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February 27, 2014

Submitted via Certified Mail

Ms. Amy F. Giuliano
CC:PA:LPD:PR (REG-134417-13)
Room 5205
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, D.C. 20044

RE: Comments on REG-134417-13, Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71535 (REG-134417-13) (Nov. 29, 2013)

Dear Ms. Giuliano:

On behalf of Judicial Watch, a §501(c)(3) educational organization, we submit the following comments concerning the referenced Notice of Proposed Rulemaking (the "NPRM").

Judicial Watch is a non-partisan educational foundation that promotes transparency, accountability, and integrity in government, politics, and the law. Judicial Watch advocates high standards of ethics and morality in our nation's public life and seeks to ensure that political and judicial officials do not abuse the powers entrusted to them by the American people. For this reason, it is very concerned about both the opaque process by which the proposed regulations were developed, as well as the context—the apparent abuse of authority and potentially unconstitutional and criminal conduct by IRS employees with respect to the review of applications for exemption under §501(c)(4) filed by hundreds of organizations, the vast majority of which were "tea party" or other organizations supporting conservative policy principles and opposing many of the initiatives promoted by President Obama and his liberal allies—out of which the proposed regulations apparently arose. The secret manner in which these proposed regulations were developed, and the substantive provisions that would overturn more than 50 years of settled precedent regarding what is "intervention in a political campaign," only increase the suspicion that the IRS is not attempting to administer the law as it is, but is attempting to arrogate to itself the making of the law, a function belonging solely to Congress, and not to the IRS.

Because, as discussed below, the Service does not have the authority to adopt the rules that have been proposed, we respectfully request that the Department of Treasury withdraw the proposed rules. If the Department and the Internal Revenue Service continue to believe that new or different rules are needed, then the Service should create an Advisory Committee on exempt organization political activities, consisting of individuals representing organizations exempt under §§501(c)(3), (4), (5), and (6), to consider the issues and develop recommendations for regulations that would more clearly define and illustrate intervention in a political campaign.

Of course, in light of the Service's lack of authority, the Service and the Advisory Committee may also recommend appropriate amendments to the Internal Revenue Code.

Request for public hearing

In addition, because of IRS lack of authority, and because of the serious problems within the proposed regulations, we request that the Service hold a public hearing to receive both oral and written testimony, and request the opportunity to testify at the hearing.

Current law

Section 501(c)(4)(A) of the Internal Revenue Code provides for tax-exempt status for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes."

The exemption for the precursor to social welfare organizations first appears in the Revenue Act of 1913. The legislative history contains no reason or explanation for this inclusion, but the general belief is that the U.S. Chamber of Commerce pushed for enactment of exemptions for both civic and commercial nonprofit organizations. Laura B. Chisolm, Exempt Organization Advocacy: Matching the Rules to the Rationales, 63 Indiana Law Journal 201, 290 (1988) (available at: http://www.repository.law.indiana.edu/ilj/vol63/iss2/1). The addition was designed to patch a gap in the law and carve out exemptions for organizations that do not qualify as charitable, educational, or religious, but whose activities benefit the general public.

Treasury regulations published in 1960[1] state that

[1] Treas. Reg. §1.501(c)(3)-1(f) indicates that the presumably "final" regulations under §501(c)(3) published in T.D. 6500 on November 26, 1960, at 25 Fed. Reg. 11737, are to be effective with respect to taxable years beginning after July 26, 1959, which appears to be the date the regulations were published in proposed form. The regulations under §501(c)(4) were also published in T.D. 6500, but do not include any similar language.

> An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community. . . . a social welfare organization will qualify for exemption as a charitable organization if it falls within the definition of charitable set forth in paragraph (d)(2) of §1.501(c)(3)-1 and is not an action organization as set forth in paragraph (c)(3) of §1.501(c)(3)-1.
>
> * * * *
>
> "The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."

Treas. Reg. §1.501(c)(4)-1(a)(2)(i) and (ii).

Since 1960, the Internal Revenue Service has consistently used the rules developed under §501(c)(3) when considering whether a §501(c)(4) EO is engaged in intervention in a political campaign. See, e.g., Rev. Rul. 2004-6 (discussing factors to be considered when determining whether a §501(c)(4), (5), or (6) EO is engaged in lobbying or intervening in a political campaign).

Proposed regulations

After 53 years, and with no notice to the public that a project to revise the regulations was even underway, the Service now proposes to revise §1.501(c)(4)-1(a)(2)(ii) to replace the longstanding "participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office" standard with "direct or indirect candidate-related political activity" ("CRPA"), as further defined in new sections of the regulations. The new definition would apply only to activities conducted by §501(c)(4) EOs, and the IRS has merely requested comments on whether the new definition should subsequently be applied to EOs described in §§501(c)(3), (5), and (6).

As statutory authorization for the proposed interpretive regulations, the Service relies on 26 USC §7805(a), which permits the Service to "prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." However, the Service's rationale for proposing the new regulations has nothing to do with any "alteration of law in relation to internal revenue," but rests *solely* on alleged confusion among both IRS employees and the public:

> Recently, increased attention has been focused on potential political campaign intervention by section 501(c)(4) organizations. A recent IRS report relating to IRS review of applications for tax-exempt status states that "[o]ne of the significant challenges with the 501(c)(4) [application] review process has been the lack of a clear and concise definition of 'political campaign intervention.'" Internal Revenue Service, "Charting a Path Forward at the IRS: Initial Assessment

> and Plan of Action" at 20 (June 24, 2013). In addition, "[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, have created considerable confusion for both the public and the IRS in making appropriate section 501(c)(4) determinations." Id. at 28. The Treasury Department and the IRS recognize that both the public and the IRS would benefit from clearer definitions of these concepts.

Preamble, 78 Fed. Reg. 71535, 71536 (Nov. 29, 2013).

However, the IRS' 50-year history of consistent interpretation and application of the political activity rules under §501(c)(3) and §501(c)(4) belie the need for a "clear and concise definition of political campaign intervention," and the proposed regulations expressly do *not* address "the measurement of the organization's social welfare activities relative to its total activities." Instead, the merely IRS requests comments from the public on that issue.

Moreover, to the extent IRS employees are confused "in making appropriate section 501(c)(4) determinations," that can be blamed only on the IRS' failure to train its employees in the principles applied to determine when an EO is intervening in a political campaign, and that determinations must be made on the basis of the facts presented in the application, and cannot be blamed on any defect in the current regulations. And despite the quoted statement in the preamble, there is little evidence of "public" confusion regarding what constitutes intervention in a political campaign. Even if there is, the proper remedy is for the IRS to provide additional guidance under the current regulations, and undertake reasonable efforts to educate §501(c)(4) EOs and their advisors, not to adopt a plainly unconstitutional regulation that arbitrarily reverses 53 years of administrative and judicial precedent.

Finally, if there is confusion either in the IRS or among the public, it most likely exists with respect to the one issue the IRS failed to address in the proposed regulations—how to measure an organization's primary activity.

The IRS does not have the authority to adopt the proposed regulations.

> At the heart of sound tax administration is interpretation of the Code. It is the responsibility of each person in the IRS charged with the duty of interpreting the law to try to find the proper interpretation of the statutory provision and not to adopt a strained construction in the belief that he or she is "protecting the revenue." The revenue is properly protected only when we ascertain and apply the proper interpretation of the statute.

Internal Revenue Manual 32.1.1(2).

As is shown below, these proposed regulations are not "the proper interpretation of the statute." The Service does not have authority to issue these regulations because its interpretation of §501(c)(4) is not reasonable. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

The history of §501(c)(4) and its regulations clearly demonstrate that Congress did not intend such an overly broad and constitutionally problematic definition. The predecessor of §501(c)(4) was enacted as part of the Tariff Act of 1913. 2003 EO CPE Text, *IRC 501(c)(4) Organizations*, at I-2 (available at http://www.irs.gov/pub/irs-tege/eotopici03.pdf). There is no legislative comment on the statute. *Id.* The IRS finalized §501(c)(4) regulations in 1960 and has not amended them since. 78 Fed. Reg. 71535, 71536 (Nov. 29, 2013). Until now, the Service's interpretation has remained consistent for over 54 years and it is the current regulations to which deference must be given, not the proposed regulations. *See EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 (1981) (special deference accorded to an agency's contemporaneous interpretation of its founding statutes, especially when the interpretation has remained in effect for a long period of time and Congress has never expressed its disapproval.); *see also, Trafficante v. Metropolitan Life Ins. Co.*, 409 U. S. 205, 210 (1972); *cf Barnhart, Commissioner of Social Security v. Walton*, 535 U.S. 212, 219 (2002) (finding the agency's regulation reflected the agency's "own longstanding interpretation.")

Congress amended §501(c)(4) in 1924, re-enacted it without change in 1986, and amended it again in 1995. But Congress did not amend the statute to disagree with the Service's interpretations that certain activities, e.g., nonpartisan voter education and registration drives (proposed to be characterized as CRPA) promote social welfare. *See Associated Dry Goods*, 449 U.S. at 600 (noting that Congress' silence suggests its consent to the Commission's practice). The Service itself has recognized that long-standing regulations left unchanged by Congress can "have the effect of law." 1988 EO CPE Text, *New Developments In IRC 501(c)(5) and IRC 501(c)(6)* at 3 ("These regulations have retained the same form since 1928 and, similar to the regulations promulgated under IRC 501(c)(5), can be presumed to have the effect of law by virtue of successive reenactments of the statutory provision.")

Congress has also encouraged the ability of nonprofit organizations to engage in some of the activities now defined as CRPA. For example, the National Voter Registration Act ("NVRA") is one example of how these poorly drafted regulations fail to take into account decades of reliance on current regulations and IRS guidance. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand."). Under the NVRA (also popularly known as the "Motor Voter law"), States may designate "nongovernmental offices," including non-profit organizations, as "voter-registration agencies." This conflict further demonstrates that the proposed regulations are unreasonable and therefore not entitled to deference.

The Federal Election Campaign Act buttresses the argument that the proposed rules are not reasonable and not consistent with Congressional intent. Congress explicitly excluded nonpartisan registration and get-out-the-vote campaigns from the definitions of contribution or expenditure. 2 U.S.C. §441b(b)(2)(B). Congress also excluded from the definitions of contribution and expenditure the establishment, administration, and solicitation of contributions to a separate segregated fund by a corporation. 2 U.S.C. §441b(b)(2)(C).

The Service has consistently treated such expenditures by §501(c)(4) organizations as not having been spent on attempts to influence elections. In Treas. Reg. §1.527–6(b)(2) and (3), the Service "reserved" the treatment of certain indirect expenses and expenditures by a corporation (including a §501(c)(4) organization) with a connected political action committee that are permissible under the Federal Election Campaign Act ("FECA"). The IRS has stated that until final regulations are issued on the treatment of these expenditures, these items are *not* to be treated as exempt function expenditures when made by §501(c) organizations. However, by treating administrative expenses incurred by a §501(c)(4) EO for its connected PAC as CRPA, the proposed regulations are inconsistent with §1.527-6(b)(2) and (3).

As discussed more fully below, the proposed regulations' adaptation, in Prop. Treas. Reg. §1.501(c)(4)-1(a)(2)(iii)(A)(*2*), of the definition of an "electioneering communication" in 2 USC §434(f)(3)(A), and its incorporation of expenditures that are reported to the Federal Election Commission in Prop. Treas. Reg. §1.501(c)(4)-1(a)(2)(iii)(A)(*3*), violates Congress' prohibition on the use of that definition in interpreting and administering the Internal Revenue Code. 2 USC §434(f)(7).

The proposed regulations are also at odds with judicial precedent. For example, the Supreme Court held in *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), that lobbying by §501(c)(3) organizations could be limited because §501(c)(4) organizations were permitted to lobby in unlimited amounts. The proposed regulations place substantial limits on a §501(c)(4) organization's ability to engage in direct and grassroots lobbying (as more fully discussed below).

While the IRS may refine its interpretation of a statute it administers, the interpretation must be reasonable and consistent with §501(c)(4), the general statutory framework, the regulatory scheme, and judicial decisions. In the 53 years since the current regulations were adopted, the Service has *never* taken the position that non-partisan voter registration, get-out-the-vote, and other issue advocacy are not social welfare activity. Instead, in revenue rulings and other guidance, the IRS has explicitly stated that such activities are charitable (and therefore promote social welfare, Treas. Reg. §1.501(c)(4)-1(a)(2)), and may be undertaken by charities (and even private foundations, with respect to certain nonpartisan voter registration drives), which are prohibited from intervening in a political campaign. Further, the Service's long-standing interpretation is consistent with other statutes and regulations (e.g., FECA, NVRA, and

§1.527-6(b)(2) and (3)) and judicial decisions. Adopting the proposed regulations would create inconsistency in the application of the law; would, ironically, create *more* confusion about the rules that apply to §501(c)(4) and §501(c)(3) EOs; and would treat as (discouraged) political activity programs that Congress has encouraged them to undertake and that the Supreme Court has said are an important element of the First Amendment rights of affiliated §501(c)(3) EOs.

Finally, given the Service's targeting of conservative non-profits, the Service cannot claim authority to overturn 54 years of consistent interpretation with regulations that target these very same groups in the middle of an election year. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion"). This "'fox-in-the-henhouse syndrome is to be avoided . . . by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority.'" *Loving v. Internal Revenue Service*, No. 13-5061 (D.C. Cir. Feb. 11, 2014)(slip op. at 17) (*quoting City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013)).

Although the Service has alleged that its true motivation behind promulgating these rules is not to shut down the speech of conservative § 501(c)(4) organizations in the middle of an election year, the timing, overbreadth, and under-inclusiveness suggest otherwise. Further, this would not be the first time that the impetus for a tax statute or regulation was to shut down the speech of opponents. *See* Judith E. Kindell and John Francis Reilly, 2002 EO CPE Text, I. *Election Year Issues* at 448-451 and n.46 (discussing two other instances of Senators amending the tax code to punish opponents). Members of Congress have for years been pressuring the IRS to investigate and take action against §501(c)(4) EOs, particularly conservative organizations. *See e.g.,* http://www.bennet.senate.gov/newsroom/press/release/?id=e7370d0a-a580-4571-97d6-8d12171670f9; http://www.schumer.senate.gov/record.cfm?id=336270. By publishing the proposed regulations, the Service has done nothing to regain the public's trust. Only by addressing the deficiencies in the proposed regulations can the Service begin to demonstrate that it will not abuse its authority by targeting the speech of opponents of the Administration in power.

The First Amendment requires substantial revisions to the proposed regulations.

The fact that the proposed regulations are published by the Internal Revenue Service does not remove them from the protections of the First Amendment. "Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution." *National Federation of Independent Business v. Sebelius*, No. 11-393, slip op. at 40 (U.S. June 28, 2012), available at http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf.

The proposed regulations must be rewritten to exclude constitutionally protected speech, *e.g.,* issue advocacy and other non-candidate related communications. As the *Buckley* Court noted:

> 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.

Buckley v. Valeo, 424 U.S. 1, 44-45 (1976). The right to speak openly and without constraint on public matters is the quintessential right secured by the First Amendment right of free speech. "'Public discussion about the qualifications of those who hold . . . positions of public trust presents the strongest possible case for applications of the safeguards afforded by the First Amendment.'" *Matson v. Dvorak*, 40 Cal. App. 4th 539, 548 (1995) (quoting *Aisenson v. American Broadcasting Co.*, 220 Cal. App. 3d 146, 154 (1990)). "[G]overnment officials and candidates for such office have almost always been considered the paradigm case of 'public figures' who should be subjected to the most thorough scrutiny." *Kapellas v. Kofman*, 1 Cal. 3d 20, 36 (1990). This is so because "[t]he public possesses an 'independent interest' in the qualifications and *performance* of its public officials." *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 859 (1986) (emphasis added). Thus, "[h]aving survived an election, a public official must be prepared to accept the insults and invectives directed during the candidate's term in office." *Yorty v. Chandler*, 13 Cal. App. 3d 467 (1970).

Buckley and its progeny make clear that: the body of speech that can be constrained is narrow, and the line must necessarily be bright to permit citizens to distinguish between the protected and the regulated *and* to prevent government from regulating protected speech. "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 474 (2007). The Service cannot disregard the protections required by the First Amendment merely for the sake of clarity and "clearer definitions."

The strength of our democracy depends upon the ability of EOs to speak. Alexis de Tocqueville queries, "Is that just an accident, or is there really some necessary connection between associations and equality." Tocqueville, 2 Democracy in America at 514. Tocqueville finds that representative democracy is dependent upon a strong nonprofit sector, in part, because of its stabilizing influence:

> Feelings and ideas are renewed, the heart enlarged, and the understanding developed only by the reciprocal action of men one upon another. I have shown how these influences are reduced

> almost to nothing in democratic countries; they must therefore be artificially created, and only associations can do that.

Id. at 515-16. He concludes,

> Among laws controlling human societies there is one more precise and clear, it seems to me, than all the others. If men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads.

Id. at 517. The proposed rules hinder the ability of s 501(c)(4) EOs to fully contribute to the debate and thereby foster our democratic system. Associational activity should be encouraged, rather than prohibited, because it protects citizens from overreaching by the government.

The proposed regulations must be revised to avoid inconsistencies in the regulatory framework.

As a practical matter, the proposed regulations must be substantially revised to avoid inconsistencies in the regulatory framework. For example, although the definition of "exempt function" under §527 is different than the proposed definition of CRPA, what is the tax treatment of an organization that spends more than 50% of its expenditures on CRPA? Is it a §527 organization, even though less than half of its expenditures are exempt function expenditures?

Section 501(c)(4) EOs with a connected PAC must decide how to treat payments for their PAC solicitation and administrative expenses. Although the §527 regulations "reserved" treatment of these expenses, under the proposed rules those expenses would be CRPA for purposes of §501(c)(4), even though they are not taken into account for purposes of §527(f).

Section 501(c)(4) EOs with affiliated §501(c)(3) EOs must determine whether the organizations can still share office space, staff, and resources if the §501(c)(3) organization engages in CRPA (e.g., nonpartisan voter registration). It is not hard to imagine the confusion that affiliated §501(c)(3) and §501(c)(4) organizations will face as they apply two different definitions to the same activity.

The overbroad definition of candidate will require some § 501(c)(4) organizations to keep up to 3 sets of books (see discussion below).

The proposed regulations will have a chilling effect on §501(c)(3) organizations

If adopted, the proposed regulations are also likely to have a substantial chilling effect on the conduct by §501(c)(3) EOs of activities that are protected by the First Amendment. This effect has three causes. First, small EOs that cannot afford to hire knowledgeable legal counsel

will instinctively adopt more restrictive policies out of fear of inadvertently engaging in activities that, even though permissible for a §501(c)(3) EO, will, if the proposed regulations are adopted, be treated as CRPA for a §501(c)(4) EO.

Second, even those §501(c)(3) EOs that rely on knowledgeable counsel may receive advice to act more cautiously, possibly out of concern that a confused IRS employee might mistakenly believe that §501(c)(3) EOs are bound by the CRPA definitions relating to political activity. There is also the likelihood that the Service will begin to interpret § 501(c)(3) activities through the CRPA lens.

Third, § 501(c)(3) EOs may refrain from participating in coalitions involving § 501(c)(4) EOs, and may find that donor support for such coalition activity or any CRPA dries up.

The same concerns would also be implicated if the proposed definition of CRPA were extended to apply to §501(c)(5) or (c)(6) EOs.

Comments on specific provisions of the regulations

1. The definition of "candidate-related political activity" is arbitrary and unreasonably broad; generally includes many activities that, if conducted on a nonpartisan basis, would not be treated as intervention in a political campaign by a §501(c)(3) organization; and reaches communications and events that even under the broadest possible standard, have nothing to do with an election. The chart attached as Appendix A demonstrates how each of the activities deemed to be "candidate-related political activity" ("CRPA") causes §501(c)(4) organizations to be treated worse than organizations exempt under §§501(c)(3), (5), or (6). That is, many nonpartisan voter engagement or issue advocacy activities deemed to be CRPA for a §501(c)(4) are not considered to be intervention in a political campaign for a §501(c)(3), (5), or (6) organization.

a. **Any public communications within 30 days before a primary election or 60 days before a general election that refer to a clearly identified candidate in the election or a political party represented in the general election.**

(1) The treatment of such communications as political activity violates the Federal Election Campaign Act.

The Federal Election Campaign Act requires disclosure of expenditures for certain "electioneering communications," 2 USC §434(f), and defines an electioneering communication:

> (i) The term "electioneering communication" means any broadcast, cable, or satellite communication which-

> (I) refers to a clearly identified candidate for Federal office;
> (II) is made within-
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

2 USC §434(f)(3)(A).

Section 434(f)(7) prohibits the use of that definition for purposes of administering the Internal Revenue Code:

> (7) **Coordination with title 26.** Nothing in this subsection 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 title 26.

If the proposed regulations are adopted, the Internal Revenue Service would have violated §434(f)(7) by adapting the definition of an electioneering communication in §434(f)(3)(A) and using it to "establish, modify, or otherwise affect the definition of political or electioneering activities . . . for purposes of title 26."

(2) The treatment of such communications as political activity violates the First Amendment.

The proposed rules include as CRPA any public communication within 30 days before a primary election or 60 days before a general election that refers to one or more clearly identified candidates or a political party represented in the general election.

The proposed rules define "public communication" as 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. "Communication" is defined as any communication by whatever means, including written, printed, electronic, video or oral communication.

Although these definitions may seem similar to the blackout periods contained in the Bipartisan Campaign Reform Act ("BCRA"), they reach much more speech. The definitions contain none of the limitations or exceptions contained in the FEC's regulations. The FEC limits

the reach of the blackout ban to communications appearing on broadcast, cable or satellite. 11 CFR §100.29(b). The FEC also includes a requirement that the communication be "targeted" to the relevant electorate. 11 CFR §100.29(a)(3). Further, FEC regulations exempt communications that are news stories, commentaries, or editorials, candidate debates or forums. 11 CFR §100.29(c)(2) and (3).

The inclusion of public communications, made within 30 days of a primary election or within 60 days of a general election, and that refer to a clearly identified candidate in that election—no matter how innocuously or incidentally—will effectively prohibit many §501(c)(4) exempt organizations ("EOs') from engaging in legislative advocacy during substantial parts of years when a federal or state election occurs. Expanding the FEC definitions makes matters worse.

With respect to candidates for President, during, and even before, each quadrennial election year, the schedule of party caucuses, primary elections, party conventions, and the general election is such that §501(c)(4) EOs would be effectively precluded from engaging in any legislative advocacy that mentions—even in neutral terms—the position of either candidate, including the incumbent, with respect to pending or proposed legislation, other actions by the President or Executive Branch agencies, or even in response to judicial decisions. As previously noted, "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 474 (2007).

Even if these restrictions were limited to advocacy related to issues important to voters in the election, both are radical restrictions on the First Amendment rights of §501(c)(4) EOs, and cannot be squared with the demands of the First Amendment. In *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), the Supreme Court decided that Congress did not violate the First Amendment or the equal protection component of the Fifth Amendment by permitting veterans' organizations to engage in substantial lobbying, while denying permission for the same activities to §501(c)(3) EOs. However, because §501(c)(3) EOs do not have any other outlet for substantial speech about legislative matters,[2] Justices Blackmun, Brennan, and Marshall conditioned their concurrence with the Court's decision on the ability of §501(c)(4) EOs to engage in substantial legislative advocacy:

> I also agree that the First Amendment does not require the Government to subsidize protected activity, *ante,* at 546, and that this principle controls disposition of TWR's First Amendment claim. I write separately to make clear that in my view the result under the First Amendment

[2] A §501(c)(3) EO is not permitted to establish a "connected" §527 organization unless the organization's activities are limited to attempting to influence the nomination, confirmation, or appointment of government employees who are not elected officials.

depends entirely upon the Court's necessary assumption — which I share — about the manner in which the Internal Revenue Service administers §501.

If viewed in isolation, the lobbying restriction contained in §501(c)(3) violates the principle, reaffirmed today, *ante,* at 545, "that the government may not deny a benefit to a person because he exercises a constitutional right." Section 501(c)(3) does not merely deny a subsidy for lobbying activities, see *Cammarano* v. *United States,* 358 U.S. 498 (1959); it deprives an otherwise eligible organization of its tax-exempt status and its eligibility to receive tax-deductible contributions for all its activities, whenever one of those activities is "substantial lobbying." Because lobbying is protected by the First Amendment, *Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127, 137-138 (1961), §501(c)(3) therefore denies a significant benefit to organizations choosing to exercise their constitutional rights.[*]

The constitutional defect that would inhere in §501(c)(3) alone is avoided by §501(c)(4). As the Court notes, *ante,* at 544, TWR 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. The §501(c)(4) affiliate would not be eligible to receive tax-deductible contributions.

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." *Ante,* at 544, n. 6; see *ante,* at 545. Consistent with that purpose, "[t]he IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying." *Ante,* at 545, n. 6. As long as the IRS goes no further than this, we perhaps can safely say that "[t]he 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." *Ante,* at 545. 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.

Any significant restriction on this channel of communication, however, would negate the saving effect of §501(c)(4). It must be remembered that §501(c)(3) organizations retain their constitutional right to speak and to petition the Government. 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. Similarly, an attempt to prevent §501(c)(4) organizations from lobbying explicitly on behalf of their § 501(c)(3) affiliates would perpetuate §501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. Such restrictions would extend far beyond Congress' mere refusal to subsidize lobbying. See *ante,* at 544-545, n. 6. In my view, any such restriction would render the statutory scheme unconstitutional

*See Speiser v. Randall, 357 U. S. 513, 518-519 (1958); Commarano v. United States, 358 U. S. 498, 515 (1959) (Douglas, J., concurring) (denial of business-expense deduction for lobbying is constitutional, but an attempt to deny all deductions for business expenses to a taxpayer who lobbies would penalize

> unconstitutionally the exercise of First Amendment rights); cf. *Harris* v. *McRae*, 448 U. S. 297, 317, n. 19 (1980) (denial of welfare benefits for abortion is constitutional, but an attempt to withhold all welfare benefits from one who exercises right to an abortion probably would be impermissible); *Maher* v. *Roe*, 432 U. S. 464, 474-475, n. 8 (1977) (same).

Id., at pages 551-554 (Blackmun, J., joined by Brennan and Marshall, JJ, concurring).

(3) The arbitrary treatment of §501(c)(4) organizations violates the Fifth Amendment.

The proposed regulations treat the same speech of §501(c)(4) organizations differently than the speech of §501(c)(3), §501(c)(5), and §501(c)(6) organizations. As a result, the proposed regulations violate the equal protection component of the Due Process Clause of the Fifth Amendment because they burden the fundamental rights of only §501(c)(4) organizations.[3] The Service may not treat the speech of §501(c)(4) organizations differently from the same speech of other §501(c) organizations solely on the basis of the identity of the speaker (a criteria wholly unrelated to the objective of the regulation). *See Reed v. Reed*, 404 U.S. 71, 75-76 (1971). A classification that implicates a fundamental right, including the right to free speech, must be narrowly tailored to serve a compelling interest. *See Plyler v. Doe*, 457 U.S. 202, 217-18 (1982) (classifications that impinge upon exercise of a fundamental right subject to strict scrutiny); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983) ("freedom of speech" a fundamental right for equal protection analysis).

The Service has not provided any reason for treating the same speech differently based only upon the identity of the speaker. If non-partisan voter registration is indeed CRPA, then it should make no difference who engages in the speech. The Supreme Court has repeatedly recognized that a regulatory scheme is not narrowly tailored if it is under-inclusive. "Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2740 (2011). *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (exemptions and inconsistencies in labeling ban brought its purpose into question); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425 (1993) (ordinance banning some sidewalk news racks and not others was under-inclusive because the city's purported esthetic interest was not met by allowing some eyesores to remain).

Nothing inherent in §501(c)(4) EOs warrants treating their speech less favorably than that of other §501(c) EOs engaged in the same speech. If nonpartisan voter registration and get-out-the-vote drives are truly candidate-related, then the proposed regulations are under-inclusive for

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[3] The Due Process Clause of the Fifth Amendment does not include an express equal protection guarantee. However, in *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954), the Court held that the Fifth Amendment's due process clause implicitly included an equal protection element identical to that of the Fourteenth Amendment.

failing to extend the definition to all §501(c) organizations. "Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. See *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 784 (1978). As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 588 U.S. 310, slip op. at 24 (2010). "[T]he statute is both underinclusive and overinclusive. As to the first, if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder's interests would be implicated by speech in any media at any time." *Id.*, at 46.

The Service cannot advance its stated interest in providing clarity by creating an arbitrary and irrational regulatory scheme that burdens only §501(c)(4) organizations engaging in activities defined as CRPA.[4] *See Rubin*, 514 U.S. at 488 ("The failure to prohibit the disclosure of alcohol content in advertising [but not labels on containers] makes no rational sense if the Government's true aim is to suppress strength wars."). The Service's under-inclusive regulation belies any interest in providing clarity, and is further evidence of its continued efforts to target conservative §501(c)(4) organizations. If the IRS really wanted to address the uncertainty faced by §501(c)(4) organizations, it would provide long-requested guidance about how to measure whether political activity is for the "primary" activity of a social welfare organization. In the absence of this threshold, there can be no clarity or certainty.

(4) The arbitrary treatment of such communications as CRPA reaches many communications that no reasonable person could conclude have anything to do with a subsequent election.

The proposed definition would arbitrarily apply even to communications of others maintained on an EO's website that may be years old and address topics that have nothing to do with any election. The proposed definition also reaches far beyond candidate-related activity to education, news gathering, government accountability efforts, and grassroots lobbying.

For example, assume that X is running for President in 2016. When X was Governor of State Y in 2011, the Y Department of Education was sued for allegedly misallocating state grants to local education agencies. A secondary issue in the case was whether Z was duly appointed as Secretary of Education, and therefore authorized to take the action in question. The opinion of the State Supreme Court, issued in 2013, mentions X because, as Governor, in 2010, he appointed Z to be the Secretary of Education for State Y. The EO maintains a copy of the decision in a library on its website, along with other judicial decisions relating to state financing of education, but the issue in the case has long been resolved and has not been discussed in the

[4] Judicial Watch opposes any regulation that would apply the proposed definition of CRPA to other §501(c) organizations.

Presidential election campaign. It cannot seriously be argued that, because the EO maintains a library of cases and other materials that incidentally mention a candidate's name and that have nothing to do with the Presidential election, it has engaged in candidate-related political activity.

Or assume that a §501(c)(4) EO whose purpose is to improve the quality of life in a city schedules its annual fundraising banquet for mid-November, two weeks *after* the election. It invites the mayor, who is campaigning for re-election that year, to speak at the banquet, and he accepts. Beginning in July and continuing through the week before the banquet, the EO regularly publishes advertisements in the local newspaper, and sends monthly newsletters and other mailings to all the residents of the city. All of these communications state that Mayor Jones will be the featured speaker at the banquet. None of the communications mention the election or that the mayor is a candidate for re-election, nor do they include any language reflecting a view on the mayor's performance in office or whether he should be re-elected. Again, no reasonable person would conclude that these communications are intended to influence the election, and the proposal to classify them as CRPA is arbitrary.

Similarly, it cannot seriously be argued that *any* document which merely mentions an individual who is currently a candidate (but was not when the document was created or posted) is CRPA. To illustrate the absurd coverage of this proposed rule, historical documents of a §501(c)(4) EO would be deemed CRPA if a candidate was previously an officer or director. Certified copies of Articles of Incorporation would become CRPA merely because they contain the signature of the secretary of state. Posted resumes and past experience of a nonprofit's officers, board members, and staff would be CRPA if they contain any mention of past employment by a candidate or political party. Written and oral testimony before government officials would be CRPA within the 30-day or 60-day blackout period. Litigation documents, including amicus briefs, would become CRPA if they mention a candidate, and are filed or maintained on the filer's website within the blackout period.[5]

Moreover, all of the following events occurred or were prominent is the news within 60 days before a general election: the Iran hostage crisis in 1979 (continuing until January 1981); President Reagan becoming the first President to open an Olympic Games in the United States in 1984; Caspar Weinberger's indictment in June 1992; the investigation into the leak that Valerie Plame was employed by the CIA (2004); and Hurricane Sandy in 2012. Under the proposed regulations, *any* communication—factual news report, commentary, or otherwise—about these events by a §501(c)(4) EO that mentioned President Bush, or any Senator or Congressman,

[5] This is quite troubling for Judicial Watch, which advocates high standards of ethics and morality in our nation's public life, and seeks to ensure that political and judicial officials do not abuse the powers entrusted to them by the American people. Judicial Watch fulfills its educational mission through litigation, investigations, and public outreach.

would have been CRPA, even if the communication did not mention the election or that any person mentioned in the report was a candidate.

The foregoing examples demonstrate that during an election year, the arbitrary and irrational reach of the proposed 30-day/60-day rule would require *all* §501(c)(4) EOs to review *all* information on their websites and, if they want to avoid being engaged in CRPA on account of such communications, remove all documents that mention a candidate, regardless of whether the document has any real nexus with the election. To effectively do so, a §501(c)(4) EO will need to know the name of every person who has declared him- or herself as a candidate in every federal, state, or local election from the Presidency down to the municipal dogcatcher. This is an intolerable burden on the First Amendment right of any §501(c)(4) EO to speak about public policy issues in a manner that has no real connection to any election.

(5) The restrictions reach communications that, for geographical reasons, are not directed to voters in an election.

Not all communications are widely distributed. Failing to include a targeting requirement results in the inclusion of speech that has nothing to do with an election. For example, under the proposed regulations, a §501(c)(4) EO would engage in CRPA were it to send an e-mail invitation to its New England members for an event to be held in New England featuring a U.S. Senator as a speaker, even though he is running for re-election in California (or anywhere else outside of New England).

Or assume that in 2017, an EO distributes 1,000 flyers in San Francisco supporting charter schools. The flyers mention that public school performance in New York City continued to decline even after Mayor Bill DeBlasio placed new restrictions on charter schools in 2014. No flyers are distributed anywhere else, the flyer does not mention that Mayor DeBlasio is a candidate for re-election, and the flyer is not posted on the EO's website.

Why is this candidate-related political activity?

b. **Any communication the expenditures for which are reported to the Federal Election Commission, including independent expenditures and electioneering communications.**

For purposes of the Federal Election Campaign Act, an "electioneering communication" is any broadcast, cable or satellite communication that fulfills all of the following conditions:

1. The communication refers to a clearly identified candidate for federal office;

2. The communication is publicly distributed shortly before an election for the office that candidate is seeking; and

3. The communication is targeted to the relevant electorate (U.S. House and Senate candidates only).

To the extent that these communications are express advocacy for or against a candidate, they are rightly considered to be intervention in a political campaign. However, the proposed definition of an "electioneering communication" is very broad, and shares the same statutory (violation of 2 USC §434(f)(7)) and constitutional problems as communications during the 30-day and 60-day blackout periods, discussed above.

c. Distributions to any §527 organization.

Although it is true that most §527 organizations are established to support or oppose candidates for elective public office, some may be established for the sole purpose of influencing the nomination or confirmation of individuals to positions in an executive branch or as judges. Because the proposed regulations' expansion of the definition of "candidate" to include such individuals is inconsistent with established law, §501(c)(4) EOs should be permitted to make distributions to §527 organizations that limit their activity to nominations and legislative confirmations of nominees for executive branch or judicial positions.

Some §501(c)(4) organizations have connected PACs (§527 organizations) and through support of their connected PACs, §501(c)(4) organizations make distributions to a §527 organization. The FECA permits §501(c)(4) organizations to pay the administrative and solicitation costs of its connected PAC. In its §527 regulations, the Service reserved the treatment of these costs. Yet, despite being permissible under both the FECA and other IRS regulations, the proposed regulations now deem these payments to be CRPA.

In addition, if adopted, this paragraph should be clarified to the effect that a distribution does not include a payment in what is essentially a commercial transaction, under which, for example, a §501(c)(4) EO purchases advertising or the right to use booth space at an event sponsored by a §527 organization on the same or better terms as any other purchaser.

d. Distributions to other §501(c) EOs that engage in candidate-related political activity.

The proposed regulations would prohibit distributions to other EOs unless the transferee certifies that it does not engage in CRPA, the transferor has no reason to believe that the certification is inaccurate or unreliable, and the contribution is restricted against use for CRPA.

This approach is unduly restrictive, and is contrary to the Service's approach to grants from private foundations to charities that engage in lobbying. There, the IRS gave private foundations a safe harbor from imposition of the tax on taxable expenditures if a general support grant is not earmarked for lobbying, and if a project grant is not earmarked for lobbying and is less the project budget for non-lobbying activities.

> (6) *Grants to public organizations that attempt to influence legislation*—(i) *General support grant.* A general support grant by a private foundation to the organization described in section 509(a) (1), (2), or (3) (a "public charity" for purposes of paragraphs (a) (6) and (7) of this section) does not constitute a taxable expenditure under section 4945(d)(1) to the extent that the grant is not earmarked, within the meaning of §53.4945-2(a)(5)(i), to be used in an attempt to influence legislation. The preceding sentence applies without regard to whether the public charity has made the election under section 501(h).
>
> (ii) *Specific project grant.* A grant, by a private foundation to fund a specific project of a public charity is not a taxable expenditure by the foundation under section 4945(d)(1) to the extent that—
>
> (A) The grant is not earmarked, within the meaning of §53.4945-2(a)(5)(i), to be used in an attempt to influence legislation, and
>
> (B) The amount of the grant, together with other grants by the same private foundation for the same project for the same year, does not exceed the amount budgeted, for the year of the grant, by the grantee organization for activities of the project that are not attempts to influence legislation. If the grant is for more than one year, the preceding sentence applies to each year of the grant with the amount of the grant measured by the amount actually disbursed by the private foundation in each year or divided equally between years, at the option of the private foundation. The same method of measuring the annual amount must be used in all years of a grant. This paragraph (a)(6)(ii) applies without regard to whether the public charity has made the election under section 501(h).
>
> (iii) *Reliance upon grantee's budget.* For purposes of determining the amount budgeted by a prospective grantee for specific project activities that are not attempts to influence legislation under paragraph (a)(6)(ii) of this section, a private foundation may rely on budget documents or other sufficient evidence supplied by the grantee organization (such as a signed statement by an authorized officer, director or trustee of such grantee organization) showing the proposed budget of the specific project, unless the private foundation doubts or, in light of all the facts and circumstances, reasonably should doubt the accuracy or reliability of the documents.

Treas. Reg. §53.4945-2(a)(6).

In any event, grants from a §501(c)(4) EO to another §501(c) EO should not be deemed to be political activity (whether defined under current law or under the proposed regulation), if the grant is restricted to use other than for political activity.

e. Conduct of a voter registration drive or "get-out-the-vote" drive.

Nonpartisan voter registration drives and get-out-the vote drives have long been considered to be outside the scope of intervention in a political campaign, Rev. Rul. 2007-41, Situations 1 and 2, and to be important "social welfare" activities. They are certainly important to the maintenance of a vital democratic republic, and should continue to be treated as social welfare activities for §501(c)(4) EOs. Nonprofits have been called "the sleeping giant of the democratic process" because of their ability to reach underrepresented groups in the electoral process. Bridgette Rongitsch, *Group to Unveil National Nonprofit Voter-Participation Campaign*, The Chronicle of Philanthropy (available at http://philanthropy.com/blogs/government-and-politics/group-to-unveil-national-nonprofit-voter-participation-campaign/10716).

Moreover, treating the conduct of nonpartisan voter registration programs as intervention in a political campaign is contrary to the permission given by Congress for certain private foundations to conduct such campaigns. I.R.C. §4945(f). See also PLR 201137012 (concluding that a foundation's voter registration program is described in §4945(f)).

The proposed rule is also contrary to the express encouragement by Congress, in the National Voter Registration Act, that states should designate "nongovernmental offices" (not otherwise defined) as "voter registration agencies" to, on a nonpartisan basis, distribute voter registration application forms; assist applicants in completing the forms; and accept completed forms for transmittal to the appropriate State election official. 42 U.S.C. §1973gg-5(a)(3)(B)((ii) and (4). It also creates a "catch-22" for any §501(c)(4) organization that contracts with the state of Minnesota. Minnesota Statutes §201.162 requires that any nonprofit which contracts with a state agency to carry out obligations of the state agency must "provide voter registration services for employees and the public."

In addition, by treating *all* voter registration and GOTV drives as partisan political activity, the rule risks tempting §501(c)(4) EOs with affiliated §501(c)(3) EOs to move activities that may or may not be partisan into the §501(c)(3) EO, even though tax policy should encourage moving those borderline activities from the §501(c)(3) EO to the §501(c)(4).

The rule also includes *all* voter registration and GOTV drives, whether or not related to candidates. This would prevent §501(c)(4) organizations from conducting voter registration and GOTV drives to increase voter turnout related to ballot measures, initiatives, and referendums.

If this rule is retained, it should, at a minimum, include exceptions for voter registration and GOTV drives that are conducted on a nonpartisan basis or that are designed to increase voter turnout for ballot measures, initiatives, and referendums.

f. Distribution of any material prepared by or on behalf of a candidate or by a §527 organization including, without limitation, written materials and audio and video recordings.

Again, until the proposed regulations were published, distribution of candidate material has long been considered acceptable, as long as it is conducted on a nonpartisan basis, without bias for or against any candidate.

Because legislators and Presidents (subject to the 22nd Amendment) are generally presumed to be candidates for re-election, assuming they have an open campaign committee and have not announced their intent not to campaign for re-election, this rule would effectively prohibit a §501(c)(4) EO from re-distributing, or (presumably) linking to, materials prepared by or on behalf of an public officeholder in her official capacity, no matter how long—even nearly six years—before the next election.

For this reason, if the rule is retained, it should include an exception for candidate-prepared material that addresses public policy issues within the scope of the office and without reference to an election. For example, a Senator may publish material addressing an important foreign policy issue and distribute it to her constituents, or post it on her official website. No political activity occurs when a §501(c)(4) organization re-distributes the material, or posts a link to it in the context of discussing the foreign policy issue without regard to any election and without reference to whether the legislator is a candidate for re-election or for election to another office. The same rule should apply to the same kind of material published by a candidate who is not an incumbent officeholder. Such a rule would encourage candidates to discuss the merits of issues without regard to an election.

If this rule is retained, it should also be clarified in two respects. First, treatment of such activities as CRPA should be conditioned on "*knowingly* distributing" candidate material. Notwithstanding that election rules in many jurisdictions require candidates to identify and take responsibility for materials they distribute, an EO that does not know the origin of candidate-published material should not be required to treat its distribution as political activity.

Second, the rule should include an exception for links from an EO's website to the home page of a candidate's website, provided that the links include all candidates in the election, and that all links appear on the same webpage and without bias for or against a candidate. See Rev. Rul. 2007-41, Situation 19.

g. Preparation 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).

For 50 years, and as recently as Rev. Rul. 2007-41, Situation 19, the IRS has considered the preparation and distribution of nonpartisan voter guides to be within the scope of activities intended to promote social welfare. Like voter registration and GOTV drives, the publication of nonpartisan voter guides educates voters about the candidates' views on important issues facing the nation, state, or municipality, and enables the voters to make more informed decisions about the candidates.

For the reasons discussed above, when §501(c)(3) and §501(c)(4) EOs are related, this treatment of all voter guides as political activity will tend to cause those guides that may or may not be partisan to be published by the §501(c)(3) affiliate.

If this rule is retained, it should include an exception for nonpartisan voter guides that is consistent with the guidance in Rev. Ruls. 78-248, 80-282, and 2007-41.

h. Hosting or conducting an event 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.

Again, for 50 years, the IRS has treated nonpartisan events at which candidates appear in a capacity other than as a candidate, and without any election-related activity, as not being intervention in a political campaign. These include both election-related events, such as candidate forums and debates, Rev. Rul. 2007-41, Situations 7–9, and events, e.g., at which a candidate appears other than as a candidate, e.g., because he is a public officeholder, or because he is an expert in a topic that is the subject of the event and that may have nothing to do with the election. Rev. Rul. 2007-41, Situations 10–13.

This rule would, e.g., arbitrarily require a §501(c)(4) EO to treat as political activity the dedication of its new building (whose timing has nothing to do with any impending election) at which the mayor of the municipality appears (assuming he is a candidate for re-election). This is directly contrary to the conclusion in Rev. Rul. 2007-41, Situation 11.

Again, if this rule is retained, it should include an exception for candidate appearances that is consistent with the guidance in Rev. Rul. 2007-41 and other rulings addressing similar situations.

2. The definition of "candidate" is unduly broad, and with respect to individuals other than candidates for elective public office, is beyond the scope of the IRS' authority.

The IRS has no authority under §501(c)(4) to include in the definition of "candidate" anyone who is not a candidate for an *elective* public office. In 1976, Congress enacted rules governing the tax-exempt status of political committees. In §527(e)(2) of the Code, Congress expressly defined as political activity (an "exempt function")—

> influencing or attempting to influence the selection, nomination, 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 individuals or electors are selected, nominated, elected, or appointed.

Except for the reference in the proposed regulation to recall elections, the individuals included in this definition are identical to those included in the definition of a "candidate" in the proposed regulation.

However, because in 1976 Congress could have amended the definition of candidate in §501(c)(3)(which also applies for purposes of the current regulations under §501(c)(4)), but chose not to do so, the IRS has no authority to import the §527(e)(2) definition into §501(c)(4). As recently stated by the Court of Appeals for the District of Columbia:

> The Supreme Court has stated that courts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies. *See Brown & Williamson*, 529 U.S. at 160 ("we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").
>
> * * * *
>
> . . . Here, as in *Brown & Williamson*, we are confident that Congress did not intend to grow such a large elephant in such a small mousehole.

Loving v. Internal Revenue Service, No. 13-5061 (D.C. Cir. Feb. 11, 2014)(slip op. at 15).

In 1976 Congress chose, for purposes of defining political committees and taxing certain expenditures of EOs that are not political committees, to define the scope of "exempt function" more broadly than it has defined "candidate" for purposes of qualification for exemption under §501(c). By proposing to add to "candidates for elective public office," all those who may be candidates for appointment to *any* governmental office, the IRS has exceeded whatever authority it may have to define who is a candidate for public office. Congress' use of "candidate" in §501(c)(3)(and applied for purposes of §501(c)(4)) has never been understood by the IRS or the

public to refer to anyone who might be nominated or applying for employment with a government agency as a non-elected employee or official. Again, the Service has proposed to upend 53 years of administrative and judicial rulings with no justification whatsoever.

The impermissibly broad definition of a candidate will also result in unnecessary complexity and recordkeeping for §501(c)(4) EOs that engage in CRPA and that incur exempt function expenditures that may be taxable under §527(f). They will be required to keep one set of records with respect to amounts spent for CRPA, which presumably will need to be reported in a new part of Form 990, Schedule C, to be completed only by §501(c)(4) EOs that must use a different definition of political activity than any other organization filing Form 990. They will also be required to maintain a second set of records to determine the amount that may be taxable under §527(f), and reportable on Form 1120-POL.

For §501(c)(4) EOs that receive substantial contributions from businesses, the new records will be a *third* set of records, because they are also required to account for and report their expenditures for political and lobbying activities for purposes of §162(e) and §6033(e).

3. The definition of a "candidate for elective public office" in Treas. Reg. §1.501(c)(3)-1(c)(3)(iii) should be revised.

Even though the definition of "candidate" in the proposed regulations is impermissible, the Service should take this opportunity to revise the definition of a "candidate for elective public office." In light of developments since 1960, the phrase, "who offers himself, or is proposed by others," is unduly vague, and should be removed from Treas. Reg. §1.501(c)(3)-1(c)(3)(iii). In addition, the entire definition should be revised as set forth below.

The quoted phrase is a problem under the current rules, would be exacerbated under the proposed regulations (because of the breadth of both the group of "candidates" and the activities that the proposed regulations would arbitrarily treat as CRPA), and needs to be fixed regardless of whether the proposed regulations are adopted in any form. No exempt organization can possibly know all the people who may have offered themselves, or been proposed by another (or "others") as a candidate for elective office, let alone any appointive or other similar office described in §527(e)(2) and the proposed regulations.

A related issue is that the Service, in interpreting and administering the prohibition on intervention in political campaigns, appears to have not treated incumbent officeholders as candidates for re-election throughout their term of office, even though the officeholder has an open campaign committee and has not announced his or her retirement or resignation. For example, in one PACI audit, a communication in an odd-numbered year referring to a congressman was deemed not to be political intervention, but the same communication in an

even-numbered (election) year was considered to be political intervention. Although this interpretation is favorable to EOs, there is no authority for it in the present regulations.

For both of these reasons, we recommend that the definition of a "candidate for public office" in Treas. Reg. §1.501(c)(3)-1(c)(3)(iii) be revised to read as follows:

> With respect to any organization, the term *candidate for public office* means an individual who—
>
> (*a*) Is registered as a candidate for an elective public office with any Federal, State, or local government agency whose primary function is to regulate the financing of election campaigns, i.e., the Federal Election Commission or a similar State or local agency;
>
> (*b*) Is eligible to be re-elected to office, and has established or maintains a candidate campaign committee or financial account that may be used for the expenses of a re-election campaign, and that is required make periodic reports to any Federal, State, or local government agency whose primary function is to regulate the financing of election campaigns;
>
> (*c*) Has publicly announced that he or she is a contestant for an elective public office, and the organization has, or reasonably should have, actual knowledge of the announcement; or
>
> (*d*) Is an officeholder who is the subject of a recall election, whether or not any other individual is a candidate in the same election.
>
> Notwithstanding the preceding sentence, with respect to any communication that does not expressly advocate the individual's election or defeat, no individual shall be treated as a candidate for public office before one year before election in which he or she is otherwise a candidate.

This proposed revision of the definition of "candidate for public office" provides greater clarity than the current definition, and provides EOs with the protection of a "knowledge" standard, based on public records or actions. It also provides EOs with a safe harbor for issue advocacy and other communications made before a time when the public does not ordinarily consider such communications to be expressions relating to an election.

4. The attribution rules need to be clarified.

In particular, the application of the proposed rules to activities conducted "by volunteers acting under the organization's direction or supervision" introduces a new phrase for which there are no recognized standards, and therefore fails to provide the clarity the Service claims to be seeking.

For example, an EO posts a notice on its website, or sends an e-mail to its constituents, calling for a rally at City Hall to support "living wage" legislation that is opposed by the mayor.

The mayor is a candidate for re-election. During the rally, individuals who are not employees of the organization begin to chant, "Defeat Mayor Jones," and despite pleas from the organization's leadership, refuse to stop.

Are those attending the rally volunteers for the organization? If so, are they acting under its direction or supervision?

The Service has addressed the attribution issue in other contexts, and has generally analyzed the issue by reference to the common law of agency. For example, in Field Service Advice 1998-209, the IRS wrote:

> A section 501(c)(3) organization acts or communicates with others through the authorized actions of its employees or members. There must be real or apparent authority by the organization of the actions of individuals other than officials [whose authority is presumed] before the actions of those individuals will be attributed to the organization. In general, the principles of agency will be applied to determine whether an individual engaging in political activity was acting with the authorization of the section 501(c)(3) organization. Actions of employees within the context of their employment are considered to be authorized by the organization.
>
> Acts of individuals that are not authorized by the section 501(c)(3) organization may be attributed to the organization if it explicitly or implicitly ratifies the actions. A failure to disavow the actions of the individual under apparent authorization from the section 501(c)(3) organization may be considered a ratification of the action. To be effective, the disavowal must be made in a timely manner equal to the original action. The organization must also take steps to ensure that such unauthorized actions do not recur.

An article published in the 2002 IRS CPE text for the Exempt Organizations staff also addresses this issue:

> An IRC 501(c)(3) organization may also act or communicate with others through the authorized actions of its employees or members. There must be real or apparent authorization by the IRC 501(c)(3) organization of the actions of individuals other than officials before the actions of those individuals will be attributed to the organization. In general, the principles of agency will be applied to determine whether an individual engaging in political activity was acting with the authorization of the IRC 501(c)(3) organization. See, e.g., G.C.M. 34631 (Oct. 4, 1971). The actions of employees within the context of their employment generally will be considered to be authorized by the organization.
>
> Acts of individuals that are not authorized by the IRC 501(c)(3) organization may be attributed to the organization if it explicitly or implicitly ratifies the actions. A failure to disavow the actions of individuals under apparent authorization from the IRC 501(c)(3) organization may be considered a ratification of the actions. To be effective, the disavowal must be made in a timely

> manner equal to the original actions. The organization must also take steps to ensure that such unauthorized actions do not recur.

Kindell and Reilly, *Election Year Issues*, at pages 364-65, accessed at http://www.irs.gov/file_source/pub/irs-tege/eotopici02.pdf, on February 21, 2014.

To clarify the rule, and apply it to both §501(c)(3) and §501(c)(4) EOs, if the regulation is adopted as a final regulation, we recommend that the attribution rule be removed from this regulation, and inserted as a new paragraph (vi) at the end of Treas. Reg. §1.501(c)(3)-1(c)(3), which defines an "action organization," to read as follows:

> (vi) Attribution. (*a*) For purposes of this subparagraph, activities conducted by an organization include activities paid for by the organization or conducted by an officer, director, or employee acting in that capacity; or conducted by any other person who, under the common law principles of agency, is acting as the organization's agent.
>
> (*b*) Acts of individuals that are not authorized by the organization may be attributed to the organization if it explicitly or implicitly ratifies the actions. A failure to disavow the actions of individuals under apparent authorization from the organization may be considered a ratification of the actions. To be effective, the disavowal must be made in a timely manner equal to the original actions. The organization must also take steps to ensure that such unauthorized actions do not recur.
>
> (*c*) Communications made by an organization include communications the creation or distribution of which is paid for by the organization or that are made in an official publication of the organization (including statements or material posted by the organization on its Web site), as part of the program at an official function of the organization, by an officer or director acting in that capacity, or by an employee or other agent authorized to communicate on behalf of the organization and acting in that capacity.

Regardless of whether the Service adopts the proposed regulation on attribution, or a revision such as is proposed here, the Service should indicate the extent to which it believes the proposed regulation affirms or contradicts Situations 3-6 in Rev. Rul. 2007-41.

5. The regulations provide no guidance regarding how to allocate expenses incurred for an activity that includes both CRPA and non-CRPA.

For example, assume an EO's website includes historical documents that mention the name of an individual who is currently a candidate for elective public office. The documents remain on the EO's website, because they are important to its issue advocacy mission but have noting to do with the current election. During the period that is 30 days before the primary election and 60 days before the general election, the EO did not incur any direct expense with respect to the documents, but incurred costs generally to maintain its website. The EO engaged

in other CRPA, but not with respect to its website. How are the costs incurred with respect to maintenance of the webpages in question calculated?

Because no direct costs were incurred, may the EO report "zero" expenditures for CRPA? If some expenditures must be reported, how is the reportable amount determined?

6. The effective date of the regulations should be changed.

As proposed, the effective date of the regulations is the date the final regulations are published in the Federal Register. Although this is permissible, it will create substantial accounting and reporting problems for all affected organizations. Any organization whose taxable year does not end on the date of publication will be required to account for its political activities using two different definitions within the same taxable year. This adds another confusing layer of complexity for every affected organization.

In addition, without advance knowledge of when the final regulations will be published, affected EOs will need time to adjust their accounting systems and train their employees regarding how expenses attributable to CRPA are tracked and accounted for.

For this reason, we recommend that, if these regulations are published as final regulations, the effective date be re-set to the first day of the EO's first taxable year that begins after the later of (1) November 4, 2014, or (2) 60 days after the date of publication. We recognize that, depending on each affected EO's taxable year, this will delay its implementation of the regulations for up to two years (in a few cases). However, given the radical nature of the changes proposed after 53 years, that is not a particularly long period of time.

Conclusions

1. The Service should withdraw the Notice of Proposed Rulemaking.

The Notice of Proposed Rulemaking violated the Paperwork Reduction Act by failing to include all of the new recordkeeping that will be required by §501(c)(4) organizations if the proposed regulations are adopted.

The Service has no authority to adopt a regulation that departs so radically from its prior, long-standing interpretation of the definition of intervention in a campaign for public office.

The proposed regulation also arbitrarily creates a separate definition of "intervention in a political campaign" that unconstitutionally applies only to §501(c)(4) organizations. See Appendix A.

If adopted, the proposed regulation would violate the constitutional rights of §501(c)(3) organizations that, as noted by Justice Blackmun in *Regan v. Taxation with Representation of Washington*, must depend on affiliated §501(c)(4) organizations to engage in substantial lobbying.

The proposed regulation arbitrarily defines certain activities as "candidate-related political activities" even when they are conducted on a nonpartisan basis. These arbitrary definitions reverse 53 years of administrative and judicial interpretations regarding "intervention in a campaign for public office," and would improperly cause many nonpartisan activities and issue advocacy conducted by §501(c)(4) organizations in support of their civic and social welfare objectives to be treated as political activity.

The proposed regulation's definition of "candidate" is impermissibly broad, because the Service has no authority to overturn Congress' decision to effectively ratify the definition in Treas. Reg. §1.501(c)(3)-1(c)(3)(iii) by not amending that definition when it enacted §527 in 1976, and by re-enacting §501(c)(4) without amendment in 1986.

In addition, the proposed definition of "candidate" will create additional complexity for §501(c)(4) organizations that do engage in candidate-related political activity, because they will have to keep one set of records for purposes of measuring and reporting the extent of their "candidate-related political activity" on Form 990, Schedule C; and a second set of records for purposes of reporting and paying any tax due on exempt function expenditures pursuant to §527(f), using Form 1120-POL.

2. If the Service does not withdraw the Notice of Proposed Rulemaking, it should re-propose the regulations.

Even if the Service continues to believe that new regulations are required, the Service should substantially revise the proposed regulations in accordance with the recommendations in these comments, and because such a revision will be substantial, re-propose the regulations in a new NPRM. We recommend that any such revision be undertaken based on recommendations developed by a new Advisory Committee on exempt organization political activities, composed of executives, lawyers, accountants, scholars, and others who provide services to, represent, or are otherwise familiar with organizations exempt under §501(c)(3), (4), (5), and (6). This will provide sufficient transparency to the project so as to rebuild a semblance of trust between the Service and the exempt organizations community with respect to these issues.

3. Finally, if the Service does not withdraw the NPRM, and decides not to re-propose the regulations, we recommend that it adopt the definition of "candidate for elective public office" and the attribution rules presented in these comments.

Judicial Watch appreciates the opportunity to comment. Thank you for your careful consideration of these comments. Please contact me at (202) 785-9500 or adye@wc-b.com if you have questions or would like to schedule a meeting to discuss these comments.

Yours very truly,

Alan P. Dye

Charles M. Watkins

Heidi K. Abegg

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cc: Judicial Watch

New Categories of Political Activity	§501(c)(3)	§501(c)(4)	§501(c)(5)	§501(c)(6)
Restricts Issue Advocacy. Public communications 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 general election, refers to one or more political parties represented in that election	No	Yes	No	No
Restricts Free Speech. Contributions (including a gift, grant, subscription, loan, advance, or deposit) of money or anything of value to or the solicitation of contributions on behalf of—any organization described in section 501(c) that engages in candidate-related political activity unless a written representation from an authorized officer of the recipient organization is obtained stating that the recipient organization does not engage in such activity; and the contribution is subject to a written restriction that it not be used for candidate-related political activity	No	Yes	No	No
Limits Civic Engagement. Conduct of a nonpartisan voter registration drive	No	Yes	No	No
Limits Civic Engagement. Conduct of a nonpartisan get-out-the-vote drive	No	Yes	No	No
Restricts Issue Advocacy. Distribution of any material prepared by or on behalf of a candidate or by a section 527 organization including, without limitation, written materials, and audio and video recordings	No	Yes	No	No
Limits Civic Engagement. Preparation or distribution of a nonpartisan 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)	No	Yes	No	No
Limits Civic Engagement. Hosting or conducting an event (candidate forum or debate) within 30 days of a primary election or 60 days of a general election at which one or more candidates in such election appears as part of the program.	No	Yes	No	No

Appendix A