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October 17, 2016
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Ms. Tuawana Pinkston
Internal Revenue Service
Room 6527
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Comments of the Free Speech Coalition, Inc. and Free Speech Defense and Education Fund, Inc. in Response to Department of the Treasury/Internal Revenue Service Notice of Proposed Rulemaking relating to "Publication 1075, Tax Information Security Guidelines for Federal, State, and Local Agencies" (OMB Number: 1545-0962)

Dear Ms. Pinkston:

These comments are submitted on behalf of Free Speech Coalition, Inc. ("FSC") and Free Speech Defense and Education Fund, Inc. ("FSDEF"). We appreciate the opportunity to comment on the proposed regulations set forth in the Notice and Request for Comments relating to "Proposed Collection; Comment Request for Publication 1975" (hereinafter referred to as the "Notice"). 81 *Fed. Reg*. 54662 (Aug. 16, 2016).

IDENTITY AND INTEREST OF COMMENTERS

FSC is an association of conservative, libertarian, liberal, and non-ideological issue-activists concerned with the preservation of the rights of nonprofit advocacy organizations and substantially, but not exclusively, focused on questions related to the First Amendment. This diverse group, formed 23 years ago and exempt from federal income tax under § 501(c)(4) of the Internal Revenue Code ("IRC"), has had occasion to present its views to the Internal Revenue Service ("IRS") in the past on a variety of regulatory issues, ranging from proposed regulations defining lobbying and burdensome disclaimer requirements to proposed regulations redefining permissible IRC § 501(c)(4) activity. FSDEF, which joins FSC in submitting these comments, 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.

In general, FSC has been pleased that some of its past suggestions — often joined in by other commenters — have been heeded by the IRS. Hopefully, that will occur again in this case, where the IRS does not currently plan to make any changes to Publication 1075 — its existing publication regarding § 6103 of the Internal Revenue Code — but these commenters believe that the IRS should add a section, which is described below.

SUMMARY

FSC and its members have been vocal for some time now in their opposition to the efforts of the attorneys general of certain states to effectively circumvent the strictures of § 6103 — by forcing tax-exempt organizations (or "charities") to disclose their donor lists on their unredacted annual information returns (Form 990 Schedule B) in return for being able to conduct charitable solicitations in those states. These donor lists — set forth on Schedule B of the Form 990 — are confidential, revealed only in the annual IRS Form 990 that is filed with the IRS (which the IRS keeps confidential), and are unobtainable by the States unless they are provided to the States by the IRS under the strictures of IRC § 6103. The attorneys general of two States — California and New York — are attempting an end-run around the § 6103 strictures 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 vehemently opposes such outrageous and illegal State government action, and has been asking the federal government to take appropriate steps to investigate and hopefully help put a stop to such State action. FSC believes that Publication 1075 — the very cover page of which summarizes its contents as "Tax Information Security Guidelines," purporting to set forth the "Safeguards for Protecting Federal Tax Returns and Return Information" — presents the Treasury Department/IRS with a most appropriate opportunity to deal with the State action issue at the federal level, by referencing such State action, its questionable legality, and its clear incompatibility with the spirit of IRC § 6103.

FACTUAL BACKGROUND

Each year, most U.S. tax-exempt organizations file an annual information return — IRS Form 990 — with the IRS. One of the schedules to IRS Form 990 is Schedule B — which seeks 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. The exempt organizations themselves are permitted by law to keep this donor information confidential, and although they are required by law to disclose the Form 990 to the public, the donor information on Schedule B may be "redacted" — that is, not disclosed in the public version of the Schedule B. For many years, tax-exempt organizations which have been required by approximately 40 States to submit their most recent Form 990 to comply with the State's charitable solicitation law requirements 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 disclose 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 is a new filing requirement that 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 unpersuaded when they are confronted by the fact that such a redacted Schedule B is permitted by the federal tax disclosure statute requiring tax-exempt organizations to make their annual Form 990 filings available, upon request, to members of the public. *See* IRC § 6104(d)(3)(A). Nor are they persuaded by the fact that, even though the IRS has a statutory duty to make certain tax return information of tax-exempt organizations available to the public, the IRS itself is prohibited from releasing to the public the name and address of any contributor listed on Schedule B. *See* IRC § 6104(b). These attorneys general also disregard any constitutional protections against such disclosure.

The nonprofit community has understandably balked at such draconian, extra-legal and apparently illegal measures, but the attorneys general have held fast. Litigation has ensued, with no quick end in sight, and with cases pending before the U.S. Courts of Appeals for the Second and Ninth Circuits. These commenters believe that the attorney generals' demands for the names and addresses of contributors to those exempt organizations not required to make them available to the general public under IRC § 6104(d) are wholly unauthorized, and even forbidden by § 6103 of the Internal Revenue Code, which is the focus of IRS Publication 1075. Although the IRS has not proposed to modify Publication 1075 to address this problem, the commenters believe that Publication 1075 should be modified — to reflect that the actions of the California and New York attorneys general in demanding unredacted Schedules B from charitable solicitation applicants clearly violate the spirit and purpose of § 6103, and that a substantial case can even be made that such actions run afoul of the statute itself.

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[1] *See* Americans for Prosperity Foundation v. Harris, Case No. DV 14-9448-R (C.D. CA, Apr. 21, 2016).

The IRS safeguards federal tax information ("FTI")[2] — including Form 990 — pursuant to its statutory confidential duties set forth in § 6103. Although § 6103 generally prohibits the disclosure of FTI to the States, there are exceptions, which are subject to specific, exacting conditions, including agreements or other assurances that the information will be protected. States may receive FTI from the IRS upon a showing that the FTI is necessary for, and is reasonably expected to be used for, law enforcement purposes or state tax administration. Any State receiving FTI may not use it for a purpose inconsistent with the authorized use whereby the State was permitted to receive it under § 6103. A State's use of such FTI is subject to a safeguard review by the IRS, and the State must maintain a record-keeping system that comports with the IRS as described in Publication 1075. Assuming a valid investigative or administrative need, States have always had the right under § 6103 to request the desired FTI of exempt organizations from the IRS — including the confidential Schedule B filed with the IRS by any charity seeking to solicit contributions in California.

The very strict provisions of § 6103 with respect to preserving the confidentiality of such FTI and accounting to the IRS for its use impose a considerable burden on the States, which would prefer the option of not being required to account for their use and maintenance of confidential FTI. The California and New York attorneys general — by obligating exempt organizations themselves to divulge directly to those States the Schedule B they file with their annual IRS Form 990 — obviously believe that they have devised a way around the strictures of § 6103. An appropriate addition to Publication 1075 could do much to dispel that illusion.

These commenters point out below how such State action — in demanding FTI from exempt organizations under pain of withholding State registration for charitable solicitation

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[2] "FTI" includes both "return" and "return information," as defined in IRC § 6103(b):

"(1) Return

The term 'return' means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) Return information

The term 'return information' means—

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense …."

rights — violates the constitutional rights of those organizations under the First Amendment, and appears to be in conflict with certain provisions of § 6103 as well. Those legal points should eventually result in firm judicial rulings outlawing such State action. However, an amendment to Publication 1075 reflecting disapproval of such State action in an attempted end-run of § 6103 need not await those judicial rulings and we believe should be made by the IRS at this time.

FEDERAL LAW PRECLUDES THE ACTIONS OF THE CALIFORNIA AND NEW YORK ATTORNEYS GENERAL

1. The State Attorney General Action is an Extra-Legal "End-Run" Around IRC §§ 6103 and 6104.

There is no statutory procedure for States to obtain exempt organizations' confidential donor lists other than through IRC § 6103. On the other hand, IRC §§ 6103 and 6104 provide very specific procedures for State governments obtaining such information if they show sufficient need and if they subject themselves to the strictures of those statutes in accepting such FTI.[3] The California and New York attorneys general have devised an extra-statutory procedure for obtaining such FTI to circumvent the requirements of §§ 6103 and 6104 in obtaining and accounting for their handling of such FTI.

Section 6103(a) expressly provides that federal tax "[r]eturns and return information shall be confidential, except as authorized by this title." "Return information" includes "the nature, source, or amount of [taxpayer] income." IRC § 6103(b)(2). Clearly, therefore, exempt organizations' donor lists, together with the Form 990 of which they are a part, constitute FTI. Although a State attorney general is among the State officers to whom disclosure of such FTI may be made under certain circumstances (see IRC § 6104(c)(6)(B)(i)), § 6104 quite specifically dictates (i) the requirements and methodology for seeking such information, (ii) the standards governing such requests, and (iii) the requirements for safeguarding and accounting for such FTI if provided through the statutory procedures. They can be summarized as follows:

> 1. The State attorney general (or designated "appropriate State officer") would be required to submit to the Secretary of the Treasury a "written request" for the desired information. IRC § 6104(c)(2)(C)(i), 6104(c)(3).

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[3] Some dispute that a nonprofit organization's confidential donor list would be available even under § 6103 in light of IRC § 6104(d)(3)(A), which forbids the "disclosure of the name and address of any contributor." *See also* IRC § 6104(c), which excepts § 501(c)(3) organizations from the reach of certain State disclosure requests.

2. The State attorney general would be required to specify "the purpose" to which the information would be put in the administration of State laws regulating charitable organizations.[4] IRC § 6104(c)(2)(ii).

3. The Secretary would need to determine that the information requested is necessary to the administration of such State laws. *Id. See also* IRC § 6103(d).

4. The State attorney general, "as a condition for receiving" such FTI, would be required to establish and maintain "a permanent system of standardized records with respect to any such request," and "a secure area or place in which such returns or return information shall be stored," as well as comply with various other requirements regarding safeguards for such FTI and reporting to the Secretary "describing the procedures established and utilized … for ensuring the confidentiality" of the FTI. IRC § 6103(p)(4).

The California and New York attorneys general — by regulation — seek to avoid the above requirements by implementing a licensing requirement for exempt organizations that is entirely at odds with the confidentiality provisions described above. These commenters submit that the California and New York donor-list filing requirements constitute an attempted "end-run" around the federal law — a State attempt to avoid a very strict federal regulatory system governing the submission and disclosure of FTI.

2. IRC § 6103(p)(8) and § 7213A Should Be Interpreted to Prohibit the Actions of the State Attorneys General.

These commenters submit that such State regulatory ploys are so obviously contrary to the spirit and intent of IRC §§ 6103 and 6104 that the IRS should consider them illegal. This contention is further supported by IRS § 6103(p)(8), which expressly provides as follows:

8) State law requirements

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[4] "As a condition of receiving FTI, the receiving agency must show, to the satisfaction of the IRS, the ability to protect the confidentiality of that information. Safeguards must be implemented to prevent unauthorized access and use. Besides written requests, the IRS may require formal agreements that specify, among other things, how the information will be protected. An agency must ensure its safeguards will be ready for immediate implementation upon receipt of FTI. Copies of the initial and subsequent requests for data and any formal agreement must be retained by the agency a minimum of five years as a part of its record keeping system. Agencies must always maintain the latest SSR on file. The initial request for FTI must be followed by submitting an SSR and submitted to the IRS at least 45 days before the scheduled or requested receipt of FTI (see Section 7.0, *Reporting Requirements—6103(p)(4)(E)*)." IRS Publication 1075 at 7.

> (A) Safeguards
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> Notwithstanding any other provision of this section, **no return or return information shall be disclosed** after December 31, 1978, to any officer or employee of **any State which requires a taxpayer** to attach to, or include in, any State tax return **a copy of any portion of his Federal return**, or information reflected on such Federal return, unless such State adopts provisions of law which **protect the confidentiality** of the copy of the Federal return (or portion thereof) attached to, or the Federal return information reflected on, such State tax return. [Emphasis added.]

IRC § 6103(p)(8) speaks to a situation remarkably close to the California and New York regulatory schemes by requiring exempt organizations to disclose their confidential donor lists in return for permission to conduct charitable solicitations in the State. A State regulatory requirement related to a licensing application requiring the disclosure of FTI can be considered as burdensome, intrusive, and dangerous as one that requires the inclusion of FTI in a State tax return. And IRC § 6103(p)(8) states that no FTI will be provided by the IRS to such States if they engage in such conduct without adequate protection for the FTI.

Since the California and New York donor-list filing requirements constitute an attempt to defeat the federal rule, by requiring FTI to be provided without the very serious access restrictions and anti-disclosure provisions set forth in §§ 6103 and 6104, they should be declared not only contrary to the spirit of IRC §§ 6103 and 6104; they should also be recognized as illegal attempts to defeat the specific provisions of §§ 6103 an 6104 designed to protect the confidentiality of FTI.

Federal law clearly prohibits a State attorney general's willful unauthorized inspection of donor names and addresses. IRC § 7213A(a)(2) reads: "State and other employees -- It shall be unlawful for any person (not described in paragraph (1)) willfully to inspect, except as authorized in this title, any return or return information acquired by such person or another person under a provision of § 6103 referred to in § 7213(a)(2) or under § 6104(c)."[5] Clearly, State attorney general procedures mandating disclosure of FTI without an ongoing

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

investigation or tax administration purpose would not qualify as a defense to a charge of violation of § 7213A.[6]

Moreover, IRC § 7213A(b)(1) states that, "[a]ny … violation of subsection (a) shall be punishable upon conviction by a fine in any amount not exceeding $1,000, or imprisonment of not more than 1 year, or both, together with the costs of prosecution." The State attorneys general's efforts to end-run the proscription of IRC § 7213A — by extorting from charities donor information that could not be obtained directly from the IRS pursuant to a legitimate investigative demand — would appear to be subject to investigation and prosecution under IRC § 7213A.

In addition to the foregoing, by conditioning approval of a charity's solicitation application on the organization providing a copy of its protected FTI, the State attorneys general would appear to be vulnerable to a charge of the federal tax crime of solicitation:

> It shall be unlawful for any person willfully **to offer** any **item of material value** in exchange for any **return** or return information (as defined in section 6103(b)) **and to receive** as a result of such solicitation any such return or return information. Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution. [26 U.S.C. § 7213(a)(4) (emphasis added).]

Although no case on point upholding such a charge has been located, approval of a charity's application which allows it to solicit contributions in California or New York is most certainly an "item of material value" insofar as it conditions charities' ability to raise donations on provision of FTI. By demanding that confidential (and federally protected) donor lists be filed, the State attorneys general appear to violate the "offer … in exchange" prohibition in the statute.

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[6] *See, e.g.*, IRC § 7602, "Examination of books and witnesses," which reads in part:

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

CONSTITUTIONAL PROTECTION OF CHARITABLE SOLICITATIONS

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

Litigation challenging the New York and California attorneys general charitable solicitation requirements is ongoing. In California, Americans for Prosperity Foundation ("AFP") — 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.[7] AFP was successful in obtaining a preliminary injunction from the trial court as an initial matter, but the injunction order was reversed by the U.S. Court of Appeals for the Ninth Circuit. *See* Americans for Prosperity Foundation v. Harris, 809 F.3d 536 (9th Cir. 2015).[8] In so ruling, the Ninth Circuit relied upon an earlier ruling[9] that the California Attorney General's Schedule B filing requirement was not facially unconstitutional, and the case was remanded for trial on AFP's as-applied challenge. After a full trial, the district court ruled in favor of AFP, determining that the California Attorney General's Schedule B requirement violated AFP's First Amendment rights. Americans for Prosperity Foundation v. Harris, Case No. DV 14-9448-R (C.D. CA, Apr. 21, 2016).[10]

The AFPF v. Harris decision is extremely relevant to the federal FTI confidentiality statute — IRC § 6103 — for it not only determined the crushing violation of First Amendment rights visited on AFP and its supporters by the California Attorney General's Schedule B filing mandate, but also revealed, *inter alia*, how State techniques to circumvent the strictures of § 6103 can thwart the very purpose of the federal statute. For example, 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

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[7] Another case is pending in California federal court as well, brought by the Thomas More Law Center. *See* Thomas More Law Center v. Harris, Case No. 15-cv-3048 (C.D. CA).

[8] These commenters filed an *amicus curiae* brief in support of AFPF's Petition for Rehearing *en banc* before the Ninth Circuit: http://freespeechcoalition.org/pdfs/AFPF%20Brief%20in%20support%20of%20rehearing.pdf.

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

[10] https://v6mx3476r2b25580w4eit4uv-wpengine.netdna-ssl.com/wp-content/uploads/2016/04/Docket184.pdf.

Attorney General has systematically failed to maintain the confidentiality of Schedule B forms." *Id*. at 8. 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 9 (emphasis added).]

In New York, the motion of Citizens United and Citizens United Foundation for a preliminary injunction was rejected by the trial court in a similar case. *See* Citizens United and Citizens United Foundation v. Schneiderman, 14-CV-3703 (SHS) (S.D.N.Y., July 27, 2015). On August 29, 2016, the district court granted a motion to dismiss the case, without a full evidentiary hearing or trial. Although Citizens United may ultimately prevail on its challenge on appeal, the harm and potential damage visited on it, as well as countless nonprofit organizations seeking to register to conduct charitable solicitations, is obvious. The Second Circuit recently placed the case on its expedited docket.

Such litigation is burdensome and expensive and many charitable organizations lack the resources to mount such a legal challenge to an attorney general's overreach in demanding confidential documents in exchange for a charitable solicitation license.

This is a situation that the IRS — as the guardian of § 6103 — can improve. One of the ways it can help is by adding language to Publication 1075 making clear that the statute effectively prohibits State attempts to force FTI disclosures outside of the parameters of § 6103, by forcing charitable solicitation registration applicants to submit Schedule B confidential donor lists as part of their application. For the reasons more fully set forth below, Publication 1075 — which is considered by many to be the national compendium of § 6103's

safekeeping requirements — should be modified to reflect that efforts to obtain FTI by circumventing § 6103's requirements are contrary to the statute. Such modifications would do much to encourage the public regarding the strength of § 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 efforts by government 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 more recently in Madigan v. Telemarketing Associates, 538 U.S. 600, 611 (2003). Indeed, in Madigan, which held that a State has remedies (such as an action for fraud) in the case of dishonest solicitors, the Court reaffirmed its line of cases which protected a broad right of charities to make communications and solicit funds under the First Amendment, despite continuing efforts by States to restrict those solicitations. The current efforts of the California and New York attorneys general — which effectively deny the right to conduct charitable solicitations to those exempt organizations carrying out their duty to protect donor confidences — should fare no better.

Presumably, both State attorneys general base their demands for all applicant organizations' Form 990 Schedule B 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 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 value 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,[11] 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).[12] 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

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[11] *See* 26 U.S.C. § 7213.

[12] *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.

ability to punish donors who contribute to groups with which the politicians disagree.[13] Donors understand that sometimes the politician lurking within can cause an elected official to abuse the public trust.

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

The unconstitutionality of the State Attorneys General 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* City of Schaumburg v. Citizens for a Better Environ., 444 U.S. 620, 631 (1980) (citing Thomas v. Collins, 323 U.S. 516, 538 (1945)). Forced disclosure of the names and addresses of an organization's contributors 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:

> 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, belongs exclusively to the speaker. *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

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[13] *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).

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.

RECOMMENDATION

IRS Publication 1075 Should Bar States from Requiring Unredacted IRS Form 990 Schedule B as a Condition of Fund Raising.

Publication 1075 is entitled "Tax Information Security Guidelines for Federal, State and Local Agencies." Its sub-title is "Safeguards for Protecting Federal Tax Returns and Return Information." Below the IRS Mission Statement on the first page (page i) appears the following:

> **Office of Safeguards Mission Statement**
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> The Mission of the Office of Safeguards is to promote taxpayer confidence in the integrity of the tax system by ensuring the confidentiality of IRS information provided to federal, state, and local agencies. Safeguards verifies compliance with IRC 6103(p)(4) safeguard requirements through the identification and mitigation of any risk of loss, breach, or misuse of Federal Tax Information held by external government agencies.

The hallmark of Publication 1075 is guidance to the public with respect to the security controls that must be implemented by other government agencies as a condition of receiving FTI. Publication 1075 does not contain new laws, of course, but rather summarizes current law and IRS practice regarding IRC § 6103 and its requirements. Publication 1075 seems to be quite thorough, and is by its very nature a summary compilation of requirements found in the statute and IRS policy. These commenters have not had the opportunity to review the publication line by line in an effort to evaluate whether all of the language in the document accurately summarizes the law and practice with respect to § 6103.

On the other hand, these commenters have reviewed Publication 1075 for any possible mention of situations, such as the California and New York State attorney general violations complained of in these comments and found none. These commenters believe that it would be appropriate and in the interest of justice to amend Publication 1075 to include mention of the State Attorney General action described above in a way that makes it clear that such action is in derogation of § 6103's spirit and the procedures established to protect, use, and account for FTI. Such an institutional statement by the IRS on this subject could do much to dissuade the State attorneys general from resorting to regulation to side-step the strict requirements of § 6103 with respect to the gathering and use of federal tax return information.

The commenters also suggest the following additions to Publication 1075:

1. Amend section 1.4.1 (page 4) by adding to the current second paragraph the bolded language below, as follows:

> FTI includes return or return information received directly from the IRS or obtained through an authorized secondary source, such as Social Security Administration (SSA), Federal Office of Child Support Enforcement (OCSE), Bureau of the Fiscal Service (BFS), or Centers for Medicare and Medicaid Services (CMS), or another entity acting on behalf of the IRS pursuant to an IRC 6103(p)(2)(B) Agreement, **as well as from the taxpayer if received under duress (including the threatened denial of a constitutional right)**.

2. Amend section 1.4.4 (page 5) to reflect that FTI does include copies of returns or return information obtained by State government from taxpayers through what might be considered as State "extortion," as described above, or by other extra-legal means. This could be accomplished by adding the following paragraph at the end of current section 1.4.4:

> Although FTI does not normally include information provided directly by the taxpayer, FTI does include federal returns or return information furnished by the taxpayer to State government as a condition of exercising rights guaranteed by the U.S. Constitution. For example, names and addresses of contributors to an exempt organization would be considered FTI if produced pursuant to a State requirement forcing a taxpayer to furnish such information to the State as a precondition to registering to conduct charitable solicitations, because the taxpayer is not required to disclose such information to the public and such information is protected from disclosure under 26 U.S.C. § 6104(d).

3. Amend section 2.1 (page 7) by adding an additional paragraph at the end of current section 2.1 to read as follows:

> Federal, state, or local agencies that obtain FTI directly from taxpayers in exchange for the right to exercise a constitutional right must also develop an SSR with respect to such information, indicating the safeguards to prevent unauthorized access and use and describing how the FTI will be protected.

CONCLUSION

These commenters believe that by taking certain actions — including making appropriate amendments of Publication 1075 as suggested above — the IRS can contribute significantly to halting the extra-legal efforts of the State attorney generals whose undertakings against federally tax-exempt organizations are intended to effectively thwart the strictures of IRC § 6103.

Respectfully submitted,

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