370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615
Phone: (703) 356-6912 Fax: (703) 356-5085
E-mail: freespeech@mindspring.com
www.freespeechcoalition.org

December 9, 2019

Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Comments of the Free Speech Coalition, Inc., *et al.* in Response to Department of the Treasury/Internal Revenue Service Notice of Proposed Rulemaking relating to "Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations" (84 *Fed. Reg.* 47447)

To Whom it May Concern:

These comments are submitted on behalf of Free Speech Coalition, Inc. ("FSC"); Free Speech Defense and Education Fund, Inc. ("FSDEF"); Citizens United; Citizens United Foundation; Conservative Legal Defense and Education Fund; Downsize DC Foundation; DownsizeDC.org, Inc.; Gun Owners Foundation; Gun Owners of America; Public Advocate of the United States; The Senior Citizens League; Sixty Plus Association; and American Target Advertising. We appreciate the opportunity to comment on the proposed regulations set forth in the Notice and Request for Comments relating to "Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations" (hereinafter referred to as the "Notice"). 84 *Fed. Reg.* 47447 (Sept. 10, 2019).

IDENTITY AND INTEREST OF COMMENTERS

FSC is an association of nonprofit organizations and for-profit corporations concerned with the preservation of the rights of nonprofit advocacy organizations. Formed 26 years ago, FSC is exempt from federal income tax under § 501(c)(4) of the Internal Revenue Code ("IRC") and has had occasion to present its views to the Internal Revenue Service ("IRS") in the past on a variety of regulatory issues. FSDEF is an educational public charity, exempt from federal income tax under IRC § 501(c)(3), which works in defense of a robust, deregulated marketplace of ideas. Joining these comments are Citizens United, DownsizeDC.org, Gun Owners of America, Public Advocate of the United States, The Senior Citizens League, and Sixty Plus Association are exempt from federal income tax under IRC § 501(c)(4), and Citizens United Foundation, Conservative Legal Defense and Education Fund, Downsize DC Foundation, and Gun Owners Foundation are exempt from federal income tax

under IRC § 501(c)(3). American Target Advertising is a for-profit corporation that assists nonprofit organizations. (These commenters will be referred to collectively as FSC.)

FSC and certain other organizations have filed amicus briefs in several federal court cases relating to this issue:

- AFPF v. Becerra & Thomas More v. Becerra, Nos. 19-251 & 19-255, U.S. Supreme Court Brief *Amicus Curiae* in support of Petitioners (Sept. 25, 2019);
- AFPF v. Harris, Nos. 15-55446 & 15-55911, Ninth Circuit, Brief *Amicus Curiae* in Support of Petition for Rehearing *En Banc* (January 21, 2016);
- Citizens United v. Schneiderman, No. 16-3310, Second Circuit, Brief *Amicus Curiae* in Support of Appellants and Reversal (January 13, 2017);
- AFPF v. Becerra, Nos. 16-55727 & 16-55786, Ninth Circuit, Brief *Amicus Curiae* in Support of Plaintiff-Appellee and Affirmance (January 27, 2017);
- Institute for Free Speech v. Becerra, No. 17-17403, Ninth Circuit, Brief *Amicus Curiae* in Support of Plaintiff-Appellant and Reversal (March 16, 2018); and
- AFPF v. Becerra, Nos. 16-55727 & 16-55786, Ninth Circuit, Brief *Amicus Curiae* in Support of Petition for Rehearing *En Banc* (October 5, 2018).

SUMMARY

FSC has been vocal in their opposition to the efforts of the attorneys general of certain states to effectively circumvent the strictures of IRC § 6103 — by forcing tax-exempt organizations (or "charities") to disclose the names and addresses of their highest donors on their unredacted annual information returns (Form 990 Schedule B) in return for being able to exercise their First Amendment rights by conducting charitable solicitations in those states. These donor lists are confidential and proprietary, revealed only in the annual IRS Form 990, which the IRS keeps confidential. These lists are unobtainable by the States except under the strictures of IRC § 6103. Nevertheless, the attorneys general of two States — California and New York — have been conducting an end-run around the IRC § 6103 requirements by forcing charities to provide the confidential donor information on Schedule B as a condition of being able to solicit contributions in the State. FSC has vehemently opposed such outrageous and illegal State government action and has asked the federal government to take appropriate steps to investigate and hopefully help put a stop to such State action. Although FSC believes that there is no need for the IRS routinely to collect confidential donor information from any nonprofit organization, the proposed rule change is an appropriate step towards protecting the confidential donor information of exempt organizations.

FACTUAL BACKGROUND

Each year, most larger U.S. tax-exempt organizations file an annual information return — IRS Form 990 — with the IRS. Schedule B to IRS Form 990 requires the names and addresses of significant contributors to the organization. The donor information on Schedule B is confidential and is not disclosed to the public by the IRS. Although exempt organizations are required by law to file the Form 990 with the IRS, the donor information in Schedule B may be "redacted" — that is, not disclosed in the public version of the Schedule B. For many years, many tax-exempt organizations have been required by approximately 40 States to submit their most recent Form 990 to comply with the State's charitable solicitation law requirements, but they have been required to file no more than only a redacted Schedule B, and that is still the requirement in all such States — except for two.

During the last several years, tax-exempt organizations throughout the United States have begun receiving letters from the California Attorney General, as well as the Attorney General of New York, informing them that their charitable solicitation registration or registration renewal filings in those states are incomplete because the copy of the IRS Form 990 that the organizations are required to file as part of their solicitation registration package contains a redacted Schedule B, which does not identify the names and addresses of contributors. Failure to do so will result in rejection or suspension of charitable solicitation registration in their States, as well as the imposition of fines.

This relatively recent state filing requirement has been introduced by administrative fiat despite no apparent pressing administrative or investigatory need.[1] The State attorneys general have refused to relax the requirement in the face of strenuous objections from the nonprofit community. They are not dissuaded even though the IRS is prohibited from releasing to the public the name and address of any contributor listed on Schedule B (*see* IRC § 6104(b)), but state laws are less robust in their protections. These attorneys general also disregard any constitutional protections against such disclosure.

The nonprofit community has understandably balked at such draconian, extra-legal, and unconstitutional measures, but the attorneys general have held fast. Litigation ensued, and has continued with petitions for certiorari now pending before the U.S. Supreme Court. That litigation, brought by 501(c)(3) organizations, will not be mooted by the proposed regulation, which applies to organizations that are not exempt under IRC § 501(c)(3).

Last year, the IRS issued Rev. Proc. 2018-38, which would have implemented the rule being proposed in this docket. However, the U.S. District Court for the District of Montana

---

[1] *See* Americans for Prosperity Foundation v. Becerra (Supreme Court No. 19-251), Petition for Certiorari at 34, and Thomas More Law Center v. Becerra (Supreme Court No. 19-255, Petition for Certiorari at 26 and 29.

set aside Rev. Proc. 2018-38, holding that the IRS must follow the notice-and-comment procedure under the APA. *See* Bullock v. IRS, 401 F. Supp. 3d 1144 (D. Mont. 2019). As a result, the IRS is undertaking this rulemaking to request notice-and-comment in response to the one objection raised one district court in Bullock.

COMMENTS

I. The Proposed Regulations Are Fully Consistent with the Internal Revenue Code.

The NPRM notes that the statutory requirement to report to the IRS the names and addresses of certain major contributors to an organization only applies to section 501(c)(3) organizations.[2] The NPRM explains that "Section 6033 does not specify that the names and addresses of contributors to tax-exempt organizations, other than those described in section 501(c)(3), be reported on annual information returns." 84 *Fed. Reg*. at 47451.

Indeed, even as the court invalidated Rev. Proc. 2018-38, it acknowledged that "the substance of [the IRS's] ultimate decision remains subject to the Commissioner's discretion." Bullock at 1154.

The commenters agree with all of the reasons that the IRS has provided for exercising its discretion to discontinue requiring donor information.

- The IRS stated that it "does not need the names and addresses of substantial contributors … in order to carry out the internal revenue laws…." Having the organizations maintain contributor information if and when the IRS may need it "is sufficient for the efficient administration of the Code."

- Having to report confidential information that must be segregated from information that must be released to the public "increases compliance costs for affected tax-exempt organizations and consumes IRS resources…."

- The IRS and other law enforcement (including states) can acquire the information as needed to enforce applicable laws. "The primary utility of the names and addresses of substantial contributors … arises during examination of a tax-exempt organization, at which point such information may be collected from the relevant tax-exempt organization."

---

[2] *See* IRC § 6033(b)(5) ("Every organization described in section 501(c)(3) which is subject to the requirements of subsection (a) shall furnish annually … (5) the total of the contributions and gifts received by it during the year, and the names and addresses of all substantial contributors….").

- "[T]he requirement to report the names and addresses of substantial contributors poses a risk of inadvertent disclosure of" confidential information.

- Finally, as names and addresses of donors are already permitted to be redacted, the rule change "will have no effect on information currently available to the public."

The claims made by Montana Governor Steve Bullock in his comments on this rulemaking are inaccurate and misleading. As the Governor himself admits, Montana "regularly requests and receives information from the IRS pursuant to Section 6103(d)…." Letter of Governor Bullock dated October 7, 2019. Montana can acquire information needed in an investigation of a specific nonprofit upon an appropriate showing.

II. Required Disclosure of Donor Names and Addresses Poses Constitutional Issues Which Should Be Avoided.

1. State Attorneys General's Violation of Nonprofits' First Amendment Rights Is Aggravated by the Public Disclosure of Confidential Donor Lists.

Litigation challenging the California Attorney General charitable solicitation requirement for donor names is ongoing. In California, Americans for Prosperity Foundation ("AFPF") — an IRC § 501(c)(3) public charity — after more than a year of resisting the California Attorney General's demands for an unredacted Schedule B as part of its charitable solicitation registration application, was forced to sue the California Attorney General in 2014 seeking an order enjoining the State Attorney General from demanding the unredacted Schedule B. AFPF was successful in obtaining a preliminary injunction from the trial court as an initial matter, but the injunction order was ultimately reversed by the U.S. Court of Appeals for the Ninth Circuit. *See* Americans for Prosperity Foundation v. Harris, 903 F.3d 1000 (9th Cir. 2018).[3] In so ruling, the Ninth Circuit relied upon an earlier ruling[4] that the California Attorney General's Schedule B filing requirement was not facially unconstitutional.

The district court decision in AFPF v. Harris, 182 F. Supp. 3d 1049 (C.D. Cal. 2016), is highly relevant to this rulemaking because it revealed, *inter alia*, how State techniques to circumvent the strictures of § 6103 can thwart the very purpose of IRC § 6103. For example,

---

[3] These commenters, joined by others, filed an *amicus curiae* brief in support of both AFPF's Petition for Certiorari to the U.S. Supreme Court and a similar challenge brought by the Thomas More Law Center. *See* Thomas More Law Center v. Becerra, U.S. Supreme Court No. 19-255: http://www.supremecourt.gov/DocketPDF/19/19-251/117078/20190925161452479_AFPF%20Petition%20Amicus%20Brief.pdf.

[4] *See* Center for Competitive Politics v. Harris, 784 F.3d 1307 (9th Cir. 2015).

after describing the substantial evidence supporting the injunction — AFPF presented a variety of witnesses who demonstrated that the Schedule B disclosure requirement subjected AFPF supporters to abuse and danger — the trial court noted in its opinion that, "[a]s made abundantly clear, the Attorney General has systematically failed to maintain the confidentiality of Schedule B forms." AFPF v. Harris at 1056-57. The trial court's findings included the following:

> During the course of this litigation, **AFP conducted a search** of the Attorney General's public website **and discovered over 1,400 publically available Schedule Bs.** (TX-56). Within 24 hours, all of those confidential documents were removed from the Registry's website. (TX-736, p. 107:12–15). Just one example of the Attorney General's inadvertent disclosures was the Schedule B for Planned Parenthood Affiliates of California. The Attorney General was made aware that the Registry had publically posted Planned Parenthood's confidential Schedule B, which included all the names and addresses of hundreds of donors. (TX-131). An investigator for the Attorney General admitted that "posting that kind of information publically could be very damaging to Planned Parenthood…" (Johns Test. 2/25/16 Vol. II, p. 41:18–21). All told, AFP identified 1,778 confidential Schedule Bs that the Attorney General had publically posted on the Registry's website, including 38 which were discovered the day before this trial. (McClave Test. 2/24/16 Vol. I, p. 27:6–32:17). **The pervasive, recurring pattern of uncontained Schedule B disclosures—a pattern that has persisted even during this trial—is irreconcilable with the Attorney General's assurances and contentions as to the confidentiality of Schedule Bs collected by the Registry.** [*Id.* at 1057 (emphasis added).]

This is a situation that the IRS — as the guardian of § 6103 — can improve. One of the ways it can help prevent state disclosure of donor information is by implementing the regulation proposed in this docket. But we also urge the IRS to also consider other ways to increase the protections provided to the donor information that it will continue to require to be reported by 501(c)(3) organizations. Modifications to require states to make a strong showing of actual fraud before obtaining donor information would do much to reassure the public regarding § 6103's effectiveness in protecting FTI.

2. The State Attorney General Action Violates the Constitutional Rights of Those Exempt Organizations (and Their Donors) Subject to Such Action.

The second half of the 20th century saw a marked surge in intrusive efforts by state governments to regulate nonprofit organizations — particularly in the area of fundraising and related questions of nonprofit management. Some states and local governments have enacted statutory licensing conditions (*e.g.*, capping maximum fees for fundraising, requiring that minimum percentages of revenue be devoted to charitable purposes) that were ultimately

contested on constitutional grounds. *See* Putnam Barber, "Regulation of US Charitable Solicitations Since 1954," Vol. 23 Voluntas (2012) ("Barber") at 746-47, 751-52. "This approach to state regulation was ended in the 1980s, though, by three decisions of the U.S. Supreme Court. Put simply, the Court ruled that fundraising activities are constitutionally protected speech and any governmentally imposed constraints must be narrowly constructed to serve an identifiable public purpose." *Id*. at 752.

The California and New York attorneys general, in forcing exempt organizations to disclose their federally protected donor lists by conditioning the organizations' right to conduct charitable solicitations on their compliance with the State disclosure requirement, have run afoul of the free speech rights guaranteed by the First Amendment. The efforts of certain States a few decades ago to curb those very rights of exempt organizations to solicit the public for contributions by imposing certain fee restrictions or filing requirements were conspicuously halted by the U.S. Supreme Court. *See* Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (striking down ordinance conditioning license on use of 75-percent of revenue for "charitable purposes"); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984) (striking down statute prohibiting fundraising expenses exceeding 25 percent of amount raised); and Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988) (striking down statute requiring, *inter alia*, "reasonable fee" for fundraising based on percentages and imposing licensing requirement for professional fundraisers). The Supreme Court's legal pronouncements were re-confirmed and strengthened more recently in Madigan v. Telemarketing Associates, 538 U.S. 600, 611 (2003). Indeed, Madigan held that a State may not impose general disclosure requirements, but only obtain such information in specific actions for fraud.

Both State attorneys general base their demands for all applicant organizations' Form 990 Schedule B, *inter alia*, on enforcement of their State's respective charitable solicitation registration laws. *See, e.g.,* Cal. Business and Prof. Code, §§ 17510, *et seq.* and Cal. Gov't Code, §§ 12580, *et seq*. However, it is submitted that neither State statute requires or even permits such regulatory action. For example, the legislative purpose of California's charitable solicitation laws is stated as follows:

> The Legislature declares that the purpose of this article is to **safeguard the public against fraud, deceit** and imposition, and to foster and encourage fair solicitations and sales solicitations for charitable purposes, wherein the person from whom the money is being solicited will know what portion of the money will actually be utilized for charitable purposes. [Cal. Business and Prof. Code, § 17510(b) (emphasis added).]

Disclosure to the state of the names of donors as they appear on the Form 990's Schedule B does nothing to further that stated purpose. A general claim with respect to law enforcement is not a justification for demanding confidential and federally protected donor information,

particularly when not related to a specific investigation, and it is submitted that no such purpose would be acceptable to the Secretary if submitted by a State seeking FTI.

Exempt organizations know the sensitivity of confidential donor information in the world of charitable giving. Donors — particularly donors of significant sums — increasingly ask where and how their names will be disclosed before making contributions. Generally, donors accept the risk associated with their gifts being revealed to the IRS on Schedule B, because they know there are laws which make disclosure of that information a felony punishable by up to $5,000 fine and five years in jail,[5] and they understand that the nonpolitical civil servants' reason for obtaining this information is narrow, primarily related to ensuring that charities maintain necessary levels of public support to qualify as public charities under federal law. *See* IRC § 509(a).[6] However, donors express little or no similar confidence when their contribution history is distributed across the nation, especially where the disclosure is made to elected politicians serving as State Secretaries of State or State Attorneys General — almost always with greater political aspirations. Those elected officials have both the motivation and the ability to punish donors who contribute to groups with which the politicians disagree.[7] Donors understand that sometimes the politician lurking within the state official can commit an abuse of the public trust.

3. The State Attorneys General Have Violated the First Amendment Principle of Anonymity.

The unconstitutionality of the State Attorneys General's actions in requiring the filing of confidential donor lists in exchange for a license to solicit seems clear under the First Amendment law. The Supreme Court has ruled that charitable solicitations are so intertwined with protected speech that no "prior permit" could be required where the grant or denial of permission is subject to the discretion of a Government official. *See* Village of Schaumburg at 631 (citing Thomas v. Collins, 323 U.S. 516, 538 (1945)). Forced disclosure of the names and addresses of an organization's contributors as a pre-condition to soliciting funds is tantamount to requiring a license to engage in First Amendment-protected activities, a violation of the freedom of the press. As Justice Black observed in Talley v. California:

---

[5] *See* 26 U.S.C. § 7213.

[6] *See* IRS, "Exempt Organizations Annual Reporting Requirements - Form 990, Schedules A and B: Public Charity Support Test," https://www.irs.gov/charities-non-profits/exempt-organizations-annual-reporting-requirements-form-990-schedules-a-and-b-public-charity-support-test.

[7] *See, e.g.*, S. Eder, "[Democratic] State Attorney General Orders Trump Foundation to Cease Raising Money in New York," *New York Times* (Oct. 3, 2016).

> The obnoxious press licensing law of England, which also was enforced on the Colonies, was due in part to the knowledge that exposure of the names of the printers, writers, and distributors would lessen the circulation of literature critical of the government. [*Id.*, 362 U.S. 60, 64 (1960).]

More recently, Justice Clarence Thomas has made a similar observation, noting that any requirement forcing the disclosure of the names of the sources of one's funds unconstitutionally usurps editorial control from the speaker who, according to the freedom of the press, possesses exclusive editorial control. *See* McIntyre v. Ohio Election Comm., 524 U.S. 334, 348 (1995) (Thomas, J., concurring). *See also* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 259 (1975) (White, J., concurring).

Forced disclosure of the names and addresses of an exempt organization's contributors would also violate their constitutional right of association. The Supreme Court has consistently ruled that the First Amendment protects an organization's interest in the privacy of its members and supporters. *See* N.A.A.C.P. v. Alabama, 357 U.S. 449, 462 (1958) ("It is hardly a novel proposition that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective … restraint on freedom of association.")

As noted above, the federal district court in Americans for Prosperity Foundation v. Harris, in light of all the evidence adduced at trial, rendered a strong and considered decision that the California Attorney General's mandatory Schedule B disclosure practice violates AFPF's First Amendment rights, as well as those of AFPF's supporters.

It is important that the IRS implement the proposed regulation to protect donor information of organizations that are not exempt under section 501(c)(3).

Respectfully submitted,

Mark J. Fitzgibbons
President of Corporate Affairs
American Target Advertising
9625 Surveyor Court, Suite 400
Manassas, VA 20110-4408

/s/ William J. Olson

William J. Olson
FSC/FSDEF Legal Counsel