IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

STEPHEN C. BULLOCK, in his official capacity as Governor of Montana; MONTANA DEPARTMENT OF REVENUE; STATE OF NEW JERSEY, Plaintiffs, vs. INTERNAL REVENUE SERVICE; CHARLES P. RETTIG, in his official capacity as Commissioner of the Internal Revenue Service; UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.	Case No.: 4:18-CV-00103-BMM **FIRST AMENDED COMPLAINT**

Because Defendants have unlawfully interfered with `Plaintiffs' ability to gather data that is necessary and useful for the administration of their respective laws, Plaintiffs respectfully seek this Court's intervention under the Administrative Procedure Act and allege as follows:

INTRODUCTION

1. The Internal Revenue Service ("IRS") has long required organizations that are tax-exempt under § 501(c) of the Internal Revenue Code to collect and report the names and addresses of their substantial contributors. By statute, § 501(c)(3) charitable organizations must furnish this information to the IRS each year. 26 U.S.C. § 6033(b)(5). Section 6033 also authorizes the Secretary of the Treasury to require this information from other tax-exempt organizations, and the Secretary has

promulgated regulations requiring all § 501(c) organizations to report this information to the IRS. 26 C.F.R. § 1.6033-2. Organizations report this information to the IRS on Schedule B of the Form 990.

2. Though substantial contributor information is first reported federally, many states examine all or some tax-exempt entities' Form 990 and the Schedule B for regulatory purposes. Federal law authorizes the IRS to share this information with state officials for the purpose of administering state laws. *See, e.g.*, 26 U.S.C. §§ 6103(d), 6104(c).

3. On July 16, 2018, Defendants the Internal Revenue Service, the United States Department of the Treasury, and David Kautter, former Acting Commissioner[1] of the Internal Revenue Service, announced that the IRS would no longer require reporting of substantial contributor information on the Schedule B for 501(c) organizations other than § 501(c)(3) groups. The change was made through a sub-regulatory document called a "Revenue Procedure"--specifically, Revenue Procedure 2018-38.[2] Revenue Procedure 2018-38 amends a prior legislative rule--26 C.F.R. § 1.6033.2--and the Administrative Procedure Act ("APA") requires agencies to notify the public and provide an opportunity for comment before amending a legislative rule. *See* 5 U.S.C. § 553(b). The IRS promulgated its new

[1] Charles P. Rettig, as current Commissioner for the IRS, has been replaced as the named Defendant pursuant to F.R.C.P. 25(d).
[2] *Available at* https://www.irs.gov/pub/irs-drop/rp-18-38.pdf.

Revenue Procedure in violation of the APA without notice and without giving the public any opportunity to comment. Accordingly, because Defendants promulgated Revenue Procedure 2018-38 "without observance of procedure required by law," under the APA, this Court must hold the revenue procedure unlawful and set it aside. 5 U.S.C. § 706(2)(D).

4. Plaintiffs regularly receive information from the IRS that they use to administer their tax laws. Federal law contains several provisions that enable and obligate the IRS to share information with state agencies and officers for the purpose of administering state tax laws. *See, e.g.*, 26 U.S.C. §§ 6103(d), 6104(c). The availability of this information is an important consideration for Plaintiffs when they determine how to structure or enforce their tax regulations. And plaintiffs regularly obtain and rely on this information from the IRS during the normal course of enforcing their tax laws.

5. Information about donor identity in particular is of fundamental importance to the Plaintiffs' statutory and regulatory administration of tax-exempt entities. For example, Montana law provides that Plaintiff Montana Department of Revenue ("MTDOR") cannot grant tax-exempt status to organizations whose net income inures to the benefit of any private shareholder or individual ("private inurement"). Mont. Code. Ann. § 15-31-102(1). Montana law does not independently require organizations seeking tax-exempt status to file the names and

addresses of their significant contributors with the state. Accordingly, Plaintiff Montana Department of Revenue ("MTDOR") relies on the availability of this information from the IRS, and on the exhaustiveness of the IRS's private inurement determinations.

6. Plaintiff State of New Jersey requires certain charitable organizations to file, along with their state registration statements, a "complete copy of the charitable organization's most recent [IRS] filing(s)" including "[a]ll schedules." Prior to the issuance of Revenue Procedure 2018-38, this requirement unambiguously included significant contributor information on Schedule B of Form 990.

7. Changes that weaken the IRS's collection of significant contributor information and the integrity of federal private inurement determinations will frustrate Plaintiffs' tax regimes, impose substantial pressure on Plaintiffs to change their relevant statutes and regulations, and require Plaintiffs to expend substantial resources to develop new procedures to administer their respective laws effectively.

PARTIES

8. The Montana Department of Revenue is an executive agency of the State of Montana. MTDOR resides within and throughout the State of Montana, including through its office in Great Falls. In administering Montana's tax laws, MTDOR determines whether organizations doing business in Montana qualify for

tax-exempt status under state law.

9. Steve Bullock is the Governor of Montana. He is the state's chief executive and exercises supervisory authority over MTDOR pursuant to the Montana Constitution and state statute. He sues in his official capacity.

10. Through the New Jersey Division of Consumer Affairs ("DCA"), within the Department of Law and Public Safety, the State of New Jersey regulates certain tax-exempt entities operating in or soliciting donations from individuals within the State of New Jersey.

11. Defendant Internal Revenue Service is an executive agency of the United States within the meaning of the APA, 5 U.S.C. §§ 551, 701(b)(1).

12. Defendant United States Department of the Treasury is an executive agency of the United States within the meaning of the APA, 5 U.S.C. §§ 551, 701(b)(1).

13. Defendant Charles P. Rettig is the Commissioner of the Internal Revenue Service. He is sued in his official capacity, and substituted for Acting Commissioner David Kautter, who was one of the original Defendants in this action. He serves as the head of the IRS in Washington, D.C.

JURISDICTION AND VENUE

14. Because this action arises under the APA, this Court has federal question jurisdiction under 28 U.S.C. § 1331.

15. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1) because Plaintiff MTDOR, an executive agency of the State of Montana, is a resident of this judicial district. Divisional venue is proper in the Great Falls Division under L.R. 3.2(b) and Mont. Code. Ann. §§ 25-2-118, -125 because Defendants IRS and United States Department of the Treasury are found throughout the state, and a substantial part of the events or omissions giving rise to the Plaintiffs' claims occurred in this Division.

BACKGROUND

I. PRIOR STATUTORY AND REGULATORY FRAMEWORK

16. Section 6033(b) of the Internal Revenue Code requires 501(c)(3) organizations to file annual reports reporting "the total of the contributions and gifts received by it during the year, and the names and addresses of all substantial contributors." 26 U.S.C. § 6033(b)(5). Substantial contributors are defined in 26 U.S.C. § 507(d)(2) as those having contributed more than $5,000, in aggregate.

17. "Although the statute does not address contributor reporting by tax-exempt organizations other than those described in § 501(c)(3), the implementing regulations under § 6033(a) generally require all types of tax-exempt organizations to report the names and addresses of all persons who contribute $5,000 or more in a year under [26 C.F.R.] § 1.6033-2(a)(2)(ii)(f)." Revenue Procedure 2018-38, at *3 (describing regulatory background).

18. The reporting requirements for tax-exempt organizations other than for organizations described in § 501(c)(3) are pursuant to a binding legislative rule, 26 C.F.R. § 1.6033-2. *See* Treasury Decision 7122, 36 Fed. Reg. 11,025 (June 8, 1971).

19. "Under existing rules, the names and addresses of contributors for all types of organizations are reported on Schedule B, 'Schedule of Contributors,' filed with Forms 990, 990-EZ, and 990-PF, or, with respect to organizations described in § 501(c)(21), in Part IV of Form 990-BL." Revenue Procedure 2018-38, at *4 (describing relevant forms).

20. By regulation, the Commissioner of the IRS may relieve organizations or classes of organizations from reporting requirements if the Commissioner determines that the information to be reported is not necessary for the efficient administration of federal tax laws. 26 C.F.R. § 1.6033-2(g)(6). This regulation does not supersede the statutory requirement that amendments to legislative rules must be promulgated through the APA's notice-and-comment process.

21. Federal law authorizes the IRS to share the returns and return information of 501(c) organizations--including the Schedule B--with certain state officials for the purpose of, and to the extent necessary in, the administration of state laws. *See, e.g.*, 26 U.S.C. §§ 6103(d), 6104(c).

22. The reports made by groups other than 501(c)(3) organizations and private foundations remain confidential from the public, but are available both to the

IRS for its purposes and to state tax authorities, including Plaintiffs, under federal law.

II. THE ROLE OF DONOR IDENTITY IN STATE REGULATION OF TAX-EXEMPT ENTITIES.

23. Schedule B donor reports serve an important function in the administration of both state and federal laws.

24. For example, to qualify for tax-exempt status pursuant to § 501(c)(4), an entity must be operated exclusively to promote social welfare and must not be organized for profit ("Social Welfare Organizations"). To be operated exclusively to promote social welfare, an entity must further the common good and general welfare of the people of the community. Social Welfare Organizations may participate in some political activities--although not specific political campaigns--provided they do not constitute the Social Welfare Organization's primary activity. Donations to Social Welfare Organizations are generally not deductible as charitable contributions for federal income tax purposes and therefore would not appear on an individual donor's tax return.

25. Thus, the Schedule B and its substantial contributor information is one of the few avenues by which state authorities can examine a Social Welfare Organization's sources of funding. The names and addresses of significant contributors to federal tax-exempt organizations can play a significant role in ferreting out improper or illegal activity conducted by entities masquerading as

charitable, social welfare, or other such groups. Without that information, proper enforcement of state tax codes, laws governing charitable organizations, and consumer fraud protections becomes more difficult.

26. Moreover, under federal law and the law of most states, social welfare organizations may not receive tax exemptions if any part of their earnings or income "inures to the benefit of any private shareholder or individual." *See* 26 U.S.C. § 501(c)(4)(B). This is often referred to as the prohibition on private inurement.

27. To determine whether an organization violates the prohibition on private inurement--and thus may not receive tax-exempt status--tax authorities may look to that organization's significant contributors. A similar determination dictates whether a group can maintain its tax-exempt status after it has been granted an exemption.

28. For example, if a plumber organized her business under the guise of a tax-exempt social welfare organization, she might receive tax-exempt income from her clients by means of "contributions." But if a tax regulator reviewed the names and addresses of the plumber's significant contributors, the regulator might determine that these persons are the plumber's clients--not contributors--and that tax-exempt status is inappropriate.

29. Accordingly, the names and addresses of significant contributors are important to the ongoing administration of tax-exemption determinations, both at

the state and federal level.

30. Given the strength and uniformity of federal reporting requirements, many states treat the IRS's tax-exemption and private inurement determinations as highly reliable and persuasive--if not authoritative--in making their own state law determinations.

31. The availability of information regarding the names and addresses of significant contributors to federal tax-exempt organizations also plays a significant role in policing improper political activity by tax-exempt organizations.

32. Access to Schedule B information permits State and Federal taxing authorities to police this restriction. For example, Social Welfare Organization "A" might spend 49% of its funding on permissible political activities, and donate the remaining 51% of its funding to another organization focused on similar issues, Social Welfare Organization "B." If Social Welfare Organization "B" uses all of the funds for political activities, then essentially all of Social Welfare Organization "A's" funds have been used for political activities. The contributor information detailed in the Schedule B would allow tax authorities to trace these funds and as a result, Social Welfare Organization "A" could be stripped of its tax-exempt status, prosecuted for filing a false return, or subject to investigation and/or penalties for potentially misleading consumers.

33. Additionally, federal law prohibits foreign nationals from participating

in federal, state, or local elections, such as by contributing to a campaign or by purchasing television or digital advertising to support a candidate in the immediate run-up to an election. *See* 52 U.S.C. § 30121. If the IRS finds out that an organization is engaged in political activity, and receives a report that the organization's significant contributors consist of an unusually large number of foreign nationals, then the IRS, or state agencies acting on information received from the IRS, may be well-positioned to investigate further and identify or stop a potential violation of federal law. Absent the reporting of names and addresses of the significant contributors, however, the IRS and state agencies will be less capable of making such a determination. Other nonprofit organizations that are exempt under § 501(c), such as §§ 501(c)(5) and (c)(6) organizations, may also use funds to engage in political activity, and so knowledge of the names and addresses of their substantial contributors is relevant to the enforcement of election law as well.

34. Sections 501(c)(4), (c)(5), and (c)(6) organizations have become particularly active in elections in recent years. By one estimate, campaign spending by "dark money" groups--primarily, organizations that are tax-exempt under §§ 501(c)(4), (c)(5), and (c)(6)--increased more than fifty-fold between 2004 and 2016. *See* Center for Responsive Politics, *Dark Money Basics*, https://www.opensecrets.org/dark-money/basics (last visited July 23, 2018) [https://perma.cc/GQR2-6GDT].

35. In its 2011 Annual Report & 2012 Work Plan regarding exempt organizations, the IRS noted that the Form 990, which includes Schedule Bs, provided the IRS with "a wealth of information" on Social Welfare organizations and touted the benefits of the Form 990 in "enforce[ing] the rules relating to political campaigns . . . ."[3]

36. Beyond tax regulators, a range of other interests in civil society--candidates, election regulators, the press--rely on the accuracy and integrity of tax-exemption determinations for these organizations.

III. REGULATION OF TAX-EXEMPT ENTITIES BY PLAINTIFFS

A. Plaintiffs Governor Bullock and MTDOR

37. Plaintiff Governor Bullock exercises executive and supervisory authority over MTDOR and other executive agencies of the State of Montana. He is ultimately responsible for directing MTDOR's administration of Montana's tax laws, including operations and policies related to tax-exempt organizations.

38. Under Montana law, certain organizations qualify for exemptions from state taxation.

39. When an organization does business in the State of Montana, it is required to register with the Montana Secretary of State. Organizations may mark

[3] Internal Revenue Service, *2011 Annual Report & 2012 Work Plan*, https://www.irs.gov/pub/irs-tege/fy2012_eo_work_plan_2011_annrpt.pdf (last visited March 11, 2019).

on their registration whether they intend to seek tax-exempt status in Montana. After registration at the Secretary of State, the information is forwarded to Plaintiff the Montana Department of Revenue.

40. Under Montana law, organizations cannot obtain tax-exempt status if any part of their net income inures to the benefit of any private shareholder or individual. Mont. Code. Ann. § 15-31-102(1). Any organization that does is likely to be denied tax-exempt status under Montana law.

41. Organizations indicating that they wish to seek a tax exemption from the State of Montana must demonstrate that no part of their net income inures to the benefit of any private shareholder or individual. Organizations begin by completing Montana tax form EXPT,[4] indicating entity type, address, contact person, and other information. Organizations are also required to submit articles of incorporation, by-laws, latest financial statement showing assets, liabilities, receipts and disbursements, and an "affidavit showing the character of the organization, the purposes for which it was organized, its actual activities, the sources and disposition of its income, and whether any of its income may inure to the benefit of any private shareholder or individual." Form EXPT.

42. The sources of an organization's income--particularly the identities of

[4] *Available at* https://app.mt.gov/myrevenue/Endpoint/DownloadPdf?yearId=178 [hereinafter "Form EXPT"].

its significant contributors--are important in determining whether the organization complies with the prohibition on private inurement. Because of the rigor of the existing federal tax-exemption process, federal tax-exemption determinations are part of Montana's analysis for tax exemptions. Applicant organizations must indicate whether they have received a federal exemption, and Plaintiff MTDOR relies on the IRS's tax-exemption determinations. In this process, some organizations submit complete federal Form 990s and attendant schedules, including the Schedule B containing significant contributor information, when seeking Montana tax-exempt status.

43. Once an organization has received tax-exempt status from Montana, Plaintiff MTDOR may later review this determination and seek additional information. For these post-determination investigations, MTDOR may request the names and addresses of significant contributors from the IRS. Federal law authorizes and obligates the IRS to share this information with state officials for the purpose of administering state laws. 26 U.S.C. §§ 6103(d), 6104(c).

B. Plaintiff State of New Jersey

44. Over 32,000 entities are registered as charitable organizations with the New Jersey DCA, including hundreds of 501(c)(4) organizations. In addition, the New Jersey DCA is aware of certain other entities that operate as charitable

organizations within the meaning of New Jersey law but that appear to have not complied with their registration obligations.

45. New Jersey regulates charitable organizations operating in the State in a variety of ways, including through the Charitable Registration and Investigation Act ("the Act"). *See* N.J. Stat. Ann. 45:17A-18 *et seq*. The Act regulates the fundraising activities of charitable organizations and professional fundraisers, fund-raising counsels, commercial co-ventures, and solicitors conducting business within the State by requiring them to register and file annual financial reports with the Charitable Registration Section of the New Jersey DCA.

46. Pursuant to the Act, entities that are, or held themselves out to be "established for any benevolent, philanthropic, humane, social welfare, public health, or other eleemosynary purpose," are considered "charitable organizations" subject to the Act. N.J. Stat. Ann. 45:17A-20. Thus, under New Jersey law, a 501(c)(4) social welfare organization may be a "charitable organization" subject to the Act. *Id.*

47. The Act requires certain charitable organizations to file registration statements with the Attorney General, which function has been delegated to the New Jersey DCA and its Charitable Registration Section. *See* N.J. Stat. Ann. 45:17A-21 to -26. The registration category and attendant fees are dependent in part on the amount of contributions an organization receives during the fiscal year. *Id.*

Significantly, it is not possible to distinguish a contribution from a grant from the face of a Form 990, Form 990-EZ, or Form 990-PF. Rather, the Schedule B and donor information assists the Attorney General and his delegates in these calculations.

48. Registrations under the Act must also include a "complete copy of the charitable organization's most recent [IRS] filing(s)" including "[a]ll schedules." N.J.A.C. 13:48-4.1(b)(7) (concerning short-form registrations or renewals); *see also* N.J.A.C. 13:48-5.1(b)(5) (concerning long-form registrations or renewals). Prior to the issuance of Revenue Procedure 2018-38, this requirement unambiguously included contributor information on Schedule B of Form 990.

49. In addition to registration forms and fees, New Jersey also uses contributor information contained in the Schedule B to track contributions over time, identify suspicious patterns, locate donors for determining whether an entity is soliciting contributions from individuals within the State (and therefore subject to registration), and other investigations under the Act.

C. Harm to Plaintiffs

50. By eliminating the requirement that significant contributor information be reported to the IRS for groups other than 501(c)(3) charities, Revenue Procedure 2018-38 produces several distinct kinds of injury to Plaintiffs.

51. Revenue Procedure 2018-38 harms Montana's ability to conduct

private inurement determinations for tax-exempt organizations doing business in the state, both by reducing the information available to the state from the IRS and by weakening the overall rigor and reliability of the federal process.

52. Montana's private inurement determinations rely on the strength of the federal tax-exemption process, including the vigorous reporting requirements for significant contributors provided by 26 U.S.C. § 6033(b)(5) and 26 C.F.R. § 1.6033-2. These reporting requirements bolster the overall quality of federal tax-exemption determinations. If significant contributor information is not reported to the IRS for groups other than § 501(c)(3) charities, it will harm Montana's ability to make private inurement determinations by degrading the quality and reliability of the federal private inurement determinations.

53. Moreover, if the IRS no longer requires certain tax-exempt organizations to report the names and addresses of significant contributors, then Montana will not be able to request that information from the agency when conducting its own determinations. Because Montana will be forced to obtain this information from potentially thousands of organizations directly, rather than from the IRS, this frustrates the efficient administration of Montana's tax laws.

54. Montana has over 10,000 tax-exempt organizations, the greatest

number per capita in the United States and nearly twice the national average.[5] Whenever Montana grants tax-exempt status to an organization, it may be forgoing income that would otherwise contribute to the state's treasury. An increased rate of mistakes, or decreased reliability, in the tax-exemption process exposes the state to additional financial loss. It also increases the potential for abuse of Montana's tax-exempt status granted by the state.

55. By eliminating the requirement that names and addresses of significant contributors be reported to the IRS for groups other than § 501(c)(3) charities, Revenue Procedure 2018-38 will shoulder Plaintiffs with additional financial and administrative burdens connected to regulation of tax-exempt entities.

56. Damage to the strength of these reporting requirements at the federal level requires state tax agencies like Plaintiff MTDOR to fundamentally change their state tax-exemption review processes, including adopting new administrative rules, developing new forms and processes, requiring new and state-specific information, and devoting more staff and other government resources away from other areas of tax administration and toward tax-exempt organizations practice.

57. Montana will be forced to assume the burden of developing unique processes to solicit the significant contributor information contained in the current

[5] *See* Scott Greenberg, *Which States Have the Most Tax-Exempt Organizations?*, Tax Foundation, Dec. 29, 2015, https://taxfoundation.org/which-states-have-most-tax-exempt-organizations.

Form 990, Schedule B, including legislative and rule changes. Montana's current affidavit requirements do not contain the level of specificity required by the Form 990, Schedule B.

58. Moreover, where previously the State of Montana could access significant contributor information in one, centralized location--the IRS--now that the IRS will no longer collect such information, Montana will be required to solicit it from every new applicant organization individually, and annually from the thousands of extant organizations that have already received tax-exempt status from Montana but that will not report their significant contributors to the IRS in future years.

59. For state governments like Montana's, there is a significant burden involved in reorienting tax processes. At present, Montana does not have any full-time staff or general fund monies devoted to tax-exempt organizations practice.

60. Similarly, information on contributors is vital for Plaintiff New Jersey's proper regulation of all charitable organizations. As a result of the IRS's changed practice, the New Jersey DCA has proposed rules to ensure that charitable organizations filing registration statements with the New Jersey DCA continue to report to the New Jersey DCA substantial contributor information that they were previously required to report to the IRS on Schedule B but will no longer be required

to report pursuant to Revenue Procedure 2018-38. *See* 50 N.J.R. 2549(a) (proposed Dec. 17, 2018).

61. The New Jersey DCA's proposed rules have not yet been adopted, and state employees continue to spend time on finalizing rules to ensure that the New Jersey DCA continues to receive substantial contributor information that is useful to its regulatory activities. The New Jersey DCA would not incur these costs had Defendants not unlawfully issued Revenue Procedure 2018-38 or if Revenue Procedure 2018-38 were promptly set aside.

62. If the New Jersey DCA adopts a rule based on its pending proposal, the agency expects to expend resources educating charitable organizations about the revised reporting requirements, responding to inquiries from charitable organizations, training staff, modifying forms and processes, and carrying out related administrative tasks. The New Jersey DCA would not incur these costs had Defendants not unlawfully issued Revenue Procedure 2018-38 or if Revenue Procedure 2018-38 were promptly set aside.

63. Even with a state-level requirement to report substantial contributor information, the New Jersey DCA anticipates that compliance rates will likely be lower than they have been prior to Revenue Procedure 2018-38, when charitable organizations have been required simply to provide a copy of their Schedule B to the New Jersey DCA. Thus, the New Jersey DCA anticipates an increase in costs

incurred in affirmatively requesting and securing substantial contributor information from individual charitable organizations. The New Jersey DCA would not incur these costs had Defendants not unlawfully issued Revenue Procedure 2018-38 or if Revenue Procedure 2018-38 were promptly set aside.

64. As for charitable organizations that fail to comply with a state-level requirement to report substantial contributor information, Revenue Procedure 2018-38 appears to eliminate the possibility that state agencies could obtain such information from the IRS. Deprived by Revenue Procedure 2018-38 of a potential avenue for securing information that the organizations have not reported to the New Jersey DCA, the State may have little option other than to seek the donor information directly from the charitable organization.

65. Moreover, to the extent that New Jersey pursues this information from charitable organizations on an individual basis as part of an investigation under the Charitable Registration and Investigations Act, the existence of the investigation will become known to the charitable organization because the organization will have received a particularized request for information (or have been notified of the particularized request by a third party). This has the potential to compromise the investigation, which would not be the case if significant contributor information is reported to the IRS as a matter of course and could be disclosed to the State. The New Jersey DCA would not face this problem had Defendants not unlawfully issued

Revenue Procedure 2018-38 or if Revenue Procedure 2018-38 were promptly set aside.

66. Eliminating the requirement that names and addresses of significant contributors be reported to the IRS for groups other than § 501(c)(3) charities, Revenue Procedure 2018-38 also causes Plaintiffs to suffer informational injury. *See Federal Election Commission v. Akins,* 524 U.S. 11, 21 (1998) (recognizing "informational injury" as "injury in fact").

67. By statute, the names and addresses of significant contributors for organizations other than § 501(c)(3) charities "shall be open to inspection by, or disclosure to," States like Montana and New Jersey. 26 U.S.C. § 6103(d). New Jersey's Division of Taxation maintains several information-sharing agreements with the IRS, including a memorandum of understanding regarding disclosure pursuant to § 6103(d). New Jersey utilizes federal tax information from the IRS in both criminal and civil investigations.

68. Both the State of New Jersey, and the State of Montana by and through its Department of Revenue and its chief executive Governor Bullock, also have a quasi-sovereign interest in the administration of their own tax laws and related charitable organization policies. Taxation is a sovereign power of the states, as is the power to regulate charitable organizations and protect consumers and donors. If the names and addresses of significant contributors are not reported to the IRS for

groups other than § 501(c)(3) charities, it will invade upon Plaintiffs' quasi-sovereign interest in the administration of their respective laws.

69. If the names and addresses of significant contributors to § 501(c) organizations other than § 501(c)(3) charities are not reported to the IRS, it will "impos[e] substantial pressure" on both New Jersey and Montana to change their laws. *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016). "[S]tates have a sovereign interest in the 'power to create and enforce a legal code.'" *Id.* (citation omitted). Plaintiffs would undoubtedly "incur significant costs" in changing their respective laws to create a new procedure for the collection of significant contributor names and addresses for use in their private inurement determinations and compliance investigations regarding charitable organizations. *See id.* at 155. In fact, as stated above, New Jersey already has initiated rulemaking procedures to address the problem created by the IRS's unlawful issuance of Revenue Procedure 2018-38.

70. Moreover, Plaintiffs are not "normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). Rather, Plaintiffs are entitled to "special solicitude" for Article III standing purposes. *Id.* at 520. Here, "[t]he parties' dispute turns on the proper construction of a congressional statute, the APA, which authorizes challenges to final agency action for which there is no other adequate remedy in a court." *Texas v. United States*, 809

at 152 (quoting *Mass. v. EPA*, 549 U.S. at 518; 5 U.S.C. § 704.

IV. REVENUE PROCEDURE 2018-38[6]

71. On July 16, 2018, Defendants announced that organizations other than §§ 501(c)(3) and 527 political groups will no longer be required to report the names and addresses of their substantial contributors under 26 C.F.R. § 1.6033-2.

72. Defendants purported to effect this change by way of a sub-regulatory, internal guidance document called a Revenue Procedure.

73. Typically, an IRS "Revenue Procedure . . . is an internal procedural rule that does not create or determine any rights, obligations, or legal consequences." *See Facebook, Inc. v. Internal Revenue Serv.*, No. 17-CV-06490-LB, 2018 WL 2215743, at *17 (N.D. Cal. May 14, 2018) (citations omitted).

74. Revenue Procedure 2018-38 states that

> tax-exempt organizations required to file the Form 990 or Form 990-EZ, other than those described in § 501(c)(3), will no longer be required to provide names and addresses of contributors on their Forms 990 or Forms 990-EZ and thus will not be required to complete these portions of their Schedules B (or complete the similar portions of Part IV of the Form 990-BL). Similarly, organizations described in § 501(c)(7), (8), or (10) will no longer be required to provide on Forms 990 or Forms 990-EZ the names and addresses of persons who contributed more than $1,000 during the taxable year to be used for exclusively charitable purposes.

[6] *Available at* https://www.irs.gov/pub/irs-drop/rp-18-38.pdf.

Revenue Procedure 2018-38, at *6.

75. In other words, Revenue Procedure 2018-38 purports to relieve organizations of the obligation to report contributors' names and addresses previously required by 26 C.F.R. § 1.6033-2.

76. Revenue Procedure 2018-38 is a reviewable "final agency action" within the meaning of the APA, 5 U.S.C. § 704, because it represents the culmination of the agency's decision-making and "determines rights or obligations or triggers legal consequences." *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 817 n.4 (2015) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). There is nothing tentative about Revenue Procedure 2018-38, and it determines organizations' rights and obligations by relieving organizations other than § 501(c)(3) charities of the obligation under 26 C.F.R. § 1.6033-2 to furnish the names and addresses of their substantial contributors.

77. In promulgating Revenue Procedure 2018-38, Defendants provided no notice or opportunity for comment.

78. Additionally, Defendants did not supply a reasoned analysis of their decision to amend a legislative rule when promulgating Revenue Procedure 2018-38.

79. Because Defendants' actions did not conform to the requirements of the APA for amending a legislative rule, Defendants have acted in excess of their

statutory authority or limitations.

80. Had Plaintiffs been given notice and afforded an opportunity to comment, they would have notified Defendants of the significant, adverse effects of the putative change in reporting rules. Reduced transparency for § 501(c) organizations at the federal level has significant downstream effects. In the context of elections and election spending, reduced transparency at the IRS upends settled expectations that federal tax-exempt organizations are what they purport to be: domestically-funded social welfare groups validly participating in elections, for example. Absent the reporting of the names and addresses of significant contributors to the IRS, the task of eradicating foreign influence in elections becomes harder if state and federal campaign finance officials cannot rely on the IRS. The same goes for tax officials seeking to determine whether organizations are evading requirements about what proportion of their funds can be dedicated to political activity. And for state treasuries, reduced reporting of significant contributor information makes it far harder for tax officials to target abuse of the tax-exempt designation.

COUNT ONE:
FAILURE TO OBSERVE PROCEDURE FOR RULEMAKING REQUIRED BY LAW IN VIOLATION OF THE APA

81. Plaintiffs repeat and reallege each of the foregoing allegations.

82. The APA requires courts to "hold unlawful and set aside agency action"

that has been promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

83. Revenue Procedure 2018-38 is a substantive or legislative rule because it purports to amend the reporting requirements contained in 26 C.F.R. § 1.6033-2 and to change the obligations and legal consequences for certain tax-exempt organizations around reporting; it "effect[s] a change in existing law" because it "effectively amends a prior legislative rule." *Wilson v. Lynch*, 835 F.3d 1083, 1099 (9th Cir. 2016) (citation omitted).

84. Before a substantive rule like Revenue Procedure 2018-38 may take effect, the APA requires the agency to issue a notice of proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved" in order to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b)(3), (c).

85. Defendants did not comply with this notice-and-comment requirement in promulgating Revenue Procedure 2018-38. Rather, Defendants merely purported to announce it as applicable for returns that will become due on or after May 15, 2019.

86. The fact that Defendants labeled the substantive change a "Revenue Procedure" does not excuse their violation of the APA. Moreover, a provision that

allows the Commissioner to relax some filing requirements does not allow Defendants to evade notice-and-comment: that provision does not permit Defendants to wholesale repeal substantive reporting requirements that affect obligations and have legal consequences outside of the procedures of the APA for legislative rules.

87. Plaintiffs have no adequate or available administrative remedy; in the alternative, any effort to obtain an administrative remedy would be futile.

88. Plaintiffs have "no other adequate remedy in a court." 5 U.S.C. § 704.

89. Defendants' action in promulgating Revenue Procedure 2018-38 has harmed and will continue to harm Plaintiffs by impairing their ability to make tax-exemption determinations and regulate those entities pursuant to their respective laws.

COUNT TWO:
UNAUTHORIZED AGENCY ACTION IN VIOLATION OF THE APA

90. Plaintiffs repeat and reallege each of the foregoing allegations.

91. The APA forbids agency action "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C).

92. The reporting requirements for tax-exempt organizations other than those described in § 501(c)(3) are pursuant to a binding legislative rule, 26 C.F.R. § 1.6033-2, that was promulgated according to the relevant requirements under the APA, including notice-and-comment. *See* 5 U.S.C. § 553.

93. The Commissioner's ability to relieve certain unnecessary filing requirements under § 1.6033-2(g)(6) does not supersede the statutory requirement that amendments to legislative rules must be promulgated through the APA's notice-and-comment process.

94. By purporting to amend a legislative rule without conforming to the requirements of the APA, Defendants have acted in excess of their statutory authority or limitations.

95. The fact that Defendants labeled the substantive change a "Revenue Procedure" does not excuse their violation of the APA. Revenue Procedure 2018-38 is a substantive or legislative rule because it purports to amend the reporting requirements contained in 26 C.F.R. § 1.6033-2 and to change the obligations and legal consequences for certain tax-exempt organizations around reporting; it "effect[s] a change in existing law" because it "effectively amends a prior legislative rule." *Wilson v. Lynch*, 835 F.3d at 1099 (citation omitted).

96. Plaintiffs have no adequate or available administrative remedy; in the alternative, any effort to obtain an administrative remedy would be futile.

97. Plaintiffs have "no other adequate remedy in a court." 5 U.S.C. § 704.

98. Defendants' actions in promulgating Revenue Procedure 2018-38 have harmed and will continue to harm Plaintiffs.

COUNT THREE:
ARBITRARY AND CAPRICIOUS RULEMAKING IN VIOLATION OF

THE APA

99. Plaintiffs repeat and reallege each of the foregoing allegations.

100. The APA forbids agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

101. To comply with the APA, an agency must supply a "reasoned analysis" of its decision to amend a legislative rule. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

102. In promulgating Revenue Procedure 2018-38, Defendants did not supply a reasoned analysis of the decision to relieve tax-exempt organizations other than § 501(c)(3) charitable organizations from the requirement that they furnish the names and addresses of their substantial contributors.

103. The fact that Defendants labeled their substantive change a "Revenue Procedure" does not excuse their violation of the APA. Moreover, a provision that allows the Commissioner to relax some filing requirements does not allow Defendants to amend a legislative rule without supplying a reasoned analysis. That provision does not permit Defendants to wholesale repeal substantive reporting requirements that affect obligations and legal consequences outside of the procedures of the APA for legislative rules.

104. Plaintiffs have no adequate or available administrative remedy; in the alternative, any effort to obtain an administrative remedy would be futile.

105. Plaintiffs have "no other adequate remedy in a court." 5 U.S.C. § 704.

106. Defendants' actions in promulgating Revenue Procedure 2018-38 have harmed and will continue to harm Plaintiffs MTDOR and Governor Bullock.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

a. Issue an order and judgment setting aside Revenue Procedure 2018-38 under 5 U.S.C. § 706(2);

b. Award Plaintiffs their costs, attorneys' fees, and other disbursements for this action; and

c. Grant any other relief this Court deems appropriate.

Dated: March 13, 2019

Respectfully submitted,

/s/ *Raphael Graybill*
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CERTIFICATE OF COMPLIANCE

In accordance with Local Rule 7.1 of the Rules of Procedure of the United States District Court for the District of Montana, I certify the following concerning the Complaint:

1. the document is double spaced except for footnotes and quoted and indented material;

2. the document is proportionally spaced, using Times New Roman, 14 point font; and

3. The document contains 6,284 words as calculated by Microsoft Word.

Dated: March 13, 2019

/s/ *Raphael Graybill*
Raphael Graybill