_pos5.*

[28] "Ted Cruz slams 'Black Lives Matter' organization," The Hill TV. August 4, 2020. Available at: *https://www.youtube.com/watch?v=FGoEF1CYS9s.*

[29] Press Release from the Office of Senator Sheldon Whitehouse, "Whitehouse Calls on Major Investment Funds to Pay Attention to Companies' Funding of Climate Denier Group," July 11, 2019. Available at: *https://www.whitehouse.senate.gov/news/release/whitehouse-calls-on-major-investment-funds-to-pay-attention-to-companies-funding-of-climate-denier-group.*

[30] Press Release from the Office of Senator Sheldon Whitehouse, "Whitehouse and Warren Call for Investigation Into U.S. Chamber of Commerce for Lobbying Disclosure Failures Amid Build Back Better Lobbying Blitz," November 17, 2021. Available at: *https://www.whitehouse.senate.gov/news/release/whitehouse-and-warren-call-for-investigation-into-us-chamber-of-commerce-for-lobbying-disclosure-failures-amid-build-back-better-lobbying-blitz.*

[31] Philip Hamburger, "How Elizabeth Warren picked a fight with Brookings—and won," *Washington Post.* September 29, 2015. Available at: *https://www.washingtonpost.com/politics/how-elizabeth-warren-picked-a-fight-with-brookings--and-won/2015/09/29/bfe45276-66c7-11e5-9ef3-fde182507eac_story.html.*

[32] Jon Cowan and Tim Kessler, "How Elizabeth Warren picked a fight with Brookings—and won," *Wall Street Journal.* December 2, 2013. Available at: *https://www.wsj.com/articles/SB10001424052702304337404579213923151169790.*

[33] Jonathan Chait, "Elizabeth Warren and Centrist Democrats Are Already at War," *New York Magazine.* December 5, 2013. Available at: *https://nymag.com/intelligencer/2013/12/warren-and-centrist-democrats-are-already-at-war.html.*

charged with tax matters. And it is my hope we can use this hearing as a foundation to conduct appropriate oversight of the IRS and ensure that Americans' private tax-related information is protected.

Today, we are here to discuss the laws and enforcement as they apply to the political activities of tax-exempt entities and, by extension, how those laws—and any proposed reforms—impact Americans' freedom of speech, association rights, and ability to privately give to causes they care about.

Free speech is not just good in theory; it is a key driver of a healthy democracy. And allowing Americans to privately give to causes they care about is a fundamental component of protecting free speech and the First Amendment. Partisan legislation to force tax-exempt groups to choose between spreading their message and protecting donors' privacy runs a real, and potentially corrosive, risk of chilling speech.

A few words about scope, 501(c) organizations, and the IRS. Section 501(c) of the Internal Revenue Code describes 28 different categories of organizations that generally are exempt from Federal income tax. We will focus much of today's discussion around four categories. These include 501(c)(3) charitable organizations, 501(c)(4) social welfare organizations, 501(c)(5) labor organizations, and 501(c)(6) trade associations and business leagues—in other words, a wide range of entities that represent diverse constituencies and causes across the country and include churches, charities, nonprofits, foundations, advocacy groups, unions, and trade associations.

The chairman has a particular interest in 501(c)(4) organizations and their impact on campaigns. And according to a recent *New York Times* analysis, the impact is anything but small—particularly for politicians on the left. *The Times* stated that in the last election, the left raised and spent more money from 501(c)(4) donors than the right.

The report showed that 15 of the most politically active nonprofit organizations that generally align with the Democratic Party spent more than $1.5 billion in 2020—hundreds of millions of dollars more than a comparable sample group aligned with the Republican Party. There is a deep bench of well-funded 501(c)(4) organizations aligned with the Democratic Party that expressly support progressive policies and causes.

Of course, there are plenty of related organizations on the right as well.

The Senate Finance Committee has a long history of oversight into 501(c) tax-exempt entities and the IRS's treatment of such organizations. Just a few years ago, the committee conducted a 2-year bipartisan investigation into the IRS's inappropriate targeting of 501(c)(3) and 501(c)(4) applications for tax-exempt status. The investigation, which culminated in 2015, found that the IRS grossly mismanaged applications filed by Tea Party and other conservative organizations.

The report showed that the IRS improperly disclosed taxpayer information from numerous conservative organizations, and that the agency systematically selected conservative organizations for heightened scrutiny in a manner wholly different from how it processed applications from left-leaning organizations. Indeed, the unifying factor for how Tea Party applicants were handled at the IRS was not specific political activities, but rather an underlying political philosophy.

Americans—regardless of political affiliation—deserve to have an IRS that will administer the tax code with fairness and integrity, and safeguard their private taxpayer information. Regrettably, recent history and current developments show the agency has fallen short.

Since last year's massive IRS leak or hack of taxpayer information, which the left-leaning ProPublica obtained and then used to publicize confidential taxpayer details, there has been no meaningful follow-up from the agency or the administration. Perhaps that is because the unauthorized disclosure of private taxpayer data by ProPublica conveniently advanced a preferred political narrative on tax policy.

More fundamentally, the apparent leak or hack of private taxpayer information is a serious breach of trust between Americans and their government. And it puts everyday citizens at risk of intimidation and harassment by ideological foes.

Americans have a right to know that the personal information they provide to the IRS remains confidential and will not be used to target them or to advance partisan political agendas.

Americans are justifiably concerned about the IRS—or, for that matter, any regulatory agency—collecting more sensitive taxpayer and donor information than is necessary, and how that collection could impact their lives and freedom of speech. Policymakers would be wise to heed their concerns.

We have an excellent panel before us today. Thank you all for being here, and I look forward to hearing your testimony.

PREPARED STATEMENT OF SCOTT WALTER, PRESIDENT, CAPITAL RESEARCH CENTER

Chairman Whitehouse, Ranking Member Thune, and distinguished members of the subcommittee, thank you for the honor of testifying, especially on problems connected to the intersection of politics and tax-exempt entities—something we at Capital Research Center have studied for decades. When I first heard the hearing's title, I assumed it referred to current scandals raging in both the tax-exempt sector—such as so-called "Zuck Bucks"—and also in the IRS itself—such as the illegal leaking of confidential tax returns to ProPublica.

Just in the last few months, many more scandals have erupted. For instance, the political activities of billionaire Hansjörg Wyss, a non-U.S. citizen, has caused a watchdog group to launch an FEC lawsuit. As *The Hill* summarizes the suit, Wyss allegedly "used two nonprofit organizations, the Wyss Foundation [a 501(c)(3) private foundation] and the Berger Action Fund [a 501(c)(4) group], to contribute millions of dollars to the Sixteen Thirty Fund and the New Venture Fund, two so-called dark money groups that fund liberal causes through operations like The Hub Project and Demand Justice."[1]

The Hub Project funded by this foreign billionaire was started, *The New York Times* reports, "in 2015 by one of Mr. Wyss's charitable organizations, the Wyss Foundation, partly to shape media coverage to help Democratic causes."[2] *The New York Times* report adds "that The Hub Project is part of an opaque network managed by a Washington consulting firm, Arabella Advisors, that has funneled hundreds of millions of dollars through a daisy chain of groups supporting Democrats and progressive causes. The system of political financing, which often obscures the identities of donors, is known as dark money, and Arabella's network is a leading vehicle for it on the left."[3]

Another recent controversy, exposed by Capital Research Center, involves the Arabella network's support for two secretive groups, Governing for Impact and Governing for Impact Action Fund, which are fiscally sponsored projects under, respectively, a 501(c)(3) and a 501(c)(4) nonprofit managed by Arabella. The groups have surreptitiously worked with Biden administration officials to reshape dozens of controversial regulations, with $13 million of funding from one of billionaire George Soros's foundations.[4]

Other recent exempt-organization scandals include the exposure of ostensible news networks designed to appear as local news outlets but actually efforts supported by mega-donors like Kathryn Murdoch and Reid Hoffman that are designed to influence the public's political views. As the left-leaning website OpenSecrets reports, "'Dark money' networks hide political agendas behind fake news sites." OpenSecrets reports that "ACRONYM, a liberal [501(c)(4)] dark money group with an affiliated super PAC called PACRONYM," is "behind Courier Newsroom, a network of websites emulating progressive local news outlets. Courier has faced scrutiny for exploiting the collapse of local journalism to spread 'hyperlocal partisan propaganda.'"[5] I note that an accompanying OpenSecrets chart describing this polit-

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[1] Brett Samuels, "Watchdog group sues FEC over citizenship of liberal donor," *The Hill,* April 25, 2022, *https://thehill.com/news/campaign/3461903-watchdog-group-sues-fec-over-citizenship-of-liberal-donor/*.

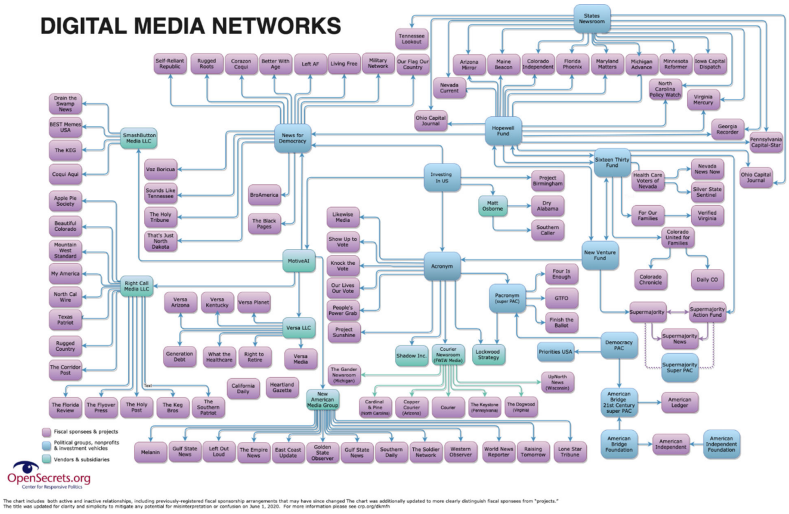
[2] Kenneth P. Vogel and Katie Robertson, "Top Bidder for Tribune Newspapers Is an Influential Liberal Donor," *New York Times,* April 13, 2021, *https://www.nytimes.com/2021/04/13/business/media/wyss-tribune-company-buyer.html.*

[3] *Ibid.*

[4] *See* Joe Schoffstall, "Secretive Soros-funded group works behind the scenes with Biden admin on policy, documents show," Fox News, April 26, 2022, *https://www.foxnews.com/politics/secretive-soros-funded-group-works-behind-scenes-biden-admin-policy-documents* and "Governing for Impact—Influence Watch," Influence Watch, accessed April 29, 2022, *https://www.influencewatch.org/non-profit/governing-for-impact/*.

[5] Anna Massoglia, "'Dark money' networks high political agendas behind fake news sites," *OpenSecrets,* May 22, 2020, *https://www.opensecrets.org/news/2020/05/dark-money-networks-fake-news-sites/*. *See also* Scott Walters, "Democratic Donors' Disinformation Ops—UPDATED,"

ical influence operation lists three of Arabella Advisors' umbrella nonprofits, the 501(c)(3) New Venture Fund and Hopewell Fund, and the 501(c)(4) Sixteen Thirty Fund:



These kinds of political operations by exempt organizations disturb many Americans. Across the political spectrum, people see exempt organizations enjoying elite power and wealth, and employing it in anti-democratic ways. This concern has even led a Democrat-invited witness today, professor Philip Hackney, to call for abolishing private foundations entirely, an admittedly extreme reaction, but perhaps one that will grow if Congress continues to dig into the true history of the sector—something that could happen whichever party has control of Senate and House next year.[6] I can document, mostly from left-leaning sources, that both the problems with the sector, and also the IRS's dangerous tendency to selectively enforce its rules, go back decades.

I especially want to show how (c)(3) private foundations and (c)(3) public charities violate limits on their political activities. Let me begin with the Ford Foundation, because soon after I criticized it before Chairman Whitehouse at a Judiciary subcommittee hearing he held last year,[7] he told a legal podcast that the Ford Foundation is "an amazingly well-established public interest foundation that doesn't seem to have much in the way of a political motive or purpose."[8]

Those words are jarring in this room, where many recognize that the Ford Foundation's half-century of left-wing activism has significantly shaped the laws governing political activities of tax-exempt entities. Ford's grants for partisan voter registration in 1967 so outraged Congress, both of whose houses were under Democratic control, that it passed the landmark Tax Reform Act of 1969, whose restrictions still largely shape what's legally permissible for private foundations and public charities.

As professor Karen Ferguson explains in a book-length history of Ford, the so-called "McGeorge Bundy amendments"—named for the antagonism the foundation's president directed toward the House Ways and Means Committee—"put strict new

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Capital Research Center, June 22, 2021, *https://capitalresearch.org/article/democratic-donors-disinformation-ops/*.

[6] "I think we ought to eliminate tax benefits for the private foundation form." Philip Hackney, "The 1969 Tax Reform Act and Charities: Fifty Years Later," *Pittsburgh Tax Review* Volume 17 (2020): 246, *https://doi.org/10.5195/taxreview.2020.116*.

[7] Scott Walter, "Scott Walter Testifies to a Senate Judiciary Subcommittee on 'Dark Money,'" Capital Research Center, March 11, 2021, *https://capitalresearch.org/article/scott-walters-testimony-before-the-u-s-senate-subcommittee/*.

[8] Sheldon Whitehouse, "Tsunami of Slime," transcript April 12, 2021 from Strict Scrutiny podcast, *https://strictscrutinypodcast.com/wp-content/uploads/2021/04/Tsunami-of-Slime.pdf*.

controls on philanthropies' political involvement." Another legal scholar adds, "The concerns of Congress at which the law struck had roots reaching back for more than 2 decades. . . ." The Democratic staff of the Joint Committee on Internal Revenue Taxation, in their "General Explanation of the Tax Reform Act of 1969," stated at the time: "In several instances called to Congress' attention, funds were spent in a way clearly designed to favor certain candidates. In some cases, this was done by financing registration campaigns in certain areas. . . ."[9] As we shall see, these abuses, especially involving voter registration with partisan results, continue through our day.

How to respond to these serious problems? First, of course, Congress and the relevant executive branch authorities should investigate the details much more thoroughly, so that members and Americans at large have a richer understanding of the facts. Beyond that, I urge you, first, not to go down several wrong roads.

Don't focus on 501(c)(4)s, for several reasons. Actual law-breaking by (c)(4)s should, of course, be punished appropriately, but (c)(4)s are not very significant in American politics, especially in terms of money. In the 2018 election cycle, contributions to political parties, candidates, and other FEC-reporting groups that OpenSecrets did not classify as "dark money" amounted to around $5 billion,[10] whereas OpenSecrets-classified "dark money" spending was only $123 million—*a rounding error.*[11] And more importantly both those rivers of cash *combined* are dwarfed by money flowing to 501(c)(3) "charities" that are active in public policy (think tanks, media watchdogs, advocacy groups). We at Capital Research Center calculated that river of money at approximately $20 billion for the 2018 cycle, with a left-wing dominance of almost four to one.[12]

If someone still insists (c)(4)s are a major plague, I can only reply that the problem comes mostly from the blue side of the spectrum, since in the 2018 cycle, OpenSecrets calculated blue "dark money" was $81 million versus $42 million for red money (around two to one),[13] while in the 2020 cycle, blue dominance grew to $85 million versus $21 million (four to one).[14] *The New York Times* agrees with this conclusion; see its recent report subtitled, "A *New York Times* analysis reveals how the left outdid the right at raising and spending millions from undisclosed donors to defeat Donald Trump and win power in Washington."[15] *The Times* added, "While the Kochs pioneered the use of centralized hubs to disseminate dark money to a broader network, the left has in some ways improved on the tactic—reducing redundancy, increasing synergy, and making it even harder to trace spending back to donors."

Every year, one of the loudest complaints about 501(c)(4) activity is the annual "Captured Courts" report that's closely identified with this subcommittee's chair and Senator Stabenow. This year's edition at least does not claim, as last year's did with no evidence whatsoever, that "dark money" was "originally a Republican political device."[16] But this year's edition continues the refusal to acknowledge the existence

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[9] Michael E. Hartmann, "The Ford Foundation, the 1967 Cleveland mayoral election, and the 1969 Tax Reform Act," *The Giving Review,* February 3, 2021, *https://www.philanthropydaily.com/the-ford-foundation-the-1967-cleveland-mayoral-election-and-the-1969-tax-reform-act/*.

[10] *See OpenSecrets.org,* "Most expensive midterm ever: Cost of 2018 election surpasses $5.7 billion," OpenSecrets, February 6, 2019, *https://www.opensecrets.org/news/2019/02/cost-of-2018-election-5pnt7bil/*. Note the $5 billion includes contributions to party committees and outside groups that OpenSecrets classifies as FEC reporting, not "pure" pre-BCRA "hard money."

[11] *See* "2018 Outside Spending, by Group," OpenSecrets, accessed April 28, 2020, *https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&chrt=V&disp=O&type=U.* The total is for the two-party split ("other viewpoint" groups excluded) for "non-disclosing groups," which OpenSecrets explains are "501(c) nonprofits that are not required to disclose their donors. Others are committees that do disclose their donors to the FEC, but receive nearly all their money from non-disclosing entities. The groups are spending money on independent expenditures and electioneering communications by using funds from their undisclosed donors."

[12] Shane Devine and Michael Watson, "Political and Policy-Oriented Giving After *Citizens United:* An Update to CRC's 2017 Analysis," December 17, 2020; *https://capitalresearch.org/article/political-and-policy-oriented-giving-after-citizens-united-an-update-to-crcs-2017-analysis.*

[13] *https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&chrt=V&disp=O&type=U.*

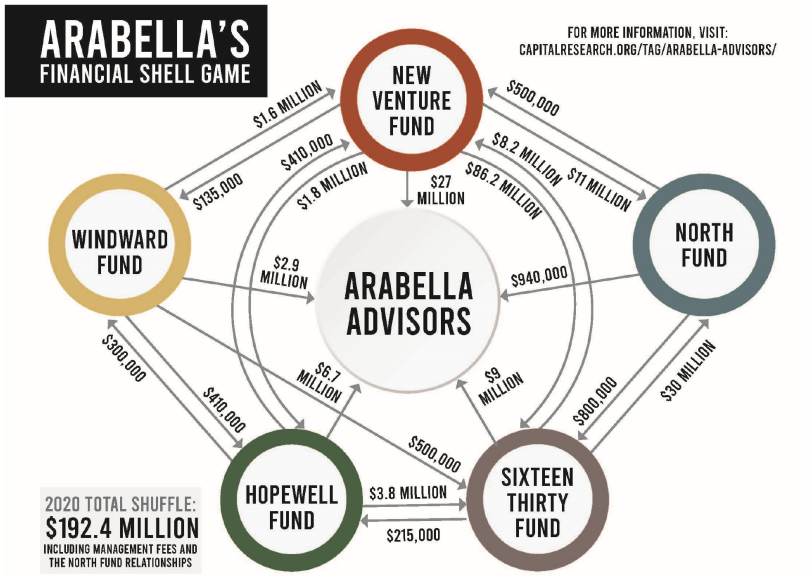
[14] *Ibid.*

[15] Kenneth P. Vogel and Shane Goldmacher, "Democrats Decried Dark Money. Then They Won With It in 2020," *New York Times,* January 29, 2022, *https://www.nytimes.com/2022/01/29/us/politics/democrats-dark-money-donors.html.*

[16] Senator Debbie Stabenow, Senator Chuck Schumer, and Senator Sheldon Whitehouse, "Captured Courts: The GOP's Big Money Assault on the Constitution, Our Independent Judiciary, and the Rule of Law," Senate Democrats, May 2020, p. 20, *https://www.democrats.senate.gov/imo/media/doc/Courts%20Report%20-%20FINAL.pdf.*

of a left-wing network that more honest observers, such as the just-cited *New York Times* report, have highlighted, namely, the Arabella network that fiscally sponsored the groups that lead the left's battles to shape the courts.[17] This omission is even more bizarre, given that this year's "Captured Courts" devotes itself almost entirely to criticizing the legal structure of a conservative network of nonprofits, without mentioning that the founders of this network—in an Axios news story "Captured Courts" itself cites—have explicitly stated that they patterned their network's structure after that of Arabella.[18]

Of course, one understands why "Captured Courts" prefers to keep Arabella in the dark: if tax-exempt "dark money" is all bad, Arabella is much worse than the conservatives being targeted. "Captured Courts" laments $400 million raised by the conservative network from 2014–2018, but hides the fact that Arabella's network raised $2.16 billion in the same years. "Captured Courts" also complains that the conservative network's groups "move money back and forth,"[19] but in just *1 year,* Arabella's network shuffled among its groups a sum equal to almost half the conservative network's entire revenues for *4 years.*



While conservatives have criticized Arabella, non-conservatives have especially critiqued the network's (c)(4) components. Politico, for example, called the (c)(4) Sixteen Thirty Fund a "massive 'dark money' network,"[20] and *The Washington Post* edi-

[17] Those groups active in judicial battles are the (c)(4) Demand Justice and the (c)(3) Fix the Court. After years as fiscally sponsored projects of Arabella's umbrella nonprofits, in 2021 the groups spun off as independent exempt organizations. *See* "Demand Justice—Influence Watch," Influence Watch, accessed April 29, 2022, *https://www.influencewatch.org/non-profit/demand-justice/* and "Fix the Court—Influence Watch," Influence Watch, accessed April 28, 2022, *https://www.influencewatch.org/non-profit/fix-the-court/*.

[18] Jonathan Swan, Alayna Treene, "Leonard Leo to shape new conservative network," Axios, January 7, 2020, *https://www.axios.com/leonard-leo-crc-advisors-federalist-society-50d4d844-19a3-4eab-af2b-7b74f1617d1c.html,* cited in note 35 of the 2022 "Captured Courts."

[19] Senator Chuck Schumer, Senator Sheldon Whitehouse, and Senator Debbie Stabenow, et al., "Captured Courts: The Impact of the Judicial Crisis Network's Dark-Money Scheme on Our Courts," Senate Democrats, April 2022, p. 6, *https://www.democrats.senate.gov/imo/media/doc/Captured%20Courts%20Report%204-5-22.pdf.*

[20] Scott Bland and Maggie Severns, "Documents reveal massive 'dark-money' group boosted Democrats in 2018: A little-known nonprofit called The Sixteen Thirty Fund pumped $140 mil-

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torial page, after reading Politico's report, was outraged that Sixteen Thirty's top donors anonymously gave $51.7 million, $26.7 million, and $10 million. *The Post* judged that Sixteen Thirty caters to "big campaign donors who want to have impact but hide their identity."[21] Last November, an *Atlantic* interview with Arabella's then-president carried the headline, "The Massive Progressive Dark-Money Group You've Never Heard Of: Over the past half decade, Democrats have quietly pulled ahead of Republicans in untraceable political spending. One group helped make it happen."[22] *The Atlantic* asked Arabella's president, "Do you feel good that you're the left's equivalent of the Koch brothers?" The president replied, "Yeah."

Don't think beefed-up IRS enforcement will cure the ills. Another wrong road to fixing the tax-exempt sector would be to imagine that more IRS enforcement of rules will eliminate all the problems. While some routinely broken rules do need more enforcement, that must be balanced against the terrible temptations the IRS places before administrations of both parties. From FDR through Nixon, the IRS repeatedly used selective enforcement as a political weapon, and entire books have been needed to chronicle this ugly abuse of governmental power.[23]

One would think this subcommittee's chair would be especially alive to this danger. After all, he chaired a hearing similar to this one in April 2013, the culmination of more than a year's efforts by him and leaders of his party to repeatedly demand heightened IRS enforcement of political abuses by exempt groups.[24] At that April 2013 hearing, these demands were highlighted yet again, with Chairman Whitehouse complaining the IRS "rarely challenges a group's 501(c)(4) designation based on political activity."[25] After the hearing, the chairman's staff sent the Justice Department examples of conservative groups he had in mind for prosecution.[26] But the very next month, the scandal surrounding IRS exempt organizations' then-head Lois Lerner erupted, after she had a question planted at a Bar Association meeting[27] that allowed her to apologize for improperly targeting conservative groups seeking IRS recognition. She did this just ahead of the appearance of a damning report by the Treasury Inspector General for Tax Administration,[28] which in turn caused Chairman Whitehouse to address the Senate on "the scandal that the IRS appears to have targeted organizations for inquiry based on Tea Party affiliation. Obviously, that's wrong."[29]

This wrongness may have had a considerable political effect: a study by academics from Harvard's Kennedy School, Stockholm University, and AEI compared voter turnout in the 2010 election, when Tea Party groups did not face IRS suppression, with turnout in the 2012 election, after the IRS's scandalous obstruction blunted such groups' ability to organize. The study observed that the 2010 success largely occurred because of "grassroots activities" involving 501(c)(4)s, and it estimated that

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lion into Democratic and left-leaning causes," *Politico,* November 19, 2019, *https://www.politico.com/news/2019/11/19/dark-money-democrats-midterm-071725.*

[21] Editorial Board, "Big campaign donors have exploited a loophole. Congress must change the law." *The Washington Post,* November 21, 2019, *https://www.washingtonpost.com/opinions/big-campaign-donors-have-exploited-a-loophole-congress-must-change-the-law/2019/11/21/ab31cf3a-0bd6-11ea-bd9d-c628fd48b3a0_story.html.*

[22] Emma Green, "The Massive Progressive Dark-Money Group You've Never Heard Of," *The Atlantic,* November 2, 2021, *https://www.theatlantic.com/politics/archive/2021/11/arabella-advisors-money-democrats/620553/.*

[23] For instance, David Burnham, *A Law Unto Itself: Power, Politics, and the IRS* (Oregon: Book News, Inc., 1990).

[24] *See, for example,* their February 2012 letter, *https://www.bennet.senate.gov/public/index.cfm/2012/2/senators-call-for-irs-investigations-into-potential-abuse-of-tax-exempt-status-by-groups-engaged-in-campaign-activity;* their March 2012 letter, *https://dailycaller.com/2013/05/17/flashback-schumer-franken-urged-irs-to-target-tea-party-in- 2012/.*

[25] *https://www.judiciary.senate.gov/download/hearing-transcript_-current-issues-in-campaign-finance-law-enforcement,* p. 12.

[26] Paul Caron, "The IRS Scandal, Day 1241," TaxProf Blog, October 1, 2016, *https://taxprof.typepad.com/taxprof—blog/2016/10/the-irs-scandal-day-1241.html.*

[27] Abby D. Phillip, "IRS Planted Question About Tax Exempt Groups," ABC News Network, May 17, 2013, *https://abcnews.go.com/blogs/politics/2013/05/irs-planted-question-about-tax-exempt-groups/.*

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

[29] *https://www.whitehouse.senate.gov/news/press-releases/the-two-scandals-at-the-irs.* Sheldon Whitehouse, "The Two Scandals at the IRS: As Prepared for Delivery on the Senate Floor," *Whitehouse.Senate.gov, https://www.whitehouse.senate.gov/news/press-releases/the-two-scandals-at-the-irs.* After this brief concession, the Senator went on at much greater length about the "other scandal," *i.e.,* "allowing big shadowy forces to meddle in elections anonymously."

similar functioning in 2012 "would have brought the Republican Party as many as 5–8.5 million votes compared to Obama's victory margin of 5 million."[30]

Alas, despite the scandal, Lois Lerner received little accountability for her actions, including for being held in contempt by the U.S. House of Representatives, and she continues to succeed at keeping a lengthy deposition of her in a major lawsuit under court seal.[31] In a more recent IRS misconduct scandal there is also little accountability; namely, the publishing by ProPublica of private tax information possessed by the IRS, and then either leaked by IRS employees or illegally accessed by persons outside the IRS.[32] This follows other scandals of leaked information, used as a political weapon, such as a case in which the IRS admitted it illegally disclosed the Schedule B donor list of the National Organization for Marriage.[33] It is especially disturbing to see the Chairman of the Finance Committee recently sit with ProPublica for an interview and never raise the issue of that media outlet's use of confidential tax information that they almost certainly possess only because someone committed a crime.[34]

There are more reasons to think increased IRS enforcement won't solve all the tax-exempt sector's issues: first, as Brad Smith and the lawyer Gregory Colvin argued at the 2013 version of this hearing, the IRS is not well-designed for understanding and regulating political activities.[35] That explains why the Service has never been able to give guidance on the topic that is even remotely clear. Demanding more from the IRS will only further confuse matters and deserve to be called, "The DC Election Lawyers Full Employment Act." As Mr. Colvin stated, "the fundamental problem affecting enforcement on 501(c)(4) nonprofits" is that "the tax rules are vague, unpredictable, and unevenly applied."[36] That was a decade ago and is likely to be true a decade hence.

Heightened disclosure is another false path. Brad Smith at the 2013 hearing and today is perhaps America's most eloquent explainer of the grave limitations on donor disclosure's ability to improve the political activities of private groups.

Coerced donor disclosure is now clearly seen as a weapon by many in politics, as was made clear when I testified last year to the Judiciary Subcommittee on the Federal Courts. After the hearing, I received a personal letter from Chairman Whitehouse, asking me to disclose Capital Research Center's donors. I replied that in our day, in addition to the traditional moral reasons for respecting anonymous giving, "The practical reason for opposing disclosure arises from the very real threats, felt across the political spectrum, of mob harassment and worse. And Mr. Chairman, just as your side has more groups, active for more years, and possessed of far more 'dark money,' so does your side have more mobs." I prefer to "stand with the NAACP of Bull Connor's Alabama, and with the NAACP of today, and with the ACLU and the Human Rights Campaign, in opposition to government schemes to force private citizens to disclose their donations."[37]

Later, in questions for the record, I was asked why, if I claim the left has more "dark money," I object to all sides having their donors disclosed equally? I replied that this question fit with the testimony given by the head of People for the Amer-

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[30] Stan Veuger, "Yes, IRS Harassment Blunted the Tea Party Ground Game," *RealClearMarkets,* June 20, 2013, *https://www.realclearmarkets.com/articles/2013/06/20/yes_irs_harassment_blunted_the_tea_party_ground_game_100412.html.* "Obama's margin of victory in some of the key swing States was fairly small: a mere 75,000 votes separated the two contenders in Florida, for example. That is less than 25% of our estimate of what the Tea Party's impact in Florida was in 2010."

[31] On Petition for Writ of Mandamus, *Norcal Tea Party Patriots, et al. v. Lois Lerner, et al.* (Case No. 22–3357, 6th Cir.), filed April 19, 2022.

[32] *See https://www.finance.senate.gov/ranking-members-news/crapo-brady-demand-update-on-criminal-breach-of-taxpayer-data,* accessed April 28, 2022.

[33] Editorials, "IRS Admits to a Smidgeon of a Felony," *Investor's Business Daily,* June 27, 2014, *https://www.investors.com/politics/editorials/irs-admits-guilt-pays-settlement-to-national-organization-for-marriage/#:~:text=The%20National%20Organization%20for%20Marriage%20has%20been%20awarded,to%20the%20pro-gay%20marriage%20group%20Human%20Rights%20Campaign.*

[34] Jesse Eisinger, Jeff Ernsthausen, and Paul Kiel, "When Billionaires Don't Pay Taxes, People 'Lose Faith in Democracy,'" ProPublica, February 28, *https://www.propublica.org/article/when-billionaires-dont-pay-taxes-people-lose-faith-in-democracy.*

[35] *See https://www.judiciary.senate.gov/download/hearing-transcript_-current-issues-in-campaign-finance-law-enforcement.*

[36] *Ibid,* p. 20.

[37] Joe Schoffstall, "Conservative Group Defends Donor Privacy as Sheldon Whitehouse Demands Disclosures," *Free Beacon,* April 1, 2021, *https://freebeacon.com/democrats/conservative-group-defends-donor-privacy-as-sheldon-whitehouse-demands-disclosures/.*

ican Way (incidentally, a 501(c)(4) incubated by the Tides Foundation),[38] who said, "The hypocrisy that you see from the right is, they claim that there's more dark money on the left, and yet they refuse to be transparent. Well, it would seem that if the first were true, then the second would be a no-brainer." The logic behind this argument is clear: forced donor disclosure harms both the donors and the groups forced to disclose; therefore conservatives should support laws that will harm their opponents more than themselves.

As I replied then, this question reveals the central disagreement between the party of forced government disclosure, and the party of citizens' privacy: "I do not wish to harm donors and groups I disagree with, and I respectfully urge you to end your campaign to harm donors and groups you disagree with."[39]

Rather than take these wrong roads to improving the exempt sector, we should recognize that the biggest reason politicized money is pouring into tax-exempt groups of all varieties is because of what is wrongly called campaign finance "reform." I sympathize with those across the spectrum who do not like dollars going into politics because they do not trust politicians, and who do not like to see exempt dollars playing a big political role. But would there be nearly so many dollars going to exempt groups if campaign finance "reform" hadn't squeezed money out of parties and candidates? In *The Blueprint,* a book that reports with sympathy on the Democratic takeover of Colorado's politics in the years after the Bipartisan Campaign Reform Act of 2002 (BCRA), the authors explain how big donors became more important than the traditional party apparatus: "campaign finance reform had completely changed the rules of the game. By limiting the amount of money candidates and political parties could raise and spend, the new law had seriously weakened candidates—and all but killed political parties."[40]

Similarly, the liberal journalist Sasha Issenberg in his 2012 book, *The Victory Lab: The Secret Science of Winning Campaigns,* reports how private foundations like Carnegie escape the campaign finance strictures that throttle political actors under FEC rather than IRS regulation: "because the tax code allowed nonprofit organizations to run registration and turnout drives as long as they did not push a particular candidate, organizing 'historically disenfranchised' communities (as Carnegie described them) became a backdoor approach to ginning up Democratic votes *outside the campaign finance laws that applied to candidates, parties, and political action committees.*"[41]

It should be no surprise that a billionaire foundation like Carnegie reveled in escaping BCRA, because billionaire foundations pushed the Act through, weakening other political actors and greatly strengthening their own political roles. In "Astroturf politics: How liberal foundations fooled Congress into passing McCain-Feingold," John Fund reported in 2005 that a study by Political MoneyLine "found that of the $140 million spent to directly promote liberal campaign reform in the last decade, a full $123 million came from just eight liberal foundations," including Carnegie, Ford, and Soros's Open Society.[42] Fund quotes a talk given by a former executive of Pew Charitable Trusts, the biggest donor among the foundations at $40 million, who confessed after the bill passed that the target of those millions was "535 people" in Congress, in whose minds the foundations hoped "to create an impression that a mass movement was afoot."

Pew's strategist is clear that he aimed to fool you members of Congress: if, he confesses, you "thought this was a Pew effort, it'd be worthless." So the conspiracy had "to convey the impression that this was something coming naturally from beyond the Beltway." Fund concludes there was never a grassroots drive for campaign finance reform. And Pew knew it: 2 months before the bill passed, Pew Research Cen-

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[38] "People for the American Way—Influence Watch," Influence Watch, accessed April 28, 2022, *https://www.influencewatch.org/non-profit/people-for-the-american-way/*.

[39] Scott Walter, "Highlights from Scott Walter's Answers to Questions for the Record from Senator Whitehouse," Capital Research Center, April 14, 2021, *https://capitalresearch.org/article/highlights-from-scott-walters-answers-to-questions-for-the-record-from-sen-whitehouse/*.

[40] Rob Witwer and Adam Schrager. *The Blueprint: How the Democrats Won Colorado (and Why Republicans Everywhere Should Care)* (Colorado: Fulcrum Publishing, 2010), 72.

[41] Sasha Issenberg. *The Victory Lab* (New York: Crown Publishing, 2013), 86. Emphasis added.

[42] John Fund, "Astroturf politics: How liberal foundations fooled Congress into passing McCain-Feingold," *The Wall Street Journal,* March 21, 2005, *https://www.wsj.com/articles/SB122512338741472357.*

ter polled Americans, asking them to rank 22 issues in order of importance: campaign finance reform came in dead last.[43]

So, policymakers' aim should be to reverse this harmful trend that currently moves money out of the FEC realm—where, I note, disclosure is much less controversial—and into the IRS realm of exempt groups. This should be done not only because the IRS is not the proper regulator of political activity, but also because the 501(c)(3) realm of charity is a critical pillar of civil society, strengthening all of us when it nobly allows us to help each other outside politics. Government, and the politics that surround it, are supposed to serve civil society, not take over this private realm which charity requires to flourish.

The two best levers policymakers have to move politically motivated money back to the FEC's world and out of the IRS exempt world are, first, much higher limits—or none at all—on "hard" dollar donations. Second, no (c)(3) entity—private foundation or public charity—should be allowed to fund or execute voter registration and get-out-the-vote (GOTV). Those activities are only legal now if (c)(3)s carry them out in nonpartisan fashion, but in this age of microtargeting, there is far too high a risk that they will not be carried out in such a fashion. Some years back, a panelist at a think tank talkfest urged that these voter turnout activities continue to be legal. When I asked her if she could name a single (c)(3) in America that actually conducts them on a nonpartisan basis, the room full of (c)(3) leaders, mostly left-leaning, laughed knowingly, while another panelist, Democratic pollster Celinda Lake, nodded. Even the woman I asked grinned for a moment before delivering a non-answer.[44]

In the interest of full disclosure, I admit that (c)(3) voter turnout work is an unusual instance in the political world where the two sides don't use the same weapons. While (c)(3) voter turnout operations are common among the blues, they are rare among the reds. I recently asked Karl Rove about this. He has done more red registration and GOTV than any person alive, much of it through 501(c)(4)s that Chairman Whitehouse urged the IRS to prosecute a decade ago. But asked if he had ever used (c)(3) foundation money to fund, or (c)(3) public charities to execute, registration and GOTV, Rove said he never had, and seemed shocked at the thought.

I would prefer this practice be forbidden to (c)(3)s, but failing that, it should be declared clearly permissible to all. Currently, the uncertainty that surrounds it leads reds to fear the next Lois Lerner if they dare try it, while blues use fig leaves like "civic participation" to cover their naked partisanship as they pursue it with gusto.

OTHER EXEMPT ORGANIZATION PROBLEMS

I must add brief sketches of some of the many problems raised by exempt groups that we at Capital Research Center have documented.

The Page Gardner empire. Ms. Gardner, a former Senator Ted Kennedy staffer, has launched multiple interlocking groups, including the (c)(3) Voter Participation Center and (c)(4) Center for Voter Information. The left-leaning groups' work has drawn criticism from *The Washington Post* (for confusing voters and not being nonpartisan),[45] National Public Radio (for allegedly illegal automated calls that seemed aimed to suppress African-American votes for Barack Obama in a primary against Hillary Clinton),[46] and ProPublica, whose headline explains, "A Nonprofit With Ties to Democrats Is Sending Out Millions of Ballot Applications. Election Officials [in both parties] Wish It Would Stop."[47] That "nonprofit with ties to Democrats" is the (c)(3) Voter Participation Center, whose partisanship is confirmed by *Victory Lab*'s liberal author: "Even though the group was officially nonpartisan, for

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[43] Scott Walter, "Pew and the Gang Ride Again," Foundation Watch, April 2011, *https://capitalresearch.org/article/pew-and-the-gang-ride-again-citizens-free-speech-still-in-danger/*.

[44] Scott Walter, "Lies, damned lies, and polls," *Philanthropy Daily,* October 7, 2014, *https://www.philanthropydaily.com/lies-damned-lies-and-polls/*.

[45] Antonio Olivo, "Mail-in ballot applications in Virginia tap into worries about fraud with faulty instructions," *Washington Post,* August 6, 2020. *https://www.washingtonpost.com/local/virginia-politics/virginia-absentee-ballot-mixup/2020/08/06/5(c)(4)029ee-d764-11ea-930e-d88518c57dcc_story.html.*

[46] "Group with Clinton Ties Behind Dubious Robocalls," NPR, 2008. Accessed June 19, 2017, *http://www.npr.org/templates/story/story.php?storyId=90114863.*

[47] Rosenthal, Lauren, Joshua Eaton, and Thy Anh Vo, "A Nonprofit With Ties to Democrats Is Sending Out Millions of Ballot Applications. Election Officials Wish It Would Stop," October 23, 2020, *https://www.propublica.org/article/a-nonprofit-with-ties-to-democrats-is-sending-out-millions-of-ballot-applications-election-officials-wish-it-would-stop.*

tax purposes, there was no secret that the goal of all its efforts was to generate new votes for Democrats."[48]

The Voter Registration Project. This (c)(3), co-located with the for-profit, Democratic-aligned consulting firm Grassroots Solutions, oversaw a secretive, multiyear, $100+-million plan to use (c)(3)s and (c)(4)s to turn out millions of Democratic voters in battleground States. The project began in 2015, when a Democratic for-profit consultant sent a draft plan to a Democratic-aligned PAC (EMILY's List), who bounced it to Hillary Clinton's campaign manager, John Podesta. The scheme fermented with help from the president of the (c)(3) Wyss Foundation, who also sent Podesta a plan version in an email with the subject line, "new (c)(3) version." That email's Microsoft Word attachment has tracked changes that revealed how the original, partisan plan, which would only be legal for "hard dollar" entities to execute, had been reworded lightly into something (c)(3) foundations could fund and (c)(3) "charities" could conceivably get away with. A sample editing change: an "enormous" difference in "potential political outcomes" in the original version became an enormous difference in "potential voter participation outcomes" in the "new (c)(3) version."[49]

The plan was executed, with the help of numerous (c)(3)s and (c)(4)s, including the Civic Participation Action Fund, America Votes, States Voices, Center for Popular Democracy,[50] and the Tides Foundation. Despite all the millions of dollars—and votes—and dozens of nonprofits involved, no mainstream media story on this project has ever appeared, nor as far as we know, any IRS investigation.

"Zuck Bucks." This term is used to describe the roughly $400 million that one billionaire family, Mark Zuckerberg and Priscilla Chan, used to "help" government election officials in nearly every State conduct the 2020 election. The funds originated from donor-advised funds at the Silicon Valley Community Foundation and were sent to two (c)(3)s, the Center for Tech and Civic Life and the Center for Election Innovation and Research, which in turn sent them to Secretaries of State and local election offices. (Let me note an additional $25 million was contributed by an Arabella-managed (c)(3).) The two centers were founded and still run by persons with strong Democratic and left-wing ties. CEIR's founder/leader was hired as an election attorney at the Justice Department in the Clinton administration and left in 2005 under an ethics complaint cloud. He later worked at the Pew Charitable Trusts and the (c)(4) People for the American Way, which inaugurated our modern political battles for Supreme Court nominees with its famous, multimillion-dollar smear campaign of Robert Bork's nomination in 1987.[51] CTCL's founders/leaders came from a now-defunct (c)(4) so politically powerful that *The Washington Post* dubbed it, "the Democratic Party's Hogwarts for digital wizardry."[52]

These partisans, operating in (c)(3) garments in 2020, distributed in effect the largest political donation in American history. Their grants went to over 2,000 government offices in nearly all States. In many States, most of the offices receiving grants were in local jurisdictions won by the Republican presidential candidate. Yet with minimal analysis of the money flows, a clear pattern of Democratic partisanship appears. Capital Research Center has detailed State-level analysis for all of the battleground States, with all of our data publicly posted.[53] Even a few data points reveal the partisanship:

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[48] Sasha Issenberg, *The Victory Lab* (New York: Crown Publishing, 2013), 305.

[49] *See* Parker Thayer, "The Left Weaponizes Charitable Cash to Win Political Battles," Capital Research, October 2021, pp. 13–19, *https://capitalresearch.org/publication/capital-research-october-2021/*. The Podesta emails were, unfortunately, likely hacked by Russian intelligence agents, but the same is true of the hack of the Bradley Foundation, whose contents are used frequently by Senator Whitehouse and the Center for Media and Democracy.

[50] CPD is best known for the time one of its leaders, protesting the Brett Kavanaugh nomination, blocked the elevator doors for Senator Jeff Flake. Elise Viebeck, "Ana Maria Archila reflects on confronting Jeff Flake over Kavanaugh nomination," *Washington Post,* September 28, 2018, *https://www.washingtonpost.com/politics/i-was-demanding-a-connection-ana-maria-archila-reflects-on-confronting-jeff-flake-over-kavanaugh-nomination/2018/09/28/7593b4fe-(c)(3)81-11e8-97a5-ab1e46bb3bc7_story.html.*

[51] "Center for Election Innovation and Research (CEIR)—Influence Watch," Influence Watch, accessed April 29, 2022, *https://www.influencewatch.org/non-profit/center-for-election-innovation-research/*.

[52] Fung, Brian, "Inside the Democratic Party's Hogwarts for Digital Wizardry," April 24, 2019, *https://www.washingtonpost.com/news/the-switch/wp/2014/07/08/inside-the-democratic-partys-hogwarts-for-digital-wizardry/*.

[53] Hayden Ludwig and Parker Thayer, "Shining a Light on Zuck Bucks in the 2020 Battleground States," Capital Research Center, January 18, 2022, *https://capitalresearch.org/article/shining-a-light-on-zuck-bucks-in-key-states/*.

- In Pennsylvania, the highest per capita funding of a Biden county (Philadelphia) was $6.56, while the highest per capita funding of a Trump county (Berks) was $1.10.
- In Arizona, the unfunded parts of the State saw Republican presidential turnout increase even higher than Democratic presidential turnout (46 percent to 40 percent). But where Zuck Bucks flowed, that pattern completely reversed, with Democrats increasing turnout 81 percent to Republicans' 66 percent.
- In my home State of Virginia, average per capita funding for Democratic counties was about double the funding for Republican counties, and 90 percent of funding went to Democratic counties.

In short, the funding went disproportionately to the most vote-rich areas for Democrats, and the margins in the funded parts of the battleground States were always larger, often far larger, than the margin for the State as a whole. In Pennsylvania, Zuck Buck localities went for the Democratic presidential candidate by 692,000 votes, compared to the State's margin of 81,000; in Georgia, the difference was 604,000 to 12,000. Zuck Bucks, as one wit put it, were "the real Kraken."[54]

The simple way to understand Zuck Bucks is to imagine the reaction if the partisanship were reversed: picture the response to the news that Charles Koch had sent nearly a half-billion dollars to a (c)(3) staffed by alumni of a (c)(4) Karl Rove group like Crossroads GPS. *The New York Times* and CNN would report every unsavory detail with outrage, and Chairman Whitehouse would make an impassioned speech on the Senate floor to decry this abuse—and I would cheer him on. Because as I have testified to State legislatures, this kind of nonprofit abuse is a threat to *both* parties.[55] And it opens the door to foreign election interference, because if Zuck Bucks are legitimate, then there's nothing to stop a Russian oligarch, or a Communist Chinese princeling, or an oil sheik from donating the same way, because (c)(3)s have no restrictions on foreign donations, nor any campaign finance limits.[56] Surely all Americans can agree that letting billionaires privatize our elections using charitable organizations is wrong. No wonder 18 States have enacted restrictions on such funding. And if you doubt that funding's partisanship, consider that six gubernatorial vetoes have been issued on similar bills in other States, all by Democratic Governors.[57]

The growth of (c)(3) foundation grants to (c)(4) groups. While it is not in all cases illegal for a private foundation to give to a (c)(4) group, the high legal hurdles are serious enough that for many years, very little foundation money was risked in this way. This is certainly a more dubious type of grant than the more often discussed grants from foundations to donor-advised funds, and anyone who seeks less politicization of exempt organizations should resist this practice. The Atlantic Philanthropies, based in Bermuda, has spent itself out, but before the end it created politically active (c)(4)s like the Atlantic Advocacy Fund[58] and the Civic Participation Action Fund,[59] and it strongly encouraged other foundations to up their giving to (c)(4)s.

Atlantic's own (c)(4) giving was utterly unrestrained, because its offshore base meant it never had to disclose its giving, nor was it bound by any U.S. restrictions on giving. And so it gave millions to Democratic-aligned PACs like Color of Change PAC and Immigrant Voters Win PAC, as well as super PACs like the League of Conservation Voters Victory Fund. Above all, Atlantic was the driving monetary

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[54] J. Christian Adams, "The Real Kraken: What Really Happened to Donald Trump in the 2020 Election," PJ Media, December 22, 2020, *https://pjmedia.com/jchristianadams/2020/12/02/the-real-kraken-what-really-happened-to-donald-trump-in-the-2020-election-n1185494.* Other useful statistical analyses have been made by the Caesar Rodney at *https://www.rodneyinstitute.org/* and the Foundation for Government Accountability at *https://thefga.org/election-integrity/*.

[55] For instance, my testimony before the Virginia Senate Committee on Privileges and Elections, January 25, 2022: *https://capitalresearch.org/app/uploads/Scott-Walter-Written-Testimony-to-VA-Senate-Jan-25-2022.pdf.*

[56] Parker Thayer, "Zuckerberg's Election Meddling Could Be Emulated by Foreign Interests," Capital Research Center, November 23, 2022, *https://capitalresearch.org/article/zuckerbergs-election-meddling-could-be-emulated-by-foreign-interests/*.

[57] Sarah Lee and Hayden Ludwig, "States Banning or Restricting 'Zuck Bucks'—UPDATED 4/28/22," Capital Research Center, April 28, 2022, *https://capitalresearch.org/article/states-banning-zuck-bucks/*.

[58] *See* "Atlantic Advocacy Fund—Influence Watch," Influence Watch, accessed April 29, 2022, *https://www.influencewatch.org/non-profit/atlantic-advocacy-fund/*.

[59] *See* "Civil Participation Action Fund—Influence Watch," Influence Watch, accessed April 29, 2022, *https://www.influencewatch.org/non-profit/civic-participation-action-fund/*.

force behind Health Care for America Now (HCAN), the (c)(4) umbrella group created to pass Obamacare. Atlantic supplied $27 million of HCAN's $60 million campaign, leading Atlantic's then-leader Gara LaMarche to brag that the bill's passage was "the culmination of a campaign" by Atlantic and its allies.[60] Oddly, the usual opponents of "dark money" never seem to have complained about a "dark money" group funded largely by an offshore donor that did not have to file standard disclosures.

A related item: sometimes (c)(3) public charities make grants to (c)(4) "dark money" groups, which again is not simply illegal but should receive scrutiny. One fascinating recent example involves one of the chairman's favorite public charities, the Center for Media and Democracy (CMD) that supplies much of the material for his famous charts. In recent years, CMD was one of the largest donors to American Family Voices, a 501(c)(4) whose director, Lauren Windsor, helped the Lincoln Project fan the flames of racism and deceive voters in Virginia's 2021 gubernatorial contest, as I noted in *The Wall Street Journal.*[61]

Open Society funding in elections abroad. Leaked internal documents from the Open Society Foundations, headquartered in New York City, appear to show an intention from the top to deliberately alter election outcomes in other countries, particularly in the 2014 elections for the European Parliament and some national parliaments in Europe.[62] In the early 2010s, OSF became increasingly worried that trends in Europe were creating a hostile environment for OSF. To counter and even reverse these trends, OSF adopted "a two-level strategy to reduce the number of opponents of the open society who get elected." Open Society Initiative for Europe (OSIFE) distributed $5.7 million to organizations to "to turn out the vote" in sympathetic constituencies. Open Society European Policy Institute (OSEPI) was assigned to "engage pan-European parties to influence their manifestos and campaigning tactics."[63] These efforts to achieve particular election outcomes appear hard to reconcile with U.S. tax law on nonprofits.

Possible Democracy Alliance "coordination" between types of groups not allowed to coordinate. The Committee on States is a partner organization to the Democracy Alliance, which is a collective of wealthy Democratic and left-wing individual and institutional donors. In a slide presentation at a 2014 Alliance meeting that *The Free Beacon* obtained, the committee staff "noted that there is a 'legal firewall' between, on the one side, nonpartisan 501(c)(3) groups and independent expenditure political groups, and, on the other, State political action committees, political parties, and campaign committees." But, *The Beacon* report continues,

> Subsequent slides explain how that firewall can be circumvented, illustrated by arrows traversing the visual "firewall." Political "investors" can give to all categories of groups, one slide notes. Another slide details committee donors' roles as *coordination,* strategy, targeting, and accountability. Political vendors operating as for-profit corporations that focus on "data, analytics, and research" can also work with all categories of groups, another slide explains. A State Democratic Party cannot share information with a super PAC operating there, for example, but a private corporation that controls extensive voter data can work with both. One such group, Catalist, is among the Democracy Alliance's core network of supported groups. The company, a limited liability corporation, is the data hub of the Democratic Party, providing extensive voter information to political groups, parties, and candidates, some of which are legally prohibited from coordinating their efforts.[64]

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[60] Gara LaMarche, "A Big Bet on Advocacy Helps to Make History on Health Care," The Atlantic Philanthropies, March 22, 2010, *https://www.atlanticphilanthropies.org/news/big-bet-advocacy-helps-make-history-health-care.*

[61] Scott Walter. "Virginia's Dirty Trick, Dark Money and Senator Whitehouse: The senator should investigate his friends' dark financial ties to race-baiting election interference," *Wall Street Journal,* November 7, 2021, *https://www.wsj.com/articles/virginia-dirty-trick-lincoln-project-youngkin-tiki-torch-whitehouse-dark-money-11636144990?page=1. See also https://www.influencewatch.org/non-profit/american-family-voices/.*

[62] Edited by Jon Rodeback, "Mapping Soros's 'Philanthropy' at Home and Abroad," Capital Research Center, November 2020, *https://capitalresearch.org/app/uploads/Mapping-Soros-Philanthropy.pdf.*

[63] *https://capitalresearch.org/app/uploads/OSEPI-strategy-2014-2017-EU-advocacy.pdf.*

[64] Lachlan Markay, "Democracy Alliance State Spending Plans Revealed," *Washington Free Beacon,* November 12, 2014, *https://freebeacon.com/politics/democracy-alliance-state-spending-plans-revealed/.* Emphasis added.

The slides indicating all these connections or "coordination" made by donor-investors plus a Catalist-type LLC should generate considerable scrutiny. Surely a congressional committee interested in examining the political activities of tax-exempt groups would want to learn more about these arrangements.

Open Society coordination of voter registration/GOTV with other foundations. A January 2011 memo appeared in the DCLeaks archive that was addressed to George Soros; Sherilynn Ifill, the incoming head of his main (c)(3) foundation; and the rest of its board. The authors were Andy Stern, then-head of the politically powerful Service Employees International Union and the most frequent outside visitor to Barack Obama's West Wing, and Deepak Bhargava, head of the (c)(3) Center for Community Change.[65] Entitled, "New Thinking on 2012 Election and Beyond," and written at the very beginning of that election cycle, the memo stresses voter registration in "OSF's priority constituencies," and "focusing resources in cities and States where OSF issue priorities . . . will be on the ballot or featured prominently in public discourse." Another priority includes "experimenting with more collaborative models for campaign communications." The memo urges $3.5 million in funding to "Win Pre-Determined Substantive Changes in Open Society Priorities that will be Resolved in 2012 City and State Elections," with a narrow focus on "key places such as California, Maryland, Ohio, and Wisconsin."

If anyone wonders whether Open Society and similar left-of-center funders collaborate on this kind of electoral work, the memo has a budget, "Currently Projected Voter Engagement Funder Budgets for 2012," which lists Ford at the most generous, with a hoped-for $20 million; Open Society next at $16.3 million; Wellspring Advisors, $10 million; Carnegie, $5.6 million; and nine more sources for a total desired budget of $84.4 million.[66] Recall the *Victory Lab* observation in 2012 that Carnegie aimed at "ginning up Democratic votes outside the campaign finance laws that applied to candidates, parties, and political action committees,"[67] and consider whether this Open Society memo does not also deserve the interest of a committee concerned about political activities of exempt groups.

CONCLUSION

Political participation by Americans is a wonderful gift and to be encouraged, but it is best pursued in the traditional political avenues of campaigns, candidates, and parties, *not* the exempt sector, and especially not the charitable (c)(3) world. I urge you to protect America's civil society by protecting the charitable space under your oversight. Like Professor Philip Hackney, "I believe deeply in the power of a fiercely independent and courageous civil society that empowers the voices of all in our communities."[68]

One way to do that is to refrain, on the political or FEC side of giving, from using campaign finance "reform" to throttle support for groups or interests. I heartily agree with Chairman Whitehouse in his 2013 hearing when he praised a point made by Ranking Member Cruz and declared, "I want the record of the hearing to reflect that I think we have agreement amongst everyone that it is never the government's position or proper role to determine based on the amount of influence that a political group or interest or individual has that they have too much. That is a role, I think, for the voters to determine."[69]

QUESTIONS SUBMITTED FOR THE RECORD TO SCOTT WALTER

QUESTIONS SUBMITTED BY HON. JOHN THUNE

Question. Can you explain your claim that 501(c)(4) organizations are not the most significant concern in regard to the political activity of tax-exempt organizations?

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[65] For more on the Center, *see* "Center for Community Change—Influence Watch," Influence Watch, accessed April 29, 2022, *https://www.influencewatch.org/non-profit/center-for-community-change/*.

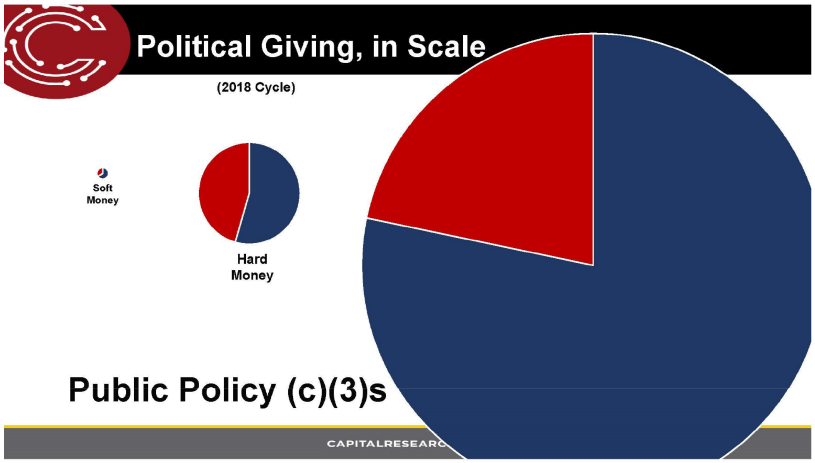
[66] For more on the memo, *see* Ken Braun, "Big Left Foundations Fund Biased Barely-Legal Voter Programs," Capital Research Center, June 3, 2021, *https://capitalresearch.org/article/big-left-foundations-fund-biased-barely-legal-voter-programs/*.

[67] Sasha Issenberg, *The Victory Lab* (New York: Crown Publishing, 2013), 86. Emphasis added.

[68] Philip Hackney, "The 1969 Tax Reform Act and Charities: Fifty Years Later," *Pittsburgh Tax Review,* Volume 17 (2020): 245, *https://doi.org/10.5195/taxreview.2020.116.*

[69] Transcript citation used above; p. 16.

Answer. Groups exempt under 501(c)(4) of the tax code, also known as "social welfare" organizations, receive attention from many politicians that is grossly disproportionate to their significance in American politics. These groups, many of which are well known to Americans, such as Planned Parenthood and the National Rifle Association, receive far less funding than is given either directly to political parties and campaigns—so-called "hard" dollar giving—or to 501(c)(3) groups that actively engage public policy. My colleagues at the Capital Research Center examined giving to all three of these "rivers" of money influencing our politics in the 2018 election cycle. The 501(c)(4) river was more of a creek at roughly $123 *million,* compared to about $5 *billion* taken in by "hard" dollar political groups and about $20 billion raised by 501(c)(3) groups that engage political issues (think tanks, advocacy groups, and the like).[1] This relative importance becomes even clearer when these numbers are represented graphically:



In addition to the very limited wealth of 501(c)(4) groups, there is also the fact that Americans have no trouble understanding many of those groups' political slant, whether it is support for abortion, or for Second Amendment rights, and so on. But few Americans have any idea of the extent of 501(c)(3) groups' subtle, often hidden work to influence who actually votes in elections. While some Senators known as "dark money hawks" complain that (c)(4) groups criticize them and their allies, the same politicians never mention how left-wing (c)(3) private foundations such as Ford and Open Society fund—and left-wing (c)(3) public charities such as the Voter Participation Center execute—voter registration and get-out-the-vote campaigns that actually drive election results, apparently flouting strict IRS rules that require (c)(3) groups never to intend, or even to "have the effect" of favoring a candidate or group of candidates.[2]

Compare the IRS's direct legal prohibition with this language, from a Democratic-aligned super PAC, which in 2020 wrote left-wing donors that in the 2020 election cycle, the "single most effective tactic for ensuring Democratic victories—[is]

[1] Shane Devine and Michael Watson, "Political and Policy-Oriented Giving After *Citizens United:* An Update to CRC's 2017 Analysis," December 17, 2020; *https://capitalresearch.org/article/political-and-policy-oriented-giving-after-citizens-united-an-update-to-crcs-2017-analysis.* Please note that our number for 501(c)(3) revenues covers only a fraction of the entire 501(c)(3) world, which also encompasses religious groups, the Salvation Army, Goodwill, etc.

[2] *https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations.*

501(c)(3) voter registration focused on underrepresented groups in the electorate." The super PAC even explains the tax advantages: "Well-designed" (c)(3) voter registration is, on a pre-tax basis, "2 to 5 times more cost-effective at netting additional Democratic votes than the tactics that campaigns will invest in. . . . Because 90 percent of the contributions we are recommending for voter registration and GOTV efforts will go to 501(c)(3) organizations and hence are tax-deductible," after taxes, "such programs are closer to 4 to 10 times more cost-effective. . . . They are also eligible recipients of donations from donor-advised funds and private foundations."[3]

The 501(c)(3) group Voter Participation Center was one of this memo's three recommended recipients of dollars aimed at "ensuring Democratic victories," which is no surprise, given that liberal reporter Sasha Issenberg in his well-received book *The Victory Lab: The Secret Science of Winning Campaigns* had already said the group (then operating under a different name) was a partisan operation despite legal prohibitions: "Even though the group was officially nonpartisan, for tax purposes, there was no secret that the goal of all its efforts was to generate new votes for Democrats."[4]

The same super PAC memo also urges mega-donors to direct cash to "Everybody Votes," which is an even larger 501(c)(3) operation that works to microtarget registration and get-out-the-vote aimed at "ensuring Democratic victories." Everybody Votes is a multiyear, $100+-million project, designed originally by Democratic party operatives and conducted via the almost-unknown 501(c)(3) Voter Registration Project. As the super PAC's secret memo explains to donors, "Everybody Votes is a national organization that funds and trains a consortium of 50+ local community groups across the country that do the actual registration work," which means that dozens of other charities are involved in this scheme and deserve investigation for possible illegal partisanship.[5]

Of course, even these brazen efforts to use (c)(3) groups to influence elections pale in comparison to the so-called Zuck Bucks operation in 2020. That involved the family of Facebook/Meta billionaire Mark Zuckerberg, as well as the "dark money" empire connected to Arabella Advisors, passing hundreds of millions of dollars through two 501(c)(3) groups and into actual government election offices at the State and local levels. Capital Research Center has conducted extensive investigations into the way that this money had a disproportionately partisan effect in every battleground State. That partisan effect was to be expected, given that the leaders of those two (c)(3) groups have partisan backgrounds. One group's founder worked at People for the American Way, a 501(c)(4) notorious for creating the multimillion-dollar political battles over Supreme Court nominations in 1987, when it spent millions on ads that smeared the Republican nominee Judge Robert Bork.[6] The other group was founded by alumni from a 501(c)(4) group described by *The Washington Post* as, "The Democratic Party's Hogwarts for Digital Wizardry."[7]

The abuses involved in Zuck Bucks have led 20 States, at this writing, to restrict such private funding of their election offices. Anyone who doubts the partisan nature of this problem can consider how another half-dozen States' legislatures have passed such restrictions, only to have them vetoed by governors—every one of whom is a member of one political party.[8]

In sum, the biggest offenses are committed by 501(c)(3) groups, not 501(c)(4)s. I am honored to have appeared before this subcommittee, and I look forward to coming back whenever this much more critical concern is addressed.

Question. You write in your prepared statement that Lois Lerner, a former IRS official that inappropriately targeted conservative Tea Party organizations for tax-exempt status, has received little accountability for her actions. She was held in contempt of Congress but never prosecuted by the Justice Department. There continues to be a deposition of Lerner in a lawsuit.

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[3] *https://www.vox.com/recode/2020/1/7/21055340/mind-the-gap-silicon-valley-donors-democrats-2020-plan-140-million.*

[4] Sasha Issenberg, *The Victory Lab* (New York: Crown Publishing, 2013), 305.

[5] For the details of Everybody Votes/Voter Registration Project, *see https://www.influencewatch.org/non-profit/voter-registration-project/.*

[6] *See https://www.influencewatch.org/non-profit/center-for-election-innovation-research/.*

[7] *https://www.washingtonpost.com/news/the-switch/wp/2014/07/08/inside-the-democratic-partys-hogwarts-for-digital-wizardry/.* For more information, *see https://www.influencewatch.org/non-profit/center-for-tech-and-civic-life/.*

[8] *https://capitalresearch.org/article/states-banning-zuck-bucks/.*

Could you provide more detail about this lawsuit? What additional oversight and accountability should the U.S. Congress consider with respect to government employees that politically target taxpayers?

Answer. The lawsuit I mentioned in my testimony involved multiple Tea Party groups suing IRS officials Lois Lerner and Holly Paz in the U.S. District Court for the Southern District of Ohio. As part of that lawsuit, Ms. Lerner was deposed by the groups' lawyer, Edward Greim, in 2015. Lerner asked the court to keep her deposition sealed and secret. Greim and his clients have continued to ask that her deposition not be sealed, but for over 3 years the district court has refused even to rule on this request, so this April, Greim and his clients filed a petition for Writ of Mandamus with the Sixth Circuit Court of Appeals, in hopes of having their request ruled upon.[9]

The best answer to how to think about additional oversight and accountability Congress should consider with respect to government employees that politically target taxpayer comes in the testimony Mr. Greim gave to the Senate Judiciary Committee's Subcommittee on Oversight in 2015.[10] A few highlights sketch the greatest dangers and promising avenues for improvement:

- "The IRS evidences a built-in distrust of conservative-leaning organizations. Two key players, Lois Lerner and Stephen Seok, who was the third Tea Party Coordinator for the Cincinnati Determinations Unit, were explicit in their distrust of conservative groups."
- "The Service views itself as under attack, and a vicious cycle is developing in which the Service fails to cooperate in making key disclosures. When [the Treasury Department's Inspector General] began its audit, [IRS officials] Lois Lerner, Holly Paz, Judith Kindell, and others engaged in a concerted effort to shape the narrative and rewrite history."
- "We need to ensure that future targeting is discovered much earlier. Any centralization of tax exempt organization review, and any grouping of three or more cases for review or audit, should be reported to the targeted groups, the Commissioner, and to the House and Senate tax-writing committees. . . . The Service's report should include the criteria being used to group entities for review, the number of groups being targeted, and the reason for centralization."
- "Congress should make it crystal clear that Federal courts must be open to provide remedies to taxpayers who are harmed by any sort of viewpoint-based targeting. . . . If Congress is convinced that viewpoint-based targeting is wrong, it should define the wrongful conduct and provide a clear remedy, removing the task of policymaking from the judicial branch."
- "Section 6103 should explicitly allow for disclosure of return information in civil cases in ways that will allow for easier private enforcement of the statute. Where the return information, or any information about targeting, is directly relevant to an issue in the case, it should be disclosed."

Of course, as Mr. Greim concedes, his proposals are only the beginning of what is needed to address the IRS's conduct in the Tea Party case and several others—which would certainly include the more recent disclosure of private tax information to ProPublica.

Question. According to an April 25, 2022 article in *The Hill* ("Watchdog group sues FEC over citizenship of liberal donor"), there is a pending lawsuit at the FEC regarding potential foreign interference in the tax-exempt sector.

Could you provide more details about the lawsuit and the concerns raised?

Answer. Our friends at Americans for Public Trust are the ones who filed the FEC lawsuit at issue. As they explain, in May 2021, the nonpartisan, nonprofit group Americans for Public Trust filed an FEC complaint alleging that Swiss-born foreign national billionaire Hansjg Wyss and the nonprofits he controls were directing money into U.S. elections via the Arabella Advisors network of nonprofits.

More specifically, Mr. Wyss's contributions were being funneled by the Arabella network into a 501(c)(3) nonprofit that controlled a super PAC called Change Now, which funds political advertising against Republicans.[11] Through his nonprofits—the Wyss Foundation, a 501(c)(3), and the Berger Acton Fund, a 501(c)(4)—Mr.

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[9] On Petition for Writ of Mandamus, *Norcal Tea Party Patriots, et al. v. Lois Lerner, et al.* (Case No. 22–3357, 6th Cir.), filed April 19, 2022.

[10] *https://www.judiciary.senate.gov/download/07-29-15-greim-testimony.*

[11] *https://www.influencewatch.org/political-party/change-now-inc/.*

Wyss has contributed huge sums to the Arabella-managed nonprofits New Venture Fund and Sixteen Thirty Fund, which have then distributed these funds to left-wing political groups across the country. Simply stated, Mr. Wyss quite possibly has pumped hundreds of millions of dollars of foreign money into our elections via the Arabella network.

The Americans for Public Trust's complaint specifically requested an investigation by the FEC into violations of the prohibition against foreign nationals directly or indirectly making contributions or expenditures for the purpose of influencing Federal elections. Additionally, the complaint asked the FEC to investigate failures by the Wyss- and Arabella-connected nonprofits to register and file disclosures required for those making political expenditures in Federal elections.

Additionally, since the time of the May 4th hearing, APT was able to attain information which further bolstered the FEC complaint; mainly, additional confirmation by Mr. Wyss's sister in a biography written about him that he is not in fact a U.S. citizen—something *The New York Times* and other media outlets have tried to have him confirm or deny, without success. As RealClearPolitics reported, ". . . despite the hundreds of millions Wyss has spent bankrolling progressive advocacy groups and despite the undeniable heft Wyss throws around in the Democratic Party and its causes, one question has remained unanswered in the American press. Despite being a power player in U.S. politics for decades, it was unclear whether or not Wyss is a permanent resident in the United States or an American citizen . . . [a]ccording to a biography of Wyss, written by his sister Hedi Wyss, and reported first by RealClearPolitics, the answer is no."[12]

The sophisticated use of his nonprofits to circumvent U.S. laws prohibiting foreign nationals from directly or indirectly influencing our elections makes it all the more important for the FEC to initiate an investigation into Mr. Wyss's nonprofits, particularly in light of his sister's assertions that "behind the scenes a Swiss plays an important part in American politics," and that "[w]hat was important for him [Wyss] was to find out that he could exert influence through his foundations."

If the FEC fails to take substantive action on an administrative complaint within 120 days, the complainant may seek to compel the FEC to take action by filing a lawsuit in Federal court. The FEC's failure to take action on Americans for Public Trust's complaint within 120 days explains why the organization has filed this lawsuit against the agency. If successful, the lawsuit would compel the FEC to conduct a full and thorough investigation into the extent that Mr. Wyss and the Arabella network of nonprofits have willfully engaged in the illegal foreign interference of U.S. elections via this liberal "dark money" machine.

QUESTIONS SUBMITTED BY HON. ELIZABETH WARREN

Question. Your organization—the Capital Research Center (CRC)—has criticized the role of dark money on the left and opposed any and all IRS reporting requirements which would eliminate this problem.[13] In your testimony before this subcommittee, you reiterated those views.[14]

Is Capital Research Center a recipient of any dark money? If so, please provide information on the identity of your dark money donors, and the amount they have contributed in each of the last 5 calendar years.

Answer. With all due respect, Senator Warren, your question is problematic for several reasons. You say my group "has criticized the role of dark money on the left," but that criticism appears in neither of the two citations you give. The first citation is to an article of ours that opposes IRS reporting requirements for "dark money" groups, but the article does not criticize such giving by any part of the political spectrum. Your second citation is not to my own testimony but to Brad Smith's written testimony at this hearing, in which he does not criticize left-wing "dark money." As for my testimony, written and oral, I defy you to quote a single instance

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[12] *https://www.realclearpolitics.com/articles/2022/05/17/swiss_billionaires_mega-influence_on_us_politics__147610.html.*

[13] Capital Research Center, "Senate to Consider Partisan Anti-Speech Resolution," Michael Watson, December 12, 2018, *https://capitalresearch.org/article/senate-to-consider-partisan-anti-speech-resolution/*.

[14] Testimony of Scott Walter before the Senate Finance Committee, Subcommittee on Taxation and IRS Oversight, May 4, 2022, *https://www.finance.senate.gov/imo/media/doc/2022-05-04_Smith%20Testimony_US%20Senate.pdf.*

of my criticizing "the role of dark money on the left." Instead, I make several quite different points about "dark money":

1. I insist that 501(c)(4) groups—the nonprofit type most often called "dark money"—are not very important or dangerous on either side (see also my response, above, to Senator Thune's first question in these questions for the record).
2. I note that numerous left-leaning outlets have criticized the role of "dark money" on the left, including OpenSecrets,[15] *The New York Times,*[16] *Politico,*[17] *The Washington Post,*[18] and *The Atlantic,*[19] to name but a few. (I could have added the OpenSecrets report, "Pro-Warren super PAC tops outside spenders—and Super Tuesday voters don't know its donors."[20])
3. While mocking the idea that 501(c)(4) funding is a serious problem, I observe that there is far more "dark money" on the left, a fact so obvious even *The New York Times* felt obliged to acknowledge it in a news report entitled, "Democrats Decried Dark Money. Then They Won With It in 2020."[21] I defy you to cite any source that claims the left has had less "dark money" than the right in the 2018, 2020, and 2022 election cycles, and I ask why, if you truly believe this money harms America, you aren't demanding your party stop taking it at *three-and-a-half times* the rate of the other side?[22]
4. I defended Chairman Whitehouse by insisting that, although he, like yourself, is a recipient of considerable "dark money" funding, "I don't think" a penny of it has "captured" him.[23]

Your question also displays one of the largest challenges posed by the phrase "dark money," namely, that there is no clear definition of it. Because of the way politicians like you and Chairman Whitehouse use the term, with no legal precision but only as an insult, I testified to Senator Whitehouse last year in the Judiciary Committee that perhaps the best definition is, *"support for speech the left wants to silence."*[24]

In the same testimony, I noted that Chairman Whitehouse and some colleagues had just published a report, "Captured Courts," that had no fewer than 18 uses of this term, yet never gave a legal definition of it. Is it money in 501(c)(3) nonprofits? in (c)(4) nonprofits? (c)(6)s? in donor-advised funds? All these and more meet the report's sole criterion of "funding for organizations and political activities that cannot be traced to actual donors."[25]

In this current hearing, held in the subcommittee responsible for oversight of the IRS, one would expect you and Chairman Whitehouse to give a clear definition of "dark money" with references to the relevant sections of the tax code—if, in fact, you were raising the issue in good faith, rather than invoking it as a vague insult that drives attention away from the substance of public policy debates like, say, the proper judicial philosophy for a judge.

As for the question you raise on efforts to have government force the disclosure of nonprofit donors, you are correct that the Capital Research Center has criticized

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[15] Anna Massoglia, "'Dark money' networks high political agendas behind fake news sites," OpenSecrets, May 22, 2020, *https://www.opensecrets.org/news/2020/05/dark-money-networks-fake-news-sites/*.

[16] *https://www.nytimes.com/2021/04/13/business/media/wyss-tribune-company-buyer.html* and *https://www.nytimes.com/2022/01/29/us/politics/democrats-dark-money-donors.html.*

[17] *https://www.politico.com/news/2019/11/19/dark-money-democrats-midterm071725.*

[18] Editorial Board, "Big campaign donors have exploited a loophole. Congress must change the law," *Washington Post,* November 21, 2019, *https://www.washingtonpost.com/opinions/big-campaign-donors-have-exploited-a-loophole-congress-must-change-the-law/2019/11/21/ab31cf3a-0bd6-11ea-bd9d-c628fd48b3a0_story.html.*

[19] Emma Green, "The Massive Progressive Dark-Money Group You've Never Heard Of," *The Atlantic,* November 2, 2021, *https://www.theatlantic.com/politics/archive/2021/11/arabella-advisors-money-democrats/620553/*.

[20] *https://www.opensecrets.org/news/2020/03/warren-super-pac-st/*.

[21] Kenneth P. Vogel and Shane Goldmacher, "Democrats Decried Dark Money. Then They Won With It in 2020," *New York Times,* January 29, 2022, *https://www.nytimes.com/2022/01/29/us/politics/democrats-dark-money-donors.html.*

[22] The multiple comes from OpenSecrets' calculation for the 2020 election cycle. *See https://www.opensecrets.org/outsidespending/summ.php?cycle=2020&disp=O&type=U&chrt=P.*

[23] Oral testimony, available at *https://capitalresearch.org/article/scott-walter-testifies-to-a-senate-finance-subcommittee-on-the-political-activities-of-tax-exempt-entities/*.

[24] *https://www.judiciary.senate.gov/download/scott-walter-testimony.*

[25] Senators Stabenow, Schumer, and Whitehouse, "Captured Courts: The GOP's Big Money Assault on the Constitution, Our Independent Judiciary, and the Rule of Law" (Washington: Democratic Policy and Communications Committee, 2020).

those efforts, and I would add that the U.S. Supreme Court has recently affirmed in *Americans for Prosperity v. Bonta* that California's donor disclosure requirement burdened donors' First Amendment rights without being narrowly tailored to an important government interest.[26] As your fellow advocates for such disclosure have made clear,[27] they believe donor disclosure will harm both the donors and the grantees forced to disclose—a fact that reveals the central disagreement over forced government disclosure: As a defender of citizens' privacy, **I do not wish to harm donors and groups I disagree with, and I respectfully urge you and Chairman Whitehouse to end your campaign to harm donors and groups you disagree with.**

This problem—your and others' desire to squelch speech and intimidate donors—brings us to your final questions: whether Capital Research Center has received any "dark money" and if so, from whom and in what amounts. In addition to the issue that you have failed to define your central term, there is also the fact that Capital Research Center will not violate our donors' privacy. This, too, was made clear in my written testimony to you and the committee: "The practical reason for opposing disclosure arises from the very real threats, felt across the political spectrum, of mob harassment and worse. And, Mr. Chairman, just as your side has more groups, active for more years, and possessed of far more 'dark money,' so does your side have more mobs." I prefer to "stand with the NAACP of Bull Connor's Alabama, and with the NAACP of today, and with the ACLU and the Human Rights Campaign, in opposition to government schemes to force private citizens to disclose their donations."[28]

But let me thank you, Senator Warren, for honoring me with two questions. I was disappointed that neither you, nor Chairman Whitehouse, nor any other member of your party asked me a single question at the hearing itself, where we could have had a respectful public dialogue. The failure to engage in such dialogue is but another reason to conclude that you invoke the bogeyman of "dark money" to prevent substantive exchanges in public. I note that the ranking member, by contrast, asked questions of both parties' witnesses.

Question. CRC has denied the existence of climate change and praised the oil industry as one of "American's most generous industries."[29]

Has CRC received funding from any fossil fuel company in any of the last 5 years? If so, please provide the name of the company, the amount provided to CRC, and the terms and conditions of these contributions.

Answer. Respectfully, the footnote you provided to assert your first claim is perplexing. The first of the two articles it cites is an article by Dr. Steven Allen involving deception in politics and policy that barely references climate issues, and the second, incomplete citation is to something called "Capital Research Service" by an author who died a decade ago.

If you care to read an article by Dr. Allen that deals extensively with the science of climate issues, there are many better ones to choose from.[30] We also have articles that document the connections between strains of environmentalism and eugenics, which were supported by philanthropies funded by Rockefellers, Carnegies, Kelloggs, and others.[31] But while our researchers express their opinions on many matters, including climate science, Capital Research Center as an organization takes no position on climate change.

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[26] *https://www.supremecourt.gov/opinions/20pdf/19-251_p86b.pdf.*

[27] *See* Scott Walter, Testimony before the U.S. Senate Finance Committee Subcommittee on Taxation and IRS Oversight, Hearing on "Laws and Enforcement Governing the Political Activities of Tax Exempt Entities," May 4, 2022," p. 11; available at *https://capitalresearch.org/app/uploads/2022-May-4-Testimony-Finance-Subcom-IRS.pdf.*

[28] *Ibid.,* pp. 11–12.

[29] Capital Research Center, "Your own lyin' eyes," Steven J. Allen, December 8, 2014, *https://web.archive.org/web/20150206074928/http:/capitalresearch.org/2014/12/your-own-lyin-eyes/;* Capital Research Service, "No Philanthropy without Capitalism," Dan Popeo, December 14, 2011.

[30] For example, this one on the abuse of graphs *(https://capitalresearch.org/article/scales-over-our-eyes-using-graphs-to-frighten-people-about-global-warming/)* and another cataloguing the predictions in *The New York Times, Harper's,* and other outlets of climate apocalypses, both warming and cooling, in the 1890s, the 1930s, the 1950s, the 1970s, and more recently *(https://capitalresearch.org/article/in-1895-climate-alarmists-warned-about-global-freezing-they-havent-stopped-scaring-people-since/).*

[31] *https://capitalresearch.org/article/a-darker-shade-of-green-environmentalisms-origins-in-eugenics/.*

As for your question on whether "fossil fuel" companies have supported us in the last 5 years, we will not, of course, as explained in the previous question, violate our donors' privacy, guaranteed by *NAACP v. Alabama.* But knowing that you, Chairman Whitehouse, and others often use a group's donors to dismiss your responsibility to address the substance of your opponents' views, I had our development staff analyze our donations in recent years. They found donations from corporations made up only a few percent of our revenues, and the corporations represented were small to medium-sized.

In addition, while we do not violate our donors' privacy, those donors have the right to choose to disclose their donations publicly. One major corporation, ExxonMobil, did so in 2008 at the behest of its CEO, Rex Tillerson, the future Secretary of Energy under President Donald Trump.[32] At that point, a decade and a half ago, ExxonMobil announced it would no longer fund Capital Research Center. Please note that this funding change made no difference whatsoever in our research or views.

Addditional links:

https://docs.google.com/viewer?url=https%3A%2F%2Fcapitalresearch.org%2Fapp%2Fuploads%2FWalter-S-Testimony-for-IRS-Hearing-on-Schedule-B-Disclosure.pdf.

https://capitalresearch.org/article/the-lefts-secret-science-part-1/.

PREPARED STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM RHODE ISLAND

Twelve years ago, the Supreme Court rested its decision in *Citizens United* on the false predicate that "effective disclosure" would let voters know who was speaking to them, and dispel corruption. Instead, a torrent of dark money—a "tsunami of slime"—washed into our politics. Special interests began to rig our elections from behind a veil of organizations formed under section 501(c)(4) of the Internal Revenue Code. Unlike most groups spending money in elections, 501(c)(4) organizations aren't required to disclose their donors.

The statute governing these organizations states they must be "operated exclusively for the promotion of social welfare." But the IRS muddied the waters with a regulation that allowed social welfare organizations to devote up to 49.9 percent of their spending to political activities and still qualify for 501(c)(4) status. Predictably, these organizations became conduits for secret political spending. In the decade preceding *Citizens United,* 501(c)(4) organizations spent $103 million on political expenditures; in the decade following it, they spent over $1 billion. It was a hell of a tsunami.

The dark money flowing through 501(c)(4)s got darker over the years. As soon as the IRS sought to review the explosion of these political groups after *Citizens United,* dark-money interests whipped up a scandal claiming the IRS was unfairly targeting conservative groups for scrutiny. Let me set the record straight—this is false. An exhaustive 2017 report from the Treasury Inspector General for Tax Administration, or TIGTA, found no such unfair targeting of conservative groups, as did a bipartisan investigation from this very committee.

Still, the damage was done. The fake scandal cowed the IRS, and an appropriations rider in place since 2015 has blocked the IRS from promulgating regulations to clarify political rules for 501(c)(4) organizations. This means groups flout limits on political activity with little risk to their tax-exempt, anonymized status.

As early as 2012, a ProPublica investigation found that roughly 3 in 10 of the 501(c)(4) organizations surveyed reported to the FEC that they had spent money on electioneering, but reported to the IRS they spent no money to influence elections either directly or indirectly. It's hard to see how both statements could be true.

A report out last week from the Citizens for Responsibility and Ethics in Washington describes several recent examples of this problem. Take the NRA. Per CREW:

> Between 2008 and 2013, the NRA reported to the FEC that it spent nearly $11 million in independent expenditures [from its 501(c)(4)]. In 2012, it re-

[32] *https://www.csmonitor.com/Environment/Bright-Green/2008/0529/exxonmobil-cuts-off-funding-to-some-climate-deniers.*

> ported making $7,448,385 in independent expenditures, more than half of which were spent opposing Barack Obama or supporting Mitt Romney in that year's presidential race. . . .
>
> Remarkably, the NRA told the IRS under penalty of perjury that it spent absolutely nothing on political campaign activities between 2008 and 2013. Nor did it file a Schedule C disclosing details of its political spending.

Despite this open and notorious predication for investigation into whether there were false statements made, there's no sign that the IRS is doing much to enforce its existing rules. A 2018 TIGTA report estimated that over 1,000 cases of impermissible political activity by 501(c)(4)s weren't even forwarded to the agency's committee tasked with recommending audits, despite meeting the IRS's own criteria. According to a 2020 GAO review, the IRS between 2010 and 2017 conducted only 226 examinations involving impermissible political campaign intervention. Of those, only 6 percent—a total of 14 examinations—involved 501(c)(4)s. That's fewer than two per year, in the middle of the dark-money tsunami.

We can't tolerate a system that lets 501(c)(4) groups operate without oversight—not when they spend tens, even hundreds, of millions of dollars per election cycle without disclosing their donors. Citizens are denied that most basic right to know what is going on around them in their democracy.

First, we should free the IRS to promulgate clear rules for 501(c)(4) organizations. Second, the IRS should use the tools and resources it already has to crack down on blatant abuse. Lax enforcement sends a message that the rules don't matter. Third, referrals need to be made of likely false statements, so that the right officials in law enforcement can investigate. We are aware of no referrals at all to DOJ, despite years of CREW, ProPublica, and press reporting.

I hope my colleagues will join me in untying the IRS's hands and providing it the tools and resources to enforce its most basic rules. The premise of transparency in *Citizens United* has been violated for far too long.

COMMUNICATIONS

ARABELLA ADVISORS

May 17, 2022

The Honorable Sheldon Whitehouse
Chair
U.S. Senate
Subcommittee on Taxation and IRS Oversight
Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable John Thune
Ranking Member
U.S. Senate
Subcommittee on Taxation and IRS Oversight
Committee on Finance
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Dear Senators Whitehouse and Thune,

In recent months, a select group of partisans have sought to mischaracterize my firm's work in an attempt to score political points at our expense. This happened during the Senate Judiciary Committee's hearings to consider Justice Ketanji Brown Jackson's nomination to the Supreme Court of the United States, and it happened again last week when a witness in front of your Subcommittee frequently disparaged our firm in his opening remarks that were submitted for the record. I write today to once again clear up misconceptions about Arabella Advisors with the hopes that the subcommittee will enter this letter into the record to prevent false information from standing uncontested.

Arabella Advisors is a business dedicated to making philanthropic work more efficient, effective, and equitable. Along with our clients, we are working to build a better future—one with healthy air, water, and food for all, with strong democracies and engaged citizens, with flourishing communities, expanded opportunity and enhanced equity, and without racism. As we noted in our 2020 impact report, we help our clients by sharing our expertise and experience, which includes providing outsourced operational support to nonprofit organizations.

We are proud to be a certified B Corporation, a Great Place to Work, a member of the Inc. 5000, and a two-time winner of *Entrepreneur* Magazine's "Best Entrepreneurial Companies" award. We are not a political organization. We are, however, a company that aims to live our values, which include a commitment to strengthening our communities, working toward a more equitable future, protecting our planet, and more. We accept that, in the highly polarized world in which we currently live, others may see these values as inherently partisan. They are nevertheless our values, and we therefore put them first.

After more than 16 years, we have become experts in the nuts and bolts of philanthropic work. From providing operations, human resources, legal, and compliance advice to nonprofits to helping individuals, families, and companies understand their impact investing options, effective philanthropy is what we do.

We are proud to count a variety of nonprofit organizations that provide fiscal sponsorship among our clients. Crucially, Arabella works for these fiscal-sponsor clients, not the other way around. These nonprofit organizations are independent of us, have their own leadership, and make their own decisions on their strategies and

programmatic work. We provide operational and administrative support and help ensure that philanthropic efforts comply with IRS regulations and that grant dollars are used appropriately and well in pursuit of impact goals.

Unfortunately, many people have been led to fundamentally misunderstand who we are and what we do. We are not a "dark money" organization, rather we are a company that works for a variety of clients including foundations and nonprofit organizations. The phrase "dark money" generally refers to a class of nonprofits that engage in certain types of programmatic activities and how these nonprofits are (and are not) required to disclose their donors. Arabella Advisors is not a nonprofit; to suggest that we are is inaccurate and demonstrates a lack of understanding of the work we do.

We do not work with Demand Justice, a nonprofit focused on federal courts. Arabella Advisors has never donated to any candidates for federal office; as a corporation, that would be illegal. We have also never lobbied Congress on legislation. And lastly, we do not control a network of organizations as one of your witnesses repeatedly suggested. As we have stated repeatedly, publicly, and previously in this letter, we work for our clients, not the other way around. We are a firm that acts as a service provider to clients. To suggest otherwise is simply false. These facts are indisputable, which is why one partisan group mischaracterizing our work was forced to change the content of one of their attacks. Our opponents understand this to be true as well. But despite that, select partisans continue to make false statements about our firm and our work.

We are immensely proud of the work we do to support our clients and, as a company, to live our values. But we also recognize that as a private company, we have a responsibility to protect our brand, our clients, and our employees from misleading attacks that stem from partisan motives. That means correcting the record with facts about our firm and our work, and we will continue to do so. We hope that this letter will help us achieve that goal.

Sincerely,

Rick Cruz
President

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Dear Chair Whitehouse, Ranking Member Thune, Chair Wyden, and Ranking Member Crapo:

Thank you for the opportunity to submit this statement to the Senate Finance Subcommittee on Taxation and IRS Oversight regarding the crucial importance of transparency about who is spending money to influence our elections. The Subcommittee's hearing on "Laws and Enforcement Governing the Political Activities of Tax-Exempt Entities" is crucial and timely.

Campaign Legal Center ("CLC") is a nonpartisan, nonprofit organization dedicated to defending and strengthening American democracy through law. CLC's Federal Reform team works to uncover campaign finance violations, file complaints seeking administrative enforcement, and advocate for reforms to strengthen and ensure the consistent and robust enforcement of campaign finance laws.

Voters have a fundamental right to know who is spending money to influence our elections. Indeed, transparency about the true sources of election spending is essential to the right of self-government and necessary to hold officeholders accountable to the public, both of which are core First Amendment values. Untraced political spending undermines these values. Voters' right to meaningfully participate in the democratic process is impeded without information about who financially supports which candidates and positions. Disclosure of the true sources of election spending is also essential to securing elections against corruption and foreign interference.

For years, the Federal Election Commission ("FEC")—the federal agency responsible for enforcing federal campaign finance laws and ensuring that voters are informed about the true sources of election spending—has been failing to protect voters' fundamental right to transparent campaigns. The Internal Revenue Service's ("IRS") total failure to police the abuse of federal nonprofit rules is exacerbating the problem.

Specifically, these federal regulators routinely permit groups engaged in extraordinary levels of political campaign activity to operate as 501(c)(4) "social welfare" nonprofits and withhold basic information about the donors financing their political campaign activity. Congress should enact legislative reforms to stop this unaccountable and untraceable political campaign spending.

Organizations that are exempt from taxation under Section 501(c)(4) of the federal tax code are not required to disclose their donors, even if they engage in campaign activity, including spending on communications that explicitly urge voters to support or oppose a specific candidate. These groups may also give millions of dollars to support the activities of independent-expenditure-only committees—commonly referred to as "super PACs"—which can receive unlimited contributions, including funds from corporations and wealthy special interests, to buy communications expressly advocating for or against candidates, so long as their activities are not coordinated with any candidate or political party.

While super PACs—like all political committees—must identify their contributors in publicly available disclosure reports, 501(c)(4) groups do not have a similar legal obligation, making them an ideal conduit for political spending by corporations and wealthy special interests who seek to keep their identities concealed. As such, these nonprofit groups have become an increasingly common front for secret political spending, or what commentators often refer to as "dark money."

Guidance from the IRS indicates that political campaign activity cannot be a 501(c)(4) organization's "primary activity," but the agency does not enforce that restriction. After careful review, we could find no example in recent memory of a 501(c)(4) organization losing its federal tax-exempt status based on its political campaign activity, despite ample evidence of such activity. Consequently, these groups are able to benefit from 501(c)(4) tax-exempt status while engaging in massive amounts of political campaign activity with impunity, secure in the knowledge that their tax-exempt status will not be challenged and their undisclosed donors will remain secret.

At the same time, the FEC, whose sole mission is interpreting and enforcing federal campaign finance laws, has consistently failed to enforce the rules requiring groups whose "major purpose" is nominating or electing federal candidates to register and report as political committees, or "PACs." Under the Federal Election Campaign Act ("FECA") and the U.S. Supreme Court's 1976 decision in *Buckley v. Valeo,* any group that raises or spends more than $1,000 on elections in a calendar year and has the "major purpose" of nominating or electing federal candidates must register with the FEC as a political committee, maintain records, and file periodic disclosure reports detailing their receipts and disbursements.

The FEC, however, has virtually ceased enforcing these legal requirements. As has been well documented, the FEC is deeply hampered by ideological division and the agency routinely deadlocks when faced with allegations that a 501(c)(4) group is breaking the law by failing to register and report as a political committee, regardless of how many millions of dollars that group may have spent to influence elections.

The upshot of these administrative failures is an extraordinary and unrelenting increase in secret spending on our elections. Because 501(c)(4) organizations do not disclose their donors—a fact well known to wealthy special interests seeking to conceal their identities—the increase in 501(c)(4) political activity has routinely deprived voters of the essential information needed "to make informed decisions and give proper weight to different speakers and messages," as Justice Kennedy wrote for the U.S. Supreme Court in *Citizens United v. FEC.* In fact, the Court's support for political disclosure has been strong across the ideological spectrum, and it has repeatedly rejected First Amendment challenges to laws requiring disclosure of the sources of election-related spending.

Yet the problem persists, and a few examples help illustrate the situation. The 501(c)(4) organization One Nation disclosed that in 2020 alone, it had raised $172 million and spent $195 million. An enormous amount of its spending was on political campaign activity—*e.g.,* it contributed more than $77 million to Senate Leadership Fund, a super PAC also run by One Nation's president. Likewise, Majority Forward is a 501(c)(4) organization that has spent tens of millions of dollars in every recent election. It shares staff, including its president, with Senate Majority PAC, a super PAC to which Majority Forward contributed $14.6 million in 2021. These are not isolated examples. Numerous 501(c)(4) groups have similarly directed vast amounts on election spending while evading oversight and accountability.

CLC has not stood idly by. We have filed numerous FEC complaints on this issue, and when the FEC fails to act, we have sought federal court orders requiring the FEC to enforce the law or authorizing us to directly pursue enforcement against the violators. Most recently, CLC filed suit against 45Committee, a 501(c)(4) organization that hid its donors while spending as much as $38 million in 2016 to help elect former President Donald Trump. CLC's suit alleges that 45Committee failed to register as a political committee as required by federal law, thereby avoiding disclosure of its donors and spending. By enforcing campaign finance law against this secret money group, CLC seeks to ensure that the public has the critical information it needs to evaluate who is influencing elections. However, voters should not need to rely on lawsuits from organizations like CLC to fill the void of inaction left by the FEC and IRS.

Congress can improve the dire current state of affairs by addressing loopholes that allow 501(c)(4) groups to spend millions on elections without disclosing the true sources of that money, and by removing the appropriations rider that curtails the IRS's ability to issue meaningful guidance on, and enforce, the rules governing nonprofit political campaign activity.

Dark money funneled into our elections through 501(c)(4) groups poses a serious and ongoing threat to the bedrock principle of electoral transparency. We urge Congress to respond accordingly by taking the necessary steps to end secret spending in our elections.

Respectfully submitted,

Adav Noti
Vice President and Legal Director

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Statement of Beth Rotman, Director of Money in Politics and Ethics

Chairman Whitehouse and distinguished members of the Committee, thank you for the opportunity to submit written testimony. Prior to joining Common Cause, I served the public in leadership roles at nonpartisan governmental oversight agencies—one at the state level and one at the municipal level. I was the Director of the Citizens' Election Program for the State Elections Enforcement Commission in Connecticut, and the Deputy General Counsel of the New York City Campaign Finance Board.

Common Cause is a nonpartisan, nonprofit citizen lobby that works to improve the way government operates for all of us. Common Cause has more than 1.5 million members around the country who are committed to open and accountable government that serves the public. Common Cause advocates at the federal, state and local level for meaningful disclosure and real transparency in our elections as key means to increased government accountability and reducing the undue influence of ultra-wealthy special interests in our politics.

Americans deserve to know who is trying to influence their voices and their votes. Disclosure allows voters to evaluate the strength, content and agenda of political messages, and is a crucial tool for holding people accountable to the voters. In *Citizens United v. FEC,* the Supreme Court reaffirmed the importance of disclosure of political spending, ruling 8–1 that transparency in political spending empowers the electorate with the tools needed to make informed decisions about speakers and messages.[1]

Nonetheless, the system is not transparent due to outdated disclosure laws in the wake of *Citizens United* (and the Republican filibusters of the DISCLOSE Act), and the failure of both the Federal Election Commission and the Internal Revenue Service to enforce existing laws, however incomplete, against apparent bad actors. Secret money spending by outside groups since *Citizens United* has exceeded $1 billion dollars in federal elections and the spending race continues. Unfortunately for the American public, a lot has had to go wrong to make it possible for them to be so completely in the dark about so much political spending.

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[1] 558 U.S. 310, 371 (2010).

First, one of the basic statutory principles of campaign finance law found in the federal statute and *mirrored in almost every state* requires the formation of a "political committee" once any organization receives contributions or makes expenditures in excess of $1,000 in a year and whose major purpose is to influence the covered election. 52 U.S.C. § 30101. The FEC has failed to enforce this basic tenet of campaign finance law due to deadlocked votes engineered by some of its commissioners' ideological opposition to the law, which has allowed these organizations to spend huge sums without registering and complying with this fundamental rule applicable to political actors.

This deadlock could be partially ameliorated by strict enforcement by the IRS fulfilling its own mandate and enforcing the laws governing nonprofit political spending. Congress never intended for social welfare organizations to exist as conduits for secret political spending. In exchange for a tax exemption, these nonprofits are required to engage exclusively for social welfare, which the IRS has said does not include political campaign intervention.[2] The IRS regulations muddied the waters with a primary purpose analysis that is inconsistent with the exclusivity requirement of the Internal Revenue Code.[3]

The use of 501(c)(4) social welfare organization status by organizations spending unlimited money in secret should face aggressive enforcement by the IRS. This is not happening. Because it is well known that this is not and has not been happening, partisan political operatives on the right and the left have excelled at establishing phony social welfare organizations that collectively pump hundreds of millions of dollars from secret sources into our elections. Rather than carry out their election-related spending through tax-exempt organizations which requires donor disclosure pursuant to Section 527, major political groups continue to masquerade as social welfare nonprofits under Section 501(c)(4) because they want to keep their donors anonymous.

This long-running scandal is no secret and it is time for the IRS to rethink its priorities to stop the continued misuse of social welfare organizations. This includes updating its outdated regulations that were written long before the Supreme Court changed campaign finance jurisprudence in *Citizens United* and subsequent decisions. It is true that Congress, through appropriations riders in recent years, has prevented the Treasury Department and IRS from setting clearer definitions and updating its regulations.

But it still falls squarely within the IRS's authority to enforce the existing laws governing nonprofit political spending. Should the IRS continue to fail to enforce against these bad actors, they are enabling tax fraud by some of the biggest political spenders meanwhile allowing them to remain anonymous to the public as to their funding sources. The IRS must stop looking the other way and require the overtly political groups masquerading as social welfare nonprofits under Section 501(c)(4) to carry out their election related spending through tax-exempt organizations in accordance with Section 527.

Political operatives should not be able to circumvent the constitutionally sound bedrock policy of disclosure by circumventing inconsistent enforcement and vague regulations governing organizations that Congress never intended would engage in election-related spending. This ongoing scandal threatens the integrity of our elections and undermines confidence in our democracy.

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Chairman Whitehouse, Ranking Member Thune, and members of the Subcommittee, thank you for the opportunity to provide a statement for the record.

The Council on Foundations is a nonprofit leadership organization of more than 800 grantmaking foundations and corporations. We work to build trust in philanthropy, expand pathways to giving, engage broader perspectives, and help create solutions that will lead to a better future for all.

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[2] 26 U.S.C. § 501 (c)(4); Treas. Reg. § 1.501(c)(4)–(1)(a)(2)(ii).
[3] Treas. Reg. § 1.501(c)(4)–(1)(a)(2)(i).

The philanthropic and nonprofit sectors are an essential component of American society: charitable giving reached a record $471 billion in 2020,[1] and the United States is consistently named[2] the most charitable country in the world. Each year, philanthropy invests tens of billions of dollars in community organizations throughout the US and around the world to advance the greater good.

Foundation leaders from across the country have long supported efforts to expand civic engagement. This commitment to our democracy has ensured nonprofits working in communities, including marginalized or underrepresented communities, have the resources they need to improve voter education, promote voter engagement, and increase voter participation.

Federal law already prohibits 501(c)(3) organizations from engaging in any political campaign activity, including endorsing specific candidates or political parties. Known as the Johnson Amendment, this protection ensures that philanthropy can support the critical programs, services, infrastructure, and other investments communities need to ensure a healthy democracy without having any involvement with partisan electioneering. The Council strongly supports the Johnson Amendment and urges this Committee to maintain this critical protection for the charitable sector.

While many foundations and other nonprofits are leading nonpartisan voter engagement efforts in the communities they serve, fear and confusion within the sector have caused some organizations to refuse to take part in any civic engagement. This is unfortunate particularly because nonprofit voter engagement can increase voter participation, an essential activity at a time when there is relatively low voter turnout in the US compared to other developed countries. At the Council, we work to educate our members and the broader philanthropic sector regarding the activities foundations and nonprofits can legally support. We also welcome the opportunity to collaborate with the Committee and Administration officials to provide additional clarity to the sector on this critical topic.

In addition, the Council shares the concern expressed by some of the witnesses regarding insufficient Internal Revenue Service (IRS) staffing and resources. A healthy and trusted charitable sector depends on appropriate oversight by the relevant federal agencies. While the Council supports the increase in funding for the IRS as provided in the most recent appropriations measure, the agency still needs additional funding to ensure it has the capacity to identify bad actors and respond to questions from the sector in a timely manner.

Thank you again for this opportunity to submit comments for the record. We appreciate this committee's leadership and look forward to working with you to ensure the charitable sector can continue to meet the needs of our communities today and into the future.

Respectfully submitted,

David Kass
Vice President
Government Affairs and Legal Resources

END CITIZENS UNITED/LET AMERICA VOTE ACTION FUND
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Statement of Tiffany Muller, President

Since the Supreme Court's disastrous *Citizens United v. FEC* decision over 12 years ago, we've seen an explosion of political spending by "dark money" groups that don't have to disclose their donors. In fact, there has been a more than ten-fold rise in undisclosed campaign spending since the decision, increasing from roughly $6 million in 2006, to more than $1 billion in 2020.[1]

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[1] *https://philanthropynetwork.org/news/giving-usa-2021-year-unprecedented-events-and-challenges-charitable-giving-reached-record-47144.*

[2] *https://www.cafonline.org/docs/default-source/about-us-publications/caf_wgi_10th_edition_report_2712a_web_101019.pdf.*

[1] Center for Responsive Politics, "'Dark money' topped $1 billion in 2020, largely boosting Democrats" (March 17, 2021). Available online: *https://www.opensecrets.org/news/2021/03/one-billion-dark-money-2020-electioncycle/*.

These groups, many organized as 501(c)4 tax-exempt social welfare organizations, have grown to rival party committees and candidate campaigns in their size and influence in our elections, but face no requirements to disclose who is behind them. Right now, the public knows the occupation of every donor who gives $200 to a campaign but almost nothing about wealthy individuals or corporations who give $2 million to political advocacy organizations trying to elect their politicians or secure judicial confirmations in hopes of securing their preferred policy outcome.

Unfortunately, due to legislative maneuvering and disingenuous attacks on the Internal Revenue Service and its mission during this same time period, the regulations governing these groups have not been modernized to reflect the changing nature of how these organizations are used to influence our elections. This lack of clarity has led to confusion in the nonprofit sector, opened the door to corruption, and reduced the public's faith in our elections.

There are several commonsense policies that can be implemented to address these issues.

- The IRS should institute rulemaking to develop clear definitions for political activity by these organizations and create clear bright lines for what constitutes political campaign intervention.
- Congress must permanently remove "riders" from appropriations bills that prevent the IRS from finalizing, issuing, or implementing such rulemaking.
- The House and Senate must also take up and pass the DISCLOSE Act (S. 443, H.R. 1334), legislation that would require groups that spend money to influence elections and judicial nominations to disclose their largest donors. Specifically, the DISCLOSE Act would require an organization that spends $10,000 or more on campaign expenditures to file a disclosure report with the Federal Election Commission within 24 hours of purchasing the expenditures. The DISCLOSE Act also addresses serious vulnerabilities in the system that currently allow foreign actors to meddle in our elections.

As the United States Supreme Court has found time and time again, transparency of political spending is a key bulwark to prevent corruption in government. Americans deserve to know who is trying to influence their vote and more transparency is critical to creating a democracy that is open and accountable to the people.

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Statement of Daniel J. Cardinali, President and CEO

Chairman Whitehouse, Ranking Member Thune, and members of the Subcommittee, thank you for convening this hearing and for your focus on the nonprofit sector. Independent Sector is a national membership organization founded in 1980 made up of nonprofits, foundations, and corporate giving programs nationwide. Working together, our approximately 500 member organizations and their networks reach every state and district and touch the life of every American in one or many ways. They range from some of the largest charities in the world to all-volunteer organizations, and from major philanthropic institutions to small foundations, academic centers, community-based organizations, and more. Independent Sector's core aim is to support these organizations and all civil society, working toward a healthy and equitable nonprofit sector to ensure all people living in the United States thrive.

Three Components of Effective Governance

Independent Sector has, from its beginnings, been committed to working with policymakers, sector leaders, and regulators to achieve a system of effective governance because we believe that is what is required to keep our sector healthy and delivering on its broad mission. As the title of today's hearing correctly notes, laws and enforcement are essential to proper oversight of the nonprofit sector. However, we hold strongly that a third component is equally essential for this system to function: committed self-regulation.

In 2004, Independent Sector worked in close partnership with Congress, and specifically the Senate Finance Committee's then-Chairman Grassley and then-Ranking Member Baucus, to convene the Panel on the Nonprofit Sector (the Panel). In 2005,

the Panel delivered its recommendations to Congress, suggesting concrete actions that the Congress, the Internal Revenue Service, and sector organizations themselves should undertake to enhance sector oversight and governance. Many of those recommendations were enacted into law through the Pension Protection Act of 2006 and, in 2007, the Panel released *Principles for Good Governance and Ethical Practice* to help nonprofits self-regulate at even higher standards of public transparency and accountability than required by law.[1] These principles were later updated in 2015 and remain deeply relevant today, as evidenced by their ranking as one of the most accessed resources on the Independent Sector website.

Unclear Rules Provide the Worst of Both Worlds

According to the Internal Revenue Code, political activity is defined as directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. 501(c)(3) nonprofit organizations may perform limited lobbying, but are absolutely prohibited from participating in partisan political activity by the Johnson Amendment, a critical firewall that must be preserved for the integrity of both charities and our democratic system. 501(c)(4) nonprofit organizations are allowed to engage in unlimited lobbying and political activity within some parameters.

Unfortunately, there is widespread uncertainty in the nonprofit sector about what truly constitutes political activity. Nonprofit organizations need clearer, consistent definitions—like those proposed in the Bright Lines Project by a committee of nonpartisan nonprofit lawyers. Independent Sector is pleased to see some recognition of this problem, with bipartisan legislation recently introduced calling on the Government Accountability Office to consider opportunities to clarify what constitutes "political campaign intervention."[2] Until then, unclear rules will provide the worst of both worlds: cautious good actors may remain on the sidelines, while bad actors operate in gray areas.

Most nonprofits, but particularly small community organizations, do not have dedicated policy staff with deep knowledge about nonpartisan advocacy rules during election years. When they are faced with uncertainty around whether an activity is allowed, they may not have the resources or connections to figure out the right path forward. Instead, they opt out of the policy process, silencing frontline experts often in charge of implementing critical services on behalf of government and the communities nonprofits represent. Amidst crises and uncertainty in 2020, Independent Sector heard from even large nonprofits with highly professional policy teams that were not speaking up about certain policy proposals that impacted their operations, because they did not want to enter a political activity gray area.

When nonprofits step aside from their appropriate role in nonpartisan civic engagement, they miss vital opportunities to advance their own missions, and American democracy suffers as well. According to a recent study, voters who were contacted by a nonprofit organization were 11% more likely to vote.[3] This impact is even stronger for lower propensity voters.

On the other hand, the legal gray areas around nonprofit political activity embolden bad actors to exploit the hard-earned trust of nonprofits for private or partisan benefit. More specifically, private interests use nonprofits designated with special benefits, like donor privacy, to deceive the public and avoid regulation. As a result, the public could come to see more nonprofits as extensions of private or partisan agendas.

Trust: A Critical Nonprofit Asset

Public perception of nonprofit trustworthiness is the currency that drives the nonprofit sector. According to research conducted by Independent Sector in partnership with Edelman Intelligence, nonprofits are among the most trusted organizations in their communities, but they are not rated as highly as they were in 2020, despite increased visibility for the work they are doing.[4]

Trust plays a critical role in the extent individuals choose to donate, volunteer, or advocate with nonprofits. Individuals reporting low trust in nonprofits and philan-

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[1] Accessible at *https://independentsector.org/programs/principles-for-good-governance-and-ethical-practice/*.
[2] H.R. 7587, Nonprofit Sector Strength and Partnership Act, section 10.
[3] *Engaging New Voters,* Nonprofit Vote, 2021.
[4] *Trust in Civil Society,* Independent Sector, July 2021. Also forthcoming research May 2022.

thropy cite scandals, abuse, and perceived partisan motives as reasons for their skepticism. Conversely, individuals reporting high trust in the sector note their trust is built, in part, upon a faith that government regulations ensure nonprofits are serving their communities.

The IRS Has Inadequate Capacity

In addition to hurting the work of nonprofits, the lack of clarity in these rules also overburdens and compromises the IRS. The widespread use of private letter rulings by nonprofits in this area requires time-consuming analysis and response from IRS staff. As such, clearer rules could free up additional staff capacity to be directed toward the Service's core mission.

The need for this additional capacity is clear. From 2000–2013, the number of 501(c)(3) charitable organizations increased by more than 28 percent, while the number of full-time equivalent staff in the IRS Exempt Organizations Division (EO) increased by less than 6 percent. A 2020 Congressional Budget Office report[5] found IRS appropriations had fallen by 20% in inflation-adjusted dollars since 2010, resulting in the elimination of 22% of its staff. The amount of funding allocated to oversight had declined by about 30% since 2010. The agency is struggling to keep pace with an exponentially growing and rapidly changing nonprofit sector. Independent Sector has been disappointed by this long-term decline in IRS appropriations and applauds the recently enacted increase for Fiscal Year 2022.

In addition to its direct impact on nonprofit sector oversight, inadequate IRS capacity has incentivized other shortcuts with damaging consequences. When the IRS created a streamlined Form 1023–EZ, nonprofit leaders expressed concern that such a simplified application approval process may open the door to incorrect determinations or increased abuse. Unfortunately, the IRS' own Taxpayer Advocate has repeatedly concurred, finding that more than one-third of ineligible 1023–EZ applicants were approved in recent years. Independent Sector believes that this error rate is simply unacceptable and we applaud recently introduced bipartisan legislation[6] that would revoke form 1023–EZ and replace it after consultation with the nonprofit sector and other experts.

Conclusion

Once again, thank you for convening this hearing and for focusing Congress' attention on the vital work of the nonprofit sector. Clear, objective rules for nonprofit political activity—balanced between laws, enforcement, and self-regulation—would allow more organizations to participate in their democracy and bolster public trust in the nonprofit sector. We appreciate your interest and look forward to working with you.

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May 4, 2022

U.S. Senate
Committee on Finance
Subcommittee on Taxation and IRS Oversight
219 Dirksen Senate Office Building
Washington, DC 20510

RE: Hearing on Laws and Enforcement Governing the Political Activities of Tax-Exempt Entities

Dear Chair Whitehouse, Ranking Member Thune, and Members of the Subcommittee:

On behalf of National Taxpayers Union Foundation ("NTUF"), I submit these written comments to the Subcommittee on Taxation and IRS Oversight for your

[5] *Trends in the Internal Revenue Service's Funding and Enforcement,* CBO, July 2020.
[6] H.R. 7587, Nonprofit Sector Strength and Partnership Act, section 9.

hearing titled "Laws and Enforcement Governing the Political Activities of Tax-Exempt Entities."[1] As a nonprofit organization that regularly works with, studies, and litigates in matters involving tax agencies, we can offer a perspective focused both on tax and First Amendment law for the Subcommittee's consideration. As you may know, NTUF has historically maintained an abiding interest not only in tax policy, but also tax administration—the mechanics of how the tax law and the agency charged with its implementation can function most efficiently and effectively for the taxpayers it serves. We have published issue briefs, policy papers, and friend of the court briefs on a variety of matters in this realm, ranging from telephone customer service challenges at the IRS to the practical considerations surrounding the recent introduction of the Form 1099–K.[2]

The problem before the Subcommittee in today's hearing combines several of our concerns over tax administration. Chief among them is a combination of workload and expertise: the Internal Revenue Service ("IRS" or "Service") finds itself overburdened in trying to police political activity. One standout solution is for the IRS to look to another expert agency, the Federal Election Commission ("FEC"), for guidance, since the FEC has the lived experience of litigating questions of regulation of speech and politics for decades. This recommendation notwithstanding, any modification of the laws must recognize the First Amendment's robust protections for privacy of association.

I. The Problem: Complex IRS Definitions of "Political Activity" Lead to Arbitrary and Subjective Enforcement

For tax-exempt organizations, what constitutes "political activity" is vitally important. But the Internal Revenue Code ("IRC") does not define the term. Worse, the Treasury Regulations employ an *eleven-factor* test to try to figure out what is and is not "political activity." This complex test chills core First Amendment activity by exempt organizations *and* is unworkable for the IRS to apply in practice.

How to define "political activity" for nonprofit organizations is essential to applying the tax code but troublesome to do in the real world. The scope of a nonprofit's permissible ventures turns on the extent to which the IRS will consider them "political activity." Section 501(c)(3) groups cannot support or oppose a candidate.[3] By contrast, § 501(c)(4) organizations are "operated exclusively for the promotion of social welfare,"[4] which the IRS has defined as being "primarily engaged in promoting in some way the common good and general welfare of the people of the community."[5] Activity in support of or opposition to a candidate is not "promotion of social welfare," but is permissible so long as it does not become the organization's primary purpose.[6] Just as with § 501(c)(4) status, the question of § 527 status is one of primary activity.[7] That is, a § 527 organization need not engage solely in "political ac-

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[1] Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts—upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce. NTUF staff have testified and written extensively on the issues of this hearing before the Subcommittee.

[2] *See, e.g.,* Andrew Wilford and Andrew Moylan, *Congress Needs to Act to Provide Relief to Taxpayers (and the IRS) From Burdensome 1099–K Requirement,* National Taxpayers Union Foundation (March 8, 2022) *available at: https://www.ntu.org/library/doclib/2022/03/Congress-Needs-to-Act-to-Provide-Relief-to-Taxpayers-and-the-IRS-From-Burdensome-1099-K-Requirement-1-.pdf;* Demian Brady, *Increasing Complexity Brings Back Bigger Compliance Burdens,* National Taxpayers Union Foundation (April 18, 2022) *available at: https://www.ntu.org/library/doclib/2022/04/2022-tax-complexity.pdf;* Andrew Wilford, "Taxpayers Expecting a Big Refund Could Be in for a Nasty Surprise," Real Clear Markets (January 10, 2022) *available at: https://www.realclearmarkets.com/articles/2022/01/10/taxpayers_expecting_a_big_refund_could_be_in_for_a_nasty_surprise_811087.html;* Brief of *Amici Curiae,* National Taxpayers Union Foundation and National Federation of Independent Business Small Business Legal Center in Support of Petitioner, *Boechler, P.C. v. Comm'r of Internal Rev.,* U.S. No. 20–1472 (November 22, 2021) *available at: http://www.supremecourt.gov/DocketPDF/20/20-1472/200934/20211122144529316_20-1472%20National%20Taxpayers%20Union%20Foundation.pdf.*

[3] 26 U.S.C. § 501(c)(3) (banning "participat[ion] in, or interven[tion] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office").

[4] 26 U.S.C. § 501(c)(4)(A).

[5] 26 CFR § 1.501(c)(4)–1(a)(2)(i).

[6] 26 CFR § 1.501(c)(4)–1(a)(2)(ii).

[7] 26 U.S.C. § 527(e)(1); 26 CFR § 1.527–2(a)(1) (both defining a political organization as one "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures" for political activity).

tivity," and may undertake other projects such as educational workshops or social activities,[8] but its main function must be political advocacy if it is to maintain its tax status.

But while these statutory distinctions pose few implications for federal revenue, they turn on nonobvious terms like "political activity" and "primary" purposes, and these terms must be interpreted by the IRS. The Service has responded with a complex, *eleven-factor* approach known as the "facts and circumstances" test.[9] The complexity of this test has a palpable impact on exempt organizations, particularly in light of the penalties assessed for violating the tax laws.

As just one example, if a group wants to host a public forum with several candidates for the same office without violating its tax status, the Service's 2007 facts and circumstances guidance provides five factors that must be taken into consideration. But the IRS declines to be bound by those five factors, and explicitly states that there may be more.[10] Any potential sixth, seventh, or eighth factors or circumstances, however, are not made public.

The Service's test is complex, and its uncertainties will inevitably leave speakers wondering if their words will be interpreted by the IRS as "political activity." Consequently, groups are likely "to steer far wide[] of the unlawful zone."[11] As the Supreme Court observed in *Buckley v. Valeo,* laws regulating speech must be drafted with precision, otherwise they force speakers to "hedge and trim" their preferred message.[12] Additionally, "[p]rolix laws chill speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at the law's meaning and differ as to its application."[13]

The Supreme Court recognized the independent First Amendment harm imposed whenever a federal agency "create[s] a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests."[14] The Service's eleven-factor "facts and circumstances" test, which embraces rather than "eschew[s] 'the open-ended rough-and-tumble of factors,'" is just such a regime.[15] Indeed, twelve years ago the Supreme Court held that the FEC's similar eleven-factor test failed First Amendment review.[16] And the anticipated chill is all the more likely given the severe tax penalties imposed for guessing wrong on whether the activity is permissible.[17]

And the IRS staff itself cannot even apply the regulations correctly or consistently, instead defaulting to key word searches and other problematic short cuts. A National Taxpayer Advocate's Special Report confirmed that there are enormous problems with the current facts and circumstances test, stating that "[t]here is very little guidance to help the IRS determine whether an organization is operating" within the parameters of the Internal Revenue Code.[18] This leads to errors and scandal. The Treasury Inspector General for Tax Administration (TIGTA) reported that the IRS targeted "Tea Party and other organizations applying for tax-exempt

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[8] 26 CFR § 1.527–2(a)(3).

[9] IRS Rev. Rul. 2004–6, 2004–4 I.R.B. 328, 330 (January 26, 2004); *cf.* IRS Rev. Rul. 2007–41, 2007–25 I.R.B. 1421 (June 18, 2007) (applying the "facts and circumstances" test to 21 situations).

[10] IRS Rev. Rul. 2007–41, 2007–25 I.R.B. at 1423 ("[F]actors in determining whether the forum results in political campaign intervention *include* the following . . .") (emphasis added).

[11] *Grayned v. City of Rockford,* 408 U.S. 104, 109 (1972) (internal citations omitted).

[12] 424 U.S. 1, 43 (1976) (per curiam) (quoting *Thomas v. Collins,* 323 U.S. 516, 535 (1945)); *see also Reno v. Am. Civil Liberties U.,* 521 U.S. 844, 871–72 (1997) (noting that "[t]he vagueness of . . . a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."); *cf. Fed. Commc'ns Comm'n v. Fox TV Stations, Inc.,* 567 U.S. 239, 254–55 (2012) (quoting *Reno*).

[13] *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 324 (2010) (quotation marks and citation omitted).

[14] *Id.* at 336.

[15] *Id.* (quoting *Fed. Election Comm'n v. Wis. Right to Life, Inc.,* 551 U.S. 449, 469 (2007) (Roberts, C.J., controlling op.).

[16] *Id.* (noting that Federal Election Commission's "11-factor test" to determine whether a nonprofit corporation could engage in political speech failed "First Amendment standards").

[17] *See, e.g.,* 26 U.S.C. §§ 4955(a)(1) and (b)(1) (penalties for 501(c)(3)s that engage in political activity); *id.* at (a)(2) and (b)(2) (personal liability for the managers of a nonprofit engaging in political activity).

[18] National Taxpayer Advocate, Special Report to Congress: Political Activity and the Rights of Applicants for Tax-Exempt Status, at 14 (June 30, 2013) *available at: https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/09/Special-Report.pdf* ("Special Report").

status based upon their names or policy positions."[19] And it turned out the program had errors affecting organizations across the ideological spectrum.[20]

As the National Taxpayer Advocate noted: "What is clear from the TIGTA report is that IRS [Exempt Organization] staff did not believe they had sufficient criteria to make fair and consistent decisions."[21] Writing better law, though, is still difficult if not done properly. Robert Bauer, the former White House Counsel to President Obama, noted in an analysis of one proposal suggesting a new rule for the IRS to apply that "[c]omplexity means hard judgments; the judgments are about sensitive political matters; and the recent controversy demonstrates, if anything, that the IRS is at risk when making judgments of this nature."[22] Simplicity is therefore the answer.

The IRS is ill equipped to make judgment calls on what qualifies as "political activity." The existing regulatory framework—an *eleven-factor* test—is so difficult to apply that even Service employees cannot do so consistently. The Service's expertise lies in tax rates and calculation, not in campaign finance or the regulation of protected First Amendment activity. The IRS needs help, and fortunately the Congress has already directed who to call.

II. The Solution: Get Help from the Federal Election Commission

In the context of regulating politically-active organizations, Congress has provided a clear mandate that the IRS and FEC work together to harmonize their regulations of organizations discussing politics and public policy.[23] Therefore, with these guidelines in place, the role of the Service is clear: collect revenue and, where possible, streamline regulation with the FEC when dealing with political activity. Getting tangled in the administrative underbrush of independently defining and regulating "political activity" will only serve to slow and frustrate the Service's mandates.

The IRS is tasked with a difficult job: enforce the tax code and guide taxpayers into properly complying with the law.[24] This role requires a multitude of specialized personnel with distinctive training in the ever-changing tax code. Every day, the Service fields calls from the public seeking help in complying with the law and regulations. The IRS forms, schedules, handouts, and web page are all designed to guide taxpayers. The Service is the agency with expertise in all things tax, but it often asks for outside help. For example, the IRS has a special Art Advisory Panel to help the Service evaluate works of art for charitable deduction purposes—a skill set far outside most Treasury employees' normal expertise.[25]

The FEC has a clear mandate to enforce the campaign finance laws, regulate political actors, and advise participants on the applications of the complex campaign finance law.[26] The FEC has spent nearly fifty years in rulemaking, drafting advisory opinions, and litigating the constitutional contours of campaign finance law. Every day, their staff answer questions about filing disclosure reports and registering as a political committee. The FEC is the expert agency for regulating political activity.

This idea of IRS deference to the FEC has the approval of the former National Taxpayer Advocate. Almost nine years ago Nina Olson, when she was still in office as Taxpayer Advocate, suggested Congress instruct the IRS to defer to the FEC on these matters: "Specifically, the FEC would have to determine that proposed activity would not or does not constitute excessive political campaign activity."[27] Therefore,

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[19] Treasury Inspector General for Tax Administration, No. 2013–10–053, Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review, at i (May 14, 2013) *available at: http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf; see also id.* at 5–10 (describing the program).

[20] *See, e.g.,* Peter Overby, "As IRS Targeted Tea Party Groups, It Went After Progressives Too," National Public Radio (October 5, 2017) *available at: https://www.npr.org/2017/10/05/555975207/as-irs-targeted-tea-party-groups-it-went-after-progressives-too.*

[21] Special Report at 14.

[22] Robert Bauer, *The IRS and "Bright Lines,"* More Soft Money Hard Law Blog, May 28, 2013, *http://www.moresoftmoneyhardlaw.com/2013/05/irs-bright-lines/*.

[23] 52 U.S.C. § 30111(f); *see also* 107 Pub. L. 276 § 4; 116 Stat. 1929, 1932 (2006) (codified at 26 U.S.C. § 527 note).

[24] *See, e.g.,* 26 U.S.C. § 7803(a)(2).

[25] IRS, "Art Appraisal Services" *available at: https://www.irs.gov/appeals/art-appraisal-services.*

[26] 52 U.S.C. § 30106.

[27] Special Report, at 16.

in crafting any regulation of political entities, the IRS should defer to the expertise of the FEC on matters of substantive regulation of political activity and disclosure.

The IRS just endured one of its toughest filing seasons yet.[28] The Service has more than enough work to do in many specialized areas of law, ranging from 199A implementation from the Coronavirus Aid, Relief, and Economic Security Act to the Enhanced Child Tax Credit.[29] And the IRS has proposed an ambitious plan for restructuring under the Taxpayer First Act.[30] Plus the Service is woefully behind in processing returns during the pandemic.[31] The IRS has enough on its plate applying the tax laws.

The core roles of the Service remain as they always were: to collect revenue and serve taxpayers. The IRS should not add to itself an attempt at wading into the prolix campaign finance laws. Thus, the Service's rules on exempt organizations' political activity should be aimed at steering clear of substantive regulation of the content of the speech.

III. Any New Statute or Treasury Regulation Must Protect Donor Privacy

The Supreme Court ardently protects our First Amendment rights, especially in public policy discussion. In *Buckley,* the Court noted that "a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates."[32] The Supreme Court has also recognized the need to protect the freedom of association from undue disclosure to the government.[33] For decades, the Supreme Court has consistently shielded organizational donors and supporters from the generalized donor disclosure found in campaign finance law.

The Supreme Court's tailoring analysis in *Buckley* was straightforward: organizations with the "major purpose" of supporting or opposing candidates are also subject to campaign finance disclosure at the FEC.[34] Thus candidate committees, political committees, and issue committees are all focused on engaging in electoral politics. Generalized donor disclosure makes sense in the context of such organizations with "the major purpose" of politics because donors *intend* their funds to be used for political purposes. The IRS would put such organizations in the § 527 category.

But if an organization is *neither* controlled by a candidate *nor* has as its "major purpose" speech targeting electoral outcomes, then disclosure is appropriate only for activity that is "unambiguously campaign related."[35] That is, when (1) the organization makes "contributions earmarked for political purposes . . . and (2) when [an organization] make[s] expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate."[36] Such limited disclosure is appropriate because it involves "spending that is unambiguously related" to electoral outcomes.[37] Thus, *Buckley* held that comprehensive disclosure can be required of

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[28] *See, e.g.,* Andrew Wilford, Pete Sepp, and Joe Bishop-Henchman, *Taxpayers Desperately Need Help with Disastrous Filing Season,* National Taxpayers Union Foundation (February 17, 2022) *available at: https://www.ntu.org/library/doclib/2022/02/Taxpayers-Desperately-Need-Help-with-Disastrous-Filing-Season-2-.pdf.*

[29] Lynn Mucenski Keck, "Pass-Through Entities Claiming the Employee Retention Credit May Have a Limited 199A Deduction," *Forbes* (March 14, 2022) available at: *https://www.forbes.com/sites/lynnmucenskikeck/2022/03/14/pass-through-entities-claiming-the-employee-retention-credit-may-have-a-limited-199a-deduction/?sh=197ca98f7983;* Wilford, "Taxpayers Expecting a Big Refund Could Be In For a Nasty Surprise," *supra* note 2.

[30] IRS, Taxpayer First Act Report to Congress (January 2021) *available at: https://www.irs.gov/pub/irs-pdf/p5426.pdf.*

[31] *See, e.g.,* National Taxpayer Advocate, "IRS Delays in Processing Amended Tax Returns Are Impacting TAS's Ability to Assist Taxpayers," NTA Blog (November 10, 2021) *available at: https://www.taxpayeradvocate.irs.gov/news/nta-blog-irs-delays-in-processing-amended-tax-returns-are-impacting-tass-ability-to-assist-taxpayers/.*

[32] *Buckley,* 424 U.S. at 14 (1976) (quoting *Mills v. Alabama,* 384 U.S. 214, 218 (1966)).

[33] *See, e.g., Americans for Prosperity Found. v. Bonta,* 594 U.S. ___, 141 S.Ct. 2373 (2021) ("*AFPF*"); *Gibson v. Florida Legislative Comm.,* 372 U.S. 539 (1963); *Talley v. California,* 362 U.S. 60, 65 (1960); *Shelton v. Tucker,* 364 U.S. 479 (1960); *Bates v. Little Rock,* 361 U.S. 516 (1960); *NAACP v. Ala. ex rel. Patterson,* 357 U.S. 449 (1958).

[34] *Buckley,* 424 U.S. at 79.

[35] *Id.* at 81.

[36] *Id.* at 80 (emphasis added). Of course, the *Buckley* Court narrowly defined "expressly advocate" to encompass only "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" *Id.* at 80 n.108 (incorporating by reference *id.* at 44 n.52).

[37] *Id.* at 80.

groups only insofar as those groups exist to engage in unambiguously campaign related speech.[38]

While the Supreme Court upheld certain disclosure outside the major purpose framework in *Citizens United,* it addressed only a narrow form of disclosure. The Court merely upheld the disclosure of a federal electioneering communication report, which disclosed the *entity making the expenditure* and the purpose of the expenditure.[39] Such a report only disclosed contributors giving over $1,000 *for the purpose of furthering* the electioneering communication.[40] The *Citizens United* Court specifically held that the limited disclosure of an electioneering communications report is a "less restrictive alternative to more comprehensive regulations of speech," such as the regular reporting and generalized donor disclosure required of political committees.[41] What is "less restrictive" in *Citizens United* is that the disclosure was focused on the entity making the message and the donors who gave for that specific activity, not the organization's general donor list.

Just last year the Supreme Court in a 6–3 decision continued to protect nonprofits from generalized donor disclosure to government officials. The Court recognized the long line of precedent that "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action."[42] That is because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and there is a "vital relationship between freedom to associate and privacy in one's associations."[43] Therefore generalized donor disclosure will fail unless the government can prove it survives "exacting scrutiny," which "requires that there be a substantial relation between the disclosure requirement and a sufficiently important governmental interest" and "the disclosure requirement be narrowly tailored to the interest it promotes."[44] Any expansion of the existing disclosure framework would need to meet this high standard of judicial scrutiny. This will be even more strenuous for any proposal for public disclosure of nonprofit supporters.

Indeed, as we detailed to the Supreme Court last year, Form 990's Schedule B was never intended to uncover wrongdoing and its collection of donor data is ripe for abuse.[45] Instead, Congress added the list of major contributors as a method of protecting donor information against IRS disclosure under other statutes, especially the Freedom of Information Act.[46] Unfortunately, Schedule B became a treasure trove for opposition researchers if and when it does get leaked. Warehousing the information is risky, and for little benefit. As it stands, the IRS itself found that Schedule B's general questions were useless compared to the detailed information contained in other areas of Form 990.[47] And the IRS has for decades exercised discretion to relieve a broad swath of organizations from the donor disclosure of Schedule B.[48] As a result, the IRS no longer uses Schedule B for most exempt organizations, and *47* states do not require the information either.[49]

In reality, the rest of Form 990 is far better suited for detecting problems. For example, Part IV of Form 990 alone contains 38 questions triggering a requirement to file more information, each designed to spot particular situations which the IRS

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[38] *Id.* at 81.
[39] 52 U.S.C. §§ 30104(f)(2)(A) through (D).
[40] 52 U.S.C. §§ 30104(f)(2)(E) and (F); *Citizens United,* 558 U.S. at 366.
[41] *Citizens United,* 558 U.S. at 369.
[42] *AFPF,* 141 S.Ct. at 2382 (citation omitted, brackets in *AFPF*).
[43] *Id.* (citations omitted, brackets in *AFPF*).
[44] *Id.* at 2385.
[45] Brief of National Taxpayers Union Foundation and the Public Policy Legal Institute as *Amici Curiae* in Support of Petitioners, *Americans for Prosperity Found. v. Bonta,* U.S. Nos. 19–251 and 19–255 at 15 (February 26, 2021) *available at: http://www.supremecourt.gov/DocketPDF/19/19-251/170004/20210226150717748_NTUF-PPLI%20Amicus%20AFPF%20TMLC%20v%20Becerra.pdf.*
[46] *See, e.g., Landmark Legal Found. v. Internal Rev. Serv.,* 267 F.3d 1132, 1135 (D.C. Cir. 2001).
[47] IRS, Tax-Exempt and Government Entities Div. "Disclosure Risk on Form 990, Schedule B and Re. Proc. 2018–38" Slide 7 (August 2018) *as reprinted in* Gurbir S. Grewal, Attorney General of New Jersey, et al., Letter to Secretary Steven T. Mnuchin, Appendix C (December 9, 2019) a*vailable at: https://downloads.regulations.gov/IRS-2019-0039-8296/attachment_1.pdf.*
[48] IRS "Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations," 85 Fed. Reg. 31959, 31960 (May 28, 2020) (collecting examples).
[49] *Id. See also* Brief of Arizona, et al., *Americans for Prosperity Found. v. Bonta,* U.S. Nos. 19–251 and 19–255, at 4 (March 1, 2021) *available at: http://www.supremecourt.gov/DocketPDF/19/19-251/170569/20210301165759643_19-251%20-255%20tsac%20Arizona.pdf.*

has determined may pose issues. These include questions about grants of money to officers, directors, and other key employees, as well as to substantial contributors "or to a 35% controlled entity or family member of any of these persons."[50] The same information is required for loans, but details are not provided via Schedule B's general list.[51] Business relationships with substantial contributors too must be disclosed, but that information is also not on Schedule B, but on the publicly-available sections of Form 990.[52] And once a problem is detected, it becomes an enforcement matter with investigation of *one* organization, not the warehousing of thousands of organizations' thousands of donors. A general donor list is not nearly as useful as the rest of Form 990 in enforcing the tax laws.

Preventing wrongdoing by charities is an important interest, but greater generalized donor disclosure is not the answer. Already the IRS struggles to keep taxpayer information secure.[53] This is a repeated problem recognized by the Government Accountability Office.[54] And the leaks are already used to make political hay against ideological foes.[55] Multiple Senators on the Finance Committee have already called for reforms to better protect taxpayer data.[56] The government should be wary of collecting and storing more sensitive donor information than is necessary.

Thank you for considering our comments. We look forward to answering any questions and working with you and your staff to develop the necessary reforms to assure regulation of tax-exempt organizations comports with the needs of proper IRS oversight, as well as the First Amendment.

Respectfully submitted,

Tyler Martinez
Senior Attorney

OPENSECRETS

Statement of Sheila Krumholz, Executive Director

Chairman Whitehouse, Ranking Member Thune, and members of the Subcommittee:

On behalf of OpenSecrets, thank you for the opportunity to submit written testimony at this hearing on "Laws and enforcement governing the political activities of tax-exempt entities."

OpenSecrets is a nonpartisan, nonprofit research organization tracking and reporting on money in U.S. politics and its effect on elections and public policy. Our vision is for Americans across the ideological spectrum to be empowered by access to clear, unbiased information about money's role in politics and policy so they can use that knowledge to strengthen our democracy. Our mission is to produce and disseminate peerless data and analysis on money in politics to inform and engage Americans, champion transparency, and expose disproportionate or undue influence.

Millions of dollars from anonymous financiers from across ideological and partisan spectrums is flowing into U.S. political systems, and the methods through which it is funneled continue to increase in complexity and opacity.

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[50] IRS, "Form 990, Return of Organization Exempt form Income Tax," Part IV, Line 27 at 4 *available at: https://www.irs.gov/pub/irs-pdf/f990.pdf.*

[51] *Id.* at Part IV, Line 26 and Schedule L, Part II.

[52] *Id.* at Part IV, Line 28 and Schedule L, Part IV.

[53] *See, e.g.,* Andrew Wilford and Andrew Moylan, "What's the Fallout From the ProPublica Leak?", National Taxpayers Union Foundation (July 27, 2021) *available at: https://www.ntu.org/foundation/detail/whats-the-fallout-from-the-propublica-leak; see also* Michael Tasselmyer, "IRS Security Breach Impacts 100,000 Taxpayers," National Taxpayers Union Foundation (May 28, 2015) *available at: https://www.ntu.org/foundation/detail/irs-security-breach-impacts-100000-taxpayers-05-28-2015.*

[54] *See, e.g.,* GAO, "Information Technology: IRS Needs to Address Operational Challenges and Opportunities to Improve Management," GAO–21–178T, at 6 (October 7, 2020) *available at: https://www.gao.gov/assets/gao-21-178t.pdf.*

[55] *See, e.g.,* Jesse Eisinger, et al., "The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax," ProPublica (June 8, 2021) *available at: https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax.*

[56] Senator Mike Crapo, et al., Letter to Commissioner Rettig (December 1, 2021) *available at: https://www.finance.senate.gov/imo/media/doc/finance_r_letter_to_rettig.pdf.*

The role of groups spending to influence elections using funds from anonymous donors has increased in recent years, but the vast majority of spending by those groups is not disclosed to the Federal Election Commission.

The Flood of Dark Money From 501(c) Groups After *Citizens United*

The 2022 election cycle's ad spending and political contributions by nonprofits that do not disclose their donors follows a decade of rising spending by politically-active nonprofits. Nonprofit organizations operating under 501(c) of the federal tax code—especially 501(c)(4) organizations—are a key vehicle used by anonymous donors to quietly influence U.S. politics.

Federal elections have attracted more than $2 billion in spending and contributions from nonprofits operating under section 501(c) of the tax code since 2010, the majority of that coming from dark money groups that do not disclose their donors.[1] Political activity by organizations exempt under IRC 501(c) is not a new phenomenon but it has increased markedly in recent years.

The number of 501(c)(4) organizations registered with the IRS increased precipitously after 2010, the year *Citizens United* was decided, as did the number of 501(c)(4) organizations reporting political activity in Form 990 tax records.

Just 82 organizations operating under 501(c)(4) of the tax code reported political activity to the IRS in a Form 990 for the 2008 fiscal year and 56 reported political activity during the 2009 political year. In the 2010 fiscal year, and every year OpenSecrets has tracked since, the number of organizations operating under 501(c)(4) of the tax code reporting political activity in a Form 990 has exceeded 100.

Treasury Department regulations require organizations operating under section 501(c)(4) of the tax code to have the promotion of social welfare as their primary purpose in order to maintain their tax-exempt status but those organizations do not necessarily only engage in activities that directly support their stated exempt-purpose.

The IRS has ruled that primarily benefiting partisan interests could also jeopardize an organization's 501(c)(4) status.

But the IRS has been criticized for failing to issue enough guidance in this area.

Dark money groups paying for ostensible political advertising under the guise of issue advocacy or educational purposes and he lack of bright line rules established by the IRS make it difficult to determine exactly how much political activity an individual 501(c)(4) nonprofit could engage in for social welfare to still be considered a group's primary purpose.

While it is a generally accepted rule of thumb that 501(c)(4) organizations are not allowed to devote more than half of their activities to non-exempt activities such as political purposes, organizations may dilute the percentage of money that goes to politics with spending on politically charged ads run under the guise of "issue" advocacy. They do this by giving money to other groups that can then spend on elections or by spending on other more legitimate "social welfare" activities within the organization's tax-exempt purpose.

According to a Government Accountability Office report, IRS officials say the "absence of bright line rules regarding what constitutes political campaign intervention" poses an "overarching challenge" to oversight of politically-active 501(c) organizations, especially regarding the lack of "clear and concise guidance" on the extent to which 501(c)(4) nonprofits can engage in political campaign activities.[2]

In 2013, the IRS released proposed regulations to clarify the limits on political campaign intervention by 501(c)(4) social welfare organizations. But in every annual appropriations bill since 2016, Congress has prohibited the IRS from implementing rules to clarify 501(c) politicking.

Even without that additional clarity, it still falls squarely within the IRS's authority to enforce the existing laws governing 501(c) political spending.

There is no shortage of examples of 501(c) groups that have spent the bulk of their funds on ads boosting or attacking candidates, though that spending is not always reported as political activity.

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[1] *https://www.opensecrets.org/news/2020/01/dark-money-10years-citizens-united/*.
[2] *https://www.gao.gov/products/gao-20-66r.*

More than $320 million in ad spending and contributions during the 2020 cycle can be traced back to nondisclosing 501(c) groups aligned with Democratic or Republican party leadership, accounting for about $3 in every $10 of dark money in 2020 elections. These 501(c) groups share office space and resources with party leaderships' super PACs but, unlike the super PACs, the 501(c) groups can raise and spend unlimited funds without disclosing their donors.

Spending fueled by undisclosed donors leaves the American public in the dark about which wealthy donors may have gained influence with party leaders.

Senate Republican leadership-aligned 501(c)(4) nonprofit One Nation was the top dark money spender of the 2020 election cycle with around $125 million between political contributions and ads.

Dark Money Is Getting Darker

Some critics of increasing transparency around politically active 501(c) groups point to the comparably small portion of overall spending reported to the FEC that is made up by 501(c) groups.

While 501(c) spending reported to the FEC makes up only a portion of the multibillion dollar spending documented in recent election cycles, 501(c) groups funded by secret donors have poured significantly more money into influencing elections through ad spending that is not required to be disclosed to the FEC. Nonprofit groups funded by anonymous donors have also increased contributions to political committees such as super PACs and Carey committees.

During the 2010 election cycle, 501(c) organizations gave under $7 million in political contributions to federal groups. In the 2020 election cycle, political contributions from 501(c) groups topped $723 million.

The 2020 election cycle also saw record gray money spending, which is spending on elections by groups funded in part by shell companies and 501(c) groups that do not disclose their donors. The vast majority of 2020 dark money was channeled through donations from 501(c) nonprofits to outside groups like super PACs that are legally required to disclose their donors. But despite being required to disclose their donors, super PACs can just disclose a 501(c) or shell company as their contributor, hiding the ultimate source of funding.

Overall, 501(c) groups poured more than $820 million into influencing 2020 federal elections. Most of that came from groups that do not disclose their donors.

Including contributions from shell corporations formed as limited-liability companies as well as 501(c) groups, the 2020 election alone attracted more than $1 billion in total dark money, though only a small portion of that was reported as spending to the FEC.[3]

Only about $79 million in spending during the 2020 cycle was reported by 501(c) groups that don't have to disclose their donors. Super PACs funded entirely or almost entirely by dark money groups reported over 38 million more in spending, according to an OpenSecrets analysis.

The 2022 election cycle has already attracted more than $115 million in contributions from 501(c) groups and spending reported to the FEC, OpenSecrets' new analysis found.

Many of the top spenders on so-called "issue" ads mentioning candidates are also politically-active nonprofits that do not disclose their donors. Issue ads aired on TV or radio are only required to be disclosed in the weeks leading up to an election, and online ads that avoid expressly advocating for an election outcome are not required to be disclosed at all.

Nonprofits that do not disclose their donors have reported just $2.8 million to the FEC during the 2022 election cycle.

Most of the spending on these issue ads has not been disclosed to the FEC because they do not explicitly advocate for the election or defeat of a candidate within the weeks leading up to an election.

One top dark money spender that has yet to disclose any spending to the FEC is American Action Network, a 501(c) nonprofit aligned with House Republican leader-

[3] *https://www.opensecrets.org/news/2021/03/one-billion-dark-money-2020-electioncycle/*.

ship.[4] According to analyses by OpenSecrets and the Wesleyan Media Project, the group has spent more than $9.5 million on TV ads mentioning House candidates and about $800,000 on Facebook ads during the 2022 cycle—none of which have been disclosed to the FEC.

In addition to its own spending this cycle, American Action Network has given more than $11.5 million to Congressional Leadership Fund, a super PAC aligned with House Republicans that shares staff and resources with the dark money group.[5]

Senate Republican leadership's dark money group, One Nation, has also poured millions of dollars into 2022 elections but has yet to disclose any spending to the FEC. The dark money group has spent over $2.8 million on TV ads and hundreds of thousands of dollars on digital ads tracked by OpenSecrets.

One Nation has avoided disclosing their spending to the FEC by framing the advertising as issue advocacy since the ads attack Democratic incumbents without explicitly advocating for their election or defeat. One Nation has also given $14.4 million to Senate Leadership Fund, a super PAC tied to Senate Minority Leader Mitch McConnell (R–KY) that shares staff and resources with the dark money group.[6] The dark money group makes up the majority of the super PAC's funding, leaving the ultimate donors fueling the group undisclosed.

During the 2020 election cycle, One Nation did not disclose any spending to the FEC but poured about $125 million into political contributions and ads—more untraceable money than any other dark money group.[7]

Dark money groups aligned with Democratic party leadership have also poured millions of dollars into influencing 2022 elections.

Congressional Democrats' dark money group, House Majority Forward, has spent more than $2.3 million on TV ads, according to figures from the Wesleyan Media Project, and $453,000 on Facebook ads.

House Majority Forward gave another $2.5 million in contributions to House Majority PAC, a super PAC aligned with House Democratic leadership that shares resources with House Majority Forward.[8]

Democrats' Senate Majority PAC received $14.3 million from Majority Forward, a dark money group that shares the super PAC's staff and resources.[9] Majority Forward has spent more than $2.1 million on TV ads and about $250,000 on Facebook ads during the 2022 cycle.

While some of the Facebook ads are through Majority Forward's own Facebook page, the group also pays for ads on regional-themed pages. Most recently, Majority Forward became the sole funder of about $74,000 in digital advertising for Nevada Unido, a Facebook page created in March that has mostly boosted Sen. Catherine Cortez Masto (D–NV) with messages about how the senator is "standing up for victims of human trafficking" and "working to protect our communities and fighting for a strong Nevada economy."[10]

Several groups across the country received the bulk of their funds from 501(c) groups aligned with national party leadership. A recent example is Coalition for a Safe and Secure America, which spent mailers aimed at depressing Republican voter turnout during the 2022 election and received the bulk of its funds from Senate Democrats' Majority Forward.

"Pop up" dark money groups can form shortly before an election and spend millions of dollars without even trying to give the appearance of engaging in activities other than politicking since there are generally few consequences when the group does not plan to remain active after the election.

A recent example of a pop-up dark money groups is Better Tomorrow for Tennessee, a 501(c)(4) organization with little footprint other than giving money to a super PAC

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[4] *https://www.opensecrets.org/donor-lookup/results?name=American+Action+Network&order=desc&sort=D.*

[5] *https://www.opensecrets.org/news/2021/08/secret-donors-are-already-pouring-dark-money-into-2022/.*

[6] *https://www.opensecrets.org/outsidespending/contrib.php?cycle=2022&cmte=C00571703.*

[7] *https://www.opensecrets.org/news/2020/10/senate-gop-dark-money/.*

[8] *https://www.opensecrets.org/outsidespending/contrib.php?cmte=C00495028&cycle=2022.*

[9] *https://www.opensecrets.org/outsidespending/contrib.php?cmte=C00484642&cycle=2022.*

[10] *https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&view_all_page_id=107498775216001&sort_data=desc&sort_data=relevancy_monthly_grouped&search_type=page&media_type=all.*

named Tennesseans for a Better Tomorrow that spent more than $1 million dollars on a toss-up Senate race in the 2018 midterm elections then closed up shop less than a month after election day.[11]

Another 501(c) called Broken Promises spent more than 99% of its funds on political activity backing a spoiler candidate in a Florida's 2018 state Senate race but told the IRS it didn't spend anything on politics.

An older example of this is a group called Carolina Rising, which was formed shortly before 2014 elections then spent 97% of its funds on ads in North Carolina's Senate race then shut down. Carolina Rising did not voluntarily disclose its donors, but an OpenSecrets' investigation later found that the group was entirely funded by Crossroads GPS.[12]

Secretly-funded 501(c) Groups Increase the Risk of Foreign Interference in U.S. Elections

Due to the lack of disclosure requirements, 501(c) dark money groups provide a vehicle for foreign interests to quietly influence U.S. elections.

While the lack of transparency around these groups makes it nearly impossible to get a comprehensive total of how much dark money comes from foreign sources, OpenSecrets has tracked several 501(c) organizations that have reported foreign activities and foreign fundraising in their tax returns during the same year they reported political activity—raising the stakes even further.

Foreign nationals are prohibited from giving money to influence U.S. elections but are able to spend unlimited sums to politically active nonprofits and even fund issue advocacy ads that may mention a candidate so long as the ads do not call for a candidate's election or defeat.

Nonprofits reporting foreign activities include dark money groups that spent tens of millions of dollars to influence U.S. elections in recent years.

The National Rifle Association started reporting foreign fundraising in 2018 and continued to disclose foreign program activities through its most tax return filed last year.[13, 14] The NRA has given over $141 million in contributions to candidates during the 2022 elections cycle.

The U.S. Chamber of Commerce has received revenue from foreign corporations that are dues-paying members. In some of the most recent years it reported foreign revenue and program services, the Chamber spent over $9.5 million on 2018 elections and $29.3 million on 2020 elections.[15]

Despite the risk, a 2020 report from the Government Accountability Office revealed that the IRS doesn't check nonprofit tax records for signs of illegal foreign money in U.S. elections.[16] The finding was used to justify policy change under the former President Donald Trump's administration that now enables 501(c) nonprofits—including politically active dark money groups—to no longer report donor names or addresses to the tax agency unless they are requested under court order or as part of an examination.[17]

The Need for Modernization

Ensuring the IRS has the resources to fulfill public records requests in a timely way is crucial for ensuring transparency.

More standardized electronic reporting of financial information, especially information about 501(c) spending mentioning candidates for elected office, would also help the IRS get a more complete accounting of political campaign activities that may be couched as educational or issue advocacy.

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[11] *https://www.opensecrets.org/news/2019/01/dark-money-fueled-super-pac/*.

[12] *https://www.opensecrets.org/news/2015/10/political-nonprofit-spent-nearly-100-percent-of-funds-to-elect-tillis-in-14/*.

[13] *https://www.opensecrets.org/news/2019/12/nra-discloses-spending-on-foreign-fundraising/*.

[14] *https://www.opensecrets.org/news/2019/12/nra-discloses-spending-on-foreign-fundraising/*.

[15] *https://www.opensecrets.org/political-action-committees-pacs/C00053553/summary/2020 See eg. https://theintercept.com/2020/02/15/dark-money-irs-reporting-501c/*.

[16] *https://www.opensecrets.org/news/2020/08/parties-dark-money-to-2020-elections/*.

[17] *https://www.opensecrets.org/news/2020/02/dark-money-steers-millions-to-super-pacs-2020/*.

Until recently, tax-exempt groups were only required to file returns electronically if they have total assets of $10 million or more at the end of the tax year and the organization files at least 250 returns of any type during the calendar year ending with or within the organization's tax year and file at least 250 returns of any type during the calendar year ending within the organization's tax year.

Many 501(c) groups that pop-up and spend significant sums of money on an election before disappearing do not leave over $10 million in assets at the end of the tax year in order to trigger that requirement so only a portion of groups actually show up in the e-file data. More widespread e-filing requirements streamline disclosure processes and allow for more timely access to crucial data contained in Form 990 returns.

Fiscal sponsorship of politically active groups poses new challenges to donor disclosure since there is no standardized way to report fiscal sponsorship arrangements in a Form 990. The form includes space for a "DBA" but several politically-active 501(c) groups have multiple fictitious names or trade names registered with state agencies that may not be listed on their Form 990 at all.

Donors who steer money to projects operating under the umbrella of a fiscal sponsor report donations to the fiscally sponsoring organization rather than the project, adding an extra layer of secrecy that further obscures the source of funds. Those sponsored projects are not required to file separate annual 990 tax returns with the IRS, and the fiscal sponsor is not necessarily required to report grants to the project in its annual 990 tax filings because the fiscally sponsored initiatives are not technically independent entities for tax purposes.

Although multiple federal agencies are tasked with oversight of 501(c) groups spending to influence U.S. elections, this more often results in agencies pointing fingers at each other than duplicative enforcement.

A 2020 Inspector General report on nonprofit political activity found that the IRS did not "adequately document research related to the allegation, tax-exempt laws evaluated, or the rationale" and failed to forward over a thousand cases of impermissible activity to the appropriate committee. A 2021 Treasury inspector general report found that the IRS examined just 0.13% of 501(c) tax-exempt nonprofit's Form 990 tax returns for the fiscal year of 2018 and about 20% of Form 990 returns selected for examinations were not examined.[18]

Thank you for your attention to our concerns on this critical issue. We would be honored to work with members further to address concerns related to politically-active 501(c) groups.

PEOPLE UNITED FOR PRIVACY
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May 4, 2022

The Honorable Sheldon Whitehouse
United States Senate
Washington, DC 20510

The Honorable John Thune
United States Senate
Washington, DC 20510

Re: Support for Citizen Privacy and Opposition to Harmful Anti-Privacy Legislative and Regulatory Proposals

Dear Chairman Whitehouse, Ranking Member Thune, and Members of the Senate Finance Committee's Subcommittee on Taxation and IRS Oversight:

On behalf of People United for Privacy (PUFP),[1] I submit the following comments for the May 4, 2022 hearing in the United States Senate Committee on Finance's Subcommittee on Taxation and IRS Oversight to examine "Laws and Enforcement Governing the Political Activities of Tax Exempt Entities." Associational privacy is an enduring First Amendment right that has been repeatedly affirmed by the United States Supreme Court and shares widespread support among Americans re-

[18] *https://www.treasury.gov/tigta/auditreports/2021reports/202110013fr.pdf.*

[1] People United for Privacy (PUFP) defends the rights of all Americans—regardless of their beliefs—to come together in support of their shared values. Nonprofit organizations perform important work in communities across the United States, and we protect the ability of nonprofit donors to support causes and exercise their First Amendment rights through private giving.

gardless of their political leanings. PUFP exists to safeguard the freedom of speech and association rights of nonprofit supporters in America—regardless of their beliefs or the level of an individual's financial support for the causes of their choice.

In last year's ruling in *Americans for Prosperity Foundation (AFPF) v. Bonta,* the Supreme Court reaffirmed that all Americans have the right to exercise their First Amendment freedoms privately. PUFP agrees strongly with the Court's decision. We believe it is essential for individuals to be free to express their views through the causes they support without being personally exposed to a political firestorm or governmental retaliation, especially in today's hyperpolarized and caustic political climate.

On multiple occasions, the Supreme Court has recognized that forcing an organization to release its member and donor lists to the government not only divulges the First Amendment activities of individual members and donors but may also deter such activities in the first place. Individuals may legitimately fear any number of damaging consequences from disclosure, including harassment, adverse governmental action, and reprisals by an employer, neighbor, or community member. Or they may simply prefer not to have their affiliations disclosed publicly or subjected to the possibility of disclosure for a variety of reasons rooted in religious practice, modesty, or a desire to avoid unwanted solicitations. For nonprofits, privacy is especially important for organizations that challenge the practices and policies of the very governments that seek the identities of the group's members and supporters.

Over 280 groups signed 43 amicus briefs in support of the petitioners in *AFPF v. Bonta.*[2] These signers represent a wide range of causes and political preferences, including progressive advocacy groups, conservative think tanks, religious organizations, trade associations, animal and human welfare advocates, educational institutions, community services, and arts and culture-focused organizations. As Chief Justice Roberts wrote in the Court's majority opinion, "[t]he gravity of the privacy concerns in [the disclosure] context is further underscored by the filings of hundreds of organizations as *amici curiae* in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors: from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist Organization of America; from Feeding America—Eastern Wisconsin to PBS Reno. The deterrent effect [of disclosure] feared by these organizations is real and pervasive. . . ." One thing the nonprofit community can agree on is the importance of defending our right to engage in free speech and to debate issues that we may disagree on, as well as the need to protect citizen privacy and the rights of individuals to exercise their First Amendment rights privately.

Beyond widespread support for this First Amendment right in the nonprofit community, polling confirms strong support for citizen privacy—and fear of disclosure—among Americans as well. A Harvard CAPS-Harris poll released in March 2021 found that 64% of respondents believe a "growing cancel culture" threatens their freedom while 36% of those surveyed agreed that cancel culture is a "big problem."[3] Only 13% percent of participants replied that "cancel culture" is "not a problem." Additionally, the poll found that 54% of respondents were "concerned" that voicing their opinions online could result in lost employment or the shuttering of their social media accounts. These worrying findings reinforce the conclusions of a summer 2020 poll from the Cato Institute, which verified that 62% of Americans across the political spectrum and various identity groups have political views that they are afraid to share in our current political climate.[4] Further, 32% of respondents in that poll were worried about being passed by for job opportunities solely because of their political views. If Americans were forced to publicize the nonprofit causes they support, it is clear many would refrain from giving at all.

In recent weeks, I have heard dangerous comments from both Republican and Democratic Members of Congress critical of groups that advocate for the beliefs of American citizens. Such rhetoric typically invokes the hollow term "dark money,"

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[2] *See* "Free speech case attracts support from nearly 300 diverse groups," Americans for Prosperity. Available at: *https://americansforprosperity.org/wp-content/uploads/2021/04/AFPF-v-Becerra-Amici.pdf* (April 2021).

[3] Brittany Bernstein, "Poll: Majority of Americans See Cancel Culture as Threat to Freedom," AOL. Available at: *https://www.aol.com/news/poll-majority-americans-see-cancel-213920486.html* (March 29, 2021).

[4] Emily Ekins, "Poll: 62% of Americans Say They Have Political Views They're Afraid to Share," Cato Institute. Available at: *https://www.cato.org/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share* (July 22, 2020).

which has no legal definition and is used inconsistently and pejoratively to describe a wide range of groups and activities that the person speaking dislikes. Many groups criticized for their advocacy on behalf of their supporters are, in fact, long-standing nonprofits supported by large and diverse memberships throughout the country—the kind of groups that set aside other policy disagreements last year to join together in *AFPF v. Bonta* to defend the privacy of their supporters. Some of those groups have existed for over a century and perform important work to offer valuable perspectives on government and public policy. Whether criticism of these groups comes from the left or the right, "dark money" is often just a cheap smear against nonprofit organizations that value their members' privacy and that are working to ensure those in power hear the voices of American citizens.

Nonprofit organizations are forces for good and have long played a role in educating Americans and policymakers about complex issues. Nonprofits also serve as a shield for people who are uncomfortable speaking publicly about an issue on their own, a vital societal function. While some donors may like having their name listed publicly as a supporter of a cause, many donors dislike or fear such attention because they value their privacy. If anything, today's highly charged political climate gives Americans even more reason to keep their beliefs and giving private. Nonprofit organizations play a crucial role in protecting the voices of many citizens who would otherwise remain silent.

Unfortunately, there are numerous examples of Americans who have been targeted because their private support for a cause was exposed. Earlier this year, tens of thousands of Americans donated to the Freedom Convoy of truckers protesting COVID–19 vaccine mandates. That donor database was hacked, exposing the personal information of donors to the cause. *The Washington Post* and other media outlets wasted no time launching a harassment campaign, demanding those donors explain their support—regardless of the amount of their donation. Both $50 and $90,000 donors were identified in an article published by *The Post.* Reporting on the illegal database hack led to outrage on social media from both sides of the aisle, with Senator Ted Cruz (R–TX) and Congresswoman Ilhan Omar (D–MN) finding common ground by pointing out that the only reason to expose small donors is to encourage people to harass them for their beliefs.[5]

In another illustrative story, a homeless shelter in Atlanta, Georgia that houses an average of 500–700 men, women, and children each night was targeted by city officials who sought to claim the land it sits on for other development projects. When the shelter fell behind on its water bill, threatening to give those politicians the land they sought, several anonymous donors contributed enough to enable the shelter to pay its bill. When local media inquired about the donors' identities, the shelter's director explained their desire to remain anonymous: "Anytime a donor appears and is public with us, that donor gets attacked."[6]

It is not difficult to imagine a nonstop wave of targeting and harassment campaigns across the country if donor information is routinely published in a searchable government database. The First Amendment would effectively be a dead letter as Americans would sacrifice their free speech rights to preserve their privacy and save themselves from lost employment, physical harm, and other forms of harassment and intimidation. Frequently, this silencing of debate appears to be exactly what nonprofit donor disclosure proponents hope to accomplish.

To the extent some members of this Subcommittee wish to propose legislative or regulatory prescriptions that would impose onerous disclosure mandates on nonprofits, we encourage Members to do the following:

(1) Oppose "For the People Act" and "Freedom to Vote Act"-Style Donor Disclosure Policies. Buried among a litany of unrelated provisions,[7] the misleading and Orwellian sounding "For the People Act" (S. 1) and "Freedom to Vote Act" (S. 2747) contain multiple policies that would force public expo-

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[5] *See* Timothy H.J. Nerozzi, "Ted Cruz asks if civil liberties groups will support Canadian freedom truckers as they clash with police," Fox News. Available at: *https://www.foxnews.com/politics/ted-cruz-civil-liberties-groups-canadian-truckers-clash-police* (February 19, 2022) and Darragh Roche, "Ilhan Omar Defends 'Freedom Convoy' Donors After GiveSendGo Leak," *Newsweek.* Available at: *https://www.newsweek.com/ilhan-omar-defends-freedom-convoy-donors-givesendgo-leak-1680116* (February 17, 2022).

[6] "Anonymous donors help pay water bill for homeless shelter," WSBTV. Available at: *https://www.wsbtv.com/news/local/anonymous-donors-help-pay-water-bill-homeless-shel/138014681/* (September 26, 2014).

[7] PUFP takes no position on the other provisions in this expansive package that have no impact on citizen privacy protections and nonprofit advocacy.

sure of the names and home addresses of Americans that give to nonprofit groups. This outcome would chill the speech of issue advocacy groups and nonprofits across the political spectrum.

In particular, standalone legislation contained in S. 1, like the so-called "DISCLOSE Act," "Stand By Every Ad Act," and "Secret Money Transparency Act," would, in different ways, expose sensitive information about Americans' support for nonprofit causes for no reason other than an organization's decision to voice an opinion in legislative and policy debates. As Senator Chuck Schumer (D–NY) boasted when first introducing the "DISCLOSE Act" in 2010, "[t]he deterrent effect" of the bill's nonprofit donor disclosure provisions "should not be underestimated."[8] Rather than a disturbing symptom, the chilling impact of the "DISCLOSE Act's" (S. 443, S. 2671) exposure mandate is the intent. This draconian measure would force organizations to report many of their donors to the Federal Election Commission for engaging in common types of nonprofit communications, including on the Internet, and, in some cases, when one nonprofit gives a grant to another nonprofit. The aggressive mandates in this bill would violate Americans' privacy, facilitate harassment, and decrease civic engagement.

The "Stand By Every Ad Act" (H.R. 1171), which has been included in some versions of the "DISCLOSE Act," would go a step further by requiring nonprofits to list the names of their top donors in lengthy disclaimers on communications about public policy. This senseless invasion of privacy will make it more burdensome for groups to fulfill their mission and dangerously expose citizens to uninvited public scrutiny. In many cases, the named donor may not be aware of or even support the message that bears their name. In effect, the disclaimer will shift the public's focus onto a nonprofit's supporters rather than the substance of a group's message, accelerating the erosion of quality public discourse about the issues of the day.

The "Secret Money Transparency Act" in S. 1 and its nefarious cousin, the "Spotlight Act" (S. 215), would eliminate safeguards placed on the Internal Revenue Service that prevent the agency from abusing its power. After the IRS was caught systematically harassing right-of-center nonprofits, restrictions were placed on the agency to prevent it from regulating nonprofit organizations' speech and Americans' privacy.

The "Secret Money Transparency Act" repeals policies repeatedly passed by Congress that prohibit the agency from using funding to issue a rulemaking that would crack down on issue advocacy by nonprofits and jeopardize the privacy of nonprofit supporters. The "Spotlight Act" goes a step further by reversing recent reforms that eliminated the requirement for certain nonprofits to report their supporters' confidential information to the agency and requiring disclosure to the IRS of the names and addresses of *all* Americans that give more than $5,000 annually to many types of nonprofits. This would render nonprofit supporters vulnerable to doxxing and harassment by government officials for information the IRS has said it does not need to enforce the tax code.[9]

Each of these measures, and those like them, should be rejected for the devastating impact they would have on the privacy rights of Americans of all stripes and the diverse causes they support.

(2) Resist Congressional Pressure for Rulemaking Efforts at the IRS that Would Trample Nonprofit Advocacy and Citizen Privacy. During the Obama administration, the Internal Revenue Service admitted that it targeted conservative nonprofits for more than two years leading up to the 2012 presidential election.[10] After being forced to acknowledge this reprehensible practice, the IRS proposed a rulemaking that would have codified many of these improper targeting practices and severely chilled issue speech by non-

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[8] T.W. Farnam, "The Influence Industry: DISCLOSE Act could deter involvement in elections," *The Washington Post.* Available at: *https://www.washingtonpost.com/wp-dyn/content/article/2010/05/12/AR2010051205094.html* (May 13, 2010).

[9] *See* Allen Dickerson, "Comments on REG–102508–16: Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations," Institute for Free Speech. Available at: *https://www.ifs.org/wp-content/uploads/2019/11/2019-11-04_IFS-Comments_IRS_REG-102508-16_Exempt-Org-Reporting-Requirements.pdf* (November 4, 2019).

[10] Abby D. Phillip, "IRS admits targeting conservative groups," ABC News. Available at: *https://abcnews.go.com/Politics/irs-admits-targeting-conservative-groups/story?id=19151646* (May 10, 2013).

profits. As a result of the proposal's harmful impact on nonprofit advocacy, it received widespread bipartisan opposition from groups typically on opposite sides of policy issues, such as the AFL–CIO and National Right to Work Committee and the American Civil Liberties Union and American Conservative Union.[11] Thanks to such overwhelming disapproval, the rulemaking stalled until Congress stepped in and halted the effort.

In response, Congress adopted a budget rider that restricts the agency's ability to adopt regulations that police and chill speech and violate citizen privacy. This policy enjoys bipartisan support and has been included in successive federal spending agreements since 2013, including in the most recent budget bill that was signed by President Biden in mid-March. The IRS is a tax collection agency, not the speech police, and it has no business surveilling the activity of nonprofit organizations or their supporters. This budget rider prevents the IRS from writing new regulations to limit political speech by nonprofit groups. Any pressure by Members of Congress to undertake a similar rulemaking is prohibited by law for the next fiscal year, would receive widespread bipartisan opposition from the nonprofit community, and should be summarily rejected.

(3) Support the Privacy of Nonprofit Donor Lists by Passing the "Don't Weaponize the IRS Act" (S. 1777) and the "Simplify, Don't Amplify the IRS Act" (S. 4046). Taken together, these measures ensure that the IRS does not collect and store nonprofit donors' private information—material the IRS does not need to enforce the tax code—and will protect groups regardless of their political ideology or beliefs. PUFP is proud to endorse both bills. Rather than regulate further in this sensitive area, Congress should be proactive in preventing the IRS from demanding nonprofit donor information that the agency does not want or need.

Privately supporting causes—and the organizations advancing those causes—is a fundamental freedom that is robustly protected by the First Amendment. As Members of Congress, you have taken an oath to support and defend the Constitution of the United States. On behalf of the millions of American citizens represented by organizations that speak on their behalf, we strongly urge you to protect nonprofit donor privacy and reject harmful donor disclosure mandates.

Sincerely,

Heather Lauer
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Thank you for holding this important hearing. Given their prominence in the national consciousness, nonprofits have in important role to play in shaping civic discourse. They can and should do political activity (within the legal limits) to further their missions.

Decades of decisions from the Internal Revenue Service (IRS), the Treasury Department (Treasury), Congress, and the Supreme Court have distorted the rules governing nonprofit political activity, separating nonprofits from what Congress intended when writing section 501(c). Social welfare organizations in particular have become conduits for secret election spending rather than working to boost the country's social welfare as they were designed to do. These organizations have become attractive to powerful donors wanting to influence elections while concealing their identity. The 2010 *Citizens United* decision, in combination with revisions of the gift tax rules, spurred the creation of partisan (c)(4) organizations designed specifically to exploit existing laws that were never designed for this new type of election spending.

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[11] "Analysis: 97% of Comments from 955 Organizations, Experts, and Public Officials Oppose IRS's Proposed 501(c)(4) Rulemaking in its Current Form," Institute for Free Speech. Available at: *https://www.ifs.org/wp-content/uploads/2014/07/2014-07-08_IFS-One-Pager_Drapkin_IRS-Rulemaking-Organizational-Expert-And-Public-Official-Comment-Analysis.pdf* (July 8, 2014).

Congress and the Treasury Department must act to clarify the rules surrounding political activity for nonprofits to ease enforcement, simplify true civic participation activities for nonprofits, and stop bad actors willing to flout the rules.

In this submission, we recommend several steps to rectify what's gone wrong and put nonprofits back on firmer ground.

Congress should:

- Pass legislation outlining objective standards for nonprofit political activity applicable to all 501(c) organizations, such as the Bright Lines Project proposal;[1]
- Increase IRS funding for nonprofit enforcement;
- Approach IRS funding decisions apolitically; and
- Remove the budget rider preventing Treasury from making rules in this area for 501(c)(4)s.

The Treasury Department should:

- Begin a rulemaking to clarify political activity rules for 501 (c)(3) organizations, which it can still do in advance of the repeal of the rider;
- Rescind the 2020 rule ending the requirement that nonprofits submit form 990 section B to the IRS.

Actions for Congress

Pass Legislation Creating a Comprehensive Framework of Objective Rules and Safe Harbors for All Nonprofits

The Bright Lines Project was drafted nearly a decade ago by a group of nonprofit attorneys (the drafting committee) who repeatedly heard from their clients that better rules were needed in this area (even before *Citizens United* and the IRS scandal of 2013, which made the need for new rules more obvious still). The rules are based around the rules governing (c)(3) lobbying, rules that have worked well for decades.

The drafting committee set out to create a comprehensive framework covering the full range of potential communications and transactions, defining safe harbors on one side and per se intervention on the other, with a much narrower range for prosecutorial discretion in the middle. This would achieve improved voluntary compliance—with more predictable standards of conduct—and have the immediate effect of invigorating nonprofit participation in our democracy.

The plan consists of objective rules designed to be easy to follow by nonprofit workers and IRS enforcers alike. The rules clearly define and differentiate between per se intervention and candidate advocacy, and lay out a safe-harbor system designed to encourage truly nonpartisan civic activity.

The rules define per se political intervention first, obvious political activity such as expressly advocating for the election or defeat of a candidate or political party. They specify that any communication that clearly refers to and expresses a view on a political candidate would generally be deemed political activity unless the communication fits within one of several specific exceptions that would protect:

- Legitimate grassroots advocacy on current policy issues;
- Nonpartisan efforts to educate the public on candidate policy positions; and
- Measured responses to candidate statements about the organization or its core issues.

These exceptions wouldn't be available for paid "mass media" communications—such as TV, radio, newspaper, direct mail, online advertising, and phone banks.

The plan recognizes that subjective analysis may be helpful in some cases, and so keeps the current test as a back-up in the unlikely event that the full analysis does not provide a clear answer.

Boost IRS Funding Generally, and for Nonprofit Enforcement

In addition, Congress should boost the IRS's funding in general and for nonprofit enforcement in particular. In 2018, the Tax Inspector General found[2] that many complaints of impermissible political activity by nonprofits were not being referred to the correct committee for further investigation and potential audit. Increased

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[1] *http://brightlinesproject.org/wp-content/uploads/2015/06/2014-11-15-draft-Regs-and-Cover-FINAL.pdf.*

[2] *https://www.tigta.gov/?utm_campaign=Washington%20Snapshot&utm_source=hs_email&utm_medium=email&utm_content=66618699&_hsenc=p2ANqtz-9ixaIODqHpcw3Lg3ePCaLlohXo8vYpqEpbWgd3phs3nF1GaHOjQYHtjprqQTrgo2xb90oxp3u8uNaMTAb52dO1Epld-KV_3WOXcY8MKJireMo77v4&_hsmi=66618699.*

staffing and funding of the Tax Exempt and Government Entities division should be prioritized to ensure that the recommendations of that report are fully implemented, and that adequate oversight of nonprofit political activity occurs.

Approach IRS Funding Without Political Bias

The IRS's cash-strapped position increases the risk that fear of congressional retaliation could have a chilling effect on what issue areas the IRS and Treasury undertake drafting guidance or issuing NPRMs. Drafting new guidance or proposed rules, considering public comment to those rules, and revising and issuing new rules are resource consuming endeavors, particularly for an agency that lacks adequate funding. Fear of congressional punishment through appropriations could stop Treasury and the IRS from undertaking vital work to solve the problems this subcommittee has identified.

Lift the Appropriations Rider Banning the Treasury Department From Making Rules Surrounding 501(c)(4) Political Activity

Over and over for years now, Congress has renewed an appropriations rider in the Financial Services and General Government title that prevents the IRS and Treasury from clarifying the rules for political activity for social welfare organizations. This rider, inserted without transparency or debate in the final negotiations of the 2015 appropriations bill, prevents Treasury from taking its inspector general's own advice on how best to avoid "scandals" like that of 2013. In fact, the rider stopped a Treasury rulemaking on that very issue in its tracks.

Partisan budget riders are no way to make good law, and do not belong in budget negotiations. Congress should remove this rider and allow Treasury to make better rules for all nonprofits.

Actions for Treasury

Begin a Rulemaking for 501(c)(3) Organizations

It may seem counterintuitive that detailed standards for political activity would help section 501(c)(3) organizations. In fact, they have a particular need of guidance because of their significant presence in the U.S. and the dire consequences they face for crossing the nebulous line into impermissible political activity.

They are the most numerous among tax-exempt organizations; they have the most assets; and they, alone, risk revocation of their tax-exempt status as a result of any political activity, however minor.

Furthermore, many (c)(3) organizations seek to engage in the democratic process, especially in an election year, in ways that have long been accepted and even encouraged. In fact, both Congress and Treasury have long recognized that (c)(3)s play an invaluable role in preserving a healthy democratic system and an engaged citizenry. Yet, the experience of the Bright Lines Project drafting committee indicates that a lack of clear guidance in the political space has made many (c)(3)s overly risk-averse, causing these organizations to shy away from even the most benign nonpartisan efforts altogether. This creates a tremendous chilling effect on the speech of law-abiding 501(c)(3) organizations and deters long-standing civic engagement and voter education efforts. Perversely, the current system can also empower more brazen 501(c)(3) organizations to engage in overt efforts to influence election outcomes with little fear of enforcement action.

As the rest of this submission indicates, the best way to help nonprofits would be to issue rules that apply to all 501(c) organizations. However, in absence of congressional action lifting the rider restricting clearer definitions for (c)(4)s, a rulemaking providing guidance for (c)(3)s would be a good start.

Rescind the 2020 Rule Ending the Requirement That Some Nonprofits Provide Donor Information to the IRS

In 2020, the Treasury Department ended the requirement that nonprofits that do political activity submit basic information about their donors to the IRS. Rescinding that requirement eliminated one of the only opportunities for enforcers to find and stop illegal foreign interference into our election system. The change also makes it harder to adequately enforce the rules, because bad-actor nonprofits will have more notice before an audit, giving them time to cook their books. Treasury should reinstate this requirement and take this opportunity to review other ways to prevent foreign election spending and other malfeasance.

Public Citizen on behalf of the Bright Lines Project deeply appreciates the opportunity to submit testimony for this important hearing, and we applaud the subcommittee for exploring these vital issues.

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