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Reviving the "Enemies List" Using IRS Form 990, Schedule B

Introduction:

One of the things that forced President Richard Nixon out of office in 1974 was using the Internal Revenue Service ("IRS") against his "enemies list."[1] Larry Gibbs, who helped draft the legislative response to the "enemies list" and later was IRS Commissioner, recently wrote:[2]

> To prevent similar abuses in the future, I subsequently helped draft the revisions to [Internal Revenue Code] Section 6103 that were enacted in 1976. In drafting these revisions, we were determined that no politician or anyone else should be able to circumvent the protections provided by Section 6103 to cause the IRS to release the content of or information about individuals' tax returns for an improper purpose. …
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> The potential damage to our tax system of upholding any request and disclosure that do not meet the foregoing tests is significant. The public generally does not trust either politicians or bureaucrats. Taxpayers are likely to decide that if the IRS cannot protect the privacy and confidentiality of even the president's returns and tax information, no one else's returns and tax information can be protected. In turn, taxpayers predictably are likely to be less willing than they previously have been to provide information requested by the IRS in tax returns.
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> As a result, I believe it will be more difficult for the IRS to identify the best returns to audit, and the audit process itself is likely to become less efficient and effective as taxpayers are less willing to be forthcoming in tax information they provide in response to IRS audit requests.

The legislature, not executive branch officials, should balance the interests involved:

> The deliberate judgment of the legislature on the balancing of the societal interests in detecting, preventing, and punishing criminal activity, in safeguarding individuals' interests in privacy, and in fostering voluntary

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[1] Impeachment Of Richard M. Nixon, Articles of Impeachment, II(2): "He has, acting personally and through his subordinates and agents, endeavored to obtain from the Internal Revenue Service, in Violation of the constitutional rights of citizens; confidential information contained in income tax returns for purposes not authorized by law, and to cause, in violation of the constitutional rights of citizens, income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner." H. Rept. 93-1305, at 3.

[2] Lawrence Gibbs, "INSIGHT: Let's Not Forget There's a Reason for Keeping Tax Returns Private," *Daily Tax Report*, BLOOMBERG TAX, Aug. 14, 2019, https://news.bloombergtax.com/daily-tax-report/insight-lets-not-forget-theres-a-reason-for-keeping-tax-returns-private.

> compliance with revenue reporting requirements, seems to us a legitimate if not compelling datum in the formation of federal common law in this area.

In Re Hampers, 651 F.2d 19, 23 (1st Cir. 1981).

In 1992, then-Chief Judge of the U.S. Court of Appeals for the First Circuit (and now Supreme Court Justice) Stephen Breyer similarly described the varied interests protected by the post-Watergate federal tax privacy provisions:

> Congress has decided that, with respect to tax returns, confidentiality, not sunlight, is the proper aim. Tax returns contain highly personal information that many taxpayers might wish not to have broadcast. Moreover, without clear taxpayer understanding that the government takes the strongest precautions to keep tax information confidential, taxpayers' confidence in the federal tax system might erode, with harmful consequences for a tax system that depends heavily on voluntary compliance. *Church of Scientology v. IRS*, 792 F.2d 153, 158-59 (D.C. Cir. 1986) (en banc), *aff'd* 484 U.S. 9 (1987). Thus, the Senate Finance Committee, recommending the tax statute here at issue, pointed both to the "citizen's right to privacy" and to the "related impact of the disclosure upon the continuation of compliance with our country's tax system" as reasons for more tightly restricting disclosure. S.Rep. No. 938, 94th Cong., 2d Sess., pt. 1, 318 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3747.

Aronson v. I.R.S., 973 F.2d 962, 966 (1st Cir. 1992).

In most cases, the interests of the federal tax system are aligned with the "citizen's right to privacy." That is the necessary result of the reliance on voluntary compliance to close the persistent "tax gap" between the tax properly due and the amount the IRS receives.[3]

But what happens when a State uses federal tax forms in a way that federal law would not permit?[4] Most taxpayers will likely not distinguish between a State government revealing information on a federal tax form and a federal official doing so, even though the effect on privacy in an Internet era would likely be the same. And if the information involves sensitive personal information, such as contributions to controversial organizations, the revelation or even collection of the

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[3] J.T. Manhire, *What Does Voluntary Compliance Mean? A Government Perspective*, 164 U. PENN. L. REV. ONLINE 11 (2015). The United States' 97% voluntary compliance rate is the highest in the world. *Id.*, at 15 n. 24.

[4] *See, e.g., Gamble v. United States*, 139 S. Ct. 1960, 1979 (2019) (discussing "silver-platter doctrine" of sharing information between dual sovereigns); *Elkins v. United States*, 364 U.S. 206, 215 (1960) ("it would seem logically impossible to justify a policy that would bar from a federal trial what state officers had obtained in violation of a federal statute, yet would admit that which they had seized in violation of the Constitution itself.").

information would likely violate the First Amendment rights of individuals as well as the needs of the federal tax system.

Background:

On January 8, 2021, the Supreme Court of the United States decided to review two cases challenging the California Attorney General's ("the Attorney General") requirement that any charity seeking to operate or raise funds in California must file a copy of Schedule B[5] ("Schedule B") to the federal Form 990 Annual Information Return filed by tax-exempt organizations,[6] a tax form listing major donors to the organization. The cases, *Americans for Prosperity Foundation v. Becerra*, No. 19-251, and *Thomas More Law Center v. Becerra*, No. 19-255, were consolidated and oral arguments may be held this spring or fall.

Schedule B is one of the simplest tax forms: a list of names, addresses and other details which could identify those who have given large amounts to charities. Schedule B's content makes it one of the most highly-protected federal tax forms because donor information, "if in the hands of the IRS at all, should be categorically sheltered from disclosure."[7] The Attorney General does not comply with federal data security requirements and usage restrictions, and so can't get Schedule B from the IRS; he must ask for it directly from the charity.

The charities are challenging the Attorney General's demands as violating the First Amendment's freedom of speech and association. They have shown that the Attorney General's office has a long and sordid history of leaking tax information on the Internet, endangering their donors' safety and livelihoods.

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[5] For an example of a completed Schedule B form, *see* the 2016 IRS Form 990 Annual Information Return from the Christopher Street West Foundation (also known as LA Pride), which is publicly available on the charity's website. The Schedule B form is available at pages 27-38.

[6] 26 U.S.C. ("Internal Revenue Code" or "IRC") § 6033 requires most tax-exempt organizations to file annual information returns with the IRS, generally known as "Form 990." This section applies generally to filing information with the IRS, but also affects information-sharing agreements with state governments. Otherwise, the IRS could, by agreeing with state governments to ignore statutory and regulatory requirements, evade the privacy interests protected by IRC § 6103 and other sections – raising complex and troubling constitutional questions about, among other things, a "silver-platter" handoff between dual sovereigns. *See*, n. 4 *supra*.

[7] *Landmark Legal Foundation v. IRS.,* 267 F.3d 1132, 1135 (D.C. Cir. 2001) ("Under the latter reading, Congress would be understood to have thought that the specifically identified information, if in the hands of the IRS at all, should be categorically sheltered from disclosure."); *Church of Scientology v. IRS* ("*Scientology*"), 484 U.S. 9, 15 (1987) ("Subsections 6103 (f)(1), (2), and (4), for example, allow the release of returns and return information to congressional committees, but distinguish between return information that identifies a taxpayer and return information that does not.").

The Attorney General claims to need the Schedule B to enforce California's laws against fraud and abuse of charitable status because it would be more "efficient." But the Attorney General did not mention to the lower courts, and the parties did not raise, a December 9, 2019, letter that he and 19 other Attorneys General sent to the IRS commenting on proposed regulations on Schedule B.[8] The Attorneys General Letter indicated that the Attorney General actually had knowledge of, and intentions to continue, use of Schedule B for purposes far different from the limited charitable law enforcement he told the courts was his sole purpose in obtaining the Schedule B forms.

Most prominent among those other purposes was to use Schedule B to fight against "dark money" organizations, which, by law, are not charities:[9] "corporations, wealthy individuals, and special interests seek to influence politics without leaving fingerprints. … The revised donor reporting requirements that the IRS now proposes are certain to make federal and state review of this spending far more difficult if not impossible."[10]

In other words, the Attorneys General of several states wanted to use Schedule B as a new kind of "enemies list," targeting those who, entirely lawfully, want to enjoy the confidentiality promised under federal tax law. The Supreme Court is unlikely to review federal confidentiality laws in this challenge to a State Attorney General's actions. Yet, the curious history of Schedule B may form part of the context to analyze the First Amendment issues being discussed.

History of Schedule B:

A. Schedule B Was Created to Protect Donor Information Against Unauthorized Access ("UNAX"), But It Immediately Failed:

In 1976, in reaction to the Nixon-era "enemies list" controversy,[11] Congress created a "general rule" to protect taxpayers' privacy: unauthorized access to identifying information ("UNAX" in tax parlance[12]) is prohibited to federal officials,

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[8] Gurbir S. Grewal and Letitia James, Letter to Steven T Mnuchin and Charles P. Rettig, RE: Notice of Proposed Rulemaking (RIN: 1545-BN28), Dec. 9, 2019 ("Attorneys General Letter").

[9] *Id.*, at 2 and n. 2. "Dark money" is a pejorative description of tax-exempt organizations which are not required by law to disclose their donors. *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 489 n. 27 (7th Cir. 2012).

[10] Attorneys General Letter, at 2 n. 2.

[11] *Tax Analysts v. IRS*, 117 F.3d 607, 611 (D.C. Cir. 1997); *Lake v. Rubin*, 162 F.3d 113, 115 (D.C. Cir. 1998).

[12] Treasury Inspector General for Tax Administration, Dept. of Treasury, *Unauthorized Access/Inspection Investigations*, Chapter 400 – Investigations, Jan. 1, 2020, § 290.1.2, Definitions: "A UNAX is an access or inspection of return or return information that is not authorized by Title 26."

State employees and any "other person … who has or had access" to the information. IRC § 6103(a)(2), (3).[13] One of the "core purposes" of these protections was "taxpayer privacy,"[14] and they are to be interpreted strictly and in favor of taxpayer privacy.[15]

In most cases, these provisions apply only to tax information disclosed by the IRS. *Stokwitz v. U.S.*, 831 F.2d 893, 894-97 (9th Cir. 1987). Under IRC § 6103(c), taxpayers can voluntarily disclose their own tax documents in most cases.[16]

But, as discussed further in Section E below, the specific language of the tax privacy statutes is much broader for disclosure of names, addresses and other identifying information for donors to charities. Federal tax privacy laws are much more protective of donor identification than other tax information.[17]

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[13] The relevant portions of IRC § 6103 read:

(a) General rule

Returns and return information shall be confidential, and except as authorized by this title—

…

(2) no officer or employee of any State, … who has or had access to returns or return information under this section or section 6104(c), and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (c) [taxpayer consent or request], …,

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

[14] *Tax Analysts*, 117 F.3d at 615.

[15] *Scientology*, 484 U.S. at 16 ("One of the major purposes in revising § 6103 was to tighten the restrictions on the use of return information by entities other than" the IRS), *citing* S.Rep. No. 94-938, p. 318 (1976) ("[R]eturns and return information should generally be treated as confidential, and not subject to disclosure, except in those limited situations delineated in the newly amended Section 6103"); Gibbs ("No politician or other government personnel should ever be able to request from the IRS and publicly discuss or disclose anything in or about an individual taxpayer's return or other tax information unless such request and disclosure have an unequivocally proper purpose and otherwise are clearly authorized by law.").

[16] Under IRC § 6103(c), a taxpayer may request or consent to the IRS disclosing its own tax information to any other person. There are several restrictions on this power, and "Persons designated by the taxpayer under this subsection to receive return information shall not use the information for any purpose other than the express purpose for which consent was granted and shall not disclose return information to any other person without the express permission of, or request by, the taxpayer."

[17] "Subsections 6103 (f)(1), (2), and (4), for example, allow the release of returns and return information to congressional committees, but distinguish between return information that identifies a taxpayer and return information that does not." *Scientology*, 484 U.S. at 15 (emphasis added).

This being tax law, there is a relevant exception to the general privacy rule. The first sentence of IRC § 6104(b)[18] provides that a tax-exempt organization's Form 990 annual return is to be made public. A charity's Form 990 includes "the total of the contributions and gifts received by it during the year, and the names and addresses of all substantial contributors."[19] Since 2000, as discussed below, this substantial contributor information has been reported on Schedule B.

But this being tax law, there are two relevant exceptions to the exception. One removes the power of Secretary of the Treasury to disclose the name or address of a contributor to a public charity,[20] and the other forbids public inspection of the same information.[21]

These provisions fulfill the "major purpose" of the 1976 statute to limit the use of return information by entities other than the IRS.[22] They also posed a dilemma for the IRS: could the protected information be collected without UNAX violations?

Prior to the introduction of Schedule B in 2000, Form 990 filers were required to include a non-disclosable list of large donors, but the Instructions did not specify a format. In 2000, after a number of UNAX releases of contributor information, the IRS determined that at least some UNAX disclosures were caused by its employees failing to recognize that these informal schedules of donors' information were protected material. The IRS decided to help its employees protect the donors'

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[18] The relevant portion of IRS § 6104(b) reads:

(b) Inspection of annual returns

The information required to be furnished by sections 6033, … together with the names and addresses of such organizations and trusts, shall be made available to the public at such times and in such places as the Secretary may prescribe.

[19] IRC § 6033(b)(5). *See,* n. 5, *supra*, for an example 990.

[20] The second sentence of IRC § 6104(b) says: "Nothing in this subsection shall authorize the Secretary to disclose the name or address of any contributor to any organization or trust (other than a private foundation, as defined in section 509(a) or a political organization exempt from taxation under section 527), which is required to furnish such information." Both private foundations and political organizations are controlled by small groups of insiders, as opposed to "public" charities, which are required to be financially supported by a more diverse group of donors. Congress expected such tight control warranted more public disclosure as part of the overall IRC § 6104 disclosure scheme, but did not want the same level of disclosure of information about public charities which were neither political organizations nor private foundations.

[21] IRC § 6104(d)(1) provides for public inspection of Form 990's, but IRC § 6104(d)(3)(A) says: "Nondisclosure of contributors, etc. In the case of an organization which is not [a private foundation or political organization], paragraph (1) shall not require the disclosure of the name or address of any contributor to the organization."

[22] *Scientology*, 484 U.S. at 16.

information by creating a standard format, which was Schedule B.[23] The original version of Schedule B included, in prominent large-font italicized text at the top of the first page, the legend: "**Note:** This form is generally not open to public inspection except for section 527 [political] organizations."

Schedule B immediately failed. In 2002, Greg Colvin and Marcus Owens,[24] well-known progressive tax-exempt organization lawyers, noted the same Schedule B UNAX disclosure problems identified in the current cases:[25]

> We have already been contacted by individuals involved in "opposition research" who are using the Schedule B disclosures to piece together profiles of the major donors to charitable organizations whose ideologies or causes they wish to disrupt and disparage. This growing industry involves the use of expanding Internet databases, pretext telephone calls from investigative reporters, and information matching techniques that surpass the capacity of the IRS itself.
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> In essence, we suspect that the IRS has unwittingly permitted itself to become an accomplice to a massive invasion of taxpayer privacy through the release of exempt organization donor information.

Steven T. Miller, then Director, IRS Exempt Organizations Division, responded to these concerns in an October 28, 2002 letter:[26] "We are taking several actions to address the issue of contributor privacy for IRC section 501(c) organizations." Seventeen years later, the IRS internal procedures manual, known as the Internal Revenue Manual, incorporated the UNAX disclosure prevention protections promised in the October 2002 IRS letter as an amended Section 11.3.9.12.

Thus, Schedule B was created by the IRS in 2000 to help IRS employees easily identify confidential donor information which Congress said must not be disclosed. It was not intended to be used for any other purpose, but "unwittingly" became a source of UNAX leaks, as rapidly-improving technology expanded the capabilities and reach of "opposition research."

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[23] As explained in an IRS training manual: "Schedule B is moving toward a situation where all of the non-disclosable contribution information required by Form 990 can be filed on Schedule B and easily removed before the return is made public. This is still a work in process." Cheryl Chasin, Debra Kawecki and David Jones, Internal Revenue Service, "G. Form 990," *Exempt Organizations Continuing Professional Education Technical Instruction Program for FY2002*, at 232.

[24] Owens was Director of the Tax Exempt Division at the IRS for ten years.

[25] Greg Colvin & Marcus Owens, "IRS Form 990 Donor Disclosure: Current Posture, Background, Options," 35 EXEMPT ORGANIZATIONS TAX REV., No. 3, March 2002, 408.

[26] Letter from Steven T. Miller to Gregory Colvin, Oct. 28, 2002.

B. Comments on the May 28, 2020, Final Amendments to the Schedule B Regulations Suggest that State Attorneys General Might Engage in UNAX Violations:

Meanwhile, the problem of UNAX violations continued, but now related to access to Schedule B itself. A December 9, 2019, letter to the IRS from the California Attorney General and nineteen other Attorneys General contained assertions that suggest that Schedule B could be a continuing source of additional UNAX problems in the future.[27] In other words, the dilemma facing the IRS in 2000 that sparked the creation of Schedule B was not only unresolved, but the Schedule B itself could be worsening the problem.

In the spring of 2016, the IRS began to review the regulations relating to Schedule B reporting.[28] The IRS decided that it could not collect the contributor information without an unacceptable level of UNAX, and proposed that it no longer collect that information from most exempt organizations: "The proposed regulations will eliminate for most tax-exempt organizations other than private foundations, supporting organizations, and certain political organizations the current reporting requirements regarding contributions received and their contributors."[29]

The IRS then issued Rev. Proc. 2018-38.[30] "The requirement to report such information increases compliance costs for some private parties, consumes IRS resources in connection with the redaction of such information, and poses a risk of inadvertent disclosure of information that is not open to public inspection."[31]

The Governor of Montana then sued to block Rev. Proc. 2018-38 because "that information concerning the identity of exempt organizations' contributors remains critical for enforcing limits on political activity."[32] The U.S. District Court for

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[27] Gurbir S. Grewal and Letitia James, Letter to Steven T Mnuchin and Charles P. Rettig, RE: Notice of Proposed Rulemaking (RIN: 1545-BN28), Dec. 9, 2019 ("Attorneys General Letter").

[28] Dept. of Treasury, Internal Revenue Service, *Unified Agenda,* "Guidance Under Section 6033 Regarding the Reporting of Contributors Names and Addresses," RIN 1545-BN28, Spring 2016.

[29] *Id.* The proposed regulatory changes did not cover IRC § 501(c)(3) charities because IRC § 6033(b)(5) specifically requires reporting of contributor information from IRC § 501(c)(3) charities. Prior to May 28, 2020, the IRS, by regulation, had extended that statutory requirement to other tax-exempt organizations and so could remove it by regulation; the IRS could not discard the reporting requirement from charities without additional legislation. In 2016, the Obama Administration opposed requesting legislative changes for Schedule B. Internal Revenue Service, Tax-Exempt and Government Entities Division, *Disclosure Risk on Form 990, Schedule B and Rev. Proc. 2018-38,* August 2018, ("IRS Disclosure Risk Briefing"), Slide 6, *reprinted in*: Attorneys General Letter, at 25.

[30] Internal Revenue Service, "Returns by exempt organizations and returns by certain nonexempt organizations," Revenue Procedure 2018-38, July 16, 2018.

[31] *Id.*, at 3.

[32] *Bullock v. IRS*, 401 F.Supp.3d 1144, 1159 (D. Mont., 2019).

Montana, agreeing with the Governor, held that the promulgation of Rev. Proc. 2018-38 violated the Administrative Procedures Act.[33]

The court did not explain why Schedule B is "critical" to enforce state limits on political activity, as opposed to Schedule C to the Form 990, which is specifically designed for that purpose. Under federal tax privacy laws, Schedule B cannot be used for anything except tax administration and certain specific uses listed as exceptions under IRC § 6103. Campaign finance enforcement is not one of the listed exceptions.

Rather than appeal, the IRS began another rulemaking procedure.[34] More than 8,000 comments were received, the overwhelming majority in favor of donor privacy.[35]

On May 28, 2020, the IRS finalized amendments to the regulations governing Schedule B.[36] "By removing the general requirement to report names and addresses of substantial contributors to tax-exempt organizations not described in section 501(c)(3), the final regulations further reduce the risk of inadvertent disclosure of names and addresses of contributors for such organizations."[37]

The IRS had good reason for its concern. The December 9, 2019, Attorneys General Letter, from the Attorneys General of 19 States (including California) and

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[33] *Id.*

[34] Internal Revenue Service, *Notice of Proposed Rulemaking*, "Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations," 84 FED.REG. 47447 (September 10, 2019).

[35] The Public Policy Legal Institute filed a lengthy set of comments on these proposed regulations, including requesting the IRS to remind those who obtained Schedule B forms that they were not to be used for, among other things, campaign finance law enforcement. Barnaby Zall, Public Policy Legal Institute, "Comments of the Public Policy Legal Institute On "Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations," REG-102508-16, 84 FED. REG. 47447 (Sept. 10, 2019)," December 6, 2019. "Protect Donors Against the Misuse of Compelled Disclosures: The Explanation of the proposed update should also stress that the ONLY intended purpose of Schedule B is the administration of tax laws, not campaign finance proposals, consumer protection, or any other non-tax-related laws." *Id.*, at 1. "There is a widespread, and erroneous, impression that disclosures of taxpayers' compelled tax-related speech are somehow intended BY THE SERVICE to be used in a variety of other contexts; the Service itself has contributed to this unwarranted expansion of the use of compelled speech." *Id.*, at 17.

[36] Internal Revenue Service, Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations ("May 2020 Schedule B Regulations"), 85 FED.REG. 31959 (May 28, 2020).

[37] May 2020 Schedule B Regulations,85 FED.REG. at 31963.

the District of Columbia[38] was among the more than 8,000 comments on the September 2019 Schedule B Regulations NPRM. The Attorneys General described what they erroneously thought were permissible uses of the information on Schedule B: "access to federally-filed information also equips state charities regulators with a powerful tool to enforce state non-profit and consumer protection laws"[39] and using Schedule B to fight alleged "dark money" election campaign expenditures.[40] IRS-disclosed information actually is to be used only for "tax administration" and a few other statutorily-designated purposes, like child support enforcement programs.

Thus, the Attorneys General Letter, in conjunction with the *Bullock* decision crediting disclosure of Schedule B information for "enforcing limits on political activity," suggests that at least some State Attorneys General contemplated using Schedule B information for non-tax-related purposes: "Because the donor information presently captured in an exempt entity's Schedule B is not currently available from any other source, the current Schedule B reporting requirements enable state regulators to obtain unique information already collected for disclosure to the IRS at minimal administrative cost to the reporting entities."[41]

In response to the Attorneys General Letter, the IRS reiterated that the described uses of Schedule B information would be UNAX violations:

> The Treasury Department and the IRS reiterate that the [Internal Revenue] Code limits the purposes for which states may use returns or return information obtained from the IRS. When states receive returns or return information under section 6103(d), the use of that information is limited to the administration of state tax laws. When states receive returns or return information under section 6104(c), the use of that information is limited by statute to administering state laws relating to the solicitation or administration of charitable funds or charitable assets of such organizations. Use of returns or return information received from the IRS under these sections for purposes other than those listed above (for example, for the enforcement of campaign finance laws or consumer protection laws) is not consistent with states' authorized use under sections 6103(d) and 6104(c).

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[38] The Attorneys General of New Jersey, New York, California, Connecticut, Colorado, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, Oregon, Pennsylvania, Rhode Island and Virginia. *Id.*

[39] Attorneys General Letter, at 3 (emphasis added).

[40] *Id.*, at 2 and n. 2.

[41] Attorneys General Letter, at 3. *But see, Wayte v. United States*, 470 U.S. 598, 613 n. 14 (1985) (because of IRC tax privacy provisions, Selective Service System "could gain no useful access to Internal Revenue Service records—the only other recognized federal source of generally accurate information.").

> While some states may use name and address information for those authorized purposes, the divergent comments from state attorneys general indicate that the desire to obtain such information, and the purpose for doing so, may differ from state to state.

May 2020 Schedule B Regulations, 85 FED. REG. at 31965 (emphasis added).

Thus, the Attorney General's claim to need Schedule B to enforce charitable laws is only part of his motivation for demanding the form. He and others seem likely to use Schedule B for other purposes.

C. Schedule B Is A Poor Vehicle For the Attorney General's Desired "Efficiency" and "Effectiveness" in Regulating Charities:

The Tax Exempt/Government Entities Division of the IRS does not use Schedule B for the type of mass "up-front" screening desired by the Attorney General or any similar screening program: "IRS does not systematically use Schedule B; the lack of a Taxpayer Identification Number makes the data unsuitable for electronic matching."[42] Neither does the IRS Small Business/Self-Employed Division. *Id.* Neither do 47 States and the District of Columbia.[43]

In fact, the IRS has been trying to get rid of Schedule B since 2016. After the May 2020 Schedule B Regulations, the IRS only requires Schedule B where the tax statutes say it must.[44]

In the May 2020 Schedule B Regulations, the IRS was clear that Schedule B is not worth the expense and resources it must use to deal with the troublesome form:

> For the specific purpose of evaluating possible private benefit or inurement or other potential issues relating to qualification for exemption, the IRS can obtain sufficient information from other elements of the Form 990 or Form 990–EZ and can obtain the names and addresses of substantial contributors, along with other information, upon examination, as needed. In light of the inefficiencies involved in collecting, maintaining, and redacting this information if it were reported annually, the Treasury Department and the IRS do not agree with comments suggesting that requiring affected tax-exempt organizations to provide name and address information of substantial

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[42] IRS Disclosure Risk Briefing, Slide 7, *reprinted in*: Attorneys General Letter, at 26.

[43] Brief for the States of Arizona, Alabama, Arkansas, Georgia, Indiana, Kansas, Louisiana, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia, and Governor Phil Bryant of the State of Mississippi, as Amici Curiae in Support of Petitioner, in No. 19-251, at 4.

[44] *See*, Schedule B, General Instructions (after the form), "Certain organizations not required to report contributor names and addresses," at 5.

contributors upon examination is less efficient for the IRS and affected tax-exempt organizations."[45]

For example, the Attorney General seeks information to enforce federal prohibitions against "private inurement" and "private benefit."[46] These prohibitions are a cornerstone of charitable status, and since January 2001, IRC § 4958 has prohibited such "excess benefit transactions" with "substantial influence persons," including all persons who would be listed on Schedule B.[47] Schedule B, however, likely has no information that would, on its face or in conjunction with other documents, demonstrate either of those violations. More importantly, violations of IRC § 4958 must be reported on Part IV, Line 25 and Schedule L, Part I, with supplemental details not appearing on Schedule B.[48]

Loans or receipts from substantial contributors or other insiders must similarly be reported on Part IV, Line 26 and Schedule L, Part II, with details not reported on Schedule B.[49] Grants or similar payments to or from substantial contributors or insiders must be reported on Part IV, Line 27 and Schedule L, Part III, but not reported on Schedule B.[50] Business relationships or transactions with substantial contributors or insiders must be reported on Part IV, Line 28 and Schedule L, Part IV, but not necessarily on Schedule B.[51]

Similarly, the Attorney General contends that Schedule B is needed to identify overvalued non-cash contributions: "having significant donor information allows the Attorney General to determine when an organization has inflated its revenue by overestimating the value of 'in kind' donations. Knowing the significant

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[45] May 2020 Schedule B Regulations, 85 FED.REG. at 31963.

[46] Attorneys General Letter, at 1. "Private benefit," logically enough, is use of charitable assets for the benefit of private individuals, and "private inurement" is private benefit for organizational insiders. *See, e.g.*, Andrew Megosh, Lary Scollick, Mary Jo Salins and Cheryl Chasin, Internal Revenue Service, "H. Private Benefit Under IRC 501(c)(3)," Exempt Organizations Continuing Professional Education Technical Instruction Program for FY2001, at 135, https://www.irs.gov/pub/irs-tege/eotopich01.pdf.

[47] *See, e.g.*, Lawrence M. Brauer, Toussaint T. Tyson, Leonard J. Henzke and Debra J. Kawecki, Internal Revenue Service, "H. An Introduction To I.R.C. 4958 (Intermediate Sanctions)," Exempt Organizations Continuing Professional Education Technical Instruction Program for FY2002, at 260, 262, https://www.irs.gov/pub/irs-tege/eotopich01.pdf, (substantial contributor to a charity is a substantial influence person to an organization subject to excess benefits transaction prohibition and penalties).

[48] *See, e.g.*, Internal Revenue Service, "Instructions for Schedule L," at 2, https://www.irs.gov/pub/irs-pdf/i990sl.pdf.

[49] *Id.*, at 2-3.

[50] *Id.*, at 3-4.

[51] *Id.*, at 4-5.

donor's identity allows her to determine what the "in kind" donation actually was, as well as its real value. Thus, having the donor's information immediately available allows her to identify suspicious behavior." *Amer. for Prosperity Found.*, 903 F.3d at 1010. But Schedule B has only three general columns, where Form 990, Part IV, Lines 29 and 30, and Schedule M, "Non-cash Contributions," require much more, including breakdowns of categories such as art work (and what type of art and whether the gift is fractional) and instructions and supplemental questions about various common sources of overvaluation.[52] For example:[53]

> Example 1. A used car in poor condition is donated to a local high school for use by students studying car repair. A used car guide shows the dealer retail value for this type of car in poor condition is $1,600. However, the guide shows the price for a private party sale of the car is only $750. The fair market value of the car is considered to be $750, which is the amount the organization reported on Form 990, Part VIII, line 1g. In column (c), the organization should enter $750. In column (d), the organization should enter "sale of comparable properties and/or opinion of expert" as the method used to determine fair market value.

In addition, as the December 9, 2019, Attorneys General Letter indicates, a major purpose for their obtaining the Schedule B is to use the form for purposes not permitted under federal privacy law, including campaign finance enforcement. Again, however, that information is already available to the Attorney General in great detail on Form 990, Part IV, Line 3, and Schedule C to the Form 990,[54] without any reliance on the list of donors in Schedule B.

In addition, IRC § 4955 imposes a tax on any charity which makes a political expenditure and a joint and several tax on the organization's managers (officer, director, or trustee). The tax rate can be up to 100% of the expenditure on the organization and 50% on the manager. Managers, in particular, tend to be very careful about IRC § 4955 taxes.[55]

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[52] Internal Revenue Service, "Schedule M (Form 990), Non-cash Contributions" https://www.irs.gov/pub/irs-pdf/f990sm.pdf.

[53] *Id.*, at 3.

[54] Internal Revenue Service, "Schedule C: Political Campaign and Lobbying Activities," https://www.irs.gov/pub/irs-pdf/f990sc.pdf.

[55] IRS data indicates that taxes paid in Fiscal Years 2003-2005 for IRC §§ 4955 (political expenditures), 4912 (disqualifying lobbying expenditures), and premiums on personal benefit contracts combined were less than $5,500 per year. Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing The Ban On Political Activity By Charities*, 6 FIRST AMEND. L. REV. 1, 12 n. 37, (2018). Available at: http://scholarship.law.unc.edu/falr/vol6/iss1/2.

Any charity which marks "Yes" on Form 990, Part IV, Line 3 and fills out Schedule C, is likely to receive an immediate contact from an IRS agent.[56] Political activities by a charity trigger penalty and excise taxes, though usually not loss of tax-exemption except in egregious cases.[57] Most cases are mistakes, taken in good faith, or so small that the IRS chose to ignore them.[58] Even so, that is an efficient trigger and high-priority response from the IRS to a very small, but high-profile problem. The IRS considers state campaign expenditures to be subject to the IRC § 4955 tax, whether or not the Attorney General does so for similar California purposes. The IRS may, in its discretion, report such excise tax liability information to a State, under IRC § 6104(c)(2)(D), even if the Attorney General does not request it.

The Schedule B is not actually the essential and efficient form that the Attorney General claims it to be. It is, in fact, not much of anything, except in a very few specific situations not mentioned by the Attorney General, and a slender reed on which to rest a requirement that all charities file their donor lists with the State.

D. Federal Tax Privacy Rules Are Much More Rigorous Than The Attorney General's, Yet Other State Agencies Are Able to Comply With Federal Privacy Regulations:

Federal UNAX leaks are rare: in 2018 the IRS reported only 14 UNAX leaks out of 1.5 million Schedule B's filed since 2010.[59] Leaks from the Attorney General's office, on the other hand, are common. The U.S. Court of Appeals for the Second Circuit called the California Attorney General's track record one of "systematic incompetence in keeping donor lists confidential of such a magnitude as to effectively amount to publication." *Citizens United v. Schneiderman*, 882 F.3d 374, 384 (2nd Cir. 2018).

> There was also substantial evidence that California's computerized registry of charitable corporations was shown to be an open door for hackers. In preparation for trial, the plaintiff asked its expert to test the security of the registry. He was readily able to access every confidential document in the registry— more than 350,000 confidential documents— merely by changing a single digit at the end of the website's URL. *See* [*Ams. for Prosperity Found. v. Becerra,* 903 F.3d 1000, 1018 (9th Cir. 2018)]. When the plaintiff alerted California to this vulnerability, its experts tried to fix this hole in its system. Yet when the expert used the exact same method the week before trial to test

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[56] *Id.*, at 9 and n. 20.

[57] *Id.*

[58] *Id.*, at 9-10.

[59] IRS Disclosure Risk Briefing, Slide 5, *reprinted in*: Attorneys General Letter, at 25. Given the discussion of State UNAX violations in Section B above, the number of UNAX leaks could be higher.

> the registry, he was able to find 40 more Schedule Bs that should have been confidential.

Ams. for Prosperity Found. v. Becerra, 919 F.3d 1177, 1185 (9th Cir. 2019) (Ikuta, dissenting from denial of rehearing en banc).[60]

The Attorney General admitted that "confidentiality lapses had occurred in the past, both as a result of technological vulnerabilities and human error." Respondent's Combined Brief in Opposition, at 10. He argued that he had improved the privacy protections for donor information, but the improvements were limited to keeping those files on a separate server, restricting the people who could access the files, and periodically sampling the data to identify problems. *Ams. for Prosperity Found. v. Becerra*, 919 F.3d at 1192 (Fisher, responding to the dissent from the denial of rehearing en banc).

In contrast, federal tax privacy procedures are sweeping, detailed, and burdensome.[61] IRC § 6103(p)(4) establishes the basic statutory requirements for information security (or "safeguards") against UNAX. IRS Publication 1075,[62] which sets out detailed guidelines for the handling of the information on tax returns, is 180 pages long. The IRS Chief Counsel's *Disclosure and Privacy Reference Guide*,[63] is 340 pages long.

The IRS's Schedule B handling requirements are significantly more rigorous than the Attorney General's. For example, among the requirements listed in Subsection 9.4.3 of the Chief Counsel Guide for the use of email to send "Federal Tax Information" are "FTI must not be transmitted outside of the agency either in the body of the email or as an attachment."[64] The Attorney General seems to have no such limit.

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[60] "[T]his is a dead simple and common hack and Citi should have seen it and prevented against it. Seriously, this is kindergarten level stuff. Really, really stupid." Ben Popkin, "How Hackers Stole 200,000+ Citi Accounts Just By Changing Numbers In The URL," *Consumerist*, June 14, 2011, https://consumerist.com/2011/06/14/how-hackers-stole-200000-citi-accounts-by-exploiting-basic-browser-vulnerability/ (last visited February 2, 2021).

[61] General Accounting Office, *TAXPAYER CONFIDENTIALITY: Federal, State, and Local Agencies Receiving Taxpayer Information*, GAO-GGD-99-164, August 1999, https://www.gao.gov/products/GGD-99-164.

[62] Internal Revenue Service, Pub. 1075, *Tax Information Security Guidelines For Federal, State and Local Agencies*, Sept. 2016.

[63] IRS Publication 4639, *Disclosure and Privacy Reference Guide,* October 2012, ("Chief Counsel's Guide").

[64] Chief Counsel's Guide, at 108, has nine specific requirements, including:

> b. Generally, FTI should not be transmitted or used on the agency's internal e-mail systems. FTI must not be transmitted outside of the agency, either in the body of an email or as an attachment

The IRS rules for printing documents in the office are equally specific: printing is permitted but all documents are to be tracked and logged, including listing of all access and who accessed the information.[65] If the information was disclosed, the "log must reflect to whom the disclosure was made, what was disclosed, and why and when it was disclosed."[66] And both printing and scanning are expressly covered:[67]

> Conversion of FTI from paper to electronic media (scanning) or from electronic media to paper (print screens or printed reports) also requires tracking from creation to destruction of the converted FTI. All converted FTI must be tracked on logs containing the fields detailed in Section 3.2, depending upon the current form of the FTI, electronic or non-electronic.

The Attorney General seems to have no such tracking or logging mechanism. Instead, the Attorney General "samples" the records for "keywords," and weekly checked, by "script," to see if identifying information is made available to the public. *Ams. for Prosperity Found. v. Becerra*, 919 F.3d at 1192 (Fisher, responding to the dissent from the denial of rehearing en banc).

The Ninth Circuit said, nevertheless, the risk of inadvertent disclosure of any Schedule B information in the future from the Attorney General's flawed and vulnerable system is "exceedingly small." *Id.*, 919 F.3d at 1193. Given that the IRS continues to experience UNAX violations,[68] even with its extensive rules and continual reporting and monitoring far beyond what the Attorney General employs, not only is the lower court's projection unlikely, but, without tracking and logs, the Attorney General is unlikely to be able to determine when such UNAX violations actually occur.

It appears the Attorney General was satisfied with a monitoring system which responds only after someone complains that their data has been accessed illegally: "There is also no dispute that the Registry Unit immediately removes any

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> c. Mail servers and clients must be securely configured according to the requirements within this publication to protect the confidentially of FTI transmitted in the email system
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> d. The network infrastructure must be securely configured according to the requirements within this publication to block unauthorized traffic, limit security vulnerabilities, and provide an additional security layer to an agency's mail servers and clients.

[65] Subsection 3.2 of the Chief Counsel's Guide requires that: "The agency must establish a tracking system to identify and track the location of electronic and non-electronic FTI from receipt until it is destroyed." *Id.*, at 15.

[66] *Id.*, at 16.

[67] Subsection 3.3. *Id.,* at 16.

[68] *See*, n. 59, *supra.*

information that an organization identifies as having been misclassified for public access." *Id.*, 919 F.3d at 1192. But, of course, by then, the information is likely on the Internet (where the complaining organization probably found it) and forever gone.

If the Attorney General were to have obtained the leaked Schedule B's from the IRS, California would likely face severe consequences. In addition to other protections in IRC §§ 6103 and 6104, there is a specific section in the Chief Counsel's Guide dealing with IRC § 6103(p)(8),[69] which covers "wraparound information" – for example, information "reflected on" a Schedule B required for a state tax return.[70] "Section 6103(p)(8) provides that the IRS can make no disclosure under section 6103(d) to a state which requires the inclusion of federal tax information in its tax returns (so called 'wraparound information') unless the state has first enacted provisions of law guaranteeing the confidentiality of wraparound information."[71] The penalty for not having the confidentiality protections is cutting off IRS information flow to important programs such as child support enforcement.

The IRS does not require that the State's "wraparound information" confidentiality protections "mirror" those of IRC § 6103, but does require certain minimum protections, such as requiring a criminal sanction of at least a misdemeanor for violations.[72] These criminal sanctions must apply to "employees of the Attorney General's office".[73]

States usually protect themselves by entering into information exchange agreements with the IRS. Chapter 8 of the Chief Counsel's Guide covers Federal/State information exchanges.[74] Section 8-1 of the Chief Counsel's Guide says: "States that require their citizens to submit federal tax information to meet state filing requirements must also enact satisfactory confidentiality laws

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[69] IRC § 6103(p)(8)(A):

(8) State law requirements. (A) Safeguards.

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.

[70] *See, e.g.*, *In Re Grand Jury Empaneled Jan. 21, 1981*, 535 F.Supp. 537, 542 and n. 4 (D.N.J., 1982) (IRC § 6103(p)(8) does not provide complete privilege to state tax returns sought in federal non-tax criminal investigations).

[71] Chief Counsel's Guide, at 8-5.

[72] *Id.*

[73] *Id.*

[74] *Id.*, "Chapter 8: Federal/State Exchange Program, I.R.C. § 6103(D) and (p)(8)", at 8-1.

protecting the information as a precondition of receiving tax information from the IRS."[75] States must have a "Basic Agreement" and an "Implementing Agreement" with the IRS, and must comply with a variety of "need and use" restrictions, including limits on use of tax information,[76] and prohibitions against disclosures to Governors and others not designated in IRC § 6103.[77]

Many States have been able to comply with the federal tax privacy rules.[78] The Attorneys General Letter says: "many state agencies have entered into information-sharing agreements with the IRS that enable them to obtain federal tax information not otherwise available to the general public in order to facilitate their administration of state laws."[79] Indiana, for example, has enacted strict rules for handling child support payment information derived from federal tax returns,[80] including using multi-layer protections,[81] and training and certification of both employees and contractors.[82]

California's three tax agencies long ago entered into information-sharing agreements with the IRS which provide federal return information to their officials and employees, including the Franchise Tax Board, which deals with most tax-exemption tax filings.[83] All charitable organizations operating in California must file CA Form 199 each year.[84] CA Form 199 is the State analogue to the federal

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[75] *Id.*

[76] *Id.*, at 8-3 ("Only federal tax data needed for a valid state tax administration purpose and which will actually be used for that purpose ('need and use') may be disclosed to state tax agencies by the IRS.").

[77] *Id.*

[78] *See, e.g.*, Wash. Rev. Code § 82.32.330 (2018), Confidentiality of return or tax information; *Tulalip Tribes v. Washington*, No. C15-0940BJR, 2016 WL 3906898 (W.D. Wash. Jul. 19, 2016) (granting Motion to Compel). *See, also*, GAO-GGD-99-164, at 21-23 (listing 215 agencies in a variety of States which have entered into agreements – five in California).

[79] Attorneys General Letter, at 3.

[80] Indiana Department Of Child Services, *Title IV-D Policy Manual*, December 2, 2019, Chapter 18, § 3, "Federal Tax Information."

[81] *Id.*, scroll down to "Procedure," paragraph 3 "Storage of FTI," ("A two (2) barrier method of security is to be used.").

[82] *Id.*, paragraph 4 "Access to FTI," ("Before being given any access to FTI, employees or contractors must complete FTI training.").

[83] GAO-GGD-99-164, at 21. *See, also,* State of California, Legislative Analyst's Office, *A Report on Tax Agency Information and Data Exchange*, January 2007, at 6 ("In addition, the recently executed Federal Information Redisclosure Agreement with the IRS regarding the use of federal data has simplified the use of certain federally sourced data by allowing the direct exchange of such data among the tax agencies.").

[84] State of California, Franchise Tax Board, *California Exempt Organization Annual Information Return Booklet*.

Form 990 filed by tax-exempt organizations with the IRS. The instructions for Line 3 of CA Form 199 require attaching "an itemized schedule if money, securities, or other property aggregating $5,000 or more is received directly or indirectly from one person in one or more transactions during the year. The schedule must show the name, address, date received, and the total amount received from each person."[85] Some tax-exempt organizations voluntarily file their federal Schedule B with the Franchise Tax Board instead of an informal schedule.[86]

Few Attorneys General, however, have entered into such information-sharing agreements, even though information they seek may be available if they comply with federal rules.[87] It's possible that the additional costs and burdens of federal privacy laws and likely also the restrictions on using the information only for tax-related purposes are deterring the Attorneys General from participating in federal sharing. As both the *Bullock* court and the Attorneys General Letter pointed out: Attorneys General want to use Schedule B to enforce campaign finance laws and other non-tax laws, which would not be permitted under federal law.

E. In its Guidance, the IRS Narrowly Limits Tax Privacy Protections to Documents Obtained From the IRS, Which Opens the Door for Attorneys General to Seek the Schedule B's:

When UNAX violations occur, they are often highly publicized and controversial.[88] One reason these rules exist is to prevent the IRS itself from being sued. For example, when an IRS employee leaked confidential information from the National Organization for Marriage, the IRS was haled into court.[89]

The IRS has interpreted the tax privacy statutes to minimize its own exposure to UNAX violations. For example, the May 28, 2020, Schedule B Regulation's explanation limits "return information" to that "received from the

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[85] *Id.*, scroll down to "Specific Line Instructions," then to "Line 3 – Gross contributions, gifts, grants, and similar amounts received."

[86] *See, e.g.*, the 2018 CA 199 return filed by End Violence Against Women International and publicly available on its website. The EVAWI federal Schedule B can be found on pages 3-4 of its CA 199.

[87] Only two State Attorneys General had entered into such agreements in 1999: Illinois and Texas. GAO-GGD-99-164, at 21-23.

[88] Kim Barker and Justin Elliott, "IRS Office That Targeted Tea Party Also Disclosed Confidential Docs From Conservative Groups," *ProPublica*, May 13, 2013,; *see also*, *United States v. Norcal Tea Party Patriots*, 817 F.3d 953, 957-59 (6th Cir. 2016) (describing inappropriate IRS collection of donor information which was then withheld from the court and the parties under tax privacy statutes).

[89] *Nat'l Org. for Marriage, Inc. v. United States*, 24 F.Supp.3d 518, 529 (E.D.Va. 2014) (court "ha[d] little trouble concluding that the unlawful disclosure ... was the actual cause of [NOM's] claimed damages.").

IRS." 85 FED.REG. at 31965 (emphasis added). This disclaimer was repeated in a footnote: "Information that a state obtains directly from a tax-exempt organization as part of its state filing is not information disclosed by the IRS under either section 6103 or section 6104."[90] Section 1.4.4 of IRS Publication 1075 – a 180-page description of safeguards for protected taxpayer information – says: "Copies of tax returns or return information provided to the agency directly by the taxpayer or his/her representative (e.g. W-2's, Form 1040, etc.) … is not protected FTI ["Federal Tax Information"] that is subject to the safeguarding requirements of IRC 6103(p)(4)."[91]

Courts interpreting the federal privacy protections have agreed with the IRS's limiting interpretation. *Stokwitz v. U.S.*, 831 F.2d at 894-97 (legislative history indicates that protections only apply to UNAX disclosures from the IRS); *Ams. for Prosperity Found. v. Becerra*, 809 F.3d 536, 542 (2015).

Supreme Court analyses of First Amendment interests and tailoring, however, are not bound by the IRS's narrow interpretation of what is protected. "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U. S. 516, 523 (1960). Agency discretion generally provides no authority "to alter [legal] requirements and to establish with the force of law that otherwise-prohibited conduct will not violate" a statute. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 326 (2014). "The rules of statutory interpretation cut both ways, and the rules that cut in favor of the IRS's reading of § 6103(h)(4)(B) here cut against the IRS's reading of "return information" to include applicant names and identifying information." *United States v. Norcal Tea Party Patriots*, 817 F.3d at 964.

This IRS interpretation is more limited than the statutory language defining protected "return information" in IRC § 6103(a) and (b)(1) and (2). The general prohibition on UNAX disclosure, for example, applies to:

> "no officer or employee of any State … who has or had access to returns or return information under this section or section 6104(c), … shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section."

IRC § 6103(a)(2) (Emphasis added). As noted in the prior Section D, many States have had "access to returns and return information" under IRC §§ 6103 and 6104.

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[90] May 2020 Schedule B Regulations, 85 FED.REG. at 31965, n. 8.

[91] Internal Revenue Service, Pub. 1075, *Tax Information Security Guidelines For Federal, State and Local Agencies*, Sept. 2016, at 5.

And the description of protected "wraparound information" under IRC § 6103(p)(8), defines the protected information even more broadly: if a State requires the inclusion of "information reflected on [a] Federal return" in a state tax return without providing sufficient confidentiality protections, the State loses the opportunity to obtain IRS disclosures of information on a wide variety of important programs, such as child support, Medicaid, housing, food and nutrition, and others.

These are not tax cases, and there is little chance that the Supreme Court will use them to extend the federal tax statutes' protections. But what the Court can do is apply existing First Amendment protections to organizations' donors.

Conclusion:

Schedule B was a well-intentioned, but ultimately unsuccessful attempt to protect donors from disclosure. A significant number of State Attorneys General have indicated that they view Schedule B not only as a source of taxpayer information that federal law protects from disclosure, but as "a powerful tool" to use as they choose, no matter what federal law forbids. This difference of opinion sets up a variety of constitutional clashes over rights of individuals, organizations, and States themselves, under the First (freedom of speech and association), Fourth (freedom from unreasonable searches and seizures) and Sixteenth (tax) Amendments.

Not all these clashes are present in the cases pending before the Supreme Court. The lower courts and the parties have limited their briefings to the First Amendment issue of whether the State can request donor lists knowing that they will inevitably injure donors. The charities' evidence of harassment and injury is strong, but disputed by the California Attorney General and in the Ninth Circuit Court of Appeals decisions.

Like a movie monster rising from the grave, Schedule B is essentially obsolete and unwanted. It injures people and undermines taxpayer confidence that is essential to support government. It is not essential or efficient in regulating charities. It raises unnecessary constitutional questions. More efficient and targeted methods are already available than the upfront collection of thousands of charities' donors' information.

The Supreme Court should use long-established First Amendment interpretations to help protect charitable donors, the organizations that depend on them, and the interests of the federal tax system in voluntary compliance. Otherwise, "enemies lists" may not only be revived, but will multiply.