AN OPEN LETTER TO ABA TAX SECTION MEMBERS ABOUT THE RECENT SECTION COMMENTS ON THE SERVICE'S PROPOSED RULEMAKING ON 501(c)(4) "CANDIDATE-RELATED POLITICAL ACTIVITY"

On May 7, 2014, the ABA Section of Taxation submitted comments drafted by some members of the Exempt Organizations Committee on the new IRS proposed regulations governing "political activity" ("Comments"). http://meetings.abanet.org/meeting/tax/MAY14/media/eo-commresponse-kingsley-outline.pdf. In general, the Comments are helpful and welcome, and the participants did much good work. But the Comments have several fundamental flaws, and more importantly, do not represent the full spectrum of the views of members of the Section; I, for example, was not included or consulted even though I presented my views on these topics on a Committee panel at last September's San Francisco Tax Section meeting. http://meetings.abanet.org/meeting/tax/FALL13/media/jt-eo-cpg-helping-zall-paper.pdf.

THE IRS IS NOT A "FIRST AMENDMENT-FREE ZONE"

For exempt organizations, the Service is principally a regulator, not a tax collector. The Comments assert in several places that the IRS is essentially free to do whatever it wants in restricting speech because this is merely a tax classification matter. *See, e.g.*, p. 56 ("Tax-based restrictions on candidate-related political activity for section 501(c)(4) and other section 501(c) organizations do not entail a direct restriction on First Amendment protected speech because the groups affected are free to engage in campaign activities to whatever extent they desire by locating that activity in a taxable entity or a different exempt entity for which campaign activity is permitted."). This echoes IRS Commissioner John Koskinen's March 26, 2014, congressional testimony that "the draft regulation does not restrict any form of political speech. It relates only to the qualification requirements for a particular type of tax-exempt status." http://oversight.house.gov/wp-content/uploads/2014/03/Koskinen-Testimony.pdf, P. 27.

This hasn't been the law at least since 1958. "The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech." *Speiser v. Randall*, 357 U.S. 513, 518 (1958); *Planned Parenthood of Kansas v. Moser*, __ F.3d __, 2014 WL 1201488, *19 (10th Cir. March 25, 2014) ("These cases recognize that the government ordinarily can impose conditions on the receipt of government funding, but that conditioning a benefit on someone's speech or association achieves an effect similar to direct regulation of the speech or association."). The Comment cites *Speiser* only in the Federal Election Commission context. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), is often misquoted as empowering the IRS to ignore speech infringements in tax classifications, but *Regan* did not reverse *Speiser*; *Regan* simply says that the IRS has such power only in cases where the speech uses direct or indirect government funding. Because there is no government "subsidy" of speech by 501(c)(4) organizations – which are both funded by non-deductible contributions and taxed under § 527 – *Regan* does not provide authority to the IRS to block § 501(c)(4) speech. *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, __ U.S. __, 133 S.Ct. 2321,

2328-30 (June 20, 2013) (agency can restrict government-funded speech but not an organization's activities which are not government-funded).

"THE TIE GOES TO THE SPEAKER, NOT THE CENSOR"

If the IRS must respect the First Amendment, it must also respect the Supreme Court's rules in applying the First Amendment. Since 2007, at least for 501(c)(4)s, those rules require that the IRS provide the benefit of the doubt in any evaluation in favor of permitting, not restricting, speech. "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 474 (2007) ("*WRTL*"). The Comments do not do so.

If the issue is defining what 501(c)(4) speech might be considered "political campaign intervention", for example, there is already a tested and effective formula. The Supreme Court has been pro-active in describing "bright line" tests for finding speech that might or might not be "express advocacy" or its "functional equivalent:" "a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Citizens United*, 558 U.S. at 324-25, *quoting WRTL*, 551 U.S. at 469-70. This is also the Federal Election Commission regulation: "a communication is the functional equivalent of express advocacy only if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 11 C.F.R. § 109.21(c)(5).

The Comments, on the other hand, reject this approach: "For example, directing an audience to ask an incumbent to disavow her or his signature legislative accomplishment can be made susceptible of *some* reasonable interpretation other than a call to vote against that candidate, even though the electoral intent will be transparent to everyone." P. 33 (emphasis in original). But "[f]ar from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad …, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue**.**" *WRTL*, 551 U.S. at 468.

These fundamental flaws overshadow the value of the Comments' other recommendations.

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