PEOPLE UNITED *for* PRIVACY

September 4, 2023

The Honorable Jason Smith
Chairman, House Ways and Means Committee
1139 Longworth HOB
Washington, DC 20515

The Honorable David Schweikert
Chairman, Oversight Subcommittee
1139 Longworth HOB
Washington, DC 20515

VIA E-MAIL (waysandmeansRFI@mail.house.gov)

RE: Request for Information on Political Activities of Section 501(c) Organizations

Dear Chairman Smith and Subcommittee Chairman Schweikert,

People United for Privacy[1] submits these comments on the above-referenced request for information (RFI). The RFI correctly points to many of the problems with the Internal Revenue Service's (IRS) existing regulation of political activity by tax-exempt organizations under Section 501(c) of the Internal Revenue Code (IRC). However, the RFI is mistaken to the extent that it seems to suggest the IRS should be given *greater* authority to regulate political activity.

The IRS is a tax collection agency. It has neither the expertise nor the appropriate structure to regulate political activity while balancing such decisions with the fundamental First Amendment and donor privacy concerns at stake. The agency's shortcomings in this area have been on full display – and the subject of widespread condemnation – over the last decade, from the Tea Party targeting scandal in the early 2010s, to the agency's ham-fisted response in issuing an ill-considered and ill-fated proposed rulemaking on political activity,[2] to leaks by the agency of conservative organizations' private donor information.[3]

[1] People United for Privacy (PUFP) believes every American has the right to support causes they believe in without fear of harassment or intimidation. We are a nonprofit, nonpartisan organization that works to protect the rights of individuals to come together in support of their shared values, and we also protect the resources organizations need to make their voices heard. PUFP provides information and resources to policymakers, media, and the public about the need to protect freedom of speech and freedom of association through preserving citizen privacy.

[2] IRS, Notice of Proposed Rulemaking on Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71535 (Nov. 29, 2013). Available at: https://www.govinfo.gov/content/pkg/FR-2013-11-29/pdf/2013-28492.pdf.

[3] *See*, *e.g.*, Paul Abowd, "IRS 'outs' handful of donors to Republican group," The Center for Public Integrity. Available at: https://publicintegrity.org/politics/irs-outs-handful-of-donors-to-republican-group/ (Apr. 4, 2013) *and* "IRS agrees to $50,000 settlement in leaking of conservative group's donor records," Fox News. Available at: https://www.foxnews.com/politics/irs-agrees-to-50000-settlement-in-leaking-of-conservative-groups-donor-records (June 24, 2014).

Far from conferring the IRS with more authority to regulate in this area, all of the problems the RFI identifies with the current regulatory approach would be better addressed by alleviating the IRS of its jurisdiction over political activity altogether. Instead, such matters should be the exclusive province of the Federal Election Commission (FEC).[4]

I. Donor privacy is an enduring and foundational First Amendment right.

Associational privacy is a lasting First Amendment right that has been repeatedly affirmed by the United States Supreme Court for more than six decades[5] and shares widespread support among Americans and the nonprofit community, regardless of political leanings.[6] Any serious discussion of the issues raised and questions posed by this RFI must begin with a strong grasp of the serious First Amendment protections at stake and Americans' resolute desire to protect their hard-earned privacy rights.

We cannot have a government of, by, and for the people if the people are not free to speak to each other and the public about the actions and choices of government officials. Our pervasive cancel culture and attacks on nonprofit donor privacy represent one of the most serious threats to free speech and democracy today. Though debates about citizen privacy may often appear partisan in Congress, there's no partisan divide on this topic in communities around the country. Nonprofits and the Americans who support them may disagree sharply on various policy issues, but they're united in agreement on protecting their privacy. **The logic is simple: A threat to the privacy of one organization or cause is a threat to that right for all others. Privacy rights are not guaranteed in a vacuum.**

While donors to candidates and political committees are required to be publicly disclosed, Americans generally possess strong First Amendment rights to keep their beliefs and affiliations private if they so choose. The Supreme Court has repeatedly emphasized the importance of limiting the reach of laws that mandate donor disclosure because of the chilling effect this policy has on freedom of speech. Individuals may legitimately fear any number of damaging consequences from disclosure, including harassment, adverse governmental action, and reprisals by an employer, neighbor, or community member. Or they may simply prefer not to have their affiliations disclosed publicly – or subjected to the possibility of disclosure – for a variety of reasons rooted in religious practice, modesty, or a desire to avoid unwanted solicitations. For nonprofits, privacy is especially important to organizations that challenge the practices and policies of the very government officials that seek the identities of their members and supporters.

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[4] For state-level political activity, state election and campaign finance agencies would similarly have jurisdiction.

[5] Prominent Supreme Court cases supporting a right to maintain privacy in one's affiliations and memberships include, but are not limited to, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (holding unconstitutional a demand by government officials for the membership list of a nonprofit organization); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (holding unconstitutional a city tax ordinance requiring nonprofit groups to publicly disclose donors); *Talley v. California*, 362 U.S. 60 (1960) (holding facially unconstitutional a city ordinance requiring handbills to identify financial supporters); *Shelton v. Tucker*, 364 U.S. 479 (1960) (holding facially unconstitutional a state requirement that public school teachers list all organizations to which they belonged or contributed to in the past five years, even though the list was not public); *and Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021) (holding facially unconstitutional a California regulation requiring charities and other nonprofits to submit an annual list of donors to state officials).

[6] *See*, *e.g.*, "Free speech case attracts support from nearly 300 diverse groups," Americans for Prosperity Foundation. Available at: https://americansforprosperity.org/wp-content/uploads/2021/04/AFPF-v-Becerra-Amici.pdf (Apr. 2021).

Every American has a First Amendment right to support causes he or she believes in without fear of harassment and intimidation, regardless of one's beliefs. Laws that invade Americans' privacy and chill their participation in public life do not belong in any democracy, let alone the United States. Due to today's highly charged political climate, Americans are increasingly concerned about their private giving being made public and weaponized against them by those who disagree with their views.[7] Unfortunately, their concerns are well-founded, thanks to a growing push for unconstitutional and harmful disclosures in Congress, at federal agencies, and in states around the country.[8] Efforts to force nonprofits to disclose their membership or donor information are among today's leading threats to the First Amendment rights to freely speak, publish, and support groups that advocate for causes supported by Americans across the country and the ideological spectrum.

Sadly, it is all too easy to imagine an endless wave of targeting and harassment campaigns across the country if nonprofit donor information is routinely published in a searchable government database. The First Amendment would effectively be a dead letter, as Americans would sacrifice their free speech rights to preserve their privacy and save themselves from lost employment, physical harm, and other forms of harassment and intimidation. Members of Congress must keep these concerns in mind during discussions of this RFI implicating this vital First Amendment right.

II. Opening Considerations: The IRS vs. the FEC.

Questions 1 and 2 in the RFI ask whether the IRS should "issue updated guidance" on what constitutes restricted "political campaign intervention" by Section 501(c) organizations. These questions rest on the mistaken premise that this is even an appropriate function of the IRS.

A. The IRS should not be regulating any political activity whatsoever.

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[7] *See*, *e.g.*, Emily Ekins, "Poll: 62% of Americans Say They Have Political Views They're Afraid to Share," Cato Institute. Available at: https://www.cato.org/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share (July 22, 2020); Julia Manchester, "64 percent view 'cancel culture' as threat to freedom: poll," *The Hill*. Available at: https://thehill.com/homenews/campaign/545387-64-percent-say-they-view-cancel-culture-as-a-threat-to-their-freedom-poll/ (Mar. 29, 2021); *and* The Editorial Board, "America Has a Free Speech Problem," *The New York Times*. Available at: https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html (Mar. 18, 2022).

[8] In Congress, *see*, *e.g.*, Eric Wang, "Analysis of H.R. 1 (Part One): 'For the People Act' Is Replete with Provisions for the Politicians," Institute for Free Speech. Available at: https://www.ifs.org/wp-content/uploads/2021/02/2021-02-22_IFS-Analysis_HR-1_DISCLOSE-Honest-Ads-And-Stand-By-Every-Ad.pdf (Feb. 2021) *and* "The AMICUS Act Is an Assault on First Amendment Rights," People United for Privacy. Available at: https://unitedforprivacy.com/the-amicus-act-is-an-assault-on-first-amendment-rights/ (July 13, 2023). At the state level, *see*, *e.g.*, Luke Wachob, "More Bills Threatening Citizen Privacy Bite the Dust," People United for Privacy. Available at: https://unitedforprivacy.com/more-bills-threatening-citizen-privacy-bite-the-dust/ (Feb. 23, 2023); Luke Wachob, "Virginia Holds Firm on Personal Privacy," People United for Privacy. Available at: https://unitedforprivacy.com/virginia-holds-firm-on-personal-privacy/ (Mar. 27, 2023); Luke Wachob, "New Mexico House Rejects Anti-Privacy Bill Amid Ongoing Lawsuit," People United for Privacy. Available at: https://unitedforprivacy.com/new-mexico-house-rejects-anti-privacy-bill-amid-ongoing-lawsuit/ (Apr. 26, 2023); *and* Luke Wachob, "Has New Jersey Learned Its Lesson on Nonprofit Donor Privacy?" People United for Privacy. Available at: https://unitedforprivacy.com/has-new-jersey-learned-its-lesson-on-nonprofit-donor-privacy/ (May 2, 2023).

After the House Committee on Oversight and Government Reform investigated the IRS Tea Party targeting scandal in the 113th Congress, it issued a scathing report concluding that:

> The solution is obvious and ought to be noncontroversial: **Congress must disentangle politics from the IRS.** To regain the trust of American taxpayers, the IRS must return to its traditional role as a dispassionate administrator of the federal tax code. **The IRS must not be an agency that determines what is and what is not political speech** and, correspondingly, whether a social-welfare group receives a tax-exemption for making political speech. Political speech can help advance the social welfare and social-welfare groups should be allowed to advance the debate about issues important to the nation. **Other federal regulators exist to oversee political campaigns and elections. That duty has never belonged – and should not belong – to the IRS.**[9]

Putting aside the IRS's well-known and well-documented misconduct in regulating political activity, the agency has also demonstrated its incompetence in this area. While the RFI asks whether the IRS should issue updated guidance on "political campaign intervention," it also recites a Government Accountability Office (GAO) report that takes the IRS to task for the "complexity" and "lack of clarity" in the guidance the agency has issued thus far. The RFI almost answers itself.

In late 2013, the IRS attempted to clarify its regulatory approach on political activity in the form of proposed rules. A record 143,852 comments were submitted by commenters from across the ideological and political spectrum. The overwhelming majority of those comments panned the proposal for being excessively vague and overbroad.[10] The proposal was so poorly considered and unsatisfactory that the IRS withdrew it, made several additional abortive attempts, and, ultimately, never adopted any such rule.[11]

The IRS is so clearly unsuited to the task of regulating political activity that Congress has specifically prohibited the agency from even issuing any proposed rule (much less a final rule), revenue ruling, or other guidance addressing this issue in <u>eight consecutive</u> annual omnibus appropriations bills spanning four Congresses led by both parties.[12] It strikes PUFP as rather incongruous that the RFI

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[9] Staff Report, "Making Sure Targeting Never Happens: Getting Politics Out of the IRS and Other Solutions," U.S. House of Representatives Committee on Oversight and Government Reform. Available at: https://oversight.house.gov/wp-content/uploads/2014/07/2014-07-29-Getting-Politics-Out-of-the-IRS-and-Other-Solutions.pdf (July 29, 2014) (emphasis added).

[10] *See* Matt Nese and Kelsey Drapkin, "Overwhelmingly Opposed: An Analysis of Public and 955 Organization, Expert, and Public Official Comments on the IRS's 501(c)(4) Rulemaking," Institute for Free Speech. Available at: https://www.ifs.org/wp-content/uploads/2014/07/2014-07-08_Issue-Review_Nese-And-Drapkin_Overwhelmingly-Opposed.pdf (July 21, 2014). For a list of organizations opposed to the proposed rule, *see also*, "Analysis: 97% of Comments from 955 Organizations, Experts, and Public Officials Oppose IRS's Proposed 501(c)(4) Rulemaking in its Current Form," Institute for Free Speech. Available at: https://www.ifs.org/wp-content/uploads/2014/07/2014-07-08_IFS-One-Pager_Drapkin_IRS-Rulemaking-Organizational-Expert-And-Public-Official-Comment-Analysis.pdf (July 8, 2014) *at* 3.

[11] *See*, *e.g.*, Michael Wyland, "Is the IRS Finally Ready to Regulate Nonprofit Political Activity?" *Nonprofit Quarterly*. Available at: https://nonprofitquarterly.org/is-the-irs-finally-ready-to-regulate-nonprofit-political-activity/ (May 27, 2015).

[12] Consolidated Appropriations Act, 2016 (H.R. 2029), Pub. L. No. 114-113, Div. E, Tit. I, § 127; Consolidated Appropriations Act, 2017 (H.R. 244), Pub. L. No. 115-31, Div. E, Tit. I, § 126; Consolidated Appropriations Act, 2018 (H.R. 1625), Pub. L. No. 115-141, Div. E, Tit. I, § 125; Consolidated Appropriations Act, 2019 (H.J. Res. 31), Pub. L. No. 116-6, Div. D, Tit. I, § 124; Consolidated Appropriations Act, 2020 (H.R. 1158), Pub. L. No. 116-93, Div. C, Tit. I, § 122; Consolidated Appropriations Act, 2021 (H.R. 133),

now seems to suggest that the IRS should update its regulatory approach to political activity when, in recent years, Congress repeatedly has prohibited the IRS from doing so.

Importantly, political activity generally has no impact on tax revenue and therefore should be of no concern for the purposes of the IRC and the IRS. Because the tax code and IRS rules currently restrict political activity for Section 501(c) tax-exempt organizations, there is often a misconception that organizations that engage in prohibited or excessive political activity are somehow cheating the U.S. Treasury of tax revenue. This is false. Political contributions and expenditures are not inherently taxable, for-profit transactions.

Consider two examples that will be intimately familiar to Members of Congress: Your campaign committees and leadership PACs. As IRC Section 527 tax-exempt political organizations, campaign committees and PACs are "organized and operated primarily for the purpose of" engaging in political activities.[13] Insofar as campaign committees and PACs are not taxable for-profit entities, it also should be of no general concern to the tax code when Section 501(c) organizations engage in the same political activities that Section 527 organizations engage in.

The only legitimate IRC concern that political activity presents is with respect to tax deductions. To prevent a tax subsidy for political activity through donors' tax deductions, Congress has prohibited: (a) Section 501(c)(3) entities – whose donors are permitted to deduct their donations on personal income taxes – from engaging in "any political campaign on behalf of (or in opposition to) any candidate for public office"; and (b) any business tax deductions for donations to Section 501(c) entities for "political campaign" activities.[14]

However, simply because the IRC addresses "political campaign" activities does not mean that the IRC and IRS should be in the business of defining what those activities are. Rather, the IRC or IRS regulations should simply define "political campaign" activities as those activities that are regulated by the Federal Election Campaign Act (FECA) and the FEC's implementing rules.[15] This simple change would remove the IRS from the business of regulating political activities – a task the agency is uniquely unsuited for – and eliminate the confusing and inconsistent dual set of regulatory authorities (the other being the FECA and FEC rules) that tax-exempt organizations have long had to navigate.

Relatedly, *Question 9* in the RFI asks about Section 501(c) entities that "have the true purpose of influencing elections in favor of one political party." As discussed above, under the IRC, an organization that is "organized and operated primarily" for partisan purposes is supposed to be a Section 527 political organization. In 2000, Congress enacted Section 527(i),[16] which requires political organizations to report expenditure and donor information to the IRS on reports that largely parallel those required under the

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Pub. L. No. 116-260, Div. E, Tit. I, § 122; Consolidated Appropriations Act, 2022 (H.R. 2471), Pub. L. No. 117-103, Div. E, Tit. I, § 123; Consolidated Appropriations Act, 2023 (H.R. 2617), Pub. L. No. 117-328, Div. E, Tit. I, § 123.

[13] 26 U.S.C. § 527(e)(1).

[14] 26 U.S.C. §§ 501(c)(3), 162(e)(1)(B).

[15] For political campaign activities concerning state elections, the definition could also reference state law.

[16] Pub. L. No. 106-230 (Jul. 1, 2000).

FECA. The IRS reports function as a backstop for political organizations that do not trigger reporting requirements with the FEC.

Because the Section 527 reporting requirements further enmesh the IRS in a function that it is inherently unsuited for, Congress should repeal Section 527(i). When Congress enacted Section 527 in 1975 to shield contributions to political organizations from being taxed as income, it appropriately did not include the donor reporting provisions that now appear in subparagraph (i), since the FECA already addressed that issue. **Unlike the FEC, the IRS is not designed to be a disclosure agency. In fact, all of the other taxpayer information that the agency receives and processes is required to be kept under the strictest confidentiality.**[17] Charging the IRS with the responsibility of implementing donor reporting requirements for political organizations always has been – and will continue to be – an extremely poor fit.

Furthermore, the IRS and FEC have adopted inconsistent standards for when organizations trigger donor reporting requirements as a Section 527 organization or PAC.[18] This inconsistency is untenable and has caused enormous confusion for organizations engaged in core First Amendment activities. Congress should reverse the mistake it made in 2000 and repeal Section 527(i) of the IRC. This would further alleviate the IRS from needing to determine what qualifies as political activity and how it should be regulated.

B. The FEC is better-suited to regulate political activity.

To paraphrase Winston Churchill's famous quote about democracy, the FEC is the worst agency to regulate political activity, except for all the other federal agencies. Although imperfect, the FEC has the better structure and agency expertise to regulate political activity. As the federal judiciary has explained:

> "Unique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity – the behavior of individuals and groups only insofar as they act, speak and associate for political purposes."[19]

> "Congress has vested the [FEC] with primary and substantial responsibility for administering and enforcing the [FECA], providing the agency with extensive rulemaking and adjudicative powers. It is authorized to formulate general policy with respect to the administration of [the FECA] . . . Moreover, the [FEC] is inherently bipartisan in that no more than three of its six voting members may be of the same political party. . . and it must decide issues charged with the dynamics of party politics, often under the pressure of an impending election."[20]

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[17] 26 U.S.C. § 6103.

[18] FEC, Supplemental Explanation and Justification on Political Committee Status, 72 Fed. Reg. 5595, 5598 (Feb. 7, 2007) ("'While IRC political *organizations* and FECA political *committees* seem to have some similarities, [section] 527 'exempt function' activity is much broader than the activity that defines FECA political committees. Consequently, IRS regulations provide no guidance for FEC rulemaking.'") (emphasis in original). Available at: https://www.govinfo.gov/content/pkg/FR-2007-02-07/pdf/E7-1936.pdf.

[19] *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) (internal quotation marks and citations omitted).

[20] *FEC v. DSCC*, 424 U.S. 27, 37 (1981) (internal quotation marks and citations omitted).

The IRS simply lacks the FEC's regulatory focus, bipartisan structure, and agency expertise to regulate political activity. Far from asking whether the IRS should further attempt to define and regulate "political campaign intervention," per *Questions 1 and 2* in the RFI, Congress should remove such matters from the IRS's jurisdiction altogether and allow them to be regulated solely by the FECA and FEC.

III. Specific disclosure concerns are better left to the FECA and FEC.

Question 4 in the RFI asks about potential changes to IRS Form 990, the tax return filed by Section 501(c) organizations. Specifically, the RFI asks whether anything can be done to "help clarify how contributions are being used by 501(c) organizations[,] [e]specially 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."

As a preliminary matter, it is unclear what the RFI is questioning. Even if Section 501(c) organizations were required to fully and publicly report all of their contributions and disbursements in the way that PACs are required to report all of their transactions, it is unclear how such reports can indicate "how contributions are being used. . . to fund [specific] political activities." This seems as nonsensical as asking how FEC reports from a Member of Congress's campaign committee can show whether a donor's funds were used to pay for a campaign mailer versus a campaign rally. There is no way to report such a non-existent nexus in any meaningful or accurate manner.

Unless donors earmark their contributions for specific activities – and, as discussed below, the FECA and FEC rules already require reporting of such earmarked contributions – their contributions are fungible. Section 501(c) organizations typically engage in a wide variety of activities. For example, it is just as likely that a donor's unearmarked contribution may be used to support an organization's jobs training program as it is to be used by the organization to support candidates who favor public policies that promote economic self-sufficiency. In this example, there are no conceivable reporting mechanisms to accurately explain "how contributions are being used. . . to fund political activities" (*i.e.*, a nexus between the contribution and the political activity).

Some states' campaign finance laws have required organizations filing political activity reports to identify their donors on such reports, regardless of whether donors earmarked their contributions for such activities. These requirements result in junk disclosure by suggesting links between donors and political activities that exist only as a matter of legal fiction, but that do not exist in reality. Accordingly, many federal courts have suggested that such donor reporting requirements are unconstitutional under the "exacting scrutiny" standard of judicial review for disclosure laws.[21] Specifically, such indiscriminate donor reporting requirements are not "narrowly tailored" to demonstrate a nexus between the donor and political activity being reported, which is the supposed governmental interest in such laws.[22]

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[21] *See*, *e.g.*, *Independence Institute v. Williams*, 812 F.3d 787, 789 (10th Cir. 2016); *National Association for Gun Rights v. Mangan*, 933 F.3d 1102, 1117 (9th Cir. 2019); *Lakewood Citizens Watchdog Group v. City of Lakewood*, 2021 WL 4060630 at *12 (D. Colo. 2021); *Wisconsin Family Action v. FEC*, 2022 WL 844436 at *10 (E.D. Wis. 2022).

[22] *See Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2383-2384 (2021).

By contrast, the FECA and FEC regulations already require organizations (including Section 501(c) entities) that are reporting spending on "independent expenditures" and "electioneering communications" to report donors who earmark their contributions for such activities.[23] Therefore, insofar as *Question 4* in the RFI asks about reporting of "contributions that are used to fund political activities by 501(c)(4) organizations," the answers are to be found in disclosures filed with the FEC, not in any filings with the IRS.

The RFI also asks about reporting of contributions that are used to fund "nonpartisan voter education activities" by Section 501(c)(3) entities, and both *Questions 3 and 4* seem to imply that some organizations may not be conducting these activities in a truly nonpartisan manner. Again, the IRS is not the proper agency to determine whether such activities are "nonpartisan," and the FEC's regulations already address partisan and nonpartisan voter registration, get-out-the-vote drives, voter guides, and candidate forums.[24]

IV. Foreign national concerns are better left to the FECA and FEC.

Questions 5 through 8 in the RFI ask about money from foreign nationals flowing through Section 501(c) organizations to influence U.S. elections. As the RFI also notes, the FECA already prohibits foreign nationals from making contributions and expenditures in connection with U.S. elections.[25] This prohibition is broad, and covers contributions that are made "directly or indirectly," such as routing money to a super PAC through a Section 501(c) organization.[26] Section 501(c) organizations are also prohibited from soliciting, accepting, or receiving a contribution from a foreign national to influence U.S. elections.[27]

Additionally, the FECA prohibits contributions from being made "in the name of another person."[28] As the U.S. Department of Justice explains,[29] "violations occur when a person gives money to straw donors, or conduits, for the purpose of having the conduits pass the funds on to a specific federal candidate [or PAC] as their own contributions."[30] Routing a foreign national's political contribution through a Section 501(c) organization would further violate the FECA's conduit contribution ban.

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[23] 52 U.S.C. § 30104(c)(2)(C); 11 C.F.R. § 104.20(c)(10). An "independent expenditure" is an expenditure "expressly advocating the election or defeat of a clearly identified candidate" and that is not coordinated with the candidate, candidate's campaign, or a political party committee. 52 U.S.C. § 30101(17). An "electioneering communication" is a television or radio advertisement that references a clearly identified candidate within 30 days before the primary or 60 days before the general election and that is "targeted to the relevant electorate." 52 U.S.C. § 30104(f)(3).

[24] *See* 11 C.F.R. § 114.4(b), (c)(2)-(5).

[25] *See* 52 U.S.C. § 30121.

[26] *Id.* § 30121(a)(1).

[27] *Id.* § 30121(a)(2).

[28] *Id.* § 30122.

[29] While the FEC has authority over civil FECA violations, the Department of Justice (DOJ) has authority over criminal FECA violations.

[30] Craig C. Donsanto and Nancy L. Simmons, "Federal Prosecution of Election Offenses, 7th Ed.," U.S. Department of Justice. Available at: https://www.justice.gov/sites/default/files/criminal/legacy/2013/09/30/electbook-rvs0807.pdf (rev. Aug. 2007) *at* 166.

In short, the FECA already includes a regulatory scheme to address foreign nationals making contributions to affect U.S. elections, whether directly or indirectly. There is no reason to enmesh the IRS in this issue any more than there is reason to entangle the IRS with any other political activity issues.

Question 8 in the RFI asks specifically about "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." The RFI cites a GAO report in which "[o]fficials at DOJ told GAO that they can only obtain donor information reported to the IRS with a court order."

This is a feature – not a bug – in our system. The longstanding presumption in American law is that donors are entitled to privacy, including from law enforcement officials and proceedings. Campaign finance reporting requirements are a narrow exception to that presumption of donor privacy. As the U.S. Supreme Court has explained:

> [W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. We long have recognized that significant encroachments on First Amendment rights of the sort that **compelled disclosure** imposes **cannot be justified by a mere showing of some legitimate governmental interest**. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny. We also have insisted that there be a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed. . .
>
> It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights, and they must be weighed carefully against the interests which Congress has sought to promote by [disclosure] legislation.[31]

More recently, the Supreme Court rejected efforts by the California Attorney General to summarily collect donor information from nonprofit organizations under the pretext of "preventing charitable fraud and self-dealing" and "improv[ing] the efficiency and efficacy of the Attorney General's important regulatory efforts." The Court held that the government's interest in "ease of administration. . . cannot justify the disclosure requirement" as "the prime objective of the First Amendment is not efficiency. Mere administrative convenience does not remotely reflect the seriousness of the actual burden that the demand for [donor information] imposes on donors' association rights."[32]

The language in the GAO report that the RFI references evokes concerns about "administrative convenience" in law enforcement that the Supreme Court has held cannot justify the government summarily collecting donor information from organizations. If DOJ has probable cause to believe that

[31] *Buckley v. Valeo*, 424 U.S. 1, 64, 68 (1976) (internal quotation marks and citations omitted) (emphasis added).
[32] *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. at 2385, 2387 (2021) (internal quotation marks and citations omitted).

foreign nationals are illegally funneling money through nonprofit organizations to affect elections, then the Department must do its job and follow the process for every other type of criminal matter: obtain a warrant or court order and investigate.

The RFI's apparent suggestion that nonprofits should be required to make additional disclosures to the IRS to aid DOJ investigations is particularly striking in light of recent developments.

First, your colleagues in the House Committee on Oversight and Accountability recently heard testimony by whistleblowers at the IRS alleging improper interference by DOJ into a high-profile and politically sensitive matter. If the allegations are true, this should be another indicator that the IRS and DOJ should not be entrusted with routinely collecting sensitive donor information from nonprofit organizations merely under the pretext that such information *could* be useful for investigating foreign national contribution violations.

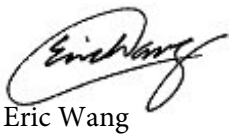
Second, as the federal judiciary has noted, the publication of donor information (whether it is required to be made public or, as discussed above, is improperly leaked by the IRS) can subject donors to threats, harassment, firings, and other reprisals. As one federal judge in Wisconsin noted, "The accessibility of the Internet and the rise of 'cancel culture' are major developments since *Buckley* [upheld campaign finance reporting requirements]. Cancel culture is the phenomenon of aggressively targeting individuals or groups, whose views aggressors deem unacceptable, in an effort to destroy them personally and/or professionally. Cancel culture [is] a prominent force in today's world."[33] As another federal judge in New Jersey observed, we live "[i]n a climate marked by the so-called cancel or call-out culture that has resulted in people losing employment, being ejected or driven out of restaurants while eating their meals; and where the Internet removes any geographic barriers to cyber harassment of others."[34]

* * *

People United for Privacy appreciates the attention your committee is giving to how Section 501(c) organizations' political activities are regulated by the IRS and the Internal Revenue Code. The concern is well-founded, but not for the reasons the RFI appears to suggest. The IRS is not the appropriate agency to regulate political activity. It lacks the expertise, focus, and appropriate structure to properly balance regulation against First Amendment and donor privacy interests. **Congress should alleviate the IRS of this function and leave the concerns raised in the RFI to the campaign finance laws and FEC.**

Sincerely,

Matt Nese
Vice President, People United for Privacy



Eric Wang
Counsel to People United for Privacy

[33] *Wisconsin Family Action*, 2022 WL 844436 at *15.
[34] *Americans for Prosperity v. Grewal*, Case No. 3:19-cv-14228-BRM-LHG (D. N.J. unpublished op. filed Oct. 2, 2019) at 42.