

2013 Columbia Law School Charities Regulation and Oversight Project Policy Conference on "The Future of State Charities Regulation"

Political Activity / Advocacy by the Sector and the States' Role

Advocacy by Charitable Nonprofits: Flipping the Accountability Lens to Focus on Government Actions

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INTRODUCTION

In taking liberties with this unconventional framing on the assigned topic of “Political Activity/Advocacy by the Sector and the States’ Role,” I salute our hosts at the Columbia Law School National State Attorneys General Program, General Jim Tierney and Cindy Lott, who always have expressed their desire – and insistence – that participants at their events engage in thought-provoking and meaningful dialogue. For those who nonetheless feel uncomfortable with the radically different approach of flipping the accountability lens, think of this paper as an explanation about why nonprofits feel compelled to engage more in advocacy.

This paper is admittedly different for a “Charities Regulation Policy Conference.” Instead of focusing narrowly on the actions of nonprofits and foundations, this paper flips the accountability lens to look back more broadly at government actions. It invites conference attendees to take a giant step back to assess how government policymakers (specifically excluding regulators) are handling their responsibilities with respect to community assets known as charitable nonprofits.

The traditional one-way lens misses the bigger picture: the public depends on the charitable sector to be healthy enough to provide a reliable social safety net and deliver a wide range of other services. Yet since the Great Recession began governments have been rapidly shifting massive amounts of their financial burdens onto charitable nonprofits, thereby straining and stretching that safety net to the point of imperiling the health of nonprofits and hurting the public.

This purposefully provocative paper documents five hidden-in-plain-sight trends to highlight how individuals and local communities are endangered by an increasing number of governments:

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1. *Abusing nonprofits in the contracting context, hurting program recipients and taxpayers in the process;*
2. *Directly taking money away from nonprofit missions;*
3. *Indirectly taking nonprofit resources by invading nonprofit boardrooms;*
4. *Abandoning commitments to the public as they eliminate programs and slash funds, expecting charitable nonprofits and foundations to fill the voids governments create; and*
5. *Draining the philanthropic pool of dollars.*

Charity regulators have not caused the five dangerous trends, but they can be an instrumental source of solutions. From front-line staff to front-office AGs (standing for “Accomplished Galvanizers” and “Always Glamorous,” as explained below), charity regulators can do their duties of protecting the public in a more holistic way that protects and advances the public interest. This paper concludes with a section identifying how this can be done.

I. GOVERNMENTS AND CHARITABLE NONPROFITS SERVE THE SAME CONSTITUENTS AND SAME COMMUNITIES

The two sectors’ shared interests – serving and protecting the public – are inextricably intertwined, albeit from purposefully different roles, perspectives, and approaches. Yet with increasing frequency subsets within government fail to see charitable nonprofits as natural partners upon which governments and the public have long relied. For instance, when fiscal officers try to balance government budgets, they can overlook (and sometimes consciously try to evade) longstanding declarations in state constitutions that nonprofits are tax-exempt. When one uninformed or shortsighted policymaker does that, it creates a problem; when several take actions that impair the ability of nonprofits to meet their missions in serving their communities, it threatens the public; and when, like now, such maneuvers are becoming more commonplace by governments at all levels, it is a pattern and practice that can no longer be ignored because it endangers the public.

Rather than submitting a conventional paper as a former Solicitor General concentrating on a discreet legal issue or as a former Chief Deputy Attorney General focusing on internal management issues for public law offices, I write as a former colleague who has since traveled as the founder of a nonprofit promoting ethical leadership that worked with many of you and now as the leader of the nation’s largest network of community-based charitable nonprofits. I urge my former colleagues/current fellow public servants to look beyond the minutiae of the moment to witness the seismic changes underway that threaten the communities and individuals across America whom we jointly serve. This paper shares deep concerns about the impact of governments’ current patterns and practices on the public, who depend daily on the charitable sector to be healthy enough to hold a reliable and secure social safety net. Individuals within governments at all levels need to recognize and change the current course of action, which truly threatens the public.

Indeed, as a former Chief Deputy Attorney General and Solicitor General, I submit that an

Attorney General's Office has an affirmative duty to provide proactive leadership in making sure that governments – state and local – interact with charitable nonprofits in fair and responsible ways. The *parens patriae* principle that Attorneys General have a responsibility on behalf of the public to protect charitable assets means much more than just reactive enforcement actions against charities and foundations. As true protectors of charitable assets, Attorneys General must protect against harm and wasteful diversion of assets perpetrated by any and all, including those within government. I recall how difficult it was to advise government officials that they could not take certain actions or that they could not ignore certain procedures. Yet I also recall the great pride in our Office and in our system of laws that an entity was there to stand up and protect the public's interest. Whether waste or diversion of charitable assets is caused by those associated with the charity or government, the Attorney General should stand up for the public interest.

Finally, as if the public interest is not enough, it is in the “self-interest” of Attorneys General, Secretaries of State, and state charity regulators to help other government policymakers improve how they handle their responsibilities regarding charitable nonprofits. For example, when policymakers undercut the social safety net by slashing funding or taking money from nonprofit missions, crime can rise as people are forced to resort to self-help after losing basic food, shelter, and survivability services (such as drug rehabilitation treatments) from nonprofits. This endangers everyone and increases workloads on law enforcement. Also, as employers of talented staffs with family members, Attorneys General and Secretaries of State know the importance of having charitable nonprofits provide reliable child care, disability care, and elder care services so those talented staff members with family members needing such services can come to work with less stress rather than routinely arrive late or leave early to take care of loved ones. Plus, Attorneys General don't want to divert their limited resources to defend lawsuits because uninformed policymakers, among other things, breached the state's contracts by failing to pay nonprofit contractors. As these unnecessary demands increase and Attorneys General are forced to prioritize their workloads – prosecuting crimes, defending the state against financial liability (plus attorneys' fees), advising state agencies, or regulating charities – eventually the first three categories will trump the third. So again, it is in everyone's best interest – especially the public's – to have policymakers making informed decisions involving charitable nonprofits.

Said another way, traditionally charity regulators look down at the lifeboat's floor to check for water leaking in from holes in nonprofit governance, yet currently a tidal wave caused by others in government is about to upend the entire lifeboat. Go alert others to the mayhem they create and speak out and take action to stop it.

II. OVERVIEW

You and I, as citizens, have the power to set this country's course.

You and I, as citizens, have the obligation to shape the debates of our time, not only with the votes we cast, but the voices we lift in defense of our most ancient values and enduring ideas.

-- President Barack Obama, Second Inaugural Address

In a vast democracy, it can be difficult to hear the voice of an individual citizen in the cacophony of competing expressions of hope and fear, need and want. But our nation’s founders knew that when individuals join together with others, the unified voices of many can resonate loudly and persuasively.

The First Amendment rights of association, speech, and petitioning our government have enabled the American people to come together – through nonprofits – to lift their voices to solve collective problems. Imagine what America would look like if nonprofits had not engaged in advocacy in the past. Thanks in part to churches and more than 1,000 abolitionist societies America unshackled the chains of slavery. The predecessor organizations of the League of Women Voters enabled women today to vote, adding their wisdom to our democracy. The five million Americans who gathered through local “Townsend Clubs” during the Great Depression pressed for creation of today’s Social Security. Thanks to the many nonprofits engaged in the civil rights movement – including churches and the Southern Christian Leadership Conference – Congress passed the Civil Rights Act of 1964 that banned discrimination in employment practices and public accommodations and the Voting Rights Act of 1965 to protect the right to vote. The American people have a proud legacy of coming together through charitable nonprofits to help the public: sometimes as advocacy organizations, sometimes as service providers, and sometimes as both.²

Beginning more formally in the 1960s and accelerating since the 1980s, governments have turned to nonprofits as natural partners for help in delivering services to the people.³ This made sense practically: governments and charitable nonprofits serve the same constituents and same communities. It made sense for nonprofits anxious to fund their missions: the sector as a whole now receives about a third of its revenue from government contracts and grants to provide services.⁴ And it made sense politically for elected officials: they could “deliver goods and services to core constituencies while neither creating vast new direct spending programs nor enlarging [governments’] bureaucracy in the process.”⁵

When the Great Recession hit, many governments abruptly retreated from the formal partnership. Government officials, caught off-guard by the speed, size, and duration of their budget crises, seemed to react by reverting to survival mode, toppling previous understandings with and about nonprofits as partners in solving community problems. The policymakers who had made conscious choices decades ago to formally partner with nonprofits were no longer around. Their successors apparently failed to recognize the natural, symbiotic partnership with charitable nonprofits upon which governments and communities rely heavily. So it was with mortified shock that charitable nonprofits watched our natural partners in government – fellow public servants

² See generally, Leslie Crutchfield and Heather McCloud Grant, *Forces for Good: The Six Practices of High-Impact Nonprofits* (Jossey-Bass 2008) (“Most organizations in the social sector can be divided into two camps: direct service organizations that run programs in local communities, and advocacy organizations that raise public awareness and push for policy reform. ... Over the course of our research, however, we found something surprising and counterintuitive: high-impact nonprofits engage in both direct service and advocacy.”) at 32.

³ See generally, Kirsten A. Grønbjerg and Lester M. Salamon, “Devolution, Marketization, and the Changing Scope of Government-Nonprofit Relations,” ch. 15 in *The State of Nonprofit America* (2nd ed.) (Brookings Institution Press 2012).

⁴ The Nonprofit Sector in Brief: 2012 (National Center for Charitable Statistics) at 3.

⁵ Suzanne Mettler, *The Submerged State: How Invisible Government Policies Undermine American Democracy* (University of Chicago Press 2011) at 17.

serving the same individuals and the same communities – take these types of actions (and these are just a small sampling):

Federal: Congress enacted massive mandatory sequestration cuts that will slash about eight percent from almost every domestic program – without reducing the underlying human needs - thereby *increasing demands* on states, localities, and nonprofits while *decreasing resources* to provide needed services.⁶ Moreover, the White House seeks to *limit incentives for charitable donations* to churches and synagogues, domestic violence shelters, early childhood programs, education, food banks, youth and senior groups, and all other charitable nonprofits, further reducing the ability of these organizations to meet increasing demands for services.⁷

State: Besides eliminating programs and expecting nonprofits to fill the void, many state governments contracting with nonprofits have resorted to practices such as not paying full costs, not paying on time, and changing contract terms mid-stream.

Local: Despite state constitutions declaring nonprofits tax-exempt, local officials have tried to tax nonprofits, re-label prohibited taxes as fees, and demand payments-in-lieu-of-taxes.

In short, governments’ rapid retreat from the partnership often feels like a direct attack. It is no wonder that charitable nonprofits are beginning to reconnect with their advocacy roots and engage more in advocacy to defend their missions from these and other assaults by government.

States demand that the federal government respect “states’ rights” and complain how the federal government imposes unfunded mandates and interferes unfairly. Similarly counties, cities, and school districts cry out for “local control” when resisting the states’ micromanagement and heavy-handed ways of making them pay for more items that the state used to fund. Nonprofits are equally affronted – but the insults and injuries are magnified because nonprofits are getting hit not just from one direction but simultaneously by the federal, state, and local governments.

Charitable nonprofits are severely depleted as a result of serving so many more, for so much longer, with so much less. Consider these ever-increasing surges year after year in the workloads of nonprofits:

- In 2008, 73 percent of nonprofits experienced an increase in demand for their services;
- In 2009, 71 percent felt an increase;
- In 2010, 77 percent reported an increase; and
- In 2011, 85 percent of nonprofits saw an increase in the demand for their services.⁸

⁶ See Budget Control Act of 2011 (which also cut \$1 trillion of spending *before* the \$1.2 trillion cuts via the sequestration process); see also American Taxpayer Relief Act of 2012 (which postponed the effective date of the sequestration cuts to March 1, 2013). State governments have cut an additional \$337 billion. National Governors Association State of the States Address (Jan. 9, 2013). Those spending cuts and others at the local level have increased needs as people consequently lost their jobs and various services. The ripple effect then spreads wider, with those in need turning to charitable nonprofits for help.

⁷ See, e.g., White House National Economic Council, *The Charitable Deduction & The Fiscal Cliff* (Dec. 4, 2012) (which calls for reducing the value of charitable donations to 28 percent).

⁸ See 2012 State of the Sector Survey, Nonprofit Finance Fund.

These skyrocketing demands have been coupled with plummeting resources: “Payments from government agencies dropped, donations from individuals, corporations, and private foundations shrank, and investment returns and fee income fell.”⁹ As a result of this mismatch in demand and resources, in 2012 more than half of nonprofits surveyed (57%) had just 3 months or less cash-on-hand.¹⁰ From 2000 to 2010, demand for services was so high that sector-wide “the gap between income and expenditures ... was negative for 8 of the 10 years.”¹¹ This fragile condition presents a danger for Americans, because the social safety net which governments and the public depend on charitable nonprofits to provide is unraveling rapidly. It is so strained, tattered, and torn that it is unrecognizable, unable to endure the additional weight dropping on it from all levels of government.

III. THE TRENDS

A. *The First Trend: Governments Abusing Nonprofits in the Contracting Context*

For a variety of reasons, including to maximize efficiency and effectiveness, governments often contract with nonprofits to deliver particular services (such as food, shelter, and social services) to certain categories of people in need (including children, the disabled, the sick, and the elderly).

Government, at every level, provides few human service programs directly. Instead, government funds an array of services and programs, such as employment and training, health care, child care, foster care, food and nutrition programs, senior citizen centers, social services, and many others. ... In the social service field, policymakers routinely use the front-line service delivery capabilities of nonprofit organizations instead of developing

⁹ Elizabeth T. Boris, Erwin de Leon, Katie L. Roeger, Milena Nikolova, Human Service Nonprofits and Government Collaboration: Findings from the 2010 National Survey of Nonprofit Government Contracting and Grants, Urban Institute Center on Nonprofits and Philanthropy (Oct. 2010) (finding that 42 percent of human service nonprofits operated with a deficit in 2009, forcing nonprofits to eliminate jobs, freeze or reduce salaries and benefits, and reduce or cut needed services). Individuals – who provide about 10 percent of the sector’s overall revenue via donations – have given less during the economic downturn. “In constant dollars, itemizers’ charitable deductions dropped 14 percent from 2007 to 2008 and by another 8 percent from 2008 to 2009.” *Id.* Unfortunately, the prospects for improvements in individual giving remain dim, with 2013 predicted to be “one of the worst fundraising years in five decades” because stocks are “likely to tumble, the unemployment rate will remain stubbornly high, health-insurance costs will surge, and the 2-percent payroll-tax increase that took effect in 2013 will make people stingier.” Raymund Flandez, “Giving Will Barely Rise in 2013, Forecast Predicts,” *Chronicle of Philanthropy* (Jan. 25, 2013).

¹⁰ *Id.*; see also Oregon Nonprofit Sector Report 2011 (57% of nonprofits reported not having three months of operating reserves and 24% reported having less than one month of operating reserves).

¹¹ See *The Nonprofit Almanac 2012*, Urban Institute’s National Center for Charitable Statistics (2012); see also State of the Sector Report, Nonprofit Center of Northeast Florida (Fall 2012) (“Since 2007, the percentage of nonprofits operating in the red has risen, reaching 45% in 2009, the highest since this research began, indicating the gravity of the recession’s impact”); New Jersey Non-Profits 2012 Trends and Outlook, Center for Non-Profits (April 2012) (“Amid widespread reports of increased demand for programs and services, 40% of responding organizations reported spending more money than they took in during their most recent fiscal year”); Oregon Nonprofit Sector Report 2011 (in 2010, expenses for Oregon-based public charities “increased by nearly one billion dollars, while revenue remained flat. The increased expenses were entirely program related. Management costs actually declined.”).

new public bureaucracies.¹²

As the Great Recession hit, more stories began circulating about government administrators withholding payments owed to nonprofits for services the nonprofits had delivered pursuant to valid and binding contracts with governments. This sad practice predates the Great Recession, yet the severity of the economic downfall exacerbated the practice and the consequences. In 2010, the Urban Institute conducted the nation’s first comprehensive study of government-nonprofit contracting relationships, focusing on human service nonprofits:

Goodwill, Boys & Girls Clubs of America, the American Red Cross, homeless shelters, food banks, and child care centers—these are just a few examples of human service organizations that Americans count on every day. Although human service nonprofits are heavily funded by government, which extends their reach, little is known about the size and scale of these contracting relationships. Based on our national survey of human service organizations it is estimated that: government agencies have approximately 200,000 formal agreements (contracts and grants) with about 33,000 human service nonprofit organizations.¹³

The Urban Institute’s detailed study revealed the untenable situation faced by nonprofits contracting to deliver government services to millions of vulnerable Americans:

- 68 percent reported that government not paying the full cost of contracted services was a problem;
- 76 percent indicated that the complexity and time required for reporting on contracts and grants was a problem;
- 75 percent indicated that the application process was too complex and time consuming;
- 58 percent said that government changes to contracts and grants were a problem;
- 53 percent said that late payments were a problem.¹⁴

The National Council of Nonprofits issued a companion analysis (“Complexification Report”)¹⁵ that provided additional context for the Urban Institute’s data by (i) explaining how the contracting problems affect everyone in America – including individuals entitled to receive services, taxpayers who pay too much for red tape, and the broader community; (ii) identifying specific practices that contribute to the problems being experienced; and (iii) proposing solutions that nonprofits, government officials, funders, and citizens can adopt to improve services, restore value for taxpayers, and strengthen communities.

¹² Carol J. De Vita and Eric C. Twombly, “Nonprofits and Federalism,” chapter 7 in *Nonprofits & Government: Collaboration & Conflict*, edited by Elizabeth T. Boris and C. Eugene Steurle (2nd ed. 2003; Urban Institute) at 259 (emphasis added).

¹³ Human Service Nonprofits and Government Collaboration, Urban Institute at vii. The study’s reports include analyses of conditions in each state and comparative rankings of the states on multiple issues.

¹⁴ *Id.*

¹⁵ National Council of Nonprofits, *Costs, Complexification, and Crisis: Government’s Human Services Contracting ‘System’ Hurts Everyone* (Oct. 7, 2010) (“Complexification Report”). The term “complexification” was coined to emphasize the irony: normally when something is done repeatedly, there is a natural simplification process as efficiencies are developed. But when government repeatedly works on contracts, for some reason a complexification process develops.

But first, the Complexification Report further documented the frightening scope of the problem, using government-issued reports admitting that governments have failed to honor their written agreements to pay nonprofits to deliver services:

- Illinois' Comptroller released a 50-page list of more than 2,000 nonprofits that the state had failed to pay almost half a billion dollars – *and that was for just the first half of 2010*;
- New York's Comptroller found that 92.5 percent of the state's contracts with nonprofits were late and the state had delayed paying numerous nonprofits for multiple years;
- The U.S. Government Accountability Office found that – for a single federal program – some states pass along all federal dollars to the nonprofits to pay for the services while other states keep between 5 to 14 percent of the federal funds; and
- The Congressional Research Service warned, “It appears that governments, especially state governments, may be contributing to the financial difficulties of nonprofit organizations, even to the point of not paying for contracted services.”¹⁶

The Complexification Report examined in detail the five major ways the government's contracting “system” is “not really an integrated system intentionally or rationally designed to perform the important duties expected.” Rather, “it is an archaic, cobbled-together, patch-work arrangement that has evolved over many decades into such a fragmented and frail framework that the social safety net has now ripped and people who really need it are being hurt.” As a result of this “convoluted, disjointed, and patch-worked laws and practices”:

- *Governments Consistently Fail to Pay the Full Cost of Services.* By paying less than it actually costs to deliver the services, by denying/arbitrarily restricting recovery of indirect/overhead/administrative costs, by using outdated or artificially low reimbursement rates, by requiring nonprofits (but not for-profits) to raise matching funds, and by imposing unfunded mandates, governments force nonprofits to divert time and resources trying to make up the difference.
- *Governments Frequently Change the Terms of Contracts Mid-Stream.* Even after contracts are signed, governments unilaterally reduce payments and arbitrarily alter performance and reporting terms that impose new unexpected costs on nonprofits, which “hurts the people the programs are designed to help, weakens our communities by undercutting trust in government, and destabilizes the organizations that governments and taxpayers rely on to fulfill their obligations. Even when governments reduce payments, they often still demand full performance by the nonprofit, which is expected to produce the same outcomes with less funding.”
- *Governments Routinely Pay Late.* “Failure by governments to pay their bills when they are due amounts to an unreasonable taking – essentially forcing nonprofits to

¹⁶ *Id.* (full citations in original); see also CBS News 60 Minutes, “State Budgets: The Day of Reckoning” (Dec. 19, 2010) (states are not honoring their written contracts after hiring nonprofits to deliver human services: “Lutheran Social Services of Illinois has been around since 1867 and provides critical services to 70,000 people, mostly the elderly, the disabled, and the mentally ill. The state owed them \$9 million just before Thanksgiving, and they nearly had to close up shop. ... [T]hey were forced to tap their entire line of credit and all their cash reserves before the state would finally pay them as a hardship case.”).

involuntarily bankroll the government services they provide. This practice increases the cost of providing services, shortchanges the people who are most in need, and forces nonprofits to borrow or raise funds to fulfill the governments' legal obligations.”

- *Complexification of Contracting Processes.* “Bidding burdens, needless red tape, and other government contracting policies and application processes routinely impose avoidable inefficiencies on nonprofits, thereby creating waste, eroding productivity by diverting staff time from serving [the public], and reducing the amount of services actually delivered to individuals and communities in need. Many of these complexities also add costs to taxpayers.”
- *Complexification of Reporting Requirements.* “Reporting and oversight processes that once made sense can run amuck when needlessly duplicated, resulting in higher costs to taxpayers without adding value and diverting resources from delivery of needed services. Everyone needs to recognize that spending certain dollars chasing possible pennies is not cost effective for taxpayers.”

The Complexification Report also identified a wide range of legislative, administrative, and regulatory solutions.¹⁷ Fortunately, several states have undertaken serious reform efforts to develop lasting solutions that will streamline government-nonprofits contracting practices to allow improved services for the public, ensure that taxpayers receive full value for the programs they are funding, and improve services that benefit communities.¹⁸ Unfortunately, while these initial steps have been promising, it will be a long journey to fix an antiquated service-delivery “system” that has evolved over decades “through happenstance, not design, and left nonprofit human service providers at the mercy of uncoordinated and often contradictory policies and practices of different federal, state, and local government departments, agencies, and offices.”¹⁹

B. The Second Trend: Governments Directly Taking Money Away from Nonprofit Missions

As state and local governments attempt to impose new fees and taxes on tax-exempt nonprofits, they essentially are violating the longstanding “social compact” and trying to take money away from nonprofit missions – money that donors gave for nonprofits, not governments, to deliver programs and services for individuals and local communities.

1. Taxes

Some jurisdictions have attempted to impose taxes through a variety of ways, including:

Property Taxes

¹⁷ *Id.* at 23-29. For more information, visit the unique website the National Council of Nonprofits developed for nonprofits, policymakers, and the general public to track trends, post problems, and share solutions: www.councilofnonprofits.org/govtcontracting

¹⁸ See “Partnering for Impact: How Government-Nonprofit Task Forces Are Producing Contracting Reform Results,” National Council of Nonprofits (National Council of Nonprofits; 2013) (reviews the genesis, recommendations, and implementation activities of joint collaborative government-nonprofit contracting reform task forces in nine states to identify trends and insights that can be applied elsewhere).

¹⁹ Complexification Report at 2.

- *Direct*: “an increasing number of states and localities are considering eliminating various tax exemptions for nonprofit groups”²⁰
- *Indirect*: governments have been trying to reclassify nonprofits’ tax-exempt property as taxable property²¹

Sales Taxes

- Imposing new sales taxes²²
- Revoking existing exemptions²³

Other jurisdictions have tried to skirt claims of unconstitutionality by relabeling their efforts to impose new taxes on tax-exempt nonprofits as:

“Bed” taxes rather than an unconstitutional property tax: taxing beds occupied by sick people in tax-exempt nonprofit hospitals that are exempt from property taxes and on students attending tax-exempt nonprofit universities that also are exempt from property taxes²⁴

Payments In Lieu Of Taxes (PILOTs): Boston’s elected officials tried to evade 200 years of Massachusetts law that prohibits cities from imposing property taxes on tax-exempt charities by asserting that the city merely sought “voluntary” payments in lieu of taxes. But instead of sending letters requesting donations of a truly voluntary nature, the city — with all the subtlety of a scarlet letter – sent simulated property tax bills to the 45 largest nonprofit landowners demanding “voluntary” payments of up to 25 percent of an imaginary tax liability.²⁵ While many targeted institutions yielded, several others refused to concede to the coercive extra-legal demands, noting they give benefits to the community every day.²⁶

²⁰ Stephanie Strom, “[States Move to Revoke Charities’ Tax Exemptions](#),” *New York Times* (Feb. 27, 2010). For example, County Commissioners in Allegheny County, Pennsylvania, voted unanimously in 2009 to impose a property assessment on nonprofits, before the County Executive vetoed the tax because it violated the state constitution. Tim Puko, “[Allegheny County Council Backs Off Plan to Tax Nonprofits](#),” *Pittsburgh Tribune-Review* (Nov. 17, 2009).

²¹ See, e.g., Troy Graham, “[Philly Council hears plan to raise revenue from nonprofits, charities](#),” *Philadelphia Inquirer* (Jan. 26, 2013).

²² For example, Kansas legislation sought to raise funds for its use by making nonprofits subject to the state’s 5.3% sales tax. See Associated Press, “[Kansas Nonprofits Worry About Sales Tax Proposal](#),” *Augusta Gazette* (Feb. 15, 2010).

²³ For instance, in summer 2012 the Hawai’i [Tax Review Commission](#) proposed eliminating most of the nonprofit exemption from the state’s General Excise Tax, so the tax would be imposed on sales by nonprofit organizations, including revenues associated with special events, program services and contracts, and dues and net sales, which collectively account for about 75 percent of their revenue.

²⁴ See, e.g., “[City \[Baltimore\] Pushes for Nonprofit Bed Tax, Drink Tax](#),” WBAL-TV (April 6, 2010); Rich Lord, “[City, County Chase Same Dollars](#),” *Pittsburgh Post-Gazette* (Feb. 1, 2010); Alan Johnson and Catherine Candisky, “[Nursing Homes Take a Hit](#),” *Columbus Dispatch* (July 29, 2009) (bed tax on nursing home beds).

²⁵ Tim Delaney, “[Boston’s Coercive PILOTs Experiment Should Crash](#),” Huffington Post (April 28, 2011).

²⁶ Boston is not alone in demanding PILOTs. Other cities – especially those in the Northeast and Pennsylvania have been exploring PILOTs. See, e.g., Editorial, *Scranton Times-Tribune* (Oct. 5, 2012) (calling the Scranton City Council’s “opposition to any zoning variance sought by any nonprofit entity” not making voluntary tax payments “an unconstitutional and self-destructive response” to the tax exemption issue); Rick Cohen, “[Oddest PILOT Proposal to Date: Tax Nonprofits, Lower Business Taxes](#),” *Nonprofit Quarterly* (January 25, 2013) (bill by Pittsburgh legislator

In the overwhelming number of cases, however, enlightened policymakers respected the law and rejected shortsighted efforts to take resources away from nonprofit missions through sales taxes, property taxes, and other new taxing mechanisms.²⁷

2. Fees

Policymakers also have been concocting a variety of innovative schemes to take money from nonprofit missions through artifices such as these:

- “Sewer Usage Fee” (*aka Toilet Tax*)²⁸
- “Street Pole Fee” – somewhat similar to the old poll taxes in the South in that they are designed as a way to evade constitutional protections.²⁹

Individually, any of these new “fees” might not seem significant. Yet for nonprofits barely surviving in this rough economy, every little nick hurts. Indeed, one nonprofit leader, when describing the street pole fee and other new assessments that take money away from nonprofit missions, observed that they amount to “death by a thousand cuts.”³⁰

C. *The Third Trend: Governments Indirectly Taking Resources from Nonprofit Missions*

The Constitution protects charitable nonprofits as private, independent entities. In *Dartmouth College v. Woodward* (1819), the U.S. Supreme Court invalidated a law passed by the New Hampshire Legislature that attempted to convert the private college into a public institution.

“essentially asks nonprofits to indirectly subsidize the business sector”). Independent third parties have documented how these attempts to evade constitutional protections hurt nonprofits. “Moody’s Investors Service is warning of the negative impact on local nonprofits if [Alleghany County, Pennsylvania pursues an intended review of tax-exempt properties](#). The Moody’s report says that meeting review requirements will place new financial stress on nonprofits that are required to spend time and money to address questions about whether they deserve the exempt status. The credit ratings agency finds that smaller organizations will be less able to absorb the related costs.” National Council of Nonprofits, *Nonprofit Advocacy Matters* (Dec. 17, 2012)

²⁷ For instance, PILOT proposals were withdrawn in [Haverford, Pennsylvania](#) and Memphis, Tennessee. See “Update, Impact of Memphis Model on PILOTs,” in *Nonprofit Advocacy Matters* (National Council of Nonprofits; Dec. 17, 2012). The [North Dakota](#) Legislature actually extended tax exemptions to enable more nonprofits in the state to focus on their mission-related work.

²⁸ Geoffrey Walter, “[County Green Lights \\$2.6 Billion Budget](#),” *Syosset, NY Patch* (Nov. 1, 2010) (opponents had “called the measure a ‘toilet tax’ and asked to ‘flush’ the measure”); Rick Cohen, “[Sewage Fee or Toilet Tax?](#)” *Nonprofit Quarterly Newswire* (Nov. 3, 2010) (“Here’s an intriguingly blatant attempt to impose taxes on tax exempt organizations.”).

²⁹ In Minneapolis, lawmakers – blocked by the state’s constitution from taxing nonprofit property – adopted a “streetlight” or “street pole” fee requiring the roughly 1,600 nonprofits with property next to a street light pole to pay this new fee. See Joe Kimball, “[Nonprofits Object to Minneapolis’ Streetlight Fees, Feeling ‘Death by a Thousand Cuts,’](#)” *MinnPost.com* (Oct. 29, 2009); see also Jean Hopfensperger, “[Cities Ask Tax-Exempt Nonprofits to Pay for Services](#),” *McClatchy News* (Jan. 28, 2013) (“City officials across the nation are rethinking the sacred covenant between governments and nonprofits that historically have escaped property taxes because of the contributions they make to their communities.”).

³⁰ See Joe Kimball, “[Nonprofits Object to Minneapolis’ Streetlight Fees, Feeling ‘Death by a Thousand Cuts,’](#)” *MinnPost.com* (Oct. 29, 2009).

In that landmark decision, the Court emphatically rejected the unsettling notion that governments could resort to legalistic alchemy to transform private entities into public bodies under the state's control.

Yet recently too many policymakers have disregarded that basic principle, acting instead as if charitable nonprofits were mere political subdivisions. For instance, beyond trying to directly take money away from charities, governments have been seeking to commandeer other resources from charities. Legislators in multiple states have introduced bills mandating that individuals log a certain number of "volunteer" hours per week with nonprofits to be eligible for certain public programs.³¹ These proposals are being made without regard to whether charitable nonprofits could handle an onslaught of tens of thousands of individuals who would be forced to show up *to do time* rather than *to do good*. Such "mandatory volunteerism" proposals are not just oxymoronic. They also would effectively confiscate limited nonprofit resources for government purposes by imposing significant financial, legal, personnel, and other costs and burdens on charitable nonprofits.³²

Lawmakers in multiple jurisdictions have ignored the constitutional protection of independence by trying to indirectly invade the boardrooms of charitable nonprofits to direct and control how their resources are spent. Many of these attempted invasions occur when governments contract with nonprofits. For some unknown reason, too many lawmakers seem to assume that when charitable nonprofits enter arms-length legal transactions involving contracts or grants with government that somehow magically converts these private organizations into governmental instrumentalities that lawmakers can subject to expensive mandates and burdensome restrictions. These same lawmakers would *never* dream to impose these types of burdens on for-profit businesses with which governments had entered contracts to provide services (such as highway contractors, construction firms, utility companies, banks, insurance companies, newspapers publishing lottery ads and public notices, office supply businesses, credit card companies, and travel-related services), yet with increasing frequency governments try to impose them on nonprofit contractors:

³¹ Examples of proposals include temporary family assistance in Michigan, Medicaid services in Utah, and unemployment benefits in Florida, Georgia, and North Carolina.

³² Consider last year's so-called "Dignity for the Unemployed Act" in Georgia. It would have required each of the 55,800 individuals receiving unemployment benefits to perform "at least 24 hours of volunteer service per week for a nonprofit charitable organization" to continue receiving those benefits. If enacted, it would have imposed significant costs on nonprofits by requiring them to, among other things:

- Respond to the initial flood of 55,800 mandated-volunteers who suddenly would be showing up and calling to put in their time, and then their continuing stream of phone calls and email looking for placements;
- Perform expensive fingerprinting and other background checks on such "volunteers" (as many nonprofits such as those working with children – do for all volunteers and employees);
- Arrange for training for "mandated volunteers";
- Provide supervision of "mandated volunteers" who would demand schedules with maximum flexibility so they can leave for job interviews and other obligations (not to mention supervising certain individuals who may resist being subjected to mandated volunteerism);
- Complete anticipated paperwork for the individuals and governments avowing under penalty of perjury by the nonprofit that the mandated volunteers actually worked the required hours (or not);
- Respond to government audits of completed paperwork; and
- Get dragged into disputes and appeals from individuals and governments contending that the individuals did or did not meet the 24-hour minimum and perhaps other requirements.

- Treating private nonprofit contractors as government bodies subject to the full panoply of public records law reporting requirements;³³
- Requiring training of board members;³⁴ or
- Limiting free speech (even forbidding nonprofit contractors from reporting suspected legal violations to law enforcement).³⁵

Even if a policymaker's concern about a particular situation was legitimate (as opposed to being made in retaliation or to garner a headline), the proposed "solutions" of governments acting

³³ In 2012, Illinois considered a [bill](#) to transform private nonprofits doing business with the state into "public bodies" by expanding the state's Freedom of Information Act (FOIA) definition of "public body" to include any "not-for-profit organization that receives moneys from any fund of the State Treasury." Yet the mere receipt of government funds pursuant to legally-binding contracts does not convert private, independent nonprofit organizations into public bodies. Plus, in yet another attempt to confiscate nonprofit resources, it would have forced each entity doing business with the state "to provide adequate personnel and equipment to comply" with all the demands of FOIA, including having a Freedom of Information Officer, disrupting regular operations to respond on an uncompensated basis within five days to every person who makes a request to inspect and copy a record, and mailing free copies of records to anyone who requests. Setting aside the costs of delivering the mandated training for thousands of new Freedom of Information Officers at each nonprofit, it would have swamped the Attorney General's Office with massive demands on the State's Public Access Counselor to handle the avalanche of new requests and increased administrative appeals. And there would have been plenty, because the proposed legislation would have authorized any member of the public to walk into any private office and demand access to its business records. Even if the record did not pertain to the contract, in Illinois FOIA expressly presumes that "all records in its custody or possession" are open to inspection and copying, and would place the burden on the contractor to prove otherwise every time a request is made, diverting uncompensated resources to make its case. In 2012 the New Hampshire Legislature considered (but defeated) a similar [bill](#) that would have extended public right-to-know-their-government requirements to any nonprofit – but not for-profits – with \$250,000 or more in state contracts

³⁴ In 2012, New Hampshire – the state told by the U.S. Supreme Court to stay out of nonprofit boardrooms because they are private and independent – considered a bill mandating that all board members and CEOs and CFOs of nonprofits with a total of \$250,000 from any and all governments contracts or grants would have to receive certain training on a regular basis. As a Senator who voted against the defeated measure observed, the proposal would have created a double-standard, with the "Live Free or Die" state saying that for-profits doing business with the state would be free of intrusive government dictates on items such as training but similarly situated nonprofits would be treated as subservient political subdivisions of the state: "We are not asking our for-profits to supply proof of financial training, but somehow we are moving to the nonprofit world and feeling that we can mandate they provide that information." Bob Sanders, "[Training mandate proposal riles N.H. nonprofits](#)," New Hampshire Business Review (Jan. 27, 2012).

³⁵ In what was seen as a brazen attempt by administrators for the Kansas Governor to muzzle developmental disability contractors who – pursuant to federal law – helped their clients complete civil rights complaints against the state (which the pertinent federal agency thought were so serious that it forwarded the complaints to the Justice Department for action), Kansas sought to insert provisions in their contracts that would have banned nonprofit contractors from communicating with any "officer or employee of any agency, a member, or employee of a member of the United States Congress or the Kansas Legislature." When this attempt was exposed by the media, the Kansas administrators tried to justify the new language to the media as a ban on the use of taxpayer funds to lobby the legislature for more taxpayer funds. But a plain reading of the proposed language revealed it would have operated like a gag order, preventing nonprofit contractors from communicating with any local, state, or federal government officials or employees regarding policy matters such as providing technical or factual information directly related to the performance of the contract, ideas on how to save taxpayers money or improve quality of care, suggestions about case management issues, or even to report criminal conduct. See "[Kansas Threat to Nonprofit Advocacy Rights](#)," *Nonprofit Advocacy Matters* (National Council of Nonprofits; June 4, 2012). Kansas ultimately withdrew the unconstitutional language, after being taken to task by the media and others (e.g., the head of the Kansas Press Association said, "This is America. We don't throw away our constitutional rights simply because we're doing business with government.").

like they own or control nonprofits have been illegitimate. The old adage is true: the ends don't justify the means.

D. The Fourth Trend: Governments Abandoning Programs, Off-Loading Them onto Nonprofits

Since the Great Recession began federal, state, and local governments have been offloading their public responsibilities onto nonprofits by slashing funding for and sometimes even eliminating the most essential programs. Faced with the steepest and longest decline in tax collections on record, state, county and city governments have resorted to major life-changing cuts in core services like education, transportation and public safety that, not too long ago, would have been unthinkable.³⁶

But when policymakers fixate on cutting expenditures without recognizing the human cost of the cuts, unintended tragedies occur. For example, when Arizona slashed Medicaid funding, lawmakers focused on sterile budget numbers not humans – a tactic resulting in actual “death by budget cut” for some unfortunate individuals.³⁷

The logic and consequences of budget cuts are rather straightforward but rarely discussed openly. When governments cut their budgets, it creates a financial hole, so programs are abolished or the level of services shrunk. Unfortunately, it appears that policymakers either (a) ignore that reducing the funding does not reduce the underlying human needs (and indeed, often amplifies needs) or (b) assume that nonprofits and foundations will simply fill the void.³⁸ Regardless of the reasons, their decision to cut often affects nonprofits in two ways. First, it generates more work for nonprofits. For instance, when mental health funding is cut, individuals who had been receiving services may then lose the medication, counseling, and stability they need to hold a job. When they lose their jobs, they may consequently lose their housing, health care benefits, and ability to buy food and other services. So they turn to one or more nonprofits for help. Thus, government budget cuts create a cascading effect on multiple nonprofits, many of which may not have been receiving any government funding in the first place. Second, for those nonprofits that had contracts with governments to provide the mental health services, it obviously reduces their funding, so they have to divert energy from service delivery to efforts to raise replacement funds to meet their missions.

³⁶ Michael Cooper, “[Governments Go to Extremes as the Downturn Wears On](#),” *New York Times* (Aug. 6, 2010) (“services in many areas could get worse before they get better. The length of the downturn means that many places have used up all their budget gimmicks, cut services, raised taxes, spent their stimulus money — and remained in the hole”); Editorial, “[The Looming Crisis in the States](#),” *New York Times* (Dec. 25, 2010) (“School aid, Medicaid, transportation, employee salaries, social services, courts — whatever there was to cut, states have slashed it, often at ruinous costs to the most vulnerable: the poor, the sick and disabled, students, tens of thousands of laid-off workers”).

³⁷ Marc Lacey, “[Arizona Cuts Financing for Transplant Patients](#),” *New York Times* (Dec. 2, 2010) (“Many doctors say the decision amounts to a death sentence for some low-income patients, who have little chance of survival without transplants and lack personal funds to pay for surgery”); *see also* Gail Collins, “[Arizona Strikes Again](#),” *New York Times* (Dec. 4, 2010) (“a 32-year-old truck driver with four kids, was denied a liver transplant because the Arizona Legislature had yanked funds for it out of a state Medicaid program”); Mary Reinhardt, “[2nd Person Denied Arizona Transplant Coverage Dies](#),” *Arizona Republic* (Jan. 5, 2011).

³⁸ Those presuming that foundations can fill the void are woefully ill-informed. The charitable sector receives about half of its revenues from fees (such as tuition, health care payments, and ticket sales), about a third from government contracts to provide services, and about 11 percent from donations – including less than two percent from foundations. See *The Nonprofit Sector in Brief: 2012* (National Center for Charitable Statistics) at 3.

Consider this “questionable” way (according to the Government Accountability Office (GAO)) that states have been shifting their fiscal responsibilities. To receive federal funding for the Temporary Assistance to Needy Families (TANF) program for low-income families and children, states and localities must meet minimum Maintenance of Efforts payment requirements. GAO has documented how an increasing number of states are counting “expenditures made by third parties, such as nonprofit organizations,” toward the states’ requirements.³⁹ Thus, states are withdrawing their own funding and counting expenditures made by nonprofits. According to the GAO, this questionable approach “may reduce the overall level of services available to low-income families in a state if, for example, that state counts services already provided by third parties while reducing its own spending.” In this way, states and localities, by failing to come up with their own matching funds, are shifting their initial funding burdens to nonprofits. In the process, the public loses services.

The federal government will commence another massive off-loading of governmental responsibility on March 1, 2013, when it cuts an additional \$43 billion in domestic spending *from the current fiscal year*.⁴⁰ Almost every domestic program funded by the federal government will be slashed by a set percentage of funding, programs that touch virtually everyone in the country, including state and local governments – and law enforcement. These cuts will occur not on an informed, considered, priority basis, but arbitrarily and across-the-board, using simple math without regard to human consequences.⁴¹

AARP has warned about cuts to "programs that affect older people, including home-based nutrition, Meals on Wheels, transit and housing."⁴² The nonpartisan Pew Center on the States explains how sequestration cuts ordered by Congress will – *among many other things* – slash Head Start (\$600 million), disaster-relief (nearly \$600 million), child care and development (\$187 million), and food for women, infants, and children (WIC program – \$543 million).⁴³ These cuts will, once again, reduce funding but not reduce human needs, thus increasing demands on nonprofits while taking away resources for public services.

E. The Fifth Trend: Draining the Philanthropic Pool of Dollars

³⁹ [GAO-12-929R](#) TANF Third Party Maintenance of Effort Letter to Chair of the Subcommittee on Human Services of the House Ways and Means Committee (July 23, 2012) (noting, among other things, that the number of states using this questionable practice of counting how much others paid so the states would spend less had increased from 5 to 13 states).

⁴⁰ These cuts will be on top of almost \$2 trillion that Congress and states previously cut. See note 6 above.

⁴¹ [Sequestration Transparency Report](#), Office of Management and Budget (Sept. 2012) (a 394-page report detailing the cuts to every federally-funded program other than Social Security, Medicaid, Children’s Health Insurance Program, and federal pensions; even Medicare will incur cuts of 2%). Originally, OMB had projected cuts would be at about 8.2 percent per program line item; now, with the \$24 billion reduction, projections are falling in the 5-7 percent range for domestic programs.

⁴² [“Washington Watch: 4 Months and Counting.”](#) AARP Bulletin (Sept. 2012).

⁴³ Jake Grovum, [“Sequestration: How a Spending Stalemate Would Affect the States,”](#) Pew Center on the States (Sept. 20, 2012). To translate some of those dollar figures into human impact, consider these facts about how this year alone the sequester will – among other things – cut Head Start by eliminating funding for 75,000 children in need, cut cancer research funding nearly in half for the National Institutes of Health, and reduce the Border Patrol by approximately 1,870 agents. H.R. 6365 (one of three bills the House passed last year to protect defense spending from sequestration cuts – but continue cuts to domestic).

While federal and state officials have been shoving more responsibilities onto charitable nonprofits with one hand, some of the same officials have been using their other hand trying to take away the funds available in the relatively stagnant pool of philanthropic dollars.

The federal and many state governments have been proposing and enacting ways to reduce charitable giving incentives. The frustration – bordering on outrage – that government policymakers would have the audacity to blithely make these proposals while heaping on more workload and taking away other resources is palpable in local communities across the country.⁴⁴ Congress and the White House have been looking at reducing the charitable giving incentive. The federal debate has occurred as partisans on both sides have been looking at the wrong end of the equation: the impact on the wealthiest. It seems that partisans want to either protect or punish the wealthy, with neither side focused on community needs – how to get adequate resources to provide for people. The hungry child, shivering senior, or homeless veteran could care less if the value of the tax benefit to the person who gave the \$100 to the charity was 28 percent or 35 percent; they just know that their government had failed to provide the services and are grateful that someone cared enough to make a donation to the nonprofit that made their meal, utility payment, or homeless shelter available to them when they were in desperate need.⁴⁵

⁴⁴ Consider the following sampling of heart-felt pleas selected from hundreds submitted from boots-on-the-ground nonprofit leaders across the country:

- “The demand on our services has never been greater than today. Private nonprofits are feeding, housing, and healing those most in need in our community. To take away the tax deductions that make it possible for nonprofits like [our nonprofit] to exist would break these entities. Please don't throw the hungry and homeless under the bus in the process.” – nonprofit food bank in Montana
- “With nonprofits taking on more and more of the roles that state and federal agencies used to do, we need to ensure they can operate at their greatest capacity. To cut the tax deduction would increase state and government costs in the long run.” – local United Way in South Carolina
- “Since Medicaid has been cut in our state, our services to those that have no insurance have increased by 75%. We serve these individuals through donations. Where are they going to turn to if you block our charitable donations?” – child and family services nonprofit in Arizona
- “Do not take away our ability to effectively raise resources and then expect us to fill the social service holes you create with program cuts.” – Michigan nonprofit fighting child abuse and neglect
- “With dollars declining from government, foundations and corporations, our nonprofit depends on individuals' generosity to ensure we can protect abused women and children with shelter and other services that create contributing members to a healthy community.” – nonprofit domestic violence shelter in Texas
- “Nonprofits struggle all the time to provide programs to more and more recipients. In a weakened economy it has been difficult to fund raise and maintain a workable budget. If charitable deductions are cut, we will cease to exist.” – New York alcoholism and substance abuse facility
- “If nonprofits are unable to function, what will Congress do to take care of all the needs that nonprofits currently do for low-income families? Additionally, our [nonprofit] creates revenue for local businesses through local purchases made that are donated to our programs. Without charitable tax incentives those local businesses will lose out as well. If Congress does not protect the charitable giving tax incentives there will be a ripple effect that will devastate our Nation at a time when we cannot afford to reduce the number of social service programs that meet basic human service needs.” -- faith-based nonprofit in Michigan.

⁴⁵ “It would make sense to modify an overall cap to retain the deduction for charitable gifts. Unlike most other deductions and exclusions, charitable gifts do not benefit the taxpayer.” Harvard professor and chair of President Reagan’s Council of Economic Advisors Martin Feldstein, “The Tax Hike Canard,” [Foreign Affairs](#) (Dec.11, 2012).

The threats to charitable donations are cropping up at the state level as well. Taxpayers in some states saw a loss of government incentive for their donations to the work of charitable nonprofits. In 2011, Hawai'i imposed caps on the amount that taxpayers can claim in itemized deductions.⁴⁶ In 2012, Michigan repealed longstanding tax credits that had encouraged donations to food banks, education, and community foundations in order to pay for tax cuts for businesses.⁴⁷ In Kentucky, the Governor's Tax Commission is recommending capping all itemized deductions, including charitable giving, at \$17,500.⁴⁸ And the list keeps growing.

IV. SOLUTIONS: CHARITY REGULATORS CAN PROVIDE NEEDED LEADERSHIP

In the vast majority of circumstances within these five large-scale trends, it appears that the problems flow not from malice or intent to harm the work of charitable nonprofits and thereby the public. Rather, the problems usually seem to flow from lack of knowledge: policymakers are either (a) unaware of how much the public and government depend on charitable nonprofits or (b) oblivious to the broader negative consequences of their actions. Either way, many of the problems can be eliminated (or at least reduced) with simple actions. Front-office Attorneys General and Secretaries of State and front-line charity regulators can help the public in multiple ways.

A. Attorneys General

We all know the weak joke line about how "AG" stands for "Aspiring Governor." But in the context of America's charitable nonprofits, "AG" could stand for "*Always Glamorous*," "*Achieving Greatness*," and "*Accomplished Galvanizer*."

1. "Always Glamorous" – Modeling the Way for Others

Attorneys General have a powerful bully pulpit from which to proudly model the way for other policymakers at all levels of government and other public lawyers. This is not a request for the Attorney General to become the Chief Cheerleader for Charities. Rather, it is a recommendation that the Attorney General – the Lawyer for the People, the state's Top Cop, and the state's Lead Public Lawyer– use the bully pulpit to talk about the broader public interest, to point out realistically that government cannot be the source of all solutions and connect the dots between public policy and people's lives. As the leaders of the entity in state government consistently close to charities, Attorneys General and Secretaries of State can educate people as to how charitable nonprofits help all employers have a more reliable workforce, help alleviate crime, and serve the public's minds, bodies, and souls from cradle to grave.

2. External Audiences (general public, media, State Bar and other public lawyers, etc.)

⁴⁶ A corrective bill ([S.B. 1091](#)) has been introduced in Hawai'i this session that would remove the cap from the charitable deduction for state income tax purposes. The Governor's Administration has come out in favor of it, recognizing "that support for nonprofit and charitable organizations is an important policy goal and priority as these groups perform critical services for and within our community."

⁴⁷ Michigan Radio, "[Michigan's charitable giving tax credit expires at the end of the year](#)" (Nov. 7, 2011).

⁴⁸ [Report by the Blue Ribbon Commission on Tax Reform](#) (Dec. 17, 2012) at 15-17.

Given the vital role that nonprofits play in delivering services for the public, it is both astonishing and frightening that policymakers and the general public have such a lack of understanding about charitable nonprofits. With so many people (voters) involved with charitable nonprofits in local communities across each state, Attorneys General can pick a few examples from this paper to illustrate how those people (voters) are being threatened by public policy decisions and how the Attorney General's Office is working to reduce the threats from other decision makers.⁴⁹

If the IRS can begin testimony to Congress by noting that “the charitable sector deserves to be commended for the vital work it does throughout America,” and “on the whole, we believe the charitable sector is, or tries to be, compliant with the Internal Revenue Code,” then Attorneys General and other state charity regulators can point out the positive behavior and benefits, too.⁵⁰

3. *Internal Audiences*

When Attorneys General confer with cabinet officials as clients, visit informally with legislative leaders, and meet with their own staff attorneys, they can play a vital role in protecting the public interest by being the state's top legal risk manager and protecting the office's limited resources from being diverted to avoidable work. In particular, Attorneys General can talk about the need for government to:

- Stop abusing nonprofits in the government contracting arena (such as the legal and moral need to pay the full amount, pay on time, and eliminate wasteful application and reporting requirements that often hurt and cost government as much as they hurt nonprofits);
- Stop violating state constitutional and statutory prohibitions against taxing tax-exempt nonprofits (directly or by untoward attempts to refine taxes as fees);

⁴⁹ I humbly believe this is sound political as well as policy advice. As someone who has been traversing the country, I sense the raw hunger that Americans have for public leaders to cast aside petty partisanship and reconnect people with unifying visions. Given that charitable nonprofits employ more than 13.5 million Americans (10% of the workforce), attract more than 63 million volunteers annually, and serve hundreds of millions through the social safety net, Attorneys General could use their bully pulpits, with charitable nonprofits that Americans love as the entry point for discussions, to educate the public about the connections between practical longer-term public policy decisions and the public interest

⁵⁰ Excerpt of the opening testimony of [Steven T. Miller](#), Deputy Commissioner of the Internal Revenue Service, at a Congressional Hearing July 25, 2012. This is not to say that charitable nonprofits couldn't do better. But every time a charity regulator is tempted to publicize a list of nonprofit scandals that smears every hardworking nonprofit, please think of the much longer list of errant government officials removed from office due to scandals (including members of Congress, Governors, and even Attorneys General) or sued for wrong-doing. (Indeed, I anticipate that your office is defending more lawsuits against state agencies and officials and prosecuting more cases against state and local officials than you are suing errant nonprofits. Again, this observation is not a defense of those in the nonprofit sector who may have crossed the line, but a perspective about how negative aspersions need to be put in context.) As one of my colleagues recently suggested, “Publicly acknowledge the good work that nonprofits do. Every December, our [charity regulator] releases a report on nonprofit charitable solicitation compliance. [They] usually have a press event at a nonprofit, which features the good work of that organization.” As another suggested, when charity regulators announce a situation involving individuals or organizations that violated the law, please consider a framing that “would proactively and prominently say, ‘but the vast majority of nonprofits are operating effectively and in compliance with the law’.”

- Stop disregarding the constitutional independence of charitable nonprofits by viewing and treating nonprofit contractors as being “quasi-governmental,” “government-sponsored,” or “publicly-supported” entities because those actions are exposing the state to liability; and
- Think carefully about the strains on charitable nonprofits on which governments and the public heavily rely.

Point out that in all of your work in regulating charitable nonprofits and your service in the past on nonprofit boards and as a volunteer, you have yet to see a nonprofit with its own money tree or ATM machine. Connect the dots for policymakers: that taking money from vital social safety net programs does not take away the human need, and when dire needs are unmet many people will have no choice but to resort to self-help, which can lead to increased crime, which both endangers the public and increases the costs on taxpayers as more crime creates a need for more law enforcement, more courts, and more prisons. Educate policymakers that if they were assuming that foundations would fill the void that foundations do not have those types of resources, plus most foundations have legally binding restrictions that your office enforces to ensure those resources are spent the way the donors intended – be it for the arts, civil rights, the environment, or other matters – and cannot automatically be transferred to fill human service needs abandoned by governments.

4. ***“Achieving Greatness” – AGs as Problem Solvers***

Historically, Attorneys General have justifiably taken great pride in being the *people’s* lawyer and not just the *government’s* lawyer. Given their influential position, Attorneys General can send a strong signal throughout the Office that *everyone* should view their jobs holistically to help the entire public. As a former Solicitor General and Chief Deputy, I have seen the power of the officeholder sending signals internally to cut things super close or cut some slack. It’s done all the time, sometimes consciously, sometimes subconsciously. Instructing your Assistant Attorneys General to remind their clients about the impact of their decisions on the broader public can go a long way to cleaning up some of the contracting abuses and attempts by policymakers to overreach by invading constitutionally independent charitable nonprofits. Attorney General Offices are where the rubber meets the road – you possess inherent power to improve and advance government so it is more streamlined and efficient for the people, so those needing services get them when they need them and taxpayers don’t have to pay excessive amounts to support needless red-tape.

5. ***“Accomplished Galvanizer” – AGs as Structural Reformers***

Attorneys General can lead needed structural reforms in two significant ways:

a. Joint Reform Task Forces

Attorneys General can establish special joint government-nonprofit task forces to address mutual problems that burden everyone.⁵¹ These temporary task forces can be assembled on

⁵¹ Leadership Committee for Nonprofit Revitalization, “[Revitalizing Nonprofits, Renewing New York Report](#)” (New York Attorney General’s Office, Feb. 2012) (“You invited representatives of nonprofits to sit at the same table with their chief regulator for the first time in recent memory and develop forward-looking solutions for change. This unique collaboration has produced significant proposals that once implemented will reduce burdens,

discreet issues or broad trends.⁵² For example, they can focus on the shared concerns about government-nonprofit contracting problems that have long plagued government, nonprofits, and the public (those needing and taxpayers paying for services).

b. Joint Attorney General – Charitable Sector Advisory Committees

Attorneys General with Charity Advisory Councils (such as in Illinois, Michigan, and New Hampshire) can expand the scope to look at the health, capacity, and viability of the nonprofit sector rather than focus narrowly on charitable regulation issues. Offices without them (including the Secretary of State and other offices if they are the lead charity regulator in a state) can create something similar.⁵³

B. State Charity Regulators

Whether in an Attorney General’s Office, Secretary of State’s Office, or another unit of government, during these strained economic times, state charity regulators are like nonprofits: stretched too thin, being expected to do too much for too long without enough resources. These jobs (in nonprofits and regulatory offices) are exhausting. But both are important.

A regulator’s overarching objective is to protect and serve the public. For instance, the State Bar regulates attorneys to keep bad actors at bay and banking regulators do the same with banks. But while their primary focus is to “keep things clean” by stopping bad actors, their related work (*e.g.*, promoting best practices) helps keep their regulated communities healthy because the public wins when there are healthy industries for legal services and banking. If the State Bar or banking regulators see that the industries they regulate are being severely injured by policymakers who weren’t paying attention or didn’t realize what was happening, those regulators would speak up; if they didn’t notice what was happening or failed to alert policymakers about serious problems that policymakers were creating, then the regulators would be failing the public. Similarly, charity regulators are in a position to tell others in government that the government policies exposed in this paper of shifting endless financial burdens to nonprofits are endangering the public. This paper is not a plea to stop regulating nonprofits to stop bad actors, but instead a plea for others in government to stop hurting nonprofits and thereby the public. With a tidal wave about to upend society’s lifeboat of charitable nonprofits, here are three simple ways that state charity regulators can shoot up an alarm flare for others to see.

1. Share this paper with others in your office.

Discuss how the trends are hitting in your state. Perhaps invite the state association of nonprofits in for a brown bag discussion about trends and possible solutions in your states. Engage in discussions beyond the charity regulatory unit and the front office to include those who

save taxpayer and charitable funds, and enhance the public’s trust in the nonprofit sector.”).

⁵² For implementation ideas, see [Three Simple Things Statewide and Local Elected Officials Can Do to Strengthen Communities, Improve Government, and Save Taxpayers Money](#) (National Council of Nonprofits 2012).

⁵³ For assistance in such matters, please feel free to contact the state association of nonprofits in your state. For your ease, a listing may be found at [Find Your State Association](#).

represent state agencies and procurement offices. Be sure to talk with the AGO's legislative team and alert agency attorneys about the need during the legislative session to beware of innocuous sounding legislation that could devastate Attorney General Offices with outrageous new workloads. For instance, in the abstract it might sound like a good idea to expand the reach of Public Records Laws to nonprofit contractors. Yet Public Records Laws rightfully apply to *public* governments, not *private* corporations. To impose Public Records Laws on all private charitable nonprofits (or even just those with government contracts) would mean that any person could walk in off the streets and ask for any document in the charity's possession, and with many charity's providing health, education, and child care services, special federal and state laws then would complicate matters first for charity employees and volunteers and then for AG Offices mired in disputes, appeals, and litigation. If AGO legislative teams focus too narrowly on just what applies directly to the AGO in the first instance, they will miss the avalanche of workload falling on them later.

2. *Look for ways to talk about the importance of charitable nonprofits with others in government.*

The natural place to start might be the State Bar's Public Lawyer Section, because many of these issues (such as government-nonprofit contracting) are multi-jurisdictional.

3. *Open lines of communication with your state association of nonprofits.*

Don't wait on your front office to create a formal joint AG-Charity Advisory Group. Reach out informally to establish contact. Many of the problems noted in this paper flow from lack of awareness and knowledge. In preparing for a recent presentation to NASCO, I asked the leaders of state associations of nonprofits what they would want to say to state charity regulators. In addition to a desire to say "*thank you*" to regulators, several offered specific ideas:

- "Talk with state associations of nonprofits before making policy changes that affect nonprofits. [The lead charity regulator in our state] often calls us *before* implementing new rules or enforcement policies, and we often can provide a reality check for how things will affect nonprofits. We also meet in person at least once a year to talk about trends we're seeing."
- Please look at the state associations as partners, and reach out early and often. In [our state], we have a longstanding relationship with the [charity regulating agency]. But obviously, more consistent and proactive communication on both sides can enhance public education, leverage resources, and result in better policies for the donors and the regulated community."
- "Please be transparent with us so we can help. Identify the type and magnitude of the problems you see. If you tell us that the data show that 32% of nonprofits are failing to file a certain attachment, then we can help educate the sector to improve compliance. But wild allegations that a 'whole bunch' are 'behaving badly' does not help either compliance or education, and actually hurts legitimate nonprofits serving people in local communities."

CONCLUSION

Policymakers have tough decisions to make, but they need to make them on an informed basis with a basic grounding in fundamental facts about nonprofits and deeper understanding of how their actions are placing unreasonable burdens on nonprofits and, consequently, creating gaping new holes in the social safety net our communities desperately need right now. There is a better, safer, saner pathway, but to get there, everyone needs to see why the current course is so disruptive and dangerous for the communities we all serve.

State charity regulators, as those within government who interact most regularly with the nonprofit sector, should lead internal discussions within governments to create meaningful seats at the table for charitable nonprofits to interact in the policymaking process. By bringing together natural partners who exist to serve the same individuals and the same communities, government can lower tension and heighten collaboration. In challenging economic times, more dialogue is needed to enhance more opportunities to build trust and to generate creative solutions to shared challenges.