organizations, the IRS "can obtain names and addresses of substantial contributors . . . upon examination as needed."[13] That is, the IRS has already announced a readily available, more narrowly tailored alternative.

Thus, the Schedule B requirement for section 501(c)(3) organizations seems to me to be at risk of being held constitutionally invalid. And without the requirement that Schedule B filings by section 501(c)(3) organizations include names and addresses, IRS oversight of charitable organizations, in particular enforcement of wrongdoing, reduced already by *Americans for Prosperity* and the regulatory change to Schedule B for noncharitable section 501(c) organizations, will suffer further. Violations will increase, and public confidence in the charitable sector will diminish.

And, of course, the consequences of *Americans for Prosperity* for government reporting and disclosure will extend beyond Schedule B and tax law. As Justice Sonia Sotomayor warns in her dissent, "Today's analysis marks reporting and disclosure requirements with a bull's-eye."[14]

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July 6, 2021 ■

[13] *See* T.D. 9898.

[14] *Americans for Prosperity*, slip op., Justice Sotomayor, with whom Justice Stephen Breyer and Justice Elena Kagan join, dissenting, *supra* note 1, at 2.

A Not-So-*Jolly* Catch-22

To the Editor:

Sound tax administration calls for the government to be consistent in its application of the law, which includes being consistent among the positions its lawyers take in court. Judge Ryan T. Holte of the United States Court of Federal Claims recently issued an order denying the United States' motion to dismiss pro se plaintiff Maketa Jolly's tax refund suit for lack of jurisdiction.[1] We applaud Judge Holte's order. However, we are troubled by the United States' argument supporting its motion and the argument's potentially deleterious effects on tax administration.

The IRS Office of Chief Counsel took one position in the Tax Court and prevailed. The Justice Department subsequently took the opposite position in the Court of Federal Claims and fell short. Specifically, before filing a refund suit in the Court of Federal Claims, Jolly had sought to resolve her dispute with the IRS commissioner in the Tax Court. The Tax Court dismissed her petition for lack of jurisdiction, agreeing with the commissioner that the IRS had never issued Jolly a notice of deficiency for 2017. After the Tax Court's dismissal, Jolly filed a refund suit in the Court of Federal Claims. The United States, represented by the Justice Department, moved to dismiss, arguing that Jolly had not satisfied the jurisdictional "full payment rule" set forth in *Flora*.[2] In support of its motion, the United States alleged that it was "unable to obtain the IRS administrative file for the 2017 tax year. Presumably, however, a . . . notice of deficiency was issued with respect to that year." Judge Holte rejected the United States' argument, holding that for the year in question, 2017, the United States had failed to show that the IRS had issued a notice of deficiency and that it had therefore properly assessed the deficiency. It followed that without a properly assessed deficiency, there was no liability that Jolly had to pay in full, and therefore *Flora*'s full payment rule had been satisfied. The United States filed a motion to reconsider Judge Holte's order, and that motion is still pending.

[1] *Jolly v. United States*, No. 1:20-cv-00412 (Ct. Cl. 2021).

[2] *Flora v. United States*, 357 U.S. 63, 75 (1958).

Our concern here is not related to the merits of Jolly's case. Rather, it is that the Justice Department has taken a position that is directly contrary to the position taken by the Office of Chief Counsel in prior litigation with Jolly, and where the Tax Court subsequently ruled in the IRS's favor, on the same facts.

It is axiomatic that taxpayers have a right to dispute their federal tax liabilities in court. Nevertheless, by successfully arguing in the Tax Court that Jolly had never received a 2017 notice of deficiency, and then turning around and arguing in the Court of Federal Claims that she in fact did receive a 2017 notice of deficiency, the government, perhaps unwittingly, has acted to preclude Jolly from exercising that right through irreconcilable positions on identical facts.

The United States may succeed on its pending motion to reconsider. And it may win some refund suits by attempting this about-face tactic in other cases, particularly where, as here, the taxpayer is unrepresented. But those victories come at a cost that cannot be measured by the dollar amounts at issue in specific cases.

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Appeal of a Failing Grade On Insurance Tax Law

To the Editor:

I just got the news that I received an "F" from Professor Stephen Utz, the Roger Sherman Professor of Law at the University of Connecticut School of Law, on my thesis addressing the tax treatment of insurance recoveries.[1] As a long-time student of the tax law, a failing grade from a renowned professor was very disappointing to me. But I do take heart in the fact that my thesis finds at least some support from another renowned professor of tax law: Jeffrey H. Kahn, the Harry M. Walborsky Professor of Law at Florida State University College of Law.[2]

With the weight of these two expert opinions canceling each other out, I'll leave it to the reader to judge my paper based on its own technical merits. The purpose of this appeal is not to restate my entire thesis; but rather to clarify some aspects of it that Utz appears to have misunderstood. Without getting into every little thing, I have selected a few excerpts from his recent article to explain my main points of clarification.

Excerpt 1 — Utz's Description of My Position

In his recent article, Utz began by describing Kahn's position as follows:

> Kahn relies on the unusual conviction that the "payment of [third-party] tort damages . . . does not qualify as a casualty loss and is not deductible under any provision." He reads the IRC as limiting deductible losses to those affecting the taxpayer's own non-monetary property. If this were true, all third-party tort damage payments would be gross income to the tortfeasor. Kahn seeks to dodge this consequence for the insured by taking the bold stand that the insurer becomes the exclusive obligor of the claims it covers, so

[1] Stephen Utz, "Further Comment on How Insurance Recoveries Are Taxed Under the IRC," *Tax Notes Federal*, June 7, 2021, p. 1575 (delivering a failing grade for my work in Ken Brewer, "Tax Risk Insurance: Another View on the Proper Tax Treatment," *Tax Notes Federal*, Feb. 15, 2021, p. 1087; referred to here as "my thesis").

[2] *See* Jeffrey H. Kahn, "Liability Insurance: A Reply to Professor Utz," *Tax Notes Federal*, Apr. 19, 2021, p. 423.