INSTITUTE FOR FREE SPEECH

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Via Electronic Submission System

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(Employee Benefits, Exempt
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Internal Revenue Service
111 Constitution Avenue, NW
Washington, DC 20224

RE: Comments on REG-102508-16: Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations

Dear Ms. Judson:

On behalf of the Institute for Free Speech,[1] I respectfully submit the following comments in support of the proposed rule updating the information reporting regulations under Section 6033.[2] In this matter, the Internal Revenue Service ("IRS") has the opportunity to protect the privacy of American citizens exercising their First Amendment rights without compromising the agency's mandate to enforce federal tax law. Amending tax regulations so that only section 501(c)(3) and section 527 organizations must continue to provide the names and addresses of contributors on their tax filings is a positive step for the freedoms of speech and association. The IRS should be commended for this action.

Compelled disclosure of donors to civil society groups offends the First Amendment. When the government compels disclosure of a private organization's financial supporters, it intrudes on the First Amendment's protection of free association.[3] Since *NAACP v. Alabama*, the Supreme Court has held that unjustified "state scrutiny" of a private organization's membership is inconsistent with all Americans' right "to pursue their lawful private interests privately and to

[1] The Institute is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, press, assembly, and petition. Formerly known as the Center for Competitive Politics, it was founded in 2005 by Bradley A. Smith, a former chairman of the Federal Election Commission. In addition to scholarly and educational work, the Institute is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels.

[2] Internal Revenue Service, Notice of Proposed Rulemaking, Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 84 Fed. Reg. 47447 (September 10, 2019) ("Notice").

[3] *See Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (*per curiam*) (compelled disclosure has been "long…recognized" as a "significant encroachment[] on First Amendment rights"); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as taxing First Amendment activity).

associate freely with others in so doing."[4] Indeed, the Supreme Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[5] "[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters … state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[6] After all, "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were also not guaranteed."[7]

Accordingly, when the government seeks to obtain private donor information from organizations, it must pass the "strict test" of exacting scrutiny.[8] Under exacting scrutiny, the government must justify its disclosure demand, not force citizens to explain why the vast accumulation of private, constitutionally-protected information is harmless.[9] It is not enough for the government to simply invoke a general interest; it must show that its disclosure regime is properly tailored to that interest.[10] Simply asserting a generalized law enforcement interest, for instance, is not sufficient.[11] As the Supreme Court has explained, "[i]n the First Amendment context, fit matters."[12]

The proposed revisions acknowledge these principles.[13] Plainly, the IRS does not need donor information to enforce tax law.[14] Enforcement of laws concerning self-dealing, excess benefit transactions, transactions with interested persons, and the like are important government interests. But information provided in portions of IRS Form 990 other than Schedule B[15] already

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[4] *NAACP*, 357 U.S. at 466.

[5] *Buckley*, 424 U.S. at 64.

[6] *NAACP*, 357 U.S. at 460-61.

[7] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

[8] *Buckley*, 424 U.S. at 66.

[9] *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (to survive exacting scrutiny, "[t]he interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest…it is not enough that the means chosen in furtherance of the interest be rationally related to that end" (citations omitted)).

[10] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-367 (2010). *See also Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) ("[G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion….").

[11] *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 205 (2014) ("[T]here are compelling reasons not to define the boundaries of the First Amendment by reference to such a generalized conception of the public good.").

[12] *Id*. at 218.

[13] 84 Fed. Reg. at 47451 ("[T]he Treasury Department and the IRS seek to balance the IRS's need for the information against the costs and risks associated with reporting of the information.").

[14] *Id*. ("The IRS does not need the names and addresses of substantial contributors to tax-exempt organizations not described in section 501(c)(3) to be reported annually on Schedule B of Form 990 or Form 990–EZ in order to carry out the internal revenue laws….").

[15] *See, e.g.*, Schedule D ("Supplemental Financial Statements" including disclosure of endowment funds, and ownership of real estate, art, and securities), Schedule I (documenting grants and other assistance of organizations,

serves these interests by providing a highly-detailed view of potential conflicts of interest, payments to officers and directors, organizational finances, the dollar amount of reported contributions,[16] whether each was a non-cash contribution, and a description of any in-kind property contributed. Moreover, as the Service acknowledges, it can obtain any additional information it needs to enforce the tax code through its ordinary investigatory process instead of requiring annual reporting of sensitive donor information.[17]

Likewise, state tax enforcement agencies can meet their mandates without continued reporting of private contributor information to the IRS. Conducting compliance audits or subpoenaing certain donor information as part of an investigation does not offend the Constitution if an organization's annual filing demonstrates a particularized suspicion of wrongdoing. This method also invites judicial supervision when executive branch agencies seek subpoenas and warrants—a vital constitutional check on governmental power. To the extent that states relied on the current IRS rule to obtain donor information, nothing in this rulemaking prevents them from creating their own processes, provided they regulate with the precision required by the federal constitution. But federal disclosure rules do not exist for the convenience of the states, and the current regulatory regime is not demanded by statute and does not serve the First Amendment rights of nonprofits or the individual Americans who support them.[18]

Ending compelled donor disclosure is also wise for prudential and practical reasons. The IRS cannot legally disclose sensitive contributor information to the public,[19] so amending the regulation does not decrease the amount of publicly available information. Changing the rule also removes an unnecessary burden on the IRS to protect private donor information when it can be obtained through the agency's ordinary auditing processes.[20] Warehousing large amounts of

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individuals, and governments), Schedule L (transactions with interested persons), Schedule M (descriptions of non-cash contributions).

[16] 84 Fed. Reg. at 47452 ("Under the proposed rule, tax-exempt organizations are still required to report the amounts of contributions from each substantial contributor as required by the Schedule B of Form 990 and 990-EZ as well as maintain the names and addresses of substantial contributors should the IRS need this information on a case-by-case basis…."). Even this could be excused, if the Secretary wished. Section 6033 requires disclosure of "the total of the contributions and gifts received" and "the names and addresses of all substantial contributors" only for § 501(c)(3) organizations. 26 U.S.C. § 6033(b)(5). There is no similar statutory requirement for other groups. *See* 26 U.S.C. § 6033(f) (giving requirements for organizations described in Section 501(c)(4)).

[17] 84 Fed. Reg. at 47451-52. Moreover, while the identities of donors may be relevant in the Section 501(c)(3) context due to the danger that individual taxpayers will claim fraudulent deductions, no similar revenue justification is present for other organizations covered by the proposed rule. The only potential revenue source would be the collection of gift taxes, but Congress has clarified that the gift tax "shall not apply" to gifts made to organizations "described in paragraph (4), (5), or (6) of section 501(c) and exempt from tax under section 501(a)." 26 U.S.C. § 2501(a)(6).

[18] Similarly, the proposed rule change has nothing to do with concerns over foreign interference in the election process. Russian online activity during the 2016 election cycle was predominantly conducted with free social media accounts "that pretended to be the personal accounts of U.S. persons" or "that mimicked real U.S. organizations." Special Counsel Robert S. Mueller, Report On The Investigation Into Russian Interference In The 2016 Presidential Election: Volume I of II, U.S. Dep't of Justice at 22, https://ig.ft.com/files/mueller_report.pdf. The Institute is aware of no evidence that Russian efforts in recent years would have been reportable on any Schedule B even if the relevant actors were law abiding – which, of course, they were not.

[19] *See* 26 U.S.C. § 6104(b).

[20] 84 Fed. Reg. at 47451-52.

private donor information increases the risk of inadvertent or illegal disclosure.[21] Lifting this burden from the IRS decreases the likelihood of donor exposure, which is significant in light of disclosures of sensitive contributor information in recent years.[22] Moreover, amending the rule has the added benefit of aiding nonprofits by decreasing compliance costs.[23]

At the same time, this rule change will increase nonprofit donations. Government collection of confidential donor information deters contributions to nonprofits.[24] When the California Attorney General adopted a dragnet policy of demanding and warehousing contributor information from certain nonprofits, the rule caused organizations (including the Institute) to stop soliciting contributions in that State—especially after it was revealed that hundreds of the collected donor lists were maintained on an unsecured website and consequently publicly disclosed.[25] A challenge to that regime is presently before the United States Supreme Court on a petition for a writ of *certiorari*. The court challenge is supported by groups as varied as Judicial Watch and the Council on American-Islamic Relations,[26] which indicates the importance of donor privacy to nonprofit organizations across the ideological spectrum.

Finally, this rulemaking came about as a result of the decision in *Bullock v. Internal Revenue Service*, which required the IRS to pursue this policy revision through the process outlined by the Administrative Procedure Act ("APA").[27] The district court expressed no opinion on the merits of the proposed change in IRS policy, and the plaintiffs stated that they simply wanted an opportunity to provide comments as part of the rulemaking process under the APA.[28] Plaintiffs now have that opportunity, and have since expressed the view that the IRS should maintain current disclosure requirements because ending donor disclosure will harm the enforcement of state tax law and allow foreign influence in the election process.[29] But, as stated above, these objections are

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[21] *Id*. at 47452.

[22] *See* Editorial Board, *The IRS's Donor Lists*, Wall St. J. (May 15, 2016), https://www.wsj.com/articles/the-irss-donor-lists-1463346736; Jonathan H. Adler, *IRS agrees to pay non-profit group $50,000 for unauthorized release of tax return*, Wash. Post (June 24, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/24/irs-agrees-to-pay-non-profit-group-50000-for-unauthorized-release-of-tax-return/?utm_term=.1f0be7d2fb78.

[23] 84 Fed. Reg. at 47451 (recognizing that "[a] requirement to annually report" donor information "increases compliance costs for affected tax-exempt organizations and consumes IRS resources in connection with the redaction of such information").

[24] *See Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 488 (D.C. Cir. 2016) ("Disclosure chills speech."); Br. of Cato Inst., *et al.* at 17, *Ams. for Prosperity Found. v. Becerra*, No. 19-251 (U.S. Sept. 25, 2019) ("Reducing the First Amendment right to associate and speak anonymously would have profoundly damaging chilling effects in our polarized political climate.").

[25] *Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1057 (C.D. Cal. 2016).

[26] Docket, *Ams. for Prosperity Found. v. Becerra*, No. 19-251, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-251.html.

[27] No. 18-CV-103-GF-BMM, 2019 U.S. Dist. LEXIS 126921 (D. Mont. July 30, 2019).

[28] *Id*. at *32.

[29] *See* Naomi Jagoda, *IRS issues proposed rules to reduce donor disclosure requirements following court ruling*, The Hill (Sept. 6, 2019), https://thehill.com/policy/finance/460287-irs-issues-proposed-rules-to-reduce-donor-disclosure-requirements-following.

meritless.

The proposed changes appropriately value Americans' right to freedom of speech and privacy in association and demonstrates serious consideration of appropriate tailoring under the First Amendment. They should be adopted.

Respectfully submitted,

Allen Dickerson
Legal Director