Center for Equal Opportunity
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COMMENT OF

THE CENTER FOR EQUAL OPPORTUNITY

ON THE PROPOSED RULE

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

February 27, 2014

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I. Introduction

These comments are submitted by the Center for Equal Opportunity ("CEO"), a not-for-profit corporation recognized as exempt from taxation under Section 501(c)(3) of the Internal Revenue Code ("the Tax Code" or "IRC"). CEO also has an affiliated organization, which is organized under Section 501(c)(4) of the IRC, called One Nation Indivisible. CEO works to promote colorblind equal opportunity and is devoted to promoting unifying principles and opposing policies that discriminate, sort, or prefer on the basis of race or ethnicity. *See* http://www.ceousa.org/. CEO and its affiliate, now and in the future, are affected by the regulations at issue.

CEO submits these comments with regard to the Department of the Treasury ("Department") and the Internal Revenue Service's ("IRS") Notice of Proposed Rulemaking ("NPRM") on tax-exempt social welfare organizations. *See Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities*, 78 Fed. Reg. 71,535 (proposed Nov. 29, 2013) (to be codified at 26 C.F R. pt. 1). The proposed rule suffers from serious flaws. If the proposed rule were adopted in its current form, it would violate the First Amendment to the Constitution and the IRC. It would also adversely affect social welfare organizations and the American public. Moreover, adopting the proposed rule would inflict lasting damage to the reputations of both the Department and the IRS. The proposed regulatory approach—restricting free speech and political activity that is at the core of our civil society—is not only unconstitutional, but is also mistaken as a matter of law, as an exercise of rulemaking authority, and as a matter of policy. The proposed rule would punish far more speech than necessary to achieve any legitimate governmental interest, and it would increase the likelihood of arbitrary

enforcement. Accordingly, CEO requests that the Department and IRS withdraw the proposed rule.

First, the proposed rule violates the First and Fifth Amendments to the U.S. Constitution. The Supreme Court has held that the government cannot threaten to deprive an organization of tax-exempt status on the basis of its political speech unless the government provides easy access to an alternative tax-exempt channel for that speech. *See Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983). Absent such an alternative channel for burdened speech, the burden itself is held to "exacting scrutiny" under the First Amendment. *See Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2818 (2010). The NPRM fails to identify any sufficient alternative avenue for social welfare groups to engage in the political speech that the proposed rule would restrain. And the speech burdens established in the proposed rule also cannot survive exacting scrutiny because they would impermissibly chill issue advocacy that lies at the core of the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976). Thus, the proposed rule cannot be squared with the First Amendment's free speech protections.

The proposed rule also cannot survive analysis under both the First and Fifth Amendments because it irrationally treats similarly situated speakers differently. By imposing, without justification, a rigid set of limitations on the political speech of social welfare organizations and no limitations at all on other similar tax-exempt entities—like labor and business organizations—the proposed rule would inevitably produce unconstitutionally disparate treatment of those groups. The proposed rule, moreover, is especially constitutionally suspect as it comes at the same time as an ongoing scandal that remains under investigation by Congress and the Department of Justice in which the IRS targeted the applications of conservative and free market social welfare groups seeking tax-exempt status.

Second, the proposed rule is contrary to the statutory text. Under the plain terms of the IRC, organizations operated exclusively for the promotion of social welfare are entitled to an income tax exemption if no part of their net earnings inures to the benefit of a private individual. 26 U.S.C. § 501(c)(4). The IRC places no restrictions on the political activities of social welfare groups. The proposed rule entirely ignores this fact, expanding on a baseless reading of "social welfare" to penalize organizations' involvement in a wide range of activities, broadly "political" in nature or otherwise. This reading is contrary to the plain meaning of "social welfare," which has long been understood to encompass political activity, including voter education and other activities that are valuable to citizens in a democracy.

Third, the proposed rule ignores the other measures Congress has actually adopted to regulate tax-exempt organizations' political activities. Congress has explicitly restricted charitable organizations organized under Section 501(c)(3) and health insurance issuers organized under Section 501(c)(29) from substantially engaging in lobbying or participating in "any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. § 501(c)(3), (29). In contrast, Congress has specifically permitted other 501(c) groups—including social welfare groups organized under Section 501(c)(4)—to spend money on campaigns so long as they pay a limited tax. 26 U.S.C. § 527(f). The broad limitations on the political speech of social welfare organizations that the Department and the IRS propose cannot be reconciled with this balanced approach established by Congress. Rather, the proposed limitations would effectively gut the congressionally established framework of political-speech limitations for tax-exempt organizations, singling out social welfare groups for impermissibly harsh treatment.

The proposed rule further abuses the Department's and the IRS's statutory authority by proposing to apply a broad version of federal and state campaign finance law and Federal Election Commission ("FEC") standards to the political activities of social welfare groups. Of course, Congress has vested the FEC, not the IRS, with the authority to regulate candidates' campaigns, speech, and other activities associated with elections, including campaign expenditures and contributions. Notably, the proposed rule would empower the IRS to regulate political activity in ways that even the FEC cannot, attempting to expand on the very electioneering limitations the Supreme Court struck down in *Citizens United v. FEC*, 558 U.S. 310, 329 (2010). This is uncharted territory for the IRS that it is admittedly ill-equipped to navigate. *See* National Taxpayer Advocate, *Special Report to Congress: Political Activity and the Rights of Applicants for Tax-Exempt Status* 2 (June 30, 2013) ("The IRS, a tax agency, is required to make an inherently controversial determination about political activity that another agency, such as the Federal Election Commission (FEC), may be more qualified to make.").

Fourth, the rationales offered to support the proposed rule rest on flawed premises and are unsubstantiated. The Department and the IRS justify the proposed rule on the ground that the *current* regulations are so unclear that they create opportunities for arbitrary enforcement by IRS officials. *See* 78 Fed. Reg. at 71,536. But congressional investigators have unearthed a mountain of evidence that casts considerable doubt on this rationale and that suggests the proposed rule is simply a means to provide legal cover for singling out the same conservative groups that the IRS is being investigated for targeting. In light of this evidence—and to mitigate the appearance of corruption—the Department and IRS should, at a minimum, put a hold on the proposed rule until the investigations into IRS wrongdoing conclude.

Moreover, even if the offered rationale for the proposed rule were sincere, it is flawed. Whereas the current regulation of social welfare groups is at least limited to regulating only "direct or indirect participation 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), the proposal excludes many more aspects of civic participation in its understanding of social welfare. In particular, by defining ''candidate-related political activity" in extraordinarily broad terms, the proposed rule will only cause more confusion among IRS agents and potentially lead to even more arbitrary abuses of authority. In short, the proposed rule would only aggravate the purported problem the agencies claim their proposal addresses.

Further, the Department and the IRS have not considered all the likely effects of their proposed rule, which is also essential to reasoned decisionmaking. Indeed, it is impossible for the agencies to assert that they have satisfied this obligation because they have not yet determined how to handle one of the most critical aspects of the current regulations: the requirement that a social welfare organization be not "primarily engaged" in political campaign activity. *See* Treas. Reg. § 1.501(c)(4)-1(a)(2).

Fifth, the proposed rule arbitrarily targets social welfare groups. The IRC treats 501(c)(4) groups exactly the same as 501(c)(5) and (c)(6) groups in that it does not impose restrictions on the political activities of any of these groups. Neither the Department nor the IRS has explained why it is reasonable to use the "social welfare" language in the IRC to curtail activity by 501(c)(4)s but leave 501(c)(5)s and (c)(6)s unrestricted.

Sixth, any regulation that addresses the political activities of 501(c)(4)s should not apply retroactively. The proposed rule would threaten to revoke social welfare organizations' tax-

exempt status based on activities that they have already undertaken. That is arbitrary and capricious.

For all these reasons, which are described more fully below, the proposed rule if adopted in its current form would be unconstitutional, would not properly implement the IRC, and would run afoul of the rulemaking requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*. Accordingly, CEO respectfully urges the Department and the IRS to abandon this rulemaking. If the agencies decide to proceed, they should hold a series of public hearings around the country, which would provide an opportunity for the agencies to gather more complete and accurate information, to engage in further dialogue with citizens, and then to consider anew what regulatory initiatives may be necessary and appropriate to build upon the virtues of social welfare groups. *See* 78 Fed. Reg. at 71,540 ("A public hearing will be scheduled if requested in writing by any person who timely submits written comments.").

II. Background On Tax-Exempt Organizations And The Regulation Of Social Welfare Organizations

In the IRC, Congress has exempted several different types of organizations from taxation. *See* 26 U.S.C. §§ 501, 527. Within these exemptions is a reticulated, comprehensive scheme for regulating the political activities of tax-exempt groups.

On one end of the spectrum lie charitable groups organized under Section 501(c)(3) of the IRC. The IRC specifically prohibits these organizations from participating or intervening in the political campaigns of candidates for public office. At the same time, however, charitable organizations receive the most favorable tax treatment. Their income is exempt from taxation and contributions to them are deductible from their donors' income as charitable contribution deductions. 26 U.S.C. § 501(c)(3); *id*. § 170(a)(1), (b).

At the other end of the spectrum lie political groups organized under Section 527 of the IRC. 527s may actively participate and intervene in candidates' campaigns, and the income they use to engage in these functions is exempt from taxation. In the terms of the IRC, this means that 527s do not pay taxes on the income used to fund their so-called "exempt functions," defined as those activities meant to influence the selection, nomination, election, appointment or defeat of candidates to federal, state or local public office. 26 U.S.C. § 527 (b), (c), (e)(1). In contrast to 501(c)(3) organizations, contributions to 527s are not deductible to their donors, and 527s are required to disclose their donors to the IRS. Further, the income 527s use to engage in "non-exempt functions," *i.e.*, non-campaign-related activities, is not tax-exempt. *Id*. § 527(c); Rev. Rul. 2003-49, 2003-20 I.R.B. 903.

The groups affected by the proposed rule—groups organized under Section 501(c)(4) of the IRC—fall in the middle of the spectrum created by Congress. 501(c)(4)s are nonprofit organizations "operated exclusively for the promotion of social welfare." 26 U.S.C. § 501(c)(4). They operate with a vast array of exempt purpose missions unique to each individual organization. Like 527s, income from donations received by 501(c)(4)s is tax-exempt and contributions are not deductible as charitable donations to their donors. But unlike 527s—and like 501(c)(3)s, and every other Section 501(c) organization—501(c)(4)s have no obligation to publicly disclose their donors. Just as their tax treatment falls in a middle ground, so too does their ability to engage in political activity. Unlike Section 501(c)(3) organizations, Section 501(c)(4) organizations may participate or intervene in candidate-related campaigns, except that they must pay a tax on expenditures for any "exempt function" activities governed by Section 527. 26 U.S.C. § 527(f). In short, 501(c)(4)s receive less favorable tax treatment than

501(c)(3)s, but they are permitted to engage in a broader range of political activity without disclosing their donors than 527s.[1]

Consistent with the statute, early Treasury regulations between 1924 and 1959 defined 501(c)(4) groups simply as "organizations engaged in promoting the welfare of mankind, other than organizations comprehended within [the precursor to section 501(c)(3]." Art. 519, Treas. Reg. 65 (1924); Art. 519, Treas. Reg. 69 (1926); Art. 529, Treas. Reg. 74 (1928); Art. 529, Treas. Reg. 77 (1932); Art. 101(8)-1, Treas. Reg. 86 (1934); Art. 101(8)-1, Treas. Reg. 94 (1936); Art. 101(8)-1, Treas. Reg. 101 (1938); Sec. 19.101(8)-1, Treas. Reg. 103 (1940); Sec. 29.101(8)-1, Treas. Reg. 111 (1943). This definition did not impose any adverse tax consequences on 501(c)(4) organizations for engaging in any political activities.

The Department adopted the regulations that currently govern 501(c)(4) organizations—the regulations the proposed rule would amend—in 1959. Those regulations, for the first time, purported to define what it meant for an entity to be "operated exclusively for the promotion of social welfare," and thus to be eligible to be a 501(c)(4). Under those regulations, the Department said that a nonprofit entity qualifies as a 501(c)(4) if it is "*primarily* engaged in promoting in some way the common good and general welfare of the people of the community." Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (emphasis added). The Department further stated that such an entity must be "operated *primarily* for the purpose of bringing about civic betterments and social improvements," *id.* (emphasis added), and that "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in

[1] Under the IRC, labor, agricultural, and horticultural groups organized under Section 501(c)(5) and business leagues and commerce groups organized under Section 501(c)(6) are treated in a similar manner as social welfare groups.

opposition to any candidate for public office," *id*. § 1.501(c)(4)-1(a)(2)(ii). The current regulations thus provide that an entity cannot be a social welfare organization if it "primarily" engages in "direct or indirect participation or intervention in political campaigns." *Id*.

The proposed rule would fundamentally alter the carefully calibrated scheme Congress created for balancing tax-favorable treatment with political activity. Worse, the proposed rule would eliminate even the current regulations' atextual focus on whether 501(c)(4) entities engage in direct or indirect participation in political activities or partisan campaign intervention (Treas. Reg. § 1.501(c)(4)–1(a)(2)(ii)), and replace it with regulations that focus on whether these entities—and these entities only—engage in "direct or indirect *candidate-related* political activity," broadly defined. 78 Fed. Reg. at 71,537. Although the term "political campaign intervention" is part of the current regulations governing 501(c)(3)s as well as those governing 501(c)(4)s, the proposed rule proposes to amend only the latter.

Under the proposed rule, "candidate-related political activities" is defined to include a wide swath of conduct that has little to no relation to candidates' campaigns for office and may be entirely issue-based. Candidate-related political activity under the proposed rule would cover communications during certain times that merely refer to a candidate, even if the message is pure issue advocacy, aimed at the candidate in his/her role as a public official, or for the purpose of influencing non-electoral action, such as a vote on pending legislation, a pending judicial nominee, or a proposed regulatory action. The proposed rule would also deem such activities as preparing voter guides, holding voter registration drives, or conducting get-out-the-vote drives to be candidate-related political activity, even where no candidate or political party is referenced and regardless of when or where such activity occurs. In effect, the proposed rule would redefine the bulk of the educational activities carried out by 501(c)(4) organizations like the National

Rifle Association and the Sierra Club—as well as many, many others—to be candidate-related and would thus militate against those organizations' abilities to be recognized as 501(c)(4) organizations. At the same time, the proposed rule would have no effect on the ability of 501(c)(3), (c)(5), and (c)(6) entities to engage in the very same activities without consequence to their tax status.

III. The Proposed Rule Violates The First And Fifth Amendments To The United States Constitution.

Free political speech is "central to the meaning and purpose of the First Amendment." *Citizens United*, 558 U.S. at 329. It is the "essential mechanism of democracy" and "must prevail against laws that would suppress it, whether by design or inadvertence." *Id.* at 340. The proposed rule would suppress the political speech of all social welfare organizations.

A. The Proposed Limitations On Candidate-Related Political Activity Would Unconstitutionally Restrict The Ability Of Social Welfare Organizations To Maintain Tax-Exempt Status While Engaging In Political Speech And Would Chill Issue Advocacy.

"'[T]he government may not deny a benefit to a person because he exercises a constitutional right.'" *Regan*, 461 U.S. at 545. Consistent with this principle, the Supreme Court has held that the government may deny a tax benefit to an organization on the basis of its political speech only if the government provides that organization with a means for retaining favorable tax treatment for its non-political activities. *Id.* at 545-46; *see also Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2329 (2013) (same); *Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C. Cir. 2000) (same). If the government does not provide this "dual structure" to preserve political speech, *Alliance for Open Soc'y*, 133 S. Ct. at 2329 (internal quotation marks omitted), then its imposed burden on that speech is subject to exacting scrutiny under the First Amendment, *Am. Soc'y of Ass'n Execs. v. United States*, 195

F.3d 47, 50 (D.C. Cir. 1999); *see also FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 400-01 (1984); *Nat'l Fed'n of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300, 1322 (S.D. Ala. 2002), *vacated on other grounds*, *Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003).

The proposed rule does not provide 501(c)(4) organizations with sufficient alternative means for exercising the political speech that it penalizes, and the resulting tax consequences would impermissibly chill protected issue advocacy speech. The proposed rule therefore violates the First Amendment.

1. The Proposed Rule Does Not Offer Social Welfare Organizations A Sufficient Alternative Means For Engaging In Political Speech Without Penalty.

In *Regan v. Taxation With Representation*, a charitable organization challenged the restriction on lobbying activities in Section 501(c)(3) of the IRC as an impermissible burden on its right to engage in political speech. The Supreme Court held that the restriction was not an "unconstitutional condition." The Court emphasized, however, that its narrow ruling relied on the fact that such groups could both lobby and retain their 501(c)(3) status by adopting a "dual structure" of incorporation as a 501(c)(3) organization for its non-lobbying activities and as a still tax-exempt 501(c)(4) entity for its lobbying activity. 461 U.S. at 544. This "not unduly burdensome" arrangement, the Court explained, avoided any constitutional defect that may otherwise have resulted from the lobbying provision's restriction on speech. *Id.* at 545 & n.6.

Three concurring Justices were even more direct: "[T]he lobbying restriction contained in § 501(c)(3) violates the principle . . . that the Government may not deny a benefit to a person because he exercise a constitutional right," but it is saved "alone" by the ability of charities "to make known [their] views on legislation through [a] 501(c)(4) affiliate." *Id.* at 552-53

(Blackmun, J., concurring) (internal quotation marks omitted). The concurring Justices also explained that this dual structure was acceptable only because it went "no further" than to require "that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used for lobbying." *Id.* at 554 (internal quotation marks omitted). Any restriction that goes further than this "would negate the saving effect of § 501(c)(4)" and "render the statutory scheme unconstitutional." *Id.* at 553-54.

There is no "dual structure" in the IRC that could preserve the ability of 501(c)(4) organizations to engage in the political speech burdened by the proposed rule. The proposed rule instead threatens to deprive 501(c)(4) organizations of their tax-exempt status for engaging in protected speech without even suggesting the sort of "bifurcated arrangement" that was "'indispensable to the *Regan* . . . holding.'" *DKT Mem'l Fund v. Agency for Int'l Dev.*, 887 F.2d 275, 305 (D.C. Cir. 1989) (Ruth B. Ginsburg, J., dissenting) (quoting Lawrence Tribe, *American Constitutional Law* 748 (2d ed. 1988)); *see also League of Women Voters*, 468 U.S. at 400-01.

Indeed, even if social welfare organizations took full advantage of other tax-exempt categories of the IRC, they would still be stifled in their ability to engage in unburdened political speech. Under the proposed rule, for instance, the IRS presumably would direct social welfare organizations seeking to engage in "candidate-related political activity" to establish an affiliated "political organization" under Section 527 of the IRC. *See* 78 Fed. Reg. at 71,537. Unlike the dual 501(c)(3) / 501(c)(4) structure endorsed in *Regan*, however, a 501(c)(4) / 527 arrangement would not preserve organizations' uninhibited speech rights because the restrictions on 501(c)(4) and 527 entities would overlap.

The limitations a social welfare organization would face in attempting to hold a non-partisan voter-registration drive illustrate this point. The proposed rule would penalize a

501(c)(4) entity for engaging in such activity. *See* 78 Fed. Reg. at 71,541. Thus, for Section 527 to offer a safety valve consistent with *Regan*, the social welfare organization would have to be able to hold its registration drive through a Section 527 affiliate without suffering tax consequences. *See* 461 U.S. at 553-54. But Section 527 *also* penalizes the holding of a voter-registration drive. *See* 26 C.F.R. § 1.527-2(c)-(e) (Section 527 generally exempts from taxation only campaign-specific expenditures). As a result, the social welfare organization would be left without a "not unduly burdensome" avenue for engaging in its desired political speech—the very denial of "a significant benefit [for] choosing to exercise . . . constitutional rights" that *Regan* demonstrates would create a "constitutional defect." *Regan*, 461 U.S. 552 (Brennan, J., concurring); *see also Am. Soc'y of Ass'n Execs.*, 195 F.3d at 50 (emphasizing that a "burden on [the] First Amendment rights" of "a tax-exempt organization[ ]" imposed by exemption restrictions avoids a constitutional defect only if the organization can "split[ ] itself into two [tax-exempt] organizations" and "segregate its activities according to the source of its funding") (internal quotation marks and citation omitted); *Massachusetts v. Sec'y of Health & Human Servs.*, 873 F.2d 1528, 1552 (1st Cir. 1989) (Torruella, J., concurring in part) ("Courts consistently have struck down regulations which attempt to curtail constitutional activities funded through private sources, by making federal grants and subsidies conditional upon termination of those activities.") (internal citation omitted).[2]

Furthermore, even if the IRS were to refine the definition of "candidate-related political activity" to align with the Section 527 exempt functions, Section 527 still would not offer an

[2] This hypothetical social welfare organization would also face similar restrictions if it attempted to publish voter guides or host nonpartisan pre-election events that in any way involved a candidate for office, among other things. *See* 78 Fed. Reg. at 71,542.

adequate alternative speech vehicle for social welfare groups. The Supreme Court specifically held in *Citizens United* that "the option" of a social welfare groups to form Section 527 political action committees ("PACs") "does not alleviate the First Amendment problems" arising from a direct burden on such groups' political speech. 558 U.S. at 337. As the Court in *Citizen's United* explained, Section 527 "PACs are *burdensome* alternatives; they are expensive to administer and subject to extensive regulations." *Id.* (emphasis added). Most notably, PACs must "keep detailed records of the identities of the persons making donations" and disclose those identities and contribution amounts in publicly filed "detailed monthly reports with the FEC." *Id.* at 338. These "onerous restrictions" are far more burdensome than the separate incorporation and recordkeeping requirements ruled permissible in *Regan*. *Id.* at 339. And, as the Supreme Court recognized, they would leave social welfare organizations with an impossible choice: sharply curtail their speech to continue operations solely as a 501(c)(4), or be compelled to disclose their donors and financial operations under Section 527 just to make their views known. *Id.* at 338-39. Thus, a Section 527-based speech alternative clearly would "impose heavy burdens on [the] First Amendment rights" of social welfare organizations, inconsistent with the safety-valve requirement established in *Regan*. *Doe No. 1*, 130 S. Ct. at 2822 (Alito, J., concurring); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (invalidating a state statute that prohibited the distribution of anonymous campaign literature); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-63 (1958) (holding that a state could not compel an organization to reveal to the state's Attorney General lists of its members' names and addresses).

2. The Proposed Rule Would Impermissibly Chill Issue Advocacy.

Because social welfare organizations cannot avoid the speech burdens in the proposed rule through alternative means in the IRC, those burdens must satisfy strict scrutiny by furthering a "compelling interest" through "narrowly tailored" means. *FCC v. Wis. Right to Life, Inc*., 551 U.S. 449, 469-76 (2007). The burdens in the proposed rule cannot satisfy this standard because they would impermissibly restrict "issue advocacy" speech. *Id.*

Recognizing that "'government may regulate in the area [of political speech] only with narrow specificity,'" the Supreme Court has established that the government has a compelling interest only in regulating "express advocacy" speech to "prevent[ ] corruption" in political campaigns. *Buckley v. Valeo*, 424 U.S. 1, 41, 45 (1976) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). All other political speech is considered "issue advocacy" and must remain free from government suppression. *Wis. Right to Life*, 511 U.S. at 469-76; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978).

Because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application," the Supreme Court has defined "express advocacy" narrowly as "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office" or are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Wis. Right to Life*, 551 at 470, 513 (internal quotation marks omitted). By contrast, issue advocacy is defined broadly as, among other things, speech that "conveys information and educates," *id*. at 470, urges action on legislation and government initiatives, or addresses "political policy generally," *Buckley*, 424 U.S. at 48. In short, it is the speech at the heart of our "profound

national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The proposed rule plainly burdens issue advocacy speech. Despite incorporating the language of the Supreme Court's "express advocacy" test and couching its restrictions in candidate-focused terms aimed at providing "bright lines," the proposed rule counts an enormous swath of issue advocacy speech against the tax-exempt status of 501(c)(4) organizations. *See* 78 Fed. Reg. at 71,541.[3] As a result, the proposed rule would impermissibly chill the issue advocacy speech of 501(c)(4) organizations, burdening their right to "discuss publicly and truthfully all matters of public concern without . . . fear of subsequent punishment." *Bellotti*, 435 U.S. at 776 (internal quotation marks and citation omitted).[4]

The extent to which the proposed rule would burden issue advocacy speech is clear from its definition of "candidate-related political activity"—all of which the proposed rule would weigh against a 501(c)(4) organization's tax-exempt status. In plain terms, that definition encompasses *any* voter registration or get-out-the-vote drive, *any* "preparation or distribution of a voter guide," and the hosting of *any* event involving a candidate within broad pre-election periods. 78 Fed. Reg. at 71,541. There is no doubt that these activities constitute

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[3] Even if the current Section 501(c)(4) regulations are confusing, the IRS cannot use administrative convenience to overrule the First Amendment: "[T]he desire for a bright-line rule . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986).

[4] Smaller organizations without the resources to spend on legal advice may feel this chilling effect most severely. These organizations, in particular, may be hesitant to engage in *any* political activity for fear of losing their tax-exempt status, or for fear of being subject to burdensome and intrusive IRS investigations. The regulations thus would have the foreseeable effect of minimizing speech. This is impermissible.

constitutionally protected issue advocacy speech. Indeed, the IRS repeatedly has recognized that these activities are at the core of issue-focused social welfare work. *See, e.g.*, Rev. Rul. 66-245, 74-574, 86-95, & 07-41 (defining non-partisan candidate debates and forums as falling outside current restrictions on political-campaign activity); Rev. Rul. 78-248 (identifying the preparation and distribution of voter guides as tax-free activities). But the proposed rule would unconstitutionally penalize 501(c)(4) organizations for engaging in these activities, offering them "no security for free discussion" and illegitimately forcing them to "'hedge and trim'" their actions to avoid loss of their tax-exempt status. *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

The proposed rule's burdening of issue advocacy is also obvious in its blackout of all "public communications" that in any way identify a candidate or political party within 30 days of a primary election or 60 days of a general election. 78 Fed. Reg. at 71,541.[5] The Supreme Court struck down less burdensome and more focused blackout periods in *Citizens United*. 558 U.S. at 341.[6] The NPRM does not explain how the proposed rule could possibly pass constitutional muster in the wake of that holding.

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[5] During a presidential election year, the blackout period extends for a much greater period than 30 days before the nominating convention or 60 days before Election Day. Indeed, during the 2012 election cycle, the proposed rule would have imposed a blackout period for more than 300 days due to the primary and caucus schedule.

[6] The Court in *Citizens United* explained that the Bipartisan Campaign Reform Act ("BCRA") restrictions, which prohibited 501(c)(4) organizations, among others, from issuing any broadcast, cable, or satellite communication that referenced a candidate within the specified time periods, were not a "permissible remedy" for the perceived problem of independent expenditures influencing elected officials because they targeted "certain disfavored speakers" and were impermissibly vague and overbroad. 558 U.S. at 341, 361.

In particular, the proposed rule's blackout period would penalize 501(c)(4) organizations for making any "public communication that refers to one or more clearly identified candidates . . . or political parties," with "clearly identified" defined to include any reference to a candidate's name, image (by photograph or drawing), voice recording, official title, or "an issue or characteristic used to distinguish the candidate." 78 Fed. Reg. at 71,541. This definition covers all manner of issue advocacy speech. Indeed, the definition makes explicit that purely "*issue*"-based remarks will threaten a 501(c)(4)'s tax status if, in the view of the IRS, the remark "refers" to a candidate. *Id.* The proposed rule thus would chill speech regarding any issue on which a party or candidate has a known position while simultaneously penalizing organizations for making remarks as innocuous as: "Republicans and Democrats agree that all children deserve an adequate education." The practical result would be a complete muzzling of social welfare organizations at the very times that their ability to share information and express opinions on important issues finds the most attentive audience and serves the greatest good.

Similarly, the definition of "public communication" in the blackout period provision would sweep in all sorts of issue advocacy speech. That definition extends to any written, printed, electronic, video, or oral communication:

"*(i)* By broadcast, cable, or satellite:

(*ii)* On an Internet Web site;

(*iii*) In a newspaper, magazine, or other periodical;

(*iv*) In the form of a paid advertising; or

(*v*) That otherwise reaches, or is intended to reach, more than 500 persons."

78 Fed. Reg. at 71,541. This definition would reach "pure" issue advocacy activities like publishing a review of recent legislative activities, reporting on the progress of organizational

initiatives, or sending an issue-specific email to members. Those activities are essential to organizations like CEO, which expressly aims to educate citizens about immigration, racial preferences, and voting rights issues—and their treatment by politicians and parties—at all times, including during periods leading up to elections. Indeed, the definition of "public communication" in the blackout provision of the proposed rule would punish CEO for sending its weekly email to supporters on redistricting issues, publishing articles to encourage Republicans and Democrats to pursue legislative reform related to civil-rights and immigration issues, or even just linking to a filed legal brief that references a party or candidate.

The proposed rule even states that the "On an Internet website" provision affects not only actions taken during a blackout period, but also those actions taken *before* the period begins. *See* 78 Fed. Reg. at 71539 (providing that the proposed rule "intends that content previously posted by an organization on its Web site that clearly identifies a candidate [or political party] and remains on the Web site during the specified pre-election period would be treated as candidate-related political activity"). Such a restriction would absolutely stifle social welfare organizations' issue advocacy speech. It would require those organizations to purge their websites—incurring substantial compliance costs—every time a federal or state caucus, primary, or general election is held. This is particularly true for CEO, as most posts on its website are likely to contain some reference to a candidate, nominee, referendum, or political party. Inhibiting organizations in this way, and depriving their members of the right to "receive information and ideas," is fundamentally inconsistent with the freedom of speech. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (internal quotation marks and citation omitted).

Furthermore, this chilling effect will be most acute for organizations that use volunteers. The proposed regulations require social welfare organizations not only to calculate the financial

expenditures of their "political" activity, but also to account for volunteer activities. *See* 78 Fed. Reg. at 71,539 ("In addition, the expansion of the types of communications covered in the proposed regulations reflects the fact that an organization's tax exempt status is determined based on all of its activities, even low cost and volunteer activities, not just its large expenditures."); *id*. at 71,540. The NPRM provides no guidance for organizations on how to calculate the value of its volunteer activities or to report them relative to the rest of its activities. Social welfare organizations therefore may choose not to rely on volunteers to avoid endangering their tax status.[7] And that would chill speech even the Department and IRS intend to preserve. Such a result is inconsistent with the preservation of open political discourse that is central to the First Amendment. *See Citizens United*, 558 U.S. at 324 ("Prolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" (quoting *Connally v. Gen. Constr. Co*., 269 U.S. 385, 391 (1926)); *see also Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035-40

[7] Indeed, keeping track of volunteers is incredibly burdensome. The current IRS Forms Instructions recognize that many organizations "do not keep track of this information in their books and records." *See* 2013 Instructions for Form 990 Return of Organization Exempt From Income Tax, P. 10, http://www.irs.gov/pub/irs-pdf/i990.pdf. This is because defining and measuring volunteer labor are difficult tasks; indeed, the International Labour Organization's internationally recognized manual for doing so is 105 pages long. Int'l Labour Organization, *Manual on the Measurement of Volunteer Work*, Geneva, 2011, http://www.ilo.org/wcmsp5/groups/public/---dgreports/--stat/documents/publication/wcms 162119.pdf. According to that manual, the only reliable method of measuring volunteer activity is a "carefully designed 'volunteer supplement'" to labor force surveys carried out on a periodic basis." *Id*. at 9. Creating and administering these surveys would significantly increase information collection for many 501(c)(4) organizations. The Department and IRS have failed to account for these burdens in issuing the proposed rule. *See* 44 U.S.C. §§ 3501-3521 (Paperwork Reduction Act).

(D.C. Cir. 1980) (striking down Treasury regulation for using vague terms that obscured its meaning and invited "arbitrary and discriminatory enforcement").[8]

B. The Proposed Rule Impermissibly Discriminates Between Speakers Based On Identity.

The First Amendment also prohibits restrictions that "allow[] speech by some but not others." *Citizens United*, 558 U.S. at 341; *see also Bellotti*, 435 U.S. at 784. As the Supreme Court has emphasized: "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United*, 558 U.S. at 341. Similarly, the Equal Protection Clause of the Fifth Amendment disallows the disparate classification of organizations for tax purposes unless there is "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (internal quotation marks omitted); *see also Regan*, 461 U.S. at 549.

The proposed rule runs afoul of these constitutional provisions. The rule treats social welfare organizations completely differently from other tax-exempt entities without justification. *See infra* pp. 28-29, 41-42. It offers, for instance, no rationale why limitations on political activity are needed to ensure social welfare organizations "further exempt purposes," while no similar limitations are needed for labor and business organizations. *See* 78 Fed. Reg. at 71,537.

[8] The proposed rule's definitions of "clearly identified candidates" and "public communication" also raise similar vagueness concerns. The Department and IRS offer no guidance on how organizations are to determine if a communication contains an "issue or characteristic" that distinguishes a "candidate." Nor do they explain how organizations are to gauge whether the "identity of a candidate is apparent by reference" to a certain "term," or when a person becomes a "candidate" upon "propos[al] by another." 78 Fed. Reg. at 71,541. The First Amendment requires greater specificity. *See Big Mama Rag*, 631 F.2d at 1035-40.

Moreover, the context in which the proposed rule has issued strongly suggests that its speaker-specific terms are "simply a means to control content." *Citizens United*, 558 U.S. at 341. The Obama Administration's desire to curb the political speech of conservative social welfare organizations after the *Citizens United* decision, and the IRS's subsequent "harassment" of conservative 501(c)(4) applicants, is now well-known. *See, e.g.*, Letter from Reps. D. Issa & J. Jordan to Hon. J. Koskinen, 1-11 (Feb. 4, 2014) (detailing evidence of Administration's attempts to stifle political speech). Under "immense pressure" to "'fix the problem' of nonprofit political speech" that Administration officials and Democrat legislators believed would result from *Citizen United*'s overturning of the BCRA blackout provisions, IRS officials initiated a "'c4 project'" to subject applicants with perceived conservative principles to an unprecedented degree of scrutiny. *Id.* at 3 (quoting "Lois Lerner Discusses Political Pressure on IRS in 2010," http://www.youtube.com/watch?v=EH1ZRyq-1iM). This project generally did not affect the applications of liberal organizations or extend to left-leaning 501(c)(5) labor unions. *See id.* at 1-4; *cf.* Diana Furchtgott-Roth, *Obama Makes the IRS Free Speech Cop Too*, Real Clear Markets (Dec. 17, 2013) (explaining that "unions, which file under 501(c)(5) of the Internal Revenue Code" are "actively engaged in political activity and get-out-the-vote drives, the vast majority on behalf of Democratic candidates"), http://www.realclearmarkets.com/articles/2013/12/17/obama_makes_the_irs_free_speech_cop_too_100798.html; Tom McGinty and Brody Mullins, *Political Spending By Unions Far Exceeds Direct Donations*, Wall Street Journal (July 10, 2012) (explaining that unions spend about four times as much on politics and lobbying as previously estimated and that they "overwhelmingly assist Democrats"); Heavy Hitters: Top All-Time Donors, 1989-2014, http://www.opensecrets.org/orgs/list.php (explaining that unions donate heavily to Democrats). Revelation of this internal IRS project resulted in the resignation of

"three high-ranking IRS officials" and a report by the Treasury Inspector General for Tax Administration ("TIGTA") that concluded the IRS "had targeted conservative organizations." Letter from Speaker J. Boehner, Sen. M. McConnell, *et al*. to Hon. J. Koskinen, 2 (Feb. 5, 2014); *see also* Treasury Inspector General for Tax Administration Michael McKenney, Acting Deputy Inspector General for Audit, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013) (determining IRS "used inappropriate criteria that identified for review Tea Party and other organizations applying for tax-exempt status based upon their names or policy positions instead of indications of potential political campaign intervention"). Moreover, recent congressional investigations have revealed that the IRS also targeted many 501(c)(4) groups for heightened surveillance, 83% of which were right-leaning. Of the groups selected to be audited, 100% were right-leaning. *See* John D. McKinnon, *Camp: IRS Targeted Established Conservative Groups for Audits, Too*, The Wall Street Journal (Feb. 11, 2014).

Despite the suggestion that the proposed rule is an independent response to the TIGTA report aimed at restoring order to the IRS, *see* 78 Fed. Reg. at 71,536, substantial evidence shows that it is actually just a continuation of the effort to stifle disfavored speech. Indeed, former IRS Acting Commissioner Steve Miller suggested to House investigators that this rulemaking is a product of continuing political pressure to target conservative and free market social welfare groups. *See* Letter from Reps. D. Issa & J. Jordan to Hon. J. Koskinen, 6-10 (Feb. 4, 2014).[9]

[9] In an interview with House investigators, Commissioner Miller was asked what the problem was in the law that needed to be fixed. He responded, "So I'm not sure there was a problem, right? I mean, I think we were—we had, you know, [Senator Carl Levin, D-Michigan] complaining bitterly to us—Senator Levin complaining bitterly about our regulation . . . ." Letter from Reps. D. Issa & J. Jordan to Hon. J. Koskinen, 9 (Feb. 4, 2014).

Congressional investigations also have found that "the draft rule had been under consideration within the administration for at least *two years* before th[e TIGTA] report came out," Letter from Speaker J. Boehner, Sen. M. McConnell, *et al*. to Hon. J. Koskinen, 1 (Feb. 5, 2014) (emphasis added), and that it was designed specifically to "limit the political activities of aggressive c4s," Letter from Reps. D. Issa & J. Jordan to Hon. J. Koskinen, 8 (Feb. 4, 2014) (quoting Email from R. Madrigal, Dep't of the Treasury, to J. Van Hove, Dep't of the Treasury (Aug. 23, 2010)); *see also* James Freeman & Brian Carney, *Former IRS Chief: Democratic Senator Made Us Do It*, Wall Street Journal (Feb. 7, 2014). And at least one career IRS official testified that the Director of the IRS Exempt Organizations Division, Lois Lerner, overruled his recommendations whether to approve or deny applications and ordered applications of conservative organizations to go through a multilayer review that included her senior advisor and the IRS Chief Counsel's office. *See* IRS Chief Counsel's Office Demanded Information on 2010 Election Activity of Tea Party Applicants, Comm. on Oversight & Government Reform (July 17, 2013).[10] Moreover, the very "timing of this rule appears calculated to take effect just in time for the mid-term elections," reinforcing the perception that it is simply "a means to infringe on the constitutionally protected right to free speech." Letter from Speaker J. Boehner, Sen. M. McConnell, *et al*. to Hon. J. Koskinen, 2 (Feb. 5, 2014); Kimberly A. Strassel, *IRS Targeting and 2014*, The Wall Street Journal (Jan. 16, 2014) (suggesting that the timing of the rule positions "the administration to shut down conservative groups early in this election cycle").

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[10] Congressional investigators also found that, before the scandal, IRS agents had no problems processing applications in three months or less. *See* Editorial, *New Evidence Undercuts White House Claim About IRS Motivation*, Wall Street Journal (Feb. 7, 2014).

The Department and IRS should discard this unconstitutional and politically motivated rule. Pressing ahead will further undermine public trust in the Administration, will unfairly chill speech in an election year, and will ensure that the Department and the IRS are rebuked in subsequent litigation.

IV. The Proposed Rule Violates The Tax Code.

A. The Statutory Requirement Of Section 501(c)(4) Organizations To Promote "Social Welfare" Does Not Authorize Broad Restrictions On Political Activity.

The IRC provides tax exempt status to "organizations not organized for profit but operated exclusively for the promotion of social welfare." 26 U.S.C. § 501(c)(4)(A). The proposed rule is inconsistent with the statute adopted by Congress.

1. The Proposed Rule Is Contrary To The Plain Meaning Of The Tax Code.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks omitted). "[W]here the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal citations omitted); *see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("Congress says in a statute what it means and means in a statute what it says there . . . . [W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms.") (internal quotation marks and citations omitted).

The proposed rule impermissibly regulates "social welfare" without proper consideration of the context in which the statute uses the term. The phrase "social welfare" does not exist in a

vacuum. Rather, an organization "operated exclusively for the promotion of social welfare" is defined in *contrast* to an entity "organized for profit." 26 U.S.C. § 501(c)(4)(A) (creating an exemption for "organizations not organized for profit but operated exclusively for the promotion of social welfare"). In a similar way, subpart (B) of Section 501(c)(4) states that an entity does not qualify for the exemption if any part of its net earnings "inures to the benefit of any private shareholder or individual." Read as a whole, Section 501(c)(4) makes clear that Congress intended to exempt from taxation entities that promote the general welfare of a *community*, as opposed to the welfare of the entity's members.

The proposed rule simply overlooks the fact that activities that it would define as inconsistent with promoting social welfare—such as get-out-the vote drives, voter registration, voter education, and candidate debates—can logically be part of an organization's mission to promote the general welfare of a community. Indeed, these activities are at the heart of social welfare because they support the "right of citizens to inquire, to hear, to speak, and to use information to reach consensus," which "is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339; *see also Buckley*, 424 U.S. at 14-15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential."). In short, as former FEC chairman Bradley Smith has stated: "What kind of democracy claims that political participation is not in the interest of 'social welfare'?" Bradley A. Smith, *The IRS Attack on Political Speech*, The Wall Street Journal (Aug. 5, 3013).

Another problem with the proposed rule is that its interpretation of "social welfare" to exclude political activity is entirely divorced from any known meaning of those words. Indeed, the ordinary meaning of the promotion of "social welfare"—both today and at the time the

exemption was enacted—clearly embraces engagement in political activity. *See* Webster's Revised Unabridged Dictionary (1913) (defining "social" to mean, among other things, "relating to . . . the public as an aggregate body; as social interest or concerns; . . . social duties"); *id*. (defining "welfare" to mean, among other things, "the ordinary blessings of society and civil government"); Webster's New International Dictionary (2d ed., 1934) (defining "social" to mean "pertaining to the welfare of human society" including "investigation, legislation, work"); American Heritage Dictionary (4th ed., 2007) (defining "social" as "relating to human society" and "welfare" as "organized efforts for the betterment of people").

In fact, the disconnect between the plain meaning of "social welfare" and the proposed rule's regulation of the term is demonstrated by the numerous prior IRS rulings that read "social welfare" to encompass "inform[ing] the public on controversial subjects and attempting to influence legislation," Rev. Rul. 76-81, 1976-1 C.B. 156 (1976), including through advocacy involving "legislators and administrators," Rev. Rul. 71-530, 1971-2 C.B. 237 (1971); *see also* Rev. Rul. 67-293, 1967-2 C.B. 185 (1967) (finding an organization substantially engaged in promoting legislation to protect animals exempt under 501(c)(4)); Rev. Rul. 67-6, 1967-1 C.B. 135 (1967) (finding an association primarily devoted to preserving the traditions and appearance of a community by political action exempt under 501(c)(4)); Rev. Rul. 68-656, 1968-2 C.B. 216 (1968) (holding an organization formed to educate the public and seek changes to the law exempt under 501(c)(4)). The NPRM makes no attempt to distinguish these precedents.

Courts, too, have confirmed a common sense understanding of "social welfare." In *Regan*, for example, the Supreme Court emphasized that the 501(c)(3) organization at issue could establish a related 501(c)(4) organization *solely* to engage in activities aimed at influencing legislation. *See* 461 U.S. at 544. Other cases addressing whether an organization is properly

operating for "social welfare" purposes turn not on whether the organization is engaged in political activity, but instead on whether the organization is operating primarily for the benefit of its members rather than for the community as a whole. *Compare Monterey Pub. Parking Corp. v. United States*, 321 F. Supp. 972, 975 (N.D. Cal. 1970) (holding that a private, nonprofit parking lot was exempt under 501(c)(4) because its organizers had not exploited the facility "by giving themselves special advertising rights, or by restricting the validation stamp system to certain businesses"), *aff'd*, 481 F.2d 175 (9th Cir. 1973), *with Contracting Plumbers Co-op. Restoration Corp. v. United States*, 488 F.2d 684, 686-87 (2d Cir. 1973) (holding that a private, nonprofit cooperative did not qualify for an exemption under 501(c)(4) because it served the private interests of its members).

2. The Proposed Rule Is Contrary To The Structure Of The Tax Code.

A review of the IRC provisions applicable to tax-exempt organizations further demonstrates that the proposed rule is at odds with Congress's intentions for social welfare organizations.

First, Congress's intent to allow 501(c)(4) entities to engage in political activity is clear from its explicit imposition of such restrictions on other tax-exempt entities. The IRC provides 501(c)(3) charitable organizations and 501(c)(29) health insurance issuers a tax exemption if no "substantial part of [their] activities [consists of] carrying on propaganda, or otherwise attempting, to influence legislation" and if they do not "participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. § 501(c)(3), (29). By contrast, the IRC contains *no restrictions whatsoever* on the political activities of social welfare organizations. *See id*. § 501(c)(4). Congress's decision not to impose political-activity restrictions on 501(c)(4) entities at the same time that it imposed such

restrictions on other entities demonstrates unequivocally that it did not intend to restrict 501(c)(4)s from engaging in political activity. Indeed, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted); *see also Allison Engine Co., v. United States ex rel. Sanders*, 553 U.S. 662, 671 (2008) (presuming an omission of certain statutory language in one section of the statute was intentional when it was present in another section). The proposed rule ignores this cardinal rule of statutory construction.

Second, Congress's intent to keep social welfare organizations free from political-speech restrictions is also clear from its specific handling of campaign contributions in Section 527 of the IRC. *See* 26 U.S.C. § 527. Section 527 grants a limited tax exemption to groups created primarily to influence the selection, nomination, election, appointment or defeat of candidates to federal, state, or local public office. *Id*. § 527(e). Those groups must pay a tax only on income generated from activities that are *not* campaign related. *Id*. § 527(b), (c). At the same time, Section 527 provides that other 501(c) groups—including 501(c)(4) social welfare organizations—must pay a limited tax for their campaign-related expenditures. *Id*. § 527(f). Thus, Section 527 governs the full gamut of tax-exempt entities, offering strong evidence that Congress sought only to monitor campaign contributions—not threaten loss of entities' tax-exempt status for engaging in other sorts of political speech. The Department and IRS have no basis for concluding otherwise.

Third, even if it were possible to read a limitation on political activity into Section 501(c)(4), the proposed rule errs in suggesting that limitation should be *broader* than the limitations Congress made explicit in Sections 501(c)(3) and 501(c)(29) of the IRC. Congress

carefully chose the language restricting the political activity of 501(c)(3) and 501(c)(29) organizations. Indeed, it explicitly refused to adopt broader restrictions.[11] Rather than using the language Congress crafted regarding political activity restrictions, which focuses solely on "participa[tion] . . . or interven[tion] in . . . political *campaign*[*s*] on behalf of (or in opposition to) any *candidate for public office*," 26 U.S.C. § 501(c)(3) (emphases added), the proposed rule suggests language that would cover, as discussed, everything from non-partisan voter-registration drives to issue-focused comments on judicial nominees, *see* 78 Fed. Reg. at 71,538. In so doing, the Department and IRS are simply "substitut[ing] their policy judgments for those of Congress." *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 176 (4th Cir 1998), *aff'd*, 529 U.S. 120 (2000). That is improper and unlawful.

Fourth, it is impossible to square the sweeping limitations in the proposed rule with the carefully calibrated structure of the IRC. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2010) (internal quotation marks omitted). As outlined above, the IRC establishes a number of targeted provisions specific to each recognized tax-exempt organization. *See supra* pp. 6-8. These provisions cover the precise benefits and burdens associated with each 501(c) organization. Section 501(c)(4) organizations have a balanced arrangement in this system: they face limitations and taxes on express-advocacy campaign speech and receiving only tax-exempt

[11] An initial draft of the Revenue Act of 1934 would have barred 501(c)(3) organizations from "participation in partisan politics." S. Rep. No. 73-558, 73d Cong., 2d Sess. 26 (1934). Congress deleted that provision based on the concern that it "was too broad." 78 Cong. Rec. 7,831 (1934).

income, but remain free to engage in unlimited issue advocacy and can preserve the anonymity of donors. 26 U.S.C. § 501(c)(4). The proposed rule's numerous added burdens on Section 501(c)(4)s would effectively gut this "carefully articulated existing system." *Loving v. IRS*, __ F.3d __, 2014 WL 519224, at *7 (D.C. Cir. Feb. 11, 2014). Dismissing the provisions that Congress "spent so much time specifically targeting" to achieve a fair taxation system, *id.*, the proposed rule would deprive Section 501(c)(4) entities of benefits to which they are entitled and deprive them of vital avenues for political expression, *see Regan*, 461 U.S. at 544-45.

The proposed rule also "would produce absurd results" that are inconsistent with the "legislative purpose" of the IRC. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). The proposed rule, for instance, would threaten to revoke a 501(c)(4) entity's tax exemption for making pre-election issue-based statements that would not even incur taxation under Section 527. *See* Rev. Rul. 2004-6, 2004-1 C.B. 328 (explaining that a social welfare organization could run an advertisement within 60 days of an election urging an incumbent candidate by name to cease an activity and not be "subject to tax under § 527(f)(1)"). And, as noted, the proposed rule also would bar social welfare organizations from conducting activities like distributing voter guides, helping voters to register, and holding pre-election candidate forums, while continuing to permit 501(c)(3) charitable groups to engage in those very same activities. *See* 78 Fed. Reg. at 71,539; Rev. Rul. 2007-41, 2007-1 C.B. 1421 (2007). It strains belief to think that Congress meant to establish detailed IRC provisions striking a balance between the benefits and burdens of tax-exempt entities only to then have the Department and IRS rebalance the arrangements in absurd ways. The agencies should rethink their approach.

B. The Proposed Rule Would Give The IRS Unprecedented Control Over Political Activity, Which Is Beyond Its Regulatory Mandate.

In addition to violating the text and structure of the IRC, the proposed rule is also suspect because the IRS lacks the authority—let alone the expertise—to regulate political speech.

Despite the FEC's "exclusive jurisdiction" over civil enforcement of the nation's campaign finance laws, 2 U.S.C. § 437c(b)(1), the proposed rule does not even bother to cover its election-focused efforts with a tax-based fig leaf. The NPRM freely admits that the Department and the IRS are seeking to adopt and expand on the election-law restrictions so as to take into account the "greater potential" for social welfare organizations' speech "to affect the outcome of an election." 78 Fed. Reg. at 71,538. Such a consideration has no bearing on the question of whether a 501(c)(4) organization is pursuing "social welfare"—the only question the agencies may consider—and is beyond their authority. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 145-46 (2000) (rejecting the Food and Drug Administration's sudden attempt to regulate tobacco products); *Loving*, 2014 WL 519224, at *8 (rejecting the IRS's attempt to regulate tax return preparers because "[t]he Supreme Court has stated that courts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies").

Despite this fact, the proposed rule actually asserts *more* authority to regulate political speech than the FEC has ever claimed. Indeed, the proposed rule builds solely on hijacked federal election law—and not tax laws or regulations—in its effort to deter the political activity of social welfare organizations.[12] And if this were not enough, the election laws on which the

[12] This is no surprise considering that Lois Lerner—the former Director of the IRS's Exempt Organizations Division and one of the persons responsible for the proposed rule—previously

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proposed rule relies are the very provisions that the Supreme Court held unconstitutional in their application to Section 501(c)(4) entities. *See Citizens United*, 558 U.S. at 310. Those provisions include, as discussed, the proposed pre-election blackout periods and the attempted "expan[sion of] the types of candidates and communications that are covered" by speech penalties. *See* 78 Fed. Reg. at 71,538-71,539; *see supra* pp. 17 & n.6, 22.

Moreover, even if the IRS had the authority to regulate the political activities of 501(c)(4) entities, the agency acknowledges that it lacks the expertise to do so. The primary justification that the IRS gives in support of its proposed rule is that the processing of 501(c)(4) applications has proven too challenging a task for its agents. *See* 78 Fed. Reg. at 71,536 (''The distinction between campaign intervention and social welfare activity, and the measurement of the organization's social welfare activities relative to its total activities, have created considerable confusion for . . . the IRS in making appropriate section 501(c)(4) determinations.") (internal quotation marks omitted). But the proposed rule only compounds this problem. A former head of the IRS's Exempt Organizations Division has stated that while the proposed rule may "eliminate[] some of the tax rule ambiguities," it "replaces them with election law ambiguities." Patrick Sullivan, *IRS To Look At Groups' Primary Purpose On Political Activity*, The Non Profit Times, https://www.thenonprofittimes.com/news-articles/irs-to-look-at-groups-primary-purpose-on-political-activity/. Even the IRS's National Taxpayer Advocate has stated that the IRS is not as qualified as the FEC in making these "inherently controversial determination[s] about political

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served as an Associate General Counsel and Head of the Enforcement Office at the FEC. The proposed rule should be considered in this context. *See* Letter from Reps. D. Issa & J. Jordan to Hon. J. Koskinen, 4-5 (Feb. 4, 2014).

activity." National Taxpayer Advocate, *Special Report to Congress: Political Activity and the Rights of Applicants for Tax-Exempt Status* 2. Because the IRS is ill-equipped to regulate political activities, it should abandon this rulemaking. *Cf. Gonzales v. Oregon*, 546 U.S. 243, 269 (2006) (ruling that the deference owed to an agency's interpretation of a statute is reduced in light of its "lack of expertise in [the] area").

V. The Proposed Rule Is Arbitrary And Capricious And Therefore Violates The Administrative Procedure Act.

As shown above, the proposed rule would violate the Constitution and the text and structure of the IRC. Thus, it would be struck down in litigation. The proposed rule *also* fails to satisfy the basic standards of the APA, because it does not consider all relevant factors and lacks a "rational connection between the facts found and the determination made." *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 766 (9th Cir. 2007); *see also Huntington Hosp. v. Thompson*, 319 F.3d 74, 79 (2d Cir. 2003) ("While an agency is not locked into the first interpretation of a statute it embraces, it cannot simply adopt inconsistent positions without presenting 'some reasoned analysis.'") (internal quotation marks omitted). Thus, an APA challenge to the proposed rule, if adopted as is, would likely succeed.

A. The Proposed Rule Rests On Flawed Premises That Are Unsubstantiated.

The proposed rule is based on a "flawed premise": the current standards regarding participation in political campaigns are described as too confusing to apply. The evidence, however, suggests that any problems with application are the product of abusive intent, not confusion; and the proposed rule would multiply any ambiguity found in the current regulations. The proposed rule is therefore arbitrary and capricious. *Safe Air for Everyone v. EPA*, 475 F.3d

1096, 1109 (9th Cir. 2007); *see also Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 179 (D.C. Cir. 2010) (rejecting agency analysis based on a "flawed presumption").

1. The Stated Rationale For The Proposed Rule Appears Fabricated To Obscure The Political Targeting Of Conservative Organizations.

The Department and IRS state that the proposed rule is necessary because the current regulations governing social welfare organizations lack "definitive rules with respect to political activities." 78 Fed. Reg. at 71,538; *see also id*. at 71,536 ("The Treasury Department and the IRS recognize that both the public and the IRS would benefit from clearer definitions of these concepts."). As detailed above, however, substantial evidence suggests that this rationale is a charade, and that the true purpose of the rule is to continue the Administration's efforts to silence opposition speech and to intimidate conservative and free market groups. *See supra* pp. 21-24. This evidence risks further undermining the reputation of the IRS and destabilizing the public trust on which it relies. *See* Letter from Speaker J. Boehner, Sen. M. McConnell, *et al*. to Hon. J. Koskinen, 1 (Feb. 5, 2014).

In light of these serious concerns regarding the proposed rule's motivation, the Department and IRS should abandon the proposed rule. At a minimum, the agencies should delay adopting any final rule until investigations into alleged wrongdoing at the IRS are completed. *See, e.g.*, Letter from Reps. D. Issa & J. Jordan to Hon. J. Koskinen, 15-16 (Feb. 4, 2014). Moving forward with the rule before then would only confirm that the rule is an unsubtle attempt to punish conservative groups, even though the President has recognized that such an attempt would be "outrageous." *Obama: Alleged IRS Political Targeting "Outrageous,"* CNN (May 14, 2013), *available at* http://www.cnn.com/2013/05/13/politics/irs-conservative-targeting/index.html. Given the IRS's recent history of partisan targeting, any rule issued before

the investigations are complete will not benefit from a presumption of regularity. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (explaining that there is no presumption of regularity when there has been a strong showing of bad faith or improper behavior).

2. Even If The Stated Premise Of The Proposed Rule Is Sincere, It Is Deeply Flawed.

Taking the Department and IRS at their word, they state that providing "sharper distinctions" regarding what constitutes "political activities related to candidates" will reduce "confusion for both the public and the IRS in making appropriate section 501(c)(4) determinations." 78 Fed. Reg. at 71,536-71,537. This assertion is baseless. There is no "confusion" regarding what constitutes participation in "political campaigns on behalf of . . . any candidate for public office"; numerous Revenue Rulings and other sources of guidance define those fairly clear-cut terms. *See, e.g.*, Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).[13] Rather, any confusion experienced by the IRS stemmed from the regulations' requirement that IRS agents engage in a "fact-intensive analysis" of whether an organization is "*primarily engaged*" in political campaign activities. 78 Fed. Reg. at 71,536 (emphasis added). The Treasury Inspector General has emphasized his view that it is the "lack of specific guidance on how to determine the 'primary activity' of an I.R.C. § 501(c)(4) organization" that causes "confusion . . . on what activities are allowed by I.R.C. § 501(c)(4) organizations." Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for*

[13] Indeed, the IRS uses a "facts and circumstances test" numerous times in many of its regulations, but it has never suggested that these other regulations are, like the current 501(c)(4) regulations, confusing to apply.

Review, Reference Number: 2013-10-053, at 14 (May 14, 2013). In other words, officials have no trouble determining whether conduct is political campaign activity on behalf of a candidate for office; the only issue is assessing the relative importance of such activity against an organization's other activities. The proposed rule, however, says *nothing* about this perceived problem.[14]

To be sure, there may be legitimate problems with the application of the current regulation, but the proposed rule does not fix them. If the proposed rule were adopted, IRS agents would still have to engage in a subjective—and likely arbitrary—analysis to determine whether an organization is "primarily engaged" in "candidate-related political activity." 78 Fed. Reg. at 71,541. Current social welfare groups, too, would be left in the dark about how to comply with the new rules, as they will still have to guess as to how the IRS will weigh their actions. Indeed, the proposed rule would actually *increase* interpretive confusion by adding a slew of new facts, communications, activities, and expenditures for organizations and agents to weigh.

Consider, for example, the proposed rule's new definition of the term "candidate," which IRS agents would use in identifying political actions to weigh against an organization's 501(c)(4) status. *See* 78 Fed. Reg. at 71,538. That definition includes both "an individual who publically offers himself" as a candidate and an individual who is "proposed by another" as a candidate "for selection, nomination, election, or appointment to any federal, state, or local public office." *Id*. at

[14] Although the IRS has called for comment on the level of candidate-related political activity that should cause the loss of 501(c)(4) status (78 Fed. Reg. at 71,537), it offers no specific proposals. Nor does it even propose how to measure activities under the "primarily" standard.

71,541. This definition leaves many questions unanswered. If the President met with a person to discuss whether that person would be interested in a federal judgeship, for instance, would that person qualify as a candidate? What if an individual told a crowd at a dog park that she wanted to be an elected official and a stranger happened to snap her picture and post it on his 501(c)(4)'s website? Is that woman a candidate and has the 501(c)(4) engaged in political speech if an upcoming election is around the corner? How public or specific does an expressed interest in office or political nomination need to be? The proposed rule provides no clear answers to these questions, leaving social welfare organizations and IRS officials hopelessly adrift.

Accordingly, there is an immense disconnect between the stated premise of the proposed rule and both (1) the actual source of current regulatory confusion, and (2) the likely effects of the rule. The solution to a confusing regulatory scheme cannot be to establish an *even more* confusing regulatory scheme and hope that it works. That approach in any form is bereft of a reasoned basis and should be abandoned. *See Safe Air for Everyone*, 475 F.3d at 1109; *cf. Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) ("It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.'").[15]

[15] Alternative proposals that may actually address the true source of confusion in the current regulations may be to eliminate the regulatory provision giving rise to any the fact-intensive inquiry—*i.e.*, "[t]he 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)—or to formalize the existing Revenue Rulings concerning the political activities of a 501(c)(4) in a Treasury Regulation. *See* Rev. Rul. 2004-6 (2003); Rev. Rul. 81-95, 1981-1 CB 332 (1981). These alternatives could offer clarity without adding further restrictions unmoored from the text and purpose of the IRC.

3. The Stated Rationale For The Proposed Rule Is Also Arbitrary And Capricious Because The Department And The IRS Have Failed To Account For The Rule's Effects.

To promulgate a rule based on a reasoned foundation, the IRS must consider all factors including the effects of its rule. *See, e.g.*, *North Carolina v. EPA*, 531 F.3d 896, 907 (D.C. Cir. 2008) (invalidating agency rule that failed to demonstrate it "achieve[d] something measurable toward the goal" set forth in the relevant statute); *Timpinaro v. SEC*, 2 F.3d 453, 457-60 (D.C. Cir. 1993) (remanding rule for further analysis where agency had not adequately substantiated its theory about the rule's likely effects). It is obvious that the Department and IRS have not considered all of the effects of the proposed rule.

It is impossible for the agencies to assert that they have considered the effects of the proposed rule because they have not yet determined how to handle what is—as just explained—the most critical aspect of the current regulations: the requirement that a social welfare organization be not "primarily engaged" in political campaign activity. *See supra* pp. 36-37. Rather than tackling the standard head-on, the agencies dodge it—soliciting comments on the standard without offering proposals on this point or a time frame for addressing this issue. *See* 78 Fed. Reg. at 71,537-71,538. A decision on the standard, however, is essential to assessing the potential effects of all other proposed revisions to the current regulations. Indeed, neither the agencies nor commenters can properly gauge how oppressive the proposed definitions of "candidate-related political activity" or "public communication" are without knowing whether the "primarily engaged" standard will be retained, modified, or jettisoned. For example, if the standard is eliminated (thereby making *any* candidate-related speech grounds for loss of tax exemption), then the definitions effectively would convert 501(c)(4) into a useless form: 501(c)(4) organizations would face an even harsher speech ban than encountered by 501(c)(3)

entities without getting the benefit of tax-deductible donations. *See supra* pp. 6-8. But if the standard is retained or relaxed, then the effect of those definitions may well be more limited. Thus, the agencies must set their views on the "primarily engaged" standard before they can assess the effects of any proposed action. *See North Carolina*, 531 F.3d at 907; *Timpinaro*, 2 F.3d at 457-60.

Similarly, until the agencies deal with the "primarily engaged" standard, they cannot weigh the potential effects of alternative regulatory actions—another essential administrative requirement. *See Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986) ("The failure of an agency to consider obvious alternatives has led uniformly to reversal."); *see also Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000) ("To be regarded as rational, an agency must also consider significant alternatives to the course it ultimately chooses."). And, indeed, the proposed rule contains no discussion of possible alternatives or their likely effects.[16]

[16] The IRS and the Department have also flouted their obligations under the Paperwork Reduction Act ("PRA") by failing to fully consider the recordkeeping, compliance, and paperwork burdens that their proposed rule would impose. The agencies estimate that, at most, the proposed rule will burden each organization by increasing their workload for two more hours per year. *See* 78 Fed. Reg. at 71,535. Beyond mere *ipse dixit*, however, the agencies provide no explanation for this wild underestimation of the foreseeable burdens of their proposed rule. Indeed, other commentators have suggested that they *produce several dozen documents a week* that mention candidates during the proposed blackout period that have "nothing to do with attempting to influence the outcome of any particular election," but would need to be analyzed under the proposed rule's requirements. *See, e.g.*, American Civil Liberties Union, *Comments on Draft Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities* 6-7 (Feb. 4, 2014).

For these reasons, the Department and IRS should reverse their course and—if they choose to start over—begin with analysis of the provision at the core of 501(c)(4) eligibility: the "primarily engaged" standard.

B. The Proposed Rule Arbitrarily Targets Social Welfare Groups.

An agency must "treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so." *Indep. Petrol. Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996). This principle has special force in the tax context. *See United States v. Kaiser*, 363 U.S. 299, 308 (1960) (Frankfurter, J., concurring); *see also Baker v. United States*, 748 F.2d 1465 (11th Cir. 1984); *Farmers' & Merchants' Bank v. United States*, 476 F.2d 406 (4th Cir. 1973); *Baker v. Commissioner of IRS*, 787 F.2d 637, 643 (D.C. Cir. 1986).

By imposing its limitations solely on social welfare groups, the proposed rule fails without justification to treat similarly situated organizations in a similar manner. This is especially true with respect to Section 501(c)(5) and 501(c)(6) organizations, which have the same statutory restrictions on political speech as 501(c)(4) groups—*i.e.*, *none*—and would surely find the proposed rule equally onerous were it to apply to them.

The Service Employees International Union ("SEIU") (a 501(c)(5) entity), for example, funded almost $70 million of campaign donations, television ads, and get-out-the-vote-efforts for President Obama and other Democrats in the last election cycle. *See* Melanie Trottman and Brody Mullins, *Union Is Top Spender for Democrats*, The Wall Street Journal (Nov. 1, 2012). That sum was more than the amount of money spent by Priorities USA, the President's main PAC. *See id.* Were the SEIU subject to the proposed rule, it could have made few of these expenditures.

Acknowledging the enormous political efforts of entities like the SEIU raises another point: singling out 501(c)(4)s places those entities at a tremendous competitive disadvantage compared to 501(c)(5)s and (c)(6)s. In the marketplace of ideas, speech is the most valuable currency. Thus, by imposing greater speech penalties on 501(c)(4)s, the proposed rule would disproportionately raise the costs for those organizations to transact in ideas. That sort of disparate treatment is unlawful. *See, e.g.*, *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965) (holding that the Federal Communications Commission's decision to treat two licensees differently was arbitrary and capricious where both licensees were connected with the same alleged wrongdoing); *cf. CBS, Inc. v. FCC*, 629 F.2d 1, 30 (D.C. Cir. 1980) (Tamm, J., concurring) ("[A]lthough the government may play a role in regulating the content of broadcast communications, that role must be carefully neutral as to which speakers or viewpoints are to prevail in the 'marketplace of ideas.'"), *aff'd*, 453 U.S. 367 (1981). It also smacks of political favoritism.[17]

C. The Proposed Rule Is Unlawfully Retroactive And Vague.

Agencies are not permitted to promulgate regulations that will have retroactive effect if doing so will cause injury or increase a party's liability for past conduct. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (a new regulation has an impermissible retroactive effect

[17] To be sure, the NPRM seeks comments on whether the IRS should also apply related restrictions to other 501(c) groups. *See* 78 Fed. Reg. at 71,538. But in the same breath, it states that the IRS will not impose restrictions on other 501(c) organizations without an additional opportunity for public comment. *See id*. Thus, even if the IRS intends to consider imposing similar regulations on other groups in the future, it has provided no rational explanation for a process that puts 501(c)(4) organizations at a significant competitive disadvantage relative to others for an indefinite period. Only a new, comprehensive effort to address 501(c) organizations can remedy this shortcoming.

where its application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed") (internal quotation marks omitted); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (noting a presumption against retroactive rulemaking authority). Similarly, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them," and must give a "person of ordinary intelligence a reasonable opportunity to know" what the law is, so that "he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (internal quotation marks omitted) (explaining that this bedrock principle "has now been thoroughly incorporated into administrative law").

If adopted in its current form, the proposed rule could cause social welfare organizations to lose their tax-exempt status based on activities that they have already undertaken. This is because the annual form on which 501(c)(4)s detail their activities (including the campaign activities that cut against their tax-exempt status) accounts for actions that occur a year or more before its submission. *See* IRS, Exempt Organization Filing Requirements: Form 990 Due Date, *http://www.irs.gov/Charities-%26-Non-Profits/Political-Organizations/Exempt-Organization-Filing-Requirements:-Form-990-Due-Date*. As a result, in assessing whether a 501(c)(4) organization is liable for any tax under any promulgated new rule, the IRS would almost surely consider its conduct that occurred before the rule's effective date. This, in turn, would subject such organizations to tax liability for actions that they could not have known would have that effect.

To the extent the agencies do not drop the proposed rule, therefore, they should take measures to ensure that any final rule will not apply retroactively. Otherwise, social welfare

organizations will be forced to guess at how the IRS will evaluate their activities under the vague terms of the proposed rule, and they inevitably will self-censor their actions moving forward for fear of losing their tax-exempt status. The Department and IRS should not promote this sort of speech limitation.

VI. Conclusion

This proposed rulemaking has enormous significance to social welfare organizations and to society as a whole. As described above, CEO believes that the proposed rule violates the First and Fifth Amendments to the Constitution by impermissibly penalizing the political speech of 501(c)(4) organizations. In addition, the proposed speech limitations are inconsistent with the statute adopted by Congress, and there are clear APA failures in the agencies' rulemaking. These concerns, moreover, are exacerbated by the highly politicized context in which the proposed rule has been defended and issued. It is arbitrary—and unwise—for the Department and IRS to move forward with a rule when the motivation for doing so is the subject of official Congressional and criminal investigations into wrongdoing.

For all these reasons, CEO respectfully urges the Department and IRS to abandon the proposed rule. Failing that, CEO believes that the Department and IRS should review the comments they receive, collect additional information about the potential effects of the rule and various regulatory alternatives, and then engage in further dialogue with the American people in the context of multiple public hearings in locations across the county. Only then will the agencies be in a position to understand the scope and breadth of the proposed regulations and the dangers that the proposed rule poses to the Constitution and the statutory framework of the IRC.