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Dear Chairman Lewis, Ranking Member Kelly, and Members of the Committee:

Many thanks for inviting me to testify about “How the Tax Code Subsidizes Hate.” The Tax Code indeed subsidizes hate, just as it subsidizes Socialism, Satanism, and a wide variety of dangerous and offensive ideas. Under the First Amendment, tax exemptions have to be distributed without discrimination based on viewpoint; that means that evil views have to be treated the same way as good views.

1. The Supreme Court has repeatedly made clear that tax exemptions **can’t be denied based on the viewpoint that a group communicates**. This was first made clear in Justice Brennan’s opinion in *Speiser v. Randall* (1958), which struck down a denial of a property tax exemption to people and organizations that “advocate[] the overthrow of the Government of the United States . . . by . . . violence . . . or who advocate[] the support of a foreign government against the United States in the event of hostilities”:

[A] discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. It is settled that speech can be effectively limited by the exercise of the taxing power. To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. . . . [T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is “frankly aimed at the suppression of dangerous ideas.”¹

The Supreme Court reaffirmed this in 1983, and again in 1995.² Though “the Government is not required to subsidize” speakers, once it chooses to provide such a subsidy—including through “tax deductions for contributions”—it must abide by “the requirement of viewpoint neutrality in the Government’s provision of financial benefits.”³ And the U.S. Court of Appeals for the D.C. Circuit has specifically applied this to denials of a 501(c)(3) tax exemption, holding that “in administering the tax code, the IRS may not discriminate on the basis of viewpoint” (there, against pro-Israel speech that departed from the Administration’s foreign policy).⁴

¹ 357 U.S. 513, 516, 518-19 (1958).

² *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983); *Rosenberger v. Rector*, 515 U.S. 819, 834 (1995).

³ *Rosenberger*, 515 U.S. at 819.

⁴ *Z Street v. Koskinen*, 791 F.3d 24, 30 (D.C. Cir. 2015).

2. The Court has also made equally clear that **excluding speech that manifests or promotes “hate” is forbidden viewpoint discrimination**. The Court said so unanimously in *Matal v. Tam*, which struck down a rule that excluded “disparag[ing]” trademarks from certain kinds of trademark enforcement benefits.⁵ In *Matal*, the Patent and Trademark Office refused to register the trademark “The Slants,” because it perceived the mark as a derogatory term for Asians. This refusal was just the denial of a benefit; no-one was being threatened with jail or fines for using the name—owners of this mark were just not being given access to certain useful remedies against those who would infringe the mark. But the Court still concluded that such exclusion of disparaging marks was forbidden viewpoint discrimination.⁶

3. The law may treat groups differently based on their actions, but not based on the views they express. Thus, for instance, in *Bob Jones University v. United States*, the Supreme Court upheld the denial of a tax exemption to a university that banned interracial dating by its students, and that threatened to expel students who violated the ban.⁷ Likewise, in *Christian Legal Society v. Martinez*, the Supreme Court held that public universities could deny generally available benefits to student groups based on those groups’ exclusionary membership policies.⁸ But the government may not deny tax exemptions or similar benefits to universities, churches, student groups, or other groups simply because they *advocate* against interracial dating, or against interfaith dating, or against same-sex dating. As the Court made clear in *Christian Legal Society*,

Although registered student groups must conform their conduct to the Law School’s regulation by dropping access barriers, they may express any viewpoint they wish—including a discriminatory one. Today’s decision thus continues this Court’s tradition of “protect[ing] the freedom to express ‘the thought that we hate.’”⁹

4. Groups may be denied tax exemptions for deliberately engaging in speech that falls within one of the few narrow exceptions to the First Amendment, such as true threats of

⁵ 137 S. Ct. 1744 (2017).

⁶ There were two opinions in the case, one joined by four Justices and one by four others, but both opinions made clear that the exclusion of disparaging marks was unconstitutionally viewpoint-based. *Id.* at 1763 (Alito, J.) (lead opinion); *id.* at 1766 (Kennedy, J., concurring in part and concurring in the judgment). Justice Gorsuch had not yet been confirmed to the Court when the case was argued, so only eight Justices participated.

⁷ 461 U.S. 574 (1983).

⁸ 561 U.S. 661 (2010).

⁹ *Id.* at 696 n.26. Likewise, in *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court held that the government may ban race discrimination by private schools, but only after distinguishing educational institutions that engage in “the *practice* of excluding racial minorities” (which can be forbidden) from those that promote “the belief that racial segregation is desirable” (which is constitutionally protected). *Id.* at 176.

criminal attack, or incitement intended to and likely to cause imminent criminal conduct. **But “hate speech” writ large doesn’t fall within any such exceptions**, as cases such as *Matal* and *Christian Legal Society* make clear.

And any such rule denying tax exemptions for constitutionally unprotected speech must itself be administered in a viewpoint-neutral way. For instance, if Congress enacts a statute denying tax exemptions to groups that engage in libel, or threats, or incitement, that statute would equally have to cover racist groups, anti-police groups, animal rights groups, and any other groups.¹⁰ Likewise, if the government enforces bans on fraudulent fundraising by 501(c)(3) educational groups, it must do that for all kinds of groups, regardless of viewpoint.

5. Tax exemptions cannot be limited (as the IRS once tried to limit them) to groups that “present[] a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion.”¹¹ Any such test, the D.C. Circuit has held, “lacks the requisite clarity, both in explaining which applicant organizations are subject to. the standard and in articulating its substantive requirements.”¹²

It’s possible that tax exemptions to advocacy groups might be allowed only for groups that support their arguments with “intellectual exposition” consisting of “a rational development of a point of view,” rather than merely “expres[ing] . . . emotions” (in the words of a 1983 D.C. Circuit decision, which the IRS has since adopted into its regulations).¹³ I’m not certain this is so; I think the Supreme Court may well conclude that this so-called “methodology” standard, like the “sufficiently full and fair exposition” standard, is so subjective as to provide too much room for deliberate or subconscious viewpoint discrimination.¹⁴

¹⁰ See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

¹¹ *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1034 (D.C. Cir. 1980).

¹² *Id.* at 1036.

¹³ *National Alliance v. United States*, 710 F.2d 868, 872 (D.C. Cir. 1983); Rev. Proc. 86-43, 1986-2 C.B. 729.

¹⁴ For instance, in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1891 (2018), the Supreme Court struck down a ban on an ill-defined category of “political” expression at polling places, reasoning:

It is “self-evident” that an indeterminate prohibition carries with it “[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation.” Election judges “have the authority to decide what is political” when screening individuals at the entrance to the polls. We do not doubt that the vast majority of election judges strive to enforce the statute in an evenhanded manner, nor that some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards. Without them, an election judge’s own politics may shape his views on what counts as “political.”

But even if such a “methodology” test is sufficiently clear to be constitutional, it must be applied in a way “neutral with regard to viewpoint.”¹⁵ Indeed, the government’s argument in favor of such a test, which the D.C. Circuit decision approved, stressed that the test supposedly “leads to the minimum of official inquiry into[,] and hence potential censorship of, the content of expression, because it focuses on the method of presentation rather than the ideas presented.”¹⁶

So if the IRS wants to deny tax exemptions to groups that spread certain ideas on the grounds that those groups are too “emotional” rather than “intellectual” or “rational” in their arguments, it **must apply precisely the same standard to all groups—animal rights groups, pro-life groups, pro-gun-control groups, and more.** And courts will then have to decide whether the government is indeed treating all viewpoints equally in that respect.

It’s also not clear that much would be gained from requiring hate groups to support their views using factual arguments (which could easily be based on pseudoscience), or pressuring them to add the patina of “reasoned development” to their claims. Advocates of any position, however wrong-headed, can always cherry-pick some facts that they could use to buttress their arguments. And the IRS can’t decide whether those arguments are correct; as the D.C. Circuit recognized, “because of First Amendment considerations, . . . the government must shun being the arbiter of ‘truth.’ Material supporting a particular point of view may well be ‘educational’ [and thus entitled to a tax exemption] although a particular public officer may strongly disagree with the proposition advocated.”¹⁷

As a result, having the IRS focus on the “methodology” of a group’s arguments is unlikely to effectively sort good advocacy groups from bad ones. But it would exacerbate the risk that government officials will succumb to the normal human impulse to apply the rules selectively to their political enemies.¹⁸

¹⁵ *National Alliance*, 710 F.2d at 875.

¹⁶ *Id.*

¹⁷ *Id.* at 873-74.

¹⁸ See, e.g., *True the Vote, Inc. v. IRS*, 831 F.3d 551, 559 (D.C. Cir. 2016) (quoting 2013 Treasury Inspector General for Tax Administration report called “Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review,” and noting that, among other things, “The Determinations Unit [of the IRS] developed and used inappropriate criteria to identify applications from organizations with the words Tea Party in their names.”); Kelly Phillips Erb, *Why Justice Matters: The Income Tax Trial of Martin Luther King, Jr.*, *Forbes*, Jan. 15, 2018 (discussing IRS targeting of Martin Luther King, Jr.); Chuck Hobbs, *Dr. Martin Luther King Jr. [and] the IRS*, *Tallahassee Democrat*, <http://blogs.tallahassee.com/community/2014/01/19/hobbs-sunday-conversation-dr-martin-luther-king-jr-ans-the-irs/> (discussing IRS targeting of King and the Southern Christian Leadership Conference, as well as of “religious organizations dubbed ‘extremist groups’”).

6. Of course, many Americans are understandably upset that their tax money flows—whether through tax exemptions or through university student group funding policies or subsidies for mailing newspapers or books—to views that they believe (perhaps quite correctly) to be evil. Many religious people are understandably upset when they have to subsidize blasphemy. Many pro-life advocates are understandably upset when they have to subsidize pro-choice groups, and vice versa.

Police officers and their friends and families may be understandably upset when their taxes go to speech that sharply condemns the police, and perhaps even creates a climate that encourages anti-police violence. In the 1950s, many Americans were understandably upset when tax exemptions benefited advocacy of Communist revolution and Communist tyranny (which explains the law struck down by the Court in *Speiser v. Randall*). And of course many Americans are understandably upset when tax exemptions benefit speech that is hateful towards blacks or whites or Jews or Muslims or evangelical Christians or any other group.

But giving the government the power to discriminate against some such viewpoints necessarily means the government will also have the power to discriminate against others. Would we feel comfortable giving this power to the Trump Administration? If we would, would we feel comfortable giving it to a possible Sanders Administration? I doubt there are many people who would trust both those Administrations; and this distrust of government power is one reason the First Amendment exists.

Many campaigns for democracy, liberty, and equality have been greatly helped by the First Amendment, and by courts' willingness to enforce the First Amendment. But the Court has recognized that this protection against governmental suppression of speech must apply to foes of these principles as well as friends. As Justice Brennan wrote in *NAACP v. Button* (1963)—an important win for the NAACP—the NAACP's civil rights mission was “constitutionally irrelevant” to the Court's First Amendment analysis. “The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse our society against the objectives of the [NAACP]. For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.”¹⁹

“[T]he freedoms . . . guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.”²⁰ Justice Black wrote this in dissent in 1950, arguing for the rights of Communists. The Supreme Court

¹⁹ 371 U.S. 415, 444-45 (1963).

²⁰ *Healy v. James*, 408 U.S. 169, 188 (1972) (quoting *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 37 (1961) (Black, J., dissenting)).

adopted this principle in a majority opinion in 1972, protecting the Students for a Democratic Society's right of equal access to public university facilities. Those were wise words then, and they remain so today.

Thank you again for inviting me, and please let me know if there are any further questions I can ask.

Sincerely Yours,

A handwritten signature in cursive script that reads "Eugene Volokh".

Eugene Volokh