

# Seize the Initiative:

A Legal Guide  
on Ballot Measures  
for Nonprofits  
and Foundations

*Ballot initiatives are a movement about people. They're about putting local concerns at the forefront of the conversation. This isn't about ideology or political parties or candidates, but about the lives of people in your community—your family and friends.*

—NEIL VOLZ, board member, Florida Rights Restoration Coalition, which led the successful 2018 ballot measure campaign to restore voting rights to the state's formerly convicted citizens

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Some of the most significant policy changes in the past 10 years have taken place at the ballot box. From increasing the minimum wage to approving marriage equality laws and legalizing or decriminalizing marijuana, ballot initiatives allowed voters to take a stand on issues that had stagnated for years in state legislatures. The number of citizen-initiated ballot measures spiked to 71 in 2016—the highest number in a decade.<sup>1</sup>

Nonprofit organizations played a critical role in shepherding these measures to victory. They conducted and disseminated research that helped launch ballot initiatives. They ran public education campaigns, hosted speaker panels and debates, and funded efforts to support a range of ballot measures that were ultimately approved by voters.

Despite their potentially critical role, nonprofits often shy away from work on ballot initiatives out of fear they will run afoul of federal tax laws regarding lobbying. This guide is designed to encourage nonprofits and foundations to get more involved in these important campaigns, by providing a roadmap for navigating legal issues and “seizing the initiative” in their communities.

Alliance for Justice released the first edition of *Seize the Initiative* in 1996, followed two years later by *Foundations and Ballot Measures: A Legal Guide*. This updated edition of *Seize the Initiative* combines both publications into a unified guide for 501(c)(3) organizations seeking guidance on best practices for funding ballot measure advocates and the rules that apply to the organizations that advance their missions through ballot initiatives.

*Seize the Initiative: A Legal Guide on Ballot Measures for Nonprofits and Foundations* offers clear and concise information on the range of legal questions that could arise when nonprofits consider working on a ballot initiative, including:

- An explanation of the different types of ballot measures and the relevant rules for each;
- Guidance on what activities 501(c)(3) organizations may engage in without jeopardizing their tax-exempt status; and
- Information that addresses the concerns of private and public foundations interested in supporting ballot measure work by public charities.

While *Seize the Initiative* directly addresses the law on ballot measures, it is not intended to serve as a replacement for your organization's own legal advice. Rather, it is our hope that this guide will provide information that allows organizations to feel confident about participating in ballot measure campaigns and to better recognize when they should consult legal counsel.

—NAN ARON, founder and president, Alliance for Justice

Alliance for Justice (AFJ) is an association of more than 120 organizations united by a commitment to a fair, just, and free America where everyone has equal access to justice and can fully participate in our democracy. For over 40 years, AFJ has promoted active engagement in the democratic process by giving nonprofits and foundations the confidence to advocate effectively. Within AFJ, Bolder Advocacy helps foundations and their grantees understand the complex rules governing advocacy and advance their mission. Bolder Advocacy offers resources, best practices, tools, coaching, and the Technical Assistance Hotline (866-NP-LOBBY). Bolder Advocacy also works to protect and expand the right of nonprofits and foundations to advocate. Learn more at [bolderadvocacy.org](https://bolderadvocacy.org).

Alliance for Justice thanks Gregory L. Colvin and Lowell Finley, the authors of the original version of *Seize the Initiative* and Thomas R. Asher, the author of *Foundations and Ballot Measures: A Legal Guide*. This updated guide relies heavily on the content of the previous guides, and uses sections verbatim in various places.

**A note to the reader about terminology in this edition of *Seize the Initiative*:**

This guide is written for organizations described in Section 501(c)(3) of the Internal Revenue Code—private foundations and public charities. When this guide discusses lobbying by 501(c)(3) public charities, unless noted otherwise, it is referring to organizations that elect to measure their lobbying under the Code section 501(h), described in more detail in Section III.

Unless otherwise noted, this publication uses the term “charity” to refer to 501(c)(3) public charities, including public and community foundations. When this publication uses the term “foundation” it is exclusively referring to 501(c)(3) private foundations. When referring to the broader universe of organizations that include 501(c)(4) social welfare organizations and 501(c)(5) labor organizations, this guide uses the term “tax-exempt organizations.”

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<sup>1</sup> Ballotpedia, “2018 Ballot Measures”. Retrieved from: [https://ballotpedia.org/2018\\_ballot\\_measures](https://ballotpedia.org/2018_ballot_measures).

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Advocates in Maine knew one thing for certain: if the state was ever going to increase its minimum wage, the change would need to take place at the ballot box, not in the legislature. “There was no legislative path. The legislature had considered and killed bills to increase the minimum wage by just 50 cents in recent years, and our Republican governor would never sign a bill,” recalls Amy Halsted, co-director of the Maine People’s Alliance.

So, with the backing of nonprofits, labor leaders, small business owners, and low-wage workers across the state, Halsted’s group launched a ballot initiative campaign to raise the state’s minimum wage from \$7.50 an hour to \$12 by 2020, with increases after that rising at the same rate as the cost of living.

By the time the measure went before voters, nearly 100 nonprofit organizations had endorsed it and many of those had participated in activities that helped galvanize support for the initiative. The measure passed in November 2016 with 55.5 percent of the vote. Says Halsted: “Nonprofit involvement was critical. Low-income service providers, children’s advocacy organizations, seniors’ groups, faith institutions—all played critical roles in leading the campaign in their communities.”

Ballot measures offer voters the opportunity to participate in direct democracy and provide nonprofit organizations with a powerful platform for educating the public about the issues they care about. Given the potential impact of these measures on society at large, charities and foundations often ask what role they can play in promoting or opposing ballot initiatives.

In general, organizations grappling with that question should first understand the interplay of federal tax law and state laws governing ballot measure advocacy. Tax law treats ballot measure advocacy as lobbying, while state law may treat ballot measure advocacy in the same way it treats campaign activity. From the outset, tax-exempt organizations need to consider how much fundraising they plan to do for a ballot measure campaign since the amount they can raise or will ultimately spend can influence how the work is structured. Organizations should also consider whether they will work in a coalition with other organizations and what role each member of the coalition will play.

Today, 26 states, plus the District of Columbia and the U.S. Virgin Islands, have provisions for statewide initiatives and/or referenda to be placed on the ballot by citizen petitions.<sup>2</sup> And 47 states have some form of local voting on ballot propositions, including bond measures.<sup>3</sup>

As this critical form of direct democracy grows in popularity, nonprofit organizations need to be prepared to use the resources available to them to legally and effectively “seize the initiative.” The following pages will help your organization determine the best path forward as you embark on this type of important work.

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2 Ballotpedia, “States with initiative or referendum”. Retrieved from: [https://ballotpedia.org/States\\_with\\_initiative\\_or\\_referendum](https://ballotpedia.org/States_with_initiative_or_referendum) and National Conference of State Legislatures, “Initiative and Referendum States.” Retrieved from: <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx>.

3 Ballotpedia, “Laws governing ballot measures”. Retrieved from: [https://ballotpedia.org/Laws\\_governing\\_ballot\\_measures](https://ballotpedia.org/Laws_governing_ballot_measures).

This guide generally uses the term “ballot measure,” which refers to the various types of initiatives, questions, and referenda that may be placed on state or local ballots. Requirements for bringing a ballot measure to the voters and enacting it into law are governed by state election laws, each with their own procedures that can differ significantly from one another. While the majority of states have ballot measure access, the rest require all laws be passed exclusively through legislative bodies. The types of ballot measures found in different states is explained below.

### Statutory Initiatives

A statutory initiative enables voters to directly propose and enact laws. To get a statutory initiative on the ballot, proponents collect the signatures of a specified percentage of all registered voters or a specified percentage of those who voted in a designated recent election.

Statutory initiative procedures can be direct or indirect. A *direct initiative* requires no action by the state legislature or local legislative body. Rather, it allows voters to bypass the legislative body and enact a statute without the assistance or intervention of that body. Typically, statutes enacted through the direct initiative process can only be repealed or amended by another vote of the people (unless the initiative provides otherwise), not by the legislative body. By contrast, with an *indirect initiative*, proponents gather signatures on a petition in support of a specific statute and present the petition to the legislative body. The legislative body has the option to adopt the statute itself or to call an election and let the voters decide.

### Initiative Constitutional Amendments

An initiative constitutional amendment is similar to a statutory initiative but seeks to amend the state constitution rather than enact a statute. Generally, more signatures are required to qualify a constitutional amendment for the ballot than to place a statute before the voters. The local counterpart for the initiative constitutional amendment is the initiative charter amendment, which permits voters to amend city charters and the organizing documents of some other local bodies.

### Referenda

A referendum permits voters to determine whether a bill enacted by the state or local legislative body should become law. Typically, those opposing the new law need to submit the required number of voter signatures within a specified period after the law is enacted but before it takes effect. Enforcement of the law is then suspended until the referendum is presented to voters, who have the option of repealing the legislation.

### Bond Measures

A bond measure is a statutory initiative that proposes issuing bonds to finance government programs and projects, such as the acquisition of public park lands or the construction or renovation of public schools. Bond measures typically provide for repayment to bondholders out of general tax revenues or out of the specific revenues anticipated from the completed project.

### Policy Declarations

Unlike an initiative statute or constitutional amendment, a policy declaration is a non-binding ballot measure that expresses the views or preferences of a majority of the electorate on a matter of public concern, such as the 2014 Prop K (Affordable Housing Goals) in San Francisco. Some jurisdictions do not permit policy declarations via ballot measure and restrict the use of the ballot to the enactment of actual laws with binding effect.



State and federal laws govern the type of activities organizations, including tax-exempt organizations, may engage in when advocating for ballot measures. Understanding the basics of these laws will help your organization develop an effective (and legal) ballot measure campaign strategy.

### Federal Tax Laws

Section 501(c)(3) of the Internal Revenue Code (IRC or Code) governs the activities of public charities and private foundations. Generally, public charities, including community foundations, may campaign for or against a ballot measure subject to caps set by federal tax law. Charities are allowed to engage in a limited amount of lobbying activity, and the law treats advocacy for or against ballot measures as lobbying. This is because members of the general public essentially act as legislators when they vote on a ballot measure, so activities to influence these votes is treated the same as directly lobbying members of a more traditional legislative body.

As we will discuss below, depending on how a charity calculates its lobbying, it may be able to spend as much as 20 percent of its budget each year on influencing ballot measures. Private foundations are more restricted than public charities and may not engage in any lobbying.

While 501(c)(3) organizations may not engage in partisan political activity, this prohibition focuses solely on activities for or against *candidates for public office*. Initiatives, referenda, state constitutional amendments, city charter amendments, bond measures, and declarations of policy are voted upon during elections, but they involve passing laws, not selecting or removing public officials. Consequently, 501(c)(3) organizations may safely participate in ballot measure campaigns without fear of violating the “electioneering” prohibition.

### Options for Public Charities

***“The 501(h) election gives public charities a lot of clarity on how much money they can spend on lobbying. This made planning the campaign more straightforward, allowing us to budget a lot more strategically.”***

—DIANA RAMIREZ, coordinated ballot measure campaign for ROC-DC to increase wages for tipped workers in the nation’s capital

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Public charities can choose to measure their lobbying under two IRS formulas: the **insubstantial part test** or the **501(h) expenditure test**. Since its enactment in 1976, the 501(h) expenditure test has provided a clearer, more predictable, and, in most cases, more generous method for measuring a public charity’s lobbying activity than the insubstantial part test.<sup>4</sup>

The insubstantial part test, under Code section 501(c)(3), states that “no substantial part of [the organization’s] . . . activities” can engage in “propaganda” or otherwise attempt to “influence legislation [except as otherwise provided in subsection (h)].” In other words, an organization may lobby as long as lobbying is an insubstantial part of overall activities; beyond this statement, there is little guidance on what constitutes “influencing legislation” or on the definition of “insubstantial.” Unless a charity chooses to operate under the 501(h) expenditure test (described below), its lobbying activities will automatically be measured under the insubstantial part test.<sup>5</sup> See **Appendix I** for more on the challenges non-electing charities face when working on ballot measures.

By contrast, the 501(h) expenditure test looks at spending only, and establishes specific dollar limits that are calculated as a percentage of a charity’s total expenditures for the year. The expenditure test was enacted to clarify the vague insubstantial part test. Under these rules, a charity may spend up to 20 percent of the first \$500,000 of its exempt-purpose expenditures to lobby. For organizations with larger budgets, this dollar amount increases on a sliding scale to a maximum of \$1 million. A significant advantage of the expenditure test is that, unlike the insubstantial part test, which tracks activities and expenditures, volunteer time does not count toward an organization’s lobbying limit. To calculate your organization’s lobbying limit under the expenditure test, see Bolder Advocacy’s [Lobbying Calculator](#).

The 501(h) expenditure test defines lobbying as either direct lobbying or grassroots lobbying. Each type of lobbying has a specific and narrow definition. Direct lobbying is a communication with a legislator, or the legislator’s staff, that expresses a view about specific legislation. Grassroots lobbying is a communication with the public that expresses a view about specific legislation and includes a call to action asking or suggesting that members of the public contact a legislator. There are also several [exceptions](#) to the definition of lobbying that can be used to maximize your advocacy, such as [the nonpartisan analysis exception](#).

To use the 501(h) expenditure test, you must notify the IRS by filing a one-page, one-time form. (See **Appendix II** for a copy of the form—IRS Form 5768.) Because the advantages and fundamental concepts of 501(h) are so essential to most organizations interested in working on ballot measures, **Appendix III** explains its mechanics in greater detail, including the types of public charities eligible to make the 501(h) election.

For a more in-depth discussion of the IRS lobbying regulations for advocacy charities, see Bolder Advocacy’s [Being a Player: A Guide to the IRS Lobbying Regulations for Advocacy Charities](#).

***Unless otherwise noted, public charities discussed in this publication have made the 501(h) election prior to advocating on ballot measures. Non-electing charities may be able to engage in the same activities, but should get advice of counsel prior to proceeding, as the rules and safe harbors available to 501(h) electing charities are not applicable.***

### Options for Other Tax-Exempt Organizations

Although private foundations are also organized under section 501(c)(3) of the Code, unlike public charities, they are subject to substantial excise taxes on lobbying expenditures, and therefore generally do not engage in lobbying. However, private foundations may make two types of grants to public charities that lobby so long as the funds are not earmarked for lobbying. Both types of grants—general support and specific project grants—are discussed in **Section IV: Funding Ballot Measures**.

Other categories of tax-exempt organizations, such as 501(c)(4) social welfare organizations, 501(c)(5) labor unions, and 501(c)(6) trade associations, have considerable latitude to campaign on ballot measures. Generally, they may engage in an unlimited amount of lobbying as long as the effort furthers the tax-exempt purpose of the organization. To the extent they are used for ballot measures and other forms of lobbying or political activities, contributions to such organizations are not deductible as charitable contributions or as business expenses.

### State Laws

*“Compliance with state law is something everyone should pay a lot of attention to. There is definitely an important role for 501(c)(3)s to play in ballot measure campaigns, but they need to be aware of the limits and any reporting requirements.”*

—JONATHAN SCHLEIFER, Executive Director, The Fairness Project, which incubates and supports ballot measure campaigns nationwide

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Every state has its own rules governing organizations that are attempting to influence a ballot measure. State laws can require everything from political committee registration to mandatory reports disclosing related activities and expenditures. The following guidelines are intended to help navigate laws in states where your organization may be supporting or opposing a ballot measure.

### Campaign Finance and Disclosure Laws

If your organization *raises or spends* funds for activities involving one or more ballot measures, the state and, in some cases, the local government, may require the organization to register and file campaign finance disclosure statements. The registration requirements may regulate how you raise money, what disclaimers must be in your advertisements and mailings, and other aspects of your ballot measure work. In some cases, these laws can be complicated and require frequent reporting including donor disclosure.

Despite the complexity of the laws, however, state and local governments must permit your organization to spend funds on ballot measure activities if it so chooses. The United States Supreme Court has ruled that the First Amendment prohibits monetary limits in election laws on the amount that can be raised or spent to support or oppose ballot measures.<sup>6</sup>

## SECTION III: UNDERSTANDING THE LAW

However, the Court did not hold that the First Amendment prohibits lobbying limitations on 501(c)(3)s in *federal tax law*, so that means the only cap on your activities supporting or opposing ballot measure is the lobbying limit set by the IRS.

### Lesson: Make Sure Partners are on the Same Page

In some instances, the difference between federal and state reporting requirements can create confusion. When Nebraska Appleseed led a successful 2018 Medicaid expansion ballot initiative campaign, several partners expressed uncertainty about how to track their advocacy work due to the difference in reporting required under IRS rules and state campaign finance rules. In response, the group held a training with the state's campaign finance department to ensure everyone was clear and comfortable with the reporting requirements.

For more information, contact the state agency responsible for enforcing your state's campaign laws. Also, see AFJ's [State Law Resource Library](#) for ballot measure rules in an expanding number of states.

### Sponsoring an Initiative

If your organization wants to sponsor an initiative, the first step is to contact the agency responsible for regulating ballot initiatives for the state, typically the state's Board of Elections, or the local jurisdiction where it would appear on the ballot. This is usually the easiest way to learn about filing deadlines, petition format requirements, signature requirements, and other important information. Be sure to start early since it typically takes several months to qualify an initiative measure to appear on the ballot.

### Election Laws

The rules governing ballot measure elections are not necessarily found in any particular place in state laws. You may find such rules in state statutes and regulations, local government charters and ordinances, or court decisions interpreting the statutes, regulations, charters, and ordinances. Often pamphlets, guidelines, and fact sheets are available from election officials in your state or local jurisdiction. You may also find information about ballot measure laws and regulations on the websites of the [Ballot Initiative Strategy Center](#) or [Ballotpedia](#).

### Tax Laws

Your organization may have a tax exemption under state law that parallels its federal exemption. You need to watch for different requirements under federal and state tax laws regarding ballot measure activity. For instance, the federal IRS Form 990 does not request information about the nature of your lobbying activity if you make the Section 501(h) election (explained above and in [Appendix II: The Section 501\(h\) Worksheet](#)). California, however, requires an organization to submit a special Form 3509 with samples of its lobbying materials to accompany the state tax returns.

### Charitable Solicitation Laws

Almost all states have enacted laws regulating the solicitation of funds for charitable purposes, with many states requiring organizations to register prior to soliciting funds and to make yearly reports. These laws are not limited to 501(c)(3) organizations. If an organization uses a professional fundraiser, both the organization and the fundraiser may have to register with state authorities and make yearly reports. An annual audit by a certified public accountant may be required and your organization's fundraising materials may need to disclose how people can obtain the most recent financial report. For more information, contact the agency charged with regulating charitable solicitation in your state, in most cases the attorney general's office. Charitable solicitation laws may also apply to organizations raising funds from the public to campaign for or against a ballot measure.<sup>7</sup>

### Restrictions Imposed on Government Grants

Rules enforced by the Office of Management and Budget (OMB) dictate that federal grant funds cannot be used for electioneering or lobbying. Further, unlike the IRS, the OMB rules treat ballot measures, initiatives, referenda, and similar campaigns as electioneering, not lobbying. Accordingly, federal funds may generally *not* be used to support or oppose a ballot measure. The law generally does not prevent a 501(c)(3) organization that receives federal grants from using funds *from other sources* (private donations, earned income, state or local government grants) for ballot measure lobbying. It is essential to understand these rules before proceeding to work on ballot measures.

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4 For a thorough discussion of the IRS lobbying regulations for advocacy charities, see Gail M. Harmon, Jessica A. Ladd & Eleanor A. Evans, Being A Player: A Guide to the IRS Lobbying Regulations for Advocacy Charities (Alliance for Justice) (1996) [hereinafter *Being a Player*].

5 See *Being a Player* for more information about the insubstantial part test.

6 *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

7 For more information on charitable solicitation registration see the National Council of Nonprofits resources at: <https://www.councilofnonprofits.org/tools-resources/charitable-solicitation-registration>.

Private and community foundations may support organizations that lobby on ballot measures just as they can fund organizations that lobby Congress, state legislatures, or local legislative bodies on pending legislation. Unlike private foundations, community foundations may engage in ballot measure advocacy on their own behalf because they are tax-exempt public charities that may lobby or fund lobbying subject to federal tax law's generous lobbying limits. See **Appendix V** for a chart that offers the types of activities that private and public foundations can fund when they are not relying on the general support or specific project grant safe harbors.

### Role of Community Foundations

Community foundations build community endowments, address local needs through grantmaking, and provide leadership on key community issues. As of this publication there are approximately 790 community foundations nationwide, collectively holding approximately \$82 billion in assets. In 2015, community foundations received an estimated \$8.6 billion from individuals, corporations, government agencies, and other foundations, and gave an estimated \$7 billion to support local charitable activities.<sup>8</sup>

Traditionally, community foundations have been primarily responsive to the interests of their donors and grant-seeking nonprofits. To this end, community foundations are increasingly embracing a civic agenda-setting role by providing proactive strategic leadership to address pressing community problems. As place-based funders, they are ideally situated for this role.

Community foundations are well attuned to the opportunities, challenges, players, culture, and priorities of their communities. They are viewed as honest brokers who can use their reputations and resources to bring stakeholders together to identify and address complex local issues. They achieve this through strong partnerships with local civic groups and community residents capable of advocating for responsive public policies.

Community foundations, as public charities, may support or oppose ballot measures. Such advocacy constitutes direct lobbying and is permissible within the lobbying limits of the community foundation. Community foundations also have the same two options for measuring their lobbying activities as other public charities—the insubstantial part test or the 501(h) expenditure test. (See **Section III—Federal Tax Laws** for a discussion of both options.)

Community foundations may earmark grants for lobbying but must keep in mind that those grants will count against their lobbying limit. In fact, earmarked grants are double-counted against the lobbying limits of both the community foundation giving the grant and the grantee that is spending the grant funds on lobbying. However, community foundations that have made the 501(h) election may follow similar general support and specific project grant rules that apply to private foundations (see section below on private foundations). Under certain circumstances, such grants will generally not be considered a lobbying expenditure by the foundation, even if the recipient public charity spends the grant funds on lobbying.<sup>9</sup> (See **Section III—Federal Tax Laws** for more information on community foundation lobbying limits.)

Community foundations may also make grants to nonpublic charities, such as 501(c)(4) social welfare organizations, for the purpose of ballot measure advocacy. These grants may be earmarked for lobbying. Additionally, while the grant will count against the community foundation's lobbying limit, a 501(c)(4) has no limit to its lobbying. Community foundations should be sure, however, to prohibit use of funds for political activities and other activities that may be inconsistent with their tax exemption.

### Role of Private Foundations

Private foundations have narrow sources of funding (typically a single donor, family, or company) and are subject to a prohibitively large excise tax on lobbying expenditures.<sup>10</sup> The tax applies to a foundation's direct expenditures for lobbying, such as when a foundation employee conducts lobbying activity on behalf of the foundation, as well as to indirect expenditures or grants to an organization that are earmarked for lobbying. Under this rule, a private foundation cannot avoid the lobbying prohibition by supporting another entity's lobbying.

The Code provides two "safe harbors" within which a private foundation grant to a charity will not be considered "earmarked" for lobbying. These safe harbors apply even if the agreement does not prohibit the use of grant funds for lobbying and even if the charity spends grant funds on lobbying activities.<sup>11</sup>

**The first safe harbor applies to a grant made for "general support."** While private foundations themselves may not lobby, public charities may use general support grants from these foundations for any purpose consistent with the grant agreement, including lobbying. Even if the grantee uses the money for lobbying, the private foundation will be considered to have made a taxable expenditure as long as the grant is *not earmarked for lobbying through an oral or written agreement between the private foundation and the grantee*. A grant agreement that forbids the use of funds for lobbying is unnecessarily restrictive and not legally required. Nevertheless, private foundations that include these restrictions prevent their grantees from lobbying with their funds.

**The second safe harbor applies to a grant made to support a specific charitable project.** Under certain circumstances, private foundations may make specific grants for projects even if the budget for the project includes some lobbying expenditures. A prospective grantee must submit a detailed project budget that breaks down the lobbying and non-lobbying portions of the budget. The grant amount may not exceed the non-lobbying portion of the budget. For more information on the specific project safe harbor, see [Investing in Change: A Funder's Guide to Supporting Advocacy](#).

These rules do not apply to grants to other types of tax-exempt entities such as 501(c)(4)s. Any private foundation grant to a *non-charity* must include, among other restrictions, a provision prohibiting the use of grant funds for lobbying. As a result, a private foundation cannot directly fund, for example, a ballot measure campaign committee exempt under Section 501(c)(4) of the Code.

Of course, a private foundation may engage in, or fund, charitable activity that does not constitute lobbying, including communications that fit within one of the **exceptions** to the federal tax law definition of lobbying.

For more information on how community and private foundations can fund organizations that engage in advocacy, see *Philanthropy Advocacy Playbook* and *Investing in Change: A Funder's Guide to Supporting Advocacy*.

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8 Foundation Center, "Foundation Stats". Retrieved from: <http://data.foundationcenter.org/#/foundations/community/nationwide/total/list/2015>.

9 [PLR 200943042](#).

10 26 USC §4945 26 CFR §53.4945-2.

11 26 CFR §53.4945-2(a)(6).



This section takes a look at each stage of a ballot measure campaign and offers advice on the types of funds that may be used for each activity.

Throughout the discussions, two key terms are used:

**Restricted Funds:** These are funds that cannot be used for lobbying because they were given with a restriction that prohibits lobbying.

**Unrestricted Funds:** These are funds that do not have a “no-lobbying restriction” and may be spent on lobbying efforts.

In general, charities may use unrestricted funds for ballot measure activities, including direct lobbying, so long as such spending is consistent with the grant purposes and within the lobbying limits of the public charity. While restricted funds may not be used for lobbying, they may support a number of activities that do not constitute lobbying, so long as those activities are consistent with the grant purpose.

### Activities Prior to Petition Circulation or Other Ballot Qualifying Efforts

A proposed initiative that has not begun to circulate for signatures, or a proposed referendum that has not yet been referred to the ballot by a legislature, is not subject to ballot measure lobbying rules under the Code.

#### COMMUNICATIONS PRIOR TO PETITION CIRCULATION

A proposed ballot measure that will be placed on the ballot by petitions signed by voters becomes “specific legislation” when the petition is first circulated among voters for signature.<sup>12</sup> *Pre-circulation* communications with the public that discuss or even reflect a view about the subject matter of the expected ballot measure are not lobbying communications, because they do not refer to “specific legislation.”

#### Non-Lobbying Activities

A charity may use restricted funds to pay for pre-circulation communications with the public about an expected ballot measure. Because such communications are not lobbying, any associated expenditures will not count against the charity’s lobbying limit.

*Scenario:* A health-focused nonprofit is concerned about the diabetes epidemic and decides to explore the idea of a penny-an-ounce tax on sugar-sweetened beverages. Since legislators are unwilling to take up the issue, the group considers mounting a petition drive to place the measure on the local ballot. To generate public support before committing resources to the ballot measure campaign, the nonprofit places ads in the local newspaper informing the public about the dangers to young people of over-consuming sugar-sweetened beverages. The ads conclude with the statement, “Support a soda tax: it’s good for your health.”

*Analysis:* Because petitions have not begun to circulate, and the ads do not include a grassroots lobbying call to action,<sup>13</sup> the ads are not lobbying communications and the expenditures to produce and place them are not lobbying expenditures. The

nonprofit can pay for the ads with restricted funds. Even after petitions begin to circulate, the group's costs associated with the ads will remain non-lobbying expenditures.

### Lobbying Activities

Expenditures such as researching, drafting, or preparing a lobbying communication likely count as lobbying expenditures even if the immediate purpose of the expenditure does not constitute a lobbying communication. Although the regulations are not explicit on this point, an expenditure made *before* a measure begins to circulate for signatures should be recorded and reported as lobbying expenditures if the activities paid for occur *after* circulation begins. Accordingly, expenditures that fall in this unusual category should initially at least be paid for with unrestricted funds.

*Scenario:* Assume the same facts as above, except that before petitions circulate the health nonprofit buys radio time to run the ads *after* the petition circulation begins.

*Analysis:* If the group proceeds with a signature drive and then runs the ads, those ads *will* be lobbying, and the cost of preparing and placing the ads will constitute lobbying expenditures that must be paid for with unrestricted funds.

There is one caveat. If the measure never does circulate for signatures the expenses previously incurred will not need to be characterized as lobbying expenditures and could ultimately be paid for with restricted funds. This might occur if, for example, expected funding fails to materialize or polling data show insufficient support for the measure.

### COMMUNICATIONS PRIOR TO LEGISLATIVE REFERRAL

Some ballot measures qualify for the ballot not by signature petition, but by legislative referral. The rules governing legislative, as opposed to ballot measure, lobbying apply to communications aimed at influencing the legislature's decision about whether to refer a proposal to the ballot for voter approval. Accordingly, a charity's communication with a legislator that refers to and reflects a view about the proposed measure will constitute direct lobbying. Similarly, a communication with the general public that refers to and reflects a view about the specific proposal, including a legislative referral that includes a "call to action," will constitute grassroots lobbying. Such communications must be paid for with unrestricted funds and will count against the charity's lobbying limits.

Although the IRS has not addressed the question directly, as soon as the legislature has voted to refer a measure to the ballot, a charity should likely treat it as a pending measure and comply with the ballot measure lobbying rules under the Code.

### FUNDRAISING

Even at this early stage, it is important to carefully plan your fundraising activities before costs begin to mount. Before launching fundraising efforts for a ballot measure campaign, you should consider the following:

- A ballot measure campaign can become quite expensive, even to the point of overwhelming a charity's lobbying limit and, in extreme cases, potentially jeopardizing the charity's exemption. Before beginning to raise money, the

## SECTION V: BALLOT MEASURE ADVOCACY: A STEP-BY-STEP DISCUSSION OF EACH STAGE OF A BALLOT MEASURE CAMPAIGN

charity should consider whether it can absorb the entire cost of anticipated expenditures. If not, it should consider [forming a non-\(c\)\(3\)](#) organization to house the ballot measure campaign. The charity can make grants to the affiliate, generally a 501(c)(4), up to the charity's lobbying limit.

- A contribution to a charity that is earmarked for lobbying, whether the lobbying is directed at a ballot measure or other type of legislation, is not deductible by the donor. (See **Fundraising for Ballot Measure Activity** below.) A charity should consider soliciting contributions in a way that does not suggest to the prospective donors that the funds raised will be used for the purpose of supporting or opposing a ballot measure (or other lobbying activities), both to preserve donor deductions and to increase the charity's flexibility in using contributed funds. For example, instead of asking a donor to fund its specific ballot measure campaign on Medicaid expansion, a charity can ask for funds to support its work on Medicaid expansion, generally including public education on the issue.

### Lesson: The Benefits of General Operating Grants

"General operating grants are easiest for both the grantee and the funder," says William A. Powers, a partner at Nossaman LLP in Washington, D.C., who advises groups on ballot initiative campaigns. "One Idaho nonprofit that works on children's issues used a general operating grant to fund a broad education campaign around a 2018 Medicaid expansion ballot measure. The funds supported activities that fell under the group's overall mission, such as pitching media stories and writing op-eds on the harm caused by the gap in health coverage for lower-income households. Because the funds used were part of the organization's general operating support, they did not constitute taxable expenditures for the foundation or lobbying for the nonprofit."

- The solicitation of contributions earmarked for a ballot measure campaign can trigger [state or local campaign finance disclosure](#) obligations, potentially including public disclosure of the donors. Expenditures made by a charity on behalf of a ballot measure campaign may also constitute in-kind contributions from the charity to the campaign or independent expenditures under state campaign finance laws.
- Private foundations are prohibited from lobbying, and from making grants to other organizations that are earmarked for lobbying. However, with assistance from knowledgeable counsel, a private foundation can make a grant to a charity that lobbies without violating the private foundation lobbying prohibition, such as through general support or specific project grants. Otherwise, private foundation grant funds may be restricted from use for lobbying. A charity can use restricted grant funds to support non-lobbying activities that may be related to a ballot measure, such as communications that fit within [an exception to the definition of lobbying](#). Charities should take care to ensure that their activities in connection with a ballot measure do not unintentionally result in campaign finance disclosure obligations that would compel the charity to disclose its private foundation donors.

Among other things, such disclosure could create the appearance that the private foundation gave to the charity for the purpose of engaging in ballot measure activity.

### DRAFTING A BALLOT MEASURE

As noted above, a measure headed for the ballot as a result of signature petitions is not considered “specific legislation” for purposes of the lobbying rules until [signature petitions begin to circulate](#). Therefore, expenditures incurred in drafting a ballot measure may not initially constitute lobbying expenditures. However, such expenditures likely fall within the definition of “preparation” for lobbying, so if the measure does begin to circulate, the charity would need to reclassify those expenditures as lobbying expenditures, unless [an exception applies](#).

*Scenario:* A nonprofit that advocates for low-income working families has promoted legislation for several years to raise the state’s minimum wage but faced resistance from the state legislature. The group consults with stakeholders, conducts research into policy alternatives, and polls voter opinion on alternative approaches. Based on the results of these efforts, the organization’s staff drafts a proposed ballot measure to increase the minimum wage to \$15 an hour and seeks to raise money to finance a signature drive. The nonprofit does not use the results for any other purpose. Up to this point, the organization’s expenditures are not lobbying expenditures because the proposal is not yet “specific legislation.” Two possible scenarios could happen:

- *Successful fundraising campaign:* Following a successful fundraising campaign, the nonprofit launches a signature drive to qualify the proposal for an upcoming ballot. Under this scenario, the proposal becomes “specific legislation” as soon as the signature drive begins and the costs of both the petition drive and the pre-circulation preparation activity constitute lobbying expenditures.
- *Unsuccessful fundraising campaign:* If, instead, the necessary resources do not materialize, the nonprofit must abandon the effort before petitions begin to circulate. Under this scenario, the proposal does not become “specific legislation,” and the preparation costs do not constitute lobbying expenditures.

### Non-Lobbying Activities

A charity could use restricted funds to draft a communication that qualifies as [“nonpartisan analysis, study, and research” \(NPASR\)](#), even if the communication includes content that later is used in the ballot measure.

*Scenario:* A report analyzing the general problems faced by low-wage workers addresses the arguments and counter-arguments related to raising the minimum wage, presents relevant data, and includes, as an appendix, a model ballot measure reflecting the conclusions drawn from the analysis.

*Analysis:* This report qualifies as NPASR and expenses incurred in researching, drafting, publishing, and distributing it, including the model ballot measure, would not be lobbying expenditures, and do not count against the charity’s lobbying limit.

### Lobbying Activities

A charity with unrestricted funds can use those funds to draft a ballot measure without the need to qualify as NPASR. Such expenditures, however, would count against the charity's lobbying limit.

### GETTING ON THE BALLOT

Qualifying a measure for the ballot includes some activities that do not constitute lobbying and therefore can be conducted with restricted funds, while others, such as signature gathering, are lobbying and must be conducted with unrestricted funds.

### Non-Lobbying Activities

Activities required by states to qualify a measure for the ballot include submitting the measure to appropriate authorities for review prior to the circulation of petitions. For example, in California, each prospective ballot measure must be submitted to the attorney general to receive an official "title and summary," which must accompany the measure on signature petitions. Although the IRS has not issued guidance on this specific issue, a nonprofit might be able to use restricted funds for activities related to this process since it could be considered non-lobbying activity.

In some cases, parties opposing a ballot measure bring litigation at this early stage to challenge the title and summary as inaccurate or misleading, or to prevent the ballot measure from being circulated. Although the IRS has not specifically provided guidance on this issue, based on the general application of the rules it is reasonable to suggest a charity may use restricted funds to initiate or defend against such litigation.

A charity may also use restricted funds to educate the public about a ballot measure and to encourage or discourage signatures *before* the petition drive begins. (See **Communications Prior to Petition Circulation** above.) Since these communications occur before petitions begin to circulate, they are not lobbying communications. (Unlike communications that are *prepared before* circulation but actually *used after* signature collection begins, these activities will not be reclassified as lobbying once petitions begin to circulate.)

### Lesson: Prepare for Legal Challenges

In some cases, parties opposing a ballot measure bring litigation at this early stage to challenge the title and summary as inaccurate or misleading, to claim the ballot initiative is unconstitutional, or to otherwise prevent the ballot measure from being circulated.

Organizations should be aware that such challenges are not uncommon. In many cases, legal challenges will not prevent a measure from making it onto the ballot. But there are exceptions. A so-called "millionaires' tax" ballot measure was expected to go before Massachusetts voters in November 2018 but was blocked by the state's Supreme Judicial Court because of language in the proposal it deemed unconstitutional. The measure would have imposed a 4 percent surtax on annual income over \$1 million and called for the additional revenue to be used for

transportation and education. The Court ruled that the measure violated a clause in the state constitution that prohibited two different subjects from being included in one ballot measure. In this case, the subjects were the tax itself and how the money generated would be spent.

While having a clear understanding of state law will help head off such challenges, opponents will likely find other ways to try to block a measure from the ballot. Organizations should consider the potential costs and delays associated with these challenges as they plan their campaigns. Restricted funds can be used to initiate or defend against such litigation.

A charity may also use restricted funds to educate the public about a pending legislative referral vote as long as the communication *does not* include a grassroots lobbying call to action. If such a call to action is included, the costs associated with the communication would constitute grassroots lobbying and require the use of unrestricted funds to pay for them.

### Lobbying Activities

A charity may use unrestricted funds to pay for the cost of gathering signatures to qualify a measure for the ballot. However, these costs can be substantial, so charities should pay careful attention to their lobbying limit. Mobilizing volunteers is one way to cut costs at this stage. For its Medicaid expansion ballot measure, an Idaho nonprofit used volunteers to collect signatures. As a result, the only expense it needed to report was the comparatively minimal staff time required to oversee the volunteers and deliver the signed petitions to the secretary of state's office.

A charity may also use unrestricted funds to influence legislators considering whether to refer a measure to the voters and to encourage the public to do the same. These expenditures will count against the charity's lobbying limits.

### Activities After Petition Circulation Begins or Measure Has Otherwise Qualified for the Ballot

After a ballot petition drive is in full swing or the measure has won a place on the ballot, charities can lead the way in educating the public about the initiative and building support. They can use unrestricted funds, not restricted funds, to actively and visibly push for the passage of the measure because most of these activities will be treated as lobbying.

### ENDORISING OR OPPOSING A QUALIFIED BALLOT MEASURE

A charity is allowed to make public statements for or against a qualified ballot measure. For a charity, mere endorsement (i.e., allowing a campaign that supports or opposes the measure to use the charity's name) has little, if any, impact on the charity's lobbying limit because virtually no expenditure is involved.

### Non-Lobbying Activities

Aside from the nonpartisan analysis (NPASR) lobbying exception, virtually all other activities involved in supporting or opposing a ballot measure are considered lobbying. Because the general public constitutes the “legislature” in the context of a ballot measure, any public communication that refers to and expresses support for or against a qualified ballot measure will qualify as a lobbying communication that cannot be paid for with restricted funds. Therefore, charities with only restricted funds will need to find an unrestricted source of money to endorse or oppose a ballot measure.

### Lobbying Activities

A charity with unrestricted funds available may publicize the charity’s support for or against a qualified ballot measure. Any expenditures incurred in connection with such communications will count against the charity’s lobbying limit.

## STATE CAMPAIGN FINANCE RULES REGULATING BALLOT MEASURE ACTIVITY

If a charity coordinates its ballot measure activities with a ballot measure committee, its expenditures may be treated under [state or local campaign finance disclosure rules](#) as contributions to the committee, possibly triggering campaign finance recordkeeping and reporting obligations. If the charity acts independently from any ballot measure committee in supporting or opposing a measure, its expenditures may be treated differently for registration and reporting purposes. In many jurisdictions, such as California, certain independent expenditures that are not coordinated with a ballot measure committee are reportable and may require registration. The law varies by jurisdiction and must be checked prior to engaging in any activities.

### Contributions to a Ballot Measure Committee

A charity may make contributions to a ballot measure campaign. But whether in cash or in-kind (staff time, office space, computers, printers, telephones, or intellectual property such as donor lists), any such contribution will constitute a lobbying expenditure and will count against a charity’s lobbying limit. Only unrestricted funds may be used to make a campaign contribution.

Non-cash contributions, like mailing lists, should be reported at fair market value. If the charity receives partial payment, then only the amount of the discount from fair market value will count as a contribution. If the charity receives payment in full, then it is not a contribution although the charity may still have taxable income.

### Loan to Ballot Measure Campaign

A loan to a ballot measure campaign may constitute [a contribution under state or local campaign finance rules](#) and possibly lobbying. Any loan made by a 501(c)(3) to a non-501(c)(3) organization should include language restricting the funds from being used for partisan political purposes.

### Non-Lobbying Activities

Arguably, a short-term cash loan at market-rate interest and fully repaid within the same fiscal year should not be treated as lobbying. To determine how the IRS would treat such a situation, the organization should seek advice of counsel to apply to the IRS for a private letter ruling.

### Lobbying Activities

On the other hand, an unsecured and/or interest-free loan to a ballot measure campaign could be considered a lobbying expenditure, meaning the use of unrestricted funds to make such a loan would reduce the risk of unintended lobbying expenditures.

## ELECTION LAW

It bears repeating that under most state campaign finance laws, market-rate, interest-free, and unsecured loans to a ballot measure committee must be fully disclosed as contributions.

## HOSTING DEBATES OR SPEAKERS

A charity may host public debates or speeches on the subject of a ballot measure. The permissible substance of such events varies depending on whether the organization has, or prefers to use, restricted or unrestricted funds.

### Non-Lobbying Activities

While there is no IRS rule or precedent, it may be possible for a charity to host a debate or speaker series about a ballot measure that qualifies as **“nonpartisan analysis, study, or research”** (NPASR), one of the exceptions to the definition of lobbying under Code Section 501(h). To qualify as NPASR, the debate or series must provide overall “a full and fair exposition of the pertinent facts” and must address arguments on both sides of the issue, allowing voters to develop their own opinion on the measure. With restricted funds, a charity may be able to research, draft, produce, and distribute communications that satisfy the requirements of NPASR. Because the IRS has not issued guidance on this, charities should seek the advice of an attorney prior to planning a candidate debate or series with the intention of classifying it as a NPASR.

A charity that successfully holds a debate or speaker series as a NPASR can also use restricted funds to address the general subject of the ballot measure, and even reflect a view on that subject, as long as no reference is made to the ballot measure. However, charities should try to avoid campaign slogans or catchphrases that are closely associated with the ballot measure, unless the charity can clearly demonstrate a track record of using such language over time without regard to whether a measure is on the ballot. While hosting a NPASR debate or series would not be lobbying under federal law, it may be reportable for state or local campaign finance purposes.



### Lobbying Activities

If unrestricted funds are available for lobbying, a charity can host speakers on just one side of the issue and use the occasion to make a case for the charity's position on the ballot measure. Costs associated with organizing, promoting, and hosting such events will constitute lobbying for federal tax purposes, and may be reportable for state or local campaign finance purposes. Using volunteers to organize, promote, and host the events can reduce the impact on the charity's lobbying limit.

## PUBLIC EDUCATION CAMPAIGNS

### Non-Lobbying Activities

A communication is lobbying only if all elements of the definition of lobbying are present and the communication does not fit within any of the exceptions to the definition (see **Section III–Federal Tax Laws**).

If a charity only has restricted funds or wants to avoid lobbying, it may be able to run a public education campaign about the general topic covered by the ballot measure as long as it does not include a reference to the ballot measure, does not reflect a view about the ballot measure—or both of these. If either of these elements is absent, the communication will not constitute lobbying. However, in the *Parks Foundation* case, discussed in more detail on pages 26–27, the court ruled that advertisements, run shortly before an election, commenting on issues that were the subject of measures on the ballot, should be treated as lobbying. Therefore, in planning a public education campaign that is on the same subject as pending ballot measures, organizations should be familiar with this case and seek legal counsel as necessary.

*Scenario:* A local nonprofit has long advocated for increased spending for K-12 public schools as a way to improve student performance and graduation rates. A proposed bond for the school district where the nonprofit is located is being circulated for signatures. After the signature drive begins, the nonprofit runs an ad in the main newspaper highlighting a report on the performance of students in the United States that concludes that increased funding of public schools leads to increased test scores and lower dropout rates. The ad makes no reference to the ballot measure or to the elections.

*Analysis:* The ad, which runs after signature petitions begin to circulate, is not a lobbying communication because it merely reflects a view about the general subject of the ballot measure but does not refer to the ballot measure itself.

Alternatively, if it satisfies the requirements for the NPASR lobbying exception, a charity's public education campaign can both refer to and reflect a view on the ballot measure, and still not constitute lobbying. The NPASR exception requires that the communication include a "sufficiently full and fair exposition of the pertinent facts" to enable the public to form an independent opinion or conclusion about the merits of a position, and that it be distributed widely, not just to people interested solely in one side of the issue. The mere presentation of unsupported opinion does not qualify. It is important to seek knowledgeable legal counsel to ensure that the requirements of this exception are met.

*Scenario:* After the ballot measure begins to circulate for signatures, the nonprofit releases a detailed report analyzing the effect increased funding for schools would have on the district. The report includes the results of extensive peer-reviewed studies of similar school districts. After thoroughly reviewing these sources and considering the arguments in favor of alternatives to increased spending, the 20-page report concludes that the most effective way to improve student performance is increased spending in the school district and urges the public to support the bond measure.

*Analysis:* The report constitutes “nonpartisan analysis, study, and research” and therefore is not a lobbying communication. Even though the report refers to and reflects a view on the ballot measure after petitions have begun to circulate, the costs associated with researching, drafting, producing, and distributing the report are not lobbying expenditures, and the nonprofit can pay those costs with restricted funds.

Note that expenditures for a communication that qualifies as NPASR, and that therefore need not be reported to the IRS as lobbying, may nonetheless constitute reportable activity for campaign finance purposes, and could trigger registration and reporting obligations under state or local campaign finance law.

### Lobbying Activities

If unrestricted funds are available for lobbying, a charity may produce and distribute a communication that both refers to and reflects a view on a ballot measure, even if the communication does not fit within an exception to the lobbying definition. For example, the charity could produce and distribute bumper stickers or door-to-door literature that supports or opposes the measure, which would not qualify as “nonpartisan analysis, study, or research,” encouraging the public to vote for or against the ballot measure.

The costs associated with producing and distributing the communication, including direct expenses such as buying the bumper stickers and staff compensation, will constitute direct lobbying expenditures that count against the charity’s lobbying limit and must be reported to the IRS. The costs may also constitute contributions or independent expenditures for campaign finance purposes and may need to be reported under state or local election law. Although these costs must be tracked as lobbying expenditures, engaging in very low-cost advocacy, such as paying for signs to display in local businesses and purchasing bumper stickers, will not significantly cut into the charity’s unrestricted funds.

### Lesson: Radio Ads that Lobbied Without Naming the Ballot Measure

Communicating on broad elements of policy issues without mentioning specific legislation has generally been held as non-lobbying advocacy, but a 2017 ruling in *Parks Foundation v. Commission of Internal Revenue* came to a different conclusion for a private foundation in the context of a ballot measure. The Parks Foundation produced a series of radio advertisements commenting on issues related to pending state ballot measures. The ads did not refer to the ballot measures by name, but nevertheless the United States Tax Court held the Parks Foundation

was promoting the ballot measures because it used terms widely used in connection with the measures and described the content and effect of it. This was the first time a court interpreted the rules for private foundations so broadly. The ruling was later affirmed by the Ninth Circuit Court of Appeals. It is unclear if these rulings have implications beyond the specific facts of the case, or if the Tax Court's logic extends beyond private foundations and ballot measures to public charities and traditional legislation.

### GOTV AND VOTER REGISTRATION CAMPAIGNS

#### Non-Lobbying Activities

A charity can use restricted funds to conduct a get-out-the-vote (GOTV) campaign that does not advocate for or against the ballot measure. The charity may spend money to encourage voting or to highlight that the measure is on the ballot without reflecting a view. If the ballot measure is the only issue on the ballot, it can inform voters about the upcoming election. A charity may also drive voters to their polling places as long as these services are not confined to those who hold a particular position on the ballot measure.

#### Lobbying Activities

A charity can use unrestricted funds to mobilize voters who agree with the charity's position. Costs associated with mobilizing voters based on their positions will constitute lobbying expenditures and will count against the charity's lobbying limits. Consequently, an organization's unrestricted funds will go further if volunteers are used for many of these activities. As it had for its signature gathering efforts, the Idaho pro-Medicaid expansion nonprofit referenced above utilized volunteers to help get out the vote, sending out email alerts to its broad list about activities such as phone banking and canvassing. The only lobbying expense was the staff time required to prepare and send out the emails.

If the GOTV effort is coordinated with a ballot measure campaign, then the charity's expenditures may constitute contributions to the campaign committee and may trigger [state or local campaign finance reporting obligations](#).

A charity can target its advocacy efforts to voters who agree with the charity's position on a ballot measure. During the GOTV phase of its ballot measure campaign, Nebraska Appleseed was able to capitalize on its earlier signature collection efforts to help determine which households to canvass. "If we collected someone's signature we would knock on their door and remind them that the election was coming up and that they would now have the opportunity to vote on that ballot measure," said Molly McCleery of Nebraska Appleseed. However, charities must avoid targeting based on partisan factors that might constitute prohibited intervention in a candidate's campaign, such as by talking about the issues in a way that favors one candidate's position over that of another. Selection and presentation of the issues should not encourage people to vote for candidates who are Democratic or Republican, liberal or conservative, or candidates who share the charity's views on the measure.

Partisan targeting factors include focusing voter registration and GOTV efforts based on voter party affiliation; expressing support for or against a particular candidate; and relying on voter lists received from or prepared in coordination with partisan sources such as political parties. When collaborating on outreach with a non-charity ally, such as a social welfare organization or a labor union, a charity should keep in mind that these organizations are permitted to engage in partisan targeting. That means that the charity needs to ensure voter lists generated by these organizations are nonpartisan.

Nonpartisan targeting factors include focusing efforts on underrepresented or low-turnout communities that could include people of color, low-income, homeless, or student populations. A charity could also focus on its natural constituency, such as clients or patients, members of the public who come into your office or agency, or families of your constituents.

*Scenario 1:* A measure is on the ballot that would raise the minimum wage. A public charity wants to make sure that interested voters get to the polls on Election Day. Polling data show that Latinx voters strongly support the proposal, so the charity focuses its limited resources on Latino neighborhoods, looking for registered voters and helping them get to their polling places.

*Analysis:* The charity is using nonpartisan criteria to target voters. Although its activities do constitute lobbying, they do not constitute partisan political activity.

*Scenario 2:* A measure is on the ballot that would raise the minimum wage. A public charity wants to make sure that interested voters get to the polls on Election Day. Polling data shows that Democrats strongly support the proposal, so the charity focuses its limited resources to get registered Democrats to their polling places.

*Analysis:* The charity is using partisan criteria to select voters. This activity violates the prohibition on partisan political activity by a public charity.

### Non-Lobbying Activities

Registering people to vote on a nonpartisan basis is an appropriate voter education activity for a 501(c)(3) organization<sup>14</sup> so there are no limits on the amount that can be spent for this purpose. The voter registration drive must be designed solely to educate the public about the importance of voting and must not contain any bias for or against any candidate or party. Generally, unrestricted funds are used for voter registration efforts because private foundations do not earmark grants for voter registration, because they are subject to excise taxes unless the voter registration efforts fulfill a narrow set of requirements under Code section 4945(f). A 501(c)(3) may use general operating support grants for voter registration activities. Additionally, 501(c)(3) organizations are permitted to use voter registration as a means of gathering support for or against a ballot measure, but its expenditures may count towards its lobbying limit.

An organization may target its efforts in areas where new voters are likely to be on its side in the ballot measure campaign, and your organization can use slogans that reflect your stance on the initiative: “Save our public services, register here to vote No on Proposition 13,” or “Stop trophy hunting of mountain lions, register and vote for Proposition 117.” If you do not want your voter registration campaign to count as a lobbying expenditure, however, avoid use of initiative-related buttons, literature, and slogans or any mention of the measure.

**Campaign Finance Law:** A Federal Election Commission regulation requires that you post a sign or provide a written notice to people registering to vote.<sup>15</sup>

*“Our voter registration services are available without regard to the voter’s political preference. Information and other assistance regarding registering or voting, including transportation and other services offered, shall not be withheld or refused on the basis of support for or opposition to particular candidates or a particular political party.”*

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Some state laws apply to all forms of voter registration. For example, you must register all qualified citizens without regard to the party, candidates, or measures they may favor. While citizens may only register and vote in one jurisdiction for federal elections, two states—Illinois and Maryland—allow local jurisdictions to permit noncitizens to vote in their local elections. Nine states—Arizona, Arkansas, California, Colorado, Delaware, Montana, Nebraska, New Mexico, Oregon, Tennessee, and Wyoming—allow nonresidents, such as business or second-home owners, to vote in some special district elections. Three states—Connecticut, Delaware, and New Mexico—allow nonresidents to vote in municipal or town elections. These rules may allow a broader array of people to vote on local ballot measures than can vote in statewide and federal elections.<sup>16</sup>

Under the campaign finance disclosure laws of most states, you may not need to report voter registration expenditures if they were not incurred at the request of a campaign committee and your registration drive does not include partisan communications urging people registering to vote for or against particular candidates or measures.

## LITIGATION

### Non-Lobbying Activities

Litigation challenging the content or qualification of a ballot measure generally falls outside the definition of lobbying. For organizations whose involvement in a ballot measure campaign is otherwise insubstantial, participation in litigation about a ballot measure would likely not constitute lobbying and could be conducted with restricted funds.

However, if an organization is substantially devoted to the passage or defeat of a ballot measure, there is some risk, in the absence of clear precedent, that the IRS might consider litigation in support of the organization’s position to be part of its legislative strategy and consequently treat it as lobbying. An organization that wants to pursue litigation with restricted funds and wants more certainty about whether it can safely do so, should consult with counsel.

### Lobbying Activities

A charity that is closely involved with a ballot measure campaign can use unrestricted funds to pursue litigation related to that measure.

### FUNDRAISING FOR BALLOT MEASURE ACTIVITY

A public charity may use its resources to raise money for activities connected with a ballot measure. Since the solicitation is a communication with the general public, the solicitation itself may constitute lobbying depending on the language used. That means the charity must consider whether the costs associated with a given solicitation should be paid with unrestricted funds.

Contributions earmarked for lobbying activities are not deductible for federal tax purposes by the donor. A solicitation seeking earmarked contributions should disclose that fact to ensure donors are aware their contribution cannot be deducted.

A charity may also seek foundation funding for its ballot measure activity. While a community foundation may fund all aspects of ballot measure advocacy, a private foundation may only fund non-lobbying advocacy. A grant that meets the criteria of either the general operating support or specific project grant safe harbors should be used. For more information, see **Section IV: Funding Ballot Measures**.

Raising money specifically for activities that support or oppose a ballot measure may trigger reporting obligations under [state or local campaign finance disclosure rules](#).

### Non-Lobbying Activities

A charity can use restricted funds to pay for solicitations that do not themselves constitute lobbying communications. For example, a solicitation that describes the general issue but does not refer to the ballot measure would not constitute a lobbying communication. Therefore, a charity could use restricted funds to produce and distribute the solicitation.

### Lobbying Activities

A charity can use unrestricted funds to pay for solicitations that both refer to and reflect a view on the ballot measure, although it should inform donors that such donations are not tax-deductible. In some jurisdictions, such a solicitation may also constitute reportable activity under [campaign finance disclosure rules](#).

### POLL WATCHING

#### Non-Lobbying Activities

A charity may monitor polling places on election day to ensure that the election is properly conducted; that opponents do not engage in unlawful activity inside or immediately outside the polling place, such as wearing campaign shirts or buttons, distributing campaign literature, or soliciting votes; and that qualified voters seeking to cast ballots are not improperly challenged or otherwise impeded.

Most states permit candidates or political parties to designate persons to serve as poll watchers. Some states require poll watchers to reside in the jurisdictions in which the polling place is located. Others require poll watchers to carry official certificates. Find out whether your state requires advance registration and what the rules are for poll watchers on Election Day. Make sure your poll watchers know the rules so they do not inadvertently violate them while keeping an eye out for violations by others.

In addition, poll watchers can monitor the list of voters who have cast their ballots as the day progresses to identify those who have not yet voted and to make last-minute GOTV contacts. Learn the rules on updating these lists so you can be sure precinct officials are doing their jobs properly.

### Lobbying Activities

A charity should not combine its lobbying activity with its poll-watching activity because doing so might violate rules prohibiting electioneering at the polls. Consequently, a charity does not need to use unrestricted funds to support poll watching. However, if the ballot measure is the only item on the ballot, a charity that wants to encourage voters to support or oppose the measure should check state law to determine whether it can engage in lobbying at polling places. It should also check other requirements, such as the distance supporters or opponents of the measure must keep from polling locations.

## WORKING WITH CANDIDATES ON A BALLOT MEASURE

***“It’s a one-way street. When you’re working on ballot measures, candidates can support and lift your efforts, but public charities cannot support or oppose candidates because of the candidate’s views on the ballot initiative.”***

—WILL POWERS, Partner at Nossaman LLP, Washington D.C.

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Political candidates can be visible and influential allies in a ballot measure campaign. However, a charity must be extremely careful when working with a candidate to ensure that none of the organization’s activities constitute strictly prohibited candidate campaign intervention. (Note: The restrictions on a charity’s relationship with candidates is defined by the IRS prohibition on candidate campaign intervention by charities, rather than by the rules governing lobbying. Consequently, this section does not distinguish between restricted and unrestricted funds.)

### Candidate Endorsement of Charity’s Position

A 501(c)(3) must not ask a candidate to pledge support for or against a ballot measure (or any other issue) because the IRS has ruled that seeking such a pledge violates the prohibition on candidate campaign intervention.

However, if an officeholder who is running for re-election or a different office expresses support for the charity’s position, the charity may decide it is worth the risk to identify the officeholder by name among its supporters but must not refer to the candidacy.

For example, in 2016, California's then-Lt. Governor Gavin Newsom, who ran a successful race for governor in 2018, endorsed 14 ballot measures, including a measure he worked on to legalize marijuana. Proponents of the measures listed Newsom, in his capacity as Lt. Governor, as a proponent of the measures.

Aligning with candidates is considerably risky for charities. A candidate for elected office should not serve as the spokesperson for the charity's ballot measure activities, and should only do so if the role is clearly unrelated to the candidacy. This may occur if, for example, the executive director of a charity that is driving a ballot measure campaign is simultaneously running for office. However, this would invite substantial scrutiny and the executive director would better serve the charity by taking a leave of absence.

### Candidate Participation on Ballot Measure Steering Committee

A charity should not include any person running for office on their ballot measure steering committee, because of the risk of appearing to support the candidacy. However, if it is unavoidable, a candidate may serve on a charity's ballot measure steering committee, but only if the charity takes great care to ensure that no charity resources are used in any way to promote or support the candidate's campaign. The steering committee must not refer to the candidate's position in connection with his or her candidacy or election campaign and must be extremely cautious when using the candidate's name in connection with ballot measure activity to avoid any potential expression of support for the candidate. If a candidate is too closely connected with the ballot measure campaign, it may be difficult to avoid candidate campaign intervention. A charity should seek advice of counsel prior to considering any connection to people running for elective office.

In some jurisdictions, close involvement by a candidate in a ballot measure campaign can trigger [special campaign finance disclosure rules](#) governing "candidate-controlled" ballot measure committees.

### Candidate's Campaign Focuses on the Ballot Measure

If a candidate campaigns on an issue that is the subject of a ballot measure supported by a charity, the group needs to ensure that its own advocacy on the measure does not constitute candidate campaign intervention. A charity should not link its position on the measure to the position any candidate takes in his or her capacity as a candidate.

## COMMUNICATIONS WITH MEMBERS

The 501(h) rules establish that lobbying includes communicating your views about the qualification, passage, or defeat of a ballot measure in the jurisdiction where the vote will be taken. The Code does allow a general exception if your organization is communicating its views on legislation to its members primarily, but the 1990 IRS regulations are silent as to whether this exception applies to communicating with members about a ballot initiative. Under this exception, the expenditures for communications made primarily to members (meaning more than 50 percent of recipients are members), and which refer to and reflect a view on specific legislation but do not directly encourage engagement in lobbying, are not lobbying expenditures. For the purpose of this exception, individuals are considered members if they contribute more than a nominal amount of time or money to the



## SECTION V: BALLOT MEASURE ADVOCACY: A STEP-BY-STEP DISCUSSION OF EACH STAGE OF A BALLOT MEASURE CAMPAIGN

organization. Some practitioners advise that the exception does likely apply, though there is no specific guidance on the issue.<sup>17</sup>

If your organization's newsletter (either print or electronic) *does* contain views on a ballot measure while the petition is circulating or any time before the vote, a possible approach is to:

- 1) Add up all the costs related to the newsletter, including staff costs, production, printing, mailing, and list usage.
- 2) Determine the percentage of space devoted to the measure. To illustrate, assume the total cost is \$2,000. Let's say one page in a four-page newsletter or 25 percent. That means \$500 of the \$2,000 was spent to communicate your views on the measure.
- 3) From your mailing list, determine the percentage of newsletters (if any) sent to people outside the area where the vote will be taken. In this example, 10 percent of the subscriptions go outside the area of the vote, so you would subtract 10 percent of \$500 (or \$50) from the total. Your total is now \$450 spent communicating with potential voters.
- 4) Determine the proportion of the remaining 90 percent of potential voters who are members and nonmembers. If two-thirds go to members and one-third to nonmembers, you would report only the cost of communications to nonmembers—one-third times \$450 = \$150 as a lobbying expenditure. However, if the ballot measure communication encourages recipients to vote for or against the measure, the entire cost, \$500, of the ballot measure communication in the newsletter should be counted as a lobbying expenditure.

### CAMPAIGN FINANCE LAW

Campaign finance reporting requirements vary from state to state. Thus, there is no uniform treatment of member communications under state law. Some states exempt member communications from their reporting requirements. Other states do not make a distinction between the costs of communications with members and those with the general public. For example, in Ohio, an organization does not have to report expenditures for any type of mailing (including a newsletter) or other direct communication to inform the organization's members of its endorsement of or opposition to a ballot measure. These expenditures are not considered contributions or independent expenditures supporting or opposing the ballot measure committee.<sup>18</sup> California exempts campaign communications included, at no additional cost, in regularly published newsletters sent to members and employees.<sup>19</sup> Any additional costs incurred, such as publishing off the normal schedule, expanding the circulation, or altering substantially the style, size, or format of the newsletter, are treated as in-kind contributions if made at the request of the ballot measure committee. If made independently of the committee, they are considered independent expenditures.

### WORKING IN COALITION WITH AN AFFILIATED NON-(C)(3)

The limit on public charity lobbying can conflict with the sometimes-high cost of a ballot measure campaign, and campaign finance disclosure rules can conflict with donor preferences about public anonymity. To address these concerns, a charity might form a non-(c)(3) affiliate to house the ballot measure activity. While a full discussion of the many issues raised by affiliate structures is beyond the scope of this publication, we highlight here some of the most important issues that arise in the context of ballot measure advocacy. For more information on working in coalitions or in an affiliate structure, see Bolder Advocacy's [Coalition Checklist](#) or [The Connection](#).

The primary consideration in establishing a non-charity affiliate to work on a ballot measure must be protection of the charity's tax-exempt status. That status will be threatened if the charity subsidizes the non-charitable activities of the affiliate by allowing its funds to be used for 501(c)(3)-impermissible activities, or if the affiliate's non-charitable activities are attributed to the charity. A charity should ensure the affiliated non-charity is conducting activities under the affiliated organization's own name. The IRS recognizes two entities as separate if they are legally distinct, generally meaning separate corporations, and if they maintain separate books and records sufficient to demonstrate that the charity is not improperly subsidizing the affiliate.

Beyond these two absolutes, a charity should maximize separation with the affiliated organization in the structure the relationship, while recognizing that efficiency may dictate a certain degree of overlap.

A charity may control the affiliate through the power to name a majority, or even all, of the affiliate's directors. The charity and the affiliate may share a common brand, have similar but distinctive names, and use a common spokesperson, but it's important to ensure that the public and the press do not confuse the two entities. The more closely related the two organizations are, the more important it is to take every practical, operational step to reinforce the separation between them.

Although not legally required, it is less risky if the charity and its non-charity affiliate have, to the extent feasible, some different officers and directors. In addition to offering the benefit of demonstrating that the entities are separate, there are also strategic reasons to have some different officers and directors as they may bring a different skill set than those required to govern a charity and avoid conflicts of interest on executing their fiduciary duties.

The boundary between the two entities must always be carefully maintained. The charity should demonstrate that its resources were only used for charity-appropriate activities in appropriate amounts and that it did not subsidize the non-charitable activities of the affiliate, so that the activities of the affiliate will not be attributed to the charity.

In addition to these general considerations, some specific issues merit discussion here.

#### Communications

The charity and its affiliate must take care to ensure that any communication is attributed to the appropriate entity. It is most efficient to house all of the lobbying activity related to the ballot measure in the non-(c)(3) affiliate, which means that all of the lobbying

communications should bear the non-(c)(3)'s brand. Communications can be shared, with communications coming from more than one organization. In that situation, the non-(c)(3) organization should pay for a reasonable portion of the communication costs so the charity does not subsidize the affiliated non-charity.

We recommend that communications avoid the use of collective pronouns (“we,” “us,” “our”) to refer to the activities of the entities, and instead adopt the habit of explicitly naming the specific entity to which reference is being made.

### Agreements

With the assistance of knowledgeable counsel, the charity and its affiliate should document their relationship to ensure that the charity's resources are properly used, and that the affiliate pays its fair share of the costs (including overhead) associated with any activities conducted on its behalf.

#### ■ Grant Agreement

If a charity makes a grant to the affiliate it will likely constitute a lobbying expenditure and count against the charity's lobbying limit. The grant should be accompanied by an agreement articulating the specific project the charity supports, which could include lobbying on the ballot measure. The grant should also prohibit the use of the charity's funds for any purpose that the charity cannot support, such as candidate campaign intervention. If the charity has not met its lobbying limit at year end, it could grant the remaining amount to a 501(c)(4) to engage in lobbying activities. This is a strategy to increase ballot measure advocacy in the following year. A sample grant agreement can be found in Appendix C of Bolder Advocacy's publication, *The Connection*.

#### ■ Resource Sharing Agreement

If the affiliate will share offices, staff, web hosting facilities, and/or other resources belonging to the charity, the two entities should enter into a resource sharing agreement providing for prompt payment by the affiliate to the charity for the full fair market value of the affiliate's use of charity resources. The agreement should provide for the accrual of interest at market rates against any amounts not paid in a timely manner to the charity. A sample resource sharing agreement can be found in Appendix B of Bolder Advocacy's publication, *The Connection*.

### WORKING IN COALITION WITH NON-(C)(3)S

When a charity collaborates on a ballot measure campaign with one or more non-(c)(3) organizations, it needs to stay clear of activities by the non-(c)(3) coalition partners that support or oppose candidates or parties. Federal tax law's prohibition on partisan electoral activity doesn't apply to the non-(c)(3) ballot measure coalition members, so charities need to take care that their actions and expenditures remain strictly nonpartisan while their partners may legally cross that line.

When a ballot measure coalition intends to be active on an ongoing basis, it may choose to incorporate or organize as an unincorporated association. As a separate entity, the coalition may wish to apply for tax-exempt status, probably as a 501(c)(4) that also registers as a ballot measure or campaign committee, depending on state law requirements. As a 501(c)(4), the

coalition can engage in unlimited ballot measure expenditures, but charitable partners should be mindful that their limits still apply when contributing to the coalition.

Many ballot measure coalitions are not formally established as separate legal entities, but are operated informally under a variety of arrangements. For example, the members of a ballot measure coalition may meet to share information or plan joint or common activities with each of the participants paying its own expenses. Generally in these situations the expenditures by the other participants do not count toward an individual 501(c)(3) participant's own lobbying limits.

Alternatively, one of the members of the coalition could agree to act as the fiscal sponsor of the ballot measure coalition. Under this structure, the coalition member acting as the fiscal sponsor formally establishes a project using the coalition name that is adopted by the executive committee or board as an integral part of its organization. The fiscal sponsor receives all revenues and makes all expenditures, and it reports both on its tax return. Checks must be made payable to the fiscal sponsor, although they may be earmarked for the ballot measure coalition. The sponsor may, but does not need to, open a separate bank account for the ballot measure coalition. The sponsor has full responsibility and complete liability for the activities of the coalition. While a 501(c)(3) can make grants to a 501(c)(4) to pay for coalition activities, it should explicitly limit the use of its funds to 501(c)(3)-permissible activities in the grant agreement. For more information, see [The Connection](#).

A 501(c)(3) organization can be the ballot measure coalition's fiscal sponsor if the work of the coalition can be conducted within the (c)(3)'s lobbying limitations. However, donations earmarked to support the ballot measure coalition will not be tax-deductible. A 501(c)(4) is generally better suited as the fiscal sponsor of a ballot measure coalition and provides several advantages. For example, a 501(c)(4) could pay all or a greater proportion of the lobbying expenses, while still using the names of 501(c)(3) coalition partners in its advocacy. This way, the coalition maximizes the abilities of all of its participants.

The trickiest issue in this kind of fiscal sponsorship is the governance. The coalition leaders may regard the fiscal sponsor as just one member of the group. However, as a legal matter, the member acting as a fiscal sponsor must have complete discretion and control over the finances of the coalition. Thus, the coalition "steering committee" is merely an advisory group, although it may exercise powers delegated to it by the fiscal sponsor's governing body. If this legal arrangement is not fully understood and observed by all involved, trouble may arise: the coalition may act like a separate legal entity when it is not, or the sponsor may disregard its responsibilities. In such circumstances, the coalition should establish a separate organization.

### ELECTION LAW

State campaign finance laws may compel your coalition to set up a separate legal entity, or at least a separate bank account under the fiscal sponsor's tax number, for the receipt and expenditure of campaign funds. These laws may also require that the organizations in the coalition be identified as sponsors of the coalition's ballot measure committee in registration statements and in the name of the committee itself.

### Activities After the Election

After voters have approved or rejected a ballot measure, the measure no longer constitutes “specific legislation” so talking about it is no longer lobbying. Thus, restricted funds may be used for the following activities.

#### BALLOT MEASURE IMPLEMENTATION

The steps involved in putting the approved measure in place are administrative in nature, not legislative. These tasks might include establishing regulations for implementing the measure and the allocation of resources by relevant executive-branch agencies. A charity can make unlimited expenditures with restricted funds to influence these administrative processes. In some states, and on the federal level, administrative advocacy does count as lobbying for reporting purposes.

*Scenario:* Voters approved a ballot measure prohibiting the sale of new handguns that lack safety devices meeting certain operational standards. Under the new law, the state attorney general is responsible for designing and implementing a testing protocol to identify which models meet the new requirements, and for certifying for sale those that qualify. Gun safety advocates who lobbied for the measure participate in several “stakeholder” meetings convened by the attorney general to develop regulations governing the testing and certification process.

*Analysis:* The gun safety advocates’ involvement in developing regulations is not lobbying, and the costs associated with their participation are not considered lobbying expenditures.

#### LITIGATION TO CHALLENGE OR DEFEND AN APPROVED BALLOT MEASURE

Litigation seeking to defend or challenge a law that has already been approved by voters is not lobbying, because it involves a judicial rather than legislative process. A charity can make unlimited expenditures with restricted funds to participate in such litigation.

State or local legislatures, as well as groups that opposed the measure, are likely to try to overturn some or all of an initiative. For instance, following voter approval of Idaho’s Medicaid expansion ballot initiative, the Idaho Freedom Foundation challenged the constitutionality of the language in the measure. Although the Idaho Supreme Court ruled against the Freedom Foundation and found the language was acceptable under the constitution, cases like this demonstrate why organizations need to plan for the possibility of legal challenges and set aside funds during the budget planning process. Depending on how a public charity decides to respond, including through litigation or by launching a subsequent ballot initiative, these activities may be classified as non-lobbying or lobbying.

#### EVALUATING AN APPROVED BALLOT MEASURE’S IMPACT

Efforts to understand the effects of an approved ballot measure are not lobbying expenditures. A charity can make unlimited expenditures with restricted funds to study the impact of an approved ballot measure.

***“It’s incredibly important for communities to defend and engage in ballot measure campaigns. They give voters a voice and allow communities to speak up for what matters most to them. As these initiatives become more visible and normalized, nonprofit organizations will take on increasingly larger roles.”***

—DIANA RAMIREZ, D.C. tipped workers ballot initiative

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This guide offers answers to questions that are likely to arise when exempt organizations and foundations consider participation in a ballot measure campaign. While the guide does not cover every nuance of tax and election law, it will help organizations better understand the legal landscape as they embark on initiatives and work in consultation with an attorney.

Ultimately, each organization needs to determine what role makes sense for it when taking into account its mission, resources, and the legal rules that address lobbying and ballot measure advocacy. As discussed, many activities will require nonprofits to register and report to the state or locality where the measure will go to the ballot. For groups that do not want to register, other roles are still available that will allow them to engage in the initiative effort.

As this guide makes clear, 501(c)(3) organizations are not only allowed to participate in ballot measure campaigns, they are often vital to their success. Moreover, participating in such campaigns allows charities to promote the issues that matter most to them directly to the public. With this guide in hand, your organization has a critical tool for taking an active role in ballot measure campaigns. Now it’s time to *be bold* and *seize the initiative*!

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<sup>12</sup> Treas. Reg. § 56.4911-2(d)(1)(ii).

<sup>13</sup> A call to action must include at least one of the following actions: 1) tell the recipient to contact a legislator; 2) provide information on how the recipient can contact his/her legislator, such as providing the phone number or address; 3) provide a mechanism for enabling the recipient to contact his legislator, such as a postcard, petition, or email form; or 4) identify a legislator who will vote on the legislation as being opposed to or undecided about the organization's view on the legislation, a member of a legislative committee who will vote on the legislation, or the recipient's legislator. If a grassroots communication does not have a call to action, it is not lobbying.

<sup>14</sup> Voter registration drives funded by private foundations are more tightly restricted under IRC §4945(f).

<sup>15</sup> 11 CFR 114.4(d).

<sup>16</sup> For more information, see the National Conference of State Legislatures' resources on Voting by Nonresidents and Noncitizens.

<sup>17</sup> Another widely distributed publication by Bolder Advocacy also takes the position that the exception applies. See *Being a Player*, *supra*, at 22-23.

<sup>18</sup> Ohio Rev. Code Ann., §3517.08(b) (Anderson).

<sup>19</sup> Cal. Code Regs., tit. 2 §18225(b)(4)(B). For a similar exemption in Illinois law, see Ill. Admin. Code, tit. 26, §100.10(b)(E)(iii).

## ***If Our Organization Cannot or Decides Not to Elect 501(h), May It Still Work on Ballot Measures?***

### **ANSWER:**

Yes, but be careful. If you do not (or cannot) make the 501(h) election, your organization will remain under the IRS's "insubstantial" limitation on ballot measures and other kinds of lobbying activity.

The consequences of substantial lobbying for an organization that cannot or does not elect under 501(h) in a particular year are (1) possible loss of 501(c)(3) status, (2) a 5 percent organizational tax on all lobbying expenditures and (3) a similar 5 percent tax on any organization manager who agreed to the lobbying expenditures. The taxes do not apply to churches or church auxiliaries.

*What is insubstantial?* In *Seasongood v. Commissioner of Internal Revenue*, the court ruled an organization's activities to be "insubstantial" where it spent less than 5 percent of its times lobbying. However, later decisions cast doubt on the usefulness of a simple percentage test and suggest that all the facts and circumstances of an organization's legislative activities must be examined. One court suggested that a single official position statement could be "substantial," depending upon its impact on the legislative process.

Organizations that cannot or do not elect 501(h) are advised to keep their ballot measure expenditures and volunteer time (together with any other lobbying work) under 5 percent of their overall activities. This level should be relatively safe. Also, be modest about taking credit for qualifying the measure for the ballot or for passing or defeating it. At the same time, do not avoid a ballot measure if it is important to your agenda. "Insubstantial" is a permissive legal term: it is not a prohibition.

The 501(h) rules, including its favorable definitions and exceptions, *cannot* be used to determine the level of lobbying allowed an organization that does not elect 501(h).