

**Written Testimony of Philip Hackney, Professor of Law
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U.S. House Ways & Means Subcommittee on Oversight
Hearing on Growth of the Tax-Exempt Sector and the Impact on the
American Political Landscape.**

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Chair Schweikert, Ranking Member Pascrell, Members of the Subcommittee, thank you for inviting me to speak with you about a matter of great importance to the operation of the democratic order of the United States. I understand you have asked me to speak to the issue of federal income tax laws related to the political activity of tax-exempt entities.

I am a professor of law at the University of Pittsburgh School of Law where I primarily teach tax law courses. I specialize in the federal tax treatment of nonprofit organizations. From 2006-2011, I worked in the Office of the Chief Counsel of the IRS in Washington D.C. overseeing the tax-exempt sector. There I helped to oversee the drafting of regulations, the overall program of auditing tax exempt organizations, and IRS litigation on matters related to tax laws applicable to nonprofits and government entities. That work necessarily interacted with politics. The IRS oversees dark money organizations, § 527 political organizations, and charities that engage in politics in its largest sense. Today, I write, research, and speak about these organizations and the regulatory regime applicable to them.¹

While I think the tax laws regarding tax-exempt organizations are wanting, our overall legal structure is justifiable. In fact, many aspects of our tax law related to nonprofit organizations that enhance our democracy find our tax-exempt sector at its best. Where we fall as a nation is in enforcement. As I will discuss below, we do not allocate enough resources to this arena, and we do not institutionally offer the support necessary to enforce these laws.

First, I describe tax-exempt law and then enforcement. As you will see in Part II, the IRS still does not have the budget to enforce the tax law, particularly in the tax-exempt sector.

I. Tax-Exempt Organizations and Politics

Tax-exempt organizations carry out incredibly important functions to a well-run democracy. In the Tax-Exempt Scholar Letter, we highlight a quote by John W. Gardner

¹ I note that in addition to my experience at the IRS this testimony is based on testimony I submitted to the Senate Finance Committee in May of 2022, and upon articles I have written including *Political Justice and Tax Policy: The Social Welfare Organizations Case*, 8 TEX. A&M L. REV. 271 (2021) [hereinafter *Political Justice*] and *Dark Money Darker? IRS Shatters Collection of Donor Data*, 25 FLA. TAX REV. 140 (2021) [hereinafter *Dark Money Darker*]. The testimony is based in part as well upon a letter I submitted with other tax-exempt organization scholars on September 1, 2023, in response to the Request for Information published by this Subcommittee (Tax-Exempt Scholar Letter). I attach my Senate Testimony and the Tax-Exempt Scholar Letter to this written Testimony.

that the nonprofit sector “is the natural home of nonmajoritarian impulses, movements, and values. It comfortably harbors innovators, maverick movements, groups which feel that they must fight for their place in the sun, and critics of both liberal and conservative persuasion.”² These organizations make up what many refer to as *civil society*.

As a preliminary matter, ‘political’ is a word that encompasses almost everything we do. One definition is how the group decides what to do. Thus, when I speak of political activity of nonprofits I am only referring to (1) intervention in a political campaign, (2) lobbying, and (3) activities close to both, sometimes referred to as issue advocacy. Each of these has a very specific meaning and has different impacts on different types of tax-exempt organization.

In tax-exempt law, the intervention in a political campaign (*political campaign intervention*) generally means the participation or intervention, “directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.”³ This includes campaigns for public office (federal, state, and local) and the encouraging of people to vote for or against candidates. *Lobbying* refers to efforts to encourage members of a legislative body to propose, support, or oppose legislation.⁴ Finally, *issue advocacy* is a looser concept. It typically involves an organization educating the public broadly about a political topic with the intention of swaying the public toward a particular political solution. In its most specific context, issue advocacy involves advocating a political solution while simultaneously identifying a candidate for office. But issue advocacy can also further an exempt purpose. As noted in the Tax-Exempt Scholar Letter, none of the tax laws require a tax-exempt entity to be non-partisan. No part of the Internal Revenue Code (Code) prohibits an organization from taking a position that happens to align with one party or the other.

a. Section 527 Political Organizations

Section 527 manages the taxable situation of political organizations organized and operated primarily for an “exempt function.”⁵ An exempt function includes the “function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization.”⁶ A § 527 organization that anticipates receiving gross receipts in excess of \$25,000 a year generally must give notice to the IRS within 24 hours of its establishment.⁷ Unlike a social welfare organization, a § 527 organization must *publicly* disclose substantial information about its receipts of contributions and expenditures.⁸ If

² John Gardner, Foundation Center, *The Independent Sector*, in AMERICA’S VOLUNTARY SPIRIT ix (1983).

³ Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).

⁴ Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii).

⁵ Act of Jan. 3, 1975, Pub. L. No. 93-625, § 10, 88 Stat. 2108, 2116-19 (codified as amended at § 527).

⁶ 26 U.S.C. § 527. See also Rev. Rul. 2004-6, 2004-1 C.B. 328 (describing when § 501(c)(4), (5) & (6) organizations are engaged in exempt function activity).

⁷ They must file with the IRS a Form 8871 found here <https://www.irs.gov/forms-pubs/about-form-8871>.

⁸ 26 U.S.C. § 527(j). Note that Political Committees that already have the obligation to file with the FEC do not have to comply with the § 527(j) disclosure requirements. See also Form 990, Return for Organization Exempt from Income Tax, Schedule B Schedule of Contributors Instructions; Form 8872 <https://www.irs.gov/forms-pubs/about-form-8872>.

a social welfare organization, business league or labor union engages in activities categorized as exempt function activity, the organization is subject to the tax under § 527(f). Congress applies a tax upon the gain of a contributor upon contribution to a § 527 of appreciated property.⁹

b. Charitable Organizations

A charitable organization must be organized and operated exclusively for religious, charitable, scientific, or educational purposes, provided no part of the organization's net earnings inures to the benefit of any private shareholder or individual.¹⁰ Such organizations may not engage in more than an insubstantial amount of lobbying and are prohibited from political campaign intervention.¹¹

There are numerous benefits the government provides to charitable organizations. For instance, they can accept tax-deductible charitable contributions from donors.¹² Contributions to charitable organizations are also deductible from the trust, gift, and estate taxes.¹³ A charitable organization generally owes no tax on its earnings unless it operates an unrelated trade or business.¹⁴ There are many more benefits.

The prohibition on campaign intervention means that the organization's representatives *when speaking for the charity* may not directly or indirectly encourage people to vote for or against a candidate for political office.¹⁵ As our Tax-Exempt Scholar Letter noted, the prohibition does not prohibit charities from aiding voter registration, providing voter education, or helping to get out the vote.¹⁶ While it is possible to run such operations in ways that do violate the law, such as for instance by turning away people from one party or the other, the fact that a charitable effort has a large percentage of one party or another is not and should not be the test.

Importantly, neither political campaign expenditures nor lobbying expenditures are deductible under the Code.¹⁷ If a charity were able to intervene in a political campaign, donors would have a means to deduct their political campaign activity.

⁹ 26 U.S.C. § 84.

¹⁰ 26 U.S.C. § 501(c)(3).

¹¹ *Id.*

¹² 26 U.S.C. § 170. See JOINT COMMITTEE ON TAXATION, PRESENT LAW AND BACKGROUND RELATING TO THE FEDERAL TAX TREATMENT OF CHARITABLE CONTRIBUTIONS, JCX-2-22, 34 (March 17, 2022), <https://www.jct.gov/publications/2022/jcx-2-22/> (making this essential point: "the value of the tax deduction to the taxpayer is the amount of the donation multiplied by the taxpayer's marginal tax rate").

¹³ 26 U.S.C. §§ 642, 2055, and 2522.

¹⁴ 26 U.S.C. § 511.

¹⁵ See Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

¹⁶ Rev. Rul. 2007-41, I.R.B. 2007-25.

¹⁷ 26 U.S.C. § 162(e). The U.S. Supreme Court upheld the prohibition on deducting political campaign expenses in *Cammarano v. United States*, 358 U. S. 498 (1959).

Congress limits the amount of lobbying in which a charity can engage.¹⁸ “No substantial part” of the activities of a charity can consist in “carrying on propaganda, or otherwise attempting, to influence legislation.”¹⁹ Lobbying involves “contacting legislators or urging the public to contact them to propose, support, or oppose legislation, or advocating the adoption or rejection of legislation.”²⁰ It is not clear how much lobbying is too much.²¹

The U.S. Supreme Court upheld the constitutionality of the limitation on lobbying in *Regan v. Taxation with Representation*.²² The Court stated: “[w]e held that Congress is not required by the First Amendment to subsidize lobbying. In these cases, as in *Cammarano*, Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR’s lobbying.”²³ The Court highlights that those who run a charity have the option of also operating a § 501(c)(4) social welfare organization in order to engage in substantial lobbying, simply without the ability for donors to deduct their contributions.²⁴ In a footnote, the Court notes that the IRS allows the same people who control the charity to also control the social welfare organization, as long as the organizations scrupulously account for the monies and ensure no monies intended for the charity are used to support the social welfare organization’s activity.²⁵

c. *Dark Money Organizations*

Dark money organizations refer to tax-exempt organizations that engage in political advocacy. The moniker “dark” means the organization neither publicly discloses contributions under campaign finance laws nor via tax information returns. Social welfare organizations and business leagues are the common tax-exempt organizations that fit this category. Though the IRS used to require dark money organizations to file information about substantial donors with the IRS, the IRS recently ended the requirement.²⁶

What is the benefit of being a § 501(c)(4) or (6) organization? Though they generally cannot accept tax-deductible contributions, just like a charity, money earned in one of these exempt organizations is exempt from the income tax.²⁷ Some payments

¹⁸ 26 U.S.C. § 501(c)(3).

¹⁹ *Id.*

²⁰ Treas. Reg. § 1.501(c)(3)-1(c)(3).

²¹ *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975) (finding a range between 16.6% and 20.5% of total expenditures over four years to be a substantial part).

²² *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) (*citing* *Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

²³ *Id.* at 546.

²⁴ *Id.* at 544.

²⁵ *Id.* at 544 FN 6.

²⁶ 85 Fed. Reg. 31959 (May 28, 2020) (codified at 26 CFR 56) T.D. 9898. *See also Dark Money Darker*, *supra* note 1 (arguing that the ending of this collection was a bad decision and should be reconsidered by the IRS, Treasury and Congress).

²⁷ 26 U.S.C. §§ 501(a), (c)(4), & (6). An exempt organization that operates an unrelated business is subject to the unrelated business income tax though under 26 U.S.C. § 511.

to these organizations are deductible as business expenses.²⁸ Unlike contributions to a § 527, a donor can contribute appreciated property like stock and not trigger gain for tax purposes.²⁹ This makes the dark money organization a more desirable destination for appreciated assets than political organizations. Finally, the gift tax does not apply to contributions to either a social welfare organization or a business league.³⁰

i. *Social welfare organizations*

Social welfare organizations include “[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare . . . and no part of the net earnings of such entity inures to the benefit of any private shareholder or individual.”³¹ The regulations suggest a social welfare purpose is furthered through “bringing about civic betterments and social improvements.”³² One court suggested that such a purpose is found in “a community movement designed to accomplish community ends.”³³

According to the U.S. Supreme Court, in interpreting “exclusively[,] . . . [t]his plainly means that the presence of a single non-[exempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purposes.”³⁴ In *Contracting Plumbers*, the Second Circuit court stated regarding § 501(c)(4) that “we adhere to the rule that the presence of a single substantial non-exempt purpose precludes exempt status regardless of the number or importance of the exempt purposes.”³⁵ There is a lack of clarity here on this issue. Though a single substantial non-exempt purpose could be reached by expenditures amounting to well under 50% of expenditures, some attorneys take the position that engaging in fifty plus one percent of expenditures furthering social welfare annually satisfies the Code.³⁶ Regulations in this area could provide significant help to those trying to comply with the law.

Lobbying can further a social welfare purpose.³⁷ However, political campaign intervention does not further a social welfare organization purpose.³⁸ In 2013, the IRS issued proposed regulations with the intent to make it clearer when such lines are crossed for § 501(c)(4) organizations.³⁹ But, in Consolidated Appropriations Acts since 2016 Congress has blocked the IRS from implementing rules to clarify this space. The

²⁸ 26 U.S.C. § 162.

²⁹ *Cf.* 26 U.S.C. § 84 (donor who contributes appreciated property to 26 U.S.C. § 527 political organization owes income tax on the gain associated with the appreciated property).

³⁰ 26 U.S.C. § 2501(a)(6).

³¹ 26 U.S.C. § 501(c)(4).

³² Treas. Reg. § 1.501(c)(4)-1(a)(2).

³³ *Erie Endowment v. United States*, 316 F.2d 151, 156 (3d Cir. 1963).

³⁴ *Better Business Bureau of Washington D.C. v. U.S.*, 326 U.S. 279, 283 (1945).

³⁵ *Contracting Plumbers Co-op. Restoration Corp. v. United States*, 488 F.2d 684, 686 (2d Cir. 1973).

³⁶ *See* Ellen P. Aprill, *Examining the Landscape of Section 501(c)(4) Social Welfare Organizations*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 345, 346-47 (2018) (noting that some practitioners take this position).

³⁷ Rev. Rul. 68-656, 1968-2 C.B. 216.

³⁸ Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).

³⁹ *Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities*, (REG-134417-13) 78 FR 71535-01, 2013-52 I.R.B. 856, (November 29, 2013).

Consolidated Appropriations Act of 2022 fixes the status of the law regarding these organizations with the “standard and definitions as in effect on January 1, 2010, which are used to make such determinations . . . for purposes of determining status under § 501(c)(4) of such Code of organizations created on, before, or after” the Act.⁴⁰

ii. *Business leagues*

Business leagues include “[b]usiness leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues.”⁴¹ A business league must promote a common business interest and direct its activities towards the improvement of business conditions in one or more lines of business as distinguished from the performance of particular services for individual persons.⁴² These organizations broadly support various industries or professions through education, advertising, networking, lobbying.⁴³ Similarly to social welfare organizations, a business league is prohibited from allowing its earnings to inure to a private shareholder or individual. Though the term is not expressly used in the Treasury Regulations or the Code, it is understood that a business league must primarily operate for its exempt purpose.⁴⁴

As with social welfare organizations, lobbying is a permissible purpose of a business league.⁴⁵ Political campaign intervention does not further a business league purpose.⁴⁶ Thus, business leagues can do unlimited lobbying, assuming it furthers the organization’s purpose, and can under tax law intervene in a political campaign if that is not the business league’s primary purpose.⁴⁷

d. Information Reporting Requirements

To be recognized as exempt from tax as a charitable organization most entities must file a Form 1023.⁴⁸ The IRS recently adopted a Form 1023EZ too. This allows any organization that expects to normally earn revenue of \$50,000 or less per year to file a very simple online form with very little information about the organization.⁴⁹ The IRS adopted this form to manage the large backlog of applications that it historically was unable to keep up with based on the staff it had available. The adoption of the form has

⁴⁰ H.R. 2471, Div E, Title I, sec. 123 (2022)

<https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR2471SA-RCP-117-35.pdf>.

⁴¹ 26 U.S.C. 501(c)(6).

⁴² Treas. Reg. § 1.501(c)(6)–1.

⁴³ For a detailed discussion of the activities and types of business leagues, see Philip Hackney, *Taxing the Unheavenly Chorus: Why Section 501(c)(6) Trade Associations are Undeserving of Tax Exemption*, 92 DEN. U. L. REV. 265 (2015).

⁴⁴ See, e.g., *American Auto Ass’n v. Comm’r*, 19 T.C. 1146, 1159 (1953) (“petitioner was *primarily* a service organization. Its Principal activities, as disclosed by our findings of fact, consisted of performing particular services, and securing benefits of a commercial nature for its members”) (emphasis added).

⁴⁵ Rev. Rul. 61–177, 1961–2 C.B. 117.

⁴⁶ See I.R.S. Gen. Couns. Mem. 34,233 (Dec. 3, 1969).

⁴⁷ Inspector Gen. for Tax Admin., *Review of the Processing of Referrals Alleging Impermissible Political Activity by Tax-Exempt Organizations*, Ref. Num. 2019-10-006, 3 (Oct. 4, 2018).

⁴⁸ 26 U.S.C. § 508; I.R.S. Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code (2017) <https://www.irs.gov/pub/irs-pdf/f1023.pdf>.

⁴⁹ I.R.S., Instructions for Form 1023EZ (01/2023) <https://www.irs.gov/instructions/i1023ez>.

subjected the IRS to intense critique, including from the Taxpayer Advocate, because of a significant concern that the system is subject to much fraud.⁵⁰ Non-charitable organizations mostly file a Form 1024 if they want to be recognized as exempt from tax.⁵¹ After legislation in 2015, any organization that intends to operate as a social welfare organization must provide notice to the IRS of its intention within 60 days of its formation.⁵² The organization files a Form 8976 to meet this notice requirement.

Most organizations exempt from income tax under § 501(a) of the Code must file an annual information return “stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the internal revenue laws.”⁵³ The Form 990, the annual information return of tax-exempt organizations, both serves a means of ensuring the organization complies with its tax status and provides the public information to hold these organizations publicly accountable.⁵⁴

The Form 990 is generally available to the public.⁵⁵ The public disclosure of the returns arguably brings “some measure of organizational accountability to various constituencies, including current and prospective donors, organization employees and patrons, other exempt entities, and the citizenry at large.”⁵⁶ The Joint Committee on Taxation has suggested “[d]isclosure of information regarding tax-exempt organizations also allows the public to determine whether the organizations should be supported - either through continued tax benefits and contributions of donors - and whether changes in the laws regarding such organizations are needed.”⁵⁷ The Independent Sector suggests the unique role of nonprofits in our society as *voluntary organizations* requires more public disclosure.⁵⁸

Until recently, most exempt organizations were required to disclose to the IRS, but not the public, the substantial donors to the organization during the taxable year.⁵⁹ Though the Treasury Department and IRS long required exempt organizations to disclose substantial donor names and addresses to the IRS alone, not publicly, in 2020, the Treasury Department and the IRS finalized regulations ending that requirement for

⁵⁰ TAXPAYER ADVOC. SERV., FISCAL YEAR 2017 OBJECTIVES REPORT TO CONGRESS 181 (2017).

⁵¹ I.R.S., Form 1024, Application for Recognition of Exemption Under Section 501(a) or Section 521 of the Internal Revenue Code, <https://www.irs.gov/forms-pubs/about-form-1024>.

⁵² 26 U.S.C. § 506.

⁵³ 26 U.S.C. § 6033.

⁵⁴ I.R.S., FORM 990, RETURN OF EXEMPT ORGANIZATION EXEMPT FROM INCOME TAX <https://www.irs.gov/pub/irs-pdf/f990.pdf>.

⁵⁵ 26 U.S.C. § 6104(b).

⁵⁶ Caroline K. Craig, *The Internet Brings ‘Cyber-Accountability’ to the Nonprofit Sector*, 13 J. TAX’N EX. ORG. 82 (2001).

⁵⁷ Staff of the Joint Comm. on Taxation, 106th Cong., STUDY OF DISCLOSURE PROVISIONS RELATING TO TAX-EXEMPT ORGANIZATIONS, at 5 (2000); see also Lloyd Hitoshi Mayer, *The Promises and Perils of Using Big Data to Regulate Nonprofits*, 94 WASH. L. REV. 1281, 1297-98 (2019).

⁵⁸ Evelyn Brody, *Sunshine and Shadows on Charity Governance: Public Disclosure as a Regulatory Tool*, 12 FLA. TAX REV. 183, 212 (2012).

⁵⁹ I.R.S., FORM 990, RETURN OF ORGANIZATION EXEMPT FROM TAX, <https://www.irs.gov/pub/irs-pdf/f990.pdf>.

all but charitable organizations.⁶⁰ This was a mistake as to dark money organizations at least. The IRS needs the information regarding substantial donors from not just charitable organizations, but also the dark money organizations to protect the revenue and as a means to deter tax avoidance.⁶¹ The ending of the collection of that information also likely impacts the integrity of the campaign finance system. Knowledge of donors to nonprofits is relevant to the enforcement of that law. For instance, the system prohibits foreign actors from contributing to campaigns for public office or making expenditures for political campaigns.⁶²

Requiring disclosure to the IRS acts as a deterrent to tax avoidance as well.⁶³ The Treasury Department notes that tax noncompliance is highest where there is no third-party reporting.⁶⁴ The Treasury Department highlights the need to “strengthen reporting requirements,”⁶⁵ and notes that enforcement activity itself is not a driver of reducing the tax gap.⁶⁶ In its 2001 study, the IRS found that about 45% of compliance has to do with information reporting.⁶⁷ Given the significant lack of enforcement of the tax laws from the IRS as discussed below in Part II, ending this requirement to disclose substantial donors becomes even more damaging. After the Supreme Court found California’s requirement that nonprofits provide their Schedule B with donor names and addresses to be unconstitutional under the First Amendment,⁶⁸ the Buckeye Institute has a challenge to this same collection of donor information for charitable organizations.⁶⁹

II. IRS Enforcement

What resources does the IRS have to ensure compliance with the law? The trend over the past ten years was not good. Congress did not provide the agency the resources, human or capital, needed to enforce the tax law.⁷⁰ That might have changed in part from the Inflation Reduction Act passed in 2022 (IRA), which dedicated \$80 billion to the IRS over ten years.⁷¹ However, that amount has been cut to \$58 million, and there are

⁶⁰ Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31959 (May 28, 2020) (codified at 26 CFR 56) T.D. 9898.

⁶¹ See *Dark Money Darker*, *supra* note 1.

⁶² 52 U.S.C. §30121; 11 C.F.R. § 110.20. See Norman I. Silber, *Foreign Corruption of the Political Process through Social Welfare Organizations*, 114 NW. U. L. REV. ONLINE 104 (2019).

⁶³ *Id.* at 170-75.

⁶⁴ See OFFICE OF TAX POLICY, U.S. DEP’T OF TREASURY, A COMPREHENSIVE STRATEGY FOR REDUCING THE TAX GAP 8 (2006), available at https://www.irs.gov/pub/irs-news/comprehensive_strategy.pdf.

⁶⁵ *Id.* at 9.

⁶⁶ *Id.* at 13.

⁶⁷ See I.R.S., Tax Year 2001 Tax Gap Update 2 (2007); see also Leandra Lederman, *Essay: Reducing Information Gaps to Reduce the Tax Gap: When is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733, 1738 (2010).

⁶⁸ *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021).

⁶⁹ *Buckeye Institute v. I.R.S.* No. 2:22-cv-04297-MHW-EPD, U.S. Dist. Ct. for the Southern Dist. of OH (2023).

⁷⁰ See, e.g., Paul Keil & Jesse Eisinger, *How the IRS was Gutted*, PROPUBLICA (Dec. 11, 2018).

⁷¹ See Cong. Res. Serv., IRS-Related Funding in the Inflation Reduction Act (Oct. 20, 2022) <https://crsreports.congress.gov/product/pdf/IN/IN11977>.

many efforts in Congress to cut that allocation even more.⁷² Prior to the IRA, though the economy grew, Congress shrank the IRS budget over a decade. According to the Congressional Budget Office (“CBO”) the IRS budget fell by 20% in real (inflation adjusted) dollars between 2010 and 2018.⁷³ This resulted in a 22% decrease in employees.⁷⁴ IRS Data Books show the IRS went from over 94,000 full time equivalent (“FTEs”) employees in FY 2010 to 73,554 FTEs in FY 2019.⁷⁵ With the recently enacted IRA, those numbers are going back up; though still quite low by historical standards, in FY 2022 the IRS had 79,070 FTEs.⁷⁶ Furthermore, over the years, some of the most specialized employees in the enforcement sphere saw declines of 35% for revenue agents and 48% for revenue officers.⁷⁷ The Government Accountability Office (“GAO”) in 2014 recognized that the budget cuts at the IRS led to less enforcement in the tax-exempt sector.⁷⁸ The IRS workforce on exempt organization matters shrank about 5% from 2010 (889 FTEs) to 2013 (842 FTEs).⁷⁹ That workforce then shrank significantly to around 550 FTEs by FY 2019⁸⁰ and seems to have shrunk even more through the end of 2022.⁸¹

The main functions of the exempt organizations group are running an application system called the determinations process, and an examination program. In determinations, as annual applications have increased annual rejections from the IRS have significantly decreased.⁸² In FY 2022, the IRS reviewed over 136,000 applications for exempt status, it rejected only 86 of those applications.⁸³ Comparatively, in FY 2010, the IRS reviewed over 65,000 of such applications and rejected 517.⁸⁴ When looking at examinations, it is impossible to have a perfect figure given the way the data is reported in the IRS Data Book, but of all the returns filed and all the returns examined in 2010, which likely includes some double counting of organizations (and includes sizable employment tax returns), the IRS had about a .38% examination rate.⁸⁵ TIGTA counted the rate in 2019 at 0.13%.⁸⁶ That rate has not begun to recover.

The IRS workforce and enforcement shrank while the tax-exempt sector grew. It is difficult to get good statistics on nonprofits. There are many problems with the data

⁷² Doug Sword & Candy Stanton, *IRS Pot of Money Doubly Targeted by GOP*, TAX NOTES (Nov. 2, 2023).

⁷³ CONGRESSIONAL BUDGET OFFICE, TRENDS IN THE INTERNAL REVENUE SERVICE’S FUNDING AND ENFORCEMENT, 1 (2020).

⁷⁴ *Id.*

⁷⁵ I.R.S., DATA BOOK, 74 Table 31 (2019); I.R.S., DATA BOOK, 66 Table 29 (2010).

⁷⁶ I.R.S., DATA BOOK, 72 Table 31 (2022).

⁷⁷ *Id.*

⁷⁸ GAO, BETTER COMPLIANCE INDICATORS AND DATA, AND MORE COLLABORATION WITH STATE REGULATORS WOULD STRENGTHEN OVERSIGHT OF CHARITABLE ORGANIZATIONS, 19 (2014).

⁷⁹ *Id.*

⁸⁰ IRS, TEGE, FISCAL YEAR 2019 ACCOMPLISHMENTS, Pub. 5329 (2020).

⁸¹ IRS, TEGE, FISCAL YEAR 2022 ACCOMPLISHMENTS, Pub. 5329, 2 (2022) (chart reflects less than 550 FTEs in Exempt Organizations).

⁸² Philip Hackney, *The Real IRS Scandal has more to do with Budget Cuts than Bias*, THE CONVERSATION (April 15, 2018).

⁸³ IRS, DATA BOOK, 28, Table 12 (2022).

⁸⁴ IRS, DATA BOOK, 56, Table 24 (2010).

⁸⁵ IRS, DATA BOOK, 4, Table 2, 33, Table 13 (2010).

⁸⁶ Inspector Gen. for Tax Admin., *Obstacles Exist in Detecting Noncompliance of Tax-Exempt Organizations*, Ref. No. 2921-10-013, 6 (2021).

from the IRS including the fact that not all organizations file returns⁸⁷ or do not file returns that provide any significant data,⁸⁸ and not all organizations file returns accurately. Nevertheless, a look at IRS data from Forms 990 suggests assets and revenue have increased over the decade.⁸⁹ In 2010, with a little over 186,000 charitable organization Form 990s filed, the charitable sector held over \$2.9 trillion in assets and almost \$1.6 trillion in revenue.⁹⁰ In comparison, in 2017 over 217,000 charitable organizations filed Form 990s reporting over \$4.3 trillion in assets and almost \$2.3 trillion in revenue.⁹¹ In 2019, they reported \$4.8 trillion in assets and \$2.4 trillion in revenue.⁹² Using that same data, again from reporting on Forms 990, for exempt organizations including 501(c)(4)-(9) in 2010 there were approximately \$547 billion in assets and \$360 billion in revenue.⁹³ In 2017, those amounts grew to approximately \$767 billion in assets and \$387 billion in revenue.⁹⁴

Efforts, such as those recommended by GAO, for the IRS to make better use of data available is the only way the IRS in this current environment can make headway against tax abuse. Robust information reporting thus needs to be the norm.

III. Conclusion

Thank you for inviting me to speak about the laws and enforcement governing the political activities of tax-exempt organizations. The tax laws are built well to prohibit the deduction of campaign expenditures and to promote a strong nonprofit sector. But still there are problems with that architecture. For instance, Congress could consider requiring donors to recognize gain on the contribution of appreciated assets to a dark money organization. Additionally, Congress should permit the Treasury Department and the IRS to issue regulations about boundaries of political campaign activity for social welfare organizations. That said, the many years of a reduced IRS budget, the lack of enforcement action by the IRS, and the failure to collect substantial donor information from dark money organizations is problematic. There is good reason to believe that taxpayers are able to take advantage, and indeed are taking advantage, of this system to intervene in politics in ways that violate the tax law. These factors undermine confidence in the tax system, the equal enforcement of the law, and our ability to operate a fair democratic system. Therefore, I urge Congress to maintain the IRA funding in its current state and to generally increase the IRS budget to a level that allows the IRS the ability to properly enforce the tax laws. But institutionally, I believe the IRS needs to be pushed and given support to enforce these laws that help work toward a fairer democratic order.

⁸⁷ After Congress added 26 U.S.C. § 6033(h) to the Code in 2006, and the IRS implemented what it calls the Form 990-N (e-Postcard), churches are likely far and away the largest group of charities that file no IRS return.

⁸⁸ Form 990-N provides little in the way of information regarding the organization.

⁸⁹ IRS, SOI Tax Stats—Charities & Other Tax-Exempt Organization Tax Statistics, Form 990—Balance Sheet and Income Statement Items.

⁹⁰ *Id.* 2010.

⁹¹ *Id.* 2017.

⁹² *Id.* 2019.

⁹³ *Id.*

⁹⁴ *Id.*