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THE ADMINISTRATION'S PROPOSED RESTRICTIONS ON POLITICAL SPEECH: DOUBLING DOWN ON IRS TARGETING

HEARING

BEFORE THE

SUBCOMMITTEE ON ECONOMIC GROWTH, JOB CREATION AND REGULATORY AFFAIRS

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

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THE ADMINISTRATION'S PROPOSED RESTRICTIONS ON POLITICAL SPEECH: DOUBLING DOWN ON IRS TARGETING

Thursday, February 27, 2014,

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ECONOMIC GROWTH, JOB CREATION & REGULATORY AFFAIRS,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:35 a.m., in Room 2154, Rayburn House Office Building, Hon. Jim Jordan [chairman of the subcommittee] presiding.

Present: Representatives Jordan, DeSantis, DesJarlais, Collins, Meadows, Bentivolio, Cartwright, and Connolly.

Also Present: Representative Issa.

Staff Present: Lawrence J. Brady, Majority Staff Director; David Brewer, Majority Senior Counsel; Sharon Casey, Majority Senior Assistant Clerk; Drew Colliatie, Majority Professional Staff Member; Adam P. Fromm, Majority Director of Member Services and Committee Operations; Christopher Hixon, Majority Chief Counsel for Oversight; Katy Rother, Majority Counsel; Laura L. Rush, Majority Deputy Chief Clerk; Rebecca Watkins, Majority Communications Director; Meghan Berroya, Minority Counsel; Aryele Bradford, Minority Press Secretary; Susanne Sachsman Grooms, Minority Staff Director/Chief Counsel; Adam Koshkin, Minority Research Assistant; Brian Quinn, Minority Counsel; and Donald Sherman, Minority Counsel.

Mr. JORDAN. The committee will come to order.

We want to thank our distinguished panel of witnesses for being here today. Members will be trickling in and out. You know how these things are; maybe you have testified before. Members' schedules are busy. But we want to get started and respect everyone's time. We will do opening statements, then we will get right to each of you and introduce you and swear you in here in just a second.

Today's hearing continues the committee's ongoing oversight of the IRS's inappropriate treatment of conservative groups applying for tax-exempt status. The IRS has doubled-down on its targeting and is now seeking to codify their actions.

On November 29th, 2013, the IRS issued a proposed regulation under the guise of clarifying the tax-exempt determinations process. As we will hear today, this rule, if implemented, will stifle speech of social welfare organizations and will systematize the targeting of nonprofit organizations.

The Administration is using the controversy surrounding the targeting of tax-exempt groups as a pretense for the need for this regulation. In reality, this is Lois Lerner's final act in the Administration's effort to curb political speech. We note that this effort was in the works well before the release of the inspector general's audit. Through the committee's investigation, we have uncovered evidence that Ms. Lerner sought to crack down on political speech by certain nonprofit groups as early as 2010, well before the rule was made public.

Emails show the IRS was surreptitiously working on this effort off-plan. In fact, the committee's investigation has revealed that the Administration secretly considered additional regulation of 501(c)(4) organizations for years. In transcribed interviews, Treasury officials have confirmed that work on changing the rules for social welfare groups started long before the inspector general's report. For example, Ruth Madrigal, a senior official in the Treasury Department's Office of Tax Policy, confirmed that she suggested that Treasury conduct its work offline in June of 2012. She testified that we had had requests to do guidance on this topic.

Former IRS acting commissioner provided further context for the request that the IRS and the Treasury received. He testified that as of the fall of 2012, "So I am not sure there was a problem, right? I mean, we had Senator Levin complaining bitterly about our regulation that was older than me. We were being asked to take a look at that, and so we were thinking about what things could be done."

Think about that. The IRS and the Treasury, under the guise of responding to the targeting scandal, had proposed a crackdown on political speech that has secretly been in the works for years and is the result of political pressure from Democrats in Congress and left wing special interest groups.

A chilling effect can already be seen. Groups who have engaged in political speech for years are now in limbo about how to proceed for fear that the IRS will retroactively look back at their activities through the lens of the new regulation and determine they are in violation of their tax status.

The rule is hugely unpopular, receiving over 94,000 comments. Record number of comments; highest number the IRS has ever received on any proposed rule. My understanding is the second highest in the history of any Government agency. Ninety-four thousand comments. And rest assured the vast majority of those are negative.

The rule has been criticized by groups across the political spectrum, as well as by groups who have nothing to do with politics and simply advocate for causes their members believe in, such as some of our witnesses here today. Make no mistake, the proposed regulation will seriously hinder the freedom of speech guaranteed by our Constitution. I think this is important. You think about the First Amendment and the rights we enjoy as Americans: freedom of religion, freedom of press, freedom to assemble, freedom of speech. And the most fundamental component of that freedom of speech right is your right to speak out against your Government; your right to exercise speech that is political in nature. And this Government, this IRS is targeting that very thing, and that is why

this hearing is so important and why I am glad that our witnesses are with us today.

I want to thank all of you for being here. We appreciate your courage in speaking out against this effort to crack down on your ability to engage in political speech, and we will do everything in our power to ensure that you continue to be able to exercise this fundamental constitutional right.

With that, I would yield to the ranking member for his opening statement.

Mr. CARTWRIGHT. Thank you, Mr. Chairman.

Good morning to all the witnesses. Thank you for being here. Look forward to hearing your testimony.

Today's hearing is intended to discuss the merits of the IRS and Treasury Department's proposed rule of clarifying the definition of political campaign activity for 501(c)(4) organizations. This rule is a positive first step towards providing much-needed clarity and guidance for tax-exempt social welfare organizations. Unfortunately, the title of today's hearing—you know, here in Washington it is not like jury trials; we start off our hearings with titles. You know, if you showed up at a criminal defense trial and it said the title of our trial is why the defendant is a criminal and must go to jail. We are not quite so open-minded here in Washington. The title of today's hearing is a not-so-subtle clue that some members will use these proceedings as another opportunity to lob bombs at the White House and the Obama Administration.

As I explained yesterday, after multiple hearings, extensive witness interviews, and the review of thousands of documents, this committee has uncovered no evidence that the White House was involved in the treatment of tax-exempt organizations or their applications. Likewise, the Treasury Inspector General for Tax Administration, TIGTA, has repeatedly testified that he found no evidence of outside influence, White House or otherwise, in how the IRS personnel processed applications.

What the IG's report on exempt organizations did find is that the applications experienced delays not because of political bias, but in part because the IRS employees struggled without specific guidance on how to determine whether social welfare was "the primary activity" of these organizations. As Mr. George explained, Treasury regulations state that IRC Section 501(c)(4) organizations should have social welfare as their primary activity.

However, the regulations do not define how to measure whether social welfare is an organization's primary activity. As a result of this longstanding ambiguity, the IG recommended that the IRS create better guidance on how to process 501(c)(4) applications and work with Treasury to develop guidance on how to measure what is primary activity. In direct response to the IG's recommendations, the IRS and Treasury developed a proposed rule to clarify the definition of political campaign activity and requested public input to ensure the standards are clear and can be applied consistently.

Despite these facts, on February 4th, Chairman Jordan and Issa demanded that the IRS Commissioner Koskinen withdraw the proposed rule, claiming it was an attempt to, as we heard this morning, "stifle political speech" by conservative 501(c)(4) organizations. There is no evidence to support my colleagues' partisan accusation,

but it seems the House Republicans will stop at nothing to keep the American public in the dark about dark money and always in a high state of political outrage.

Furthermore, there is nothing in the proposed rule that restricts any form of political speech. Political groups can still be tax-exempt organizations under the IRC Section 527. They simply would be required to disclose their donors. And that is the big point today, is that they don't want their donors disclosed. We are not here about stifling free speech, ladies and gentlemen. To any Americans listening to this subcommittee hearing, what is being stifled, what is being attempted to be stifled is stifling your freedom to find out where the money behind political campaigns is coming from. This is an attempt to crack down on transparency in American elections. Make no mistake, that is what this is about, to hide where the dark money is coming from.

It is counterproductive to demand that the proposed rule be withdrawn, especially in light of the very real and clear need for more guidance on the issue. Regardless of our specific views on the proposed rule, I hope we can at least agree that IRS employees and organizations seeking 501(c)(4) tax-exempt status need to have clear, easy to follow guidance about what is permissible and impermissible. Many, including me, have also called for a return to the language of the 501(c)(4) statute itself, requiring that these organizations be "operated exclusively for the promotion of social welfare," instead of using the current primary activity test.

To this end, I have introduced the Open Act, which would require both corporations and unions to disclose their political spending to shareholders and members. It would also cap political spending by 501(c)(4) organizations at 10 percent of annual expenditures. And this is a legislation that will help shine a light on that dark money funding political activities in the United States of America.

I look forward to hearing from the witnesses today on this important issue and I yield back to the chairman.

Mr. JORDAN. I thank the ranking member's comments. I certainly appreciate the ranking member, but his revisionist history is astounding. The idea that conservative groups were not targeted when there was a specific list, called the Bolo List, which had these terms on it: 9/12, Tea Party, and patriot, and somehow that was not targeting just dismisses the facts that I think the vast majority of Americans understand and certainly many of those 94,000 comments understand.

With that, I would yield to the chairman of the full committee for his opening statement.

Mr. ISSA. Thank you. Thank you so much, Mr. Chairman.

I listened with interest at your ranking member and, Mr. Cartwright, you are certainly entitled to your opinions. They couldn't be more wrong, but you are entitled to them. Dark money. 501(c)(4). Organize for Action. The President's own agenda, perhaps $1 billion in 501(c)(4) money unreported. Beautiful picture of the President standing in front of a windmill on the last page of this 501(c)(4). Of course, it says, Donate as the first item you see. And then it says Organizing for Action is the grassroots movement fighting for the agenda Americans voted for in 2012.

We are millions of people empowering individuals to make their voices heard. Climate change comes next. Gun violence prevention. Healthcare. Helping millions of Americans learn how Obamacare works. Okay, there is something you can have a lot of trouble getting them to believe. Fixing our broken immigration citizen. A pathway to citizenship. Advocating for a pathway to citizenship.

The list is the President's political agenda; it is millions and millions and millions and millions of dollars that are not reported as to their source. And I am okay with that. I am okay with the small donor being able to give without retribution, without the IRS going after the donors, putting their list online, having them intimidated for who they support. I am okay with that. And you should be too. Americans' right to donate without tax deduction at all.

And make one thing perfectly clear: this is not tax deductible, this is not charity contribution; this is a pooling of Americans' post-tax money to do what they want to do. It is no different, Mr. Cartwright, than if you sat in a room and you got 10 guys and you said, you know, let's all put in 50 bucks apiece and buy an ad to say what we believe; and you each take your $50 and you buy a $500 ad. Would you expect to have to go through endless filing and have all your donors disclosed?

But make no doubt about it, the President did this and did it very well. His 501(c)(4) didn't bother to go through the abuse because his lawyers knew that they didn't need to; they simply self-declared and went on.

Organize for Action is as political as any organization in the world, and to say that it is somehow organizing the way Wikipedia does for social welfare is as much hogwash as any other organization could dream of. It is advocating the President's political policies and promoting the election of the candidates who work with him.

Your only objection is you can't go on the House floor and yell about the Koch brothers the way Senator Reid did. You can't talk about specific monies because you are not getting to know who gave how much.

This is an amazing debate that has absolutely nothing to do with what happened to law-abiding citizens who saw the tax code, made an application, and from application one they were sent to, among others, Lois Lerner and they were stopped. This wasn't about ambiguity. A man who has put more than four decades into being at the IRS fully recommended that these be approved, and his approval was simply not discussed.

The facts do not support any of the allegation the ranking member made in his opening statement. Our investigation shows consistently effective targeting by denial of an answer to organizations. You know, the American people deserve answers. If anyone thinks for a moment that it takes years to answer the question of whether or not you get a 501(c)(4) on even one application, if they really believe that, please call or write my office, because the fact is even the people who want to be on the other side of this know you deserve an answer in days or weeks, not waiting years. The months tick by for these organizations and the only thing they got were abusive questions, questions that in many cases were outside the legal or even the reasonable right to request.

So I would certainly hope, Mr. Chairman, that your ranking member and the rest of us on the committee will go back to the basics, which has nothing to do with whether a 501(c)(4) discloses its contributors; whether or not we change the rules one way or the other based on longstanding court decisions; whether or not the President's Organize for Action has in fact done far more than any Tea Party group ever dreamed of doing when it came for advocating political positions. We simply look at the facts of the IRS getting involved in an ideological political bent.

The ACLU is here today, and other groups, who have stood on both sides, to stop conservatives from taking advantage of liberals, liberals taking advantage of conservatives, the many taking advantage of the few. And I hope today what we hear is the danger of allowing a Federal agency to pick winners and losers, regardless of the ideology.

Mr. Chairman, there can be no more important hearing; that is why I came here personally to it. This may be a subcommittee hearing, but this is one of the most important hearings we will do this year, and I thank you and yield back.

Mr. JORDAN. I thank the chairman

Does the gentleman from North Carolina wish to be recognized? The gentleman is recognized.

Mr. MEADOWS. Thank you, Mr. Chairman.

I would just like to point out, if we could, my esteemed colleague from the great State of Pennsylvania was pointing out that indeed this rule change is a result of the IG's report. And I find that troubling because, quite frankly, we already have knowledge that there was a rule change in effect long before the IG's report came out, Mr. Chairman. If you would put up a slide, if they could put up a slide on the screen here, there is an email that we have from June the 14th, 2012, basically saying that what we were going to do is, Don't know who in your organization is keeping tabs on (c)(4)s, but since we mentioned potentially addressing them off plan in 2013, I've got it on my radar up and this seems interesting.

Now, the problem is that if the genesis of this was the IG's report, we have a time problem, Mr. Chairman, because the IG's report did not get filed and completed until 2013, and yet here we have an email from June 14th of 2012. So I think it is important that we have a time line and just wanted to correct that for the record.

I yield back.

Mr. JORDAN. Appreciate the gentleman.

Anyone else wish to make an opening statement? Go ahead.

Mr. COLLINS. Thank you, Mr. Chairman.

I think what is really interesting here is, as has also been said, and I think we just continue to jump off and you take what is given, is the use of this hearing, as spoken about by the ranking member, to lob bombs at this Administration. I think all you have to do is go find 93,000 comments that have done that for us. I don't think this is a time when we can look at what has actually happened and say why is this happening, why are we doing this now, and what are we distracting from? We are distracting from the real issues and the real problems of this country that are a broken health care system, a broken system that is driving our businesses

and our employees to a brink of not understanding why their Federal Government is against them, and yet we are still dealing with this and saying we don't want you to have a voice.

Mr. Chairman, this is a good hearing. This is something we need to take a part in and realizing that this is an area that people care about because they care about our Country and the direction that it is in right now. This is why we need to be here and, like I said, we don't need this hearing to lob bombs; 93,000 folks or more have already said this is a bad idea and we need to stop it.

Mr. Chairman, I yield back.

Mr. JORDAN. I thank the gentleman.

We are pleased to have with us today Ms. Jenny Beth Martin, who is the President and Co-Founder of Tea Party Patriots; Mr. Gabriel Rottman is a Legislative Counsel and Policy Advisor at the American Civil Liberties Union; The Honorable Wayne Allard—Senator, good to have you with us—is Vice President of Government Relations for the American Motorcyclist Association; Ms. Diana Aviv is the President and CEO of the Independent Sector; Mr. James R. Mason, III is Senior Counsel at Home School Legal Defense Association.

I might point out an association that my wife and I used to contribute money to; I think Mr. Meadows did the same. We homeschooled—well, I use the term "we" lightly; my wife did all the work—for several years, so we appreciate your organization. Glad to have you with us.

And Mr. Allen Dickerson is the Legal Director at the Center for Competitive Politics.

We want to thank our distinguished guests. It is the practice of this committee to have you stand, raise your right hand, and swear you in, so if you would please all stand up.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you, God?

[Witnesses respond in the affirmative.]

Mr. JORDAN. Let the record show that each witness answered in the affirmative.

And we will start with the lady. Jenny Beth Martin, you are recognized.

WITNESS STATEMENTS

STATEMENT OF JENNY BETH MARTIN

Ms. MARTIN. Chairman Jordan and members of the subcommittee, thank you for conducting this hearing today and for inviting me to share my story. It is absolutely imperative that members of Congress understand what is going on with the IRS, what has been going and what is still going on.

I am holding in my hand an email I received yesterday from Tea Party Patriots attorney, an email that was received less than 24 hours before our five-year anniversary event today across Capitol Hill. This email was received less than 24 hours before the deadline for commenting on the proposed IRS regulations and this email was received less than 24 hours before my testimony here today.

What does it says? It says that yesterday the IRS finally decided, after more than three years and tens of thousands of dollars in legal fees and accounting fees, and countless hours of volunteer and staff time answering questions and questions and questions and more questions from the IRS, that finally the IRS has decided to grant us our 501(c)(4) status. We don't have a letter yet from the IRS, but they told my attorney in a phone call.

Now, I am happy to receive this information. It is about time.

Mr. Chairman, the question I have is what took them so long? Tea Party Patriots is not engaged in any political activities. None. We made a conscious decision from the beginning not to engage in political activities, and that did not keep the IRS from withholding our exempt status for more than three years and investigating our organization that entire time.

I am happy and relieved to receive the information, but I still wonder what took them so long. We have not engaged in political activities. The IRS should have been able to determine that within a few months of receiving our application in December of 2010. After all, these allegations, which talk about the primary purpose for social welfare organizations, have been in place since 1959, over a decade before I was born and before man landed on the moon.

Perhaps a reason for the delay of these regulations is that the IRS is what we are here today to talk about, the proposed regulations from the IRS that they issued just before Thanksgiving. If those regulations are enacted, yesterday's approval will be moot. The new definition of political activity could not be more targeted at Tea Party Patriots if the IRS had spent the last three years, two months, and 10 days drafting rules specifically to silence us.

I have attached to my written testimony a the copy of the comments we are submitting to the IRS. We outline a great many of the constitutional and practical problems with these regulations. Let me highlight just a few.

One of the most egregious is the requirement that we track, calculate, report the activity of thousands of volunteers. The army of citizens who volunteer for their Country is the backbone of every group in America, Tea Party, moderate, or progressive. Volunteerism is one of the greatest character traits of our Country. These proposed regulations would treat volunteers as a problem, annihilating relationships that are the heart of an informed electorate.

Furthermore, Tea Party Patriots provides grants to local groups, always requiring the grants are not used for political activity. Under the new regulations, a grantee group's decision to use its own funds for an event as innocuous as a nonpartisan voter registration drive would become our political activity. That standard would gut our ability to assist local groups.

The new regulations would sensor the Internet. Tea Party Patriots would not be able to mention any incumbent on our Web site within 30 days of a primary or 60 days before a general election. We have to scrub our Web site of any mention anywhere in it of information just as basic of how elected representatives voted on the Affordable Care Act, Federal spending, or just historic voting information.

The proposed rules would attribute to us a value of the remarks by our leaders and our volunteers. If, in September of this year, The New York Times quoted a volunteer or me about a congressman's voting record, we would have to place monetary value if The New York Times reported that.

The proposed rules create cracks in the trust of the foundation of our Nation. A Government of the people, by the people, and for the people is supposed to trust the people and the people should be able to trust our Government. When the people are afraid of an agency and they see that agency as a bunch of bullies who abuse power, the trust is shattered. Free people shouldn't fear a politicized bureaucracy that delves into social media and communications to determine what they have said, whom they have heard speak, and what they think about their Government.

We can't fill these cracks in the foundation by adding more rules to the 67,000 pages of oppressive tax code. We personally favor replacing with a flat fair rate, and until then, Mr. Chairman, the Government must fulfill its duty and stop the IRS from infringing on the rights of the American people to freely associate, speak their minds, talk to the press, and petition their Government.

[Prepared statement of Ms. Martin follows:]

TESTIMONY OF JENNY BETH MARTIN, PRESIDENT
TEA PARTY PATRIOTS

SUBCOMMITTEE ON ECONOMIC GROWTH, JOB CREATION AND REGULATORY AFFAIRS HEARING
OF THE
HOUSE COMMITTEE ON OVERSIGHT & GOVERNMENT REFORM ON

FEBRUARY 27, 2014

Chairman Jordan and Members of the Subcommittee:

Thank you for the opportunity to appear here today and to discuss with the Subcommittee the proposed IRS regulations, and how those regulations will intimidate and silence grassroots public interest organizations.

Tea Party Patriots, Inc. is the largest of the tea party grass roots organizations. Today, we are hosting in this city a celebration of the five-year anniversary of that movement. On February 27, 2009, Americans met in 48 different cities to protest the wasteful, profligate, and out-of-control spending that we saw in Washington. The tea party groups that grew out of that protest represent the largest grass roots response to government overreach that this country has seen since its founding.

Tea Party Patriots is guided by and empowers more than 3,000 local grass roots organizations. Those organizations deal with a variety of local issues, and we all agree on three core values of fiscal responsibility, constitutionally limited government, and free markets. Everything that Tea Party Patriots does is focused on advancing one of those core values. We provide training and resources to local groups, and we serve as a megaphone to transmit their concerns to elected officials.

For these past five years, we and our local groups have worked, educated, organized, networked, rallied, met and tirelessly tried to put the brakes on government policies that we believe are harmful to the American economy and the American dream that we want to pass on to our children.

It is ironic that today, the fifth anniversary of the tea party movement, is also the deadline for public comments on the Internal Revenue Service's proposed regulations for certain nonprofit groups. If adopted, those regulations will permanently silence grassroots organizations within the tea party movement. They

will silence not only our local groups, but *any* citizens' organization, regardless of its philosophical leanings or beliefs. I know this because Tea Party Patriots has lived under this scrutiny for the past three years.

On December 17, 2010, Tea Party Patriots applied for tax-exempt status under section 501(c)(4) of the Internal Revenue Code. Our sister organization, Tea Party Patriots Foundation, applied for tax exemption under section 501(c)(3). The IRS never acknowledged Tea Party Patriots' application. Fourteen months later, in February 2012, the IRS sent exhaustive requests for more information about our activities. Tea Party Patriots responded with almost two boxes of documents. We heard nothing more until May 2013, when we learned from news reports that the IRS had targeted groups with "tea party" or "patriots" in their name. Tea Party Patriots quite naturally believed that we were in that targeted group.

Even after admitting that it had targeted groups, and a TIGTA report detailed the abuses, the IRS still did not let up. In August 2013, the IRS requested yet more documents and information. It asked us to provide, for example, all fundraising communications for the 60 days before the November 6, 2012 election, and all materials that we used in various "Get Out the Vote" activities. That request made no sense under the current standards for evaluating non-profit applications. The regulations proposed three months later, however, explain the requests, as they include specific provisions classifying any mention of a candidate's name within 60 days of an election and get-out-the-vote efforts as taxable political activity.

We provided yet more boxes of documents to the IRS. Nevertheless, as of today, 3 years, 2 months, and 11 days after our application, we have not received a decision about our tax-exempt status. Two weeks ago, Tea Party Patriots Foundation finally received its tax-exempt status letter, a mere 1155 days after it applied.

Let me be very clear: Tea Party Patriots does not engage in *any* political activities. We made a decision from the beginning not to engage in any political or campaign activities because we did not want to run afoul of the law – even though the law *allows* us to conduct *some* political activities. We have scrupulously avoided campaign and political activities since our incorporation, but we *still* have not been able to satisfy the IRS that we deserve our tax-exempt status.

Over the past four years, Tea Party Patriots has assisted local organizations with activities that the IRS for five decades has not classed as political activity.

We have produced voter guides, hosted candidate debates, encouraged voter registration, supported get-out-the vote efforts, and assisted local groups in lobbying on specific local and national legislation. We have invited members of Congress to speak at our rallies and events, not as candidates, but as experts on important topics. We have posted news about national events on our social media sites. The current rules recognize all of those activities as non-political. The proposed rules would classify all of them as political.

Attached to my testimony are the Comments that Tea Party Patriots is submitting today to the IRS. We believe that those comments reflect the views of millions of Americans, and accurately assess the dangers that these regulations pose to 501(c)(4) groups. The reason that Americans form organizations is because we need a place to meet. We need tools to communicate with each other. Places and tools are not free -- and we don't expect them to be. We want to pay for them. We want to abide by the rules and track the money according to accepted procedures. The new regulations, however, go beyond accountability and into censorship.

Tea Party Patriots has had to spend thousands of hours and tens of thousands of dollars, mostly from small donors, in attorney and accountant's fees to satisfy a government bureaucracy that refuses to be satisfied. Even after all of that time and expense, the IRS still refuses to tell us whether it will acknowledge our tax exempt status. No citizen, whether liberal or conservative, tea party or progressive, should have to suffer like this.

The problems with the proposed regulations are myriad, but let me explain just a few of the worst effects. The proposed rules would interfere with Tea Party Patriots' relationships with the local groups and volunteers who are the heart of the tea party movement. The changed regulations attribute to us the time of all of our volunteers, a standard that clearly interferes with those volunteers' freedom of association and freedom of expression. It also places an onerous burden on us, diverting us from our core activities to track the activities of thousands of volunteers. Smaller groups simply will not have the resources to document volunteer hours, and will give up.

Tea Party Patriots provides grants to local groups, always with the requirement that the grants not be used for any political activity. Under the proposed regulations, those groups' independent decisions to use other funds for candidate-related political activity, even anything as innocuous as a local candidate

forum, will become political activity on our part. That broad standard will gut our ability to direct financial resources to grass roots groups.

The proposed regulations would censor our Internet communications. Under the proposed standard, Tea Party Patriots would not be able to mention any politician by name on its website within 30 days of a primary. Within 60 days of a general election, we cannot mention either politicians or political parties. As a national group, we will have to scrub our website before any primary or general election anywhere in the country. We will not be able to tell American citizens something as basic as which of their elected representatives voted for controversial legislation, such as the Affordable Care Act.

The proposed rules would restrict nonpartisan voter registration and voter education activities of 501(c)(4) groups, while allowing unions, trade associations, and other nonprofits – in fact, *any* group other than a 501(c)(4) – to engage in those important activities. Such voter suppression in any other context would be clear and unacceptable.

Local groups and Tea Party Patriots would no longer be able to host candidate debates, candidate forums and presentations by public officials who are also candidates for office. Americans would no longer be able to meet with candidates and ask them direct questions. Rather, they could receive information only from 30-second media ads.

The proposed rules would attribute to a citizens group the value of 'remarks' by leaders of or volunteers discussing a candidate. Thus, if I were quoted in the *New York Times* about a Senate candidate during September of this year, Tea Party Patriots would be required to place a monetary value on that news report, and count it against the organization's primary purpose. That interference with a free press and free speech cannot enrich our public conversation.

Tea Party Patriots vehemently opposes these proposed IRS regulations for 501(c)(4) organizations and we urge Congress to stop the IRS from implementing them. We oppose these proposed regulations *not* because Tea Party Patriots wishes to engage in political activities (as presently defined); rather, we oppose these proposed regulations because of the permanent damage they would do to the *non-political* advocacy of every grassroots citizens' organization in America. The IRS should not be engaged at all in attempting to regulate, restrict or encumber the protected First Amendment rights of the American people.

The proposed rules will not only limit free speech, but they create cracks in the trust that is the foundation of our government. A government of the people and by the people must trust the people, and the people must trust the government. When the people are afraid of a government agency, when they see that agency as a bunch of thugs who abuse power, the trust is shattered. A free people should not fear a politicized bureaucracy that delves into their social media, communications, and records to determine what they said, whom they heard speak, and what they think about their government.

We need to fill the cracks in the foundation, solve this problem and a host of others, not by adding more rules to the 67,000 pages of tax code, but by replacing it all with a flat, fair rate. Until then, Mr. Chairman, we ask that you and others in our government will stop this infringement on the rights of the American people to freely associate, speak their minds, and petition their government.

Thank you.

Mr. JORDAN. Thank you.

I failed to mention five minutes, more or less. We try to keep it less, but Ms. Martin did fine; she was just a few seconds over. So hopefully we will maintain that. We are going to go to Ms. Aviv, and then we will go right down the line.

Ms. Aviv, you are recognized.

STATEMENT OF DIANA AVIV

Ms. AVIV. Good morning, Chairman Jordan, Representative Cartwright, and members of the subcommittee.

Independent Sector is a leadership forum for charities, foundations, and corporate giving programs whose member networks collectively represent tens of thousands of organizations nationally, locally, and globally. Our membership also includes a number of 501(c)(4) social welfare organizations. Thank you very much for the opportunity to share with you the perspectives of our community today.

Charitable organizations understand that continued support from Americans who give their time and money depends upon the public trust in our sector, and that any erosion of their trust will ultimately limit our effectiveness and harm those that we serve. We are therefore deeply committed to ensuring that all charitable nonprofit organizations are governed effectively and transparently, maintain maximum accountability, and demonstrate highest levels of ethical conduct and fully comply with the law.

As part of our commitment to supporting responsible practice, Independent Sector, for some time, has been deeply concerned about the rules governing political activity by 501(c)(4) social welfare organizations and have advocated three changes.

First, it is imperative that a clear definition of political activity across all 501(c) organizations be created so that exempt organizations and regulators are no longer forced to rely on the ambiguous facts and circumstances approach to determine whether, and to what extent, political activity has actually taken place.

Secondly, a clear limit should be established for how much political activity is permitted by 501(c)(4) organizations. Doing so will provide certainty for exempt organizations and remove the subjective judgment of case officers at the IRS.

Thirdly, the rules must ensure that all 501(c) entities lawfully permitted to engage in partisan political activity are transparent regarding the source of donations used for those activities. When clearly defined and within appropriate limits, political activity can be an important part of advancing the missions of these organizations, but it must be conducted in a way that organizes the electorate's right to know who is working to influence the outcome of elections.

We sought and welcome the IRS's recognition of the need to improve the current rules, but the recently proposed regulations fail to address some of the most serious problems I have just outlined. At the same time, in the areas it does address, we believe that the IRS has overreached in a deeply problematic way. The proposed guidance includes an overly broad definition of candidates related political activities that conflates partisan with longstanding, widely accepted nonpartisan activities.

For the first time, activities such as nonpartisan voter registration efforts, get out the vote campaigns, voter guides, and nonpartisan candidates forums that encourage civic participation and educate the general public would be considered political. Defining nonpartisan voter engagement activities as political for 501(c)(4) social welfare organizations will have a deleterious cascading effect on 501(c)(3) public charities. Given the expressed prohibition for (c)(3) organizations to engage in candidate-related political activity risks sensitive public charities and their funders may curtail the activities in order to avoid association with activities that the IRS would then deem as political.

Furthermore, the proposed guidance would define as candidate-related political activity any public communication that clearly identifies an candidate or any forum where a candidate appears within 30 days of a primary or 60 days within a general election. This would include any effort to influence legislation during the blackout period that refers to an elected official who is running for reelection. Such a rule would have limited the ability of 501(c)(4) organizations to engage with or publicly mention lawmakers during consideration of the 700 million top bank bailout bill passed just before the 2008 election.

A uniform set of rules that applies across all tax-exempt categories will provide predictability and clarity for what constitutes political activity, will protect free speech, and will encourage civic engagement. Thank you.

[Prepared statement of Ms. Aviv follows:]

STATEMENT FOR THE RECORD

DIANA L. AVIV
INDEPENDENT SECTOR, PRESIDENT AND CEO

HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE
SUBCOMMITTEE ON ECONOMIC GROWTH,
JOB CREATION & REGULATORY AFFAIRS

"HEARING ON THE ADMINISTRATION'S PROPOSED
RESTRICTIONS ON POLITICAL SPEECH"

FEBRUARY 27, 2014

Chairman Jordan, Representative Cartwright, and distinguished Members of the Subcommittee, thank you for the opportunity to share the perspectives of America's charitable sector as the Subcommittee examines the recently proposed IRS regulations on political activity by 501(c)(4) organizations.

Independent Sector

I serve as the president and chief executive officer of Independent Sector, the leadership forum for nonprofits, foundations and corporate giving programs whose member networks collectively represent tens of thousands of organizations locally, nationally and globally. We are committed to advancing the common good in America and around the world in order to fulfill our vision of a just and inclusive society and a healthy democracy of active citizens, effective institutions and vibrant communities. We work to ensure that America's 1.3 million charitable organizations are able to help people and improve communities across the country and around the world. Our membership also includes a number of charitable organizations with affiliated 501(c)(4) social welfare organizations.

Good Governance: Importance and Background

Charitable nonprofit organizations understand that continued support from Americans who give of their time – 12.7 billion hours of volunteer service in 2012[1] – and money – $316.2 billion[2] in charitable giving in 2012 – depends upon the high level of public trust in our sector, and that any erosion of that trust will ultimately limit our effectiveness and harm those we serve. We are therefore deeply committed to ensuring that public charities and private foundations are governed effectively and transparently, maintain maximum accountability, demonstrate the highest levels of ethical conduct, and fully comply with the law.

Independent Sector has long been at the forefront of efforts to promote good governance and ethical practice among tax-exempt charitable organizations. In October 2004, we convened the Panel on the Nonprofit Sector with the written encouragement of Congressional leaders of both parties. The Panel undertook a comprehensive review of governance and other aspects of charitable sector practice in order

[1] Urban Institute, National Center for Charitable Statistics. 2013. "The Non-profit Sector In Brief: Public Charities, Giving, and Volunteering, 2013." Sarah L. Pettijohn. http://www.urban.org/UploadedPDF/412923-The-Nonprofit-Sector-in-Brief.pdf
[2] Giving USA: The Annual Report on Philanthropy for the Year 2012 (2013). Chicago: Giving USA Foundation.

to develop recommendations for action by Congress, the IRS, and the sector itself that would help charitable organizations maintain the highest possible standards of ethical conduct.

The 24-member Panel conducted extensive outreach to solicit input and comments from the broader charitable community. This outreach included the creation of six committees[3] that met regularly; phone calls with thousands of participants; two public comment periods; and 15 field hearings that gave more than 2,500 people in communities across the country the opportunity to provide input on the Panel's work. The Panel issued a *Final Report to Congress and the Nonprofit Sector* in 2005, which contained an integrated package of more than 120 recommendations for improvements within the sector, more effective government oversight, and changes in the law.

Many of the Panel's legislative and regulatory recommendations were incorporated into the Pension Protection Act of 2006, widely considered to be the most comprehensive reform of the charitable sector since the 1969 Tax Reform Act. Among the key Panel recommendations adopted by Congress were:

- Doubling the excise taxes for charities, social welfare organizations, private foundations, and exempt organization managers found to be participating in abusive tax shelters;
- Requiring exempt organizations with annual gross receipts less than $25,000 to file an annual notice with the IRS containing basic contact and financial information;
- Clarifying that assets in donor advised funds may not be used in ways that confer substantial benefits on donor/advisors;
- Removing barriers that prevent information sharing between state charity officials and the IRS; and
- Improving the appraisal process to ensure more accurate deductions for donated property.

Additionally, Independent Sector worked with many member organizations to offer input into the major redesign of the Form 990 subsequently undertaken by the IRS and released in 2008. The IRS engaged in an extensive outreach effort to members of the charitable community during the redesign process. Panel recommendations that were ultimately adopted by the IRS or incorporated in the Form 990 redesign included:

- The mandatory revocation of exempt status for organizations that fail to file an appropriate Form 990 for three consecutive years;
- Expanded Form 990 compensation reporting, to include listing names and reporting compensation for the organization's five most highly compensated employees;
- Requiring additional information, including a summary and statement of purpose on the first page, disclosure of which voting board members are independent, and disclosure of the total amount of donor advised funds; and
- Asking whether an organization has a written conflict of interest policy.

The IRS's solicitation of input from the tax exempt sector on the Form 990 redesign did not end with the release of the new form for tax year 2008, which had been designed with substantial input from the charitable community. Indeed, as the IRS has continued working to improve the Form 990, the agency has continued to seek outside input. During a public comment period conducted in 2011 on several issues of concern that had come to the attention of the agency, Independent Sector conducted an online forum to

[3] Expert Advisory Group, Governance and Fiduciary Responsibilities Work Group, Government Oversight and Self-Regulation Work Group, Legal Framework Work Group, Transparency and Financial Accountability Work Group, and Small Organizations Work Group.

gather input from exempt organizations, and we ultimately submitted a number of specific recommendations to the IRS, including:

- Revising Part VIII of the Form 990 to better capture the full extent of government revenue received by nonprofit organizations by clarifying that government pay-for-service contracts also qualify as government contributions, and by including lines to record revenue received from Medicaid and Medicare payments;
- Adding lines to the Form 990 to inquire whether audited financial statements are made available to the public, and whether the audit includes an unqualified, qualified, adverse, or disclaimer of opinion; and
- Expanding mandatory electronic filing of the Form 990 to include more organizations.

Independent Sector and the broader charitable and philanthropic community have an extensive history working with the IRS and Congress on specific issues related to the oversight and regulation of tax exempt organizations, including reform of the revised Form 990. The charitable sector's deep commitment to ensuring this nation's laws and regulations are fair and effective while also reflecting our priorities of accountability, transparency and good governance stems from an understanding that doing so enhances our effectiveness and ultimately improves our ability to better serve individuals, families and communities.

As part of our commitment to supporting responsible practice, Independent Sector has for some time been concerned about lack of clarity in the rules surrounding political activity by 501(c)(4) social welfare organizations. We believe the problems with the current rules and regulations governing political activity by nonprofit organizations must be appropriately corrected, in order to provide clear unambiguous guidance for charitable and social welfare organizations.

Need for Guidance

We underscore the importance of the IRS recognizing the need for additional guidance to clarify federal rules governing political activity by tax-exempt organizations and moving away from the ambiguous facts and circumstances approach to determine whether and to what extent an organization has engaged in political activity. We are also encouraged that the IRS prioritized the issuance of the proposed rules and invited public comment on several key areas of reform. However there are some serious flaws in the proposed regulations and we believe that if they are to be useful, they must be substantially revised.

Under current law, tax exempt organizations and regulators lack a clear definition of candidate related political activities or a clearly defined threshold for how much political activity is permissible. This clarification is a critical first step to begin addressing the current ambiguity in defining what constitutes political activity and will provide regulators with a clear consistent standard by which they review applications for tax exempt status, and ensure transparency and the even application of these rules for tax exempt organizations.

Concerns with Proposed Guidance

The proposed guidance fails to provide the necessary clarity for organizations engaging in candidate-related political activities and would undermine the key role that charitable and social welfare organizations play in non-partisan civic engagement work and public policy debates.

Nonpartisan voter engagement and candidate forums

The proposed guidance includes an overly broad definition of candidate-related political activities that conflates partisan and longstanding, widely accepted nonpartisan activities. For the first time, nonpartisan voter registration efforts, get-out-the vote campaigns, voter guides, and nonpartisan candidate forums undertaken by 501(c)(4) social welfare organizations to encourage civic participation and educate the general public would be considered political.

Social welfare organizations under these proposed rules would be subject to limits on the amount of nonpartisan civic engagement activities they could pursue. This undermines one of the key ways many such organizations advance their missions: helping American citizens better understand various issues being debated by those running for public office and encouraging them to register and cast their votes. Such a change would send a message to organizations and their donors that longstanding widely acceptable nonpartisan activities that encourage civic participation would no longer be considered part of our common responsibility as citizens of this great democracy.

Many communities rely on the nonpartisan programs provided by tax-exempt social welfare and charitable organizations to assist in voter registration and facilitating turnout in elections, initiatives designed to increase understanding of the electoral process and the mechanics of voting, as well as informing the general public about policy issues and positions of all candidates regardless of party affiation. The need for this work is underscored by the fact that in 2012, only 59 percent of all eligible voters participated in the general election. A recent study by Nonprofit VOTE determined that nonpartisan voter engagement activities provided by nonprofit organizations increased participation across all registered voters, with the biggest impact on turnout among least-likely voters.[4] Reclassifying as political and limiting these activities could set a dangerous precedent for stifling important and irreplaceable civic engagement work by the tax-exempt charitable sector.

Defining nonpartisan voter engagement activities as political for 501(c)(4) organizations will have a deleterious cascading effect on 501(c)(3) public charities. Given the express prohibition for 501(c)(3) charitable organizations to engage in candidate-related political activity, risk-sensitive public charities and their funders will likely take guidance for the rules governing 501(c)(4) welfare organizations and accordingly, curtail their activities as well in order to avoid association with activities that the IRS views as political. The reclassification adds further confusion by contradicting existing legislation such as the Motor Voter Act, where lawmakers spelled out the key role nonprofits play in registering citizens to vote via nonpartisan means and enabling qualified voters to cast ballots on Election Day.

Our laws have long permitted tax-exempt charitable and social welfare organizations to encourage voter registration, urge eligible citizens to vote, and provide nonpartisan resources to assist the public in making informed judgments about candidates and their views. Our laws and regulations should facilitate more civic engagement, not less. These regulations, as crafted do the opposite.

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[4] "Can Nonprofits Increase Voting among their Clients, Constituents, and Staff: An evaluation of the track the vote program." Nonprofit Vote. 2013. http://www.nonprofitvote.org/documents/2013/08/can-nonprofits-increase-voting-executive-summary.pdf

Blackout periods

Under the proposed guidance, any "public communication" that clearly identifies a candidate, or any forum where candidates appear within 30 days of a primary and 60 days of a general election, would now be defined as candidate-related political activity.

Incumbents whose work impacts the programs and services of a tax-exempt organization would become "untouchable" during the 30 day and 60 day blackout period. Any engagement of an incumbent by a 501(c)(4) organization, including events during the blackout periods, would be considered political activity. This redefining of activity as 'political' would extend even to the organization simply acknowledging the incumbent's role in policy issues or proposals. This artificial separation of nonprofit organizations from key decision makers in our democracy, even as these public officials continued to advance their policy work would stifle informed decision-making and strain the crucial relationship between civil society and elected officials.

Any effort to influence legislation during the blackout periods that refers to an elected official who is running for re-election would now be considered political activity. This would blur the lines between what constitutes political activity and lobbying, which 501(c)(4) organizations are currently permitted to engage in without limitation. This rule would have the unintended consequence of undermining longstanding advocacy campaigns by 501(c)(4) organizations that may – by no fault of their own – require action within 30 days of a primary or 60 days of a general election.

Historically, lawmakers have continued to work on legislation in the weeks and days before impending elections. For example, the law banning assault weapons expired within 60 days before the 2004 general election, and the $700 billion "TARP" bank bailout bill was passed in October before the 2008 election. The guidance would also open the door for elected officials to bypass the objections of opposing voices and pass controversial legislation within the 30 or 60 day blackout period.

The classification as political activity of public communications clearly identifying a candidate within 30 days of a primary and 60 days of a general election would extend to many critical communication vehicles employed by 501(c)(4) organizations, including newsletters, email alerts, social media, and websites. These communications would be deemed political within 60 days of a general election if a political party was mentioned. Organizations would presumably have to erase content mentioning candidates or parties during the blackout period or else risk classifying those communications as political activity. This requirement would place an undue burden on organizations with extensive digital archives and links mentioning public officials, which would necessitate vigilant monitoring, removal, and republishing of content throughout the election cycle.

Missing Elements from Proposed Guidance

Despite reclassifying additional activities as political and broadening the scope of candidate-related political activities, the proposed guidance misses the mark by failing to provide clarity around *how much political activity is permissible*. Without establishing a clear dollar or percentage limit for the amount of political activity 501(c)(4) social welfare organizations may engage in, enforcement of the rules will remain subjective and require evaluations to be handled on a case-by-case basis by IRS officials. This will perpetuate the existing uncertainty for organizations engaging in political activity and create the possibility of uneven rulings depending on the subjective judgment of the particular case officer.

The proposed guidance redefines candidate-related political activity only for 501(c)(4) organizations, which fails to address any of the underlying problems across the full spectrum of tax-exempt organizations. If faced with new restrictions on the timing and types of political activities subject to limits for 501(c)(4) organizations, donors can merely shift their contributions to support these identical activities conducted by other tax-exempt organizations where the rules would not apply – such as 501(c)(6) trade associations. Just as troubling, despite the express prohibition on charities from engaging in political activity, under the new guidance social welfare organizations could establish new charity arms and shift the newly-classified political activities to an affiliated charity.

In addition, the lack of a clearly defined limit for permissible candidate-related political activities and retaining conflicting definitions for other tax-exempt entities makes it extremely difficult for both the IRS and the tax-exempt sector effectively to evaluate the potential impact of each element of the proposed guidance. Additional clarity about expectations and requirements will enable 501(c) organizations to comply with the laws and regulations, and reduce the opportunity for abuses by those who seek to circumvent them.

Finally, the proposed regulations do not address the lack of transparency in the rules for 501(c)(4) organizations engaged in partisan political activity. Such activity, when clearly defined and within appropriate limits, is an important part of advancing the social welfare missions of these organizations, and should be conducted in a way that recognizes the electorate's right to know who is working to influence the outcomes of elections. These social welfare organizations should not be used as a vehicle to hide activity that properly and reasonably belongs in the public domain.

Recommendations

The proposed guidance for 501(c)(4) social welfare organizations on candidate-related political activities, while an appreciated first step, should be substantially reworked to address the concerns outlined above. We also believe that simply withdrawing the proposed regulations and leaving in place the status quo is also not a desirable or acceptable alternative.

Specifically, we urge the IRS in its subsequent proposed guidance to:

- Revise the definition of candidate-related political activities to avoid infringement on nonpartisan civic engagement work, voter registration activities, advocacy-related communications and candidate forums traditionally undertaken by tax-exempt organizations and avoid excessively restrictive blackout periods prior to elections that may undermine long-standing, nonpartisan issue advocacy;
- Create a universal definition of political activity across all 501(c) organizations in order to provide clarity and consistency for the consideration of tax-exempt status applications and to prevent the shifting of political activity to tax-exempt organizations not covered under the current proposed guidance;
- Establish a clear limit of the amount of permissible political activity for 501(c)(4) social welfare organizations , defined either by a clear percentage or dollar amount indexed for inflation; and
- Ensure that 501(c)(4) social welfare organizations are transparent with regard to the sources of donations concerning only their work on partisan political activity.

We believe that IRS proposed guidance would be best served by rejecting a subjective facts and circumstances test in favor of a bright-line definition of political intervention that applies to all relevant

501(c) organizations, which the current guidance fails to provide. Independent Sector supports the Bright Lines Project[5], whose recommendations should be incorporated into any future IRS proposed guidance in this area. These recommendations (attached) outline a uniform set of rules that would apply across all tax-exempt categories, provide predictability and clarity for what constitutes political activity, and protect free speech and encourage civic engagement while preventing many prevalent abuses of the system.

A multitude of factors contribute to the current ambiguity and uncertainty on the part of exempt organizations, the lack of enforcement of the existing rules governing political activity, and the increasing misuse of 501(c)(4) social welfare organizations for partisan political purposes. We urge the IRS to consider in totality these contributing factors, including existing donor disclosure and registration and reporting requirements. In evaluating these issues, we further recommend that reforms reflect the principles on 501(c)(4) political activity[6] adopted by Independent Sector in 2012 (attached).

We encourage the IRS to engage tax-exempt organizations in a meaningful dialogue to address the many concerns expressed during this comment process, and provide the public an opportunity to provide input on a revised proposed rule that better defines permissible political activity while preserving the important advocacy role and vital voice of tax-exempt organizations in civic engagement and public policy work.

We thank the House Oversight and Government Reform Committee Subcommittee on Economic Growth, Job Creation and Regulatory Affairs for its consideration of these important issues.

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[5] "The Bright Lines Project: Clarifying IRS Rules for Political Intervention." Bright Lines Project. December, 2013. http://www.citizen.org/documents/bright-lines-project-december-2013-summary.pdf.

[6] "Principles for Evaluating Legislative and Regulatory Proposals on 501(c)(4) Electoral Campaign Activity." Independent Sector. December 2012. http://www.independentsector.org/principles_501c4_electoral_campaign_activity

Mr. JORDAN. Thank you, Ms. Aviv.
Mr. Rottman?

STATEMENT OF GABRIEL ROTTMAN

Mr. ROTTMAN. Thank you, Mr. Chairman.

Chairman Jordan, Ranking Member Cartwright, members of the subcommittee, I very much appreciate the opportunity to testify today on the troubling rule proposed by the Internal Revenue Service. We believe that, if implemented, the sweeping new definition of candidate-related political activity in the rule will chill a vast amount of debate on matters in the public interest.

By way of illustration, had these rules been in place during the presidential race in 2012, the ACLU would have been limited in its ability to even mention President Obama or Governor Romney during a period covering almost 300 days of that year. Were we to do so, even in a completely nonpartisan way, it would have counted against our allowance of candidate-related political activity, too much of which would jeopardize our 501(c)(4) status.

During 30 days before any primary and 60 days before the general election, we would have had to purge all such communications from our Web site, including thousands of individual Web pages, or account for them in our tax filings. In fact, this testimony, Mr. Chairman, would have to come down just because I mentioned your name.

The proposed rule would not be an improvement on the existing standard. Earlier this month, the ACLU submitted comments critical of the current facts and circumstances test, the inherent vagueness of which likely led to the use of inappropriate criteria in the selection of conservative and some progressive groups for undue scrutiny. We further noted that the IRS's proposed alternative would make matters worse by chilling a legitimate issue advocacy while doing very little to address the perceived problem of anonymously funded campaign ads. For these and other reasons we have concerns with several provisions in the rule.

We oppose the proposed application of the rule to communications merely mentioning a candidate within the 30 days before a primary and 60 days before a general election. The IRS's proposal is so broad that it would cover such communications if they were posted to a Web site before the blackout period and kept up during that time. Indeed, in the 60 days before a general election, remarkably, we would be limited in our ability to even mention any political party represented in the election. Totally nonpartisan communications like urge Democrats and Republicans to unite in support of NSA surveillance reform would be covered.

We also oppose the extension of the definition of candidate-related political activity to advocacy communications that are the functional equivalent of expressed advocacy. Historically, Government regulators have been unable to draw appropriate lines between communications urging voters to support or oppose a candidate and those that urge action on an issue in the public interest. The ACLU itself has repeatedly run afoul of this functional equivalence problem. In the 1970s, for instance, The New York Times refused to run a sharply worded advertisement criticizing then President Richard Nixon for opposing court-ordered desegregation. The

New York Times believed that to be a campaign ad. Communications by groups like the NAACP or the National Organization for Women on issues like voter identification laws or reproductive rights could also quality depending on where and how they run.

Finally, we have strong concerns with the inclusion in the proposed rule of totally nonpartisan voter registration, mobilization, and education efforts, and candidate forums within the 30/60 day blackout period.

While the IRS does deserve credit for taking action here, the rule unfortunately attempts to cast as broad a net as possible, rather than narrowly targeting actual electioneering using explicit terms of support or opposition. In America, the First Amendment disfavors regulations that suppress protected speech to get an unprotected speech. The regulations do exactly that; they give the tie to the sensor, not the speaker. Regardless of the politics involved, that should be of concern to any advocate for the public interest.

Thank you again for inviting me to testify today.

[Prepared statement of Mr. Rottman follows:]

STATEMENT OF
GABRIEL ROTTMAN, LEGISLATIVE COUNSEL/POLICY ADVISOR

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON LEGISLATIVE OFFICE

on

GUIDANCE FOR TAX-EXEMPT SOCIAL WELFARE ORGANIZATIONS ON CANDIDATE-RELATED POLITICAL ACTIVITIES

Before

The House Committee on Oversight and Government Reform
Subcommittee on Economic Growth, Job Creation and Regulatory Affairs

February 27, 2014

Good morning Chairman Jordan, Ranking Member Cartwright and members of the Committee. Thank you for the opportunity to testify today on behalf of the American Civil Liberties Union ("ACLU") about the rules proposed by the Department of Treasury and Internal Revenue Service ("IRS" or the "Service") that would expand the definition of political intervention by social welfare tax-exempt groups to completely non-partisan issue advocacy.

As explained below, while we support replacing the current "facts and circumstances" test for political activity by affected tax-exempt organizations with a bright-line standard, we have serious concerns with the rule proposed by the IRS,[1] both from a First Amendment perspective and as a simple matter of workability.[2]

We offer our perspective on the following areas of concern below:

- The danger with the Service's proposed "electioneering communications-plus" approach in the definition of candidate-related political activity ("CRPA"), which would cover any public communication that refers to a candidate within 30 days before a primary or 60 days before a general election, or, in the 60 days before a general election, refers to a political party;

- Why the proposed "functional equivalence" test, which would count as CRPA any communication that is "susceptible of no reasonable interpretation" other than one in support of or opposition to a candidate or candidates of a party, will fundamentally undermine the bright-line approach that the Service wishes to adopt, and will produce the same structural issues at the IRS that led to the use of inappropriate criteria in the selection of various charitable and social welfare groups[3] for undue scrutiny;[4]

- The need to exclude non-partisan voter guides, get-out-the-vote ("GOTV") drives and voter registration activity from the definition of CRPA;

- The need to exclude non-partisan candidate events during the 60/30-day blackout period from the definition of CRPA;

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[1] Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1) [hereinafter *Notice*].

[2] Please note that this testimony is based closely on the comments submitted by the ACLU to the IRS in connection with the Notice. Those can be found at http://bit.ly/MoPWh4.

[3] Referred to herein as §§ 501(c)(3) and 501(c)(4) groups, respectively.

[4] Treasury Inspector Gen. for Tax Admin., Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review (2013) (the "TIGTA Audit").

- The need to harmonize the definition of CRPA across all tax-exempt groups and to provide greater clarity and coordination with the definition of "exempt function" under 26 U.S.C. § 527(e)(2) (2012);[5] and

- Why the Service should apply a real bright-line test for CRPA that limits its scope as closely as possible to "magic words" express advocacy.[6]

Despite our serious concerns with the approach in the proposed rule, the Service can and should take resolute steps to address the issues that resulted in the inappropriate targeting of conservative and progressive § 501(c)(4) (and § (c)(3)) groups, and to apply a true bright-line test for political intervention by social welfare groups. Most social welfare organizations—on both the left and right—serve exactly that function as they see it, the promotion of social welfare and community good. Based on their respective visions, they advocate for the powerless and the voiceless. They promote fiscal responsibility and good government. They serve as a check on government overreach, or as a cheerleader for sound public policy.

In many of these functions, social welfare organizations praise or criticize candidates for public office on the issues and they should be able to do so freely, without fear of losing or being denied tax-exempt status, even if doing so could influence a citizen's vote. Such advocacy is at the heart of our representative democracy. To the extent it influences voting, it does so by promoting an informed citizenry. The current IRS exempt organization review system serves to chill that activity and, despite our concerns with the proposed rule, we appreciate the Service's demonstrated commitment to reforming the current rule to provide a clearer standard.

We further believe that the limitation on social welfare organizations serving a private benefit, which is articulated in statute, may apply to express political advocacy using explicit words of

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[5] "Exempt function," somewhat counter-intuitively, does not refer to activities conducted by a tax-exempt group. Rather, it covers political advocacy, which is *taxable* under § 527 if engaged in by a § 501(c) group. Specifically, "exempt functions" include "influenc[ing] or attempt[ing] to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed." As explained below, while we support harmonizing an appropriately narrow definition of political intervention across all relevant sections of the Internal Revenue Code, the campaign finance laws and associated regulations, there may be good reason to maintain the greater sweep of the § 527 exempt function definition (but only as applied to § 527 groups).

[6] The "magic words" test refers to communications that use express terms of advocacy for or against a candidate, as opposed to communications that may be critical or laudatory but represent advocacy around specific legislative, regulatory or policy issues. The test has its origins in *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) ("The construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"). We acknowledge that the list of express advocacy "magic words" in *Buckley* is not exhaustive, and we look forward to working to inclusively refine the definition of express advocacy.

support or opposition, and may be invoked without a chill on legitimate issue advocacy. Pure issue advocacy such as that engaged in by the ACLU and similar groups, however, clearly serves the community good.

The ACLU is a nationwide, nonprofit, non-partisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws.

As a matter of formal policy, we do not endorse or oppose candidates or nominees for political office. We do, however, often engage in issue advocacy on legislative and policy matters impacting civil liberties and civil rights. We frequently do so in close proximity to elections, and identify office holders, some of whom may be candidates, in these communications.[7]

We also provide extensive voter education materials, including an online ACLU "scorecard" that assigns numerical scores to all current members of Congress based on key civil liberties and civil rights votes and, prior to the 2012 presidential election, a resource called "Liberty Watch" that likewise assessed the civil liberties records of President Obama, Governor Romney and Governor Johnson, the Libertarian Party candidate.[8] None of these materials endorse or oppose a candidate or nominee.

Further, the ACLU has an extensive state and local network, with affiliates and chapters in every state and Puerto Rico.[9] These organizations separately advocate for civil liberties and civil rights at all levels of state and local government, and are often deeply involved in efforts to protect low-income and minority voters. These efforts include participation in legislative advocacy and voter education campaigns, including a coordinated effort called "Let Me Vote" that provides state-by-state information and resources on how voters can register, polling place locations, early and absentee voting and, crucially, abusive voter identification requirements.[10] ACLU affiliates and chapters are likewise bound by formal policy to abstain from *any* partisan political activity.

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[7] *See McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 793 (D.D.C. 2003) (opinion of Leon, J.), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003), *overruled in part by, Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) ("[The] 60 days before a general election and 30 days before a primary . . . are often periods of intense legislative activity. During election years, the candidates stake out positions on virtually all of the controversial issues of the day. Much of the debate occurs against the backdrop of pending legislative action or executive branch initiatives." (quoting Decl. of Laura. W. Murphy, director of the ACLU's national lobbying office ¶ 12)).

[8] *See* Key Votes: Congress, ACLU.org, http://bit.ly/1fsuftY (last visited Jan. 13, 2014); ACLU Liberty Watch 2012, http://www.aclulibertywatch.org/ (last visited Jan. 13, 2014).

[9] Local ACLU Affiliates, ACLU.org, https://www.aclu.org/affiliates (last visited Jan. 15, 2014).

[10] *See* Know Your Voting Rights: State-By-State Voter Information 2012, ACLU.org, http://bit.ly/Lfpy8Q (last visited Jan. 17, 2014). The ACLU has been at the forefront of the fight against various voter discrimination tactics, including voter identification requirements that disproportionately disenfranchise minority, low-income and elderly Americans. *See* Voter ID, ACLU.org, http://bit.ly/1eQwkwW (last visited Jan. 17, 2014).

Nevertheless, under a plain reading of the proposed rule, to the extent this activity is performed by the ACLU's § 501(c)(4) entity, the American Civil Liberties Union, Inc. ("ACLU, Inc."), and by state and local ACLU § 501(c)(4) affiliate and chapter groups, it may qualify as CRPA.

Additionally, based on past experience, we anticipate that both the Service and tax practitioners will look to the final rule for § 501(c)(4) groups as guidance for other tax-exempt organizations. The breadth of the proposed definition of CRPA could therefore significantly impair the ability of the ACLU's § 501(c)(3) entity, the American Civil Liberties Union Foundation, Inc. ("ACLU Foundation, Inc."), to engage in public communications and advocacy, despite only an insubstantial part of its activities being federal or state lobbying, and its complete avoidance of any partisan political activity.[11] The ACLU Foundation, Inc. sponsors communications that mention candidates for public office as part of its issue advocacy that some may argue qualify under the proposed definition of CRPA.

Accordingly, we can say with confidence that bona fide charitable organizations, may also, under the proposed rule, be forced to seriously "hedge and trim" what should be fully protected speech in their issue advocacy to stay far clear of any potential CRPA.[12] Worse, this chilling effect will be more acute for smaller organizations that do not have access to legal expertise in this area.

For the past four decades, the ACLU has been involved in efforts to craft sensible campaign spending laws that respect First Amendment principles while limiting corruption. We support numerous measures to improve the integrity of our political system, including reasonable limits on direct campaign contributions, meaningful public financing, appropriate disclosure rules, reasonable bulwarks against coordination between candidates and outside political groups, enforcement of criminal laws against straw donors and measures to improve under-resourced candidates' access to media.[13]

Since even before *Buckley*, however, we have also forcefully defended the First Amendment in the face of well-meaning but overreaching campaign finance laws that unconstitutionally restrict issue advocacy.[14] As explained below in detail, we fear that the proposed rule will result in

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[11] The ACLU Foundation, Inc. does take an annual election under 26 U.S.C. § 501(h) (2012).

[12] *Buckley*, 424 U.S. at 43 (opining that, absent a truly bright line between express and issue advocacy, restrictions on political speech offer "no security for free discussion" and force speakers to "hedge and trim" (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945))).

[13] *See* Gabe Rottman, *Common Ground on Campaign Finance*, ACLU.org (Apr. 12, 2013), http://bit.ly/12RpLGK; Michael W. Macleod-Ball, *One Key to Campaign Finance Reform*, ACLU.org (June 21, 2012), http://bit.ly/1m5JLN0; The ACLU and Citizens United, http://bit.ly/1eptX5n (last visited Jan. 15, 2014); News Release, ACLU, In New Alliance, ACLU and Public Campaign Urge Support for Full Public Financing (Oct. 26, 1999), http://bit.ly/16Ia6cH.

[14] *See* Amicus Curiae Br. of the Am. Civil Liberties Union in Support of Appellant on Supplemental Question, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (No. 08-205), 2009 WL

many of the same unintended consequences that we warn of in that context, and will impermissibly chill political speech that should receive the highest level of protection under the First Amendment.[15]

I. The Proposed Blackout Period in the 30 Days Before a Primary and 60 Days Before a General Election Will Sweep In Vast Amounts of Non-Partisan Issue Advocacy, and Will Pose Daunting Logistical Challenges for Tax-Exempt Groups

As explained below, the provision in the proposed rule extending the definition of CRPA to what we term "electioneering communications-plus" is so broad that it may extend to this testimony if we were to post it to our website and leave it up during the 30 days before a primary or 60 days before a general election. Indeed, the rolling nature of the primary blackout would mean that only a small portion of a presidential election year would escape CRPA status.

The proposed rules would extend the definition of CRPA to any "public communication" in the 30 days before a primary or 60 days before a general election that refers to one or more clearly identified candidates or, in the case of a general election, one or more political parties that are represented in the election.[16]

"Public communication," in turn, includes any communication (1) by broadcast, cable or satellite; (2) on an internet website; (3) in a newspaper, magazine or other periodical; (4) in the form of paid advertising; or (5) that otherwise reaches, or is intended to reach, more than 500 persons.[17] "Communication" is defined circularly as any communication by whatever means, including written, printed, electronic, video or oral communications.[18]

2365203; Br. Amicus Curiae of the Am. Civil Liberties Union in Support of Appellee, *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (Nos. 06-969, 06-970), 2007 WL 894817; Br. of Appellant Am. Civil Liberties Union, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) (No. 02-1374), 2003 WL 21649664; Br. of the Am. Civil Liberties Union, Amicus Curiae, in Support of Appellee at 14, *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), 1989 WL 1126847, at *14; Br. Amicus Curiae of the Am. Civil Liberties Union and the Civil Liberties Union of Mass., *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986), 1986 WL 727489; *Buckley*, 424 U.S. at 1; *Am. Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom.*, *Staats v. Am. Civil Liberties Union*, 422 U.S. 1030 (1975); *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972).

[15] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) ("Our First Amendment decision have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position . . . .") (Stephens, J., concurring).

[16] *Notice*, *supra* note 1, at 71,541 (§ 1.501(c)(4)-1(a)(2)(iii)(A)(2)).

[17] *Id.* (§ 1.501(c)(4)-1(a)(2)(iii)(B)(5)).

[18] *Id.* (§ 1.501(c)(4)-1(a)(2)(iii)(B)(3)).

"Candidate" is defined aggressively to include any federal, state or local candidate or nominee (including electors) in a race for (1) public office, (2) a recall election *or* (3) office in a political organization.[19] "Clearly identified" includes (1) express reference to the candidate, including through a photograph, drawing or other visual representation; (2) identification apparent by reference (e.g., "the Mayor"); *or* (3) reference solely to an "issue or characteristic" that serves to differentiate candidates or nominees from their opponents.[20] "Election" covers all federal, state and local caucuses and primary, general, special, run-off and recall elections.[21]

Accordingly, and as the Service acknowledges, virtually any document, audio-visual file or graphic posted to a § 501(c)(4) group's website that identifies a "candidate," including documents that merely reference a hot-button issue like abortion or voting rights in a particular election, will qualify as a "public communication."[22] If they appear during the blackout periods, they qualify as CRPA.

The 30- and 60-day blackout periods track a similar approach in the "electioneering communications" that were regulated under the Bipartisan Campaign Reform Act,[23] but the capacious definitions of "public communication" and "communication" dramatically expand the scope of the proposed regulation.

This "electioneering communications-plus" CRPA would encompass an enormous amount of ACLU material that has absolutely nothing to do with partisan politicking.

In fact, ACLU legislative counsel and representatives produce several dozen documents a week, especially in the lead up to a national election, that expressly mention an incumbent candidate or

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[19] *Id.* (§ 1.501(c)(4)-1(a)(2)(iii)(B)(1)).

[20] *Id.* (§ 1.501(c)(4)-1(a)(2)(iii)(B)(2)).

[21] *Id.* (§ 1.501(c)(4)-1(a)(2)(iii)(B)(4)). Special and run-off elections used to nominate a candidate are treated as primary elections, as are conventions or caucuses; special or run-off elections that elect a candidate are considered general elections. A recall election is classified as a general election. *Id.*

[22] *Id.* at 71,540 ("These proposed rules also provide that an organization's Web site is an official publication of the organization, so that material posted by the organization on its Web site may constitute candidate-related political activity.").

[23] *See* Pub. L. No. 107-155, 116 Stat. 81, § 203 (2002) ("BCRA"). Section 203 was codified at 2 U.S.C. § 441b (2012) and amended § 316 of the Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 3 (1972) ("FECA"). It barred various entities, including non-profit corporations like the ACLU, from making any electioneering communications, defined as broadcast, cable or satellite communications that clearly identify a candidate for federal office in the 60 days before a general election or 30 days before a primary, and, with the exception of presidential races, are targeted at the relevant electorate. The restriction on electioneering communications was narrowed by the Supreme Court in *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), and struck down in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

party. ACLU affiliates and chapters do the same at the state and local level. All of this activity is part of our workaday legislative analysis and advocacy; it has nothing to do with attempting to influence the outcome of any particular election.

Indeed, the Service's proposed definition of public communication could encompass internal communications to our members, donors and supporters. For instance, "ACLU Action" seeks to mobilize existing supporters and identify potential new members through targeted communications on litigation, legislation and public policy issues. All of these communications include a requested action, which may either directly identify a sitting lawmaker running for reelection or may be deemed to identify a candidate through mention of a disputed campaign issue.[24] None of these communications are meant to influence the outcome of an election, but rather are meant to influence the debate on a particular issue. Any restriction on these communications would clearly implicate our members' and supporters' associational and free speech rights.[25]

Remarkably, the Service even anticipates that communications produced and posted to a social welfare group's website *before* the blackout period would slip into the definition of CRPA if left up *during* the blackout period.[26] Accordingly, the ACLU would have to purge its website of all communications identifying a federal, state or local candidate or, in the case of a general election, even a political party during the blackout period, or would have to devise a way of accounting for them as CRPA.

It's crucial to note that the ACLU's website includes literally hundreds of thousands of individual webpages, and the proposed blackout rules would cover vast amounts of content that has absolutely nothing to do even with issue advocacy, let alone partisan politicking. For instance, it could cover copies of publicly filed lawsuits with government defendants, requests under the Freedom of Information Act, any communication addressed to a candidate currently holding elective or appointed office or even 50-state legal surveys mentioning covered officials.

Further, were the Service to harmonize the definition of CRPA with § 527, we would have to count them as reportable exempt function expenditures under § 527(e)(2) subject to tax under § 527(f). Such a requirement isn't just unworkable, it's impossible.

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[24] *See Notice*, *supra* note 1, at 71,541 (§ 1.501(c)(4)-1(a)(2)(iii)(B)(2) (explaining that communication not identifying candidate by name, image or reference may still "clearly identif[y]" candidate through reference to "issue or characteristic used to distinguish the candidate from other candidates"); *see also* discussion *infra* pp. 15-16.

[25] *Cf.*, *Va. State Bd. of Pharm. V. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("[W]here a speaker exists . . . the [First Amendment] protection afforded is to the communication, to its source and to its recipients both."); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (acknowledging independent First Amendment right to "receive information and ideas"); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (affirming right of U.S. citizens to receive foreign publications).

[26] *See Notice*, *supra* note 1, at 71,539.

Additionally, during a presidential election year, the blackout period will extend *far* beyond just the 30 days before the nominating convention or 60 before Election Day.

In 2012, for instance, both major parties held their initial caucuses on January 3. The 30-day clock would therefore have begun on December 4, 2011. For both Democrats and Republicans, there was no 30-day break between primaries from January 3 through late June. In other words, the 30-day blackout period for each primary would have ended only after another blackout period had begun. Accordingly, successive 30-day primary blackout windows would have applied to all communications from early December 2011 through June 5, 2012, for Democrats (the South Dakota primary) and June 26, 2012, for Republicans (the Utah primary).

Additionally, for the Republicans, the 30-day clock before the national convention would have started ticking on July 28 (30 days before August 27), providing a mere 31-day non-blackout period between early December 2011 and late August 2012. For the Democrats, the 30-day pre-national convention blackout period would have started on August 6, 2012 (30 days before September 5), providing only a 60-day non-blackout period for communications. For both parties, the pre-*election* 60-day blackout would have started on September 7, 2012—two days after the Democratic convention began.

In Table 1 below, we use the 2012 presidential election to demonstrate the scope of the overlapping 60/30-day primary-general CRPA blackout.[27] We list the number of days between the first caucus and the election in which a mere mention of *any* presidential candidate, including a third party candidate, would qualify a communication as CRPA, and the limited number of days that escape the rolling 30/60-day blackout periods.

Importantly, during the last 60 days before the election, even mention of a political party represented in the election would qualify as CRPA. This would include *objectively* non-partisan communications that are supportive or critical of all represented parties equally (e.g., "neither Democrats nor Republicans have committed to reforming NSA surveillance authority" or "the ACLU applauded the bi-partisan vote today on surveillance reform, where 94 Republicans joined 111 Democrats in attempting to defund NSA bulk collection authority").

	Iowa Caucus	Last Primary	Convention	Non-CRPA Days	CRPA Days[28]
D	Dec. 4, 2011	June 5, 2012	Sept. 5, 2012	61[29]	278
R	Dec. 4, 2011	June 26, 2012	Aug. 27, 2012	41[30]	298

[27] We focus on the two major parties for ease of illustration, but we note, crucially, that the rules would also apply to third parties that are able to field candidates for the presidential ticket.

[28] Based on a count of 339 days between December 4, 2011, and Election Day, November 6, 2012.

[29] That is, 60 days between the first caucus and the last state primary, plus presumably one day between the first day of the convention and the beginning of the election blackout period.

By way of further illustration, we list below a representative sampling of the types of communications that would qualify as CRPA for this extended primary and general presidential election season. As noted, *all* of the ACLU's online communications referencing a candidate or, in the case of a general election, party would be covered under the proposed rule if they remained up during a blackout period, and hundreds of communications would be captured by the "rolling" 60/30-day presidential CRPA blackout demonstrated above.

For the sake of emphasis, however, we include only communications posted to our website in the 60 days before November 6, 2012. These include:

- A blog mentioning several House members by Legislative Counsel/Policy Advisor Gabe Rottman urging a "No" vote on the Stolen Valor Act, a bill that would criminalize false statements about military decorations;[31]

- A blog by Legislative Assistant Sandra Fulton on ACLU testimony regarding domestic drone use, which quotes Rep. Hank Johnson (D-GA) and mentions drone legislation sponsor Rep. Ted Poe (R-TX);[32]

- An ACLU letter to the Privacy and Civil Liberties Oversight Board on domestic surveillance and privacy priorities, which mentions the president;[33]

- A blog by Legislative Representative Ian Thompson on the one-year anniversary of the repeal of the military's "Don't Ask, Don't Tell" policy that criticized an anti-DADT measure introduced by Rep. Todd Akin (R-MO), then in a heated race against Sen. Claire McCaskill (D-MO);[34]

- Comments submitted to the Department of Health and Human Services and posted to the ACLU's website mentioning President Obama and criticizing an HHS rule that would

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[30] Adding 10 days between the first day of the convention and the election blackout to the 31-day CRPA window following the last primary.

[31] Gabe Rottman, *Stolen Valor in House Today*, ACLU.org, Sept. 11, 2012, http://bit.ly/19Z3FGr.

[32] Sandra Fulton, *ACLU Testifies as Congress Takes on Domestic Drones*, ACLU.org, Oct. 25, 2012, http://bit.ly/1i7Cycs.

[33] Letter from Michael Macleod-Ball & Michelle Richardson, ACLU, to the Privacy and Civil Liberties Oversight Board (Oct. 26, 2012), *available at* http://bit.ly/1f92wJZ.

[34] Ian S. Thompson, *At DADT Repeal's One-Year Anniversary, Refusing to Turn Back the Clock*, ACLU.org (Sept. 19, 2012), http://bit.ly/1hYlF6s.

unfairly exempt certain immigrant women and children from provisions of the new health care plan;[35]

- A detailed report by ACLU Policy Counsel Sarah Lipton-Lubet defending the Obama administration's contraceptive coverage rule in the Affordable Care Act ("ACA");[36]

- A blog by Legislative Counsel/Policy Advisor Gabe Rottman praising President Obama for defending the First Amendment during the controversy over the "Innocence of Muslims" video in September 2012;[37]

- A blog by Legislative Counsel Devon Chaffee applauding the Obama administration's issuance of an executive order to prevent human trafficking by government contractors;[38]

- A blog by Legislative Representative Ian Thompson and Legislative Counsel Joanne Lin noting efforts by House Minority Leader Nancy Pelosi (D-CA) and Senator Dianne Feinstein (D-CA), both up for re-election in November, to have the Department of Homeland Security consider the ties of same-sex partners and spouses as a positive factor in determining discretionary relief in deportation cases;[39] and

- An amicus brief submitted by the national ACLU and the D.C. affiliate, posted to the ACLU's website, noting Sen. Harry Reid's (D-NV) support for the contraceptive coverage rule in the ACA.[40]

To put a finer and final point on it, as noted above, ***this testimony***, when posted to the ACLU's website and otherwise distributed, would likely qualify as CRPA under the proposed rule during

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[35] Comments from Laura W. Murphy et al. to the Centers for Medicare & Medicaid Services (Oct. 29, 2012), *available at* http://bit.ly/1hrNql5.

[36] Sarah Lipton-Lubet, Promoting Equality: An Analysis of the Federal Contraceptive Coverage Rule (Oct. 11, 2012), *available at* http://bit.ly/1j7Rwlt.

[37] Gabe Rottman, *A "Foreign Policy Exception" to the First Amendment*, ACLU.org (Sept. 28, 2012), http://bit.ly/LeWvmJ.

[38] Devon Chaffee, *President Issues Executive Order to Stop Human Trafficking in Government Contracts*, ACLU.org (Sept. 25, 2012), http://bit.ly/LLNNMn.

[39] Ian S. Thompson & Joanne Lin, *Important Breakthrough for LGBT Immigrant Families*, ACLU.org (Oct. 2, 2012), http://bit.ly/1g4N2fb.

[40] Memorandum of the Am. Civil Liberties Union and the Am. Civil Liberties Union of the Nat'l Capital Area, as Amici Curiae, *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012) (No. 12-1635(RBW)), 2012 WL 5903980, *available at* http://bit.ly/19QCKws.

the 60/30-day blackout period, including the rolling blackout period before the 2014 election.[41] The ACLU would have to either remove ***this*** document from its website or otherwise determine a way to account for the expense in creating it as CRPA expenditures.

The Court in *Buckley* recognized the clear danger in allowing campaign finance (or, by extension, tax code) restrictions on these "pure" issue advocacy communications. As noted, the Court adopted an express advocacy standard limited to "communications that in plain terms advocate the election or defeat of a clearly identified candidate [and contain] explicit words of advocacy of election or defeat."[42] It did so precisely because it recognized the impossibility of accurately separating electoral advocacy from policy advocacy, and the constitutional threat when the government burdens speech in an attempt to do so:

> The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical operation. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.[43]

These protections for issue advocacy serve a wide array of liberty interests. They provide needed space in the public discourse for unfettered criticism of the government. Relatedly, they serve as an essential check on government abuse and corruption. They refine public policy debates, marginalize objectionable or unwise views and promote an engaged and informed citizenry. Occasionally, of course, these protections cover noxious speech and even misleading "sham" issue ads. They do so, however, to provide the greatest possible latitude for all speakers, at any point on the political and ideological spectrum.

For all these reasons, we have urged the IRS to withdraw the proposed "electioneering communications-plus" definition of CRPA in proposed § 1.501(c)(4)-1(a)(2)(iii)(A)(2). In addition to chilling a vast amount of core political speech about crucial issues of the day, the expanded definition of public communication will apply to virtually all documents, files and other elements of a social welfare group's website that happen to mention a candidate or, in a general election, just a party, a requirement that will pose insurmountable compliance issues. This goes beyond impracticality and raises First Amendment concerns of the highest order.

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[41] Because they mention a clearly identifiable political party in the case of the 60-day general blackout and/or because they potentially refer to candidates in the 2014 race. *See Notice*, *supra* note 1, at 71,514 (§ 1.501(c)(4)-1(a)(2)(iii)(A)(2)).

[42] *Buckley*, 424 U.S. at 44-45.

[43] *Id.* at 42-43.

II. Applying a "Functional Equivalence" Test Will Effectively Restore the Unbounded "Facts and Circumstances" Standard and Will Lead to Similar Problems

In addition to communications that contain clear words of support or opposition like "vote for" or "defeat,"[44] the proposed rule troublingly expands the definition of "express advocacy" to communications that are "susceptible of no reasonable interpretation other than a call for or against the selection, nomination, election, or appointment of one or more candidates *or* of candidates of a political party."[45]

The Service's expanded definition tracks, and expands upon, the Supreme Court's formulation in *Wisconsin Right to Life*.[46] There, the Court invalidated the "electioneering communications" ban in § 203 as applied to a non-profit group engaged in bona fide issue advocacy, and held that it could only be constitutionally applied to communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[47] This is often referred to as the "functional equivalence" or "functional equivalent" test.[48]

That functional equivalence test applied to § 203 until the Court's decision in *Citizens United*. There the Court found that a pay-per-view documentary critical of then-Senator Hillary Clinton was, indeed, the "functional equivalent" of express advocacy but still could not be constitutionally restricted under § 203. *Citizens United* overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which had upheld restrictions on express advocacy by

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[44] *Notice*, *supra* note 1, at 71,541 (§ 1.501(c)(4)-1(a)(2)(iii)(A)(1)(i)).

[45] *Id.* (§ 1.501(c)(4)-1(a)(2)(iii)(A)(1)(ii)) (emphasis added). Notably, the definition is broader than the Federal Election Commission's ("FEC") current regulation defining express advocacy, which only applies to communications that reference a clearly identified candidate, not "one or more candidates or candidates of a political party" (for instance, perhaps, an ACLU communication critical of the DISCLOSE Act, support for which splits along partisan lines, which mentions one or more Democratic candidates in support). 1 C.F.R. § 100.22 (2014) (defining "expressly advocating" under 2 U.S.C. § 431(17) (2012)'s definition of "independent expenditure"). It also requires that the electoral portion of the communication be "unmistakable, unambiguous, and suggestive of only one meaning" and that "reasonable minds could not differ on whether it encourages actions to elect or defeat one or more clearly identified candidates." *Id.* And, it requires "limited reference to external events, such as the proximity to the election." *Id.* The Service's proposed definition contains no such limiting guidance and appears to apply to any functionally equivalent express advocacy at any time. In fact, it could even apply to communications that praise or criticize the *winner* of a presidential election, which clearly pose little to no risk of electoral corruption, because they could be construed as an exhortation to *electors*.

[46] 551 U.S. 449 (2007).

[47] *Id.* at 470.

[48] *Id.* at 481; *see also Citizens United*, 558 U.S. at 325 ("[T]he functional-equivalent test is objective . . . ."); *The Real Truth About Abortion, Inc. v. Fed. Elections Comm'n*, 681 F.3d 544, 551 (4th Cir. 2012).

corporations and labor unions using their own money that was not directed by a candidate or party (known technically as "independent expenditures").[49]

The ACLU offered an amicus curiae brief in *Citizens United* solely on the supplemental question of whether § 203's ban on electioneering communications—even as narrowed under *WRTL*—could withstand First Amendment scrutiny. We argued that any open-ended functional equivalence test would still invariably ensnare genuine issue advocacy and would therefore still be a violation of the First Amendment (with the offense of vagueness piled on top of both overbreadth and underinclusiveness).[50]

Those concerns stand with the Service's proposed rule and its inclusion of a similar functional equivalence test in the definition of CRPA.[51] In *Citizens United*, the ACLU offered several related reasons why § 203, even as narrowed to functionally equivalent express advocacy, should be declared facially unconstitutional. Several of these arguments counsel strongly in favor of dropping the functional equivalence test in the proposed rule.

First, vague "totality" tests like functional equivalence and the current "facts and circumstances" approach chill too much protected speech.[52] As an abstract matter, a hypothetically reasonable speaker should be able to predict with a reasonable degree of certainty how a hypothetically reasonable listener will interpret an advertisement. History suggests otherwise.[53] This

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[49] *Citizens United*, 558 U.S. at 365. The functional equivalence test under § 100.22 is still applied in the Fourth Circuit with respect to FEC disclosure rules. *See supra* note 44; *The Real Truth About Abortion, Inc.*, 681 F.3d at 555. While the court affirmed the application of § 100.22(b)'s functional equivalence test in determining when a communication compels disclosure, it applied a lower standard of scrutiny because, it said, disclosure rules "do not restrict either campaign activities or speech." *Id.* at 549.

[50] Amicus Curiae Br. of the Am. Civil Liberties Union in Support of Appellant on Supplemental Question at 13-15, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2365203, at *13-*15.

[51] Again, the definition in the proposed rule is actually broader than the functional equivalence test as articulated by Chief Justice Roberts in *WRTL* or as formulated by the FEC in 11 C.F.R. § 100.22(b) (2014). It applies not just to candidates, but to communications on nominations, appointments or to those that generically advocate for or oppose a political party (i.e., "candidates of" a political party).

[52] Amicus Curiae Br. of the Am. Civil Liberties Union in Support of Appellant on Supplemental Question at 14, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2365203, at *13-*14.

[53] Shortly before the 1972 presidential elections, for instance, the ACLU sought to run an ad in the New York Times highly critical of President Nixon for his position on court-ordered busing (the ad opened with "[w]e write because we believe that you are taking steps to create an American apartheid"). *See Am. Civil Liberties Union v. Jennings*, 366 F. Supp. 1041, 1058 (D.D.C. 1973), *vacated as moot sub nom.*, *Staats v. Am. Civil Liberties Union*, 422 U.S. 1030 (1975). The New York Times refused to run the ad unless the ACLU registered as a political committee. The Times essentially took the position that the ad was an express advocacy wolf in issue advocacy sheep's clothing, and treated the ad as one "on behalf" of the reelection of the lawmakers named in the ad ("on behalf" being FECA's first attempt to

uncertainty is compounded by the tendency of regulators to pile "prophylaxis-upon-prophylaxis" in an attempt to capture anything that could conceivably sway a vulnerable listener.[54] That is, in effect, the rationale behind both the functional equivalence and current facts and circumstances tests. They encourage the government to burn down the house to roast the pig.

The *Buckley* Court rightly recognized the danger of a chilling effect in allowing the government to adopt a test based on the likely effect of the speech on a hypothetical listener:

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question of both intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of the hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers ***no security for free discussion***. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.[55]

In other words, listener-centric tests such as "functional equivalence" force speakers like the ACLU, the National Rifle Association or Planned Parenthood to "steer far wider of the unlawful zone" than is actually necessary because their exhortations on civil liberties, gun rights or abortion *could* lead a hypothetical voter to vote a certain way.[56]

Second, and of particular import given the findings of the TIGTA audit report detailing the use of inappropriate criteria, vague laws and regulations invite discriminatory enforcement.[57] This failing is particularly troubling in the context of political communications, where open-ended laws and regulations allow those in power to selectively enforce speech restrictions to disadvantage political opponents. Although the TIGTA Audit found absolutely no evidence of

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restrict functionally equivalent express advocacy). The ACLU sued, and secured a declaratory judgment that the proposed interpretation of FECA violated the First Amendment. *Id.* at 1051.

[54] *WRTL*, 551 U.S. at 479.

[55] *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)) (emphasis added).

[56] *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

[57] Amicus Curiae Br. of the Am. Civil Liberties Union in Support of Appellant on Supplemental Question at 14, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2365203, at *13-*14.

political motivation in this case, and we emphatically do not question that finding or impugn the integrity of the Service, the IRS has indisputably been used on multiple occasions to that end.[58]

Further, even when selective viewpoint discrimination is a result of simple and honest human error, it is no less harmful as a practical and legal matter. And when applied to core political speech—by any group, on the left or right—the harm is ever greater. As the Supreme Court has said, "speech concerning public affairs is more than self-expression, it is the essence of self-government."[59]

To illustrate the danger of a vague "functional equivalence" standard, we attached to our comments to the IRS an advertisement sponsored by the ACLU that ran in the New York Times Magazine and the Economist in June 2004.[60] Part of an ongoing series of ads, it features the former Navy Judge Advocate General, Rear Admiral John D. Hutson (ret.), asking, "[h]ow can we fight to uphold the rule of law if we break the rules ourselves?" Although it does not expressly mention President George W. Bush by name or even hint at express electoral advocacy, under the Service's proposed rule, it is unclear whether it qualifies as CRPA.

First, to a "reasonable" observer, it is a transparent criticism of President George W. Bush, who, at exactly that point in time, was running for reelection largely on his record in the popular "war on terror" and the then-popular Iraq War.[61] As the New York Times reported when the initial set of advertisements ran, the ads "indirectly accuse the administration of trampling on the Bill of Rights, without actually mentioning the president."[62] Accordingly, there is an argument that the ad "express[es] a view . . . against the . . . election" of a candidate, despite, again, the ACLU's strict non-partisanship.[63]

Indeed, there's even an argument that the advertisement meets the requirement that it "clearly identif[y]" a candidate, despite President Bush not having been named in the advertisement. As

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58 *See* David Burnham, *Misuse of the I.R.S.: The Abuse of Power*, N.Y. Times, Sept. 3, 1989.

59 *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

60 News Release, ACLU, In ACLU Ad, Retired Navy Admiral Says U.S. Breaking Rules (June 16, 2004), http://bit.ly/1asyoXk. Note again that the functionally equivalent express advocacy provision in the definition of CRPA is not limited by the 30/60-day blackout window. This ad, however, would also qualify as CRPA under the "electioneering communications-plus" provision, assuming it meets the definition of "clearly identified," as it ran on June 20 and 26. The last Republican primary occurred on June 26, 2012.

61 *See, e.g.*, Gallup Historical Trends: War on Terrorism, http://bit.ly/1biVcsx (last visited Jan. 22, 2014); Gallup Historical Trends: Iraq, http://bit.ly/1aJNJpJ (last visited Jan. 22, 2014).

62 Nat Ives, *Celebrities Line Up to Criticize Bush in A.C.L.U. Campaign*, N.Y. Times, Sept. 12, 2003, *available at* http://nyti.ms/1at0ll4.

63 *See Notice*, *supra* note 1, at 71,541 (§ 1-501(c)(4)-1(a)(2)(iii)(A)(1)).

noted, the proposed rule would find a communication that identifies a candidate not by name but "by reference to an issue or characteristic used to distinguish the candidate from other candidates" as one that "clearly identifies" that candidate.[64]

There is no question that the issues of civil liberties, due process and, especially, the rights of detainees in Iraq and Guantanamo Bay, all of which were expressly mentioned in the Hutson advertisement, were central in the then-white hot 2004 presidential race. In fact, two days after the advertisement ran in the Economist, the Supreme Court dealt a significant blow to the Bush administration—one that was praised by the presumptive Democratic nominee, then-Senator and current Secretary of State John Kerry (D-MA)—in the decision *Hamdi v. Rumsfeld*, which held that U.S. citizens detained as enemy combatants retain habeas corpus rights.[65]

Although we firmly believe this advertisement is far from being the "functional equivalent" of express advocacy, and, indeed, is permissible even for a § 501(c)(3) group subject to the more restrictive "facts and circumstances" test, the analysis above demonstrates the significant uncertainty that would flow from the proposed rule. And, while larger social welfare and charitable groups may have the resources to make these difficult determinations, smaller and single-issue advocacy groups have no such luxury and may totally avoid engaging in core political speech like the Hutson advertisement out of an overabundance of caution.

This hedging and trimming presents a direct restriction on non-partisan political speech—on a matter squarely in the public interest—that presents absolutely no threat of electoral corruption.

III. Non-Partisan Voter Registration Drives and Voter Education Guides Should Not Qualify as CRPA, Regardless of Any Incidental Effect on an Election

As discussed above, the ACLU engages in a significant amount of voter education and voter protection work, including our "Let Me Vote" resource and our legislative scorecard. The latter selects key civil liberties votes during each Congress and lists a numerical score for each sitting member's voting record. We also provide voters with various "know your rights" materials on voting issues. While it is difficult to state with specificity how much is spent on such activities, it is safe to say they are much more than a negligible part of the work of both entities.

By way of preview, we recommend that non-partisan voter education, registration or mobilization drives, as well as voter education guides, should be completely exempt from the definition of CRPA and, further, the Service should also abandon the existing facts and circumstances test as applied to these efforts. To the extent any of these activities contain express advocacy, they can be regulated under the narrow bright-line test we propose.

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[64] *See Notice*, *supra* note 1, at 71,541 (§ 1-501(c)(4)-1(a)(2)(iii)(B)(2)).

[65] 542 U.S. 507 (2004); *see also* Todd S. Purdum, *In Classic Check and Balance, Court Shows Bush It Also Has Wartime Powers*, N.Y. Times, June 29, 2004, at A17 (highlighting split between candidates on issue).

The proposed rule would define as CRPA both "voter registration" and GOTV drives, as well as "[p]reparation or distribution of a voter guide that refers to one or more clearly identified candidates or, in the case of a general election, to one or more political parties . . . ."[66]

Although these terms are not defined in the proposed rule, we anticipate that the Service may look to the definitions of "voter registration" and "get-out-the-vote" activity under the regulations implementing the BCRA's restrictions on party funding.[67] Under such an approach, the ACLU's non-partisan voter education and protection activity may qualify.

With respect to the definition of "voter registration activity," among other things, the ACLU's national organizations and affiliates encourage voters to vote,[68] provide detailed information about how to vote,[69] and offer links and/or access to voter registration materials.[70] With respect to the definition of GOTV activity, ACLU national and affiliates encourage voters to vote,[71] and inform potential voters about voting hours, polling locations and early and absentee voting.[72]

Despite the non-partisan nature of all of this activity, the proposed rule would nevertheless apply the definition of CRPA, meaning that all of the voter education and voter protection work could imperil our tax-exempt status. Indeed, were the Service to apply the proposed definition of CRPA to political activity by charitable groups, *any* amount of voter education by the ACLU Foundation, Inc. could result in revocation of its tax-exempt status.

Although *partisan* voter registration and GOTV activity directly or indirectly supported through tax policy raises more complicated constitutional questions,[73] there should be no question that *non-partisan* voter education, registration, mobilization and protection activities receive full First Amendment protection, and, indeed, are central in the promotion of a healthy and informed representative democracy.

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66 *Notice*, *supra* note 1, at 71,541 (§ 1-501(c)(4)-1(a)(2)(iii)(A)(5), (7)).

67 11 C.F.R. § 100.24 (2014).

68 *Id.* § 100.24(a)(2)(i)(A) ("Encouraging or urging potential voters to register to vote . . . by any other means").

69 *Id.* § 100.24(a)(2)(i)(B) ("Preparing and distributing information about registration and voting").

70 *Id.* § 100.24(a)(2)(i)(C) ("Distributing voter registration forms or instructions . . .").

71 *Id.* § 100.24(a)(3)(i)(A) ("Encouraging or urging potential voters to vote . . . by any other means").

72 *Id.* § 100.24(a)(3)(i)(B)(1)-(3).

73 *See infra* Part VIII.

The proposed rule, however, would dramatically chill such unbiased and non-partisan activity by the ACLU and other voting rights groups. Further, the proposed rule goes against decades of IRS guidance permitting tax-exempt social welfare and charitable groups to engage in non-partisan voter education, voter registration and GOTV drives without endangering their exempt status.[74] Indeed, the breadth of the proposed rule may even lead groups engaged simply in "know-your-rights"-style voter education, which objectively does not encourage voters to register and/or vote, to limit such activity for fear the proposed rule could apply.

The same analysis applies with equal force to voter guides, though, unlike voter registration and GOTV drives, we acknowledge that existing guidance does suggest that a voter election guide identifying specific candidates, even one without any editorial content or other evidence of bias, may potentially constitute political intervention if the guide is focused on a narrow issue or set of issues selected by a group advocating on those issues.[75] Conversely, there is also guidance suggesting that something like the ACLU's legislative scorecard, which is maintained without regard to the timing of elections and only lists the past votes of sitting members who may incidentally be running for office, will not constitute political intervention.[76]

Regardless, the First Amendment is implicated even by tax law restrictions on non-partisan voter guides, including those that are geared toward a particular election, identify sitting lawmakers running for re-election and score them based on their position on a set of issues.[77] Again, the constitutional questions raised are more difficult when a voter guide affirmatively includes explicit language of support or opposition, but the proposed rule is decidedly not so limited.

In the Notice, the IRS asks for comment on "whether any particular activities conducted by section 501(c)(4) organizations should be excepted from the definition of candidate-related political activity as voter education activity and, if so, a description of how the proposed

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[74] The main guidance on the subject pertains to § 501(c)(3) groups, but, as noted, guidance on charitable groups has often been seen by practitioners as instructive for social welfare groups (and vice-versa). Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1422; Rev. Rul. 81-95, 1981-1 C.B. 332 (citing rulings under § 501(c)(3) as authority for § 501(c)(4) political intervention determinations and allowing non-partisan voter education, registration and GOTV activity).

[75] Rev. Rul. 78-248, 1978-1 C.B. 154.

[76] Rev. Rul. 80-282, 1980-2 C.B. 178.

[77] That was the precise issue in *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251-52 (1986) ("*MCFL*"), in which the Supreme Court found the pre-*Citizens United* independent expenditure ban unconstitutional as applied to a narrow subset of non-profit organizations. As discussed below, we acknowledge that the restriction here is less direct than the blanket prohibitions at issue in *MCFL* and the other campaign finance cases (though it would present a flat ban if applied to § (c)(3) groups). Nevertheless, the public policy harm of a broad CRPA definition is quite similar and, legally, the rule would be so burdensome on § (c)(4) groups that many would be forced to either forgo a sizeable amount of totally non-partisan issue advocacy or would have to disclose their donors, both of which present significant and new First Amendment concerns.

exception will both ensure that excepted activities are conducted in a non-partisan and unbiased manner and avoid a fact-intensive analysis."[78]

As with the impossibility of accurately cleaving issue advocacy from functionally equivalent express advocacy, we argued in our comments that one cannot and should not try. Voter guides, for instance, especially those that are intended to present a public official's view on a narrow issue of public interest, are quintessential issue advocacy. They are designed to facilitate voter pressure on incumbents to take a particular position on legislation or regulation, and only incidentally influence voters (because some voters don't like anti-abortion or pro-gun control candidates). Accordingly, they should not constitute political intervention in any case. The same analysis applies with equal force to voter education, registration and GOTV activities.

In sum, with respect to voter registration and GOTV drives, we have argued that the Service should remove them from the definition of CRPA completely *and* abandon the current facts and circumstances test for when they constitute political intervention. Including them in the definition of CRPA will create too great a risk that valuable, non-partisan voter protection and education activities will be harmed. To the extent these activities include actual express advocacy, the Service would be able to regulate them under the bright-line test we propose.

With respect to voter guides, we again argued that the Service should abandon both the approach in the proposed rule and the facts and circumstances test, and only consider voter guides as political intervention by all tax-exempt groups when they contain express words of advocacy.[79]

Finally, we would just note the serious public policy harm in the Service applying the definition of CRPA to non-partisan voter education, registration or mobilization activities. While there may be some debate over whether the original understanding of the § (c)(4) exemption even contemplated legislative or political advocacy, there is no question that the provision was enacted to provide tax benefits for groups that may not qualify strictly as charitable, educational or religious but nevertheless provide some benefit available to the community at large.[80]

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[78] *Notice*, *supra* note 1, at 71,540.

[79] That said, to the extent the Service maintains voter guides in the final rule, it should still exempt completely all publications that merely report on the legislative records of sitting lawmakers even when they focus on one set of issues, like civil liberties or the environment, and even when they list the organization's position on the vote. Although not ideal, that would provide a bright line rule and much less of a burden on speech.

[80] *See generally* 1981 EO CPE Text, *available at* http://1.usa.gov/1lv2Hqp; Laura Chisholm, Exempt Organization Activity: Matching the Rules to the Rationales, 63 Ind. L. J. 201, 290 (1988); Rev. Rul. 62-167, 1962-2 C.B. 142 (distinguishing non-exempt subscription provider of closed-circuit television carriage of broadcast signals from exempt organization providing such service to all members of the public).

It is difficult to conceive of a more publicly beneficial service than the provision of non-partisan voter information and education. Just as an expansive definition of the First Amendment is cited as a guardian of other rights and liberties, an informed, engaged and active citizenry safeguards our liberal democracy itself.[81] To the extent the proposed rule would create disincentives for groups to expend resources on non-partisan voter support, it could result in disastrous unintended consequences in areas as diverse as the promotion of civil rights, public education, health care, religious freedom and many others.

IV. Non-Partisan Candidate Events Should Not Qualify as CRPA

The proposed rule would extend the definition of CRPA to events hosted or conducted by a § 501(c)(4) during the 60/30-day blackout periods at which one or more candidates "appear as part of the program."[82] Under current regulations, non-partisan candidate forums would not count against a § (c)(4) group's permissible allotment of political intervention. They are, also, protected fully by the First Amendment and quite valuable for voter education.

During the 2012 presidential election, for instance, the ACLU invited all candidates to speak at its annual staff conference as part of its "Liberty Watch" initiative. Only Libertarian candidate Gary Johnson and one time-GOP candidate Buddy Roemer showed up. The sessions with Johnson and Roemer were conducted without any of the hallmarks of a campaign event but were extremely useful in introducing civil libertarians to many of their positions on ACLU issues.[83]

Under current rules, these events would have been permissible without any limits at any stage in the election. Under the proposed rules, they would qualify as CRPA if held during the blackout period, and would thus count against the ACLU's permitted allotment of CRPA.

Campaign events lacking indicia of express advocacy—where multiple parties are invited, for instance, or town hall-type forums where a candidate faces unscripted questions from the audience—should be excluded from any definition of CRPA.

On the other hand, we do not oppose defining candidate forums that feature explicit indicia of express advocacy as CRPA. Such indicia would include, for instance, extending an invitation to only a single candidate to give a speech promoting her candidacy or signage at the event with *Buckley* magic words of support.

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[81] *See, e.g.*, Jennifer L. Hochschild, *If Democracies Need Informed Voters, How Can They Thrive While Expanding Enfranchisement?*, 9 Election L. J. 111, 111-13 (2010) (describing studies on role of voter education in health of modern democracy and beneficial policy outcomes).

[82] *Notice*, *supra* note 1, at 71,541 (§ 1-501(c)(4)-1(a)(2)(iii)(A)(8)).

[83] Mike Riggs, *Gary Johnson Braves the ACLU*, Reason.com, Jan. 31, 2012, http://bit.ly/1ffVH9R.

V. The Service Should Apply a Bright-Line Definition of Political Intervention to all Relevant § 501(c) Groups and Provide Greater Clarity and Coordination With Respect to that Definition and That of Exempt Function Activity Under § 527(e)(2)

By its terms, the proposed rule would apply only to § 501(c)(4) groups.[84] Assuming the issues discussed above can be satisfactorily addressed, we recommended to the IRS that it expand the rule uniformly to all relevant organizations under § 501(c).

We further suggested that the Service should offer better clarity and coordination regarding the definition of political activity by § 501(c) groups and the definition of exempt function activity under § 527(e). If the definition of exempt function is broader than the definition of political activity for § 501(c) groups, which may be warranted given the statutory purpose of § 527, then tax pursuant to § 527(f) should only apply to § 501(c) groups on the activities that are within the definition of § 501(c) political intervention.

Assuming the rule can be properly narrowed, there are three reasons why the application of a uniform definition across all affected groups would be beneficial.

First, the Service has been accused of political favoritism, in that the narrow application of the rule to § 501(c)(4) groups will disadvantage many conservative groups while sparing organized labor, which historically favors Democrats.[85] Regardless of the merits of this claim, and we do not suggest there are any, a special rule for § 501(c)(4) groups, especially one with a broad functional equivalence test, creates the *potential* for abuse by unscrupulous regulators against groups on both the right and left. Regulators could, for instance, cite the different standards as reason to treat the U.S. Chamber of Commerce, a § 501(c)(6) group, more leniently than the Natural Resources Defense Council, a § 501(c)(4).

Second, it actually makes sense from both a First Amendment and compliance perspective to have a unified definition across all relevant exempt organizations. Part of the problem with the facts and circumstances test historically has been confusion and lack of certainty on the part of tax practitioners as to whether the definition of § 501(c)(4) political intervention, which is allowed so long as it is not the primary activity of the entity, is coextensive with § 501(c)(3) political intervention, which is totally disallowed. Such added simplicity will reduce the need for advocacy groups to "hedge and trim," which will serve the First Amendment interest in encouraging vigorous public debate over government policy.

Finally, the different standard for § 501(c)(4) groups promises to create odd results. Charitable groups, for instance, would not be subject to the expansive definition of "public communication"

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[84] Though again, if past is prologue, we anticipate that the Treasury Department and the IRS will look to the § 501(c)(4) guidance for other exempt organizations, *and* that practitioners will rely on it in providing guidance to other groups.

[85] *See, e.g.*, Kimberly A. Strassel, IRS Targeting and 2014, W.S.J., Jan. 16, 2014, http://on.wsj.com/1b1S5sQ.

and would therefore not have to purge their websites of "electioneering communications-plus" documents and files during the 60/30-day blackout. It would be incongruous to hold § 501(c)(3) organizations, which are statutorily barred from engaging in any political intervention, to a lesser standard than § (c)(4) groups, which may conduct actual express electioneering so long as it is not their primary activity. Of course, we do not support expanding such a broad definition to § (c)(3) groups. We want conformity, but with a true bright-line rule.

Likewise, applying a different standard to labor groups and business leagues, which are now considered to be subject to similar restrictions as § 501(c)(4) groups, would result in potentially far reaching advantages to certain political constituencies, which could benefit particular parties, candidates or ideological groups.

For instance, under the rule as proposed, the AFL-CIO would be able to circulate, with no tax consequences, a legislative scorecard for citizens interested in right-to-work laws.[86] By contrast, Americans for Tax Reform, a group often critical of labor, would have to count its voter guides as CRPA. Likewise, the U.S. Chamber of Commerce would remain subject to the arguably narrower "facts and circumstances" test while MoveOn.org Civil Action or the American Association of Retired Persons ("AARP") would face the expanded IRS guidance and definition of CRPA.

VI. The Service Should Abandon Both the Proposed Definition of CRPA and the "Facts and Circumstances" Test in Favor of a True Bright-Line Approach

We believe the IRS can effectively address concern over anonymous express advocacy by social welfare groups without tamping down on issue advocacy. Consequently, we urged the Service to abandon both the approach in the proposed rule and the existing "facts and circumstances" test. The IRS needs to offer a clear and easily interpreted rule on what constitutes express advocacy *and* a firm answer on how much such activity will result in denial or revocation of exempt status.[87]

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[86] Assuming it is limited to past votes and meets the criteria suggested in Rev. Rul. 80-282.

[87] We offer no opinion on that question in this submission. Other concerned groups will likely suggest a sliding scale approach, where a higher percentage of allowable CRPA permits a more expansive definition and vice-versa. Because we believe that the definition of CRPA should be crystalline and limited as closely as possible to magic words express advocacy, we do not have a view on the quantitative question. Were the Service to adopt a magic words definition, we stand ready to help it work through the more difficult statutory and constitutional question of when and how Congress and the Service can limit express political advocacy by § (c)(4) groups in exchange for tax-exempt status. *Cf. Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) (upholding lobbying restriction on § (c)(3) groups); *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (finding no First Amendment violation on campaign intervention ban for § (c)(3) groups); *Christian Echoes Nat'l Ministry v. United States*, 470 F.2d 849 (10th Cir. 1972) (same).

Otherwise, the proposed rule threatens serious unintended consequences. It will result in self-censorship of fully protected speech by tax-exempt organizations fearful of imperiling their exempt status through sharply worded issue communications. Such groups will be forced to radically curtail their speech on matters of public policy during the 60/30-day blackout periods, and, during the 60 days before a general election, will not be able to even mention a political party or parties represented in the election. They will also be significantly constrained in their ability to engage in non-partisan voter support efforts, which will, under the proposed rule, count against the permitted allowance of non-social welfare activity.

The definition of CRPA should be limited to public communications that use express terms of support for or opposition to a candidate or nominee for public office.[88] The rule should only apply to voter registration or GOTV material and voter guides if they themselves include express terms of advocacy. We recognize that the *Buckley* "magic words" list is illustrative, not exhaustive, but it must clearly protect all issue advocacy.

In fashioning the express advocacy doctrine in election law, the Supreme Court was not wearing blinders. It knew full well that groups could devise "expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited [a] candidate's campaign."[89] It chose, however, to accept that risk rather than extend the restriction to all issue communications that could conceivably be seen by someone as a campaign ad.

The Court has adopted this "tie goes to the speaker, not the censor,"[90] perspective repeatedly in holding that protected speech that resembles unprotected speech cannot constitutionally be restricted to suppress unprotected speech.[91] The proposed rule unabashedly does so by covering issue advocacy that inherently poses no risk of unduly influencing voters or officials.

We acknowledge that the practical effect of the lack of a bright line rule under the tax code is different than the outright muzzle on electioneering communications in the BCRA. Here, § 501(c)(4) groups are allowed to engage in express advocacy, just not too much. BCRA, by contrast, was a flat ban on corporations and labor organizations, even as narrowed to apply only to functionally equivalent express advocacy.

Regardless, the harms of a tax restriction are nonetheless similar and perhaps worse. Though they can still engage in advocacy, both express and issue, exempt organizations are at risk of

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[88] *Buckley*, 424 U.S. at 44 n.52.

[89] *Id.* at 45.

[90] *WRTL*, 551 U.S. at 474.

[91] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) ("The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.").

denial or revocation of their status for engaging in too much genuine issue advocacy even if they *avoid* express advocacy. That gives the tie to the censor.

To be clear, denial or revocation of such status can prove harmful, especially for controversial groups that rely on assurances of anonymity to attract donors. Denial or revocation is also unwarranted for the thousands of legitimate social welfare organizations that avoid electioneering but engage in policy and legislative advocacy that tangentially implicates partisan politics through mention of candidates or nominees for public office.[92] Finally, the uncertainty generated by the proposed rule will disproportionately affect smaller and single-issue groups with limited resources. All of these consequences will chill or sanitize public debate over issues squarely in the public interest, which threatens to harm—not help—our policy outcomes.

Further, as a constitutional matter, while it is true that the courts apply a greater degree of deference to political speech regulations in the tax code,[93] and accepting for the sake of argument that this is appropriate, the rules governing what constitutes political intervention should still be limited to *political*—i.e., partisan—activities. And even if subject to a lesser standard of scrutiny than an outright prohibition on speech, such restrictions would still need to have an appropriate relationship to a legitimate or important government purpose.[94] In extending the definition of CRPA to concededly non-partisan activity, the Service cannot articulate such a purpose.

The Service's proposed rule also fails to provide a "safety valve" for protected speech, which the courts dismissing First Amendment challenges to tax provisions limiting political speech often cite in doing so.[95]

In *Regan*, an unsuccessful challenge to the lobbying restriction in § 501(c)(3), the unanimous decision by the Supreme Court found that the lobbying restriction on charities was not an "unconstitutional condition" but a rational attempt to prevent the subsidization of direct lobbying through the use of donor-deductible contributions. Groups that want to engage in substantial

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[92] Interestingly, our understanding is that the only "be-on-the-lookout" targeted § 501(c)(4) groups actually denied tax-exempt status were all state affiliates of Emerge America, a non-profit dedicated to training female Democratic candidates. (Several of the conservative groups whose applications were delayed withdrew, however.) The IRS found that their exclusive focus on Democrats provided a private benefit, not a community good. Oddly, while several of the denied groups' applications were pending, *other* state affiliates of the same group, engaged in the same activity, saw their applications granted, which just serves to further illustrate the danger in a non-bright-line approach. Stephanie Strom, *3 Groups Denied Break By I.R.S. Are Named*, N.Y. Times, July 20, 2011.

[93] *See supra* note 86.

[94] *Regan*, 461 U.S. at 547.

[95] *See Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 430 F. Supp.2d 222, 259 (S.D.N.Y. 2006) (using term "safety valve" to describe concurrence's reasoning in *Regan*), *aff'd*, 651 F.3d 218 (2d Cir. 2011), *aff'd*, 133 S. Ct. 2321 (2013).

lobbying are just required to do so through a separate but affiliated § 501(c)(4) group where only the group enjoys the tax benefit.[96] That the Court said was okay.

In the *Regan* concurrence, however, Justices Blackmun, Marshall and Brennan stated plainly that the § 501(c)(3) lobbying restriction *absent* the § 501(c)(4) safety valve *would* have amounted to an unconstitutional condition.[97] As Justice Blackmun argued, "[i]f viewed in isolation, the lobbying restriction contained in § 501(c)(3) violates the principle . . . that the Government may not deny a benefit to a person because he exercises a constitutional right."[98]

There appears to be no such safety valve here and, indeed, the unconstitutional condition is different in kind, and much more serious, than forbearance from the use of donor-deductible contributions for lobbying activities.

The safety valve argument in the context of CRPA would be that a group that wants to have as its primary purpose the conduct of CRPA would presumably be treated as a § 527 group, subject to § 527's tax exemption. This might hold water under three conditions: (1) the proposed definition of CRPA were actually limited to express political advocacy; (2) the Service is correct that Congress intended to exclude political intervention from the definition of social welfare; and (3) Congress was able to do so without imposing an unconstitutional condition. But the definition of CRPA is not so limited and there is no indication that Congress intended to exclude *issue* advocacy from the definition of social welfare, and nor could it.[99]

So, aside from the different tax treatment of § 501(c)(4) and § 527 groups, which, for the sake of argument, *might* be analogous to the difference between § (c)(3) and § (c)(4) groups in *Regan*, there is still one major difference between the two types of groups: § 527 groups have to ***publicly disclose the identity of their donors***. The proposed definition of CRPA therefore places legitimate social welfare groups in a Catch-22; either they self-censor genuine issue advocacy or they disclose their donors. It is well and long established that forced donor disclosure for any controversial political group—even partisan groups—is unconstitutional.[100]

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[96] *Id.* at 544, 552 ("The constitutional defect that would inhere in § 501(c)(3) alone is avoided by § 501(c)(4). [Appellant] may use its present § 501(c)(3) organization for its nonlobbying activities and may create a § 501(c)(4) affiliate to pursue its charitable goals through lobbying. . . . Given this relationship between § 501(c)(3) and § 501(c)(4), the Court finds that Congress' purpose in imposing the lobbying restriction was merely to ensure that 'no tax-deductible contributions are used to pay for substantial lobbying.'") (Blackmun, J., concurring).

[97] *Id.* at 552.

[98] *Id.* (internal citations omitted).

[99] *See, e.g.*, *Notice*, *supra* note 1, at 71,540 (acknowledging that proposed rule will extend to non-partisan voter guides, candidate events, etc.).

[100] *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (recognizing constitutional right to distribute anonymous campaign literature); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982) (requiring exemption from donor disclosure for controversial groups subject to reprisal or

The proposed rule therefore may impose an unconstitutional condition on § (c)(4) groups by forcing them to disclose their donors in exchange for tax-exempt status. This could present an unconstitutional condition even in the case of express political advocacy. We argue that it almost certainly does in the case of legitimate issue advocacy.

A true bright line test—limited to actual express advocacy—is the better approach.

VII. Conclusion

We very much appreciate the subcommittee's attention to this important issue. America's constitutional democracy depends on vigorous and unfettered debate. We acknowledge that, sometimes political pugilists do not play by Marquis of Queensberry rules, but the First Amendment to the Constitution demands that political speech be protected from government interference with only the narrowest of limitations.

While we commend the IRS for attempting to address the existing "facts and circumstances" test, we continue to advocate for a true bright line test that will preserve the ability of groups at all points on the political spectrum to advocate vigorously on the issues of the day without fear.

We look forward to working with the subcommittee, Congress and the administration in crafting a more appropriate definition of political intervention by the relevant tax-exempt groups.

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harassment); *Nat'l Assoc. for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958) (prohibiting state from requiring donor disclosure as condition for in-state operation). *NAACP* also expressly recognized that tax policy burdening speech could pose as severe a First Amendment concern as a direct restriction. *Id.* at 461 ("Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment.").

Mr. JORDAN. Thank you, Mr. Rottman. We appreciate that.
Senator Allard.

STATEMENT OF THE HONORABLE WAYNE ALLARD

Mr. ALLARD. Chairman Jordan and Ranking Member Cartwright and distinguished members of the subcommittee, thank you for inviting the American Motorcyclists Association to speak today and discuss the rule proposed by the Federal Internal Revenue Service designed to provide guidance to tax-exempt organizations.

The AMA believes this rule will limit our ability to communicate with our members and will create a defacto blackout period during which our Government will be less accountable to the people it serves.

Currently, the IRS provides a tax exemption for civic leads or organizations not organized for profit, but operated exclusively for the promotion of social welfare. The AMA is exactly that type of organization that lawmakers anticipated granting tax-exempt status to when they drafted Section 501(c)(4).

The AMA provides enormous social benefit to the motorcycling community. As an organization, we sanction about 3,000 competition recreational events a year, and, sanctioning with the AMAm event promoters and track owners agree to use the AMA rule book and operate their events in a safe manner with set minimum insurance levels. As a result, participants in these events know they will be treated fairly and in a safe manner.

On the highway we provide numerous benefits to our members, including sanctioning charity rides, which include providing insurance and best practices to make the roadways safer for riders and drivers, providing roadside assistance to our members, and educating and informing our members regarding congressional and regulatory actions.

The AMA represents the interests of our Nation's estimated 27 million motorcyclists and all terrain vehicle riders. Any fact-intensive analysis takes into account all of the facts and circumstances of the AMA and its functions would conclude that the AMA promotes the social welfare of motor-cross racers, recreational off-highway vehicle riders, on-highway motorcyclists and drivers. We do not participate in elections. Since 1984, the AMA has been classified as a 501(c)(4) organization based upon this analysis. However, the IRS new guidance would force the AMA either to muzzle its advocacy efforts or lose its status as a tax-exempt organization.

The definition of candidate-related political activity the IRS proposes to use is arbitrary and limits free speech. For example, any communication mentioning an elected official's name is considered political activity during the 60-day period before a general election or 30-day period before a primary election. This creates an odd situation. The timing of the speech is what makes political not the content.

According to the proposed rule, it even includes material without regard to whether the public communication is intended to influence the election or some other non-electoral actions, such as a vote on pending legislation. As a result, the new definition of candidate-related political activity assumes that all congressional, regulatory, and executive actions cease before an election. We know this is not

the case. Legislative and regulatory business is conducted right up to an election. This creates a defacto blackout period during which citizens will find it much harder to gain information about the actions of their representatives and Government.

The U.S. House of Representatives is scheduled to be in session for 12 days during the proposed rules blackout. Additionally, the reauthorization of MAP–21, our Nation's transportation bill, an important vehicle to road safety programs, may be debated and voted on during this time. We must be allowed to communicate information about such issues to our members in a timely manner.

According to George Mason University's United States Election Project, less than 54 percent of eligible voters cast a ballot in 2012. This is a decline of more than 3 percent than the 2008 presidential election. At a time when the proportion of eligible voters casting a ballot is declining, the AMA opposes any effort to restrict access to voter registration drives, voter guides, and information related to their representatives' voting records. In fact, this is a time when more voter educational material is needed, specifically pertaining to issues Americans care about.

The proposed rule the IRS seeks to implement will stifle nonpartisan speech in a manner that leads to a less informed electorate. We believe that the changes proposed will prevent the AMA from educating voters and advocating for the social welfare of the motorcycling community. Even the IRS agrees, stating in the rule itself, more definitive rules might fail to capture activities that would or would not be captured under the IRS traditional facts and circumstances approach.

It is our understanding that the IRS hoped to curtail electoral activity, but this rule is limiting our ability to educate our members about congressional and regulatory activity in keeping with our objective to promote social welfare of the motorcycling community.

Thank you very much for your time and consideration of the American Motorcyclist Association's views.

[Prepared statement of Mr. Allard follows:]

The Honorable Wayne Allard
Vice President, Government Relations
American Motorcyclist Association

Chairman Jordan, Ranking Member Cartwright and distinguished members of the subcommittee – thank you for inviting the American Motorcyclist Association to speak today and discuss the rule proposed by the federal Internal Revenue Service designed to provide guidance to tax-exempt organizations [Reg: 134417-13].

The AMA believes this rule will limit our ability to communicate with our members and will create a de facto blackout period during which our government will be less accountable to the people it serves.

Currently, the IRS provides a tax exemption for "civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare."

The AMA is exactly the type of organization that lawmakers anticipated granting tax exempt status to when they drafted section 501(c)4 of Title 26. The AMA provides enormous social benefit to the motorcycling community. As an organization, we sanction about 3,000 competition and recreational events a year. In sanctioning with the AMA, event promoters and track owners agree to use the AMA rulebook and operate their events in a safe manner with set minimum insurance levels. As a result, participants in these events know they will be treated fairly and in a safe manner.

On the highway, we provide numerous benefits to our members -- including sanctioning charity rides – which include providing insurance and best practices to make the roadways safer for riders and drivers, providing roadside assistance to our members and educating and informing our members regarding congressional and regulatory actions.

The AMA represents the interests of our nation's estimated 27 million motorcyclists and all-terrain-vehicle riders.

Any "fact-intensive" analysis that takes into account all of the "facts and circumstances" of the AMA and its functions would conclude that the AMA promotes the social welfare of motocross racers, recreational off-highway-vehicle riders, on-highway motorcyclists and drivers. We do not participate in elections!

Since 1984, the AMA has been classified as a 501(c)4 organization based upon this analysis. However, the IRS' new guidance would force the AMA either to muzzle its advocacy efforts or lose its status as a tax-exempt organization.

The definition of candidate-related political activity the IRS proposes to use is arbitrary and limits free speech. For example, any communication mentioning an elected official's name is

considered political activity during the 60-day period before a general election or 30-day period before a primary election.

This creates an odd situation. The timing of the speech is what makes it political, not the content.

According to the proposed rule it even includes material "without regard to whether the public communication is intended to influence the election or some other, non-electoral actions (such as a vote on pending legislation)."

As a result, the "new" definition of candidate-related political activity assumes that all congressional, regulatory and executive actions cease before an election.

We know this is not the case.

Legislative and regulatory business is conducted right up to an election.

This creates a de facto black out period during which citizens will find it much harder to gain information about the actions of their representatives and government.

The U.S. House of Representatives is scheduled to be in session for 12 days during the proposed rule's "blackout period." Additionally, the reauthorization of MAP-21 – our nation's transportation bill and an important vehicle for road safety programs – may be debated and voted on during this time.

We must be allowed to communicate information about such issues to our members in a timely manner.

According to George Mason University's United States Election Project, less than 54 percent of eligible voters cast a ballot in 2012. This is a decline of more than 3 percent from the 2008 presidential election.

At a time when the proportion of eligible voters casting a ballot is declining, the AMA opposes any efforts to restrict access to voter registration drives, voter guides and information related to their representatives' voting records. In fact, this is a time when more voter education material is needed, specifically pertaining to issues Americans care about.

The proposed rule the IRS seeks to implement will stifle nonpartisan speech in a manner that leads to a less informed electorate. We believe that the changes proposed will prevent the AMA from educating voters and advocating for the social welfare of the motorcycling community.

Even the IRS agrees, stating in the rule itself: "More definitive rules might fail to capture *(or might sweep in)* activities that would *(or would not)* be captured under the IRS' traditional facts and circumstances approach." It is our understanding that the IRS hope to curtail electoral activity, but this rule is limiting our ability to educate our members about congressional and regulatory activity in keeping with our objective to promote the social welfare of the motorcycling community.

Thank you very much for your time and your consideration of the American Motorcyclist Association's views.

Mr. JORDAN. Thank you, Senator.
Mr. Mason.

STATEMENT OF JAMES R. MASON, III

Mr. MASON. Mr. Chairman, ranking member, and honorable members, thank you for the honor of being invited to testify before this committee.

Home School Legal Defense Association is a social welfare organization that is tax-exempt under Section 501(c)(4) of the Internal Revenue Code. I oversee HSLDA's compliance with numerous State and Federal tax laws, campaign finance laws, lobbying laws, and other areas of Government affairs. In a previous job I worked on several important campaign finance cases in which Federal courts, including the Supreme Court of the United States, struck down regulations of political speech as being unconstitutional under the First Amendment. The constitutional issues and those in many other campaign finance cases are closely related to the constitutional issues raised by the IRS's proposed rules.

HSLDA is a national organization that has as its primary purpose advancing and protecting the right of parents to educate their children at home. We have over 80,000 member families in all 50 States and the District, and we communicate with many thousands more by various channels, including email, Web site, news media, and personal appearances at conferences.

Many social welfare organizations, like ours, from across the political spectrum are dedicated to giving a voice to the people so that together they can affect social change. These social welfare organizations, like ours, are made up of millions of people who wish to speak with one voice on issues of importance to them.

One of HSLDA's main activities is monitoring State, Federal, local legislation. When a bill, ordinance, regulation, or policy change is proposed that will affect the ability of parents to home school, we frequently alert our members and friends about the proposal. Sometimes we urge them to contact their elected officials, by name, to express their support or opposition to the proposed legislation. We communicate with home schoolers about legislative issues to advance our policy goals in ways that we believe are in the public interest.

Under current law, we need not worry about whether a particular elected official is also a candidate or whether an election is near when legislation is introduced. But under the proposed rules, 30-and 60-day pre-election windows, what would be an issue advocacy communication on Monday would be a candidate-related political activity on Tuesday without changing a single word. Even worse, if the issue advocacy communication is posted on our Web site on Monday, by some strange IRS alchemy it would be magically transformed into a candidate-related political activity on Tuesday.

The IRS justifies its expansive definition of candidate-related political activity by the need for bright-line rules. We agree that a bright-line rule is preferable to placing IRS agents in charge of deciding whose speech is protected and whose is not. But according to the notice of proposed rulemaking, "The IRS acknowledges that the approach taken in these proposed regulations, while clearer,

may be more restrictive and more permissive than the current approach."

In some cases a bright-line rule may be a good thing, but not all bright-line rules are created equal. In this case, the aspects of the bright-line rule that are "more restrictive" actually abridge protected free speech. In the interest of clarity, the IRS approach has captured too much speech. Issue advocacy does not become expressed advocacy based on arbitrary dates on the calendar, and the need to speak out on issues of public importance does not decrease as election day approaches. Indeed, issue speech becomes all the more valuable because the public and officials are paying closer attention.

The IRS's bright-line rule is designed to prevent impermissible use of tax-exempt status, but, because it captures too much speech, the proposed rule is contrary to decades of Supreme Court precedence that hold that the better approach is to err on the side of regulating less speech, even if it means missing some that might properly be subject to regulation to avoid improperly abridging any protected speech. As the Court has said, such a prophylaxis upon prophylaxis approach to regulating expression is not consistent with strict scrutiny. The desire for a bright-line rule hardly constitutes the compelling State interest necessary to justify any infringement on First Amendment freedom.

The IRS proposed rules would damage HSLDA, other social welfare organizations, and the public's ability to keep abreast of issues that are important to a healthy civil Government. The proposed rules are also contrary to the free speech clause of the First Amendment. We strongly oppose the proposed rules.

Thank you.

[Prepared statement of Mr. Mason follows:]

United States
House of Representatives
Subcommittee on Economic Growth,
Job Creation and Regulatory Affairs

HSLDA Testimony in Opposition to the Internal Revenue Service's Proposed Regulation Defining Candidate Related Political Activities

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Testimony of
James R. Mason, III
Senior Counsel
Home School Legal Defense Association

February 27, 2014

Mr. Chairman, thank you for the honor of being invited to testify before this Committee. My name is James R. Mason, III, and I am Senior Counsel for the Home School Legal Defense Association, a section 501(c)(4), tax-exempt organization. In that capacity, I oversee HSLDA's compliance with state and federal tax laws, campaign-finance laws, lobbying laws, and other areas of government affairs. Before coming to work at HSLDA in 2001, I was employed by the law firm of Bopp, Coleson, and Bostrom. There I worked on several important campaign-finance cases in which federal courts, including the Supreme Court of the United States, struck down regulations of political speech as being unconstitutional under the First Amendment.[1] The constitutional issues in these campaign-finance cases are closely related to the constitutional issues raised by the IRS proposed rules.

HSLDA is a national organization founded in 1983, which has as its primary purpose the protection of the right of parents to educate their children at home. We have over 80,000 members in all 50 states and the District of Columbia.

HSLDA strongly opposes this Proposed Rule in its entirety. This Proposed Rule unlawfully restricts the First Amendment free speech rights of millions of Americans who belong to social-welfare organizations and who depend on these organizations to influence public policy and society in beneficial ways. The Proposed Rule also oversteps the Congressionally-mandated jurisdiction of the Internal Revenue Service.

Many 501(c)(4) organizations from across the political spectrum are dedicated to giving a voice to citizens so that together they can effect social and political change. The Sierra Club is a 501(c)(4) organization dedicated to protecting the environment. The National Rifle Association is a 501(c)(4) organization dedicated to protecting gun rights. The American Civil Liberties Union is a 501(c)(4) organization dedicated to preserving civil liberties. And there are countless other organizations which are also 501(c)(4) organizations which are made up of millions of American citizens who wish to speak with one voice on an issue of importance to them.

One of HSLDA's main activities is monitoring federal, state, and local legislation. When a bill, ordinance, regulation, or policy change is proposed that will affect the ability of parents to homeschool, we frequently alert them about the proposal. Sometimes we urge them to contact their elected officials, by name, to express their support or opposition to the proposed legislation. We communicate with homeschoolers about legislative issues to advance our policy goals in the public interest.

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[1] *Randall v. Sorrell*, 548 U.S. 230 (2006); *Federal Election Com'n v. Beaumont*, 539 U.S. 146 (2003); *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004); *Beaumont v. Federal Election Com'n*, 278 F.3d 261 (4th Cir. 2002); *Virginia Society for Human Life, Inc. v. Federal Election Com'n*, 263 F.3d 379 (4th Cir. 2001); *Florida Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *Daggett v. Com'n on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000); *Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *Kansans for Life, Inc v Gaede*, 38 F.Supp. 928 (D. Kan 1999).

Under current law, we need not worry about whether a particular elected official is also a candidate or whether an election is near. But under the Proposed Rule's 30 and 60 day pre-election windows, what would be an issue-advocacy communication on Monday would be a "candidate-related political activity" (CRPA) on Tuesday—without changing a single word. Even worse, if the issue advocacy communication is posted on our website on Monday, by some strange IRS alchemy it would be magically transformed into a CRPA on Tuesday.

HSLDA urges that the entire Proposed Rule be rejected. In addition to the arguments listed above, the Proposed Rule would threaten the ability of HSLDA to advocate for homeschool freedom at the local, state, and federal level, and would threaten the ability of HSLDA to share what elected officials, judges, and government officials are saying about homeschooling, both good and bad. Each and every provision of the proposed rule would have a serious negative effect on HSLDA's ability to advocate for homeschool freedom as we have done since our founding in 1983.

There are numerous specific problems with the Proposed Rule:

1. **Even though the Proposed Rule is directed only at 501(c)(4) organizations, it will affect 501(c)(3) organizations.**

   The IRS's claim that these proposed rules will not affect the ability of 501(c)(3) charities to engage in limited nonpartisan activities fails to take into account that the final rule for 501(c)(4) groups will be used as guidance for other tax-exempt organizations. For example, the proposed rules treat nonpartisan voter registration drives when conducted by a 501(c)(4) organization as a CRPA, but not so when done by a 501(c)(3) charity. There are many small 501(c)(3) organizations around the country that routinely share nonpartisan voter guides or conduct nonpartisan voter registration drives. Their actions benefit the public and are currently legal. But if this Proposed Rule is finalized, it will chill the environment for 501(c)(3) organizations, effectively silencing them as well. Many of these small charities cannot afford high-priced lawyers and would decide it is not worth the risk to engage in these previously safe activities.

2. **Proposed Rule § 1.501(c)(4)-1(ii) only applies to 501(c)(4) organizations and not 501(c)(5) and 501(c)(6) organizations, which limits the free speech rights of certain organizations while allowing the same speech by other organizations.**

   This Proposed Rule does not apply to labor unions. If the IRS wished to regulate candidate-related political activities in a rational, fair manner, this Proposed Rule would not have been published without being equally applied to similarly-situated tax-exempt organizations. Labor unions, for example, are spared from the new definitions. In addition to being unfair on its face, it invites abuse by regulators.

HSLDA believes that no tax-exempt organizations should be regulated in the way the Proposed Rule would allow. HSLDA believes that the long standing abilities of 501(c)(4), 501(c)(5), and 501(c)(6) organizations, as well as other organizations, to be engaged in public policy and to share with the public where politicians stand on issues, is vital to a vigorous public discussion and part of a healthy democracy. Therefore, HSLDA would also oppose any revisions to the Proposed Rule that would include 501(c)(5) and 501(c)(6) organizations.

3. **Proposed Rule § 1.501(c)(4)-1(ii) is an unprecedented and unconstitutional attempt by the Internal Revenue Service to usurp Congress' authority to set tax policy.**

   HSLDA believes that this Proposed Rule is such a broad, intrusive, and substantive change in longstanding federal tax policy that it should be left to Congress to decide, not executive agencies. Congress has shown willingness in the past to change the rules for 501(c) organizations as needed. Elected representatives of the people, not unelected rule makers, should hold a vigorous and open debate about whether there should be more restrictions on 501(c) organizations. If the Proposed Rule were to be adopted, HSLDA and other organizations would likely challenge these Rules as exceeding the IRS' legal authority under the law.

4. **Proposed Rule § 1.501(c)(4)-1(ii) would negatively affect HSLDA in numerous ways, impairing our ability to communicate with our nationwide membership about homeschool freedom.**

   If the Proposed Rule were to be adopted, it would significantly impair HSLDA's ability to communicate with our membership and the homeschool community; it would increase our costs; and it would negatively affect thousands of other 501(c)(4) organizations around the nation.

   a. Nonpartisan voter registration drives: As part of our mission of encouraging civic involvement, HSLDA encourages our members to conduct nonpartisan voter registration drives, supports these nonpartisan voter registration drives, and has also conducted nonpartisan voter registration drives. If the Proposed Rule were adopted, HSLDA would be severely hampered in our ability to conduct these nonpartisan voter registration drives.

   b. Candidate debates: As part of our mission of encouraging civic involvement, HSLDA encourages and supports our members as they conduct nonpartisan candidate debates. Homeschoolers wish to know how candidates from the local to federal level view homeschooling. If this Proposed Rule were adopted, HSLDA would be prohibited from conducting candidate debates, and possibly even helping our members organize and conduct their own candidate debates.

c. Voter guides, voting records, and key votes: As part of our mission to enable homeschool families to know where their elected officials stand on issues, HSLDA circulates voter guides, lets homeschool families know how their elected officials vote, and occasionally scores and publishes key votes on issues that relate to homeschool freedom. If this Proposed Rule were adopted, HSLDA would be prohibited from doing this as part of its social-welfare mission, and homeschool families would be in the dark about how their elected officials act in regards to homeschool freedom.

d. Prohibition on making any mention of incumbent elected officials within 30 days of a primary or 60 days of a general election: HSLDA routinely communicates with our nationwide membership and the broader homeschool community regarding pending legislation and about how officials vote on homeschooling. This goes all the way from local school board officials and town council members, to state legislators and governors, to federal Members of Congress. If Majority Leader Harry Reid were to vote in the Senate for a resolution commending homeschoolers the month before his election, and this Proposed Rule had been adopted, HSLDA would be prohibited from mentioning this to the homeschool community until after the election. In addition, if this Proposed Rule were adopted, HSLDA may need to routinely scrub our website of all references to elected officials before primaries and elections.

This Proposed Rule would damage HSLDA, other 501(c)(4) organizations, and our nation's long standing Constitutional freedoms. HSLDA strongly opposes the Proposed Rule and urges Congress to intervene to prevent it from being promulgated.

Mr. JORDAN. Thank you, Mr. Mason.
Mr. Dickerson.

STATEMENT OF ALLEN DICKERSON

Mr. DICKERSON. Thank you, Chairman Jordan, Ranking Member Cartwright, members of the committee. I am going to try not to repeat everything you have already heard from the panel, but I do want to make a few points.

One is because this involves a regulation of the Internal Revenue Service, one might be forgiven for thinking this involves, in some ways, the collection of the Nation's revenue. It does not. There is no reason to believe one way or the other that revenue will rise if this is adopted or that it will fall if this is adopted, and the reason for that was already made clear by the chairman of the full committee earlier; the organizations we are talking about do not receive tax deductible money.

So if this doesn't involve the internal revenue, why exactly is the IRS involved in the first place? And isn't it odd that something called candidate-related political activity would be regulated by the IRS at all, given that we already have a commission, called the Federal Election Commission, which would seem to be somewhat more competent in this area?

I would suggest that the reason for this is simple and structural. When this Congress gave the Federal Election Commission "exclusive jurisdiction" over the civil remedies and enforcement of the Nation's election laws, it made a structural choice. There are six members of the Commission, unlike the usual five, and they are evenly divided between the two parties. The reason for this is simple: no one party may, using the Federal Election Commission, take a partisan advantage.

The IRS does not have that safeguard. I will leave it to the committee to draw its own conclusions.

One of the things the FEC has that the IRS doesn't is the institutional confidence that comes from 40 years of regulation in this area. And going back to this idea of clarity, and whether these rules in fact provide clarity, I practice generally in the Federal election area, mostly in campaign finance cases, and there you have real clarity. You have financial cutoffs. Something is a type of communication if you spend $10,000 on it, not if people volunteered and we somehow have to value their time in this very amorphous and unpredictable manner.

We know that something is directed at an electorate if it can be found under FCC regulation to reach 50,000 voters of the person being identified; unlike here, where it says that something is candidate-related if it is intended—and for the lawyers in the room, we all know the wiggle room in there—that is intended to reach 500 persons. The difference between a broadcast ad that is taken out in a member's home State intended to reach that person's electorate and something put on You Tube is enormous and is a trap for the unwary and for small organizations.

So in that sense I would suggest that even if the facts and circumstances test lacks clarity, and it most certainly does, there are other areas here where the clarity is perhaps worse. In this attempt to create a patina of predictability and a patina of sensible

regulation, you actually have buried in the NPRM a number of things that are very troubling. For instance, how do we know when someone is a candidate? Well, under the FEC rules, we know someone is a candidate when they spend money as a candidate through an authorized candidate committee. How do we know someone is a candidate under this? Well, when someone proposes them as a candidate for office, full stop.

Theoretically, if I were to suggest Mr. Cartwright as the next vice presidential nominee of the Democratic party, I would have converted him into a candidate for that office. Now, presumably this could be dealt with later on in the process, but the fact that the IRS saw fit to use that as its standard suggests if not a political intention, at least a lack of institutional competence in this area, which perhaps give us a certain amount of pause about the IRS regulating this in the first place.

And I think it is important to deal with the elephant in the room, which is disclosure. The fact, as I said earlier, is that there is no revenue purpose to this rule. It is about the disclosure of people's donors. And I want to tackle that head on. The reason 501(c)(4)s do not disclose their donors is because Congress said so. When the Internal Revenue Code was passed, it created criminal penalties for the unauthorized disclosure of the donors to these organizations. And the reason for that is that it has always been understood that 501(c)(4)s are the beating heart of civil society. These are the organizations, like the NRA and the Sierra Club, which go out there and take unpopular positions and move the national debate and make this a vibrant and functioning democracy.

Requiring unpopular organizations to give up their donor list to public scrutiny is not only contrary to Congress's intention in the Internal Revenue Code, it is also contrary to constitutional law. In a number of very hard-fought victories during the civil rights era, the Supreme Court said unanimously that organizations could not be required to give up their donors unless there was a strict and important overriding governmental interest. And the reason for that was that the Court noted the ability to speak is undeniably held by the ability to associate, and chilling the ability to associate inevitably makes it less likely that speech will be effective and that 501(c)(4)s will continue to be able to do their job as civil society.

Thank you.

[Prepared statement of Mr. Dickerson follows:]

Testimony of Allen Dickerson
Legal Director, Center for Competitive Politics
February 27, 2014

Thank you for the opportunity to provide this written testimony, on behalf of the Center for Competitive Politics ("CCP"), to the Subcommittee on Economic Growth, Job Creation and Regulatory Affairs of the Committee on Oversight and Government Reform. I attach CCP's comments on the IRS's proposed regulation, "Guidance for Tax-Exempt Social Welfare Organizations on Candidate Related Political Activities." Those comments serve as the basis for, and further explain, the points made below.

Since this hearing involves a proposed regulation of the Internal Revenue Service, one might expect it to involve the collection of federal revenue. But it does not. There is no reason to believe this regulation will have any impact, one way or the other, on revenue collection.

The most obvious reason for this is that 501(c)(4) organizations do not receive a tax subsidy in the same way as charities, because their donors do not get a tax deduction. Doubtless this is because the role of a 501(c)(4) organization is also different from that of a charity. 501(c)(4) groups exist to *advocate* for social welfare as they see it. Such advocacy—on the full range of issues from gun control to environmental policy to tax reform—has always been understood to be a central pillar of American civil society and our right as citizens to discuss, and even criticize, our society and its government. These groups have been powerful agents of change, on both the left and the right, and have helped guide our collective conversation on complex topics. In short, 501(c)(4)s embody the very heart of the First Amendment's protections of speech, the press, and the right to associate with one another.

If revenue is not implicated, then why is the IRS involved in this area at all? Why is it revisiting rules that have been in place for more than half a century? And, in particular, is it not odd that something called "Candidate Related Political Activity" would be regulated by the tax collecting agency, and not by the Federal Election Commission?

The answer to all of these questions is simple and structural. The FEC has an equal number of members from each political party, which makes it is impossible to expand the scope of federal regulation without bipartisan agreement. The IRS, on the other hand, is headed by an appointee of the president.

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These regulations, at their most basic, fail to understand the past forty years of campaign finance law, including a number of famous pronouncements by the Supreme Court. At the heart of its error is the decision to flip the presumption of the First Amendment: that speech is, as a constitutional matter, free from governmental regulation.

True, the Supreme Court has allowed for the regulation of speech directed at convincing citizens how to vote in elections. But the nexus of that narrow exception—an election—has been lost in these draft regulations. As a result, they ignore the essential distinction, articulated by the Supreme Court in *Buckley v. Valeo,* between the discussion of issues and exhortations to vote for a candidate. That is because the IRS appears to believe that advocating *for* a candidate, and talking *about* a candidate—who is, very often, an officeholder—are the same thing.

They are not, especially as the draft rules would consider *any* person being considered for an elected or appointed post—and it does not specify at what level—to be a "candidate" if "proposed" for the job.

In practice, discussing issues often means discussing the officeholders who make policy concerning those issues. The Supreme Court has noted that the discussion of issues and candidates "may often dissolve in practical application" since candidates, especially incumbents, are intimately connected to legislative and executive (and, indeed, judicial) action. In fact, in a representative republic with regular elections, such policy is *made* by candidates. To take a prominent example of how these types of speech can bleed into each other, the case of *FEC v. Wisconsin Right to Life* centered on ads discussing the filibuster of judicial nominees. Despite mentioning an incumbent senator running for reelection, the Supreme Court found that these ads were discussions of issues, not electoral advocacy.

The IRS's proposed regulations would chill the discussion of issues in a number of ways. Among its weaknesses are the following:

- An expansive definition of who a "candidate" is, such that commenting on virtually any federal officeholder or federal worker could become political speech. This would include individuals who have been mentioned as possible officeholder, including potential executive officers and judges. Worse, discussing legislation that bears the name of a candidate would be considered a discussion of the candidate him-or-herself. Examples such as McCain-Feingold or Dodd-Frank spring to mind, as do recent examples such as the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013—sometimes referred to as "Schumer-Rubio." Again, this converts an enormous range of issue speech into "candidate related" political speech, without any connection to the actual election of a candidate.

- The proposed regulation appears to consider any discussion of an executive or judicial nominee to be "candidate related" if conducted within sixty days of that person's confirmation hearing. The opportunity to limit discussion of such an appointment through creative use of the legislative calendar does not seem to have been considered.

- The regulations would include volunteer activity, not only spending, as potentially "candidate related." There is no indication as to how this would be calculated, and the rule would create a practical nightmare for small organizations.

- The regulations attempt to cover charitable events such as informational conferences and galas, which are key to educating the public about public policy. If a candidate (as expansively defined) shows up at an event, a 501(c)(4) would reasonably fear that its event may be counted as political activity. Indeed, even sending an officer of the nonprofit to a gala may be counted as political activity if a candidate happens to appear (even unannounced).

- Candidate fora, which help educate the public concerning where candidates stand on the issues, and non-partisan voter guides would be counted as political activity. Yet, for decades 501(c)(3) charities have been able to conduct these activities so long as they are organized or written in a non-partisan manner. Nonetheless, the IRS appears to believe that these charitable purposes (which may receive tax-deductible support) do not "promote social welfare" if done by a 501(c)(4) organization.

The attached comments provide many more examples, but the thrust of the draft rules is clear: to convert a wide swath of discussion about *government* into political activity that the IRS may regulate.

When Congress established the Federal Election Commission it gave that agency "exclusive jurisdiction" over the nation's campaign finance laws. In keeping with this charter, the Commission was organized so that no one party could control it and use the policing of speech as a partisan weapon. Over the course of decades, the FEC has become expert in the area of political regulation—and, sometimes with the prodding of the courts, in the limits the First Amendment places on such regulation.

These rules would not only aggravate the danger of the IRS being used for partisan purposes, it would also subject the Service to costly and redundant litigation about what political speech can and cannot be regulated—a question that has already been litigated over many years by the FEC.

Perhaps the next famous case will be *Civil Society v. IRS.*

Thank you again for the opportunity to appear today and provide testimony concerning the IRS's proposed regulation.

February 20, 2014

Via Federal eRulemaking Portal

John Koskinen
Commissioner of Internal Revenue
CC:PA:LPD:PR (REG-134417-13), Room 5205
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

RE: Supplemental Comments on IRS NPRM, REG-134417-13

Dear Mr. Koskinen:

The Center for Competitive Politics ("CCP") respectfully submits these supplemental comments concerning the Notice of Proposed Rulemaking issued by the Internal Revenue Service ("IRS" or "Service") on November 29, 2013. Guidance for Tax-Exempt Social Welfare Organizations on Candidate Related Political Activities, Internal Revenue Service REG-134417-13, 78 Fed. Reg. 71535 (Nov. 29, 2013) ("NPRM"). In its first comment, CCP promised further analysis of the NPRM, and the concerns the Service raised therein. Bradley A. Smith and Allen Dickerson, Center for Competitive Politics, Comment on IRS NPRM, REG-134417-13 at 1-2 (Dec. 5, 2013) ("CCP Comment I").[1] CCP also requests a public hearing concerning the NPRM, and the opportunity to speak at that hearing.

In drafting the NPRM, the Service expressed its desire to "promote tax compliance (as opposed to campaign finance regulation)." NPRM, 78 Fed. Reg. at 71538. In this, the NPRM fails. Its attempt to avoid the regulatory paradigm established by the Federal Election Commission ("FEC" or "Commission") is foiled by its casual adoption of campaign finance terms of art without the precision appropriate for such a complex and specialized body of law. Worse, by ignoring the FEC's existing framework and decades of associated constitutional jurisprudence,

[1] In addition, Eric Wang, CCP senior fellow, submitted comments addressing the record-keeping burden imposed by the NPRM's draft regulation, pursuant to the Paperwork Reduction Act of 1995, Pub. L. 104-13 § 3507(d), 109 Stat. 163, 177 (1995) (codified at 44 U.S.C. § 3507(d)). Eric Wang, Center for Competitive Politics, Supplemental Comments on IRS NPRM, REG-134417-13 at 1 (Jan. 23, 2014) ("CCP Comment II").

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the IRS has written a rule rife with vague and overbroad terms. Constitutionally-questionable provisions aside, the NPRM also improperly rewrites and rearranges the statutory framework carefully considered and adopted by Congress.

I. The Federal Election Commission's existing regulatory and reporting framework provide the appropriate system for classifying political activity.

Throughout the NPRM, the Service seeks to avoid the fact-specific analysis that plagues its existing "facts and circumstances" test. *See, e.g.*, IRS Rev. Rul. 2004-6, 2004-4 I.R.B. 328, 330; IRS Rev. Rul. 2007-41, 2007-25 I.R.B. 1421. Indeed, the Service recognizes that "more definitive rules with respect to political activities related to candidates—rather than the existing, fact-intensive analysis—would be helpful in applying the rules regarding qualification for tax-exempt status under section 501(c)(4)." NPRM, 78 Fed. Reg. at 71536.

Fortunately, there is already an agency expert in defining the contours of regulable political activity. It is the Federal Election Commission, not the Internal Revenue Service.

Giving the Commission "exclusive jurisdiction of civil enforcement" of the Federal Election Campaign Act and its amendments, Congress created the FEC to administer, enforce, and formulate policy regarding federal elections, including disclosure of political activity. 2 USC § 437c(b)(1). Consistent with this mandate, the FEC has drafted regulations and provided guidance on regulating political activity for the past forty years. During that time, the FEC has regulated both political committees—organizations having the major purpose of supporting or opposing candidates—and also the activities of groups such as § 501(c)(4) and other advocacy nonprofit organizations. Even though such groups are not political committees under FECA, the FEC nonetheless regulates their political activities and administers reporting requirements for their candidate advocacy.

Of course, direct contributions to or communications coordinated with candidates are political activity. But "independent expenditures" are spending (usually for communications) that support a candidate but are not "contributions" under FECA. This activity is most similar to the majority of the "political activity" the NPRM seeks to regulate.

The FEC already has jurisdiction over the political activity of advocacy nonprofits. *See, e.g.*, 2 U.S.C. § 431(17) (defining independent expenditures); 2 U.S.C. § 434(c) (requiring nonpolitical committees to file independent expenditure reports). Pursuant to its authority to promulgate regulations, the FEC established

rules defining "independent expenditures." 11 C.F.R. § 100.16.[2] The FEC also governs the reporting requirements of organizations without the major purpose of candidate political activity—such as § 501(c)(4) organizations and other advocacy groups. 11 C.F.R. § 109.10 (independent expenditure reports for nonpolitical committees); *see also* 11 C.F.R. § 104.4 (describing forms for disclosure and reporting). Furthermore, the FEC participated in much of the campaign finance litigation over the last forty years—especially the major Supreme Court cases. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976); *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986); *McConnell v. FEC*, 540 U.S. 93 (2003); *FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007) ("*WRTL II*"); and *Citizens United v. FEC*, 558 U.S. 310 (2010).

Given its expertise in the area of independent political activity, which stems in part from forty years of interpreting and implementing the constitutional decisions of the Supreme Court in the area of speech regulation,[3] the FEC's rules and guidelines provide the IRS with clear guidance, and obviate the need for the IRS's facts and circumstances test. Likewise, the NPRM's proposed rule is simply an attempt by the IRS to recreate similar doctrines from whole cloth without the benefit of relevant experience. Consequently, the Service should seek to simply incorporate the FEC's existing rules into its tax regulations.[4]

Thus, to give one example, if an organization is already required to file an independent expenditure report with the FEC,[5] the activity reported thereon would be an exempt function under IRC § 527(e)(2) and, consequently, non-exempt activity if conducted by a § 501(c)(4) organization. Capitalizing upon the overlap between what the FEC already regulates and what the Service seeks information about will ease the burdens upon both advocacy nonprofits and the government alike. Such congruence has the added benefit of helping to fulfill Congress's mandate that "the [Federal Election] Commission and the Internal Revenue Service shall consult and work together to promulgate rules, regulations, and forms which are mutually consistent." 2 U.S.C. § 438(f).

The NPRM provides no such consistency.

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[2] The courts have examined such "independent expenditures" already. *See, e.g.*, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc).

[3] There have been a number of such decisions, as well as many challenges in the lower courts. Indeed, the FEC has defended the bulk of First Amendment challenges to federal regulation of independent political speech. If the NPRM, or something similar, is adopted, the Service can reasonably expect to be the defendant in future litigation of this type.

[4] Likewise, many states have adopted a similar policy of piggybacking off of the FEC. For example, some states exempt multiple filings of reports and instead rely on FEC filings to satisfy state disclosure requirements. *See, e.g.*, COLO. REV. STAT. § 1-45-108(3.5) (2013). The resulting decreased confusion and increased efficiency likely furthers the transparency intended by disclosure requirements.

[5] Or report analogous activity to a state agency. *See* CCP Comment I at 13.

II. The "close in time" public communication provision is not comparable to the federal electioneering communication statute.

The NPRM states that the Service has "draw[n] from provisions of federal election campaign laws that treat certain communications that are close in time to an election and that refer to a clearly identified candidate as electioneering communications, but make certain modifications." NPRM, 78 Fed. Reg. at 71539. While this description indicates that such "close in time" communications will be similar in scope to federal electioneering communications, this is not the case.

Admittedly, the two definitions are superficially similar. Both regulate activity clearly identifying a candidate that takes place 60 days before a general election or 30 days before a primary election. As the NPRM itself notes, "[t]hese timeframes are the same as those appearing in the Federal Election Campaign Act." *Id.* But the similarity ends there.

To take but one general and glaring example, the lack of a "news story" or "commentary" exemption is particularly troubling. Some news outlets are projects of § 501(c)(4) organizations—such as the *Washington Free Beacon*, an online newspaper administered by the Center for American Freedom[6] or *Think Progress*, a widely read blog that is a project of the Center for American Progress Action Fund.[7] Implementing the proposed rules contained in the NPRM—both in the time close to an election and more generally—would force the organization and the IRS to comb through every story of that outlet and calculate what is and what is not candidate related political activity—a challenging task, and no doubt a reason why the news story/commentary exemption has been kept in place by the Federal Election Commission for decades. This omission further demonstrates the superficial understanding of existing FEC rules found throughout the NPRM, and the inadvisability of IRS regulation in the area of political speech.

a. Scope of how communications are delivered

- A "close in time" communication is "any communication by whatever means" in news media, paid advertising, on "an Internet Web site," "broadcast, cable, or satellite," or otherwise intended to reach over 500 persons.

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[6] "About Us," WASHINGTON FREE BEACON (last accessed Feb. 11 2014), *available at* http://freebeacon.com/about/.

[7] "About ThinkProgress," THINKPROGRESS (last accessed February 19, 2014), *available at* http://thinkprogress.org/about; "About the Center for American Progress Action Fund" (last accessed February 19, 2014), *available at* http://www.americanprogressaction.org/about/capaf-mission/.

- The federal electioneering communication statute only covers "broadcast, cable, or satellite communication[s]" targeted to the relevant electorate, which is defined as actually reaching at least 50,000 voters in the relevant electorate. 11 C.F.R. § 100.29(b)(3)(5). That is, an advertisement is not an electioneering communication unless it can feasibly be received by 50,000 people in a congressional district (for a House candidate) or the entire state (for a Senate candidate).

Thus, the NPRM ignores the narrow specificity of the federal statute. By bringing in activities related to the Internet or merely supposed to reach over 500 persons, the NPRM offers a very shallow safe harbor for communications.

Additionally, the Federal Communications Commission has, as required by statute, 2 U.S.C. § 434(f)(3)(C), provided the metric for determining the feasibility of a communication being received by the requisite 50,000 persons. *See* 11 C.F.R. § 100.29(b)(7). The FCC provides this information through the agency's Electioneering Communications Database website.[8] No such metric exists for determining if a communication reaches 500 persons, let alone if it is merely "intended" to reach 500 persons.

The NPRM turns the existing, straightforward rule upside down. Instead, the proposed rules regulate speech that is "intended" to reach or "reaches" 500 persons or more. The much lower threshold, "intent," is not defined. If a video is posted on YouTube, for instance, it can receive (theoretically) millions of views, creating questions about the intent of the communicant even if the organization never intended the video to be shared by more than a few dozen people. The obvious end result is that, if the proposed rule were to take effect, the IRS, with no expertise in the field, will search for a test—likely, we suspect, one that will ultimately be a complex, indeterminate "facts and circumstances" test—to determine if the communication is covered. This is not progress in the quest for clarity, and it is not based upon the standards included in the Federal Election Campaign Act.

b. Scope of candidates covered

Perhaps the widest gap between the federal electioneering communication statute and the "close in time" communication provision rests in the breadth of "candidates" covered.

- The federal electioneering communication statute only covers candidates for federal office: President, Vice President, the Senate, the House, and Delegate or Resident Commissioner to the Congress. 2 U.S.C. §431(3).

[8] http://apps.fcc.gov/ecd/.

- Further, the federal law does not consider a person a candidate for office until after that individual, or somebody acting on that person's behalf, has spent or received $5,000 toward the candidate's election. 2 U.S.C. § 431(2).

The electioneering communication statute went to great pains to cabin the number of people who could be captured in such a communication. At bottom, a candidate had to be actively seeking federal office. But this is not the case in the NPRM.

The definition of "candidate" goes well beyond any common understanding of the word. Instead, virtually anyone who is proposed, which may include a mere mention in the media or blog, as suitable for virtually any position in government, party or political committee becomes a "candidate." Under the rule, the list of offices that appear to be covered is practically limitless. Whether an individual is running for a local party central committee seat or is mentioned by the judicial press as merely a potential nominee for a state supreme court or federal district court appointment—the rule appears to sweep in all speech about such "candidates." Worse, the rule is unprecedented in scope. It would define communications as political if they relate to offices where there is no election of any kind or even any requirement that the potential "candidate" be subject to even a legislative confirmation vote.

The lack of an expenditure/contribution trigger coupled with the expansive definition of "candidate" greatly expands the "close in time" provision. Under the federal law, candidates become candidates after at least $5,000 has been accepted or expended by a candidate or an authorized committee. 2 U.S.C. § 431(2). This provides a bright-line, objective trigger that is entirely within the control of the candidate. But the NPRM carries no such monetary trigger. The opportunities for gamesmanship—especially if the Service decides to go forward and issue further rules regulating "public communications identifying a candidate for a state or federal appointive office that are made within a specified number of days before a scheduled appointment, confirmation hearing or vote, or other selection event"—are obvious. NPRM, 78 Fed. Reg. at 71539.

c. *McConnell* would not protect this definition.

Presumably, the Service chose to adapt the federal electioneering communications statute because that provision has already withstood a facial constitutional challenge. *McConnell v. FEC*, 540 U.S. 93, 194 (2003). However, in that case the Court explicitly upheld the federal statute because of its precision. *McConnell* operates against the background rule of *Buckley v. Valeo* that only communications that include "express advocacy of election or defeat" may be subjected to the full array of political regulation, including compulsory disclosure. Broad, sweeping disclosure could not be dictated for organizations that did not have

a primary purpose of electing candidates to office. In *McConnell,* the Court upheld the electioneering communication provisions because, as with *Buckley's* definition of "express advocacy," "the components of [the electioneering communication definition were]...both easily understood and objectively determinable." *Id.* This is simply not the case here, thereby exposing the rule to constitutional challenge.

The scope of the "close in time" rules will cause other absurdities, which are discussed further *infra.*

III. Even when properly understood and circumscribed, the federal electioneering communication definition may not be considered political activity within the meaning of the IRC.

Proposed 26 C.F.R. 1.501(c)(4)-1(a)(2)(iii)(A)(3) attempts to define any electioneering communication as "candidate-related political activity" ("CRPA"). NPRM, 78 Fed. Reg. at 71541 ("any communication the expenditures for which are reported to the Federal Election Commission, including...electioneering communications").

This proposal violates the clear intention of Congress, which specifically stated that the electioneering communication definition ought not to be applied to the IRC:

> Nothing in this subsection [on electioneering communications] may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of the Internal Revenue Code...

2 U.S.C. § 434(f)(7). Congress understood and intended for electioneering communication regulation to be separate from internal revenue regulation. The NPRM ignores this clear statutory language.

Additionally, no temporal window is appropriate for limiting issue speech; it is issue speech regardless of when it is conducted. Any attempt to define as political activity a communication that mentions the name of a candidate within a certain number of days prior to an election, when that communication is clearly a discussion of issues, is contrary to the law, contrary to Supreme Court precedent and inherently inappropriate.

As we discussed extensively in our first comment, the *Buckley* Court carefully read the campaign finance laws to avoid sweeping in issue speech with regulation of candidate speech. CCP Comment I at 8-11 (discussing *Buckley v. Valeo,* 424 U.S. 1

(1976)). In the United States, our leaders are elected and their actions on policy issues necessitate mentioning these officeholders. This is why "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley*, 424 U.S. at 42.

When Congress passed the law providing for reporting of electioneering communications, it banned corporations from conducting such communications. *See* 2 U.S.C. § 441b(b)(2). That ban was later ruled unconstitutional in *FEC v. Wisc. Right to Life*, 551 U.S. 449, 481 (2007) ("*WRTL II*"). However *the same law* allowed certain qualified nonprofit § 501(c)(4) organizations to conduct electioneering communications. 2 U.S.C. § 441b(c)(2); *see also, generally,* 11 C.F.R. § 114.10; Electioneering Communications, Federal Election Commission 67 Fed. Reg. 65190, 65204 (Oct. 23, 2002) (discussing legislative history). When passing that law, Congress could have stated that such qualified nonprofit § 501(c)(4) groups would have to treat electioneering communications as § 527 exempt functions. It chose not to do so, and instead specifically directed that the definition not be used to define political activity "for purposes of the Internal Revenue Code." The year before considering the law that created electioneering communications, Congress substantially modified IRC § 527, but again, Congress did not define broadcast communications, or define communications based on their proximity to an election, as a § 527 exempt function. *Compare*, Pub. L. 106-230; 114 Stat. 477 (2000) (amending IRC § 527 to require disclosure) *with* BCRA, Pub. L. 107-155 §201(a); 116 Stat. 81, 89 (2002) (codified at 2 U.S.C. § 434(f)(3)) (defining electioneering communications). This inaction, combined with Congress's explicit command that electioneering communications *not* be used by the IRS, should be dispositive. Yet the NPRM offers no suggestion that the Service is even aware of this statutory history.

IV. The proposed rule's treatment of express advocacy is also incompatible with existing federal law and will cause enormous confusion concerning its reach.

While the federal regulations regarding express advocacy are not always easy to implement, they are straightforward. *See* AO 2012-11 (Free Speech); 11 C.F.R. § 100.22. Only "unmistakable, unambiguous" communications advocating for federal candidates constitute express advocacy. 11 C.F.R. § 100.22(b). The express advocacy rules that the Service has "draw[n] from [the] Federal Election Commission rules" go much further than any existing FEC guidance has countenanced. NPRM, 78 Fed. Reg. at 71539.

For example, express advocacy is tied in the federal rules to monetary triggers. As mentioned *supra*, a candidate is deemed a candidate once a specific

amount of money has been spent toward her election to specific federal office. There is no such trigger here.

Further, groups that are not PACs need not report their independent expenditures unless the cost of those expenditures exceeds "$250 with respect to a given election in a calendar year." 11 C.F.R. § 109.10(b). Again, there is no such trigger here.

Moreover, there are a significant number of "safe" expenditures that may be made under the federal rules. A few examples:

- News stories and commentary are explicitly protected. 2 U.S.C. § 431(9)(B)(i).
- "Nonpartisan activity designed to encourage individuals to vote or to register to vote." 2 U.S.C. § 431(9)(B)(ii).
- Certain communications by membership organizations and certain corporations "to its members, stockholders, or executive or administrative personnel." 2 U.S.C. § 431(9)(B)(iii).

Nowhere does the NPRM indicate any of these safe harbors would exist for entities engaging in such activities. The lack of a "news story" or "commentary" exemption has already been mentioned in the context of close-in-time communications. But the need to comb through every story of a § 501(c)(4) news outlet and calculate what is and what is not express advocacy remains burdensome and, likely, arbitrary.

Indeed, this substantial expansion of the scope of "express advocacy" to include all commentary appears intentional. The NPRM notes that while the "proposed regulations draw from Federal Election Commission rules in defining 'expressly advocate,'" they also

> expand the concept to include communications *expressing a view* on the selection, nomination, or appointment of individuals, or on the election or defeat of one or more candidates or of candidates of a political party. These proposed regulations make clear that *all communications*—including written, printed, electronic (including Internet), video, and oral communications—that express a view, whether for or against, on a clearly identified candidate (or on candidates of a political party) would constitute candidate-related political activity.

NPRM, 78 Fed. Reg. at 71538 (emphasis supplied).[9] That *any* communication that *expresses a view* might be considered similar to express advocacy shows a grave misunderstanding of the term. Indeed, it defines the word "express" out of existence, and uses the term "advocacy" in an unusually loose sense.

This broad understanding would also create needless confusion and ambiguity. It would generally, of course, also subject all 501(c)(4) organizations to two sets of rules, one to comply with the FECA, and one to maintain (c)(4) exempt status. This complicates rather than clarifies the law and the legal obligations of regulated parties, and illustrates why Congress imbued the FEC with "exclusive jurisdiction" over civil enforcement of political regulation. It is also contrary to Congress's directive that "the [Federal Election] Commission and the Internal Revenue Service shall consult and work together to promulgate rules, regulations, and forms which are mutually consistent." 2 U.S.C. §438(f).

The scope of the express advocacy rules will cause other absurdities, particularly related to the breadth of communications covered, which are discussed further *infra*.

V. The NPRM suffers from severe vagueness and overbreadth—chilling the speech of advocacy nonprofits and significantly burdening the right to free association.

The NPRM asserts that "[t]he Treasury Department and the IRS recognize that both the public and the IRS would benefit from clearer definitions" of political campaign intervention, as well as "'[t]he distinction between campaign intervention and social welfare activity, and the measurement of the organization's social welfare activities relative to its total activities." NPRM, 78 Fed. Reg. at 71536. As we have noted in previous comments, CCP appreciates that the IRS and Treasury have recognized this problem. But for all the underlying hope that the NPRM's draft rule will provide precise guidance to the regulated community, it in fact falls far short of the mark.

At its foundation, the NPRM conflates the role of the leadership of our Republic. Our president, senators, and representatives are elected, and are therefore candidates for office from time to time. But once in office, our representatives and executive officers make policy, and so talking about *policy*

[9] This explanation also appears to conflict with the text of the proposed rule itself. The rule appears to restrict "expressing a view ... on ... candidates" to a communication "that ... Contains words that expressly advocate" or "is susceptible of no reasonable interpretation other than a call for or against" candidates. Enormous confusion will result from these three definitions: the text of the rule, the explanation for the rule, and the FEC's regulation at 11 C.F.R. § 100.22. This does not serve the IRS's stated goal of providing "both the public and the IRS ... clearer definitions of these concepts."

inevitably leads to mention of the leaders engaged in policymaking. In *Buckley*, the Supreme Court noted this difficulty: "the distinction between discussion of issues and candidates may often dissolve in practical application...Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." *Buckley*, 424 U.S. at 42.

These distinctions are vital, because lobbying about issues of public policy often requires a discussion or mention of the policymaker. In the context of advocacy nonprofits—chief among them § 501(c)(4) organizations—grassroots lobbying involves telling others to contact, or directly contacting, these policymakers. Even discussing relevant legislation involves mentioning the leader—a group may mention "President Obama's Job Creation Plan" or the "King-Altmire gun bill" as part of their efforts to advocate for the homeless or seek gun control reform. *See* CCP Comment I at 6.

Certain elements of the NPRM's proposed rule blur this distinction by being either vague, overbroad, or both in defining and regulating "candidate-related political activity" ("CRPA"). In so doing, the NPRM functionally rearranges the statutory scheme set up by Congress and eliminates § 501(c)(4) as a viable form of organization for advocacy in the public interest. The IRS may not do so by mere regulation. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-843 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, *as well as the agency*, must give effect to the unambiguously expressed intent of Congress") (emphasis added).

a. The NPRM uses vague terms and definitions, making it difficult for covered organizations to know whether or not they may speak, and how to value that speech if they do.

As proposed, the new rule would "trap the innocent by not providing fair warning...foster arbitrary and discriminatory application...[and] also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone...than if the boundaries of the forbidden areas were clearly marked." *Buckley v. Valeo*, 424 U.S. at 41 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (quotations omitted)).

The proposed rule attempts to resolve the vagueness of the "facts and circumstances" test—which is undisputedly problematic—with a new measure that would functionally serve to regulate many § 501(c)(4) organizations out of existence. The IRS may not invalidate a part of the IRC, duly enacted legislation, by administrative rule.

i. A real world example

Under the NPRM, "any public communication that is made within 60 days of a general election and clearly identifies a candidate for public office...would be considered candidate-related political activity." NPRM, 78 Fed. Reg. 71539. A candidate is considered "an individual...proposed by another for selection, nomination, election, or appointment to any public office...whether or not the individual is ultimately selected, nominated, elected, or appointed." *Id.* at 71538. A "public communication" includes Internet and broadcast communications. *Id.* at 71539. The NPRM "make[s] clear that *all* communications—including written, printed, electronic (including Internet), video, and oral communications—that express a view, whether for or against, on a clearly identified candidate (or on candidates of a political party) would constitute candidate-related political activity." *Id.* at 71538 (emphasis supplied).

On September 7, 2012, in her capacity as president of NARAL Pro-Choice America, a § 501(c)(4) organization, Nancy Keenan went on *The Rachel Maddow Show* on MSNBC to discuss Mitt Romney's position on abortion.[10] A copy of the interview was uploaded on NARAL's YouTube channel on September 12, 2012.[11]

At this juncture, the proposed rule already poses significant questions:

- NARAL Pro-Choice America posted this video on its YouTube channel. Does an organization's YouTube, Twitter, or Facebook page qualify as its "Web site"?
- If not, if NARAL merely posted a link to the YouTube page on its Web site, would that qualify as the organization's "Web site"?

But the significant questions do not end there. Throughout the segment, Keenan made favorable comments about President Barack Obama and the Democratic Party. Keenan claimed that people "cannot trust Mitt Romney" and that if Romney were elected President, he "could have...[an] opportunity" to functionally overturn *Roe v. Wade* through his appointment of Supreme Court justices. She also stated several times that women would play a vital role for President Obama in 2012. Finally, in response to whether she "fe[lt] like the articulation of the issues around the federal election, the presidential election, may have effects in the states," Keenan answered affirmatively.

The NPRM is unclear as to whether or not Ms. Keenan's comments, and NARAL's decision to post the message on the Internet right before the election,

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[10] Transcript *available at:* http://www.nbcnews.com/id/48972378/ns/msnbc-rachel_maddow_show/#.UvjfXT07uSo.

[11] *Available at:* https://www.youtube.com/watch?v=n9gWFgtbYOw.

constitute a "public communication." And if this segment does not qualify as a "public communication," the NPRM indicates that it could possibly qualify as an "express advocacy communication."

Ms. Keenan was unquestionably representing NARAL Pro-Choice America, as she was an "officer" of that organization when she was interviewed. NPRM, 78 Fed. Reg. 71540. Her discussion about Governor Romney's abortion position is certainly an oral communication—may it be counted against the organization as a "broadcast communication" as well?

- At the beginning of the segment, before Nancy Keenan begins speaking, a clip of her speech to the Democratic convention is played in which she states "I am proud to say that the Democratic Party believes that women have the right to choose a safe, legal abortion with dignity and with privacy." Does this convert the rest of the segment into CRPA, by framing the discussion around the Democratic position on abortion?
- At another point in the segment, Ms. Maddow discusses the strategic value of Ms. Keenan's primetime address at the convention. Keenan responds by discussing the effects of Republican victories in 2010, the issue of birth control, and that the "consciousness of people in this country" believed that the *status quo* on abortion was "at risk." Is this CRPA?
- Is it CRPA when Ms. Keenan states that "we understand the role that women are going to play in this election for Barack Obama?"
- Moreover, is discussion of the President's constitutional role in appointing U.S. Supreme Court justices constitute CRPA in this context?
- What about the effect of responding affirmatively that discussion of abortion and birth control on a national level will have effects in down-ballot races?

And even after determining the status of this YouTube posting, the Service would still have to determine precisely *how much* CRPA it constituted—a mind-boggling endeavor, to be sure, and certainly no easier or less fact-intensive an inquiry than the old facts and circumstances test.

The Proposed Rule's expansive understanding of a candidate also poses a problem for § 501(c)(4) organizations that wish to weigh in on executive or judicial appointments. After the President nominated Sonia Sotomayor to replace former-Justice David Souter, Nancy Keenan released a statement praising then-Judge Sotomayor's "distinguished record...impressive personal biography" and that NARAL Pro-Choice America was "encouraged by the strong support she receives from her peers and other legal scholars and the fact that the Senate has twice

confirmed her for federal judgeships." But the statement also stated that NARAL "look[ed] forward to learning more about Judge Sotomayor's views on the right to privacy and the landmark *Roe v. Wade* decision." The statement was posted, among other places, on the Web site NARAL Pro-Choice California (also a 501(c)(4) organization). *See* "About Us," NARAL Pro-Choice California (last accessed Feb. 11, 2014).[12]

- Is Ms. Keenan's statement express advocacy?
- Would it have been express advocacy if the more hesitant language regarding then-Judge Sotomayor's views on *Roe* and privacy had been excised?
- If so, whose express advocacy is it? NARAL Pro-Choice America's because Ms. Keenan spoke the words? NARAL Pro-Choice California's for posting it on the Web site? Both? In what combination? And how will its value be calculated and attributed?

ii. Specific vagueness concerns

1. Proposed Candidate

Under the proposed rule, a candidate is considered "an individual...proposed by another for selection, nomination, election, or appointment to any public office...whether or not the individual is ultimately selected, nominated, elected, or appointed." NPRM, 78 Fed. Reg. at 71538. On April 1, 2012, Van Jones, a senior fellow for the Center for American Progress, suggested that if Mitt Romney, then the presumptive Republican Presidential nominee, chose former Secretary of State Condoleezza Rice for the Vice Presidential nomination it would get "the tea party base excited" and make "the Obama campaign go crazy." *This Week*, ABC NEWS Apr. 1, 2012.[13] Although there is no real evidence that Ms. Rice was seriously considered by the Romney campaign, would Mr. Jones's comments have converted Ms. Rice into a "proposed candidate"?

Idle "Veepstakes" speculation is a regular part of Presidential election years. In 1992, the *McLaughlin Group* aired a segment discussing the pros and cons of several potential Vice Presidential choices, such as then-Senator Harris Wofford and then-Senator Jay Rockefeller. "McLaughlin Group 'Picks' (D) VP – 1992" YouTube Spring 1992. (last accessed Feb. 5, 2014).[14] The *McLaughlin* segment omitted one crucial name: the future 45th Vice President of the United States, Al Gore.

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[12] *Available at* http://www.prochoicecalifornia.org/about-us/.

[13] Transcript *available at* http://abcnews.go.com/Politics/week-transcript-rep-paul-ryan-rep-chris-van/story?id=16040853&singlePage=true.

[14] *Available at* https://www.youtube.com/watch?v=WjCuS2XDaOI.

It's also unclear how far back in time one has to go to become a "proposed candidate." On August 28, 2013, Scott Conroy of *RealClearPolitics* published an article suggesting that—if Hillary Clinton were to become the Democratic nominee—the mayor of San Antonio, Julian Castro, might be an excellent choice for Vice President. Scott Conroy, "Vice President Julian Castro?" REAL CLEAR POLITICS. Aug. 28, 2013.[15] Is it now impossible for a 501(c)(4) group to run advertisements within 30 days of any election that happens to mention the name of the mayor of San Antonio? What if Mayor Castro himself decides in early 2016 to appear in a 501(c)(4)'s nationwide advertising campaign about any issue at all? Is that communication now CRPA?

2. Clearly Identified Candidate

The NPRM's proposed definition of a clearly identified candidate poses significant problems for determining whether a communication constitutes CRPA under the rule. "A candidate can be 'clearly identified' in a communication by...a reference to a particular issue or characteristic distinguishing the candidate from others." NPRM, 78 Fed. Reg. at 71538.

By 2012, the Patient Protection and Affordable Care Act and its implementing regulations became widely referred to as "Obamacare." It is unclear under the rule whether or not a communication discussing "Obamacare" would have been considered express advocacy.[16] This is not a trivial question—the FEC had difficulty reaching consensus on this very question in 2012. AO 2012-11 (Free Speech). And given the scope of the proposed rule—reaching into local and state elections, where many § 501(c)(4) groups often took positions on the health exchanges or contraception mandates stemming from Obamacare—the vagueness of this definition has significant potential to chill free discussion.

BCRA—the Bipartisan Campaign Reform Act—is often referred to colloquially as "McCain-Feingold." During years when Senator McCain is a candidate for public office, or proposed as a candidate for public office, would the rule convert all discussion of that law (by that name) into candidate-related political activity? Capitol Hill's naming convention for legislation with bipartisan support renders the scope of this question extremely broad. Indeed, the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013—sometimes referred to as "Schumer-Rubio"—provides another example, as it is far from hypothetical that Senators Marco Rubio and Chuck Schumer will again seek office in 2016.

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[15] *Available at* http://www.realclearpolitics.com/articles/2013/08/28/vice_president_julian_castro_119737.html.

[16] While the President is not constitutionally eligible for reelection, it stands to reason that future campaigns will feature the equivalents of "Obamacare" or "the Bush Tax Cuts."

And if the identification of a candidate in the context of express advocacy poses these critical difficulties, the problem will be still more acute in other areas, such as the close-in-time communications discussed *supra*.

3. Political Organization

Under the proposed rule, someone who seeks leadership in a "political organization" can also qualify as a candidate. The impact of this definition on the law is far from clear. Does this cover discussion of the appointment of the heads of political parties, of delegates to a national convention? Given the rule's scope—deep into localities—this vagueness could pose significant problems. Suppose that a § 501 (c)(4) organization posts a message on its website laudatory of an employee who happens to be aspiring to become the chairman of the local Young Democrats—has the § 501(c)(4) engaged in CRPA?

4. Volunteer Activities

The proposed rule does not explicitly define who a "volunteer" for an organization is, or what "acting under the organization's direction or supervision" consists of. If an individual emails a § 501(c)(4) organization asking for leaflets related to the death penalty, receives the leaflets from an officer of the organization with vague instructions on distribution, then distributes these leaflets door-to-door and advocates against an anti-death penalty candidate for state senate, has that organization conducted CRPA? Does the Service intend to review the training materials each § 501(c)(4) organization uses for volunteers as part of its analysis? How is that a superior approach to the current "facts and circumstances" test? And how would an organization or the Service value the time of a volunteer?

5. Hosting an Event

Under the proposed rule, "an organization that hosts an event on its premises or conducts an event off-site within 30 days of a primary election or 60 days of a general election at which one or more candidates in such election appear as part of a program (whether or not such appearance was previously scheduled) would be engaged in candidate-related political activity under the proposed definition." NPRM, 78 Fed. Reg. at 71540.

It is unclear what "hosting" or "conducting" an event is, under this definition. If a corporation helps sponsor an event, even at a *de minimis* level—such as by buying tickets for two officers of an organization to attend—has it engaged in CRPA? What if an organization co-sponsors an event, sends no personnel to the event, and a candidate unexpectedly joins the event?

Or, given the expansive definition of "candidate," what if a speaker who is not a candidate is suddenly proposed—however such a proposal might occur—as a candidate the day before? To revisit the Van Jones/Condoleezza Rice example, when Mr. Jones suggested Ms. Rice as a possible VP choice for Mr. Romney during the Republican primaries, would a § 501 (c)(4) hosting Ms. Rice to speak that night about her 2011 book *No Higher Honor: A Memoir of My Years in Washington*, suddenly be engaging in CRPA unless they canceled the event, or postponed it?

And postponed the event until when? After Mr. Romney selected Representative Paul Ryan as his Vice Presidential nominee on August 11, 2012? After their formal nomination at the Republican National Convention on August 30, 2012? After Election Day, November 6, 2012? After the Electoral College cast its votes on December 18, 2012? After the Senate certified the results of the Electoral College balloting on January 6, 2013?

b. The NPRM is overbroad—to the point of regulating many § 501(c)(4) organizations and many of their activities out of existence.

The NPRM's proposed definitions for regulating the new category of "candidate-related political activity" are overbroad. In defining regulable activity so broadly, the NPRM regulates many § 501(c)(4) organizations, and many of their common activities, out of existence. Doing so improperly invalidates existing statutes and consequently ignores the commands of Congress.

The IRS even identified the problem within the NPRM, noting, "[t]he Treasury Department and the IRS acknowledge that the approach taken in these proposed regulations, while clearer, may be both more restrictive and more permissive than the current approach." NPRM, 78 Fed. Reg. at 71538. CCP urges the IRS to pause and consider the serious problems this overbreadth presents.

i. The NPRM regulates a broad range of communications.

1. "Candidate" covers millions of people

Under proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2(iii)(B)(1), a "candidate" is

> [A]n individual who publicly offers himself, or is proposed by another, for selection, nomination, election, or appointment to any federal, state, or local public office or office in a political organization, or to be a Presidential or Vice-Presidential elector, whether or not such individual is ultimately selected, nominated, elected, or appointed.

NPRM, 78 Fed. Reg. at 71541. The IRS acknowledges that this definition departs from historic precedent—even covering "executive branch officials and judicial nominees." *Id.* at 71538.

But in our Republic, not every leader is a candidate—there is no popular vote for Assistant Secretary of the Navy or for Secretary of Health and Human Services. There is no way to corrupt, via campaign contributions, the Commissioner of Internal Revenue. Yet such executive branch officials make very real policy—from setting standards for the acquisition for the next generation of naval ships to how to implement the Affordable Care Act to how to regulate nonprofit entities. It stands to reason that their names may come up in discussing such issues or lobbying for a particular cause. But they are not "candidates" in any common usage and insulated from the electoral pressures politicians face.

But, does this include non-senate-confirmed civil servants as well? They are, after all, "selected" for their job. The proposed rule has no facial limit to how far down the federal or state organizational chart an employee may be to be covered as a "candidate." The federal civilian workforce includes just under 2 million people. OFFICE OF PERSONNEL MANAGEMENT, SIZING UP THE EXECUTIVE BRANCH OF THE FEDERAL WORKFORCE 4 (Jan. 2013).[17] Under the NPRM, "candidate" includes millions of federal workers.

This limitless definition poses further complications beyond the appointments of correspondence analysts and assistant United States attorneys. Would the President's appointment of the Commander of the U.S. Pacific Fleet be covered under the NPRM?

Indeed, what about the President's appointments of U.S. ambassadors with the advice and consent of the Senate? U.S. CONST. art. II, § 2. President Obama recently nominated Senator Max Baucus to be the U.S. ambassador to China. Would all criticism or praise of Mr. Baucus's multidecade career in the Senate chamber suddenly be at risk of being transmuted into CRPA, even if it was about the Montanan's record on agricultural subsidies or tort reform?

Likewise, federal judges are specifically insulated from popular pressure by Article III of the Constitution. The whole purpose of lifetime appointment (more specifically, during "good behavior"), is that judges are to be free from worry about reelection, reappointment, removal, or similar political pressure. Indeed, the American Bar Association ("ABA") Model Code of Judicial Conduct Canon 4 specifically assumes that most judges are never candidates. *See* ABA Model C. of

[17] *Available at* http://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/sizinguptheexecutivebranch.pdf.

Jud. Conduct Rule 4.1.[18] But the nomination process is a vital issue for many, including the ABA itself. The ABA rates judicial nominees as a service to help the Senate in advising and consenting to the president's choices.[19] The NPRM suggests that this service is CRPA.

2. In-person communications

Taken together, the definitions of "communication" and "public communication" cover a staggeringly wide range of activity. The NPRM defines "communication" as "any communication by whatever means, including written, printed, electronic (including Internet), video, or oral communications." NPRM, 78 Fed. Reg. at 71541 (proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(B)(3)). Likewise, "public communication" is anything that "reaches, or is intended to reach, more than 500 persons." *Id.* ((proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(B)(5)(v)).

This limit on *oral* communication—once thought to be absurd in campaign finance regulation—puts every speech, rally, or event in jeopardy. Most of the theaters in the Kennedy Center hold more than 500 seats. *See*, "Kennedy Center Seating Charts" *The Kennedy Center*. Web. Jan. 30, 2014.[20] Even a college group may reach more than 500 people on campus on any given day by sitting on the campus's central square or quad. Every rally on the National Mall, every speech in the local square, any place 500 or more may be gathered—the proposed regulation covers them all.

3. Mere mention of a candidate

Mere mention of a candidate triggers regulation under the NPRM. Under proposed §1.501(c)(4)-1(a)(2)(iii)(A)(2), candidate-related political activity takes place in the case of "any public communication...within 30 days of a primary election or 60 days of a general election that refers to one or more clearly identified candidates in that election or, in the case of a general election, refers to one or more political parties represented in that election." NPRM, 78 Fed. Reg. at 71541. Presumably, the IRS is aiming to regulate something similar to "electioneering communications," but the NRPM's proposed rule misses the mark. Regulation of communications is far more than the temporal component.

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[18] The ABA Model Rules also supply guidance for elected state and local judges. *See, e.g.* Rules 4.2 *et seq.* But the NPRM apparently covers federal judicial nominees as well.

[19] The ABA is a § 501(c)(6) organization. IRC § 501(c) works as a whole and the regulation of § 501(c)(4) will affect other § 501(c) organizations as well.

[20] *Available at* http://www.kennedy-center.org/tickets/seating.html.

Electioneering communications, created by BCRA § 201, are tightly defined to apply only to *broadcast* communications,[21] referring to clearly-identified candidate, made within 30 days of a primary or 60 days of a general election, targeted to the relevant electorate. 2 U.S.C. § 434(f)(3)(A). Furthermore, "targeted to the relevant electorate" only applies if the communication reaches 50,000 or more persons in the jurisdiction.[22] 2 U.S.C. § 434(f)(3)(C). The Supreme Court in *McConnell* approved of the electioneering communications sections of BCRA precisely because they were rigidly defined by these multiple factors. *McConnell*, 540 U.S. at 194.

ii. Volunteer hours

The NPRM proposes a definition of "contribution" that includes "anything of value." NPRM, 78 Fed. Reg. at 71541 (proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(A)(4)(iii)). The "anything of value" language is not unusual among existing federal and state campaign finance laws, but what is unusual is the NPRM's inclusion of volunteer time within this definition: "the Treasury Department and the IRS intend that the term 'anything of value' would include both in-kind donations and other support (for example, *volunteer hours* and free or discounted rentals of facilities or mailing lists)." NPRM, 78 Fed. Reg. at 71539 (emphasis added).

Volunteering is good for the community. We encourage our children to volunteer. More importantly, nonprofits rely heavily on volunteers to get much of their work done, including mobilizing their neighbors to advocate for cleaner air or better teaching standards. Yet the NPRM not only proposes to burden volunteering with the possibility that it could be CRPA but also has the attendant burdens on trying to qualify the value of volunteer's hours.[23]

This difficulty is obvious and predictable. Perhaps that is why the FEC has long exempted volunteer activities from its definitions of "contributions" and "expenditures."[24]

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[21] In contrast to the proposed rule's expansive definition of "communications" and "public communications" discussed *supra*.

[22] In contrast to the proposed rule's mere 500. NPRM, 78 Fed. Reg. at 71541 (proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(B)(5)(v)).

[23] Indeed, the Supreme Court has explicitly flagged the inclusion of volunteer efforts in calculation of campaign contributions as a danger sign of impermissible regulation of contributions. *Randall v. Sorrell*, 548 U.S. 230, 259 (2006) (Breyer, J., plurality opinion).

[24] *See* 11 C.F.R. §§ 100.74 and 116.6(a).

iii. Section 501(c)(3) organizations cannot engage in political activity. Yet the NPRM classifies activity § 501(c)(3) organizations have engaged in for decades—with the express blessing of the Internal Revenue Service—as explicitly candidate related if conducted by a § 501(c)(4).

Section 501(c)(3) organizations are explicitly banned from engaging in political activity. 26 U.S.C. §501(c)(3) (banning "participat[ion] in, or interven[tion] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office"). The NPRM's proposed paradigm presents many practical problems, chief among them the reclassification of a swath of activity that § 501(c)(3) organizations have engaged in for years, *with the explicit blessing of the IRC*, as regulable political activity if conducted by a § 501(c)(4) organization. *See, e.g.*, 26 U.S.C § 4911(d).

The NPRM defines CRPA to include "a voter registration drive or 'get-out-the-vote' drive" NPRM, 78 Fed. Reg. at 71541 (proposed 26 C.F.R. §1.501(c)(4)-1(a)(2)(iii)(A)(5)). But the Service found that such activity was explicitly not "political" if conducted in a nonpartisan way. *See* Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1422.

Likewise, the NPRM—in an abrupt shift—classifies voter guides, a mainstay of § 501(c)(3) educational activities—as CRPA. NPRM, 78 Fed. Reg. at 71541 (proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(A)(7) ("[p]reparation or distribution of a voter guide that refers to one or more clearly identified candidates or, in the case of a general election, to one or more political parties (including material accompanying the voter guide)"). Indeed, as early as 1978, the Service gave its explicit blessing to § 501(c)(3) organizations producing nonpartisan voter guides. Rev. Rul. 78-248 at 4-5 (1978) (discussing Organization B's voter guide); *see also* Rev. Rul. 80-282 (1980).

Moreover, even if candidate fora are conducted in the nonpartisan manner that § 501(c)(3) organizations have used for decades, under the NPRM candidate-related political activity takes place when "an organization that hosts an event on its premises or conducts an event off-site within 30 days of a primary election or 60 days of a general election at which one or more candidates in such election appear as part of the program (whether or not such appearance was previously scheduled)." NPRM, 78 Fed. Reg. at 71540; *cf id.* at 71541 (proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(A)(8)). Section 501(c)(3) organizations are permitted to hold such fora, as the Service recognizes both educational and charitable aspects of these events.[25]

[25] Indeed galas, dinners, and other events provide both the opportunity to educate the public about the organization's cause and a chance to advocate for policies consistent with the organization's mission. Such events are common philanthropic pursuits in the District of Columbia and around the country.

Rev. Rul. 86-95 (1986) ("The presentation of public forums or debates is a recognized method of educating the public") (citing Rev. Rul. 66-256). Likewise, if a § 501(c)(3) organization owns a broadcast station, it may provide air time to candidates. Rev. Rul. 74-574 (1974); *see also, e.g.*, 26 C.F.R. § 1.501(c)(3)-1(d)(3)(ii). Yet under the proposed rules, such activity explicitly cannot promote social welfare if carried out by an organization organized under § 501(c)(4) of the IRC.[26]

In sum, under the NPRM, activity that is explicitly acceptable for § 501(c)(3) organizations would be regulable political activity (which, according to the NPRM, under no circumstances furthers social welfare) when done by § 501(c)(4) organization. This is an absurd result given that *only* IRC § 501(c)(3) contains a ban on political activity, and such organizations have produced voter guides, held nonpartisan candidate fora, and participated in other activity the NPRM considers "political," and have done so with Congressional and IRS approval since the 1950s. *Compare* 26 U.S.C. § 501(c)(3) *with* 26 U.S.C. § 501(c)(4) *and* Rev. Rul. 81-95 1981-1 C.B. 332; *see also* CCP Comment I at 5-7.

The IRS acknowledged this inconsistency in the NPRM. NPRM, 78 Fed. Reg. at 71537 ("The proposed regulations do not address the definition of political campaign intervention under section 501(c)(3). The Treasury Department and the IRS recognize that, because such intervention is absolutely prohibited under section 501(c)(3), a more nuanced consideration of the totality of facts and circumstances may be appropriate in that context"). But IRC § 501 works as a unit, describing the range of nonprofit organizations and what they are permitted to do on the political activity spectrum. Upsetting this system—as deliberately framed by Congress—will have serious consequences. This is particularly so if such upset is effected with a single NPRM focused only on IRC § 501(c)(4).

Thus, the IRS asked for "comments on whether any modifications or exceptions would be needed in the section 501(c)(3) context...Any such change would be introduced in the form of proposed regulations to allow an additional opportunity for public comment." *Id.* The answer is yes. If the IRS seeks to upset the entire statutory framework, it will need more than this NPRM. Moreover, given the settled expectation that political activity prohibited in the § 501(c)(3) context is essentially identical to that regulated in the § 501(c)(4) context, the Service runs the risk of creating enormous confusion and casting much of its previous work over decades into question. It is not clear how doing so would assist with regulatory

[26] Likewise, the FEC has extensive regulations on exempting voter guides and other nonpartisan efforts. *See, e.g.*, 11 C.F.R. §§ 114.4 (voter guides), 100.233 (voter registration and get-out-the-vote activities exempted from "expenditures"), 100.89 (voter registration and get-out-the vote activities for Presidential candidates exempted from regulation as "contributions"), 100.149 (same activities exempted from regulation as "expenditures").

precision, assist the fair enforcement of the IRC and collection of the nation's revenue, or comply with Congress's intent.

iv. The NPRM leaves room for discretionary enforcement—the precise problem the IRS faces now.

Imprecise and overbroad drafting is also problematic in the context of the "safe harbor" proposed § 1.501(c)(4)-1(a)(2)(iii)(D)[27] creates. This provision ostensibly carves out an exception to the definition of political activity for contributions to § 501(c) organizations, where the recipient of such a contribution has represented to the donor that such funds will not be used for political activity. This carve-out will not apply, however, where the IRS finds that the contributing organization "[has] reason to know that the representation [that funds will not be used for political activity] is inaccurate or unreliable." NPRM, 78 Fed. Reg. at 71539.

This is an uncomfortably amorphous trigger for ousting a group from this safe harbor. How can one say with certainty whether there was "reason to know" that an ultimately unreliable representation was, in fact, unreliable? And what would the standard for "unreliability" even be—actual falsehood of the representation? Prior misrepresentations by the recipient organization? Something else? This nebulous threshold creates unwelcome incentives, particularly given the selective, even retaliatory, enforcement of tax law against charitable organizations witnessed recently. TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, No. 2013-10-053, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 5 (May 14, 2013); CCP Comment I at 12-13 (discussing possibility of selective enforcement).

The apparent ease with which an organization might find itself ousted from this safe harbor is compounded further by the breadth of activity encompassed in the new definition of political activity. Indeed, a § 501(c) organization may in good faith represent that they will not engage in political activity, but find itself (and a § 501(c)(4) organization which has contributed to it) mired in IRS enforcement actions because of vagueness and overbreadth explored elsewhere in this Comment.

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[27] This carve-out would provide that "a contribution to an organization described in section 501(c) will not be treated as a contribution to an organization engaged in candidate-related political activity if [t]he contributor organization obtains a written representation from an authorized officer of the recipient organization stating that the recipient organization does not engage in such activity (and the contributor organization does not know or have reason to know that the representation is inaccurate or unreliable); and [t]he contribution is subject to a written restriction that it not be used for candidate-related political activity within the meaning of this paragraph (a)(2)(iii)." NPRM, 78 Fed. Reg. at 71541.

v. Even absent these problems with the NPRM, the proposed framework eviscerates Congress's duly enacted statutory paradigm for regulating § 501(c)(4) organizations.

The IRC, particularly § 501, works as a holistic system. The NPRM's proposed changes damage that system by blurring the types of nonprofit organizations and introducing vague and overbroad terms to the regulatory scheme.

Different types of organizations have different roles under the IRC, and are therefore subject to different rules regarding the *types* of activity they may engage in. As detailed in CCP's first comment, Congress set up a specific framework: § 501(c)(3) organizations educate, § 501(c)(4) organizations lobby (which may include some political activity so long as it is not the primary purpose of the organization), and § 527 organizations do politics, with limited engagement in anything else. CCP Comment I at 8. Lobbying—both direct and grassroots—are what § 501(c)(4) organizations do. Their advocacy is the heart of promoting social welfare.

The Supreme Court agrees. In *Regan v. Taxation with Representation*, the Supreme Court held that "Congress is not required by the First Amendment to subsidize lobbying." 461 U.S. 540, 546 (1983). But beyond this notable holding, the case examined the differences between IRC §§ 501(c)(3), 501(c)(4) and 501(c)(19).

In that case, an organization had both § 501(c)(3) and a § 501(c)(4) components. *Id.* at 543. The § 501(c)(3) arm focused on public education and litigation. *Id.* The § 501(c)(4) arm forced on influencing legislation. *Id.* The organization sought to use tax-deductible § 501(c)(3) monies to fund the lobbying activity. *Id.* Since a substantial part of the latter's activities was influencing legislation, it thus fell outside the purview of § 501(c)(3). *Id.* at 542.

The Supreme Court examined the statutory scheme governing tax exempt organizations, and noted the key distinction between tax-deductible donations to a § 501(c)(3) and the non-deductible donations to a § 501(c)(4):

> For purposes of our analysis, there are two principal differences between § 501(c)(3) organizations and § 501(c)(4) organizations. Taxpayers who contribute to § 501(c)(3) organizations, are permitted by § 170(c)(2) to deduct the amount of their contributions on their federal income tax returns, while contributions to § 501(c)(4) organizations are not deductible.

Id. This distinction results in the other "principal difference" between these types of organizations: § 501(c)(4) organizations may lobby, while § 501(c)(3) organizations may conduct only very limited lobbying. *Id.* at 543. Thus, the Court examined how

the different subsections of IRC § 501(c) work together to form a holistic system for regulating activity.

It is the statutory scheme constructed by *Congress* that was upheld by the Court in *Regan*. It was the fact each § 501(c) organization plays a particular role in the body politic that made the system work. Indeed, while the Court approved of the lobbying restriction on § 501(c)(3) organizations, it noted that § 501(c)(19) veteran's organizations *could* lobby. *Id.* at 548.

Justices Blackman wrote a concurrence, in which Justices Brennan and Marshall joined. Together, they took the logic of the majority's statutory analysis further: "If viewed in isolation, the lobbying restriction contained in § 501(c)(3) violates the principle...that the government may not deny a benefit to a person because he exercises a constitutional right". *Id.* at 552 (Blackmun, J. concurring). But § 501(c)(4) cured this defect: "A § 501(c)(3) organization's right to speak is not infringed, because it is free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities." *Id.* at 553.

The concurrence clarified: "As long as *the IRS goes no further than this*, we perhaps can safely say that [the] Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby." *Id.* at 553 (internal citations and quotation marks omitted) (emphasis supplied). For the justices, the blurring of regulation could create constitutional problems. *Id.* ("Should the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4) affiliates, the First Amendment problems would be insurmountable. It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him"). Therefore, Justice Blackmun expressed cautious hope: "I must assume that the IRS will continue to administer §§ 501(c)(3) and 501(c)(4) in keeping with Congress' limited purpose and with the IRS's duty to respect and uphold the Constitution." *Id.* at 553.

The NPRM, however, does precisely what *Regan v. Taxation with Representation* feared: it conflates the distinct roles of § 501(c) organizations. In particular, it makes the §501(c)(4) option considered under *Regan* ephemeral in many circumstances. Many organizations concentrate their efforts on a single issue such as clean water, gun control, or abortion rights. A major legislative battle on that issue could occur within 60 days of a general election. In such a case, a § 501(c)(4) organization may find that essentially *all* of its necessary grassroots lobbying activity will be considered CRPA—even though the organization clearly does not control the legislative calendar. Since all grassroots lobbying would be

CRPA, the organization would have to self-silence in violation of its charter and *Regan*'s presumption of unlimited lobbying.[28]

The NPRM trades a vague, eleven-factor "facts and circumstances" test for a regulation that is both vague and overbroad. By radically redefining "political activity," the NPRM chills an organization's ability to engage in all activity within the spectrum of advocacy (education, lobbying, and politics). This is the very grave constitutional harm that both the majority and concurring opinions in *Regan* feared. Worse still, the NPRM upsets decades of statutory framework and precedent.

Finally, this failure to provide a statutorily and constitutionally defensible bright line will force the IRS to scrutinize every application for § 501(c)(4) status. Far from allowing the Service to avoid allegations of political favoritism and targeting, it will now have to evaluate websites, volunteer hours, the valuing of air-time and press efforts, and the timing of judicial nominations. Fairly or not, this intrusive and open-ended analysis cannot help but bring the fairness and impartiality of the Service into question, lead to extensive litigation, and serve as a distraction from the Service's core mission.

VI. The NPRM's treatment of transferred funds from one organization to another as *entirely* CRPA assessed against the contributing organization if the recipient does *any* CRPA is contrary to logic and finds no basis in the IRC.

The NPRM's treatment of an *entire* contribution to from one § 501(c)(4) group to another, where the latter does *any* CRPA, as being *entirely* CRPA assessed against the contributing group makes little sense. *See*, NPRM, 78 Fed. Reg. at 71539. There is no basis in the IRC for such attribution. The relevant process, which requires *both* that the recipient conduct *no* CRPA and receive a letter to that effect, is burdensome. Moreover, given the scope of CRPA as documented throughout these comments, it would be difficult for an organization to make such a promise (unless, for instance, it were to disallow all comments on its YouTube videos, post security to prevent unannounced candidates from infiltrating its events, and pledge not to mention the name of anyone who might potentially be appointed Secretary of Agriculture at any point during an election year).

[28] The situation would be far worse for a §501(c)(3) organization, which is limited in the small amount of lobbying it can do, and which is prohibited from organizing a §527 political organization. In such a situation, a single-issue organization would be essentially unable to comment upon the pending legislation. Doubtless legislators will quickly learn that controversial activity should be conducted 60 days before an election, when much of the nonprofit world will be unable to effectively respond.

At a minimum, the rule should allow for pro-rata consideration of a contribution as CRPA, and allow that determination at the conclusion of the recipient organization's tax year, when it will be clear how much of its budget has been spent on such activities.

VII. Answers to the Service's specific questions

Throughout the NPRM, the IRS sought comments on specific elements of the new rule and the underlying rationale supporting it. With all three sets of CCP comments in mind, we briefly answer each below.

a. On incorporating the proposed rule to IRC § 527

In the overview of Section 1 of the NPRM, the IRS sought advice on "whether the same or a similar approach [as the proposed rule] should be adopted in addressing political campaign activities of other section 501(c) organizations, as well... in defining section 527 exempt function activity." NPRM 78 Fed. Reg. at 71537.

Broadly speaking, this poses a risk of substantially upsetting how certain corporations and associations interact with the public. The proposed rule should not be expanded to other § 501(c) organizations. If the rule properly defines political activity, a uniform rule would be preferable and would not conflict with the purposes of other § 501(c) organizations. CCP offered such a solution in the first comment. CCP Comment I at 15 (Annex 1).

b. On applying similar rules to § 501(c)(3) organizations

Again, the Service requested comments on whether the rule should be imported to § 501(c)(3) regulation "either in lieu of the facts and circumstances approach reflected in Rev. Rul. 2007-41 or in addition to that approach (for example, by creating a clearly defined presumption or safe harbor)." NPRM 78 Fed. Reg. at 71537.

As discussed in our comments, the "facts and circumstances" approach is confusing and may allow for arbitrary enforcement. So, the regulation of § 501(c)(3) organizations likely also needs an overhaul. The proposed rule attempts to import certain terms of art that exist in the sphere of campaign finance regulation—but uses the terms improperly. Bringing this confusion into the realm of § 501(c)(3) activity is far more disconcerting, as § 501(c)(3)'s are not permitted to engage in *any*, as opposed to *some*, campaign activity.

The result will compound the problems that CCP identifies in this comment, as the subsequent chilling effect might prevent § 501(c)(3) organizations from *ever*

discussing issues. The Service seems to recognize this concern—the NPRM noted that "because [campaign]...intervention is absolutely prohibited under section 501(c)(3), a more nuanced consideration of the totality of facts and circumstances may be appropriate." NPRM, 78 Fed. Reg. at 71537. This is certainly true, but creating a scheme—where campaign activity means one thing for § 501(c)(3) groups and another for § 501(c)(4) groups—could easily become both inefficient and be perceived as an arbitrary distinction.

c. On integration with "exempt function" in § 527(e)

Similar to the question of importing the proposed rule to § 501(c)(3) organizations, the IRS also asked if it should "adopt[] rules that are the same as or similar to these proposed regulations for purposes of defining section 527 exempt function activity in lieu of the facts and circumstances approach reflected in Rev. Rul. 2004-6." NPRM, 78 Fed. Reg. at 71537.

As noted above, generally, the Service should seek to have uniform rules as applied to activity within the advocacy-political spectrum. Likewise, generally, the Service should eschew the rough factors of any "facts and circumstances" test. The IRS should seek to give clear guidance to organizations so that they know which IRC "box" is appropriate for them to use. However, the NPRM's current proposed rule conflates the distinct roles different types of organizations play within our system and muddies the regulatory waters by using terms of art inappropriately.

The better approach is for the Service to eschew the rough-and-tumble of political factors and instead harmonize its rules governing IRC § 527 with the FEC's rules governing political committees. All other groups should be governed by IRC § 501(c). CCP has already provided a road map as to how the Service might do so.

d. The effect on §§ 501(c)(5) and 501(c)(6)

Again, the IRS asked if it should use the proposed rule "in defining activities that do not further exempt purposes under sections 501(c)(5) and 501(c)(6)." NPRM 78 Fed. Reg. at 71537.

As discussed earlier, IRC § 501(c) is a system, wherein the activity of one section is defined in relation to the activity (or prohibited activity) of another. Thus, regulation of § 501(c)(4) organizations affect other § 501(c) organizations—including §§ 501(c)(5) and 501(c)(6). Once again, the proposed rule should not be expanded to other § 501(c) organizations due to its deficiencies. If a uniform rule is constructed, it needs to account for the differences between §§ 501(c)(4), 501(c)(5) and 501(c)(6). CCP offered such a solution in the first comment. CCP Comment I at 15 (Annex 1).

e. Use of "primarily" standard

The NPRM noted that "some have questioned the use of the 'primarily' standard in the section 501(c)(4) regulations and suggested that this standard should be changed." NPRM 78 Fed. Reg. at 71537. Therefore, the IRS sought guidance on whether the "primarily" standard should be modified or even limited to § 501(c)(3) standards. *Id.*

The premise of "some" is that political activity does not promote social welfare, but there is no statutory basis for that view. Indeed, the preamble to the Constitution states, in part, that "We the People of the United States, in Order to ... promote the general Welfare... do ordain and establish this Constitution for the United States of America." U.S. CONST. preamble. The artificial separation of political advocacy and advocacy in favor of social welfare posits a cynical view of representative democracy that finds no support in our laws or traditions. Instead, Congress has provided a range of organizational means for citizens to organize, lobby, and advocate for candidates who take positions supported by organizations. *All* of these activities improve the general welfare of the nation. § 501(c) reflects this belief.

Only § 501(c)(3) organizations are prohibited from participating in campaigns. 26 U.S.C. § 501(c)(3). Logically, this is sensible because if a § 501(c)(4) may not engage in political activity, including merely mentioning public officials, then what is the functional difference between §§ 501(c)(3) and 501(c)(4)? This point is sufficient to cast grave doubt on the view that political advocacy is not in furtherance of "social welfare" as a statutory matter.

On the other end of the spectrum, § 527 organizations must principally engage in candidate-focused activity. By implication, § 501(c)(4) organizations sit in the middle, able to do some political activity. If Congress wished to ban political activity by § 501(c)(4) organizations, it could attempt to do so, but for the last 60 years the legislature has not chosen that path.

Thus the real issue to what extent advocacy nonprofits may engage in such political activity. Since § 501(c)(3) bans political activity and § 527 requires mostly political activity, it stands to reason that between zero and half of the activity is the realm of § 501(c)(4). To read otherwise is to read a gap in the advocacy spectrum and render the IRC's statutory framework illogical under *Regan*. The only reliable, objective way to rate such activity is by expenditures. Therefore, the threshold for permissible activity should be up to 50% of the § 501(c)(4) organization's expenditures.

Imagine if it were otherwise, and the Service were to choose an arbitrary number—say 40%—as the permissible amount of CRPA by a § 501(c)(4)

organization. Leaving aside the problem, described above, that much of this activity may very well not be "political" in any real sense, such a rule would orphan a nonprofit organization that spends 45% of its budget on CRPA. Perhaps not a § 501(c)(3) organization (after all, CRPA includes activity *permitted* for such groups), out hypothetical organization would lose its § 501(c)(4) status. Moreover, because such activity is *below* half its budget, it does not fit comfortably into § 527. Unless the Service holds the unlikely belief that Congress intended a revenue windfall from advocacy organization spending more than 40%, but less than 50% of its budget in this manner, and the Service somehow missed that intention for several decades, the problem of statutory interpretation becomes obvious. The situation would be still worse if the "primarily" standard is simply removed. At that point, there would be little clear distinction between §§ 501(c)(3) and (4), which was obviously not Congress's intention when it adopted two separate, and sequentially-numbered, subsections.

f. On the size of the communications window

The NPRM asked if the 30/60 day window is appropriate for regulation, or "should [it] be longer (or shorter) and whether there are particular communications that (regardless of timing) should be excluded from the definition because they can be presumed to neither influence nor constitute an attempt to influence the outcome of an election." NPRM 78 Fed. Reg. at 71539.

As discussed earlier, the law does not permit the IRS to use the electioneering communications definition to "affect the definition of political activities ... for purposes of the Internal Revenue Code." Given this statutory command, it would be inappropriate for the Service to model its regulations on BCRA, including its 30/60 day window. This is especially true as electioneering communications are tightly defined, limited to broadcast communications, and do not include state and local elections.

Communications inside such a 30/60 day window could solely advance, and in fact long have solely advanced, activities that are clearly grassroots lobbying or educational activities that have always qualified as activities that advance social welfare. For example, in the last Congress, during the 60-day period prior to the general election, many important floor votes were taken on controversial legislation. These included votes on an alternative to sequestration, an omnibus appropriations bill, reauthorization of the Foreign Intelligence Surveillance Act, energy regulations, and work requirements for welfare recipients. Ads on such legislation cannot be considered CRPA simply because an incumbent is mentioned in the communication. Many social welfare groups are active on a single issue and are at the mercy of the Congressional schedule.

Worse, state primaries are all over the calendar, and so it is unclear how the IRS could choose an appropriate timeframe without making an arbitrary decision. For instance, in the state of Delaware, the state primaries are held in September, the general election in November. Some states, in certain years, have tiered primaries—in 2008, California had a presidential primary in February and a nonpresidential primary in June. Still other states, such as Virginia, sometimes use state-wide conventions for nominating candidates—conventions which any registered voter may attend. Others provide for primary and runoff elections, or both primaries and conventions.

g. On communications temporally near an appointment, confirmation, hearing, vote, or other selection event

The IRS asked if it should expand its attempted regulation of public communications temporally near executive and judicial appointments. NPRM 78 Fed. Reg. at 71539.

As discussed earlier, the concept of covering discussion of non-candidate officials is overbroad, and wholly abhorrent to the freedom of speech. Adding to this is the inherent vagueness of when such officials may be up for appointment or confirmation. The IRS knows even less about the appointment schemes of the various states. It is hard to imagine that the IRS has the authority to grant unknown time frames for when groups may use the names of individuals in their communications, regardless of how the organization is using that name.

Take the case of an official appointed to office this year. The first primary for 2014 is the Texas primary, which will take place the first week of March. From the first week of February, then, through election day in November, there will essentially always be a primary (or general) election within 30 (or 60) days of any particular date. For appointees to national office—that is, national candidates (a distinction without a difference given that communications need not be targeted to a relevant electorate under the proposed rules) this entire nine-month period will arguably be covered, and any communication mentioning them would be considered CRPA. The NPRM's failure to address this eventuality, as well as its puzzling treatment of activities concerning unelected appointees with respect to unrelated elections, suggests again that the Service is poorly positioned to regulate in this area.

Furthermore, this places an extraordinary amount of power in the hands of committee chairmen or executives making appointments at all levels of government. It is not difficult to imagine how such a system may be abused by savvy political actors. For example, a Senate chairman might schedule a vote for a controversial nominee during a period that would limit advocacy by covered entities.

h. On indirect contributions

The NPRM sought comments on "indirect contributions described in section 276 to political parties or political candidates, should be treated as candidate-related political activity." NPRM 78 Fed. Reg. at 71539

Already it is illegal to contribute in the name of another. 2 U.S.C. § 441f. What the NPRM apparently seeks is to artificially attribute money to another organization. The more the IRS seeks to regulate indirect or inadvertent transfers to other groups, the more the Service's ability to enforce bright-line, clear rules is harmed. Such regulation will provide ample ground for inappropriate use of IRS scrutiny against organizations, similar to the problems exposed in recent events. The IRS should eschew the temptation to artificially assign attribution to contributions.

i. On possible exemptions from CRPA

The IRS asked if there should be any exceptions from the definition of CRPA that is "voter education activity... conducted in a non-partisan and unbiased manner [that] avoid[s] a fact-intensive analysis." NPRM 78 Fed. Reg. at 71540.

As discussed throughout our comments, CRPA is defined vaguely and overbroadly. Rather than look for "exceptions" the Service should narrow the rule to already-known regulations. At the very least, the activity already excepted for § 501(c)(3) organizations should be excepted for other § 501(c) organizations as well. Reference to FEC regulations will provide clarity and consistency to all organizations covered by the campaign finance and tax laws. *See, e.g., supra* at 2; CCP Comment I at 2, 13.

j. On the Facebook problem: links, comments, and other connections to third party activity

Further, the IRS wants to know "whether, and under what circumstances, material posted by a third party on an interactive part of the organization's Web site should be attributed to the organization for purposes of this rule." NPRM 78 Fed. Reg. at 71540. Currently, this attribution scheme applies to § 501(c)(3) organization websites. *Id.* (citing Rev. Rul. 2007-41).

Adopting any rule which expands the amount of responsibility an organization has over third-party material posted on its website—or other pages, such as Facebook pages or YouTube channels—will only force 501(c) entities to spend more time monitoring those pages and scrubbing interactivity—or suspending such interactivity altogether. The rule would be burdensome and contrary to common understanding of how the Internet works. Few people believe

that on public or semipublic fora the comments of a third party must necessarily be the express endorsement of the page's owner. The comments posted to a *New York Times* article likely do not reflect the views of the paper's publisher.

Furthermore, the attribution requirement would run counter to any cognizable Service interest in ensuring that the entity itself engages in acceptable amounts of social welfare activity. It is also unclear that the Service could promulgate non-arbitrary rules to enforce the standard. For example, if a CRPA comment stays up for five seconds or five hours, does that change the calculation of *how much* activity has occurred?

k. On applicability of the Administrative Procedure Act's Notice and Comment requirements

Finally, the NPRM claims that it "has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations." NPRM 78 Fed. Reg. at 71540. The NPRM does not state on what grounds the Service has made this determination, but it is plainly incorrect.

As discussed throughout all of our comments, the NPRM radically changes the Congressionally-designed framework of IRC § 501(c) and actually burdens every covered organization with vague and overbroad rules to apply. Therefore, the NPRM is no mere interpretative rule clarifying the law, but substantive changes to the regulatory framework.[29] The reach of the proposed rule covers *all* of IRC §§ 501(c) and 527. Further, it is the stated purpose of the rules to create new substantive responsibilities—the NPRM acknowledges that the proposed rules "might sweep in activities that would...not be captured under the IRS' traditional facts and circumstances approach." *Id.* at 71536. The rules have been fashioned by the Service itself not as "interpretative" or a "policy statement," but as a "Notice of Proposed Rulemaking," and throughout the Notice uses language consistent with an invocation of its rulemaking authority. *Syncor International Corp. v. Shalala,* 127 F.3d 90 (D.C. Cir. 1997). The regulations do not interpret existing regulations or the agency's enforcement posture, but rather purport—indeed claim as their purpose—to outline new substantive requirements that may be both more inclusive or less inclusive than the Agency's prior standards. NPRM 78 Fed. Reg. at 71536-37. The proposed rule specifically amends prior rules, and is to be published in the Federal Register. In *American Mining Congress v. Mine Safety & Health Admin.,* 995 F.2d

[29] We presume that the Service is not claiming an exemption under Section 553 (a)(1) (military and foreign affairs) or (a)(2) (agency management or personnel, or public property, loans, grants, benefits, or contracts). We further presume that the Service is not claiming an exemption on the grounds of 553 (b)(3)(B) (notice and public procedure impracticable, unnecessary, or contrary to the public interest), since the Service, by seeking comment, has clearly shown that not to be the case. Therefore we presume that the Service argues that this is an "interpretative rule" or "general statement of policy, or rules of agency... procedure, or practice," under 5 U.S.C. § 553 (b)(3)(B).

1106 (D.C. Cir. 1993) the court outlined four key elements distinguishing a legislative rule from an interpretive rule or policy statement: 1) absent a rule, could the agency enforce the statute; 2) was the rule published in the Code of Federal Regulations; 3) whether the agency has explicitly invoked its general legislative authority, and 4) whether the rule amends a prior legislative rule. The Court concluded, "[i]f the answer to any of these questions is affirmative, we have a legislative, not an interpretative rule." *Id.* at 1112. In this case, the answer to all four questions is yes.

Therefore the NPRM proposes legislative rules and are subject to the Administrative Procedure Act's notice and comment requirement in 5 U.S.C. § 553(b). *See, e.g., Sierra Club v. EPA*, 699 F.3d 530, 535 (D.C. Cir. 2012); *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005). Indeed, the exceptions to 5 U.S.C. § 553(b) are narrow. *American Hospital Asso. v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) ("In light of the obvious importance of these policy goals of maximum participation and full information, we have consistently declined to allow the exceptions itemized in § 553 to swallow the APA's well-intentioned directive"). The IRS is mistaken: the APA's "notice and comment" rulemaking procedures apply.

The IRS further assumes that the regulatory burden of the proposed rule will be low and "[t]herefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required." NPRM, 78 Fed. Reg. at 71540. This again is incorrect. An initial regulatory flexibility analysis is required no matter if the IRS counts the NPRM as a substantive rule or interpretive rule:

> Whenever an agency is required by [5 U.S.C. § 553], or any other law, to publish general notice of proposed rulemaking for any proposed rule, *or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States*, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis.

5 U.S.C. § 603(a) (emphasis added). Likewise, the IRS must do a final analysis in promulgating the final rule, addressing the issues raised by comments on the initial analysis. 5 U.S.C. § 604; *Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161, 175 (D.C. Cir. 2007) (describing when an agency must respond to Regulatory Flexibility Act comments and concerns). There is an exception to §§ 603 and 604 "if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). Presumably, the IRS believes the NPRM to fall into this category, but it has provided no support for this belief. *Nat'l Mining Ass'n v. MSHA*, 512 F.3d 696, 701 (D.C. Cir. 2008) (noting that "[w]hen promulgating a rule, an agency must perform an analysis of the impact of the rule on small businesses, or certify, *with support*,

that the regulation will not have a significant economic impact on them") (emphasis added).

As we discussed in this comment, *supra*, the proposed rule significantly impacts the fundraising and other activities of *all* § 501(c) organizations.[30] For example, nonprofit organizations depend on fundraising activities, such as galas, and the proposed changes will significantly impact such activity. The proposed rule is particularly pernicious to small organizations without the legal counsel to avoid the vague and overbroad terms. *See also* CCP Comment II (discussing the IRS's misestimation of the paperwork burden of the proposed rule).

VIII. The proposed effective date in the NPRM is chilling speech now.

The NPRM states that the proposal would "apply on and after the date of publication of the Treasury decision adopting these rules as final regulations in the Federal Register." NPRM, 78 Fed. Reg. at 71542. Since these rules could be adopted as final regulations as early as February 28, 2014, the uncertainty about the effective date of the rule and the definition of political activity it will adopt is affecting speech right now during the current tax year. Tax regulations are typically prospective in nature. These regulations, if adopted during the middle of any tax year, would reclassify speech already made earlier in the year as political activity and would be highly disruptive to advocacy and political activity.

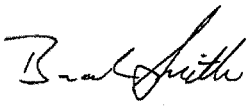
The Treasury should immediately issue a statement of policy indicating that any final rule will be effective only for tax years beginning after the date of publication.

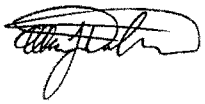
* * *

Thank you for considering these and CCP's other comments. We look forward to working with you, your staff, and the Department of the Treasury to develop a rule that provides clear guidance to social welfare organizations, respects vital First Amendment rights, and eases the Service's tax administration burdens.

[30] Nonprofit organizations are specifically protected by Regulatory Flexibility Act, 5 U.S.C. § 601(4), and the proposed rule will directly affect their activities.

Respectfully Submitted,





Bradley A. Smith
Chairman

Allen Dickerson
Legal Director

Mr. JORDAN. Well said, Mr. Dickerson. That is why freedom of assembly and freedom of speech are in the same darn amendment; they are very, very important.

Before turning to the vice chair of the committee, I would just recognize—I don't know who is for this rule. We have the Center for Competitive Politics and the independent sector opposed to it; we have home schoolers and Harley riders opposed to it; we have the Tea Party and the ACLU. I mean, who is for this? We could stop right now. This thing is done. Get rid of this crazy thing. But we probably can't do that because members of Congress like to talk, too, and they want to ask some questions. So we are going to go first to the vice chairman, Mr. DeSantis, the gentleman from Florida.

Mr. DESANTIS. Well, maybe after this presentation the Administration will agree to just pull the rule. I was very impressed with what I saw. Look, I think this rule is going to have a chilling effect on speech. I think it is going to facilitate the type of targeting that we have seen, unfortunately.

And really of concern to me particularly is I don't think Government should be in the speech police business generally, but certainly you shouldn't have the IRS doing this; and this committee has uncovered emails back in 2012, one email from a Treasury Department official to, among others, Lois Lerner at the IRS that said don't know who in your organization is keeping tabs on (c)(4)s, but since we mentioned potentially addressing them off plan in 2013, I've got my radar up and this seemed interesting. And, of course, Steven Miller has testified about trying to "level the playing field" between 501(c)(4) groups and 527 organizations based on pressure from Senator Levin and others in Congress. So, to me, I think that the IRS needs to get out of this entirely.

But you talk about a 30/60 day window. That is precisely the time where people need to be able to engage on public issues. I mean, it is just absolutely ridiculous, but I think what it does is it stems Government's desire of Government muzzling of speech in this context. It is really rooted in the desire of incumbents to control discourse, because if you can control who can speak, the people who are here now are going to be more likely to be returned to office; and if more people can speak and get involved, then it becomes more competitive. It is more difficult to continue to get returned if you are held accountable.

I appreciate Mr. Dickerson talking about the anonymity and the donors disclosure. I just wanted to ask you, Mr. Rottman, because I read in your testimony you do talk about that. Is it your group's position that there is value in having these social welfare groups for them to be able to keep their donors anonymous?

Mr. ROTTMAN. Congressman, yes. The short answer is yes. The right to anonymous political speech, as Mr. Dickerson said, was hardened during the civil rights era, but it goes back to the founding of our Country.

Mr. DESANTIS. And why was it? I assume you agree with NAACP vs. Alabama, where basically Alabama had a law that required donor disclosure if you wanted to operate in Alabama. So the NAACP would have to have disclosed their donors. So just for peo-

ple who may not be familiar with that case, why would that have a chilling effect on First Amendment speech at that time?

Mr. ROTTMAN. Well, it was quite literally an attempt to intimidate the NAACP into leaving the States. By disclosing the membership list, it would have left the members of the NAACP open to reprisal, which, at the time, would be completely expected. So the Court found that in that case, if there is a chance of harassment or reprisal, then the right to an honest political speech is constitutionally guaranteed.

Mr. DESANTIS. Yes. And I would just remind folks who may be watching the Federalist papers were anonymous. I mean, this was the one most potent mechanism that the Founding Fathers used to get the Constitution ratified in New York, which was the critical thing at the time, because if they had lost in New York, they probably would have lost and wouldn't have gotten ratification. So Hamilton didn't sign the SAs, Madison didn't sign the SAs, and John J. didn't sign the SAs under their name, they signed it as Pubulous.

Of course, during the American Revolution you had all kind of pamphleteers. This was one of the main ways where people were able to be educated about these things. Many of those were written anonymously or written under pseudonyms. So I think that there is just such a desire in this town to control everything that goes on that we end up seeing proposed rules like this, but I will just say I really appreciate the chairman having the hearing.

Thanks to all the witnesses. I think you all made very good and logical statements, and I think we can stop this rule from taking effect in Congress and just make sure that we want a robust debate. We want people getting involved in political education and issue education, and that is part of what being an American is all about.

So I yield back the balance of my time.

Mr. JORDAN. I thank the gentleman, would recognize the gentleman from Pennsylvania, the ranking member.

Mr. CARTWRIGHT. Thank you, Mr. Chairman.

And I thank you for the comments from all of the witnesses. I listened, I learned, and I appreciate your attendance today.

I was born in 1961, and I say that because it was two years before I was even born that this Country, the United States of America, placed restrictions on political activity by 501(c)(4)s. So anyone listening to this hearing who thinks that this new rule being proposed is introducing a novel concept is sadly mistaken; this has been part of the American fabric since two years before I was born, and I am getting pretty long in the tooth myself.

What we are up to right now is trying to craft a rule that answers what everybody has been screaming about on Capitol Hill, you know, is the IRS unfairly targeting right wing groups? We know that there were BOLOs on right wing groups. We also know that there were BOLOs on left wing groups. We haven't sorted through the statistics to see what percentage of the right wing groups were targeted, what percentage of the left wing groups were targeted. Maybe some day we will engage in that exercise. But what we are up to right now is try to make clearer rules, because even though the FEC does know a lot about political campaign fi-

nance rules, since 1959 it has been the charge of the IRS to handle some of that as well.

Now, Ms. Aviv, I particularly appreciated your testimony, because rather than scrap everything, what you have done is you have come up with some clear and cogent suggestions on tightening this rule up. They appear on page 6 of your written testimony, and rather than go through them, I just want to thank you for those intelligent suggestions.

We also had Senator Allard. I appreciate your testimony here and I want to say it is an honor to have a former United States senator testifying before our subcommittee. I also appreciated your points about the time restrictions. I think that is worth looking into. I think you make some sensible comments. Having served here on Capitol Hill, you know about the business that goes on here, the workaday work that we do here in dealing with interest groups and their concerns, and I appreciate your comments and I hope that your thoughts will be taken into consideration.

Remember, everyone, this is a proposed rule; it is malleable, it is subject to change. We are not wasting our time and our breath here because there are people paying attention to your comments, and, Senator Allard, I appreciate yours as well.

Now, Ms. Aviv, I wanted to follow up with you a little bit. As I mentioned at the outset, really what my concern is about is the elephant in the room that Mr. Dickerson mentioned, and that is the dark money, the dark money. I mean, on the one hand we have concerns about First Amendment, freedom of speech and political expression; on the other hand we worry, we worry in this Country about undisclosed donors, who they are, where they are from, are they even from this Country, the people pumping money into who gets elected in this Country. And I wanted to follow up with you, Ms. Aviv. Why do you think there is public concern about the increase in partisan activity funded by dark money?

Ms. AVIV. Mr. Cartwright, I am going to come at this question from the perspective of the charitable sector. I started off my testimony by saying that we depend on the public trust. We know that the public likes charitable organizations, 501(c)(3) and 501(c)(4) organizations, to be involved in educating about the issues, communicating with law makers, with elected and appointed officials, and all of that. They are also very clear that they don't want us involved in partisan political activity, in determining who is sitting there. But once people are sitting there, for us to engage.

Our concern with 501(c)(4) social welfare organizations is that they have the right to do both of those activities.

Mr. CARTWRIGHT. Right. And you said that. In fact, you wrote in The Washington Post that this proposed rule could be an important first step in pushing dark money into the sunlight and providing IRS examiners with objective tools for reviewing applicants for tax exemption. Did you say that?

Ms. AVIV. Yes, but we hoped that is what it would do. Our concern is that these rules, as currently crafted, don't do that. We have an equal concern that we simply throw out these rules and nothing happens. We think that the current law is not workable and we think that these rules, as crafted, are the wrong way to go.

Mr. CARTWRIGHT. Well, thank you for that.

Mr. Chairman, I would like to enter her op ed in The Washington Post for the record.

Mr. JORDAN. Without objection.

Mr. CARTWRIGHT. Mr. Chairman, I also got an email from Richard Painter, Professor Painter from yesterday's hearing. He said, so far, I have not heard facts suggesting involvement in this scandal of anyone at the White House. I hope the rhetoric in the course of this investigation will not get ahead of the facts.

And I would ask permission to enter this email into the record.

Mr. JORDAN. Without objection.

Mr. CARTWRIGHT. I yield back.

Mr. JORDAN. The gentleman from Florida is recognized for a response.

Mr. DESANTIS. Mr. Chairman, could we maybe put into the record the number of times that officials from the IRS visited the White House, if we are going to put that in? I know the committee has previously uncovered that. Maybe we can just note that for the record, if that is okay.

Mr. JORDAN. That is fine. That is fine. Without objection.

Mr. JORDAN. The gentleman from Tennessee is recognized.

Mr. DESJARLAIS. Thank you, Mr. Chairman.

Though I have lived in Tennessee for over 20 years, Senator Allard, I grew up in a town you may have heard of, a little north of your home State, Sturgis, South Dakota. I guess you probably advocate for a few of the AMA folks there.

Mr. ALLARD. Yes, sir.

Mr. DESJARLAIS. And I wouldn't be surprised if maybe you have been there.

Mr. ALLARD. I have not, but we have a lot of members who go there.

Mr. DESJARLAIS. Okay.

The American Motorcyclist Association is not a political party, correct?

Mr. ALLARD. It is not a political party, that is correct.

Mr. DESJARLAIS. Okay. And it is an organization dedicated to advocacy for the motorcycle community, right?

Mr. ALLARD. It is a social welfare organization and we promote responsible and safety behavior on our roads and when they are out on our public lands.

Mr. DESJARLAIS. So what do you think, then, the big concern about the AMA advocating for issues and talking to elected officials would be?

Mr. ALLARD. There shouldn't be any concern because we are a social welfare organization. We are prohibited from being partisan in our activity. And I might give you an example. We do list all the candidates for office on our Web site and we also send out a questionnaire and we put that questionnaire on the Web site verbatim; we don't edit it or anything else. We are just there to educate our members, then they can understand what the members are doing in the Congress and they can understand our issues. The highway transportation bill, for example, comes up during that dark period and we have a lot of issues in there, and we can't mention a bill carried by so-and-so. That would preempt us from doing that.

Mr. DESJARLAIS. And so this would end that?

Mr. ALLARD. Yes.

Mr. DESJARLAIS. Ms. Martin, the ranking member now, for two days in a row, has indicated that we really don't know if this targeting was a bipartisan process, that conservative groups were targeted and liberal groups were targeted. I saw you making some notes after that statement. Do you have any information that would help the ranking member with who was targeted and who wasn't?

Ms. MARTIN. The inspector general's report said that 100 percent of conservative groups were targeted.

Mr. DESJARLAIS. And the number of liberal groups that were targeted, I believe all of them received their status?

Ms. MARTIN. They all received their status, including one for a 501(c)(3) named after the President's father, Barack Obama Foundation was a (c)(3), and it was approved by Lois Lerner.

Mr. DESJARLAIS. How long does it typically take an organization to receive tax-exempt status?

Ms. MARTIN. Prior to late 2009, it took somewhere between two to four months, maybe six months at the most. After the beginning of 2010 or very late 2009, it seems 2010, it took years, at least for organizations like mine with Tea Party and Patriots in their name, or conservative organizations.

Mr. DESJARLAIS. Why do you think that you were targeted specifically? What do you think the underlying purpose was. Just open and honestly, why do you think you were targeted?

Ms. MARTIN. I think we were targeted because people in the IRS and other parts of this Government did not want to hear from the people. They wanted us to be quiet.

Mr. DESJARLAIS. Do you really believe it was the IRS, the IRS doesn't want you to speak, or do you think maybe it was somebody higher up the chain?

Ms. MARTIN. You know, I want to see what the evidence says. I try my best not to jump to conclusions with this. It certainly seems that there were quite a few people who did not want us speaking, and they have done everything they can to silence us.

Mr. DESJARLAIS. Do you think it was a lot of conservative people that didn't want to see you speaking?

Ms. MARTIN. I would hope not. I have a feeling there may even be some Republicans who, from time to time, don't want to hear us speaking, because we are nonpartisan and we hold both parties accountable.

Mr. DESJARLAIS. Okay. After going through what you have been through the last several years, your organization, other conservative groups, how does it make you feel after finally getting tax-exempt status, after being put off for years, how does it make you feel now that they want to invoke this rule?

Ms. MARTIN. So just before coming here to testify, I receive a call or our attorneys receive a call saying we have finally been approved. If these regulations go into effect, that approval is absolutely meaningless. The organization, Tea Party Patriots, has lived under these rules for the past three years. We may be one of the only national organizations who truly knows the effect of what it is like to keep the mountains of paperwork, to watch every single word you say, whether you even say Obamacare or the health care

law, because using the word Obama in Obamacare may count against you. It is oppressive and it is very, very frustrating. I didn't want to have to go through that. I don't want any organization to go through it, even one who disagrees with me on all of the issues. No organization in America should have to go through this.

Mr. DESJARLAIS. And I think we have a table full of them represented here today, so thank you.

I yield back.

Mr. JORDAN. I thank the gentleman.

Just real quickly before going to the gentleman from Michigan. So the ranking member mentioned 1959, but it seems to me the history for 50 years, from 1959 to 2009, we didn't really have a problem, and then suddenly we have a huge problem and we have a new rule that is proposed offline. So for 50 years this thing worked fine, but something changed in 2009, right?

Ms. MARTIN. In 2009, five years ago, to today, this movement, the modern day Tea Party movement started.

Mr. JORDAN. But something changed at the IRS which happened to correspond with the modern day Tea Party movement. All right, thank you.

The gentleman from Michigan is recognized.

Mr. BENTIVOLIO. Thank you very much, Chairman Jordan, Ranking Member Cartwright and distinguished members of the subcommittee. I want to thank all of the witnesses who have taken time from their busy schedules to come and testify today about this very, very important issue.

Ms. Jenny Beth Martin, you and I go way back, right? In fact, I got involved in politics because of the Tea Party.

Ms. MARTIN. Yes.

Mr. BENTIVOLIO. And I remember then jokingly saying if we really wanted to control speech, we should hook up our politicians to lie detectors; it would be the quietest campaign season in history, right? And we have been talking about the First Amendment here this morning, which is one of our basic rights, put into the Constitution by our Founding Fathers. It is a fundamental right and a pretty important one, isn't it? This amendment gave the people the right to prohibit the Federal Government from exercising their authority over freedom of speech. And the Founding Fathers did note that this right was not absolute and must operate under reasonable restrictions. But the intent was for the States to establish these standards, not the Federal Government.

I am guessing all of you here today know what the First Amendment says, correct? Everybody?

Do you think the employees at the IRS know what the First Amendment says, Ms. Martin?

Ms. MARTIN. I would imagine no, they do not, because if they did, there is no way they would not have done—if they knew what the First Amendment said, they wouldn't have done what they have done to my organization and others like ours.

Mr. BENTIVOLIO. Mr. Rottman?

Mr. ROTTMAN. I am not sure that that is actually the question that needs to be answered. Whether they do or not, the fact is that the rule, as proposed, could be misused to target groups on both the right and the left, and that should be a concern to all of us.

Mr. BENTIVOLIO. I understand. Lawyer, right?

Mr. ROTTMAN. Yes.

Mr. BENTIVOLIO. Okay.

[Laughter.]

Mr. BENTIVOLIO. First Amendment, Senator, do you think the IRS——

Mr. ALLARD. I am not a lawyer, by the way, I am a veterinarian.

Mr. BENTIVOLIO. There you go.

Mr. ALLARD. But let me point out I think there probably are some employees there that understand. I think, if they reflect the total population, a lot of employees that don't. And in regard to this rule, I think they completely ignored the First Amendment.

Mr. BENTIVOLIO. Ms. Aviv?

Ms. AVIV. Sir, I think that is the IRS employees are charged with fulfilling their responsibilities according to the rules. The rules are so unclear that using facts and circumstances allows individual agents to make personal determinations about what is right and wrong. We think that we need greater clarity so that there is less discretion left up to them.

Mr. BENTIVOLIO. In the interest of time, I think you would probably say pretty much what they said.

In the hearing we had back in May of last year, I asked Mr. Schulman of the IRS, who is a lawyer, by the way, if he knew the First, Second, and Nineteenth Amendments. He told me he didn't have the Constitution memorized. Do you think IRS agents should have a right to training in the Constitution and Bill of Rights? I think they should know basically, even though they are attorneys, what the Constitution says. Would you agree, Mr. Rottman? I mean, you know, case law, constitutional law, that is for lawyers, but basically?

Mr. ROTTMAN. The fundamental problem is they are given too much discretion under both the existing rule and the proposed rule, and that discretion is going to lead to problems, regardless of who is in office.

Mr. BENTIVOLIO. But it is a basic right. I mean, a constituent came to me one time and asked, Mr. Bentivolio, I don't like this type of noise coming from this particular church, and I said, well, if I did that, I would have to pass a law that said get rid of church bells, and I am not going to do that because it is freedom of religion, and I am here to protect those rights, just like freedom of speech, right?

I don't really have that many questions, but, Ms. Martin, we go a long way. I think you are responsible for my and much of America's great political awakening that took place since 2009. I want to thank you for that. Don't let this get you down; we are fighting the good fight. Our job here in Congress is to protect those rights, not take them away.

Ms. MARTIN. Thank you.

Mr. BENTIVOLIO. Thank you very much, Mr. Chairman. I appreciate it.

Mr. DESANTIS. [Presiding] The gentleman yields back.

I am going to recognize the ranking member for three minutes.

Mr. CARTWRIGHT. Thank you, Mr. Chairman.

So I want to address this idea of everything coming up since 2009 now. What was I doing talking about 1959 if everything started in 2009? Well, I want to first invite everyone's attention to 1979. I was born then; I was graduating high school then. In 1979, an IRS general counsel memorandum referred to the "perennially troublesome question" of whether the regulations implementing 501(c)(4) should be changed. In fact, Mr. Chairman, I would like to enter that memo from 1979 in the record.

Mr. DESANTIS. The memo will be entered into the record.

Mr. CARTWRIGHT. So it was already a perennially troublesome question in 1979. I will take it forward to 2004, also before 2009. Members of the American Bar Association's—forgive me for mentioning lawyers; evidently, that is out of fashion. The American Bar Association's Committee on Exempt Organizations proposed that the IRS design a "simplified, clear, and predictable alternative test for 501(c)(4) qualification." So they were concerned about that at the ABA in 2004. And then in 2006 George Washington University Law School Professor Miriam Galston observed in 2006, "Since the late 1970s, there appears to have been no serious consideration given to changing either the 'primarily' aspect of the exempt purpose standard in the regulations or the IRS's application of the standard in its rulings or other pronouncements."

So I am here to tell you that for anyone to say that there was some kind of epiphany that this Nation had in 2009——

Mr. JORDAN. Would the gentleman yield for a question?

Mr. CARTWRIGHT. I yield.

Mr. JORDAN. My point was this. In the 50 years, I don't ever recall reading stories, hearing any information about it taking three years to get approved when you applied for whatever tax-exempt status you were applying for. That was my point. In 50 years, it never took anyone three years to get approval, but since 2009 it has taken three years for hundreds of groups. That was my point.

Mr. CARTWRIGHT. Well, I certainly will credit the chairman with being much more elderly than I am and have a fuller view of history.

Mr. JORDAN. Well, do you have any evidence that people were denied their tax-exempt status and had to wait three years from 1959 through 2009? If you can produce that, produce it.

Mr. CARTWRIGHT. You know, that is a fundamental flaw of this entire Oversight and Government Reform Committee and all of its subcommittees, is that we constantly say, well, there is no evidence that the President isn't a murderer, so therefore we feel justified in suggesting——

Mr. JORDAN. Mr. Chairman, I didn't bring up the year 1959, the ranking member did. And I am saying that based on this committee's investigation, we know the delays happened after 2009.

Mr. CARTWRIGHT. And do you have evidence that there were no groups that had to wait two or three years, say, in the 1970s or 1980s? Do you have evidence of that, Mr. Jordan?

Mr. JORDAN. I don't.

Mr. CARTWRIGHT. So, therefore, it must have happened or it must not have happened. Let's stop engaging in this there is no evidence of as proof of the opposite.

Yield back.

Mr. DESANTIS. The gentleman from Ohio, the chairman, is recognized.

Mr. JORDAN. I would just ask also enter into the record a letter sent yesterday, excuse me, two days ago, from the Treasury, Alastair Fitzpayne, Assistant Secretary for Legislative Affairs, sent to the chairman of the Ways and Means Committee, and would highlight on page 2, beginning in 2010, 2010, beginning in 2010, it doesn't say 1959 anywhere in this letter. Beginning in 2010, this is from the Treasury, Treasury and the IRS received requests from members of Congress and others to consider engaging in rulemaking to clarify the rules regarding social welfare organizations. Beginning in 2000, the very first sentence in that portion of the letter, Mr. Chairman. So I would ask that this be entered into the record.

Mr. DESANTIS. Without objection.

Mr. JORDAN. Thank you, Mr. Chairman.

Let me start with Mr. Rottman. Mr. Rottman, just, again, to highlight how ridiculous this rule, as proposed, is, let's say this October the ACLU wanted to sponsor a debate between Mr. Cartwright and Mr. DeSantis on the Second Amendment, host that event. Could you, in fact, do that?

Mr. ROTTMAN. In October we could, but we would have to count it against our permissible allotment of candidate-related political activity. And if that, in the aggregate, was to go over our permissible allotment, then our 501(c)(4) exempt status would be jeopardized.

Mr. JORDAN. Okay. Could you even, after the fact, let's say a local college was hosting an event, you weren't. Could you comment on the event after it took place? Could you send someone there and comment on what Mr. DeSantis and Mr. Cartwright had to say about the Second Amendment? Could you do that?

Mr. ROTTMAN. It would be the same issue.

Mr. JORDAN. Counting against you.

Mr. ROTTMAN. It would be counted against us, yes, even if we didn't mention your name, actually, because the topic itself could be at issue in the election, and that would qualify under the rule as clearly identifying a candidate.

Mr. JORDAN. Okay, what if you just wanted to host a candidate, let's say for some reason Mr. Cartwright moved to Florida and wanted to run against Mr. DeSantis. Could you sponsor a debate against those two candidates this October, short time before the election?

Mr. ROTTMAN. Again, it would be counted.

Mr. JORDAN. Yes. Okay. And that is the absurdity of it. I think about, in Ohio, our primary election is in early May, and on tax day, if a Tea Party organization wants to have me come speak at their event, they would be in the same boat. Same kind of thing. Again, just how ridiculous this rule is.

Let me go to Ms. Martin. This is something that bothers me, too, the timing of things we now get from our Government, this Administration. Are you familiar with Katherine Engelbrecht, Ms. Martin?

Ms. MARTIN. Yes, sir.

Mr. JORDAN. And Ms. Engelbrecht testified in front of this committee a couple weeks ago, did an outstanding job. And what we discovered in that hearing was that Ms. Engelbrecht, for 20 years her and her husband had ran a successful business. She had never had any interaction with OSHA in that 20 years. She had never had any interaction with the FBI in that 20 years. She had never had any interaction with ATF in that 20 years. And her only interaction with the IRS in that 20 years was filing her annual return.

And then she starts to do the same thing you do, she applies for tax-exempt status for her organization called True the Vote, and suddenly her world changes. After she applies, the FBI visited her six times. Not in the course of the criminal investigation of the Justice Department, before that started, but between when she applied and when the current investigation started, the FBI visited her six times, two in person, four on the phone. ATF showed up at her business; OSHA showed up at her business; and the IRS audited both her personal and business records.

And if you remember that hearing, the Democratic side said that was just one big coincidence. Shazam, it just happened.

Now, you come to us today and you tell us comment for the rule ends today. You are testifying today. You applied for tax-exempt status three years ago, and suddenly, yesterday, you get an email from the IRS saying, by golly, we finally got around to you, right? We finally figured it out, you are now approved.

Ms. MARTIN. Exactly.

Mr. JORDAN. One big coincidence again.

Ms. MARTIN. It is apparently pure coincidence and no political motivation and no smidgeon of corruption.

Mr. JORDAN. You know why I think it took so long for them to approve you, and do you know why I think they went after Ms. Engelbrecht, the full weight of the Federal Government came at Ms. Engelbrecht? Why do you think it took them three years for you?

Ms. MARTIN. I think that—I cannot answer what was going through their mind. All I can do is say that looking——

Mr. JORDAN. Hazard a guess why.

Ms. MARTIN. I think that they wanted me to be able to come in here and, if I were asked did you receive your status approval, I would have to testify yes.

Mr. JORDAN. But I am asking about—I think you get harassed. I think you received the treatment you did, I think Ms. Engelbrecht received the treatment she did because you are effective. Right? You are actually making a difference in the political process, just like Katherine Engelbrecht was. And they couldn't have that. No, we are going to have the full weight of the Federal Government come down on you. We are going to make you wait three years, which from 1959 to 2009 took weeks or months.

Ms. MARTIN. That is correct. The time involved to do this, no organization should have to go through this. When we should have been able to talk about issues or Supreme Court hearings, instead, I would be working all day long and literally go back to a hotel room and spend another few hours dealing with accountants and attorneys to make sure I complied. And the questions they were asking me, regardless of the targeting, which happened, regardless

of the questions they were asking me are the questions they will be asking every single person on this panel, and the time and the money involved is enormous.

Mr. JORDAN. I am a little over time, but if I could, Mr. Chairman.

Mr. Mason, I just thought of this, because I remember when this happened, I think it was the early 1990s, there was a proposed change in law that would have essentially put home schoolers out of business. Parents wouldn't have been able to exercise that option. Because I remember hearing about it on the radio and I remember my wife calling me up and saying, I am on the phone and she is calling friends who also home schooled, and they mobilized in a way that I think this place had probably never seen before.

If this rule was in place, could you have had the same impact that you were able to? And you won that debate; that law was stopped, proposed law was stopped. If this rule is in place, could you have that same kind of impact that you had back in the 1990s?

Mr. MASON. It would be very doubtful because everything that we did was contacting elected officials, and if—that was H.R. 6, by the way——

Mr. JORDAN. It was. What year was that? Refresh my memory, Mr. Mason, what year was that?

Mr. MASON. Ninety-four. Yes, 1994. My organization at that time wasn't real savvy in email and Internet, as probably most of us were not, so a lot of it was done by real grassroots effort, phone trees and just people contacting each other; you get the word out and it gets spread. And a lot of it was contact your member of Congress and oppose this. I believe we shut down the congressional switchboard.

Mr. JORDAN. Sure did.

Mr. MASON. If that had occurred, especially during somebody's primary election, it would have counted against us as candidate-related political activity.

And on that score I would like to address one point. Every minute would have to be tracked by every employee of a social welfare organization because you would have to be able to determine what amount of time and overhead expenses were being used for these candidate-related political activities. It is an enormous amount of effort and paperwork, and when you add on to that 50 States, all regulating political speech, all regulating lobbying, all regulating charitable solicitations, the amount of paperwork that an organization like ours has to do and the amount of care we have to take to avoid getting in trouble is enormous.

Mr. JORDAN. Thank you, Mr. Mason.

Mr. Chairman, I yield back.

Mr. DESANTIS. The chair recognizes the chairman of the full committee, Mr. Issa.

Mr. ISSA. Thank you, and thank you, Mr. Jordan. That was a good line of questioning to help, I think, explain the burdensome nature of this.

Mr. Rottman, you are not normally seen as a right wing neanderthal Republican. Would that be a correct assessment?

Mr. ROTTMAN. I think that is fair.

Mr. ISSA. And the history of the ACLU is one of being as independent and as willing to object to Congress's or the Administration's actions, regardless of popularity, isn't that true?

Mr. ROTTMAN. Absolutely.

Mr. ISSA. I am very proud of the ACLU. At some times my current pride is not as great as my historic pride. I might think back to the internment of American citizens in World War II, and the ACLU bravely said it may be popular, but it is not right.

The ACLU has always stood for a number of constitutional amendments and support, and we always hear about the First Amendment, but for a moment give me your answer on freedom of association. And I will give you an environment. If I am a homeowners association, I have 200 homes and everybody is paying in to a homeowners association with after-tax money, and that association is doing the usual good social work of deciding whether or not we should have gates in our community, or whatever the other items are, whether we are going to re-slurry the road; and then there is a proposed power line coming through our community and we say, well, we need to use a little of our money, from which we got no tax deduction, and we need to be able to meet and we need to be able to push against this absurdity that will diminish our values of our home.

Is there really any difference between that freedom of association and the basic freedom of association of Ms. Martin's group that gets together and holds up copies of the Constitution and says, God, we have to save our Country, we have to explain to people that this is what our Founding Fathers left to us as inalienable rights?

Mr. ROTTMAN. Mr. Chairman, I think that brings up exactly the concern with this proposed rule, and that is that it doesn't deal with partisan political activity, it extends the definition of partisan political activity to fundamentally nonpartisan issue advocacy. And you are absolutely right, the rights to freedom of speech and the corollary right to freedom of association are essential when we are talking and debating about the issues of the day, regardless of which side of the political spectrum we land on. And that fundamentally, it would be one thing if we were talking about partisan politicking. This rule is not about partisan politicking, it is about regulating fully protected issue advocacy by social welfare groups.

Mr. ISSA. Senator, you and I have a long history of looking at these issues in minute detail. You have looked, undoubtedly, at the question of what 527s can do and how they do it. Essentially, isn't the biggest difference that if you are a 501(c)(4), like Ms. Martin—congratulations, by the way. After only three years you are an overnight success. But when we look at these things, aren't we really having a discussion about what entity can advocate for or against an elected official and what entity can do other things, but not advocate for or against an elected official? Isn't that really what defines the difference between a 527, of which there are many, and super PACs and the like, and 501(c)(4)? In your opinion, after years of looking at it.

Mr. ALLARD. Well, 501(c)(4)s are prohibited from participating in partisan activity.

Mr. ISSA. And, therefore, the intent of the Federal Election Commission, something where Lois Lerner worked for a period of time, is 527s, they get to look at; other groups that advocate for or against, try to bring down somebody like you or me or promote, by bringing us down, the person running against us, that is an activity in which the FEC and Congress has determined that there needs to be transparency as to donors, right?

Mr. ALLARD. That is correct.

Mr. ISSA. And when you get to issue advocacy, including Organize for Action, President Obama's well connected organization, it isn't just his picture on the cover, it is him raising the money for it, they are prohibited from trying to defeat me directly; they can simply turn out people who disagree with my views, right?

Mr. ALLARD. That is correct.

Mr. ISSA. So the President is well within his rights because it is issues. Does anyone think that the attempt by the IRS to organize the 501(c)(4) isn't essentially to bring it within the FEC? All of you at the table, I would love to have each of your responses, because, to me, that is what I see, is I see these rules designed to say to, and I am going to call it my homeowners association for a moment, although Ms. Martin's new organization could follow in that too, they just basically want to bring us under the Federal Election Commission as though our organizations exist for purposes of electing or defeating federal officers.

Right down the row.

Ms. MARTIN. Chairman Issa, after the 2012 election, and because of the questions we were being asked by the IRS, we actually did form a 527 super PAC, just so that, when we got close to an election, we can mention a candidate's name. We truly, truly have been living under these regulations for three years, and now, today, we don't have to, and we may have to again very soon.

Mr. ISSA. Mr. Rottman?

Mr. ROTTMAN. I am not sure. I think that the regulations, they go even further than that, right?

Mr. ISSA. You mean they are worse than I——

Mr. ROTTMAN. What they do is they conflate fundamentally nonpolitical issue advocacy with partisan politicking, and they make that the definition of candidate-related political activity. So I am not sure that it is an administrative question; I think it is fundamentally erring on the side of suppressing speech in order to get at absolutely anything that could be problematic, as opposed to erring on the side of caution and erring on the side of free speech.

Mr. ISSA. So similar to putting in Federal agents in broadcast studios to see whether the new reporting rose to political activity, maybe.

Mr. ROTTMAN. Actually, we came the opposite way on that, but——

Mr. ISSA. You thought it was okay to go in there and see if they were being fair and balanced at MSNBC?

Mr. ROTTMAN. We didn't feel that it was coercive, what the SEC was doing, and, therefore, if it is not coercive, then there is no First Amendment issue.

Mr. ISSA. Yes. No, a Federal agent sitting in my office never intimidated me.

Senator?

Mr. ALLARD. We are basically a social organization——

Mr. ISSA. That advocates for helmet laws.

Mr. ALLARD. And safe driving and responsible behavior, whether it is on public lands or——

Mr. ISSA. But that leads to legislation, rulemaking, and so on.

Mr. ALLARD. That is correct.

Mr. ISSA. So you would fall right in the trap of they want to call you political because you would like to make sure that dirt bikers have access to dirt.

Mr. ALLARD. We are prohibited by Federal law from being active in partisan politics.

Mr. ISSA. But this rule would sweep you into calling partisan politics just trying to make sure that dirt bikers have dirt.

Mr. ALLARD. That is correct.

Mr. ISSA. Ms. Aviv?

Ms. AVIV. Mr. Chairman, we are focused on (c)(3) and (c)(4) organizations, and we see 501(c)(4) social welfare organizations as different than 527s, since their primary purpose is supposed to be a social benefit purpose, but can engage in some partisan political activity. Our concern with this rule is what has been expressed by I think everybody on this panel, which is that it goes too far and it doesn't address the problems that have been talked about in the media and by this committee and others in the last number of months, which is to define what political activity is, to limit the scope of what IRS agents have by way of personal opinions or judgment calls because there are clear criteria of what political activity includes, and not to include longstanding activities that are part and parcel of the American fabric that (c)(3) organizations can do and (c)(4) organizations have long been doing.

Mr. ISSA. Thank you.

Mr. Mason?

Mr. MASON. Thank you, Congressman. I think that it may be a little different than what you think, and it is probably worse. In the Federal Election Campaign Act, all of these kinds of regulations have a long history, it is well litigated, there is a very precise distinction between issue advocacy and expressed advocacy. That has been frustrating to those who think that more speech should be regulated because, under the FEC case law, less speech is regulated. So now it is not that it is bringing speech into the FEC, it is taking that speech and putting it into the regulatory authority of the IRS. So instead of having a complaint made with the FEC, you get an IRS agent in to decide whether you are engaging in issue advocacy or expressed advocacy, and I think that is just enormously wrong-headed.

Mr. ISSA. Thank you.

Mr. Dickerson?

Mr. DICKERSON. Well, chairman, I appreciate the suggestion. My organization, a very few days after the comment period was opened, filed a comment suggesting that if what we are really concerned about here is specificity and clarity, what we should do is just say political activity is that which the FEC considers political activity. You have to file a report if you do an independent expenditure. That has been fully legally vetted up to the Supreme Court

of the United States; there is a dollar number on it. That is your candidate-related political activity. If you import those regulations in, you don't have any of these constitutional problems, you have a clear dollar value that can be applied against your overall budget. We think it is a very elegant solution and I would suggest those draft regulations.

Mr. ISSA. Thank you.

Mr. Chairman, I appreciate the indulgence in time and I think the point was well made that what Ms. Lerner and others at the FEC have tried to expand the FEC, but even if you expand the FEC, much of exactly what this rule would capture would be outside their jurisdiction, outside the speech that they have any influence in; and I think that is the reason that, from the President on down, those who objected to Citizens United and wagged his finger at the U.S. Supreme Court in the well of the House are trying to get a back door of something that even Congress never legislated in the post-Nixon era with the Federal Election Commission. So I certainly think this has been a fruitful discovery. I am just sorry for the ranking member that he has been so wrong in this hearing. I yield back.

Mr. DESANTIS. The chairman yields back and we will recognize the ranking member for five minutes.

Mr. CARTWRIGHT. If the chairman hadn't said that, I would have had to check and make sure I was in the right hearing room.

Mr. ISSA. You are in the right hearing room.

Mr. CARTWRIGHT. Ladies and gentlemen, I am a freshman here in Congress, I am not afflicted with the decades inside the Beltway that many of my brothers and sisters are afflicted with, and what I have come here to Washington to do is to try to seek consensus, try to look for the ways that we can come together on issues in Washington, D.C. that affect the entire Nation. Believe it or not, although it doesn't sell newspapers, we do agree on a great many things here in the Congress, and I am looking to expand those areas.

And I think that this hearing is so important because what we are struggling with here is how to solve this problem. You know, when you leave things undefined, when you leave things vague and ambiguous, that is when these fistfights break out; that is when, if you have left undefined what political activity is prohibited by this 501(c)(4) and then the IRS, they are at their wit's end trying to make the definition, well, then, if they decide to go one way or the other, one end of the political spectrum ends up being creased and raising the alarm and screaming bloody murder, and that is what we have been hearing for the last year and a half.

But it is not a new problem, it is something that Americans have understood. That ambiguity, that uncertainty, that vagueness has existed since 1959. Commentators have mentioned it through the 1970s and through the 1990s and through the 2000s, and it behooves us to come together and talk about these things. And we have talked about this. There is this tension where, on the one hand, we have the First Amendment rights to engage in political activity and free speech, and on the other hand we have this concern that there is going to be dark money, there is going to be un-

disclosed money financing elections, and we don't know who is behind the money that got this or that candidate elected.

I know all of you see that tension and you understand it, and, Ms. Martin, I want to congratulate you not only on getting your 501(c)(4), but also on getting your 527. As we know, here in the United States 527 organizations can engage in political activity, and they do disclose their donors. And that is a very, very important point not to be missed, that disclosing your donors is required in 527 organizations.

I am here to say protecting dark money has to stop. Chairman Issa was here saying, well, the Democrats do that too, and that is well and good, and I think it has to stop on both sides. This is not just about finger-pointing between Democrats and Republicans, it is about making our Nation better, making our democracy better. We are the shining light, we are the beacon for the world on how democracy is supposed to work. Let's make it work better.

And what I want to do is I want to run down the panel quickly, because I want to get a good sense from you. And we have heard great comments from all of you, including Senator Allard, Ms. Aviv, Mr. Dickerson, all of you. But I want to get a sense. Raise your hand if you think—I am going to ask it two ways. Do you think we should absolutely not have more specific rules on how 501(c)(4)s are allowed to engage in political activity? Should we just not have more specificity and clearing up the ambiguities or should we just eliminate all control?

How many of you, raise your hand if you think we ought to have better, more specific rules. Okay, seeing three hands out of six.

And raise your hand if you think we ought to just have no control over what the 501(c)(4)s can do in terms of political activity. Okay, I am seeing no hands.

So I think we are in agreement that there has to be control over the dark money, and I thank you for appearing here today and making that clear.

Mr. DESANTIS. Would the gentleman yield for a question?

Mr. CARTWRIGHT. I yield for a question.

Mr. DESANTIS. With dark money, so would you have dissented in the NAACP vs. Alabama case, where the Supreme Court struck down Alabama's forced disclosure of donors to groups like the NAACP, who were unquestionably engaged in public issues, not simply that we would define, but of the utmost seriousness and importance, and that ability to conduct anonymous speech was critical not only in terms of martialing resources in the African-American community. Imagine if you were a white individual who had sympathy. To be able to stay anonymous allowed you to probably help more than maybe you just didn't have the courage to come out and do it on your own. So would you have wanted to uphold that Alabama statute in order to force the disclosure in that situation?

Mr. CARTWRIGHT. No, I think not, and I think that is a great question, Ron. I am glad you asked it. It is something that has to go into the mix. We have to strike the right balance, because on the one hand we have to protect the people in Alabama who, at that time, were doing whatever they could think of to rebel against the oppressive conditions and the violent atmosphere and climate there, but, on the other hand,——

Mr. JORDAN. Would the gentleman yield?

Mr. CARTWRIGHT.—you don't want to give a blank check to dark money, and I think we all agree on that, as the panel does.

I yield back.

Mr. DESANTIS. Thanks for answering the question.

The chair now is going to recognize Mr. Meadows from North Carolina for five minutes.

Mr. MEADOWS. Thank you, Mr. Chairman. I will be very brief. I want to apologize to each of you; I had a markup. We have been following this, our staff has been following it, so I had a markup to go. But I would encourage the gentleman from Pennsylvania to quit using dark money. Since when is free speech dark money? And I am tired of us. It is like nails on a chalkboard when I hear that, because when we really look at it, it is not dark money, it is moms and dads giving money that, quite frankly, they don't have, because they believe in this Country. And we need to make sure that we do that.

So that I am not redundant in the questions that may have already been asked, I am going to yield the balance of my time to the gentleman from Ohio, Mr. Jordan.

Mr. JORDAN. Thank you, and I appreciate the gentleman yielding, and a great point. Was it dark money that funded the Federalist papers? I mean, this is ridiculous. And what the gentleman suggests is it is okay for some people not to disclose, but other groups need to disclose, and we are going to let the IRS decide which ones those are. That is the gentleman's premise. That is the scariest thing in the world.

Mr. CARTWRIGHT. Would the gentleman yield for a question?

Mr. JORDAN. Yes. You have had more time than any other member on the committee, but yes, go ahead.

Mr. CARTWRIGHT. Well, we are not talking about letting the IRS decide anything. In fact, it is very much the opposite.

Mr. JORDAN. That is what this rule is about. Why do you think we have six witnesses, including the Democrat-requested witness, Ms. Aviv, who said this rule is wrong?

Mr. CARTWRIGHT. Just let me finish the sentence. What we are talking about is crafting a rule that takes away unfettered discretion from the IRS so that they have bright lines to follow, and then we don't get into these fistfights. That is all my point is.

Mr. JORDAN. And I am sure we are all confident that will actually take place if they move in that direction.

Mr. DESANTIS. Would you yield just for one second?

Mr. JORDAN. I would be happy to. It is amazing, I am actually the chairman of this committee and I have to yield?

[Laughter.]

Mr. DESANTIS. Well, bright-line rules are great, but I like Amendment 1, U.S. Constitution bright-line, Congress shall make no law——

Mr. JORDAN. Well said. Thank you, Mr. Chairman.

I would ask to enter into the record a piece that Mr. Dickerson probably think is well written as well. Bradley Smith, a guy that Mr. Dickerson and I both know, has an outstanding piece in today's Wall Street Journal, and I am actually going to read from this, which I normally don't do when it is my time to ask questions and

during my five minutes. But this is important because this gets at why it started now, why it wasn't 1959, why it was now. And Mr. Smith's point is the smoking gun in the targeting of conservative groups has been hiding in plain sight, it has been members of Congress who have asked the IRS, who have pushed the IRS to do exactly what they did, harass people like Jenny Beth Martin and her organization for three years.

And I am just going to read the bullet points that Mr. Smith so nicely put in his piece.

January 27th, 2010, not 1959, January 27, 2010, President Obama criticizes Citizen United in the State of the Union address and asked Congress to correct the decision.

February 11th, 2010, Senator Chuck Schumer says he will introduce legislation known as the Disclose Act to place new restrictions on some political activity by corporations and force more public disclosure of contributions to 501(c)(4) organizations. Mr. Schumer says the bill is intended to "embarrass companies." Not a Republican saying that, Senator Chuck Schumer saying that, embarrass companies out of exercising their rights in recognizing Citizens United.

Soon after, March 2010, Mr. Obama publicly criticizes conservative 501(c)(4) organizations engaging in politics. In his August 21 radio address, he warns Americans about shadowy groups with harmless sounding names.

Mr. Mason, are you a shadowy group?

Mr. MASON. I don't believe so, but I might have to check with my colleague.

Mr. JORDAN. Senator Allard, is the Motorcyclists Association a shadowy group?

Mr. ALLARD. Certainly not.

Mr. JORDAN. I mean, this is amazing.

September 28, 2010, Mr. Obama publicly accuses conservative organizations posing as not-for-profit social welfare and trade groups.

Mr. Mason, are you just a poser? Are you just posing or are you a real social welfare group?

Mr. MASON. We have been a real social welfare group for decades, doing the same business for many, many years.

Mr. JORDAN. Helping lots of families, thousands and thousands of families across the Country.

October 11, 2010, Senator Dick Durbin asks the IRS to investigate. Dick Durbin, Democrat from Illinois, I should have added that, asks the IRS to investigate Crossroads GPS and other organizations.

April 2011, White House officials confirm that Mr. Obama is considering an executive order that would require all Government contributors to disclose their donations to politically active organizations.

February 16th, 2012, seven Democratic Senators, Michael Bennett, Al Franken, Jeff Merkley, Mr. Schumer, Senator Shaheen, Senator Udall, Senator Whitehouse, write to the IRS asking for them to investigate conservative 501(c)(4) organizations. That is why they couldn't approve you. Democrat Senators said no, don't keep investigating. That is why you had to wait three years. That is why you get approved the day before the comment period is up.

March 12th, 2012, the same seven Democrats write another letter asking for more investigation of other conservative groups.

July 27th, 2012, Senator Carl Levin writes one of several letters to then-IRS Commissioner Doug Schulman seeking a probe of nine conservative groups.

August 31st, 2012, in another letter Senator Levin calls it is fair to investigate and prosecute targeted organizations unacceptable. What? Senator Levin says the IRS was failing to target and investigate organizations. You waited three years. What Senator Levin didn't know was the very thing he had been asking for was going on.

December 14th, 2012, ProPublica receives Crossroads GPS's 2010 application for tax-exempt status.

April 9th, 2013, Senator Whitehouse convenes the Judiciary Committee on crime and terror to examine nonprofits. He alleges that nonprofits are violating Federal law by making false statements about the activities of donors using shell companies to PACs to hide donor identities.

May 10th, 2013, Senator Levin announces the permanent Subcommittee on Investigation will hold hearings on "the IRS's failure to enforce the law."

November 29th, February—I mean, it just continues. I will stop because I had two more bullet points, which shows how extensive this was. All, again, happening not in 1959, but starting January 27th, 2010.

Mr. Chairman, again I ask for unanimous consent to enter this fine piece by Mr. Smith into the record.

Mr. DESANTIS. Without objection, it shall be entered into the record.

Mr. JORDAN. And I yield back all that remaining time.

Mr. DESANTIS. Oh, yes. Thank you.

At this point, the chair will recognize the gentleman from Virginia.

Mr. CONNOLLY. I thank the chair.

By the way, Ms. Martin, does your organization have its tax-exempt status?

Ms. MARTIN. As I said in my opening statement, just yesterday, after three years, two months, and 10 days, and the day before this hearing, we got a call from the IRS saying we would be granted it. We still don't have the letter.

Mr. CONNOLLY. Okay. So whatever that attempt to silence you was seems to have failed, is that right?

Ms. MARTIN. I am sorry, what?

Mr. CONNOLLY. You were indicating in your testimony that I was at earlier that there was some conspiracy to silence your voice.

Ms. MARTIN. I didn't say there was a conspiracy to silence my voice, I said there was a silencing effect with the way that we were treated.

Mr. CONNOLLY. Ah. Okay.

Ms. MARTIN. And there will be a silencing effect of any organization who has to do this, especially when they have to find out how volunteers spend their time, what they say, and what they do. At which point do you determine whether a volunteer is still affiliated

with your organization or acting as an independent and free American?

Mr. CONNOLLY. Thank you.

As somebody who was very involved, before your time, in antiwar protests and expressing dissent during the Vietnam War era, I am very sensitive to the idea that the Government would ever attempt to silence voices, even dissenting voices. So even though we probably have very little in common politically, one thing we do have in common is the absolute commitment to making sure all voices are protected in the United States of America. I am not persuaded that there is any active attempt to squelch your voice, but should there be I assure you Democrats, certainly this Democrat, will be on your side.

Mr. Rottman, I heard your testimony too, and, forgive me, I had to leave; I had a markup that just ended in the House Foreign Affairs Committee, otherwise I would have been here for all of your testimony. But isn't the issue here about in terms of who has what tax-exempt status and what the rules are, doesn't it really boil down to whether or not we want to disclose who our donors are?

For example, you were complaining about whose name could be invoked and who you might use. But isn't that really about whether you wish to disclose your donors or not? I mean, don't we have an awful lot of tax-exempt organizations that have filed who consciously want to make sure that they can protect the anonymity of who funds them?

Mr. ROTTMAN. I would say two things. I would say, first of all, that this debate may flow from the concern over the lack of disclosure of donors to groups that are engaged in partisan political activity. But the proposed rule at the IRS goes far beyond that and it covers a vast amount of legitimate issue advocacy that has nothing to do with partisan politicking. That is the concern.

Mr. CONNOLLY. So it overreaches, you are saying.

Mr. ROTTMAN. It overreaches and it also would do very little to tamp down on the phenomena that caused it to be proposed.

Mr. CONNOLLY. Well, let me ask you another question. As I said to Ms. Martin, I am a child of the 1960s and 1970s and was very involved in dissent; a different kind of dissent, but dissent. And I did see the Government try to squelch that dissent. I saw the Government infiltrate organizations that were simply trying to express their point of view about a terrible war. So it does happen and we have to be always on our guard to make sure it doesn't happen ever again.

But I am also an English Lit major, and I always wondered whether that would come in handy here in Congress. And to an English Lit major words mean something. So let me try out on you, Mr. Rottman. I am reading Section 501(c)(4) of the Internal Revenue Code, and it says, civil leagues organizations not organized for profit, but operated exclusively for the promotion of social welfare.

What does the adverb exclusively mean to you? I mean, here is a simple Wikipedia definition: to the exclusion of others; only or solely. Not 60 percent. When I say to my wife, ours is an exclusive relationship, it doesn't mean 60 percent; the other 40 percent I am free to sort of roam. It is exclusively a relationship.

Primarily means for the most part or mainly. And what I find in this debate is we have sort of lost track of what the English language means. Exclusively does not mean mostly.

Mr. ROTTMAN. Congressman, can I just jump in?

Mr. CONNOLLY. Yes, of course. Please.

Mr. ROTTMAN. Well, you are absolutely right that the statute says exclusively and the regulations say primary purpose. The definition of political intervention, for 60 years, has been limited as closely as possible to partisan politicking. This rule has very little to do with partisan politicking. It would allow the same type of activity that is ongoing right now, but at the same time it would cover a vast amount of nonpartisan issue advocacy, and that is the concern that you are hearing from both the right and the left.

Mr. CONNOLLY. I wish I had a little more time. I would just say this is something we have to clear up either in the law or with regulations, but exclusively doesn't mean for the most part. That is not what the word, the adverb means. You can look it up in any dictionary. Primarily does mean that.

Mr. ROTTMAN. We don't disagree. In fact, we have supported an expressed bright-line that would make it very clear, and easy to apply by the IRS, between partisan political activity and legitimate issue advocacy, and that bright line would end the need for hearings like this and the current controversy.

Mr. CONNOLLY. And just a final point I would say, Mr. Rottman, because I think you make a good point, but remember it is not just partisanship that is the issue, it is political. It is political involvement. And when you say I am exclusively a social welfare organization, but what you really mean is I am actually, for the most part, a political organization, that is a different matter. And I think we have to get these definitions right, and I think some legislative relief, I think, is frankly going to be in order.

Mr. ROTTMAN. I agree completely, but I would say, though, that partisan politicking aside, if you are engaged in political activity like anti-war protests, you have a right to do that anonymously, and that right should be protected strenuously.

Mr. DESANTIS. The gentleman's time has expired.

Mr. CONNOLLY. I thank the chair.

Mr. JORDAN. Mr. Chair?

Mr. DESANTIS. The chairman is recognized.

Mr. JORDAN. Just real quickly.

Mr. Mason, does Home School Legal Defense engage in exclusive activity to better home schooling for the families you represent?

Mr. MASON. We have other things that we do as well.

Mr. JORDAN. But it is all about home schooling.

Mr. MASON. Yes.

Mr. JORDAN. And, Mr. Allard, does the Motorcyclists Association, are you exclusively focused on better roads, better helmet laws because you care about exclusively doing things for the motorcyclists who are part of your organization?

Mr. ALLARD. That is correct. We are a motorcyclist organization.

Mr. JORDAN. And, Ms. Martin, I bet your organization is exclusively about defending the United States constitution and the principles that you think make America great, is that correct?

Ms. MARTIN. Yes, sir.

Mr. JORDAN. Yes. So we are fine, exclusive is the right word. We are all fine. But this new rule would say, uh-uh, now you have big problems, now you have big problems, because it tries to define what political—that is, again, why this thing is so absurd and why everyone across the political—as I said before, from the Tea Party to the ACLU, from the home schoolers to the Harley riders, everyone knows this rule is bad. Everyone knows it except this Administration. Everyone except this Administration. And this is why this hearing was important and why we had such a great panel.

I yield back, Mr. Chairman.

Mr. DESANTIS. Well, thanks for that. And I really appreciate the witnesses coming. I think you all did a wonderful job, and I think clearly this rule cannot stand; it is way over-broad, it will chill core First Amendment speech. And I know we are going to be moving legislation through Congress; hopefully the Senate will agree.

But at the end of the day we need to be able to speak, people need to be able to pool their resources. And the thing that amazes me is you chill these 501(c)(4)s from getting involved in different issues. Guess what? That actually gives more power to people who are very wealthy, who can just stroke an individual check on their own. So you are not making it more democratic, you are making it more difficult to speak.

This committee stands adjourned.

[Whereupon, at 11:37 a.m., the subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

OPENING STATEMENT OF CHAIRMAN JORDAN

Subcommittee on Economic Growth, Job Creation & Regulatory Affairs hearing entitled, *"The Administration's Proposed Restrictions on Political Speech: Doubling Down on IRS Targeting. "*

February 27, 2014, 9:30 a.m.

2247 Rayburn House Office Building

- Today's hearing continues the Committee's ongoing oversight of the IRS's inappropriate treatment of conservative groups applying for tax exempt status.

- The IRS has doubled down on its targeting and is now seeking to codify their actions.

- On November 29, 2013, the IRS issued a proposed regulation under the guise of clarifying the tax-exemption determinations process.

- As we will hear today, this rule, if implemented, will stifle the speech of social welfare organizations and will systematize the targeting of non-profit organizations.

- The administration is using the controversy surrounding the targeting of tax-exempt organizations as a pretense for the need for this regulation.

- In reality, this rule is Lois Lerner's final act in the Administration's effort to curb political speech.

- We know that this effort was in the works well before the release of the Inspector General's audit. Through the Committee's investigation, we uncovered evidence that Lois Lerner sought to crack down on political speech by certain nonprofit groups as early as 2010. Well before the rule was made public, e-mails show the IRS was surreptitiously working on this effort "off-plan."

- In fact, the Committee's investigation has revealed that the Administration secretly considered additional regulation of 501 C4 organizations for years.

- In transcribed interviews, Treasury officials have confirmed that work on changing the rules for social welfare groups started long before the Inspector General's report. For example, Ruth Madrigal, a senior official in the Treasury Department's Office of Tax Policy, confirmed that she suggested that Treasury conduct its work "off-plan" in June of2012. She testified that "We had had requests to do guidance on this topic."

- Former IRS Acting Commissioner provided further context for the requests that the IRS and Treasury received. He testified that, as of the Fall of2012, "So I'm not sure there was a problem, right? I mean ... we had ... Senator Levin complaining bitterly about our regulation that was older than me .... [W]e were being asked to take a look at that. And so we were thinking about what things could be done."

- Think about that. The IRS and Treasury, under the guise of responding to the targeting scandal, have proposed a crackdown on political speech that has secretly been in the works for years and is the result of political pressure from Democrats in Congress and left-wing special interest groups.

- A chilling effect can already be seen. Groups who have engaged in political speech for years are now in limbo about how to proceed for fear that the IRS will retrospectively look back at their activities through the lens of the new regulation and determine they are in violation of their tax status.

- The rule is hugely unpopular, receiving over 94 thousand comments.

- The rule has been criticized by groups across the political spectrum, as well as by groups who have nothing to do with politics and simply advocate for causes their members believe in, such as some of our witnesses here today.

- Make no mistake; the proposed regulation will seriously hinder the freedom of speech guaranteed by our Constitution. It is my hope that our colleagues on the other side of the aisle will join me in calling for this rule to be revoked.

- I want to thank all of our witnesses for being here. We appreciate your courage in speaking out against this effort to crack down on your ability to engage in political speech, and we will do everything in our power to ensure that you continue to be able to exercise this fundamental constitutional right.

OPENING STATEMENT OF CHAIRMAN ISSA

Subcommittee on Economic Growth, Job Creation & Regulatory Affairs hearing entitled, *"The Administration's Proposed Restrictions on Political Speech: Doubling Down on IRS Targeting. "*

February 27, 2014, 9:30 a.m.

2247 Rayburn House Office Building

- I thank Chairman Jordan for calling this important hearing today.
- This hearing is about Freedom of Speech and Freedom of Association -rights that are fundamental to our core democratic values.
- Make no mistake. The Administration's proposed regulation will stifle political speech and restrict political association.
- Over 9 months ago, Lois Lerner publicly acknowledged the IRS's targeting of conservative nonprofit groups.
- We have learned since then that for years, the IRS used terms like "Tea Party," "Patriot," and "9/12" to identify applications for extra scrutiny.
- These groups received extraordinary attention from the IRS about their political speech and activities.
- The Administration's proposed regulation on political speech of 501(c)(4) organizations is an attempt to codify the IRS's targeting.
- It writes into the law regulations designed to stifle political speech and prevent nonprofits from exercising Constitutional rights.
- The Administration's proposal is the result of years of political pressure from some in Congress and the media to force the IRS to "crack down" on nonprofit political speech.
- I look forward to hear testimony from this distinguished panel of bipartisan and nonpartisan organizations concerned about the Administration's proposed restrictions on political speech.
- I hope the Administration is watching today. I hope that the Administration will take these concerns seriously.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

ASSISTANT SECRETARY

February 25, 2014

The Honorable Dave Camp
Chairman
Committee on Ways and Means
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Camp:

I write in response to your recent letter to Secretary Lew regarding a notice of proposed rulemaking (the NPRM) relating to tax-exempt organizations. We share your interest in this important issue, and we are committed to ensuring that the Internal Revenue Service (IRS) treats all applicants seeking tax-exempt status in a fair, even-handed, and transparent manner. This letter describes, in more detail below, the reasons that the Department of the Treasury and the IRS issued the NPRM, its scope and contents, and the standard rulemaking process we have followed and will continue to follow.

The Treasury Inspector General for Tax Administration (TIGTA), the National Taxpayer Advocate (NTA) and members of Congress recommended that Treasury and the IRS consider issuing new guidance in this area. The NPRM is consistent with those recommendations. Our ultimate goal—to which we are firmly committed—is to simplify the IRS determinations process and to provide greater clarity for organizations seeking tax-exempt status. The NPRM, however, is only the first step. There are many additional steps to be taken before any final rules are released. For example, the central purpose of issuing any NPRM is to solicit public comments on proposed regulations. We have already received over 76,000 comments, and we will consider them carefully before taking any further steps in the rulemaking process.

Unfortunately, there have been numerous misleading reports and public statements regarding the NPRM. Therefore, it also is important to highlight what the NPRM does not do. *First*, the NPRM does not restrict any form of political speech. It relates only to the qualification requirements for a particular type of tax-exempt status. *Second*, the NPRM does not favor any individual political party or group. It applies to all organizations, regardless of political affiliation. *Third*, the NPRM does not prevent politically-active organizations from qualifying for tax-exempt status. Congress provided a clear mechanism for political groups to organize as tax-exempt organizations—*i.e.*, under Internal Revenue Code Section 527. The major difference is that Congress requires Section 527 groups to be transparent and to disclose their financial donors. In requiring disclosure, Congress presumably made the judgment that political organizations should be open and transparent in their fundraising. *Fourth*, the NPRM does not seek to impose greater restrictions on Section 501(c)(4) organizations than on other tax-exempt organizations. In fact, it expressly seeks comments on whether the proposed rule should apply to other types of tax-exempt organizations.

1. **In May-June 2013, TIGTA, NTA, and Congress Called for Clarity in the Rules Regarding Social Welfare Organizations.**

Under the law enacted by Congress, only an organization that is "operated exclusively for the promotion of social welfare" is entitled to tax-exempt status. In 1959, Treasury and the IRS issued regulations interpreting this standard. The regulations allow a social welfare organization to qualify for tax-exempt status if it is "primarily engaged" in promoting social welfare. Those regulations also state that the promotion of social welfare does not include participation or intervention in political campaigns on behalf of or in opposition to any political candidate.

Beginning in 2010, Treasury and the IRS received requests, from members of Congress and other interested parties, to consider engaging in rulemaking to clarify the rules regarding social welfare organizations given the public attention this issue was receiving. As the NPRM makes clear, these requests included requests for guidance on the meaning of "primarily" as used in the current regulations under Section 501(c)(4).

In May 2013, TIGTA issued a report regarding the IRS's processing of certain applications for tax-exempt status under Section 501(c)(4). In its report, TIGTA expressed concern that lack of specific guidance in the regulations may have led to confusion on the part of IRS employees tasked with assessing these applications. TIGTA recommended that guidance on how to measure the "primary activity" of social welfare organizations be included for consideration in the Primary Guidance Plan (PGP).[1] TIGTA summarized its recommendation on its "Highlights" page as follows: "TIGTA recommended that the IRS [] request that social welfare activity guidance be developed by the Department of the Treasury." In its response to TIGTA's recommendation, the IRS stated that it would "share this recommendation with the IRS Chief Counsel and Treasury Office of Tax Policy."

In public testimony regarding his report, TIGTA Russell George repeated his call for increased clarity in the rules relating to social welfare organizations. In a May 22, 2013 hearing before the House Oversight and Government Reform Committee, Mr. George stated that "[t]here's no question that clarity in – in the law and how to implement it would certainly help anyone who's trying to apply the law in the instance" and that "one of the recommendations in this report, is that the Internal Revenue Service work with the Department of the Treasury for clarity in the area."[2]

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[1] The PGP, which is published yearly, sets forth the joint guidance priorities for IRS and Treasury for the coming year. Adding a guidance matter to the PGP represents a commitment by Treasury and the IRS to devote resources to a particular matter. However, it is important to note that the PGP is not a comprehensive list of all matters Treasury and the IRS are considering for future guidance.

[2] In a May 17, 2013 hearing before the House Ways and Means Committee, Mr. George stated that "we have indicated that some clarification from those in the policy area of the Department of the Treasury might be needed in this area." He agreed that "further tightening" [of the definition of the criteria of 'primarily engaged in social welfare'] would be helpful to IRS personnel when it comes time to review the applications." In a June 3, 2013 hearing before the House Appropriations Committee, Mr. George repeated that it was the report's recommendation "that the IRS seek further clarity" on this issue.

Both President Obama and Secretary Lew stated that all of the recommendations of the TIGTA report would be implemented. Members of Congress also urged implementation of TIGTA's recommendations. In a June 3, 2013 hearing before the House Appropriations Committee, Chairman Crenshaw told Acting IRS Commissioner Danny Werfel that "[w]e're going to insist that the IRS implement all nine of the recommendations in the inspector general's report to the satisfaction of the inspector general."

In addition, the National Taxpayer Advocate Nina Olsen recommended clarifying the standards for Section 501(c)(4) tax-exempt status in a special report issued in June 2013 relating to the TIGTA report. The special report stated that "there is very little guidance to guide IRS employees in determining whether an organization is operating 'primarily' for social welfare purposes or what level of political campaign activity is permissible." The report concluded that "[t]o enable the IRS's EO function to evaluate applicants for Section 501(c)(4) status in a consistent manner, the Advocate recommends that Congress or the Treasury Department provide clearer standards."

2. Treasury and the IRS Are Implementing The Recommendations from TIGTA, NTA, and Congress through Public Notice and Comment Rulemaking.

Consistent with these recommendations, Treasury and the IRS added guidance on how to measure the "primary activity" of social welfare organizations to the 2013-14 PGP, which was published in August 2013. Subsequently and consistent with standard agency rulemaking procedures, Treasury and the IRS issued the NPRM, containing a proposed rule and a number of requests for comments, last November.[3]

There are two principal questions about the interpretation of Section 501(c)(4): first, how to define the candidate-related political activity that does not promote social welfare; and second, how to determine what proportion of an organization's activities must be devoted to social welfare.

The NPRM addresses the first question by defining the kinds of candidate-related political activity that will, if the rule is implemented, be deemed not to promote social welfare. The NPRM sets forth a clear rule, drawn primarily from existing laws and regulations, to replace the "facts and circumstances" test currently used by the IRS. Application of the "facts and circumstances" test can involve a fact-intensive inquiry into the planned or actual operations of organizations seeking tax-exempt status. In addition, making an organization's tax-exempt status dependent on a fact-specific agency inquiry can lead to uncertainty for individual organizations about whether they meet the criteria. A clear rule will reduce the need for detailed factual analysis in the IRS determinations process and provide greater certainty for organizations. The approach that we have taken provides Congress and the public an opportunity to comment on how this rule should be defined.

[3] Because all IRS and Treasury regulations are issued pursuant to public notice and comment rulemaking procedures, as a result, neither IRS nor Treasury can (or do) engage in secret rulemaking.

The inclusion of voter guides and candidate forums in the definition of "candidate-related political activity" has attracted considerable public attention. Under the "facts and circumstances" test, these activities would be deemed to promote social welfare only if conducted in a neutral and unbiased way. However, determining whether these activities are conducted in a neutral and unbiased way can require a particularly fact-intensive and complicated inquiry by the IRS into the operations of an organization. For this reason, Treasury and the IRS included them in the proposed definition of campaign-related political activity. Treasury and the IRS will consider the public comments received on this issue before any final rule is issued. It is worth noting that, if implemented as proposed, the rule would not prevent an organization from distributing voter guides or holding candidate forums and maintaining its tax-exempt status. Social welfare organizations may engage in some amount of "candidate-related political activity." In addition, as noted above, there are other ways to qualify for tax-exempt status, including as a political organization.

On the second question—what proportion of a social welfare organization's activities must promote social welfare and how it should be measured—Treasury and the IRS chose to first solicit comments from the public before issuing a proposed rule. Treasury and the IRS understand that there is significant public interest in this question and recognize the importance of soliciting public feedback.[4] Once we have reviewed all the comments, Treasury and the IRS hope to issue a proposed rule that will, to the extent possible, further clarify and simplify the determinations process for social welfare organizations.

The NPRM also seeks comments on the important question of whether the proposed (or a similar) definition of candidate-related political activity should be adopted for other tax-exempt organizations, such as Section 501(c)(5) (labor) or Section 501(c)(6) (business) organizations.[5] We recognize the importance of promoting, to the extent possible, consistent definitions across tax-exempt organizations.

Treasury and the IRS recognize that social welfare organizations are a broad and diverse set of organizations. The notice and comment process allows us to hear from all concerned parties, and we look forward to reviewing their comments. Treasury and the IRS have already received over 76,000 comments in response to the NPRM. After the comment period closes on February 27, 2014, Treasury and the IRS will hold a public hearing or hearings as a standard practice, to allow for further public input regarding these important issues. Treasury and IRS will carefully consider the issues raised in the comments received before issuing any further guidance.

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[4] It bears repeating that Treasury and the IRS have not yet issued even a proposed rule on the important question of what proportion of a social welfare organization's activities must promote social welfare and how it should be measured. As the NPRM states: "Given the potential impact on organizations currently recognized as described in section 501(c)(4) of any change in the 'primarily' standard, the Treasury Department and the IRS wish to receive comments from a broad range of organizations before deciding how to proceed."

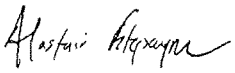
[5] The NPRM states: "Recognizing that it may be beneficial to have a more uniform set of rules relating to political campaign activity for tax-exempt organizations, [we] request comments ....regarding whether the same or a similar approach in addressing political campaign activities of other section 501(c) organizations."

3. Treasury and the IRS Are Committed to Cooperation with Your Committee.

Treasury and the IRS are committed to cooperating with your Committee. For the last several months, your Committee has conducted an investigation into the IRS's treatment of certain applications for 501(c)(4) tax-exempt status. As you know, IRS has devoted significant resources to your investigation and responding to your requests. To date, Treasury and the IRS have produced over 500,000 pages to Congress, responded to more than 200 formal Congressional inquiries regarding 501(c)(4) issues, and handled several hundred informal requests from Congress for information or documents. Treasury and IRS officials have answered questions relating to 501(c)(4) issues at 15 Congressional hearings. Treasury and the IRS have made over 35 current and former employees available for more than 60 interviews by Congressional committees. We understand that IRS employees are in regular contact with your Committee's staff and are working hard to satisfy outstanding requests for information regarding your investigation into the IRS's treatment of certain applications for 501(c)(4) tax-exempt status. We look forward to your report and any specific recommendations you may have for Treasury and the IRS regarding TIGTA's recommendation that we consider additional guidance in this area.

I hope this letter answers your questions about the rulemaking process. To the extent you may have additional questions, please do not hesitate to let me know.

Sincerely,



Alastair M. Fitzpayne
Assistant Secretary for Legislative Affairs

The Washington Post

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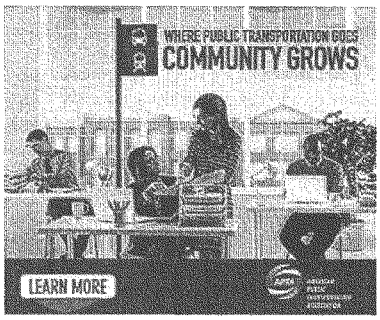
Treasury and IRS rules on nonprofits' political activity miss the mark



By Gary D. Bass and Diana Aviv, Published: December 12

Gary D. Bass is an affiliated professor at Georgetown University's McCourt School of Public Policy and executive director of the Bauman Foundation, which gives grants to support nonpartisan civic engagement. Diana Aviv is president and chief executive of Independent Sector, a Washington-based leadership network of nonprofits, foundations and corporate giving programs.

Many Americans disapprove of the soaring amounts of money flowing to political campaigns through "social welfare" groups, which are not required to disclose their donors. Many others are angry about revelations that Internal Revenue Service (IRS) workers applied extra scrutiny to applications for tax-exempt status from conservative-leaning nonprofit groups. But a recent proposal from the Treasury Department and the IRS to address nonprofit political activity misses the mark — and stands to undermine nonpartisan civic engagement.

On its face, the proposal is appealing. It would set standards for defining political activity among social welfare groups. This could be an important first step in pushing "dark money" into the sunlight and providing IRS examiners with objective tools for reviewing applicants for tax exemption. For example, the rules would make clear for the first time that communications that identify a candidate within a specific pre-election time frame would be political intervention or "candidate-related political activity."

Beyond this, however, the proposed rules have a number of fatal flaws.

First, because the proposed rules apply only to social welfare groups, donors could move money for issue ads and other activities deemed "political" under the rules to other types of nonprofits, such as trade associations. Under current law, social welfare groups can spend on political activity a little less than half of the money they raise. If the IRS were to follow up with additional rules limiting the amount of permissible political activity or requiring donor disclosure — as we think it should — donors are likely to shift their contributions to trade associations, where these IRS rules would not apply. In short, Whack-a-Mole does not solve the problem.

Second, the proposal defines political activity in troubling ways. The rules would no longer differentiate between partisan and nonpartisan efforts to register voters, educate voters or get out the vote. Our laws have long

permitted nonprofit organizations to urge all eligible people to vote, and such organizations have provided nonpartisan resources to help people make informed judgments about public policies and candidates. Traditionally, we believe in more civic engagement, not less.

The Treasury-IRS proposal undermines this approach. Nonpartisan candidate forums that take place 30 days before a primary and 60 days before an election would be defined as partisan political activity. Yet as elections near, these vehicles educate voters, help them cut through campaign ads and better understand what candidates stand for. Government should encourage, not discourage, such initiatives.

Other consequences are likely. The proposed rules do not apply to charities, which make up the largest segment of the nonprofit sector. Charities are already — appropriately — prohibited from political activity. They are, however, permitted to participate in many nonpartisan civic engagement activities, including voter registration, get-out-the-vote efforts and voter education. Risk-averse charities and their funders may become hesitant to engage in activities the IRS defines as political, even if that definition is not intended to apply to them.

Using bright lines to define political activity is a step in the right direction, but the government's proposed lines are in the wrong places. Fortunately, a team of highly respected nonprofit tax lawyers has been working on this problem for more than four years. Their alternative, published under the Bright Lines Project, calls for uniform rules to apply across all tax categories.

Their proposal defines as political speech express advocacy and communications that reflect a view about a candidate, but it also carves out four exceptions that permit nonpartisan civic engagement as long as paid mass media are not used. The exceptions are: legitimate advocacy on current, specific actions an officeholder can take; nonpartisan efforts to educate the public on candidates' policy positions; measured responses to statements by a candidate about an organization or its core issues; and oral remarks made at an organization's non-broadcast, in-person meeting where the comments are clearly identified as personal and do not expressly call for the election or defeat of a candidate.

This approach would provide predictability and ease understanding of what constitutes political activity. It would protect free speech and encourage civic engagement while preventing abuse of the system such as through large-scale advertising expenditures.

Ultimately, the proposed Treasury-IRS rules would further chill nonprofit civic engagement and send a message to funders and groups that even long-standing and widely accepted nonpartisan behavior is "political." Such limitations are unacceptable in a democracy and raise troubling constitutional issues in their ambiguity and uneven treatment of charities, social welfare groups and other tax-exempt organizations. The Obama administration should look to the ideas generated by the Bright Lines Project to modify its proposal.

Read more on this issue: The Post's View: Drawing a line on social welfare's involvement in politics The Post's View: The temptation of dark money Ruth Marcus: The IRS has been too lax on tax-exempt status

Berroya, Meghan

From: Richard Painter <rpainter@umn.edu>
Sent: Wednesday, February 26, 2014 9:45 PM
To: [redacted]
Cc: [redacted]
Subject: Re: today's hearing

[redacted] and [redacted]:

I have a few observations on today's hearing that may be entered into the record if any Member from the Majority or Minority chooses to do so:

I believe this investigation needs to be taken seriously and concluded as quickly as possible. The conduct that is known to have occurred is egregious and the partisan political motivation that is alleged is even more serious. The American people deserve answers.

So far, I have not heard facts suggesting involvement in this scandal of anyone at the White House. Such involvement is always a possibility (anything is possible) but so far the facts don't show it. I hope the rhetoric in the course of this investigation will not get ahead of the facts.

I believe I heard mention in the hearing that the President of the United States is a potential target of the investigation, which is news to me. Once again anything is possible when we have no idea where an investigation of misconduct in the Executive Branch might lead. At the same time, such investigations rarely lead to the President. I would never have dreamed of telling President Bush that he was a potential target of every investigation of malfeasance in an Executive Branch agency, and I hope once again that the rhetoric used in the course of this investigation will not get ahead of the facts.

I urge the Committee to consider whether the IRS should be charged with discerning the political purpose of an organization to determine its tax treatment. Such an arrangement is an invitation to the IRS to make judgment calls in the realm of politics, and I don't think they should be doing that. And certainly not if they can't do it competently and impartially.

Richard W. Painter