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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

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May 31, 2018

The Honorable Steven Mnuchin
Secretary of the Treasury
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

The Honorable David Kautter
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Dear Secretary Mnuchin and Acting Commissioner Kautter:

The Committee on Homeland Security and Governmental Affairs is examining the Internal Revenue Service's (IRS) requirement for tax-exempt organizations to submit donor names and addresses. I respectfully write to request your assistance on this important matter.

Tax-exempt organizations must file an annual tax return on IRS Form 990.¹ Form 990's Schedule B requires tax-exempt organizations to list the names and addresses of donors who have contributed \$5,000 or more.² Although the Internal Revenue Code requires § 501(c)(3) charitable organizations to disclose donor information, such a requirement does not exist in statute for other types of tax-exempt organizations.³ The IRS, however, has created such a requirement for other tax-exempt entities through regulation.⁴

Compelled disclosure of donor information may threaten the freedoms of speech and association.⁵ In rejecting Alabama's compelled disclosure of member lists from the NAACP in the 1950s, the Supreme Court described the "vital relationship between freedom to associate and *privacy in one's associations*."⁶ The Court explained how "disclosure of affiliation with groups engaged in advocacy may constitute . . . a restraint on freedom of association . . ."⁷ "[R]evelation of the identity" of NAACP members had exposed them "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."⁸

¹ See 26 U.S.C. § 6033; 26 C.F.R. § 1.6033-2(a)(2)(i).

² Schedule B ("Schedule of Contributors") (2017), <https://www.irs.gov/pub/irs-pdf/f990ezb.pdf>.

³ See 26 U.S.C. § 6033(b)(5).

⁴ 26 C.F.R. § 1.6033-2(a)(2)(ii)(f).

⁵ See generally U.S. CONST. amend. I; *NAACP v. State of Alabama*, 357 U.S. 449 (1958).

⁶ *NAACP*, 357 U.S. at 462 (emphasis added).

⁷ *Id.*

⁸ *Id.*

A similar threat exists today from the compelled disclosure of donor information held by tax-exempt organizations, including § 501(c)(4) social welfare groups. If information about donors to these groups becomes publicly available,⁹ the information could be used in a way to chill future speech and association.¹⁰ Donor information is also susceptible to abuse by the federal government itself. In one egregious example, in 2010, the IRS sent 1.1 million pages of tax-exempt return information—including donor information, in some cases—to the Justice Department for potential prosecutions relating to political speech.¹¹

More recently, some states have sought to compel the disclosure of donor information from Schedule B.¹² The disclosure of donor information has led to the harassment of donors in some cases.¹³ In a court brief filed in January 2017, the NAACP warned against states compelling the disclosure of donor information:

[F]orcing an organization to release [organizational membership and/or donor lists] to the State not only divulges the First Amendment activities of individual members and donors, but may also deter such activities in the first place. Specifically, individuals may legitimately fear of any number of negative consequences from disclosure, including harassment by the public, adverse government action, and reprisals by a union or employer.¹⁴

This potential harm exists across the political spectrum, regardless of donors' ideological beliefs.¹⁵

The IRS has questioned the need for requiring tax-exempt groups to report donor

⁹ See *Nat'l. Org. for Marriage, Inc. v. United States*, 807 F.3d 592, 595 (4th Cir. 2015) (describing IRS's release of unredacted donor list); see generally *Billionaires Donating to a Goldman Charity Unmasked by IRS Error*, INV. NEWS (Mar. 15, 2018), <http://www.investmentnews.com/article/20180315/FREE/180319953/billionaires-donating-to-a-goldman-charity-unmasked-by-irs-error> (describing IRS's accidental release of donor information).

¹⁰ See Kimberly A. Strassel, *Conservatives Became Targets in 2008*, WALL ST. J., May 23, 2013 (explaining how donor information was used to "create a chilling effect that [would] dry up contributions" (internal quotation marks omitted)); see also e.g., *NAACP v. State of Alabama*, 357 U.S. 449 (1958).

¹¹ H. Comm. on Oversight & Gov't Reform, *The Internal Revenue Service's Targeting of Conservative Tax-Exempt Applicants: Report of Findings for the 113th Congress 172-80* (Dec. 23, 2014).

¹² See *Citizens United v. Schneiderman*, 882 F.3d 374, 379-80 (2d Cir. 2018) (describing former New York Attorney General Schneiderman's pursuit of Schedule B information); *Americans for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1052 (C.D. Cal. 2016) (describing California's requiring unredacted Schedule B from non-profit, despite not requiring such information from 2001-2010).

¹³ See, e.g., *Americans for Prosperity Found.*, 182 F. Supp. 3d at 1055-56 (describing harassment against donors whose affiliations becomes public).

¹⁴ Brief for the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae Supporting Plaintiff-Appellee/Cross-Appellant, at 2 (citations omitted), *Americans for Prosperity Found. v. Becerra*, Nos. 16-55727, -55786 (9th Cir. Jan. 27, 2017), ECF No. 45.

¹⁵ See generally *The IRS's Donor Lists*, WALL ST. J., May 15, 2016.

information.¹⁶ Other stakeholders agree. According to one practitioner, “[t]here is no compelling governmental interest in requiring citizens [*sic*] groups to tell the government who their donors are”¹⁷

Accordingly, I respectfully urge the Treasury Department and IRS to consider rescinding the regulation that requires tax-exempt organizations other than § 501(c)(3) groups to submit donor information. In addition, to assist the Committee’s oversight, I respectfully request that the Treasury Department and IRS provide a staff-level briefing on the following issues:

1. How the Treasury Department and IRS use donors’ names and addresses submitted by tax-exempt organizations;
2. A comprehensive description of the security processes and policies for protecting donors’ identifying information from leaks, cybersecurity threats, and any other intentional or inadvertent disclosures;
3. Interactions between or among the Treasury Department, the IRS, and any federal entity, including but not limited to federal law enforcement agencies or the Federal Election Commission, within the last ten years concerning the use of donor information submitted by tax-exempt organizations; and
4. Interactions between or among the Treasury Department, the IRS, and any states within the last ten years concerning the use of donor information submitted by tax-exempt organizations.

Please arrange this briefing as soon as possible, but no later than 5:00 p.m. on June 14, 2018.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate “the efficiency, economy, and effectiveness of all agencies and departments of the Government.”¹⁸ Additionally, S. Res. 62 (115th Congress) authorizes the Committee to examine “the efficiency and economy of all branches of the Government including the possible existence of fraud, misfeasance, malfeasance, collusion, mismanagement, incompetence, corruption, or unethical practices....”¹⁹

¹⁶ See *Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options*, Hearing before the Senate Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts of the Senate Committee on the Judiciary, 114th Cong. (July 29, 2015); see also *IRS Considering Ending Required Reporting of EO Contributors*, TAX NOTES TODAY, 231-3 (Dec. 1, 2015), available at Lexis Advance, Doc. No. 2015 TNT 231-3 (quoting former Director, Exempt Organizations at the IRS, as questioning whether IRS needs donor information).

¹⁷ *Revisiting IRS Targeting* (statement of Cleta Mitchell, Partner, Foley & Lardner), *supra* note 16, <https://www.judiciary.senate.gov/imo/media/doc/07-29-15%20Mitchell%20Testimony.pdf>.

¹⁸ S. Rule XXV(k); see also S. Res. 445, 108th Cong. (2004).

¹⁹ S. Res. 62 § 12(e)(1)(A), 115th Cong. (2017).

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The Honorable David Kautter
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If you have any questions regarding this matter, please contact Douglas C. Geho of the Committee's staff at (202) 224-4751. Thank you for your attention to this matter.

Sincerely,



Ron Johnson
Chairman

cc: The Honorable Claire McCaskill
Ranking Member