James Madison
JAMES MADISON CENTER FOR FREE SPEECH

GENERAL COUNSEL
James Bopp, Jr., Esq.

September 8, 2023

U.S. House of Representatives
Committee on Ways and Means
1139 Longworth House Office Building
Washington, D.C. 20515

Re: Request for Information: Understanding and Examining the Political Activities of Tax-Exempt Organizations Under Section 501 of the Internal Revenue Code

I write on behalf of the James Madison Center for Free Speech ("**JMCFS**"),[1] and submit these comments in response to an August 14 request for information by the Committee on Ways and Means ("**Committee**") about the "political activities" of tax-exempt organizations described in 501(c)(3) and 501(c)(4) of the Internal Revenue Code (the "**Code**"). Though JMCFS and I have almost exclusively represented and advised conservative organizations, I find much to agree with in the thoughts of counsel with Harmon, Curran, Spielberg & Eisenberg, LLP ("**HCSE**") on these important questions and largely endorse them, adding, where appropriate, additional points of agreement or disagreement with their responses.

1. Would it be helpful to 501(c)(3) and 501(c)(4) organizations for the Internal Revenue Service (IRS) to issue updated guidance on how to define "political campaign intervention" and the extent to which 501(c)(4) organizations can engage in "political campaign intervention" be helpful to 501(c)(3) and 501(c)(4) organizations? If yes, why?

We agree that the current guidance and "facts-and-circumstances" approach to questions invite uncertainty, leading to both costly compliance advice for tax-exempt organizations and a chill on their participation in public debate and voting, basic constitutional rights. To remove the chill, the IRS should be required to establish bright-line definitions of "political campaign intervention" ("**PCI**") and the terms "primarily" and "exclusively" insofar as they are used to define 501(c)(3) and 501(c)(4) organizations. On the other hand, "updating" definitions[2] to distinguish communications and activities on the internet (including social media) and electronic messages (texts, etc.), *infra*, is both unnecessary and can only introduce more ambiguity.

---

[1]I am General Counsel for the James Madison Center for Free Speech, which was founded to protect the First Amendment right of all citizens to free political expression in our democratic Republic. Its purpose is to support litigation and public education activities in order to defend the rights of political expression and association by citizens and citizen groups as guaranteed by the First Amendment of the United States Constitution. I am also the principal attorney at The Bopp Law Firm, P.C.

[2]The effects of *Citizens United v. FEC*, 558 U.S. 310 (2010) do not, in our opinion, include questions that could be addressed by tightening up IRS tax-exempt organization terminology and regulation.

2: Does the IRS's current guidance on the definition of "political campaign intervention" properly account for new forms of political activity? If not, what should be included in updated guidance from the IRS to account for forms of political advocacy that are currently not covered?

Introducing to the lexicon "political activity," as this question does, further blurs the line establishing PCI and implies that there is some inherent property in a communication's mode of distribution that requires its being treated differently. These "new forms" of communications on the internet and via other electronic means are now treated as they would be as any "traditional" hard-copy, television, or radio medium, and we don't find there to be confusion or questions about this. Instead, if a text, for example, is treated differently from another mode of written communication, another font of ambiguity is established, and it becomes reasonable to argue for different treatment of each media type. A bright line *simplifies* compliance (and enforcement) while treating like communications differently based on the medium used increases ambiguity.

3: Are there any tax-exempt organizations whose voter education or registration activities you suspect might have had the effect of favoring a candidate or group of candidates which would constitute prohibited participation or intervention? If yes, please describe those activities.

As HCSE points out, assuming that the perceived effect of speech can be used to categorize it as PCI is to adopt an inaccurate premise, and we would add that it violates basic protections of free speech, association, and the right of franchise.

The First Amendment demands that campaign finance law eschew subjective intent-or-effect tests, *Buckley v. Valeo*, 424 U.S. 1, 43 (1976), and, similarly, "regulations authorizing tax exemptions may not be so unclear as to afford latitude for subjective application by IRS officials." *Big Mama Rag, Inc. v. U.S.*, 631 F.2d 1030, 1034 (D.C. Cir. 1980). Government need not provide tax-exemption to entities or activities. But if it does, the First Amendment requires non-subjective, non-vague, speech-protective, non-chilling tests to safeguard educational issue advocacy.

Voter registration and "get out the vote" activities also enjoy other constitutional protection: "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Categorizing for regulation tax-exempt organizations on the basis of voter education or registration activities that *might have had the effect of* PCI would violate the First Amendment and the Constitution's protection of the right to vote.

4: Are there changes to Form 990 that would help clarify how contributions are being used by 501(c) organizations? Especially regarding contributions that are used to fund political activities by 501(c)(4) organizations or nonpartisan voter education activities that 501(c)(3) organizations are allowed to engage in such as voter registration activities, public forums, and publishing voter education guidelines?

No. As HCSE has explained, Form 990 already requires reporting of political activity on Schedule C, and it is not within the authority of the IRS to enforce federal—or state—campaign finance law.

In addition, there is nothing preventing the FEC or any relevant state campaign finance enforcing agency from requiring the relevant information when a 501(c) organization undertakes "political activities" as defined by the relevant campaign finance law. 501(c)(4)s *do*, in fact report their "political activities," properly defined, to the IRS and, when the relevant campaign finance law so demands, to the FEC or a state campaign finance enforcement agency.

5: Should Congress consider policy changes to address money from foreign nationals flowing through 501(c)(3) and 501(c)(4) organizations to influence U.S. elections? If so, what specific policy changes should be considered?

First, as noted above, the IRS should not be empowered to regulate activities that can be described as "to influence . . . elections," language that is classically vague and potentially overbroad. The IRS should be providing bright lines, not adopting yet more ambiguous standards.

As is the case with "political activities," to the extent that activity "to influence . . . elections" is properly limited to the reach of typical valid campaign finance law, foreign national funding *is already addressed by campaign finance law*. That is, for example, funds used for FECA-regulated activities cannot be funded by foreign nationals. *And that doesn't change when it is a 501(c)(4) doing the activity*. Unless the proposed changes aim at a broader swath of activities, they would be superfluous.[3]

6: Does the IRS collect information from 501(c)(3) and 501(c)(4) organizations that would aid the Federal Election Commission in enforcing the foreign national prohibition under the Federal Election Campaign Finance Act of 1971?

This question, like the previous one, necessarily but wrongly assumes that a 501(c) organization would not be subject to the foreign national prohibition if it engaged in activities that fall under the FECA. In addition, since the IRS definitions are ambiguous, using them to determine what is turned over to the FEC—which has relatively bright-line rules—can only have the effect of making the FEC rules functionally broader.[4]

7: Given the concerns over foreign influence in our elections, should IRS examiners review the national origin of sources of donations reported by a tax-exempt organization on the agency's IRS Form 990-series?

As HCSE points out, the IRS has neither the authority nor the expertise to enforce campaign finance laws, which is what the question seems to propose. And once again, the question assumes

---

[3]If the relevant campaign finance laws are not being applied to 501(c) organizations or are being ignored, the solution is to provide notice followed by increased enforcement. If Congress believes that government has a valid interest in *expanding* the foreign national prohibition to other 501(c) activities, it should write a law that does so.

[4]We do not share HCSE's general views as to the benefit of IRS collecting information on 501(c) organizations. The JMCFS has offered its opinion of and experiences with government collecting—and disclosing—confidential donor information. *See Comments of the James Madison Center for Free Speech on REG-102508-16*, available at https://jmcfs.s3-us-west-2.amazonaws.com/jmcf-ir-rulemaking-comments-final.pdf. The Exhibits cited in the Comments are at https://jmcfs.s3-us-west-2.amazonaws.com/exhibits-jmcfs-comments-irs-nprm.zip

that a 501(c) organization could use funds of a foreign national for activities covered by campaign finance law.

If the relevant campaign finance laws are not being applied to 501(c) organizations or are being ignored, the solution is for the enforcing agencies to provide notice followed by increased enforcement.

If Congress believes that government has a valid interest in *expanding* the foreign national prohibition to other 501(c) activities, it should write a law that does so.

8: Are there additional disclosures by 501(c)(3) and 501(c)(4) organizations engaged in "political campaign intervention" that would help prevent illegal contributions made by foreign nationals to influence U.S. elections?

We agree with HCSE— before imposing additional disclosure, the government should first provide clarity on the scope of the PCI prohibition. The IRS should not be using a "to influence . . . elections" standard that is classically vague and potentially overbroad.

And if Congress believes that government has a valid interest in *expanding* the foreign national prohibition to 501(c) activities beyond those that already fall under campaign finance law, it should write a law that does so.

9: Are you aware of organizations under section 501(c) that are tax-exempt but have the true purpose of influencing elections in favor of one political party?

The IRS should eschew a "purpose of influencing elections" standard for regulation of 501(c) organizations. And as HCSE points out, there is a tax-exempt organization that, by definition, has that purpose, the § 527 political organization. Those organizations report either to the IRS, the FEC, or to a state campaign finance enforcement agency.

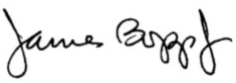
10: Are you aware of organizations under Section 501(c) that are tax-exempt but have misused donor funds for the personal benefit of organization executives or have misused donor funds outside of the stated purpose of the donor? If so, please provide a description of those organizations and the relevant conduct.

We are not.

We appreciate the opportunity to comment on these issues, which lie at the core of JMCFS's mission and, we believe, constitutional protection. If you have any questions, please contact me by phone at (812) 232-2434 or by email at jboppjr@aol.com.

Sincerely,

JAMES MADISON CENTER
FOR FREE SPEECH



James Bopp, Jr.
General Counsel