American Future Fund
Advocating Conservative, Free Market Ideals

February 25, 2014

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

Dear Internal Revenue Service,

These comments are submitted on behalf of American Future Fund (AFF). AFF is incorporated in Iowa and is organized and operates pursuant to Section 501(c)(4). AFF formed in August 2007, and the IRS approved AFF's Form 1024 application in October 2008. AFF works to provide Americans with conservative and free market points of view with a mechanism to communicate and advocate on the issues that most interest and concern them, and accomplishes these goals primarily through citizen education and issue advocacy efforts. AFF also engages in a limited amount of activity that qualifies as "political campaign intervention" activity under existing IRS rules, and which would constitute "candidate-related political activity" under the IRS's proposed rules. AFF carefully tracks its activities to ensure that its "campaign" activity remains strictly limited, and that the promotion of social welfare constitutes the organization's primary, and predominant, role. The rules proposed in the Notice of Proposed Rulemaking[1] ("NPRM") would directly impact the programmatic activities of AFF and its ability to carry out its mission.

I. THE IRS SHOULD NOT HAVE BEGUN THIS RULEMAKING, AND IT SHOULD NOT PROCEED FURTHER

This rulemaking is ill advised. Congressional investigations into the IRS's mishandling of a variety of Section 501(c)(4)-related matters are ongoing, and it is still unclear to what degree

[1] Internal Revenue Service Notice of Proposed Rulemaking, *Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities*, 78 Fed. Reg. 71,535 (Nov. 29, 2013).

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the IRS's "problems" were the result of a lack of clarity in the applicable legal standards as opposed to official abuse and/or mismanagement.

The former Director of the Exempt Organizations division, Lois Lerner, when asked by a Congressional committee about her role in the scandal claimed: "I have not done anything wrong. I have not broken any laws. I have not violated any IRS rules or regulations. And I have not provided false information to this or any other congressional committee."[2] After claiming she had done absolutely nothing wrong, she invoked her Fifth Amendment right against self-incrimination. Four months later, Ms. Lerner retired. According to reports, "the IRS was moving toward terminating Lerner after completing an investigation into her role in the targeting controversy. The IRS found that Lerner, who led the agency's unit that reviewed requests for tax exemptions, mismanaged her department and was 'neglectful of duty.'"[3] Representative Sander Levin, the ranking Democrat on the House Ways and Means Committee, said at the time: "Lois Lerner is being held responsible for her gross mismanagement of the IRS tax-exempt division, which led to improper handling of applications for tax-exempt status, whether conservative [or] progressive."[4] Representative Darrell Issa, Chairman of the House Oversight and Government Reform Committee, however, said: "We still don't know why Lois Lerner, as a senior IRS official, had such a personal interest in directing scrutiny and why she denied improper conduct to Congress."[5] Ms. Lerner's role in this matter is discussed in more detail in a letter from Representatives Issa and Jordan to Commissioner Koskinen, dated February 4, 2014, and attached as Exhibit A.

Ms. Lerner's top deputy, the former Director of the Office of Rulings and Agreements, was removed from her position.[6] Daniel Werfel's report of June 24, 2013 (Charting a Path

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[2]Ed O'Keefe and William Branigan, *Lois Lerner invokes Fifth Amendment in House hearing on IRS targeting*, Washington Post (May 22, 2013), http://www.washingtonpost.com/politics/lois-lerner-invokes-fifth-amendment-in-house-hearing-on-irs-targeting/2013/05/22/03539900-c2e6-11e2-8c3b-0b5e9247e8ca_story.html.

[3] Lauren French, *Lois Lerner still Hill's favorite piñata*, Politico (Sept. 23, 2013), http://www.politico.com/story/2013/09/lois-lerner-retires-irs-97217.html.

[4] *Id.*

[5] Stephen Dinan, *Lois Lerner, IRS official in tea party scandal, forced out for 'neglect of duties,'* Washington Times (Sept. 23, 2013), http://www.washingtontimes.com/news/2013/sep/23/lois-lerner-irs-official-tea-party-scandal-retires/?page=all.

[6] Rebekah Metzler, *Top IRS Official Removed From Job, Not Fired, Likely Still Works at Agency*, US News & World Report (June 24, 2013), http://www.usnews.com/news/articles/2013/06/24/top-irs-official-removed-from-job-not-fired-likely-still-works-at-agency.

Forward at the IRS: Initial Assessment and Plan of Action) details the significant "management failures" of the Exempt Organizations division.

Still, many do not take this matter seriously. A former Director of the Exempt Organizations unit, Marcus Owens, recently "dismissed the Tea Party scandal as one in which conservative groups suffered nothing more than being subjected to 'silly questions.'"[7] An important voice, President Obama, during a recent interview cited "bureaucratic reasons" for the scandal, and complained, "they've got a list, and suddenly everybody's outraged."[8] The President subsequently blamed the scandal on "boneheaded decisions" that occurred because the IRS "did not know how to implement" a "501(c)(4) law people think is confusing," and assured the public, before investigations have concluded, that there was "[n]ot even a smidgeon of corruption."[9]

This rulemaking amounts to an effort by the IRS to absolve itself by further punishing its victims. Over the past few years, Section 501(c)(4) organizations that lawfully engaged in political or politically-related activities in the past, or attempted to do so, were subjected to official abuse in the form of the "tea party scandal," which, by most accounts, extended beyond the tea party. (Chairman Issa's cryptic comment about Ms. Lerner's "personal interest in directing scrutiny" has not yet been fully explained.) While the scandal at the IRS is not addressed in the NPRM,[10] this proposal is the agency's most significant and visible response thus far.[11] The NPRM asserts that the agency's motivation is to establish "more definitive rules" to

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[7] Diane Freda, *IRS to Issue 501(c)(4) Rules, but Observers Say Cure May Be Worse Than the Problem*, Bloomberg BNA Money & Politics (Jan. 27, 2014), http://news.bna.com/mpdm/MPDMWB/split_display.adp?fedfid=40496849&vname=mpebulallissues&jd=a0e5t4g5f5&split=0.

[8] Hardball with Chris Matthews, Transcript (Dec. 5, 2013), http://www.nbcnews.com/id/53755285/ns/msnbc-hardball_with_chris_matthews/#.UufHjNIo4dU.

[9] *Obama on IRS Scandal: "Not Even A Smidgen Of Corruption,"* Real Clear Politics (Feb. 2, 2014), http://www.realclearpolitics.com/video/2014/02/02/obama_on_irs_scandal_not_even_a_smidgen_of_corruption.html#.Uu7xIlczqAs.twitter.

[10] According to the NPRM, "[r]ecently, increased attention has been focused on potential political campaign intervention by section 501(c)(4) organizations." NPRM at 71,536.

[11] It is not entirely clear whether this rulemaking proposal is a response to the agency's scandal, or a continuation of that scandal. On February 5, 2014, House Ways and Means Committee Chairman Camp issued a statement indicating that "[a]ccording to interviews, as early as 2011, work on potential 501(c)(4) regulations was started," and "[a] June 2012 email between Treasury and Lois Lerner revealed that these potential regulations were being discussed "off-plan" – or not to be published on the public schedule." *Press Release: Camp Blasts Treasury & Lois Lerner for Developing 501(c)(4) Rules "Off-Plan,"* Feb. 5, 2014, http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=369014.

"provide greater clarity and reduce the need for detailed factual analysis."[12] Virtually every observer, however, immediately recognized that this proposal is an effort "to rein in the influence of tax-exempt groups in elections by creating rules to restrict their spending on a wide range of campaign-related activities."[13] The IRS should acknowledge what is widely known: the government seeks to further regulate and restrict the constitutionally protected speech and activities of a certain, now disfavored, type of organization.

Congress is acutely aware of, and deeply engaged in, the question of Section 501(c)(4) regulation. **Congress is the appropriate body to provide an answer, if one is needed. The wrongdoer in this affair – the IRS – is not in a position to provide a solution.** The proposed rule was hastily prepared and offered while Congressional investigations into the matter are still ongoing. Legislation has been introduced in both the U.S. House and Senate to delay implementation of any new rules stemming from this rulemaking for one year. In the U.S. House, Representative Camp "introduced legislation prohibiting for one year the Department of the Treasury (Treasury) and Internal Revenue Service (IRS) from issuing or finalizing proposed 501(c)(4) regulations issued last November."[14] In the U.S. Senate, the same measure was introduced on February 11, 2014, by Senators Roberts and Flake, along with 37 co-sponsors.[15]

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[12] NPRM at 71,536 – 71,537.

[13] John D. McKinnon, *IRS Moves to Restrict Nonprofit's Politicking*, Wall Street Journal (Nov. 26, 2013), http://online.wsj.com/news/articles/SB10001424052702304465604579222110598111076; *see also* Gregory Korte and Fredreka Schouten, *IRS moves to curb tax-exempt groups' political activity*, USA Today (Nov. 27, 2013) ("The Obama administration is moving to clamp down on the growing political activity of "social welfare" tax-exempt groups, six months after controversy erupted over the IRS scrutiny of conservative groups. The Treasury Department's proposed rules, released Tuesday, would restrict the ability of those groups to conduct a wide range of activities, from running ads to distributing mailers that target specific candidates to get-out-the-vote drives."), http://www.usatoday.com/story/news/politics/2013/11/26/irs-to-define-political-activity/3757495/; Matea Gold, *Obama administration proposes new rule curtailing political activities by nonprofit groups*, Washington Post (Nov. 26, 2013) (the proposal "represents the most aggressive effort to date to rein in the activities of nonprofit groups that have had a growing influence on elections in recent years"), http://www.washingtonpost.com/blogs/post-politics/wp/2013/11/26/obama-administration-proposes-new-rule-curtailing-political-activities-by-nonprofit-groups/?clsrd; Richard Rubin and Greg Giroux, *IRS Limits Political Activity in Post-Tea Party Flap Rule*, Bloomberg (Nov. 26, 2013), http://www.bloomberg.com/news/2013-11-26/irs-defines-political-activity-in-post-tea-party-rules.html.

[14] Press Release: *Camp Introduces Legislation to Block Proposed IRS Regulations that Stifle Rights of Tea Party Groups* (Jan. 15, 2014), http://camp.house.gov/news/documentsingle.aspx?DocumentID=366895. Representative Camp's bill, H.R. 3865, was approved by the House Ways and Means Committee on February 11, 2014.

[15] *See* Press Release: *Sen. Roberts & Sen. Flake Introduce Bill to Prevent IRS Targeting, Preserve Free Speech* (Feb. 11, 2014),

Both bills, H.R. 3865 and S. 2011, are known as the "Stop Targeting of Political Beliefs by the IRS Act of 2014."

By all outward appearances, this rulemaking has been heavily politicized from the start, and its proponents appear to view it, and value it, as a political weapon to be wielded against their perceived opponents. The letter from Representatives Issa and Jordan to Commissioner Koskinen, see attached Exhibit A, includes a detailed examination of the partisan and political origins of this rulemaking. These Congressmen believe "the proposed rule is simply the final act of the Administration's history of attempts to stifle political speech by conservative § 501(c)(4) organizations."[16]

As detailed by Representatives Issa and Jordan, the IRS "quietly considered guidance on § 501(c)(4) organizations for several years," and this consideration began "well before the publication of the TIGTA audit."[17] The IRS Chief Counsel, one of the agency's two political appointees, was heavily involved in these efforts.[18] Former Acting Commissioner Miller stated that Democratic Senator Carl Levin's "complaining bitterly to us" gave impetus to addressing the matter of Section 501(c)(4) regulation.[19] In a March 2012 letter, Senate Democrats urged the IRS to impose the sorts of limits proposed in this rulemaking,[20] and one of those Senators, Senator Schumer, recently spoke approvingly of this rulemaking in the context of offering

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http://www.roberts.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=87f61381-e91a-4072-8f1b-e64c02237479.

[16] Letter from Representatives Issa and Jordan to Commissioner Koskinen at 2, attached as Exhibit A.

[17] *Id*. at 6.

[18] *Id*.

[19] *Id*. at 9.

[20] Press Release: *Senate Democrats Urge IRS To Impose Strict Cap On Political Spending By Nonprofit Groups – Vow Legislation If Agency Doesn't Act* (March 12, 2012), http://www.schumer.senate.gov/record.cfm?id=336270&. The IRS's press release of November 26, 2013, explains: "In defining the new term, 'candidate-related political activity,' Treasury and the IRS drew upon existing definitions of political activity under federal and state campaign finance laws, other IRS provisions, as well as suggestions made in unsolicited public comments." Press Release: Treasury, IRS Will Issue Proposed Guidance For Tax-Exempt Social Welfare Organizations (Nov. 26, 2013), http://www.treasury.gov/press-center/press-releases/Pages/jl2225.aspx. The IRS could allay some suspicions about the origins of this proposal if it were more forthcoming, and revealed, for instance, more details about these "unsolicited public comments" that apparently influenced this rulemaking before it was released to the rest of the public.

strategies "for Democratic efforts to marginalize the tea party."[21] On February 13, 2014, *The Hill* reported that "Senate Democrats facing tough elections this year want the Internal Revenue Service to play a more aggressive role in regulating outside groups expected to spend millions of dollars on their races."[22] The partisan, speech-suppressing motives of supporters of the IRS proposal could not be clearer.

Senate Minority Leader Mitch McConnell characterized this proposal as an effort by the Administration "to silence the voices of their critics going into this important fall election."[23]

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[21] Meredith Shiner, *Schumer: Administration, IRS Must "Redouble Efforts" On Campaign Finance Enforcement*, Roll Call (Jan. 23, 2014), http://atr.rollcall.com/schumer-administration-irs-must-redouble-efforts-on-campaign-finance-enforcement/. Ironically, Senator Schumer made these political remarks at an event sponsored by a Section 501(c)(4) organization that might have constituted "political activity" under the proposed rules.

[22] Alexander Bolton, *Vulnerable Dems Want IRS To Step Up*, The Hill (Feb. 13, 2014), http://thehill.com/homenews/senate/198298-vulnerable-dems-want-irs-to-step-up.

[23] Fox News, *McConnell says proposed Treasury regulation meant to silence Obama critics* (Jan. 29, 2014), http://www.foxnews.com/politics/2014/01/29/mcconnell-says-initiated-treasury-dept-regulation-meant-to-silence-obama/. Senator McConnell explained further: "I think what they have decided to do is to take these people off of the playing field, and if it hits a few liberals, fine, but I think what they are really worried about are their conservative critics." On January 30, 2014, Senator McConnell made the following comments on the Senate floor:

> "I'm referring to the administration's radical new proposal to codify the same kind of targeting of grass-roots groups that an independent Inspector General determined the IRS had engaged in the run-up to the 2012 election. . . . Here's their plan: the administration proposes to redefine political activity so broadly that grass-root groups all across the country that exist for the sole purpose of speaking out on issues of liberty or limited government or free enterprise or anything else that the administration doesn't want to hear about will be forced to shut down. . . . Now, as usual, the folks who are pushing this new assault on speech tell us it's some kind of good-government proposal that increases transparency. But the truth is, the only thing transparent here is the administration's thuggish attempt to shut down its critics. . . . Rather than reform the IRS and root out any hint of corruption or targeting of political opponents, they're now proposing to codify it. . . . Instead of getting the IRS out of the business of policing speech, they want to make it the final arbiter of political speech. . . . And that's why the new IRS commissioner has a simple choice: he can either restore the public's trust in an agency whose reputation was already in doubt, or he can allow himself to be used as a political pawn by an administration that now seems willing to do anything to keep those it disagrees with from fully exercising their constitutionally-protected right to free speech. After recent scandals the IRS shouldn't be getting more involved in what people can and cannot say, but less. Commissioner Koskinen must take a stand against this kind of thuggery and make it clear to a nervous public that his agency will not engage in any more government-sanctioned crackdowns on speech."

House Ways and Means Chairman Dave Camp views this rulemaking as an effort to put "tea party groups out of business."[24] On January 30, 2014, Chairman Camp, by letter to the Secretary of the Treasury, requested "all documents and communications sent by, received by, or copied to any employee of the Department of the Treasury between January 1, 2009 and the present relating to rulemaking or proposed guidance for 501(c)(4) organizations."[25] In recent budget negotiations, Congressional Republicans reportedly sought to include "language that would put a hold on the IRS rule," but Congressional Democrats steadfastly refused to agree to such language, even though it cost them the inclusion of several of their own priorities.[26] On February 5, 2014, ten members of the Congressional Republican leadership asked Commissioner Koskinen to "abandon this proposed rule, and make it clear to a nervous public that your agency will no longer engage in government-sanctioned crackdowns on speech."[27]

Even though specific language to place this rulemaking on hold was rejected during the recent budget negotiations, the Consolidated Appropriations Act of 2014 may still bar the IRS from advancing this rulemaking. That Act provides that "[n]one of the funds made available under this Act may be used by the Internal Revenue Service to target citizens of the United States for exercising any right guaranteed under the First Amendment to the Constitution of the

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Press Release: *McConnell Calls on IRS Commissioner to Resist Obama Administration Efforts to Muzzle Free Speech* (Jan. 30, 2014), http://www.mcconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=5102c641-48de-4262-a431-619f8e06340b.

[24] Kimberley A. Strassel, *IRS Targeting and 2014; Democrats are working hard to make sure conservative groups are silenced in the 2014 midterms*, Wall Street Journal (Jan. 16, 2014), http://online.wsj.com/news/articles/SB10001424052702304603704579324783339931114.

[25] Letter from U.S. House of Representatives Committee on Ways and Means Chairman Dave Camp to Secretary of Department of the Treasury Jacob Lew, January 30, 2014, http://waysandmeans.house.gov/uploadedfiles/13014_camp_to_lew_regs.pdf.

[26] Kimberley A. Strassel, *IRS Targeting and 2014; Democrats are working hard to make sure conservative groups are silenced in the 2014 midterms*, Wall Street Journal (Jan. 16, 2014), http://online.wsj.com/news/articles/SB10001424052702304603704579324783339931114. Senator Schumer recounted a version of the same story. *See* Remarks by Senator Charles Schumer (D-NY), *The Rise of the Tea Party and how Progressives can Fight Back*, Center For American Progress Action Fund (Jan. 23, 2014), http://www.americanprogressaction.org/events/2014/01/16/82507/remarks-by-senator-charles-schumer-d-ny/.

[27] Letter to The Honorable John Koskinen from Senators McConnell, Cornyn, Thune, Hatch, and Shelby, and Representatives Boehner, Cantor, McCarthy, McMorris Rodgers, Camp, and Rogers, Feb. 5, 2013, http://www.speaker.gov/sites/speaker.house.gov/files/UploadedFiles/IRS%20letter_140205.PDF.

United States."[28] This is extremely broad language, and this rulemaking unquestionably "targets" citizens for exercising their First Amendment rights; it is "aimed" at reducing the amount of "political" speech from Section 501(c)(4) organizations.

Given current political realities, however, it seems likely that this rulemaking will proceed. If that is the case, we offer the following comments on the proposal.

II. THE PROPOSED RULE FAILS TO ADDRESS THE MANY CONSTITUTIONAL ISSUES PRESENTED

"**Congress shall make no law … abridging the freedom of speech … or the right of the people … to petition the Government for a redress of grievances.**"

The NPRM does not even pay lip service to our basic freedoms. The First Amendment is not mentioned anywhere in the NPRM. To the extent that the IRS seeks to regulate – *i.e.*, limit – the "election-related" speech of non-profit organizations, it must recognize that it is acting not simply as a tax administrator, but as a campaign finance regulator that would censor both issue advocacy and election-related speech. And to the extent that the IRS regulates – *i.e.*, limits – an organizations' ability to engage in issue advocacy, the IRS must recognize that its actions infringe upon both the right to free speech and the people's constitutional right "to petition the Government for a redress of grievances." In both instances, the IRS is subject to boundaries established by the Supreme Court's First Amendment jurisprudence.

The failure to acknowledge the First Amendment is not entirely surprising given the fact that the agency's existing approach (the "facts and circumstances" test) has never been conformed to First Amendment requirements. For years, the IRS has sought to protect its standards – found only in a series of Revenue Rulings, training materials, and the minds of certain IRS officials and select reviewing agents – from judicial review.[29] If the IRS pursues this

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[28] In addition, the Act also provides that "[n]one of the funds made available in this Act may be used by the Internal Revenue Service to target groups for regulatory scrutiny based on their ideological beliefs." *See also* Patrick Caldwell, *Did These 68 Words Just Kill IRS Oversight of Dark Money?*, Mother Jones, Jan. 22, 2014, http://www.motherjones.com/politics/2014/01/congress-irs-law-regulate-political-groups.

[29] *See, e.g.*, *Catholic Answers, Inc. v. United States*, 438 Fed. Appx. 640 (9th Cir. 2011) (unpublished opinion) cert. denied 132 S. Ct. 1143 (2012). In *Catholic Answers, Inc.*, the Ninth Circuit noted, "However, should this set of facts recur, the case will not evade review because it will be clear then, while it is not now, that *the IRS has intentionally maneuvered to avoid judicial scrutiny and will not be permitted to engage in evasion of this kind*" (emphasis added). *See also Christian Coalition of Florida, Inc. v. United States*, 662 F.3d 1182, 1196 n.13 (11th Cir. 2011) ("This point also highlights the possibility that, should a similar dispute over CC-FL's tax exempt status arise in a future tax refund suit,

rulemaking, perhaps one of the few positive results will be that by conducting a rulemaking pursuant to the Administrative Procedures Act, the courts may finally have an opportunity to weigh in on the matter.

Under both the existing and proposed approaches, the IRS places limitations on the amount of "political" speech and activity that an organization may undertake and still retain its tax-exempt status. In both instances, the IRS uses content-based standards to identify certain candidate- and election-related speech. An organization that exceeds the limits on the permissible total amount of candidate- and election-related speech and activity faces negative legal consequences, including the loss of tax-exempt status, tax penalties, and/or rejection of a Form 1024 application. Accordingly, the IRS conditions a government benefit (*i.e.*, tax exempt status) on the recipient's willingness to curtail and limit protected First Amendment activity. An organization that does not accept this "bargain" faces the penalties described above. This regime has obvious First Amendment implications that the IRS does not appear to have ever considered. This rulemaking *absolutely must* grapple with those issues, and to the extent that the IRS continues to pretend that it operates in a tax administration or revenue collection vacuum that has no relation whatsoever to the Supreme Court's First Amendment and campaign finance jurisprudence, this rulemaking will remain fundamentally flawed.

The most obvious result of this failure to acknowledge the First Amendment considerations that are present is the NPRM's complete disregard for a series of Supreme Court pronouncements that *should* (and eventually will, likely through litigation) guide this rulemaking. In *Citizens United v. FEC* the Supreme Court held that an incorporated Section 501(c)(4) organization cannot be prohibited from distributing an advocacy film that contains the functional equivalent of express advocacy. The Supreme Court majority viewed the corporate expenditure ban at 2 U.S.C. § 441b as a law "enacted to control or suppress speech," and remarked that "[i]ts purpose and effect are to silence entities whose voices the Government deems to be suspect."[30] Similarly, the Court explained that "[t]he purpose and effect of this law is to prevent corporations, including small and non-profit corporations, from presenting both facts and opinions to the public."[31] As a general principle, however, "political speech must prevail against laws that would suppress it, whether by design or inadvertence."[32]

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the 'voluntary cessation' exception to mootness may have a role to play if the IRS fails to refund the disputed taxes within the six month statutory period, and then later refunds the taxes after litigation begins, *solely to deprive the court of jurisdiction* and without any independent basis for granting the refund. We offer no opinion on the merits of a voluntary cessation claim presented under such circumstances, as those circumstances do not describe the case currently before us.") (emphasis added).

[30] *Citizens United*, 558 U.S. 310, 336, 339 (2010).

[31] *Id*. at 355.

Citizens United also makes clear that the government is prohibited from restricting speech based on the identity of the speaker, which, of course, is precisely what Section 501(c)(4) does, at least as interpreted by the IRS. The Court wrote, "[p]rohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. . . . 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."[33] In addition:

> Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each. . . . [I]t is inherent in the nature of the political process that voters be free to obtain information from diverse sources in order to determine how to cast their votes. At least before Austin, the Court had not allowed the exclusion of a class of speakers from the general public dialogue. We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.[34]

Finally, the availability of other outlets for speech (*i.e.*, "the PAC option") made no difference in *Citizens United*. The Court explained, "[a] PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak. . . . PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations."[35] Similarly, just because a Section 501(c)(4) organization *could* create a Section 527 organization in order to speak fully and without restriction, the Supreme Court has already held that this less-than-ideal alternative does not alleviate or excuse the First Amendment burdens imposed in the first place.

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[32] *Id*. at 340.

[33] *Id*.

[34] *Id*. at 340-341.

[35] *Id*. at 337.

As the Court explained:

> When Government seeks to use its full power … to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.[36]

The NPRM does not explain how the proposed regulation is permissible in light of *Citizens United*, although the IRS is unquestionably aware of the possible implications of *Citizens United*. In fact, it appears that the tea party "targeting" scandal was motivated, at least in part, out of concern that the agency's tax exempt rules were threatened by *Citizens United*. On February 1, 2011, former Director of Exempt Organizations Lois Lerner sent an email to five IRS colleagues. She wrote:

> Tea Party Matter very dangerous. This could be the vehicle to go to court on the issue of whether Citizen's [sic] United overturning the ban on corporate spending applies to tax exempt rules. Counsel and Judy Kindell need to be in on this one pl ease needs to be in this [sic]. Cincy should probably NOT have these cases – Holly [Paz] please see what exactly they have please.[37]

It is possible that the Supreme Court may one day uphold political activity restrictions in the context of the tax exempt classification system that the IRS administers. Such a decision, however, is far from a foregone conclusion, and a proper rulemaking must address the questions presented by *Citizens United*.

Assuming only for the sake of argument that this rulemaking is permissible, and *Citizens United* notwithstanding, then the IRS must still craft its "candidate-related political activity" definition to conform to the Supreme Court's instructions in *FEC v. Wisconsin Right to Life, Inc.* (*WRTL*). In *WRTL*, the Supreme Court directly addressed a question that is at the very heart of this rulemaking: How may the government constitutionally distinguish between campaign-related speech and issue advocacy? The Court's answer to that question provides the Service with the broadest available, "outer boundary" definition of "candidate-related political activity"

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[36] *Id.* at 356.

[37] Dave Wiegel, *Read Lois Lerner's Emails and Decide Whether the IRS Scandal Is Back*, Slate (Sept. 12, 2013), http://www.slate.com/blogs/weigel/2013/09/12/read_lois_lerner_s_emails_and_decide_whether_the_irs_scandal_is_back.html.

that it may constitutionally adopt if it seeks to define and limit the amount of "candidate-related political activity" that a Section 501(c)(4) organization may undertake.

In *WRTL*, the Supreme Court recognized two categories of "advocacy" speech: "the 'functional equivalent' of speech expressly advocating the election or defeat of a candidate for federal office" and a "genuine issue ad."[38] (The Court explained that an "issue ad" is "speech about public issues more generally … that mentions a candidate for federal office."[39]) The IRS is not free to create a hybrid category, such as the proposed "candidate-related political activity," that straddles these two concepts, even though the Supreme Court has "long recognized that the distinction between campaign advocacy and issue advocacy 'may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions.'"[40] As the Court explains, "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it."[41]

The Court held that "[d]iscussion 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."[42] The Court then referred to *Ashcroft v. Free Speech Coalition*, which held that "[t]he government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."[43]

Adopting a regulation that is intentionally overbroad, and which unquestionably captures and restricts what the Supreme Court defines as "genuine issue advocacy," as the proposed standard for "candidate-related political activity" does, is simply not permissible. The NPRM fails to acknowledge that activity close in time to an election *can* be directly related to issues pending before a legislature. The IRS, however, has acknowledged this fact for years in its prior rules, and also expressly acknowledges it in its rules regarding lobbying activities by Section 501(c)(3) organizations.

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[38] *FEC v. Wisconsin Right to Life, Inc*., 551 U.S. 449, 456 (2007).

[39] *Id*.

[40] *Id.* at 456-457 *quoting Buckley v. Valeo*, 424 U.S. 1, 42 (1976).

[41] *Id*. at 457.

[42] *Id*. at 474.

[43] *Id*. at 475 *quoting Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

The Supreme Court's standard for distinguishing between candidate- and election-related speech and issue advocacy is simple: "[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[44] Advocacy speech that does not meet this standard is issue advocacy. The Court also set forth several factors that identify a "genuine issue ad":

> First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.[45]

The ad sponsor's subjective intent, along with the timing of the ad, were both deemed unpersuasive and irrelevant to the question of whether an advertisement constitutes genuine issue advocacy.[46] As the Court explained, "a group can certainly choose to run an issue ad to coincide with public interest rather than a floor vote."[47]

As noted above, the *WRTL* standard represents the "outer boundary" for distinguishing between "candidate-related" advocacy and "issue advocacy." In other words, the broadest available standard for identifying "candidate-related" advocacy is to include any communication that is the "functional equivalent of express advocacy." A communication is the "functional equivalent" only if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." If the IRS is concerned that requiring its employees to identify the "functional equivalent of express advocacy" may prove difficult, or may require indeterminate subjective judgments, which is a fair assessment,[48] then the remaining option is to draw a bright line using *Buckley*'s "magic words" conception of express advocacy.

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[44] *Id*. at 469-470.

[45] *Id*. at 470.

[46] *Id*. at 472-473; *see also id*. at 476 n.8 ("'purpose' is not the appropriate test for distinguishing between genuine issue ads and the functional equivalent of express campaign advocacy").

[47] *Id*. at 473.

[48] The Supreme Court invalidated the FEC's regulatory test for identifying the "functional equivalent of express advocacy" in *Citizens United*. *See Citizens United*, 558 U.S. at 335-336. Previously, that test's lack of precision was demonstrated when the Federal Election Commission divided when asked if a

III. THERE IS NO CLEAR STATUTORY BASIS FOR EITHER THE EXISTING FACTS AND CIRCUMSTANCES TEST OR THE IRS'S PROPOSED STANDARD

A. The Problems Inherent In The Facts and Circumstances Test Are Well Known and Not New

The shortcomings of the existing "facts and circumstances" approach to defining "political campaign intervention" are well known. Simply put, no one really knows what the "standard" means. The NPRM quotes the June 24, 2013 report ("Charting a Path Forward at the IRS: Initial Assessment and Plan of Action"), which stated that "[o]ne of the significant challenges with the 501(c)(4) review process has been the lack of a clear and concise definition of 'political campaign intervention,'" which in turn has "created considerable confusion for both the public and the IRS in making appropriate section 501(c)(4) determinations."[49] This, however, has been the case for many years, and the NPRM leaves unstated the actual reason(s) for this rulemaking's urgency.

IRS Commissioner John Koskinen recently "suggested that the IRS's problematic behavior toward advocacy groups was partly due to confusion about the existing tax-exemption rules and how to apply them. . . . 'We need as much clarity as possible,' Koskinen said. 'If we can get clarity, that's the way we'll get the IRS out of this as much as possible.'"[50] Commissioner Koskinen also stated, "Everyone would gain and we would avoid issues that we've had in the past if it were clearer what the definition of political activity is and how much of it (organizations) are allowed to engage in with as much clarity as possible and if it was clearer to whom those rules apply."[51]

The lack of "clarity," however, is not the "facts and circumstances" test's sole shortcoming. The "facts and circumstances" approach lacks clarity because: (1) it statutory basis

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certain communication was the "functional equivalent" of express advocacy. *See*, *e.g.*, FEC Advisory Opinion 2008-15 (National Right to Life Committee, Inc.).

[49] NPRM at 71,536.

[50] Josh Hicks, *New IRS commissioner addresses agency challenges*, Washington Post (Jan. 6, 2014), http://www.washingtonpost.com/blogs/federal-eye/wp/2014/01/06/new-irs-commissioner-addresses-agency-challenges/.

[51] Kendall Breitman, *New IRS chief sees end to Tea Party investigation*, USA Today (Jan. 6, 2014), http://www.usatoday.com/story/news/politics/2014/01/06/irs-commissioner-koskinen-tea-party/4344465/.

has never been explained; (2) it is not the product of a formal rulemaking; and (3) it completely ignores the Supreme Court's rulings regarding the regulation of political speech. The standards outlined in Revenue Rulings 2004-6 and 2004-41 are not derived from any statutory language and have no apparent statutory basis, are almost certainly unconstitutionally vague, and, as noted above, they fail to take into account the Supreme Court's rulings in *WRTL* and *Citizens United*.[52] The lack of clarity is merely a symptom of what is wrong with the "facts and circumstances" test; it is not the root problem.

B. The Proposed Rule Is No More Anchored To Statutory Language Than The Facts and Circumstances Test

The NPRM does not specifically identify the statutory language that serves as the delegation of authority to the IRS to conduct a rulemaking for the purpose of restricting the extent to which Section 501(c)(4) organizations may engage in "political" activities. 26 U.S.C. § 501(a) grants tax exempt status to "[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," provided that "no part of the net earnings of such entity inures to the benefit of any private shareholder or individual."[53] Section 501(c)(4) of the Internal Revenue Code does not, on its face, prohibit or restrict the political activities of organizations operating under its terms.

Of course, the question of Section 501(c)(4) organizations' "political" activity is tied to the question of what it means to be "operated exclusively for the promotion of social welfare." Section 501(c)(4), however, does *not* include a provision that corresponds to the provision in Section 501(c)(3) that explicitly bars participation or intervention in political campaigns. Section 501(c)(3) expressly provides that a Section 501(c)(3) organization may "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[54] In other words, Congress expressly provided in Section 501(c)(3) that political campaign intervention is inconsistent with being "operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the

[52] We acknowledge that both Revenue Rulings were issued before the Supreme Court decided *WRTL* and *Citizens United*. However, the IRS has taken no steps to address those decisions in any subsequent public statements or guidance.

[53] 26 U.S.C. § 501(c)(4).
[54] 26 U.S.C. § 501(c)(3).

prevention of cruelty to children or animals."[55] Congress has *never* stated that activities that promote "social welfare" somehow do not include "political" activities, although the IRS has taken this position in its regulations.[56]

Nevertheless, the IRS's long-standing position has also been that the promotion of social welfare and the conduct of "political" or "campaign intervention" activities are *not* mutually exclusive. A Section 501(c)(4) organization that is required by statute to operate "*exclusively* for the promotion of social welfare," but, according to IRS regulations "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."[57] Still, a Section 501(c)(4) organization may undertake a significant amount of "political" or "campaign" activity, provided this is not the activity in which the organization is "primarily engaged."[58] This is only possible if "political" activity is understood to promote "social welfare," contrary to the declaration made in the IRS's regulations. The IRS has appropriately taken this view for decades, and this view is entirely consistent with the plain language of Section 501(c)(4), especially when considered in light of Section 501(c)(3). The IRS is encouraged to clearly set forth its interpretation of the statute, identify the statutory source of its rulemaking authority, and explain how its proposed rule is consistent with, and authorized by, the statute.

The IRS also does not adequately explain why the activities it seeks to classify as "candidate-related political activity" would not be treated as promoting "social welfare." Instead, the proposal creates a new term, "candidate-related political activity," but does not contain any explanation of the basic, guiding principle the IRS used to determine what types of speech and activity should be included within its reach. Instead, the proposal simply decrees a series of bright-line rules. Some commentators have astutely noted that rather than develop a standard that coherently defines "political activity," the proposal simply collects the kinds of "political" activities in which Section 501(c)(4) organizations typically engage and labels those activities "political." One observer noted "the growing concern by House Ways and Means Committee investigators that the regulation was reverse-engineered – designed to isolate and shut down the same tea party groups victimized in the first targeting round. Treasury appears to have combed through those tea party applications, compiled all the groups' main activities, and

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[55] *Id.*

[56] *See* 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii) ("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.").

[57] *Id.*

[58] 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i) ("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.").

then restricted those activities in the new rule."[59] House Ways & Means Chairman Dave Camp said, "[t]he new regulation so closely mirrors the abused tea-party group applications, it leads me to question if this new proposed regulation is simply another form of targeting."[60] Without additional explanation from the IRS, it is difficult to conclude otherwise.

For decades, Section 501(c)(4) organizations have conducted issue advocacy, nonpartisan voter registration and get-out-the-vote drives, and made restricted grants to other organizations, and for just as long, the IRS has recognized that these activities promote social welfare. Under the proposed rule, these activities would no longer be deemed to promote social welfare, because the IRS wishes to treat anything even tangentially related to an election as "candidate-related political activity" for the sake of "providing clear rules that avoid fact-intensive determinations." The explanation in the NPRM for this change is wholly inadequate and does not satisfy basic agency rulemaking requirements. The D.C. Circuit previously explained that an agency's "barebones incantation of two abbreviated rationales cannot do service as the requisite 'reasoned basis' for altering its long-established policy."[61]

More specifically, the IRS must explain:

- Why "political activities" in general do not promote either "social welfare" or "the common good and general welfare of the people of the community." (What is the basis for the IRS's conclusion that "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)(ii).)
- Why issue advocacy that cannot be reasonably interpreted as an appeal to vote for or against a candidate for office does not promote either "social welfare" or "the common good and general welfare of the people of the community."
- Why nonpartisan voter registration drives do not promote either "social welfare" or "the common good and general welfare of the people of the community," but still may be deemed appropriately charitable or educational in nature if undertaken by a Section 501(c)(3) organization.

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[59] Kimberley A. Strassel, *IRS Targeting: Round Two*, Wall Street Journal (Dec. 12, 2013), http://online.wsj.com/news/articles/SB10001424052702303932504579254521095034070.

[60] *Id.*

[61] *Action For Children's Television v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987); *see also National Black Media Coalition v. FCC*, 775 F.2d 342, 355 (D.C. Cir. 1985) ("it is also a clear tenet of administrative law that if the agency wishes to depart from its consistent precedent it must provide a principled explanation for its change of direction").

- Why nonpartisan get-out-the-vote drives do not promote either "social welfare" or "the common good and general welfare of the people of the community," but still may be deemed appropriately charitable or educational in nature if undertaken by a Section 501(c)(3) organization.
- Why making a restricted grant to another Section 501(c)(4), on the condition that it be used only for activities that promote social welfare, does not promote either "social welfare" or "the common good and general welfare of the people of the community."

C. If Adopted, The Proposed Rule Would Further Complicate The Speech Regulation Regime That Applies To Section 501(c) and 527 Organizations

The IRS should seek to adopt rules that harmonize the regulation of "political" speech among 501(c) and 527 organizations – that is, the notion of what is "political" should be as uniform across entity types as the statutes allow. Presently, the IRS administers two concepts of "political" speech and activity: (1) the standard applied to the activities of Section 501(c) organizations; and (2) the standard applied to Section 527 organizations.

In this rulemaking, the IRS proposes to adopt a new rule that applies only to Section 501(c)(4) organizations – but not to other Section 501(c) organizations. This would create a third standard for "political" speech. This would further confuse an already confusing area of the law. The classification of speech – as either "campaign advocacy" or "issue advocacy" – should not depend on the identity or tax status of the speaker. Additionally, there is no statutory basis for treating the "political" speech of Section 501(c)(4) organizations more harshly than that of other Section 501(c) organizations.

The application of the proposed rule exclusively to Section 501(c)(4) organizations, but not to entities organized under Section 501(c)(3), Section 501(c)(5), or Section 501(c)(6), is problematic under the anti-discrimination principles set forth in *Citizens United* v. *FEC*.[62]

D. The Continued Use of the "Primarily Standard," or its Replacement, Is A Critical Element of This Rulemaking and is Inadequately Addressed

The NPRM also requests comment on the "primarily" standard, and specifically "on what proportion of an organization's activities must promote social welfare for an organization to

[62] *See Citizens United*, 558 U.S. at 340 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. . . . 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.").

qualify under section 501(c)(4) and whether additional limits should be imposed on any or all activities that do not further social welfare." This is a critical question that needs to be addressed simultaneously with any consideration of redefining the "political campaign intervention" standard. The proportion standard and the definition of political or campaign activity work together and are inextricably linked. For example, the scope of the "political activities" definition can be rendered effectively meaningless if the IRS dramatically reduces the proportion of political activity that it deems acceptable. Until the IRS addresses this issue clearly, it is not possible to offer comprehensive comments because the actual impact of the *full* proposal remains unknown.

Ultimately, the question of proportion is a question that is properly answered by Congress. The IRS should not attempt to alter the standard currently in use, and certainly not without first fully addressing all possible alternatives in a notice of proposed rulemaking.

IV. BRIGHT LINE RULES MAY BE ATTRACTIVE IN THEORY, BUT THE REGULATION OF SPEECH REQUIRES MORE NUANCE

When engaging in efforts to regulate speech, the government cannot simply impose a bright line rule on the grounds that bright line rules simplify matters for the government. As the Supreme Court explained, "the desire for a bright-line rule … hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom."[63] The IRS should heed the Supreme Court's warning: "Discussion of issues cannot be suppressed simply because the issue may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor."[64]

As discussed in more detail below, the proposed definition of "candidate-related political activity" includes a broad range of speech and activity that does not involve encouraging people to vote for or against candidates for office, but instead is aimed at influencing public policy. The IRS acknowledges that one of its proposals "would apply without regard to whether a public communication is intended to influence the election or some other, non-electoral action (such as a vote on pending legislation)…."[65] The IRS is fully aware that its proposal is overbroad, and asks if "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

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[63] *Wisconsin Right for Life, Inc. v. FEC*, 551 U.S. 449, 479 (2007) *quoting Massachusetts Citizens for Life, Inc. v. FEC*, 479 U.S. 238, 263 (1986).

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

[65] NPRM at 71,539.

influence the outcome of an election."[66] The question itself reveals that the IRS fundamentally misunderstands the standards to which it is bound to adhere – and acknowledges the over breadth of its proposal. In distinguishing between electoral advocacy and issue advocacy, the Supreme Court has already held the question of timing is "irrelevant," "unremarkable," and "unpersuasive,"[67] and the Court "ha[s] already rejected an intent-and-effect test for distinguishing between discussions of issue and candidates."[68]

Rather than asking if it may simply "presume" that a communication is election-influencing, the IRS *must* consider whether the actual communication at issue "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." If the answer is "yes," then the IRS may properly classify it as "political campaign intervention" or "candidate-related political activity." Congress already attempted to impose an overbroad standard for speech regulation by statute, and the "electioneering communication" standard was invalidated in *WRTL* and *Citizens United*. It is incomprehensible that the IRS would even propose taking the government down this road again.

The IRS's proposed definition of "candidate-related political activity" is highly problematic and unlikely to survive judicial scrutiny. In offering the following specific comments, we assume solely for the sake of argument here that: (1) the IRS has the authority to conduct this rulemaking; and (2) the IRS may, as both a constitutional and statutory matter, impose restrictions on the amount of election- or campaign-related speech and activity that a Section 501(c)(4) organization may undertake and remain tax-exempt.

A. Express Advocacy

1. The Express Advocacy Standard

Defining "candidate-related political activity" in terms of express advocacy and its functional equivalent is permissible under relevant Supreme Court precedent. However, the language set forth at proposed § 1.501(c)(4)-1(a)(2)(iii)(A)(1) differs somewhat from the Supreme Court decisions from which it is drawn. To avoid confusion, and temptation on the part of the Service to expand the concept of "express advocacy" beyond the Supreme Court's boundaries, any regulatory language adopted should mirror the Supreme Court's language. For example, the phrase "*expressing a view on*, whether for or against, the selection, nomination,

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[66] *Id*. (emphasis added).

[67] *WRTL* at 472.

[68] *WRTL at 467.*

election, or appointment of one or more clearly identified candidates" unnecessarily introduces new phrasings into the express advocacy concept which burdens the regulated community with added confusion and lack of clarity.

In *Buckley v. Valeo*, the Supreme Court referred to "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." Buckley v. Valeo, 424 U.S. 1, 44 (1976). The "expressing a view" phrasing should be replaced with language drawn directly from *Buckley*.

Subparagraph (i) obviously refers to the "magic words" standard of express advocacy, but it does not directly track the language of footnote 52 in *Buckley*, or the first half of the Federal Election Commission's "magic words" provision at 11 C.F.R. § 100.22(a). If it is the IRS's intention to employ the "magic words" standard, the IRS should clearly state this and include a full recitation of the standard. The failure to do so will prompt litigation simply to determine whether its standard mirrors *Buckley* or is intended to be something different.

Similarly, subparagraph (ii) is presumably an attempt to capture the Supreme Court's definition of what constitutes the functional equivalent of express advocacy, but the IRS does not directly track the language used by the Supreme Court in *WRTL*. Rather than focusing on whether a communication constitutes "*a call for or against*" a candidate's election, the Supreme Court more clearly expressed the standard as one which asks whether a communication "is susceptible of no reasonable interpretation other than as *an appeal to vote for or against* a specific candidate." *WRTL*, 551 U.S. at 470. The phrase "appeal to vote" is the crucial element, not "call for or against."

Given that the "express advocacy" standard is limited by definition to communications that expressly advocate *a vote* for or against a candidate for elected office, the concept has no application to selections, nominations, or appointments of individuals to office. It makes no sense, for example, to issue an "appeal to vote" for or against a Supreme Court nominee. Rather, an advocacy organization typically lobbies members of the U.S. Senate to support or oppose the nominee's confirmation, or calls on the public to do the same. For the reasons set forth above, the IRS is urged not to treat nominees and appointees as candidates. However, if the determination is made that a communication that somehow supports or opposes a political nominee or appointee should be included in the concept of "candidate-related political activity," the IRS should create a separate category that sets forth the standard for communicating with respect to political nominees or appointees. The "express advocacy" standard is not applicable beyond the electoral candidate context, and pretending otherwise disregards the fact that the term "express advocacy" is an established term of art that cannot simply be redefined at will.

2. The "Clearly Identified Candidate" Component

One of the essential component parts of an express advocacy communication is that it must refer to a clearly identified candidate for office. The term "clearly identified candidate" has a long history. The phrase is defined in the Federal Election Campaign Act of 1971, as amended.[69] The FEC's regulatory definition of the term provides that "*clearly identified* means the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or 'the incumbent,' or through an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for Senate in the State of Georgia.'"[70] The Service's proposed definition of "clearly identified" does not include the "unambiguous reference" limitation, which comes directly from the Federal Election Campaign Act.[71]

The IRS's addition of the "use of the candidate's recorded voice" in its proposed definition is a clear nod to FEC Advisory Opinion 2012-19 (American Future Fund), or perhaps to the press coverage of that Advisory Opinion. In subsequent litigation, a federal court held that an audio clip of the President's voice, unidentified in an advertisement as such, did not constitute a reference to a clearly identified candidate.[72] (There is no mention or discussion of the inclusion of "recorded voice" in the NPRM.)

Finally, the IRS's proposed definition provides that "a candidate may be 'clearly identified' by reference to an issue or characteristic used to distinguish the candidate from other candidates." It is entirely unclear what this means, and the NPRM provides no examples. We suspect it may be an effort to incorporate one of the most objectionable considerations found in the "facts and circumstances" test. Rev. Rule. 2007-6 provides that one of the "factors that

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[69] *See* 2 U.S.C. § 431(18); s*ee also Buckley v. Valeo*, 424 U.S. 1, 43 n.51 ("Section 608(e)(2) defines 'clearly identified' to require that the candidate's name, photograph or drawing, or other unambiguous reference to his identity appear as part of the communication. Such other unambiguous reference would include use of the candidate's initials (e.g., FDR), the candidate's nickname (e.g., Ike), his office (e.g., the President or the Governor of Iowa), or his status as a candidate (e.g., the Democratic Presidential nominee, the senatorial candidate of the Republican Party of Georgia)."); *FEC v. Nat'l Org. for Women*, 713 F. Supp. 428, 433 (D.D.C. 1989) ("An explicit and unambiguous reference to the candidate must be mentioned in the communication ....").

[70] 11 C.F.R. § 100.17.

[71] *See* 2 U.S.C. § 431(18)(C) ("the identity of the candidate is apparent by unambiguous reference").

[72] *See Hispanic Leadership Fund, Inc. v. Federal Election Commission*, Case No. 1:12cv893 (E.D.Va. Oct. 4, 2012).

tend[s] to show that an advocacy communication on a public policy issue is for an exempt function under § 527(e)(2)" is that "[t]he position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications." Both *Buckley* and *WRTL* bar the introduction of considerations of individuals' positions on public policy issues into the "express advocacy" concept.

B. Public Communications Distributed Close In Time To An Election

The IRS proposes to treat as "candidate-related political activity" *any* "public communication [made] 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." A "public communication" is defined to broadcast, cable, or satellite, Internet Web sites, and newspaper, magazine, or other periodicals. Although unclear from the proposed regulatory language, it appears that any other form of paid advertising is also included, as well as some unpaid advertising (such as media coverage of an organization's activities). Finally, the proposal includes any other communication that "reaches, or is intended to reach, more than 500 persons," which the NPRM explains includes mass mailings or telephone banks.

The underlying premise is clear, and absurd: any communication, regardless of format, made by a Section 501(c)(4) organization and directed to any segment of the public that so much as mentions an individual who is a candidate for office, within one month of the primary election, or within two months of the general election, is treated as election- or campaign-related as a *per se* matter. The NPRM's justification for this presumption is that these communications, "because they occur close in time to an election or are election-related, have a greater potential to affect the outcome of an election."[73] This proposal is unsupportable as a matter of common sense, and is impermissible in light of recent Supreme Court rulings. A communication that merely mentions an individual who is a candidate for office, close in time to an election, cannot be *presumed* to have "campaign-related" content, as the IRS itself has previously acknowledged. *See* Revenue Ruling 2004-6, Situation 5.

The IRS proposes to implement 30- and 60-day "blackout" periods, during which any mention of a candidate by a Section 501(c)(4) is automatically deemed to be "political" speech. If adopted, the effect of the IRS proposal is predictable: Section 501(c)(4) speech will be stifled in the periods right before elections, which are also the periods when issue advocacy is generally deemed *most* effective. Interest groups that have engaged in, and political scientists who have

[73] NPRM at 71,538.

studied, issue advocacy generally conclude that the most effective issue advocacy is conducted during election campaign periods because that is when: (1) the public is most engaged with the democratic process; (2) public officials are most responsive to their constituents; (3) serious and/or divisive matters are discussed and often settled; and (4) legislative and policy agendas for the following years are determined and established.[74] As one law professor explained, various "studies reflect a simple point: the election period is not just when voting happens, but when citizens are most democratically engaged, and most actively participating in the work of self-government."[75] Or, as Justice Kennedy said during oral argument in WRTL, "I think it's accepted, that the public only tunes in to the political dialogue shortly before the election. That's the time in which you – in which you reach the public."[76]

1. The Scope of the IRS's Proposal

The IRS's proposed standard is obviously based on "electioneering communications" provision found in the Bipartisan Campaign Reform Act (BCRA). BCRA defines an electioneering communication as "any broadcast, cable, or satellite communication which … refers to a clearly identified candidate for Federal office; … is made within … 60 days before a general, special, or runoff election for the office sought by the candidate; or … 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 … 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."[77]

The IRS's proposal is far broader than the definition of "electioneering communications." First, the IRS proposes to expand the concept beyond broadcast, cable, and satellite communications. Instead of applying only to television and radio ads, the IRS proposal would include virtually all forms of media. Second, the IRS proposal does not include BCRA's

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[74] *See, e.g.*, Saul Zipkin, *The Election Period and Regulation of the Democratic Process*, 18 Wm. & Mary Bill Rts. J. 533, 544 (2010) ("The pre-election period is a time of heightened engagement with the democratic process: a time when both voters and political actors are more attentive to one another."); see also McConnell v. FEC, 251 F. Supp. 2d 176, 793-94 (D.D.C. 2003) (discussing interest groups' belief "that the periods immediately preceding elections are the most effective times to run issue advertisements discussing pending legislation because the public's interest in policy is at its peak").

[75] *Id*. at 545.

[76] *WRTL*, Oral Argument Transcript at 14 (April 25, 2007), http://www.supremecourt.gov/oral_arguments/argument_transcripts/06-969.pdf.

[77] 2 U.S.C. § 434(f)(3).

"targeted to the relevant electorate" limitation. Thus, under the IRS's proposal, any communication that refers to a candidate close in time to that candidate's election is treated as a "candidate-related political activity" even if that communication is not targeted or directed to persons who can actually vote for or against that candidate.[78] The speech restrictions imposed by the IRS proposal would be far more expansive than the restrictions imposed by the "electioneering communication" concept, which, of course, has been invalidated by the Supreme Court. What the IRS proposes is to revive, and expand, a concept that the Supreme Court has already invalidated.

With respect to the proposed scope of the IRS's proposal, courts that have considered state variations of the federal "electioneering communications" concept are divided over the permissibility of electioneering communications laws that extend to media other than broadcast, cable, and satellite communications.[79] The legislative history of the electioneering communications provision, the factual record that was created in support of the provision (which was limited only to television and radio advertisements), and the Supreme Court's reliance on that record when it upheld the electioneering communication provision against a facial challenge in *McConnell* v. *FEC* are important considerations for this rulemaking. The electioneering communications concept was conceived as an alternative to the express advocacy standard in order to broaden the category of speech funded by corporations, labor unions, and trade associations that could be prohibited. The law's speech-suppressing proponents developed an extensive record that they claimed demonstrated that the electioneering communications concept functioned as an accurate and easily-applied shorthand to identify television and radio advertisements that had an "electioneering" purpose. The history of the provision demonstrates both its speech-suppressing origins and the fact that even its proponents understood that it must be tailored in ways that the IRS has disregarded in the present proposal.

2. History of the "Electioneering Communication" Concept

The IRS's stated justification for its proposal is that "certain activities … , because they occur close in time to an election or are election-related, have a greater potential to affect the outcome of an election," and it would "provid[e] clear rules that avoid fact-intensive

[78] For example, under the proposed rule, a organization based in California that distributes a written communication to update its California members about ongoing Congressional budget negotiations, and which so much as mentions Senator Minority Leader Mitch McConnell between April 20, 2014, and May 20, 2014, has made a "political" communication because Senator McConnell is running in a primary election to be held in Kentucky on May 20, 2014.

[79] *See, e.g., Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012); *Ctr. for Individual Freedom, Inc. v. Tennant*, 849 F. Supp. 2d 659 (S.D. W. Va. 2011).

determinations." NPRM at 71,538 and 71,539. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court essentially agreed with the IRS's stated justification above, and accepted, at least on the record before it, that "electioneering communications" that lack express advocacy "are no less clearly intended to influence the election." *Id*. To demonstrate the point, the Court emphasized the most extreme example available, the (in)famous "Bill Yellowtail" ad.[80]

Of course, not all "electioneering communications" fit the "Bill Yellowtail" model, and the fatal flaw of the "electioneering communications" concept quickly became apparent – it captured and banned genuine issue advocacy. In 2007, the Supreme Court took a very different approach when Wisconsin Right to Life, Inc., a Section 501(c)(4) organization, was prohibited from distributing two radio advertisements because of the BCRA's "electioneering communication" provisions. The two advertisements were substantially the same. The script of one advertisement, titled "Wedding," read:

> PASTOR: And who gives this woman to be married to this man?
>
> BRIDE'S FATHER: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up . . .
>
> VOICEOVER: Sometimes it's just not fair to delay an important decision. But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' vote. So qualified candidates don't get a chance to serve. It's politics at work, causing gridlock and backing up our courts to a state of emergency. Contact Senators Feingold and Kohl and tell them to oppose the filibuster. Visit: BeFair.org. Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate for candidate's committee.[81]

Wisconsin Right to Life, Inc., wished to air these advertisements in Wisconsin, within 30 days of a primary election in which Senator Feingold was a candidate. There was no dispute that both advertisements, if aired, would satisfy the statutory definition of "electioneering communication," and would be illegal under existing campaign finance laws.[82]

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[80] *See McConnell v. FEC*, 540 U.S. at 194 n.78.

[81] *WRTL*, 551 U.S. at 458-459.

[82] *WRTL* at 460.

The Supreme Court found this advertisement to be genuine grassroots issue advocacy which the government could not constitutionally prohibit Wisconsin Right to Life, Inc., from distributing.[83] The Court majority explained that *McConnell* upheld the "electioneering communications" provision only against a facial challenge, and in an as-applied setting, the question is "whether the speech at issue is the 'functional equivalent' of speech expressly advocating the election or defeat of a candidate for federal office, or instead a 'genuine issue ad.'"[84] With respect to the "barrier between express advocacy and so-called issue advocacy" referenced in *McConnell*, the *WRTL* Court explained that "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions," and "[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it."[85] The *WRTL* Court held that the electioneering communication prohibition, as applied to a genuine issue ad, was unconstitutional. The IRS's NPRM does not even attempt to explain why the Supreme Court's holding does not apply to the speech restrictions found in the proposed rule.

As noted above, the IRS asserts in the NPRM that communications made close in time to an election "have a greater potential to affect the outcome of an election." NPRM at 71,538. *WRTL* specifically rejected his line of argument. Chief Justice Roberts wrote for the majority, "this Court in Buckley had already rejected an intent-and-effect test for distinguishing between discussions of issue and candidates."[86] In addition, "Buckley also explains the flaws of a test based on the actual effect speech will have on an election or on a particular segment of the target audience. Such a test 'puts the speaker … wholly at the mercy of the varied understanding of his hearers.'"[87]

WRTL held that the statutory standard that defines an "electioneering communication" cannot be used to determine whether an advertisement is the functional equivalent of express advocacy as opposed to genuine issue advocacy. The line between the two categories of speech is explained as follows:

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[83] *See WRTL*, 551 U.S. at 476 ("Because WRTL's ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, we hold they are not the functional equivalent of express advocacy, and therefore fall outside the scope of *McConnell*'s holding.").

[84] *WRTL*, 551 U.S. at 456.

[85] *Id*. at 456-457.

[86] *WRTL* at 467.

[87] *WRTL* at 469 *quoting Buckley*, 424 U.S. at 43.

> [A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.[88]

The Court specifically rejected the argument that "any ad covered by [the electioneering communication provision] that includes 'an appeal to citizens to contact their elected representative' is the 'functional equivalent' of an ad saying defeat or elect that candidate."[89] As the Court explained, "[i]ssue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose – uninvited by the ad – to factor it into their voting decisions."[90] The Court rejected several arguments pertaining to "contextual" factors that allegedly suggested that WRTL's "subjective intent" may have been to influence an election. The Court was clear: "intent is irrelevant."[91] In a footnote, the Court explained further:

> The McConnell Court did not find that a "vast majority" of the issue ads considered were the functional equivalent of direct advocacy. Rather, it found that such ads had an "electioneering purpose." For the reasons explained, 'purpose' is not the appropriate test for distinguishing between genuine issue ads and the functional equivalent of express campaign advocacy.[92]

The passage above should make perfectly clear that the IRS's proposal to treat all communications made in close proximity to an election as "candidate-related political activity" is entirely impermissible. The premise of the "electioneering communications" concept is that it

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[88] *WRTL*, 551 U.S. at 469-470.

[89] *WRTL*, 551 U.S. 470.

[90] *Id*. at 470.

[91] *Id*. at 471.

[92] *Id.* at 476 n.8.

captures communications that "everyone knows" are "intended" to influence elections, even though they do not expressly say "vote for" or "vote against." For purposes of distinguishing between communications that are the functional equivalent of express advocacy and communications that are genuine issue advocacy, the Supreme Court has in absolutely clear terms rejected this premise is impermissible. "Proximity to an election" may not be used as a proxy for "campaign-related" speech.

Beyond demonstrating the obvious – that an advertisement may satisfy the statutory definition of "electioneering communication" and also be a genuine issue ad – the Court specifically found the question of timing to be "irrelevant" and "unpersuasive."[93] The Court explained that "a group can certainly choose to run an issue ad to coincide with public interest rather than a floor vote."[94] In summarizing its holding, the Court explained: "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."[95]

The Supreme Court held that Wisconsin Right to Life's two advertisements, "Wedding" and "Loan," are "not the functional equivalent of express advocacy," and that "their content is consistent with that of a genuine issue ad."[96] The IRS's proposal would treat both of these advertisements as "candidate-related political activity." This classification is impermissible under *WRTL*.

3. Impact on Section 501(c)(4) Organizations' Ability To Lobby Congress, and Broader Constitutional Issues Raised

Under the IRS's proposal, *any* communication made or distributed by a Section 501(c)(4) organization that mentions the name of a candidate for elected office within 30 days of that candidate's primary election, or within 60 days of that candidate's general election, regardless of the communication's substantive content, would be treated as "candidate-related political activity." As explained above, because many candidates for office are also incumbent lawmakers, many of the communications captured by the IRS's proposal will be lobbying communications, including the types of communications identified by the Supreme Court in *WRTL* as genuine issue advocacy and grassroots lobbying. The IRS's proposal, if adopted,

[93] *Id*. at 472.

[94] *Id*. at 473.

[95] *Id*. at 474.

[96] *Id*. at 470.

would place limits on the ability of Section 501(c)(4) to engage in lobbying efforts and petition the government. For example, a Section 501(c)(4) organization might wish to lobby Congress during the 60 day period before a November general election, but could find itself effectively barred from doing so because its lobbying expenditures and communications would be treated as "candidate-related political activities," and those activities must be limited if the organization wishes to retain its tax exempt status.

Even apart from *WRTL*, the Supreme Court has previously warned that this precise scenario could be unconstitutional. In *Regan v. Taxation With Representation*, the Court upheld the statutory restriction on lobbying activities by Section 501(c)(3) organizations, and explained that the appellee "could still qualify for a tax exemption under § 501(c)(4)" and "obtain tax-deductible contributions for its nonlobbying activity by returning to the dual structure it used in the past, with a § 501(c)(3) organization for nonlobbying activities and a § 501(c)(4) organization for lobbying." *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983). In a concurring opinion, Justice Blackmun, joined by Justices Brennan and Marshall, explained:

> I write separately to make clear that in my view the result under the First Amendment depends entirely upon the Court's necessary assumption -- which I share -- about the manner in which the Internal Revenue Service administers § 501. . . .
>
> 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. . . .
>
> 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.
>
> 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.[97]

The Supreme Court embraced this reading of *Regan* last summer in *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328-2329 (2013) (explaining that the *Regan* Court "highlighted—in the text of its opinion … the fact that the condition did not prohibit that organization from lobbying Congress altogether" and that "[b]y returning to a 'dual structure' it had used in the past—separately incorporating as a §501(c)(3) organization and §501(c)(4) organization—the nonprofit could continue to claim §501(c)(3) status for its nonlobbying activities, while attempting to influence legislation in its §501(c)(4) capacity with separate funds").

The IRS's proposal not only unconstitutionally restricts and limits the ability of Section 501(c)(4) organizations to engage in lobbying activities, but it imperils the constitutionality of the statutory restriction on lobbying activity by Section 501(c)(3) organizations. As the Court explained, that restriction is only constitutional to the extent that Section 501(c)(3) organizations can turn to a Section 501(c)(4) affiliate in order to petition the government. If a Section 501(c)(4) organization is restricted from engaging in lobbying activities, as it would be under the IRS's proposal, then the restrictions on lobbying by Section 501(c)(3) organizations are rendered unconstitutional.

C. Expenditures Reported To The FEC, Including Independent Expenditures and Electioneering Communications

Proposed § 1.501(c)(4)-1(a)(2)(iii)(A)(3) should be removed. Expenditures that are reported to the FEC as independent expenditures are, by definition, express advocacy communications. Any communication that is an independent expenditure reported to the FEC is already captured by the proposed express advocacy provision.

The IRS's proposal to treat all communications reported to the FEC as "electioneering communications" as "candidate-related political activity" runs afoul of *WRTL*. As that decision made clear, a communication that satisfies FECA's definition of "electioneering

[97] *Regan v. Taxation with Representation*, 461 U.S. 540, 552-554 (1983) (Blackmun, J., concurring).

communication" may actually be genuine issue advocacy or grassroots lobbying, despite the "electioneering" label. In other words, the only "electioneering communications" that may be treated by the IRS as "candidate-related political activity" are those that do not qualify as issue advocacy – namely, those that contain the functional equivalent of express advocacy. Post-*WRTL*, if an electioneering communication is *not* issue advocacy, it is because it contains the functional equivalent of express advocacy. This category of speech is already captured in the second part of the proposed express advocacy provision.

D. Contributions To Candidates/Section 527 Organizations, and Redistribution of Candidate/Section 527 Organization Materials

Making a contribution to a candidate for federal, state, or local elective office, or to a Section 527 political organization, is "a general expression of support for the candidate"[98] or political organization, and may properly be classified as an activity that is unambiguously campaign related.

The distribution of a candidate's or Section 527 organization's materials by another organization is often classified as an "in-kind" contribution under federal and state campaign finance laws. To the extent that the redistribution of materials is otherwise treated as an in-kind contribution, it is of the same nature as a direct, cash contribution.

E. Contributions or Grants to Section 501(c)(4) Organizations

A contribution, or grant, to a Section 501(c) organization that "engages in candidate-related political activity" may be fairly treated as "candidate-related political activity" *if* the grantee *actually uses* the funds for "candidate-related political activity" (assuming the term is properly defined by the IRS to exclude genuine issue advocacy and other activities that do not encourage a vote for or against a candidate for office). If, however, the grantee uses the funds for activities that promote social welfare, there is absolutely no reason to treat the grant as "candidate-related political activity."

The NPRM does not explain why the IRS would automatically treat the entirety of any grant made to a Section 501(c)(4) organization that engages in any "candidate-related political activity" as "candidate-related political activity." The only conceivable purpose for this proposed rule is to cut off or severely limit the sources of funding for Section 501(c)(4) organizations that do engage in even the most limited amounts of "candidate-related political activity."

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[98] *Buckley*, 424 U.S. at 21.

Non-profit organizations have long made grants to fellow non-profit organizations, and these grants are sometimes made for general operating purposes where the recipient has full discretion over how to use the funds, are sometimes earmarked for a particular project, and are sometimes given with other limitations on how the funds may used. A contribution or grant that is made "subject to a written restriction that it not be used for candidate-related political activity" should not be treated as "candidate-related political activity." This is not logical and is not consistent with the IRS's treatment of grants in other contexts. For example, grants from Section 501(c)(3) organizations to other types organizations are permissible as long as the funds are monitored and used in accordance with certain imposed restrictions.

F. Voter Registration Drives, Get-Out-The-Vote Efforts, and Voter Guides

For years, IRS materials have explained that non-partisan voter registration drives, non-partisan get-out-the-vote drives, and non-partisan, unbiased voter guides do not constitute "political campaign intervention" and are appropriate activities for Section 501(c) organizations. This position was entirely sensible – these efforts do not promote the election or defeat of candidates, but rather, encourage participation in the electoral process. "Encouraging participation in the electoral process" has long been deemed to be an activity that promotes social welfare, probably because it is entirely self-evident. While American Future Fund has, from time to time, engaged in these activities, many other Section 501(c)(4) organizations with whom American Future Fund interacts devote substantial resources to encouraging electoral process participation on a non-partisan basis.

The Alliance for Justice, which represents dozens of liberal interest groups, correctly observed that the IRS's proposal "would drastically reduce the ability of (c)(4)s to engage in nonpartisan get-out-the-vote drives, candidate questionnaires, and voter registration drives," and that the proposal "create[s] a danger to citizen participation in our democracy."[99] It is difficult to believe that the IRS should take *any* action that reduces voter registration and get-out-the-vote efforts. Registering voters and encouraging people to participate in the political process is self-evidently "beneficial to the community as a whole." The only reason given in the NPRM for reclassifying these activities is to "avoid a fact-intensive analysis." This reason is not especially plausible or compelling. As noted above, however, "the desire for a bright-line rule … hardly constitutes the compelling state interest necessary to justify any infringement on First Amendment freedoms."

These activities certainly bear a connection to elections. That does not mean, however, that they have anything to do with urging people to vote for or against certain candidates or

[99] Alliance for Justice Press Release: *IRS proposal endangers citizen participation in democracy* (Nov. 27, 2013), http://www.afj.org/press-room/press-releases/afj-treasury-irs-proposal-endangers-citizen-participation-in-democracy.

parties. The IRS has no authority to impose restrictions on activities that are merely or somehow "election-related." Any restrictions placed on these activities must be carefully drawn to include only efforts that satisfy the *WRTL* standard.

VI. CONCLUSION

For the reasons set forth in Part I above, the IRS should withdraw this proposed rule. Congress should be permitted to complete its investigations into the matters that prompted this rulemaking in the first place. Following these investigations, if *Congress* believes new standards are needed, *Congress* should act to develop and institute those standards by legislation.

If the IRS and the Administration are determined to proceed, however, the proposed rule should be thoroughly re-evaluated. As explained in Part II above, the proposed rule is not consistent with recent Supreme Court rulings, and the notice issued by the IRS fails to even mention the many relevant First Amendment considerations involved. As explained in Part III above, the statutory authority for the proposed rule is not adequately established in the notice. Finally, as explained in Part IV above, the proposed "bright line" regulatory standards draw heavily on federal campaign finance concepts, but it is readily apparent that the IRS lacks the expertise necessary to establish a new legal regime that centers so heavily on concepts that are foreign to tax law.

We appreciate the opportunity to provide these comments.

Respectfully submitted,

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ATTACHMENT A

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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February 4, 2014

The Honorable John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Dear Mr. Koskinen:

The Committee on Oversight and Government Reform is conducting oversight of the Internal Revenue Service's inappropriate treatment of tax-exempt applicants. The Obama Administration recently issued a proposed regulation limiting political speech by certain nonprofit organizations. The Committee's ongoing investigation has identified several procedural and substantive concerns with the Administration's proposed regulation. We write to request that the IRS withdraw the rule from consideration and that you provide the Committee with information about the process by which this rule was crafted.

On November 29, 2013, the IRS issued a proposed regulation related to political speech by organizations exempt from tax under Internal Revenue Code ("I.R.C.") §501(c)(4). The proposed regulation is intended to clarify the tax-exemption determinations process and resolve problems identified in a Treasury Inspector General for Tax Administration (TIGTA) audit report.[1] It does not. As written, the Administration's proposed rule will stifle the speech of social welfare organizations and will codify and systematize targeting of organizations whose views are at odds with those of the Administration. In addition to these substantive concerns, we also have serious concerns about the process by which the Administration promulgated this rule. Our concerns are discussed in this letter.

I. The proposed rule codifies the Obama Administration's earlier attempts to stifle political speech

The Administration's proposal to restrict political speech by § 501(c)(4) nonprofits must be understood in context. As the Committee's investigation has shown, beginning in 2010, the

[1] Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71535 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1) (quoting the "Charting a Path Forward at the IRS: Initial Assessment and Plan of Action" report) [hereinafter "Proposed Regulation"].

Administration "orchestrated a sustained public relations campaign seeking to delegitimize the lawful political activity of conservative tax-exempt organizations and to suppress these groups' right to assemble and speak."[2]

In the wake of the Supreme Court's *Citizens United* opinion, the President and Democratic allies in Congress loudly bemoaned the lawful political speech of nonprofit groups. During his 2010 State of the Union address, the President declared:

> With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests – including foreign corporations – to spend without limit in our elections. I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities.[3]

As the 2010 midterm election neared, the President's rhetoric amplified. "[A]s an election approaches," the President proclaimed in September 2010, "it's not just a theory. We can see for ourselves how destructive to our democracy this can become. We see it in the flood of deceptive attack ads sponsored by special interests using front groups with misleading names."[4] Singling out the conservative group Americans for Prosperity by name, the President expounded in October 2010: "[Y]ou have these innocuous-sounding names, and we don't know where this money is coming from. I think that is a problem for our democracy. And it's a direct result of a Supreme Court decision that said they didn't have to disclose who their donors are."[5]

For months, the Administration denounced the rights of these groups to engage in anonymous political speech and baselessly suggested that they were funded by malevolent special interest and foreign entities. This public targeting was intended to shame these groups into disclosing their funding sources and scare potential donors from making otherwise lawful contributions. The proposed regulation represents the culmination of the President's rhetorical campaign to delegitimize social welfare organizations engaged in political speech. The proposal effectively codifies the Administration's earlier attempts to suppress political speech by nonprofit organizations.

The Committee's investigation into the IRS's targeting of conservative tax-exempt applicants demonstrates that the proposed rule is simply the final act of the Administration's history of attempts to stifle political speech by conservative § 501(c)(4) organizations.

a. The proposed rule is a continuation of Lois Lerner's efforts to curb conservative political speech

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[2] Memorandum from Majority Staff, H. Comm. on Oversight & Gov't Reform, to Members, H. Comm. on Oversight & Gov't Reform, "Interim update on the Committee's investigation of the Internal Revenue Service's inappropriate treatment of certain tax-exempt applicants" (Sept. 17, 2013).

[3] The White House, Remarks by the President in the State of the Union Address (Jan. 27, 2010).

[4] The White House, Weekly Address: President Obama Castigates GOP Leadership for Blocking Fixes for the Citizens United Decision (Sept. 18, 2010).

[5] The White House, Remarks by the President in a Youth Town Hall (Oct. 14, 2010).

The Committee's investigation uncovered evidence that Lois Lerner, the former IRS Director of Exempt Organizations, sought to crack down on political speech by certain nonprofit groups. Lerner, who previously served as the head of enforcement at the Federal Election Commission, demonstrated a keen interest in curbing nonprofit political speech. Documents and information suggest that under her leadership, the Exempt Organizations Division considered curbing political speech as early as 2010.

In Fall 2010, as the President and Democrats in Congress publicly sought to undermine the legitimacy of conservative-oriented nonprofits engaged in political speech, Lerner told an audience about the immense political pressure on the IRS to "fix the problem" of nonprofit political speech. She stated:

> What happened last year was the Supreme Court – the law kept getting chipped away, chipped away in the federal election arena. The Supreme Court dealt a huge blow, overturning a 100-year old precedent that basically corporations couldn't give directly to political campaigns. And everyone is up in arms because they don't like it. The Federal Election Commission can't do anything about it.
>
> They want the IRS to fix the problem. The IRS laws are not set up to fix the problem: (c)(4)s can do straight political activity. They can go out and pay for an ad that says, "Vote for Joe Blow." That's something they can do as long as their primary activity is their (c)(4) activity, which is social welfare.
>
> So everybody is screaming at us right now: 'Fix it now before the election. Can't you see how much these people are spending?' I won't know until I look at their 990s next year whether they have done more than their primary activity as political or not. So I can't do anything right now.[6]

Within the IRS, Lerner proposed a "c4 project" to examine more closely self-declared nonprofits engaged in political speech.[7] Lerner noted "there is a perception out there" that some 501(c)(4) groups are established only to engage in political activity.[8] Under her leadership, the Exempt Organizations Division launched a concerted effort to measure and assess the degree of political activity by nonprofits.

By April 2013, the Exempt Organizations Division had finished an analysis of the trends in 501(c)(4) groups with indications of political activity.[9] This document grounded the concern in *Citizens United*, stating: "Since Citizens United (2010) removed the limits on political

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[6] *See* "Lois Lerner Discusses Political Pressure on IRS in 2010," www.youtube.com (last visited Dec. 10, 2013) (transcription by Committee).

[7] *See* E-mail from Lois Lerner, Internal Revenue Serv., to Cheryl Chasin, Laurice Ghougasian, & Judith Kindell, Internal Revenue Serv. (Sept. 15, 2010). [IRSR 191031-32]

[8] E-mail from Lois Lerner, Internal Revenue Serv., to Cheryl Chasin, Laurice Ghougasian, & Judith Kindell, Internal Revenue Serv. (Sept. 15, 2010). [IRSR 191031]

[9] *See* Internal Revenue Serv., Baseline Analysis of 501(c)(4) Form 990 Filers with Schedule C *Political Campaign and Lobbying Activities* (Apr. 15, 2013). [IRSR 195642-65]

spending by corporations and unions, concern has arisen in the public sphere and on Capitol Hill about the potential misuse of 501(c)(4)s for political campaign activity due to their tax exempt status and the anonymity they can provide to donors."[10] It is unclear how Lerner intended to utilize this information, but other e-mails suggest she hoped to publicize the IRS's efforts to reign in nonprofit political speech.[11] According to one IRS employee, "The mere fact that we are doing anything at all in this area will be huge."[12]

The Administration's rule can only be properly understood in this context. As such, the proposal is merely an outgrowth of multi-year effort to "fix the problem" of nonprofit political speech. By April 2013 – a month before TIGTA released its audit report – Lois Lerner's Exempt Organizations Division already developed an analysis of political speech by tax-exempt organizations. The rule is merely the result of "everybody" – led by the President of the United States – "screaming" at the IRS to fix the perceived problem of nonprofit political speech. Accordingly, the Administration's proposed rule should be properly understood as the final act of Lois Lerner's tenure at the IRS.

b. The proposed rule improperly applies Federal Election Commission standards to tax-exempt organizations

According to the notice of proposed rulemaking (NPRM), "[i]n defining candidate-related political activity for purposes of section 501(c)(4), these proposed regulations draw key concepts from federal election campaign laws...."[13] Without explanation, the IRS co-opts the FEC's time frames for electioneering communication, a specific type of communication within federal election law, to apply to any communication referring to a candidate.[14] The proposal relies more heavily on federal election law than tax statute or IRS precedential regulatory material, without explanation.[15] Rather than focus on whether political speech advances "social welfare," as required by the governing statute, the IRS is using FEC standards to improperly expand restrictions on political speech for nonprofit groups. Thus, it appears that the IRS, in advancing the proposed rule, is simply attempting to make up for the FEC's loss of regulatory authority due to the Supreme Court's *Citizens United* decision.

c. Lois Lerner's background at the Federal Election Commission and her questionable communications with FEC employees provide further context for the proposed rule

Prior to her role as the Director of the IRS Exempt Organizations office, Ms. Lerner was an Associate General Counsel and Head of the Enforcement Office at the Federal Election

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[10] *Id.* at 3.
[11] *See* E-mail from Lois Lerner, Internal Revenue Serv., to Nancy Marks et al., Internal Revenue Serv. (Apr. 1, 2013). [IRSR 188429]
[12] E-mail from David Fish, Internal Revenue Serv., to Nancy Marks et al., Internal Revenue Serv. (Apr. 1, 2013) (emphasis added). [IRSR 188427]
[13] Proposed Regulation, *supra* note 1.
[14] Proposed Regulation, *supra* note 1.
[15] *See* Proposed Regulation, *supra* note 1.

Commission.[16] During her tenure at the FEC, she engaged in questionable tactics to target conservative groups, often subjecting those who wanted to expand their influence in politics to heightened scrutiny.[17] Not only was her political ideology evident to her FEC colleagues, she brazenly subjected conservative groups to meticulous investigations. Similar liberal groups did not receive the same scrutiny.[18]

Documents produced to the Committee demonstrate coordination between Lerner and the FEC. Employees from the FEC communicated with Lerner about tax-exempt groups engaged in political speech. For instance, William Powers, an FEC official in the Office of the General Counsel, e-mailed Lerner, on February 3, 2009, seeking information about the conservative nonprofit groups American Issues Project and the American Future Fund.[19] Powers asked about the status of these groups' applications for tax-exempt status and the IRS review process.[20] In the course of the e-mail, Powers referenced prior conversations with Lerner from July of 2008 concerning the American Future Fund.[21]

The propriety of this relationship raises serious concerns. In her discussions with Mr. Powers, it appears that Ms. Lerner disclosed information protected by 26 U.S. Code § 6103 by revealing confidential information about specific taxpayers.[22] Furthermore, Donald McGahn, former FEC vice chairman, characterized any FEC "dealing" with Lois Lerner as "probably out of the ordinary."[23] McGahn went on to say: "The FEC has not had a good track record with calling balls and strikes. They've been criticized for not playing fair."[24] Lerner's background at the FEC, combined with her recent communications with current FEC officials, provide further context for the IRS's effort that culminated in the promulgation of this proposed rule.

d. The IRS's efforts to develop new restrictions on political speech for non-profit groups, led by Lois Lerner and the IRS chief counsel's office, began long before the TIGTA audit was released

The Administration put forth the rule under the guise that it is responsive to TIGTA's recommendations concerning the evaluation of applications for tax exempt status. The

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[16] Eliana Johnson, *Lois Lerner at the FEC*, NAT'L REVIEW (May 23, 2013), *available at* http://www.nationalreview.com/article/349181/lois-lerner-fec-eliana-johnson (last accessed Jan. 14, 2014) [hereinafter *Lois Lerner at the FEC*].
[17] *Id.*
[18] *Id.*; Rebekah Metzler, *Lois Lerner: Career Gov't Employee Under Fire*, U.S. NEWS & WORLD REP. (May 30, 2013), *available at* http://www.usnews.com/news/articles/2013/05/30/lois-lerner-career-government-employee-under-fire (last accessed Jan. 14, 2014).
[19] E-mail from Mr. William Powers, Office of the General Counsel, Federal Election Commission, to Ms. Lois Lerner, Director of Exempt Organizations, Internal Revenue Service, February 3, 2009.
[20] *Id.*
[21] *Id.*
[22] *See e.g.* Eliana Johnson, "E-mails Suggest Collusion Between FEC, IRS to Target Conservative Groups," *National Review*(July 31, 2013) available at < http://www.nationalreview.com/corner/354801/e-mails-suggest-collusion-between-fec-irs-target-conservative-groups-eliana-johnson>.
[23] Dana Bash and Alan Silverleib, "Republican says e-mails could mean FEC-IRS collusion," CNN (Aug. 6, 2013) available at <http://www.cnn.com/2013/08/05/politics/irs-fec-controversy>.
[24] *Id.*

Committee's investigation has uncovered evidence that the Administration considered regulating § 501(c)(4) organizations well before the publication of the TIGTA audit. Indeed, according to IRS attorney Don Spellman, the Administration had quietly considered guidance on § 501(c)(4) organizations for several years. He testified:

> A [C]ertainly guidance under 501(c)(4) has been under discussion for a great deal of time, including this period.
>
> Q When you say a great deal of time, . . . how much time are you talking about?
>
> A Well, as I said there was a guidance project back in 1969 about whether to address exclusively under 501(c)(4), and it's been on and off since then. But that was a formal guidance project that was open and closed. And then just since I have been there, you know, the topic will just come up periodically. But it's been a very active topic for the last certainly 5 years.
>
> ***
>
> Q And you also said that the (c)(4) primarily standard has been an active topic on and off in the IRS but especially in the last 5 years.
>
> A Yes.
>
> Q What has occurred in the last 5 years to make it an active topic during that timeframe?
>
> A Litigation.
>
> Q And who has been actively talking about it within the IRS?
>
> A We certainly actively discussed it within Counsel.
>
> Q And would those discussions be driven by the IRS Chief Counsel?
>
> A Yes.
>
> ***
>
> Q And were there discussions about issuing a new General Counsel memorandum in regard to the (c)(3) – (c)(4) primarily standard in the meeting that you had [with Lerner's direct reports in the Exempt Organizations Division] in April, May 2011?

A There was a discussion and there was even a draft prepared of a legal memo from Counsel to Exempt Organizations on the exemption standard under 501(c)(4), and those discussions started somewhere in 2009, 2010. I don't remember the exact date.[25]

Mr. Spellman also explained that a legal memo on the exemption standard under 501(c)(4) was approved by the IRS chief counsel's office sometime before 2012, but was not made public.[26]

Similarly, former IRS Acting Commissioner Steve Miller testified that the IRS and the Treasury Department had considered regulations on § 501(c)(4) organizations well before May 2013. He testified:

Q Why did you want to discuss this article [entitled "The IRS's 'Feeble' Grip on Big Political Cash"] with Ms. [Nikole] Flax and Ms. [Catherine] Barre?

A So, I was interested in thinking about what we might be able to do into the future in the area.

Q What do you mean by "the area"?

A The area of what constitutes political activity for a 501(c)(4) organization. That's my recollection, anyway.

Q And what kind of ideas did you have in mind?

A So, there were issues around the regulation and the definition of "exclusively" as "primarily" in the regulation. And there were other things gone on. I don't even know what else. It actually was a brainstorming session, is my suspicion.

Q Okay. But refining the regulation was one idea that you were brainstorming?

A That had been on – that had been thought about. But I'm not sure we were brainstorming specifically on that.

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Q What were the other ideas that you brainstormed, to your recollection?

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[25] Transcribed interview of Don Spellmann, Internal Revenue Serv., in Wash., D.C. (July 12, 2013).
[26] *Id.*

A I think what could be done in terms of, if anything, in terms of a legislative disclosure rule. That's a recollection. I may be wrong on that, but that's the only other one that I can remember right now.

Q And, sir, what do you mean by "legislative disclosure rule"?

A So, under the rules – and, you know, this is a long piece. But under the rules, 501(c)(4) donors are not disclosed to the public. And there is an argument made here and elsewhere that that's a reason why money is flowing into those organizations for political purposes – for purposes of spending on politics. I'm sorry. I'll be more precise.

Q And so you wanted to implement a disclosure rule that would take away that advantage for (c)(4)s?

A Did I want to do that? No. But in terms of brainstorming things that would level the playing field between 527 organizations and 501(c)(4) organizations, that was one thing that was talked about.

Q Did you have discussions with anyone at Treasury about these ideas?

A Probably would have had them with Mark Mazur, the tax policy person. And I think I did have a discussion with him on the concept of, is there a thought about changing the disclosure rules? And we did talk about "exclusively"/"primarily" and whether it made sense to do that or not.

Q And that discussion was in this October 2012 timeframe?

A. I don't know. It would have been – it would have been probably a little later than that. It probably would have been, you know, when I was acting [commissioner]. But I'm not – again, that would have been the timeframe.[27]

Documents obtained by the Committee confirm that the Treasury Department has 501(c)(4) regulations "on [its] radar" well before the release of the TIGTA report.[28] One e-mail from 2010 clearly articulated the Department's concern as being rooted in the FEC's regulatory failure:

> Before Citizens United, corporations (including c4s) were limited by the FEC rules re: campaign spending and disclosure and subject to immediate FEC enforcement action. Fear of FEC enforcement in real time may have served to limit the political activities of aggressive c4s more than fear of IRS TEGE

[27] Transcribed interview of Steven Miller, in Wash., D.C. (Nov. 13, 2013).
[28] E-mail from Ruth Madrigal, Dep't of the Treasury, to Victoria Judson, Internal Revenue Serv. (June 14, 2012). [IRSR 305906]

> enforcement action . . . . Now that the FEC cannot prohibit corporations (including c4s) from making such expenditures . . . , there is some concern that aggressive c4s will be bolder and multiply, intervening in campaigns with relative impunity.[29]

Moreover, former Acting Commissioner Miller attributed the discussions about further regulating § 501(c)(4) organizations to pressure placed on the IRS by congressional Democrats. He testified:

> Q And, sir, what did you see as the problem that needed to be addressed through either a regulatory change or a legislative change?
>
> A So I'm not sure there was a problem, right? I mean, I think we were – we had, you know, Mr. Levin complaining bitterly to us about – Senator Levin complaining bitterly about our regulation that was older than me, where we had read "exclusively" to mean "primarily" in the 501(c)(4) context. And, you know, we were being asked to take a look at that. And so we were thinking about what things could be done.[30]

e. The proposed rule is a continuation of the IRS's malfeasance, and not a true response to TIGTA's audit recommendations

The rule is purported to be a direct response to TIGTA's audit of the IRS's targeting of conservative tax-exempt applicants,[31] but the reality is that the Administration has used the controversy surrounding the IRS targeting as pretext to wrongly justify the need for this regulation. The notice of proposed rulemaking (NPRM) asserts that "both the public and the IRS would benefit from clearer definitions" and cites the IRS's 30-day progress report that responds to the TIGTA audit.[32] The Treasury Assistant Secretary for Tax Policy, Mark Mazur confirmed that the rule was intended to be responsive to a recommendation in the TIGTA report.[33]

Contrary to the Administration's assertion, TIGTA did not recommend that the IRS issue regulations narrowing the type of permissible political speech by § 501(c)(4) organizations. The report offered nine recommendations, but not one recommended a change in the term political campaign intervention.[34] On December 13, 2013, Russell George, the Treasury Inspector General for Tax Administration, told the Committee that the proposed rule was not responsive to any recommendation of his office's audit.[35]

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[29] E-mail from Ruth Madrigal, Dep't of the Treasury, to Jeffrey Van Hove, Dep't of the Treasury (Aug. 23, 2010). [OGR 11-7-13 2260]
[30] *Id.*
[31] Proposed Regulation, *supra* note 1.
[32] Proposed Regulation, *supra* note 1.
[33] Transcribed interview of Mark J. Mazur, Internal Revenue Serv., in Wash., D.C. (January 10, 2014).
[34] *See* Treasury Inspector Gen. for Tax Admin., Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review (May 14, 2013).
[35] Meeting with J. Russell George, TIGTA, and House Committee on Oversight and Government Reform, December 13, 2013.

Given these circumstances, we are concerned about the stated purposes and justification for the Administration's proposed regulation. Especially in light of the close White House coordination with the IRS concerning ObamaCare, including the potential sharing of confidential taxpayer information,[36] we have serious reservations about the integrity and transparency of the rulemaking process. The rule appears to be a continuation of a troubling pattern, wherein the IRS, rather than enforcing laws, carries water for the Administration's political agenda.

The rule was developed by those complicit in the targeting of the President's enemies and conceived with the intention of stifling political speech under false pretenses. The unexplainable reliance and deference to FEC definitions of political activity made applicable to social welfare organizations further calls into question the underlying motivations of the proposal. Given the facts revealed through the course of the Committee's investigation, allowing the rule to go forward can only be properly explained as the codification of the Administration's desire to stifle the activities of non-profits with which it disagrees.

II. The Administration purposefully concealed its efforts that culminated in the promulgation of the proposed rule

The Committee's investigation uncovered evidence indicating the Administration hid its efforts to curb political speech by nonprofits. Repeatedly, the Administration has failed to live up to President Obama's promise that his would be "the most transparent administration in history."[37] The proposed rule is yet another example of deliberate regulatory and legal subterfuge, designed to conceal unpopular and unconstitutional public policy actions. Released before the conclusion of several investigations into the multi-year political targeting campaign of conservative leaning social welfare nonprofit organizations, the proposed regulation is designed to alter a 50-year-old regulation in a manner that lacks transparency.

In June 2012, Ruth Madrigal of the Treasury Department's Office of Tax Policy wrote to several IRS leaders about potential § 501(c)(4) regulations. She wrote: **"Don't know who in your organization is keeping tabs on c4s, but since we mentioned potentially addressing them (off-plan) in 2013, I've got my radar up and this seemed interesting."**[38] [emphasis added] Madrigal forwarded a short article about a court decision with "potentially major ramifications for politically active section 501(c)(4) organizations."[39] In her transcribed interview with Committee staff, IRS attorney Janine Cook explained how the Administration works a regulation "off-plan." She testified:

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[36] *See* Letter from Darrell Issa & Jim Jordan, H. Comm. on Oversight & Gov't Reform, to J. Russell George, Treasury Inspector Gen. for Tax Admin. (Oct. 21, 2013).

[37] Jonathan Easley, "Obama says his is 'most transparent administration' ever," The Hill (Feb. 14, 2013) available at http://thehill.com/blogs/blog-briefing-room/news/283335-obama-this-is-the-most-transparent-administration-in-history.

[38] E-mail from Ruth Madrigal, Dep't of the Treasury, to Victoria Judson, Internal Revenue Serv. (June 14, 2012). [IRSR 305906]

[39] *Id.*

> [T]o understand the term, when it says off plan, it means working it. Working on it, but not listing it on the plan. . . . The term – I mean it's a loose term, obviously, it's a coined term, the term means the idea of spending some resources on working it, getting legal issues together, things like that, but not listing it on the published plan as an item we are working. That's what the term off plan means.[40]

Not only did the IRS and Treasury develop the rule "off-plan", but they also did not include their work on the proposed rule on the Administration's Unified Agenda until the fall of 2013, concurrently with the release of the proposed regulation.[41] The Unified Agenda is the federal government-wide report on current and future regulatory action under consideration by agencies.[42] In summary, it is clear that the IRS and Treasury went to great lengths to prevent the public from learning about their ongoing work that culminated in the proposed rule.

III. The proposed rule is a radical deviation from any precedential guidance and completely lacks statutory authority

Nonprofit organizations "operated exclusively for the promotion of social welfare" and for which "no part of the net earnings... inures to the benefit of any private shareholder or individual" are entitled to tax exemption under I.R.C. §501(c)(4).[43] Treasury regulations promulgated in 1959 interpreted the statutory language to define "the promotion of social welfare activity."[44] The regulations state: 1) "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"[45] and 2) "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."[46]

The Administration's current proposal significantly broadens the exclusion of political activity well beyond any reasonable interpretation of §501(c)(4)'s statutory text. The proposed definition replaces the phrase "participation or intervention in political campaigns . . . for public office" with the much broader phrase "candidate related political activity" and a far-reaching eight point test.[47] As the NPRM states, the proposed regulation "is intended to help organizations and the IRS more readily identify activities that . . . do not promote social welfare."[48] Paradoxically, the proposed regulation shifts the burden of proof from the presence

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[40] Transcribed interview of Janine Cook, Internal Revenue Serv., in Wash., D.C. (Aug. 23, 2013).
[41] Leland E. Beck, Fall *2013 Unified Agenda Published: Something New, Something Old*, Federal Regulations Advisor (Nov. 27, 2013) available at: http://www.fedregsadvisor.com/2013/11/27/fall-2013-unified-agenda-published-something-new-something-old/.
[42] *How to Read the Unified Agenda*, Center for Effective Government (last visited Jan. 13, 2013) available at: http://www.foreffectivegov.org/node/4062.
[43] I.R.C. §501(c)(4) (2013).
[44] Treas. Reg. §1.501(c)(4)-1 (as amended in 1990).
[45] *Id.*
[46] *Id.*
[47] Proposed Regulation, *supra* note 1.
[48] Proposed Regulation, *supra* note 1.

of social welfare activities to the absence of political activities. Whereas, by its plain language, the statute recognizes exemption for an organization that promotes the social welfare, the proposed regulation precludes recognition for an organization engaged in activities arbitrarily deemed to be political. The "candidate related political activity" definition focuses on types of activities that may be political, rather than types of activities that promote social welfare.

As discussed above, the Committee's investigation uncovered a hidden agenda within the IRS – conceived "off-plan" and before the issuance of the TIGTA report – to neuter the ability of non-profits to participate in the political process and thereby engage in activities that promote their respective views of social welfare. The rule's departure from the statutory text is the work of an overzealous and unchecked agency and must not go forward.

IV. The Proposed Rule suffers from deficient regulatory review and analysis

The proposed regulation did not undergo the standard regulatory analysis that most agency rulemakings require. Generally for significant regulatory action, like this proposed regulation, agencies must include a comprehensive cost-benefit analysis and the Office of Information and Regulatory Affairs (OIRA) engages in a thorough review of the proposed regulation before it is offered to the public for comment.[49] However, the IRS did not provide any cost-benefit analysis and the proposed regulation was never sent to OIRA for review.[50] This gap in the IRS's regulatory process allows faulty rules like this one to reach the public without adequate analysis.

V. The Proposed Regulation will needlessly harm social welfare organizations

The result of this inadequate regulatory review is a proposed regulation that will exclude nonprofit organizations from a tax exempt status based on arbitrary and statutorily unfounded restrictions on political speech. The new definitions of "political activity" are overly broad, create an unnecessarily harsh standard for §501(c)(4) organizations, and stifle socially beneficial activities that I.R.C. §501(c) was designed to cover. Even the left-leaning Alliance of Justice, a "broad array of groups committed to progressive values,"[51] believes that the Administration's rule will chill political speech by nonprofits. It stated:

> If implemented, there would be no such thing as a nonpartisan election activity conducted by a 501(c)(4); it would all be considered "political." By expanding the definition of what activities are political, the rules would drastically reduce the ability of (c)(4)s to engage in nonpartisan get-out-the-vote drives, candidate questionnaires, and voter registration drives. These activities have been critical to

[49] Exec. Order No. 12866 (1993).
[50] *See* Proposed Regulation, *supra* note 1.
[51] Alliance for Justice, About AFJ, http://www.afj.org/about-afj (last visited Jan. 30, 2014).

the ability of nonprofits to influence the public policy debate on a wealth of issues.[52]

a. The new definition of political activity will stifle constitutionally protected political speech

"Speech is an essential mechanism of democracy,"[53] but the proposed regulation redefines social welfare to exclude constitutionally protected political speech. In recognition of the "fundamental importance of the free flow of ideas and opinions on matters of public interest and concern," the First Amendment protects the freedom of speech and freedom of association.[54] In particular, political speech is "central to the meaning and purpose of the First Amendment" and "must prevail against laws that would suppress it, whether by design or inadvertence."[55] Through the proposed rule, the IRS is rejecting America's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"[56] in favor of "more definitive rules" to "reduce the need for detailed factual analysis."[57]

Traditionally, social welfare organizations were permitted to engage in unlimited issue based advocacy and comment on the selection of executive branch officials and judicial nominees, as part of the promotion of the common good and general welfare. As examples, environmental advocacy groups have been able to comment and advocate for the removal of a conservative EPA Administrator[58] and gun rights advocacy groups have been able to speak against the nomination of anti-Second Amendment judicial appointees.[59] In a radical deviation from the "historical application" of express advocacy, the proposed rule chills speech by restricting advocacy for appointed administrators that will hold incredible power over the social and public policy issues that are fundamental to the missions of social welfare organizations.[60]

The proposed rule creates a profound disincentive to engage in any constitutionally protected political speech because the mere mention of a candidate may affect the tax status of a social welfare group. Under the rule, "[a]ny 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" is political activity."[61] Organizations might reference the election in

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[52] Press Release, Alliance for Justice, AFJ: Treasury, IRS proposal endangers citizen participation in democracy (Nov. 27, 2013) available at http://www.afj.org/press-room/press-releases/afj-treasury-irs-proposal-endangers-citizen-participation-in-democracy.
[53] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
[54] Hustler Magazine v. Falwell, 485 U.S. 46 (1988).
[55] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
[56] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[57] Proposed Regulation, *supra* note 1.
[58] *See* "Environmentalists Protest Selection of Utah Gov. Michael Leavitt at EPA Head," Democracy Now (Aug. 12, 2003) available at http://www.democracynow.org/2003/8/12/environmentalists_protest_selection_of_utah_gov.
[59] *See* Declan McCullagh, "Gun Rights Groups are Wary of Sotomoayor," CBS News (May 27, 2009) available at http://www.cbsnews.com/news/gun-rights-groups-are-wary-of-sotomayor/.
[60] Proposed Regulation, *supra* note 1.
[61] Proposed Regulation, *supra* note 1.

a newsletter, write a blog post about the election linking to the candidates' web pages, or simply mention the activities of the incumbent elected official in a non-election related communication, but the new rule will flatly declare that these activities do not promote social welfare, thus jeopardizing the tax status of the group engaged in political speech.

b. The proposed definition will limit the public's ability to petition government officials and learn about public policy

Under the proposed rule, invitations to incumbent elected officials might turn an otherwise nonpartisan event into political activity for up to 90 days out of any election year. Members of Congress are regularly invited to speak at policy forums, community events, and many other occasions, even while serving as candidates. For example, many nonprofit groups host Tax Day events every year on April 15 and often invite Members of Congress to speak on matters of tax and fiscal policy. This rule will chill these expressive demonstrations, the purpose of which is to educate the public on the nation's fiscal state.

c. The proposed definition will curb important voter education activities

Ensuring that eligible citizens are legally able to vote on Election Day is important to our democracy. Voter registration and get-out-the-vote drives promote social welfare by encouraging citizens to participate in electing their representatives. Several IRS guidance materials have expressly permitted voter registration drives, recognizing the value to social welfare,[62] but the proposed rule classifies voter registration drives or "get-out-the-vote" drives as political activity. The rule would thus discourage this type of behavior and have a negative effect on democracy.

In addition, voter education activities are essential to the promotion of social welfare. Many organizations that engage in voter education activity distribute information about the candidates in the form of voter guides. According to Revenue Ruling 78-248, exempt organizations may permissibly distribute voter guides,[63] but this new rule declares that the "[p]reparation or distribution of a voter guide that refers to one or more clearly identified candidates" is political activity.[64]

Moreover, under the rule, "[h]osting 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" does not promote social welfare.[65] The rule declares that all candidate forums, all debates, and all opportunities to hear from candidates provided by any nonprofit tax exempt organization are political activity. It discourages nonprofit social welfare organizations to host important voter education events, which will be deleterious to democracy.

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[62] *See* Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organization*, 31 Wm. Mitchell L. Rev. 55 (2004) and *see* Rev. Rul. 2007-41 (Jun.18, 2007).
[63] Rev. Rul. 78-248, 1978-1 C.B. 154.
[64] Proposed Regulation, *supra* note 1.
[65] Proposed Regulation, *supra* note 1.

Confusingly, the new definitions run counter to IRS precedence and guidance. Standards for what constitutes a permissibly apolitical voter guide have been in place for decades and are well understood.[66] Candidate forums have long been permissible and many nonprofit tax-exempt host events with candidates and elected officials to educate voters prior to an election.[67] The deviations from long standing understandings of permissible and impermissible activities are illogical and without explanation.

VI. Conclusion

The Committee is conducting a comprehensive investigation into the IRS's targeting of conservative tax-exempt applicants. Over the course of the last nine months, the Committee reviewed over 400,000 pages of documents and conducted dozens of transcribed interviews with Administration employees. Information received in the course of this investigation shows that the proposed regulation is little more than a veiled attempt to stifle the exercise of constitutionally protected speech afforded to non-profit organizations by law. Accordingly, we request that you rescind the Administration's misguided regulation.

Because of the serious concerns outlined above, the Committee has questions about the process by which the Administration developed the proposed regulation. To assist the Committee's oversight obligations, we request the IRS produce the following information, in electronic format, for the time period January 1, 2012, to the present:

1. All communications between the current or former IRS employees, including but not limited to Lois Lerner, and the Executive Office of the President including but not limited to the White House Office and the Office of Management and Budget, referring or relating to the development of the proposed regulation and any suggested amendment to Treas. Reg. §1.501(c)(4)-1.

2. All communications between the IRS and the Department of Treasury referring or relating to the development of the proposed regulation and any suggested amendment to Treas. Reg. §1.501(c)(4)-1.

3. All communications between the IRS and the FEC referring or relating to the development of the proposed regulation and any suggested amendment to Treas. Reg. §1.501(c)(4)-1.

4. All documents and communications referring or relating to the decision not to send the proposed regulation to OIRA for review.

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[66] *See e.g.* Rev. Rul. 78-248, 1978-1 C.B. 154 and *see* Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organization*, 31 Wm. Mitchell L. Rev. 55 (2004).

[67] *See* Rev. Rul. 2007-41, 2007-25. I.R.B. and Rev. Rul. 86-95, 1986-2 C.B. 73.

5. All documents and communications referring or relating to the decision to exclude this regulation from the Spring 2013 Unified Agenda and the Fall 2012 Unified Agenda.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

We request that you provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on February 18, 2014. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

If you have any questions about this request, please contact Katy Rother or Tyler Grimm of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,

Darrell Issa
Chairman

Jim Jordan
Chairman
Subcommittee on Economic Growth,
Job Creation and Regulatory Affairs

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable Matthew A. Cartwright, Ranking Minority Member
Subcommittee on Economic Growth, Job Creation and Regulatory Affairs

DARRELL E. ISSA, CALIFORNIA
CHAIRMAN

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

Majority (202) 225–5074
Minority (202) 225–5051

Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

   (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

   BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT,CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,

CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.

8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.

12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.

15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.

16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been

located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.

18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.