



## **“You Say You’ll Change the Constitution”: What Your Nonprofit Needs to Know About Advocating on State Constitutional Amendments**

*Updated: July 13, 2018*

This fall, North Carolina voters will have the opportunity to decide whether six amendments will be made to the North Carolina Constitution. Voters will be asked to decide on constitutional amendments that would:

1. Reduce the maximum state income tax rate from 10% to 7%;
2. Require photographic identification for in-person voting in future elections;
3. (a) Remove the Governor’s ability to appoint some members of state boards and commissions, giving the state legislature the power to make these appointments; and (b) restructure the Bipartisan State Board of Elections and Ethics Enforcement;
4. Constitutionally enshrine the right to hunt and fish;
5. Expand the rights of victims of crimes; and
6. Remove the Governor’s power to fill judicial vacancies.

Many nonprofits – along with the people and communities they serve – would be affected by these changes to the state constitution and may be interested in advocating for or against one or all of these proposed constitutional amendments.

**This guide is designed to answer some frequently asked questions that North Carolina nonprofits have about advocating for or against state constitutional amendments and other ballot measures.**

### **Can a 501(c)(3) nonprofit support or oppose one (or more) of these constitutional amendments?**

**Yes!!!**

Even though 501(c)(3) nonprofits are prohibited from taking positions on candidates on the ballot, it is legal for charitable organizations to encourage voters to support or oppose ballot measures, including state constitutional amendments. Because voters are ultimately the “lawmakers” on ballot initiatives, nonprofits are engaging in direct lobbying (which is legal) when they encourage members of the public to vote for or against these measures.

## What types of activities can a 501(c)(3) nonprofit (legally) do to support or oppose constitutional amendments?

Nonprofits can advocate on ballot measures (including constitutional amendments) in a wide variety of ways, including:

- Communicating directly with their staff, board members, volunteers, and clients about the merits of the constitutional amendments;
- Publishing research, white papers, or other analyses of the impact of these constitutional amendments (which can be coupled with a call to action encouraging people to vote for or against them);
- Using traditional media (e.g. newspapers, television, radio) or social media to make the case for or against these amendments;
- Purchasing advertisements (e.g. media ads or billboards); and
- Encouraging people to vote for or against an amendment (or amendments) at the nonprofit's events or while providing services.

## How much ballot measure activity is allowable for a 501(c)(3) nonprofit?

It depends on whether the organization has elected to use the [Section 501\(h\) expenditure test](#) for lobbying or whether it uses the default "insubstantial part" test. Here is a quick overview of these two options.

### [Option 1: The expenditure test under Section 501\(h\) of the Internal Revenue Code](#)

Nonprofits electing to follow the 501(h) expenditure test may spend a specified percentage of their overall expenditures on direct lobbying (including advocacy on ballot measures and legislative lobbying at the federal, state, or local level). The following table sets forth the limits, based on the nonprofit's total expenditures.

| If the amount of exempt purpose expenditures is: | Lobbying nontaxable amount is:   |
|--|--|
| ≤ \$500,000                                      | 20% of the exempt purpose expenditures   |
| >\$500,00 but ≤ \$1,000,000                      | \$100,000 plus 15% of the excess of exempt purpose expenditures over \$500,000   |
| > \$1,000,000 but ≤ \$1,500,000                  | \$175,000 plus 10% of the excess of exempt purpose expenditures over \$1,000,000 |
| >\$1,500,000                                     | \$225,000 plus 5% of the exempt purpose expenditures over \$1,500,000            |

The absolute maximum amount of direct lobbying that is permissible for a nonprofit taking the 501(h) election is \$1 million per year. This maximum limit is only relevant for very large nonprofit institutions.

The 501(h) election is **not** open to houses of worship (or their integrated auxiliaries) or to private foundations.

If a 501(c)(3) that has taken the 501(h) election has actual lobbying expenses that exceed the permissible lobbying amounts in any given year, it must pay a 25% excise tax on its excess lobbying expenses. If its total lobbying expenses exceed the limit over a four-year period, the nonprofit can lose its tax-exempt status.

### [Option 2: The “insubstantial part” test](#)

Charitable nonprofits that have not made the 501(h) election can only engage in an “insubstantial” amount of lobbying.

## How is “insubstantial” defined?

Insubstantial means “not substantial.”

## Seriously, how much lobbying is “substantial”?

Neither Congress nor the IRS has established a clear, bright-line test for how much lobbying is a “substantial” activity for a 501(c)(3) nonprofit that has not elected to follow the 501(h) expenditure test. The IRS has suggested that lobbying probably is not a substantial activity if it constitutes less than 5% of a charitable nonprofit’s total activities. Nonprofits that lobby and haven’t taken the 501(h) election must provide details about all of their lobbying *activities* on Schedule C of Form 990. This includes time that volunteers and board members spend on lobbying, even though the organization is not incurring expenses for this type of lobbying. It also includes time staff spends on influencing legislation, communications with lawmakers, media advertisements and press statements related to legislation, rallies and demonstrations on policy issues, and educational events related to legislation. Ultimately, nonprofits that use the “insubstantial part” test have no absolute assurance that the IRS will determine that their lobbying activities are “insubstantial.” If the IRS determines that a 501(c)(3) nonprofit’s lobbying activities are “substantial,” it can revoke the organization’s tax-exempt status.

## Okay, you’ve sufficiently scared me about the risks of the “insubstantial part” test. How does a 501(c)(3) nonprofit take the 501(h) election?

A nonprofit electing to use the 501(h) expenditure test can file [IRS Form 5768](#) at any point during the year it first chooses to make the election. The 501(h) election remains in effect in future years unless the nonprofit chooses to stop using it. Form 5768 is very simple. To complete the form, a nonprofit just needs to check one box and have a board officer or trustees sign it.

## Our nonprofit is also planning to do nonpartisan voter registration. Can we encourage people to vote for or against a constitutional amendment when they register to vote?

**Absolutely!**

While nonprofits that do voter registration, voter education, and get-out-the vote activities must remain nonpartisan in these activities, they can still make suggestions for how citizens should vote on ballot measures. For more great resources on nonpartisan voter registration, voter education, and get-out-the-vote work, check out [Nonprofit VOTE’s website](#).

## Can a 501(c)(3) nonprofit coordinate its advocacy on a constitutional amendment with a political party, candidate, PAC, or 501(c)(4) social welfare organization?

Section 501(c)(3) of the Internal Revenue Code requires charitable nonprofits to be nonpartisan. This means that 501(c)(3) organizations cannot endorse candidates, make campaign contributions, or coordinate partisan activities with candidates for office, political parties, political action committees (PACs), or 501(c)(4) social welfare organizations. While there is no clear IRS guidance about the extent to which 501(c)(3) organizations can coordinate ballot measure work with partisan entities, it is very difficult to coordinate efforts with these groups without co-mingling funds or creating the appearance of endorsement of particular candidates or political parties.

It is possible that the IRS may not revoke a 501(c)(3) organization's tax-exempt status for these coordinated ballot measure activities. However, coordinating activities with candidates, parties, PACs, or 501(c)(4) organizations can create the appearance of impermissible partisan political intervention by a 501(c)(3) organization. This can cause serious damage to charitable nonprofit's reputation with its donors, clients, and the public.

**This is a long-winded way of saying that, at the very least, 501(c)(3) nonprofits should have very serious reservations about coordinating their advocacy for or against constitutional amendments with political parties, PACs, individual candidates for office, or 501(c)(4) social welfare organizations.**

## What type of activities related to ballot measure advocacy does a nonprofit need report to the state?

Because 501(c)(3) nonprofits cannot endorse candidates or make campaign contributions, they are generally not subject to state campaign finance laws. However, the state campaign finance laws require disclosure of certain expenditures related to ballot measures. Specifically:

1. Nonprofits that contribute more than \$100 to a referendum committee must file reports with the North Carolina Bipartisan State Board of Elections and Ethics Enforcement (State Board).
2. Nonprofits that make "independent expenditures" – meaning that they spend their own money in support of or in opposition to ballot measures – must also file reports with the State Board.

[Reporting forms](#) are available online from the State Board. All forms must be signed and submitted by mail (not electronically).

## What is a referendum committee?

A referendum committee is a combination of two or more organizations, businesses, or individuals organized for the primary purpose of supporting or opposing any referendum on the ballot in North Carolina. Charitable nonprofits can organize, or be participants in, referendum committees. Referendum committees must file various financial reports with the State Board within 10 days after being organized, within 48 hours after receiving contributions of \$1,000 or more, at least 10 days before the referendum, and within 10 days after the referendum. There are no limits to the amount of money that businesses or nonprofits may contribute to referendum committees.

## Can you give a one-sentence summary of the answers to these frequently asked questions?

It is perfectly legal for 501(c)(3) nonprofits to advocate for or against ballot measures – including state constitutional amendments – but nonprofits should be careful to avoid coordinating their activities with partisan groups and should be aware that they may need to report certain expenses related to this advocacy to the North Carolina Bipartisan Board of Elections and Ethics Enforcement.

## Can you recommend anything else to read or watch to learn more about nonprofits and ballot measures?

[Nonprofit VOTE](#) and [Bolder Advocacy](#) both have some excellent resources with guidance for ballot measure advocacy by 501(c)(3) nonprofits.

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