Written Testimony of Philip Hackney
Associate Professor of Law
University of Pittsburgh School of Law

Pennsylvania House State Government Committee
DONOR DISCLOSURE AND CAMPAIGN FINANCE REGULATIONS: REVIEWING RECENT LEGAL PRECEDENTS.

February 7, 2022

Chair Grove, Chair Conklin, members of the committee, thank you for inviting me here today to speak with you about a matter of great importance to the operation and regulation of our shared Commonwealth. I am from Representative Jessica Benham's district 36 in the South Side of Pittsburgh. I understand you have asked me to speak to the issue of donor disclosure related to campaign finance and particularly the consideration of how the recent United States Supreme Court case *Americans for Prosperity Foundation v. Bonta*[1] impacts that regulatory landscape.

I am an associate professor of law at the University of Pittsburgh School of Law where I teach primarily about tax law. I specialize in the tax obligations 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 the litigation of the IRS on matters related to tax laws applicable to nonprofits and government entities. That work necessarily interacted in a robust way with politics. The IRS oversees dark money organizations, section 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 that is applicable to them. I have significant depth of knowledge about the tax laws related to these organizations, the state nonprofit regulatory regime that applies to them, and as a result an understanding, though not an expertise in campaign finance law. Thus, my expectation is that the best way I can help your committee is in understanding the complex of regulatory regimes that work to oversee this terrain, the relationship between these different regimes, and hopefully also the object and importance of each individual regulatory regime.[2]

Americans for Prosperity Foundation v. Bonta

In 2021, the U.S. Supreme Court in *Americans for Prosperity Foundation v. Bonta* struck down as facially unconstitutional under the First Amendment a law in California requiring charities soliciting donations in the state of California to disclose

[1] Americans for Prosperity Foundation v. Bonta, 141 S.Ct. 2373 (2021).
[2] I note that this testimony is informed in part by articles I have written including *Political Justice and Tax Policy: The Social Welfare Organizations Case*, 8 TEX. A&M L. REV. 271 (2021) and *Dark Money Darker? IRS Shutters Collection of Donor Data*, 25 FLA. TAX REV. _ (forthcoming 2022) [hereinafter *Dark Money Darker*].

substantial donors identified on Schedule B to the IRS Form 990.[3] The Form 990 is the information tax return nonprofits must file annually to maintain their tax-exempt status.[4] That return collects from charities information about substantial donors, meaning generally those donors to the nonprofit that provided the greater of $5,000 or 2% of total donations to the nonprofit during the year. California argued it had a compelling interest in collecting the information in order to police fraud on charities.[5] The Court, however, found that the law chilled the free association rights of donors without narrowly tailoring the law to the state of California's governmental interest. *Notably, this was neither a tax case, nor a campaign finance case. Nevertheless, the reasoning of the Court may impact the constitutionality of disclosure laws associated with both domains of law.* I will first describe the reasoning of *Americans for Prosperity Foundation*, briefly discuss prior Court precedents on disclosure in the campaign finance regime, then describe the tax law obligations of the nonprofit organizations that tend to populate and dominate the space of the political in our country.

The Court found that the requirement that charities confidentially disclose substantial donors to the state of California created the unnecessary risk of the chilling of association protected under the First Amendment.[6] The chilling effect arose because donors feared making donations to charities in California both because the state of California obtained the information and the consequent danger that information might be disclosed. Though the Court seemed to apply the "exacting scrutiny" standard to a disclosure regime such as applied previously in *Buckley v. Valeo*,[7] some members of the Court were willing to apply the higher standard of strict scrutiny.[8] More significantly, the Court ultimately added to the exacting scrutiny test that disclosure regimes need to be narrowly tailored to the governmental interest involved.[9] While California had an interest in preventing fraud, the Court held that the requirement was too broad and not narrowly tailored to accomplish the governmental interest.[10] The Court believed California used a dragnet to generate information that it believed the state of California only needed in a much narrower set of cases. The Court highlighted that the record developed in the court below showed that California rarely if ever used the donor information in its investigations.[11] Crucially for the disclosure in the case of tax law or

---

[3] 141 S.Ct. at 2385. For full disclosure, I note that I submitted an amicus brief in *Americans for Prosperity* along with 11 other nonprofit scholars supporting the state of California in its effort to protect its ability to demand this donor information from charities. Brief of Amici Curiae Scholars of the Law of Non-Profit Organizations in Support of Respondent, Americans for Prosperity Foundation v. Bonta, 141 S.Ct. 2373 (2021) (Nos. 19-251 & 19-255).

[4] I.R.S., FORM 990, RETURN OF ORGANIZATION EXEMPT FROM TAXATION, https://www.irs.gov/pub/irs-pdf/f990.pdf.

[5] Brief of respondent Matthew Rodriquez, Acting Attorney General of California, Americans for Prosperity Foundation v. Bonta, 141 S.Ct. 2373 (2021) (Nos. 19-251 & 19-255). https://www.supremecourt.gov/DocketPDF/19/19-251/172982/20210325141442657_19%20251%2019%20255%20Brief%20on%20the%20Merits.pdf.

[6] 141 S.Ct. 2373, 2388.

[7] Buckley v. Valeo, 424 U.S. 1, 44-45 (1976).

[8] *Id.* at 2390 (Thomas, J., concurring).

[9] *Id.* at 2383-84.

[10] *Id.* at 2385.

[11] *Id.* at 2386.

campaign finance law, the Court explicitly left open the possibility that the governmental interests involved in tax collection might support disclosure.[12]

Campaign Finance

The legal regime of campaign finance at the federal level and generally at the state level as well depends upon contribution limits, expenditure limits, and disclosure. For ease, I will focus only on federal campaign finance. Modern campaign finance law rests upon the structure created in the Federal Election Campaign Acts of 1971 and amended in 1974, 1976 and 1979 (FECA) enacted with an intent to stymie the corruption of money on our politics. The contribution limits limit the amount of money individuals, parties, and political action committees (PACs) can contribute to campaigns, parties, and PACs.[13] FECA also regulates what it refers to as "expenditures." These are defined as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office."[14] FECA applies limits on coordinated expenditures on federal campaigns of national committees, state committees, and subordinate committees to the state committees to an amount that is connected to the population of a particular state.[15] Finally, individuals, groups, corporations and labor unions are required to disclose to the FEC certain independent expenditures, and have disclosure obligations upon producing or airing certain electioneering communications.[16] Federal political committees have disclosure obligations through registration and reporting. Candidates, national parties, and federal PACs must file quarterly reports identifying donors who have given $200 or more. The disclosure regime provides information to the Federal Election Commission to oversee the contribution and expenditure limits.

In Buckley v. Valeo, a particularly complex case, the Court generally upheld the contribution limits because though the law impinged in part on free association rights the government demonstrated a sufficiently important interest in preventing

---

[12] *Id.* at 2389.

[13] 52 U.S.C. 30116(a); F.E.C. Contribution Limits for 2021–22 Federal Elections https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/#:~:text=%24100%20limit%20on%20cash%20contributions,or%20election%20to%20federal%20office. The Supreme Court has struck down some individual limitations. McCutcheon v. FEC, 572 U.S. 185 (2014) (the Court found 2 U.S.C. 441a(a)(3) (now 52 U.S.C. § 30116(a)(3)) limiting an individual's ability to aggregate contributions in a particular time period to candidates or committees unconstitutional). 52 U.S.C. § 30116(a)(2); see also F.E.C. Contribution Limits for 2021–22 Federal Elections https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/#:~:text=%24100%20limit%20on%20cash%20contributions,or%20election%20to%20federal%20office. 52 U.S.C. 30116(a); F.E.C. Contribution Limits for 2021–22 Federal Elections https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/#:~:text=%24100%20limit%20on%20cash%20contributions,or%20election%20to%20federal%20office.

[14] 52 U.S.C. §30101(9). The FEC publishes the amounts annually at https://www.fec.gov/help-candidates-and-committees/making-disbursements-political-party/coordinated-party-expenditures/coordinated-party-expenditure-limits/.

[15] 52 U.S.C. § 30116(d).

[16] 52 U.S.C. § 30104(c) & (f).

corruption.[17] After applying an exacting scrutiny test, the Court generally found the disclosure requirements constitutional.[18] The Court found that the disclosure furthered three important governmental interests: (1) it provides important information to voters in evaluating candidates; (2) it "deter[s] actual corruption and avoid[s] the appearance of corruption;" and (3) it provides "essential means of gathering the data necessary to detect violations of the contribution limitations."[19] The Court finally found the expenditure limitations the most suspect and found many of the provisions to be unconstitutional, stating that the expenditure limitations imposed "direct and substantial restraints on the quantity of political speech."[20]

Since *Buckley*, while the Court has tended to uphold the contribution limits and disclosure limits, it has continued to strike down expenditure limits.[21] In Citizens United for instance, the Court struck down as unconstitutional a law prohibiting corporations and unions from using their general treasury funds on express advocacy but upheld the disclosure requirements.[22] Though Citizens United, a nonprofit organization exempt from tax under section 501(c)(4), could have used a Political Action Committee ("PAC") to distribute a film critical of then candidate Hillary Clinton, Citizens United wanted to spend money of the corporation itself.[23] The Court found that this requirement did not alleviate the constitutional concern of infringing on the freedom of speech of the corporation because the PAC is a separate association from the corporation.

Tax Exempt Organizations and Politics

How does tax fit into this mix? The IRS in its tax-exempt division oversees a range of nonprofit corporate entities that engage in various levels of political activity in its broadest sense, some of which is overseen by the FEC and some of which is only overseen by the IRS. These entities range from section 527 political organizations, section 501(c)(3) charitable organizations, section 501(c)(4) social welfare organizations, and section 501(c)(6) business leagues. Many of the 527 organizations are directly regulated by the FEC, but some are only overseen by the IRS. Though charities are prohibited from intervening in a political campaign, many charities today either intervene in political campaigns or engage in activity that comes close to the political campaign intervention line. Social welfare organizations and business leagues are often today referred to as dark money organizations. I explain more about each below.

Section 527 Political Organizations

---

[17] 424 U.S. at 26-29.
[18] 424 U.S. at 68.
[19] 424 U.S. at 66-68.
[20] 424 U.S. at 39.
[21] SpeechNow.org v. FEC, 599 F.3d 686 (2010); Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 135 L. Ed. 2d 795, 116 S. Ct. 2309 (1996) (independent expenditure limits placed on political committees unconstitutional); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001) (Constitutional for Congress to regulate coordinated political committee expenditures because the functional equivalent of contributions.).
[22] Citizens United v. FEC, 558 U.S. 310 (2010).
[23] 558 U.S. at 321.

Prior to the 1970s, the IRS mostly ignored the tax implications of political committees or organizations.[24] They saw the contributions as gifts and non-taxable to the entity or individual.[25] Congress enacted 527 of the Code in 1975 to manage the taxable matters created by these political committees and organizations.[26] In 2000 and 2002, Congress amended the statute to require disclosure of donors from 527 organizations that did not specifically come within the FEC's jurisdiction.[27] This means the IRS directly plays a role in our campaign finance regime including providing some public disclosure from some political organizations. It also means the disclosure of donors under this regime is newly vulnerable after *Americans for Prosperity Foundation*.

Political organizations are organized and operated primarily for what is called an "exempt function." 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."[28] A section 527 organization still maintains a tax-exempt status, but is subject to a complicated tax, primarily on its investment income. A section 527 organization that anticipates generating gross receipts in excess of $25,000 a year generally must give notice to the IRS within 24 hours of its establishment.[29] Unlike social welfare organizations, Section 527 organizations must publicly disclose substantial information about their receipts of contributions and expenditures.[30] Congress considered extending these same disclosure obligations to social welfare organizations as well, but never has.[31] If 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 section 527(f).[32] An organization described in section 501(c) could alternatively create a segregated fund to operate as a political organization under section 527.[33]

---

[24] I.R.S., I. IRC 527 – Political Organizations, Exempt Organizations CPE Text (1989) https://www.irs.gov/pub/irs-tege/eotopici89.pdf.
[25] *See, e.g.*, Rev. Proc. 68-19, 1968-1 C.B. 810.
[26] Act of Jan. 3, 1975, Pub. L. No. 93-625, § 10, 88 Stat. 2108, 2116-19 (codified as amended at § 527); *see also* CONGRESSIONAL RESEARCH SERVICE, POLITICAL ORGANIZATIONS UNDER SECTION 527 OF THE INTERNAL REVENUE CODE (2008) https://crsreports.congress.gov/product/pdf/RS/RS21716/4.
[27] P.L. 106-230; P.L. 107-276; see also CONGRESSIONAL RESEARCH SERVICE, POLITICAL ORGANIZATIONS UNDER SECTION 527 OF THE INTERNAL REVENUE CODE (2008) https://crsreports.congress.gov/product/pdf/RS/RS21716/4.
[28] 26 U.S.C. § 527.
[29] They must file with the IRS a Form 8871 found here https://www.irs.gov/forms-pubs/about-form-8871.
[30] 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 section 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.
[31] See, e.g., Donald Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, 10 ELECTION L.J. 427, 430 & FN 21 (2011) (citing H. Rep. No. 106-702, at 9–11 and H. Rep. No. 106-702, at 40–41).
[32] Rev. Rul. 2004–6, 2004–1 C.B. 328.
[33] 26 U.S.C. § 527(f)(3).

Charitable Organizations

Charitable organizations are exempt from tax under section 501(a) of the Code because described in section 501(c)(3) of the Code. To be a charitable organization, the nonprofit 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.[34] Also importantly, a charitable organization may not engage in more than a substantial part lobbying and is completely prohibited from intervening in a political campaign.[35] In the political sphere, most charitable organizations rely upon either a religious or educational purpose to support their claim to exemption. Religious organizations will often assert that they are speaking from a religious perspective to either lobby or sometimes even to advocate for a candidate. There are many think tank advocacy groups that today qualify under section 501(c)(3) by educating the populace about important ideas to our governance.

The prohibition on intervening in a political campaign means that a charity cannot advocate for or against a candidate for political office either directly or indirectly. The idea of lobbying imbued in section 501(c)(3) refers to efforts to encourage members of a legislative body to propose, support, or oppose legislation.[36] Notably, the Supreme Court upheld the constitutionality of this limitation on lobbying under the First Amendment and the Equal Protection clause in *Regan v. Taxation with Representation*.[37] Charitable organizations can, consistent with their purpose, educate the public about important issues.[38] When this is done in the context of matters that are being debated before the legislature, it is often referred to as issue advocacy. In turn, issue advocacy can also often be an effective means of advocating for a candidate without expressly advocating for a candidate. Because charitable organizations have some ability to lobby, and an unlimited ability to educate, they can often accomplish quite a lot of political goals. My sense is that the charitable world has become much more politically involved today than it was even twenty years ago.

In addition to the political aspects of charities, much of the regulatory architecture found in section 501(c)(3) is there to prevent fraud on charity and hinder the avoidance of income tax. For instance, the inurement provision is an absolute ban on a private shareholder or individual from taking the earnings of charity that are supposed to be dedicated to charitable purpose. Additionally, limitations on the use of charities require that they be operated for a public purpose and not a private one. This idea has become a limitation on an amount of private benefit that a charity can provide. Again, generally this is designed to prevent abuse of charities by directing them to help private individuals and businesses instead of helping charitable beneficiaries. One more provision is worth noting here, Congress enacted a provision which prevents charities from engaging in what are known as excess benefit transactions.[39] In general, this

---

[34] 26 U.S.C. § 501(c)(3).
[35] *Id.*
[36] Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii).
[37] Regan v. Taxation with Representation, 461 U.S. 540 (1983).
[38] Treas. Reg. § 1.501(c)(3)-1(d)(2).
[39] 26 U.S.C. § 4958.

means that the Code imposes a tax upon an individual who has some control over a charity and takes from that charity some amount they were not entitled to. For instance, and simplistically, someone who provides a charity $100,000 worth of services who receives from the charity $200,000 would have an excess benefit equal to $100,000. They would have to pay a tax on that amount and return the amount to the charity. Finally, charitable contributions to charitable organizations are potentially deductible to taxpayers.[40] Notably, a taxpayer may neither deduct a contribution for the purposes of intervening in a political campaign nor for lobbying.[41]

In order to hold charities accountable for proving their exemption, to ensure the proper collection of tax revenue, and to provide important information to the public, charities must annually file a Form 990 with the IRS.[42] The tax reporting of charities also allows the IRS to ensure that taxpayers are not misusing this opportunity to deduct contributions to an organization that do not deserve to be deducted from tax. Most of the information on the form is disclosable to the public. The form provides financial information about the charity as well as descriptions of the activities of the charity during the taxable year. The Schedule B to the Form 990 seeks information about substantial donors to the charity. The information sought includes the name and address of the donor along with the contribution amount to the charity.[43] The information on donors is generally not disclosable to the public except in the cases of section 527 political organizations and private foundation.[44] It is not clear whether that requirement of disclosure on the Form will meet the exacting scrutiny test applied by the Court in *Americans for Prosperity Foundation* to the very similar requirement applied to enforce state nonprofit law. I believe the information is needed to enforce many of the above provisions to ensure the proper collection of revenue and to protect charity from fraud. It also can act as a deterrent against misuse of charitable dollars in the way red light cameras deter drivers from running red lights. Finally, it can act as a deterrent as well to the abuse of campaign finance laws.

Dark Money Organizations

We regularly hear in the news about dark money organizations. What are they and how do they relate to tax and campaign finance? Dark money organizations refer to tax exempt organizations that typically do not engage in express advocacy but do engage in political advocacy by intervening in political campaigns and by engaging in lobbying. The moniker "dark" means that the public has little access to knowledge about who funds these organizations because first they need not disclose the money to the FEC because they do not engage in the type of express advocacy that comes under its jurisdiction. Here I am referring primarily to social welfare organizations and business leagues. Each of these organizations is exempt from the income tax under section 501(a) just like a charitable organization. Though these organizations file certain information about substantial donors with the IRS, none of that information is disclosed publicly.

---

[40] 26 U.S.C. § 170.
[41] 26 U.S.C. 162(e).
[42] 26 U.S.C. § 6033.
[43] I.R.S. Form 990, Schedule B, Schedule of Contributors, https://www.irs.gov/pub/irs-pdf/f990ezb.pdf.
[44] 26 U.S.C. § 6104(b).

Additionally, in 2020, the IRS ended the requirement that dark money organizations must disclose substantial donor names and addresses to the IRS on Schedule B to the Form 990.[45]

Social welfare organizations must operate exclusively to promote social welfare and prohibit inurement to any private shareholder or individual.[46] Though the statute uses the term "exclusively" the IRS regulations state that social welfare organization only need primarily further a social welfare purpose.[47] Though there is no hard and fast rule on how to satisfy the primarily test, a simple rule of thumb is that an organization must engage in more than fifty percent of activities that further its exempt purpose. This creates challenges for IRS enforcement in determining when a social welfare organization has crossed the line. Social welfare organizations are not all political advocacy organizations. In addition to those, they include health maintenance organizations, civic social clubs like Kiwanis and Rotary clubs, homeowners' associations, and kid's sports clubs.[48] Still, many social welfare organizations participate in the political sphere in its broadest sense. On the one hand, a social welfare organization may engage in lobbying activities as a social welfare purpose.[49] On the other hand, a social welfare organization does not further its purpose when it intervenes in a political campaign. It can be very difficult for the IRS to make the call between activity that might be considered issue advocacy and that activity that crosses the line into political campaign intervention.[50]

There are of course other aspects of social welfare organizations that the IRS oversees. An organization claiming social welfare status that does not so qualify owes tax on its taxable income. Like charities, social welfare organizations cannot allow their earnings to inure to the benefit of a private shareholder or individual.[51] Additionally, the private benefit limitation and the tax under section 4958 on excess benefit transactions applies to social welfare organizations like described above with respect to charities. Contributions to social welfare organizations do not qualify for the charitable contribution deduction.

Social welfare organizations must file a Form 990 just like a charity. Its return is public as well. The return both serves a means of ensuring the organization complies with its tax status, provides information that could allow the IRS to detect if there is any

---

[45] 85 Fed. Reg. 31959 (May 28, 2020) (codified at 26 CFR 56) T.D. 9898. *See also Dark Money Darker, supra* note 2 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3855543.
[46] 26 U.S.C. § 501(c)(4).
[47] 26 U.S.C. 1.501(c)(4)–1(a)(2).
[48] JEREMY KHOULISH, FROM CAMPS TO CAMPAIGN FUNDS: THE HISTORY, ANATOMY AND ACTIVITY OF 501(C)(4) ORGANIZATIONS, URBAN INSTITUTE, 6 (2016).
[49] Rev. Rul. 68–656, 1968–2 C.B. 216.
[50] A good example of the challenge is found in the IRS consideration of the application for exemption of the major political social welfare organization associated with Karl Rove Crossroads GPS. Though the IRS initially proposed denying the organization because many of the ads it ran appeared to be engaged in intervening in a political campaign, the IRS ultimately granted the organization status after Crossroads filed an appeal. See Robert Maguire, *How Crossroads GPS beat the IRS and Became a Social Welfare Group*, OPEN SECRETS (February 12, 2016) https://www.opensecrets.org/news/2016/02/how-crossroads-gps-beat-the-irs-and-became-a-social-welfare-group/.
[51] 26 U.S.C. 501(c)(4).

avoidance of tax, and provides the public information to hold these organizations publicly accountable. Unlike the situation with charitable organizations though, currently the IRS does not potentially run afoul of the precedent in A*mericans for Prosperity Foundation* on any dark money organizations because the IRS no longer requires the organizations to disclose the names and addresses of substantial donors. I have argued, however, that the IRS needs the information regarding substantial donors in order to protect the revenue through knowledge about the information and through deterrence.[52] The ending of the collection of that information also likely impacts the integrity of the campaign finance system as individuals can contribute to social welfare organizations with the knowledge that there is no information going to any part of the government regarding these contributions.

Business leagues present many of the same issues as do social welfare organizations. They are exempted from the income tax under section 501(c)(6) and include "[b]usiness leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues."[53] A business league must be formed to promote a common business interest and must 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.[54] These organizations broadly support various industries or professions through education, advertising, networking, lobbying. Similarly, to social welfare organizations business leagues are prohibited from allowing their earnings from inuring to a private shareholder or individual.

Just like social welfare organizations, lobbying is a permissible purpose of a business league.[55] Though it is unclear whether intervening in a political campaign furthers a business league purpose, it is more likely than not that it does not such as is the case with social welfare organizations.[56] The practical result of this regime is that business leagues can do unlimited lobbying, assuming it furthers the organizations purpose, and can do a significant amount of activities that might intervene in a political campaign. Thus, these organizations can potentially engage in quite a bit of activity that has impacts on elections without providing much disclosure to the public or even the government today.

I believe the interest in ensuring proper collection of revenue and in deterring controlling individuals from taking advantage of business leagues is significant in the case of business leagues as well. I believe the substantial donor information is important to the enforcement of the tax law in the case of these organizations such that the IRS should again collect that information.[57] However, the IRS would need to be able to meet

---

[52] *Dark Money Darker, supra* note 2.
[53] 26 U.S.C. 501(c)(6).
[54] Treas. Reg. § 1.501(c)(6)–1.
[55] Rev. Rul. 61–177, 1961–2 C.B. 117.
[56] I.R.S. Gen. Couns. Mem. 34,233 (Dec. 3, 1969). Campaign finance law also significantly impacts the operation of business leagues in the political campaign sphere. For instance, a business league, as a corporation, is subject to the law that they use "separate segregated funds" as controlled political action committees to make contributions to candidates for federal political campaigns. 52 U.S.C. 30118; 11 C.F.R. §§ 114.1(a)(2)(iii) & 114.5.
[57] *Dark Money Darker, supra* note 2.

the exacting scrutiny test of *Americans for Prosperity Foundation* in order to collect that information in a way that does not violate the Constitution. The failure to collect this information though likely does not just impact the integrity of the tax system, but likely impacts the integrity of our campaign finance system.

In the case of both social welfare organizations and business leagues the IRS needs to be able to determine the quantity of political campaign activity in which these organizations engage.[58] This is in part because an organization that primarily engages in that intervention activity, is considered for tax purposes as an organization described in section 527. An organization described in section 501(c)(4) or (6) could alternatively create a segregated fund to operate as a political organization (i.e., a PAC) under section 527.[59] Note that a charity may not create a PAC directly. However, it can form a social welfare organization and that social welfare organization can in turn form a PAC.

Conclusion

Thank you for inviting me to speak about the important issue of disclosure of donors associated with nonprofit organizations and the relationship of that to campaign finance regimes as well as its larger relationship to the tax obligations of these nonprofit organizations. I believe that the First Amendment freedom of association is a key component of the operation of our governmental system. I am concerned that the Supreme Court may have pushed the limits of it too far in Americans for Prosperity. It has the potential to undermine the already weak enforcement environment associated with nonprofits. That said, we have other regimes that this disclosure regime depends upon including campaign finance and the taxation of exempt organizations. Legislators need to keep this new precedent on disclosure in mind and work to ensure that they have a substantial governmental purpose in mind as they design any disclosure regime and ensure that the tool used for enforcement is narrowly tailored to that government interest. As a concluding matter, I would also be glad to discuss generally the state law obligations of nonprofit organizations including the role of the attorney general of enforcing those.

[58] Rev. Rul. 2004–6, 2004–1 C.B. 328 (describes circumstances where social welfare organizations, labor unions, and business leagues conduct too much intervention into a political campaign).
[59] 26 U.S.C. § 527(f)(3).