

**Written Comments of Peter Roberts
Submitted to the House Committee on Ways and Means
“Tax Reform and Charitable Contributions”**

February 28, 2013

Mr. Chairman and members of the committee, when considering changes to the tax code governing nonprofits, I propose that you consider legislation that will protect small business from unfair nonprofit competition. More specifically, I propose that the “Commerciality Doctrine” be codified into federal law. Also, so that enforcement of nonprofit law is transparent, I propose removing nonprofits from the confidentiality requirement in 26 U.S.C. § 6103(b)(2)(A).

The Commerciality Doctrine (hereafter “CD”) is federal court-made law that is *supposed* to prevent tax exempt entities from engaging in activities where there is a direct tax-paying counterpart. The effectiveness of the CD and its so-called “counterpart test” is limited because according to distinguished nonprofit attorney, professor and extensively-published author Bruce R. Hopkins, the CD "has not been well articulated" and is "unevenly applied." In his 2004 book the "Planning Guide for the Law of Tax Exempt Organizations" Hopkins writes: "Hundreds or perhaps thousands of organizations would lose their tax exempt status if the doctrine were applied to them." He also writes that "many of the elements of the doctrine do not make sense in the modern era. . . ." (See page 182.)

The confidentiality requirement of 26 U.S.C. § 6103(b)(2)(A) is part of the Tax Reform Act of 1976, Pub.L. No. 94-455, 90 stat. 1520 (1976). The Act was adopted in the wake of Watergate and Nixon’s use of audits against his enemies. The purpose of the law was to insulate the IRS from political pressure and protect the privacy of *taxpayers*. Keeping IRS oversight of nonprofit programs secret does not further that purpose. Keeping violations by nonprofits secret engenders its own abuse. Regulators are tempted not to regulate. Irresponsible nonprofits are tempted to behave irresponsibly. At the end of the day, taxpayers, the very people the law was intended to protect, pay the price.

When a nonprofit or its state enabler disregards the CD and the counterpart test, the undermined business asks the IRS to enforce compliance. Weeks later the IRS responds with a form letter stating that it is prohibited by 26 U.S.C. §6103(b)(2)(A) (hereafter “the secrecy provision”) from disclosing the “existence, status, or findings of an investigation.” By the time the IRS acts (if it ever does), for many businesses, it is too late.

I know about the issue of unfair nonprofit competition and the frustration of asking for enforcement of the CD from the IRS first-hand. I own *Downtown Bicycle Rental Inc*, in Anchorage, Alaska. During the summer of 2000, without any notice, my state authorized a nonprofit program that provided free bikes to tourists just a few blocks from my store and the *Tony Knowles Coastal Trail*. The so-called *Earth Bike Program* was not like *Capital Bike Share* and Anchorage is not like Washington D.C. Three undermined bike rental businesses failed. In 2003 *Earth* (nonprofit running the program) was dissolved. Did the IRS eventually act as we had requested? Because of the secrecy provision, there is no way to know. Although my business survived, because I had just graduated from law school, I decided to set a precedent that would prevent what happened from happening again.¹ I lost.

In *Roberts v. Alaska*, 162 P.3d 1214 (Alaska 2007), *cert. denied*, 552 U.S. 1101 (Jan 7, 2008), congressional public policy, the CD and common sense were turned on their head. My case was decided before the Great Recession. Now that the country has experienced its pain, no one will honestly dispute what I argued and what I am sure members of this committee believe: the success of a small business equates to the public interest as a whole.²

Alaska's positions in the case that bears my name are outrageous on their face. The state made the incredible assertion in a court pleading that businesses undermined by nonprofits should "adapt to the interference, either by moving . . . or by offering a product [the nonprofit] did not offer." The court did not disagree. "[E]ven if the program had interfered with his business – a fact that was not established – such interference does not render the program detrimental to the public interest as a whole." *Roberts* at 1224. Alaska's enunciated public policy thwarts federal law and goes against everything America is supposed to be about.

The totality of the public's interest in small businesses is made up of individual "Joe the Plumber" enterprises. Nationwide, small businesses pay half of all private sector employees. Employers and employees pay taxes. Taxes are the

¹ In 2006 I passed the Alaska Bar. I could have sworn-in as an attorney but chose not to so I could preserve the issue of whether a non-attorney who owns 100% of the stock in their corporation can litigate assigned corporate claims. Now I choose not to swear-in because I prefer to run my small business and because I have lost faith in the Alaska judiciary.

² "Roberts argues that the permit was detrimental to the best interests of the public because 'no public benefit to society' accrues when government provides tourists with recreation that they would otherwise pay for. But the superior court found that Roberts was equating 'his business interests and profits with the 'best interests of the public.'" *Roberts* at 1224.

lifeblood of government.³ A business that does not earn a profit cannot meet payroll nor will it pay taxes. This increases pressure on government safety nets. When a nonprofit or its government enabler undermines small business, government must cut services, run a deficit, or increase taxes on everyone else. Congressional public policy acknowledging this axiomatic truth is law.⁴ Incredibly, the Alaska Department of *Revenue* argued otherwise and the court agreed. “[N]o public policy prohibits nonprofit entities from competing in the marketplace.” *Roberts* at 1225. The “opinion” of Alaska’s highest court is wrong.

There is no way a business can survive when a nonprofit provides an identical service down the street for free. Unless you act, when nonprofits and their state enablers suddenly decide to provide a below cost or free service already provided by a tax-paying business, the tax-paying business will either fail or be forced to “adapt to the interference, either by moving . . . or by offering a product [the nonprofit] did not offer.” In other words, the small business must go to the back of the bus.

This plea for federal action from the country’s most northern state is built on the same foundation as the plea heard by Washington coming from oppressed people in southern states beginning in 1955. If this committee passes the two pieces of legislation I propose, it should spell-out its supremacy over state law *and* state action. I also suggest adding a notification provision and a public comment period. Absent an emergency, *before* a nonprofit launches a program, it should be required to notify the IRS Exempt Entity Office, the most local office of the SBA, the planning department of the town the program is supposed to serve, and most importantly, neighboring businesses offering the same or similar products and services. Responsible nonprofits will welcome a notice and comment requirement because it will solidify support for their programs. By itself, a notice and comment period will go a long way to making the law self-enforcing.

When irresponsible nonprofits do disregard the counterpart test over the objections of small businesses, the existence, status, findings and action (if any) of the IRS should be public. Making this exception to 26 U.S.C. § 6103(b)(2)(A) will

³ Unlike other states and the Federal government, Alaska has no income or sales tax. The lifeblood of Alaska government is oil.

⁴ “The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. . . . It is the declared policy of Congress that the Government should aid, counsel, assist, and **protect, in so far as is possible the interests of small-business concerns in order to preserve free competitive enterprise. . . .**” 15 U.S.C. § 631.

cause the public no harm. In fact it will promote what is good. Transparent enforcement will increase public trust in the charitable sector. Presently, public access to Form 990 shows detailed financial data but it does not show qualitative information necessary to assess what nonprofits actually do. When the IRS does make a qualitative assessment of a nonprofit program, the public that program is supposed to serve has a right to know.

Asking Congress to pass a law that prevents nonprofits from ambushing for-profits is not asking for very much. Codifying the CD and amending 26 U.S.C. § 6103(b)(2)(A) are actions that will carry out what is supposed to be the first rule of government: First do no harm.

Respectfully submitted

Peter Roberts

333 W 4th Avenue, Suite 206

Anchorage, AK 99501

Email: bicyclealaska@aol.com

Phone: 907-279-5293