

James Madison
JAMES MADISON CENTER FOR FREE SPEECH

GENERAL COUNSEL
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Victoria Judson
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Exempt Organizations
Internal Revenue Service
111 Constitution Avenue, NW
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Re: Comments on REG-102508-16¹

I write on behalf of the James Madison Center for Free Speech (“JMCFS”),² and submit these comments in support of the Services’s proposed regulation that will, in accordance with the underlying statute, eliminate the need for § 501(c)(4) organizations to provide the names and addresses of contributors in annual IRS filings.

The JMCFS formally requests that the Service hold a public hearing on the proposed regulation and requests that it be permitted to testify at that hearing.

As the Service has noted, Congress never required the gathering of this information from § 501(c)(4) organizations, and the present proposal merely clarifies this in regulation.³ The regulation will have no effect on publicly-available information, and, as the Service explains, any genuine need it may have for the information to carry out tax laws is sufficiently and more efficiently met within existing examination procedures.⁴ And it is encouraging that the Service is considering the “hard” costs of compliance for the regulated.⁵ But the most important consideration here is what the

¹Internal Revenue Service, Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 84 F.R. 47,447 (Sept. 10, 2019) (“NPRM”).

²I am General Counsel for the James Madison Center for Free Speech, which was founded to protect the First Amendment right of all citizens to free political expression in our democratic Republic. Its purpose is to support litigation and public education activities in order to defend the rights of political expression and association by citizens and citizen groups as guaranteed by the First Amendment of the United States Constitution. I am also the principal attorney at The Bopp Law Firm, P.C.

³NPRM, 84 F.R. at 47,451.

⁴*Id.* at 47,451-2.

⁵*Id.* at 47,451.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Service politely describes as the “risk of inadvertent disclosure.”⁶ The Service is statutorily required to maintain confidentiality of this information,⁷ but there are *constitutional* violations that spring directly from that “inadvertent” public disclosure of contributors’ identifying information that should be considered.

There is no doubt that public disclosure of a contributor can violate the First Amendment rights of the disclosed donor. By the time of *NAACP*, it was already “hardly a novel perception that compelled disclosure of affiliation with [advocacy] groups . . . may constitute an effective constraint on freedom of association,”⁸ and the Court in *Buckley* readily found contributing to an organization to be just as protected as joining or holding membership in an association.⁹ The legal harm of publicly exposing contributors is that it deters their affiliation with the groups to which they contribute and thereby infringes on their First Amendment-protected right of political association.

The Service recognizes that “reducing the number of organizations providing the names and addresses of contributors on Schedule B” decreases the *potential* for the harm triggered by inadvertent disclosure,¹⁰ but the Service should also consider “the gravity of the resulting injury” in its calculus.^{11,12} The public exposure of the identities of contributors to a political cause violates the First Amendment when it can be shown that there is a “reasonable probability that disclosure of its contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.”¹³ The clients represented by my law firm, The Bopp Law Firm, P.C., and the JMCFS have extensive experience with and data on threats, harassment, and reprisals resulting from disclosing donors to advocacy groups.

ProtectMarriage was a citizen-advocacy group in California’s Proposition 8 campaign, which sought a constitutional amendment to protect traditional marriage in the November 2008 California state elections. After it was adopted by the people of California, disclosure of ProtectMarriage’s financial supporters, which was required by California campaign finance law, led to their widespread, serious harassment. Filed with these comments is Plaintiffs’ Statement of Undisputed Facts, filed in

⁶*Id.* at 47,452.

⁷*Id.*

⁸*NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

⁹*Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976).

¹⁰*Id.*(emphasis added).

¹¹*United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d. Cir. 1947).

¹²Other comments have aptly addressed the probability of inadvertent disclosure, discussing the plentiful cases where information identifying contributors to exempt organization has found its way into the public domain. *See, e.g.*, Comments of Americans for Prosperity Regarding Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 84 Fed. Reg. 47,447 (Sept. 10, 2019) (RIN 1545–BN28) at 6-7 (available at <https://www.regulations.gov/document?D=IRS-2019-0039-1502>).

¹³*Citizens United v. FEC*, 558 U.S. 310, 367 (2010) (internal quotation marks and citations omitted).

support of summary judgment in *ProtectMarriage v. Bowen*,¹⁴ wherein ProtectMarriage sought exemption from disclosure because of the record of harassment of its donors. Filed here as well are the exhibits filed in support of summary judgment detailing this serious harassment of donors.

In sum, because California law required the public release of the identities, home addresses, and employers of donors to ProtectMarriage, political opponents were able to publish this personal information on numerous websites, including MapQuesting the donor's homes and businesses so that aggressive activists could attack them there. The result of this vicious campaign was overwhelming evidence, gathered by The Bopp Law Firm, that the publicly-disclosed information led directly to harassment, intimidation, and reprisals for the donors to an advocacy group.

The documents that were filed in federal court and now here provide: (1) undisputed testimony and evidence of over 80 previously-unreported instances of harassment, intimidation, and reprisals against 58 "John Does"; (2) links to 14 then-contemporary videos reporting and in some cases recording ugly and sometimes violent confrontations and "protests" with Prop 8 supporters, and; (3) 157 contemporarily-published accounts of harassment, intimidation and reprisals directed at supporters of Prop 8. Among the incidents reported in this evidence were death threats, threats of violence, vandalism, threats of destruction of property, arson, threats of arson, angry and lewd protests, intimidating emails and phone calls, mailed envelopes of suspicious powder, entire web sites dedicated to blacklisting supporters of traditional marriage and similar causes, loss of employment and job opportunities, intimidation and reprisals on campus and in the classroom, economic reprisals and demands for "hush money," and gross expressions of anti-religious bigotry, including vandalism and threats directed at religious institutions and religious adherents. Not surprisingly, this vicious campaign damaged the victims of it and cast a chill over supporters of traditional marriage who might have considered working with ProtectMarriage or other organizations in favor of traditional marriage. *See also ProtectMarriage.com v. Bowen* (district court's evidence summary).¹⁵

The United States Supreme Court and its members have cited and acted on the evidence in *ProtectMarriage*, making it the quintessential example of threats, harassment, and reprisals emanating from disclosure of contributors:

- In *Hollingsworth v. Perry*, the Court relied on the record in *ProtectMarriage* in staying broadcast of

¹⁴830 F. Supp. 2d 914 (E.D. Cal. 2011).

¹⁵*Id.* at 916-22. The harm to exposed Proposition 8 contributors continued for years, *see, e.g.*, Salvador Rodriguez, *Mozilla CEO Brendan Eich Resigns under Fire for Supporting Prop. 8*, L.A. Times, Apr. 3, 2014, <http://articles.latimes.com/2014/apr/03/business/la-fi-tn-mozilla-ceo-resigns-under-fire-prop-8-20140403>. The system of matching people's contributions and views with their addresses and other personal information that maximized the Proposition 8 flood of threats and harassment has been replicated, expanded, and made almost instantly deployable. Even *journalists* now must take precautions to avoid having their personally identifying information exposed. *See, e.g.*, Reporters Committee for Freedom of the Press, *The Dangers of Doxxing* (2015) (available at <https://www.rcfp.org/journals/news-media-and-law-spring-2015/dangers-doxxing/> ("doxxing" "invokes serious intimidation, harassment and threats against journalists that could interfere with their reporting, place them in real danger and, ultimately, drive them from the work they love."). At the same time, ordinary disagreement is now considered to justifiably invoke violence. *See* Peter Boghossian, *Welcome to Culture War 2.0: The Great Realignment* (available at <https://americanmind.org/essays/welcome-to-culture-war-2-0/>).

the Proposition 8 trial.¹⁶

- In *Doe v. Reed* (harassment of traditional-marriage supporters),¹⁷ the Supreme Court rejected a facial challenge to Washington’s petition-signer disclosure but remanded for a possible exemption,¹⁸ and, concurring, Justice Alito said “widespread harassment and intimidation suffered by supporters of California’s Proposition 8 provides strong support for an as-applied exemption in the present case.”¹⁹
- In *Citizens United v. FEC*, the Supreme Court cited amici briefs about harassment of Proposition 8 supporters, saying it was “cause for concern,”²⁰ and Justice Thomas relied on the record in *ProtectMarriage* in dissenting from upholding contributor disclosure.²¹

Public disclosure of donors effects a constitutional injury when it chills political association and speech. The specter of significant chill is presumed where there is a reasonable probability of threats, harassments, or reprisals.²² Conversely, to the extent that there is evidence of chill, it serves to reinforce the conclusion that there is a “reasonable probability” of reprisals.²³ The evidence adduced in *ProtectMarriage*, and presented here, is a sobering modern demonstration of the alacrity with which campaigns to threaten, harass, and intimidate donors are carried out and of the chill on donors that is effected by such campaigns.²⁴

The Service recognizes that having the names and addresses of donors on Schedule B presents a risk of exposing their personally-identifying information to the public without a commensurate benefit to the Service. JMCFS submits that the Service’s concern over exposure is less than it should be. The organizations at issue are advocacy organizations, which exist to promote views on public issues that are universally controversial *somewhere*. The likelihood of donor identities’ being using to launch campaigns of harassment and intimidation is heightened by the increased polarity of opinion in our society and the ease with which personally-identifying information can be made public and shared to organize campaigns to threaten, harass and provoke reprisal. The *ProtectMarriage* experience, detailed herewith, has taught us that a serious First Amendment injury can be inflicted by public disclosure of contributors to an advocacy group. In its calculus of the proposed regulation,

¹⁶558 U.S. 183, 185-86 (2010).

¹⁷561 U.S. 186 (2010).

¹⁸*Id.* at 200.

¹⁹*Id.* at 205.

²⁰558 U.S. at 370.

²¹*Id.* at 480-85 (noting, *inter alia*, that “opponents of Proposition 8 compiled [government-disclosed personally-identifying contributor information] and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters.”).

²²*Averill v. City of Seattle*, 325 F. Supp. 2d 1173, 1179 (W.D. Wash. 2004).

²³*Id.*

²⁴*See, e.g.*, Decl. of John Doe #1, ¶ 27, Decl. of John Doe #2, ¶ 7.

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December 9, 2019
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JMCFS urges the Service to consider the gravity of the injury resulting from exposing 501(c)(4)s' contributors.

For the foregoing reasons, JMCFS strongly urges adoption of the proposed regulation. If you have any questions, please contact me by phone at (812) 232-2434 or by email at jboppjr@aol.com.

Sincerely,

JAMES MADISON CENTER
FOR FREE SPEECH

A handwritten signature in black ink that reads "James Bopp, Jr." in a cursive style.

James Bopp, Jr.
General Counsel