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"Bright Lines": A Project That Fails to Live Up to Its Name

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According to the writer Julian Barnes, "Mystification is simple; clarity is the hardest thing of all."[1] Be that as it may, the "Bright Lines Project" began with the noble ambition of defying this axiom by taking the harder course; it was supposed to clear up the hopelessly vague rules that the IRS uses for determining "political intervention," in which non-profit entities are prohibited or restricted from partaking. The recent IRS scandal, involving the agency's discrimination against conservative groups applying for non-profit status, has brought to a head the need for serious reform of the tax law's treatment of political activity.

Unfortunately, the Project, chaired by non-profit tax attorney Gregory L. Colvin, and consisting of seven other prominent members and two contributors, ended up taking the easier route. As demonstrated by its recently released 32-page draft proposal, the Project has failed to live up to its name thus far. Its proposal does little to clarify the IRS's infamous "facts and circumstances" test and, in some respects, makes matters worse. The proposed rule would continue to regulate the timing, manner, and content of constitutionally protected speech about matters of public importance. Similarly, the proposal would still put the IRS in charge of regulating and making judgments about such speech, despite the inherent dangers in granting it such powers, not to mention the agency's longstanding incompetence and lack of interest in doing precisely that.

Perhaps the most damning evidence comes from the Project's own members, who write the following: "We seek a new definition of political intervention that is clear and predictable, *most of the time.*"[2] A group calling itself the "Bright Lines Project" should not have to hedge about the clarity of its own proposed rule. What's worse, the proposal

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[1] Merritt Moseley, Understanding Julian Barnes 72 (University of South Carolina 1997).
[2] "The Bright Lines Project: Clarifying IRS Rules on Political Intervention," Interim Draft, May 23, 2013 at 2 (emphasis added). *Available at* http://www.citizen.org/documents/BLP-clarifying-irs-rules-on-political-intervention.pdf.

they have come up with doesn't even meet their own qualified standard. In practice, their proposal is likely to be clear and predictable only *some of the time*.

The Overall Framework

Non-profit charities organized under Section 501(c)(3) of the U.S. tax code are prohibited from engaging in "political intervention," while tax-exempt entities under Sections 501(c)(4) (social welfare organizations), (c)(5) (labor unions), and(c)(6) (trade associations) cannot have political intervention as their "primary purpose." Although Project Chair Gregory Colvin has proposed setting a limit on political intervention by the latter groups to no more than 10 percent of their overall spending,[3] the Project itself does not address how much political activity is too much.[4] Rather, the Project simply purports to define what constitutes political intervention.

A) The "General Speech Rule"

The proposal begins with a very broad two-pronged approach that would include within the ambit of political intervention "any communication to any part of the electorate that (a) refers to a clearly identified candidate and (b) reflects a view on that candidate."[5] The proposal itself acknowledges not once, but twice that it is a "broad standard" and "broad at the outset."[6] As one delves deeper into the particulars, it becomes apparent that the standard is broader than broad.

Per the proposal, a communication is considered to "reflect a view" on a candidate if it "indicates a bias or favoritism *of any kind*."[7] "The view could be positive, negative, or *nuanced*."[8] On the other hand, a communication that refers to candidates "neutrally, without favoritism" would pass muster.[9] By the proposal's own account, the General Speech Rule is more speech-restrictive "than express advocacy," more speech-restrictive "than the functional equivalent of express advocacy," more speech-restrictive "than the *Furgatch"* standard [a controversial Ninth Circuit ruling], and more speech-

[3] *See* Testimony to Senate Judiciary Subcommittee on Crime and Terrorism, Apr. 9, 2013, *available at* http://www.judiciary.senate.gov/pdf/04-09-13ColvinTestimony.pdf.
[4] Bright Lines Project, Interim Draft at 7.
[5] *Id.* at 2.
[6] *Id.* at 12 and 14.
[7] *Id.* at 12 (emphasis added).
[8] *Id.* (emphasis added).
[9] *Id.* at 13.

restrictive "than the 'promote, attack, support, or oppose' rubric" used by the Federal Election Commission to define certain public communications.[10]

In short, the guiding principle of the General Speech Rule is to simply ban more speech by defining more of it as political campaign intervention. Groups that wish to speak would need to prove after the fact, if they can, the speech is permissible because it is neutral or falls under more complex exemptions. This will greatly chill speech about legislation and issues. To give but one example, many gun control groups were very disappointed with the early 2013 vote to reject gun control legislation in the Senate. Part of their strategy to change votes if the issue comes up again later in the current Congress is to run paid ads that harshly criticize Senators who voted against the bill and urge them to reconsider.[11] Under the General Speech Rule, all of this speech could be classified as political campaign intervention that would trigger taxes or possible loss of a tax exemption. Now imagine how the audit might go if the IRS auditor reviewing their speech is a member of the NRA.

It is also difficult to fathom how, in reality, anyone can determine whether a communication is perfectly "neutral" as opposed to being "nuanced." Simply because one person believes a message is "neutral" is no guarantee that IRS bureaucrats will consistently come to the same subjective conclusion. Remember, this is the agency whose employees took issue with groups that were simply trying to "make America a better place to live."[12] In practice, the Bright Lines proposal is a mere reference standard. That is to say, a communication that merely references a candidate for office could create a presumption of political intervention.

Moreover, to force groups to adopt a strict, monastic, IRS-enforced vow of speech neutrality is highly offensive to free speech and the concept of spirited public debate about important issues. An incumbent who breaks a campaign promise, to give but one example, could not be criticized for doing so, even if the criticism is irrespective of any election.

The prohibition against expressing a view also appears to be tied to whether there is controversy around it. A group can ask candidates to take a stand on issues or even make a pledge, but if the group wants to publish this information it may be wandering

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[10] *Id.* at 13.
[11] *See* press release, Americans for Responsible Solutions, April 24, 2013, *available at http://americansforresponsiblesolutions.org/news/americans-for-responsible-solutions-launches-accountability-campaign/*.
[12] "Obama: Alleged IRS political targeting 'outrageous'," CNN.com, May 13, 2013, *available at* http://www.cnn.com/2013/05/13/politics/irs-conservative-targeting (last visited June 12, 2013).

into prohibited territory "depend[ing] on the responses," particularly if there is disagreement among the candidates or disagreement with the organization's view.[13] Former Obama campaign general counsel and White House Counsel Bob Bauer summarizes the problems with this rule:

> In short, the controversial nature of the issue [that is the subject of the candidate pledge] is the dispositive factor. For it is not controversial speech, and of the most interest to voters, if none of the candidates buy it, or if all agree with it. It is controversial and prime subject matter for voter education if there will be a division of opinion among the candidates, presumably reflecting a division within the electorate. The organization's view is the same in all three cases—but under the test presented by the Project, the organization could not present its view in only one case—where the issue stirs up differences of opinion and the interest in voter education might be the highest. The ban on educating voters on these differences does not depend on further editorializing by the tax-exempt; it is just enough [to trigger the ban] for the organization to reveal its position and the agreement or disagreement with it among the candidates whose views are presented.[14]

B) The Safe Harbors

If a communication that satisfies the "General Speech Rule" does not meet one of four, very limited safe harbors, then the sponsor is presumed to be engaging in political intervention, and bears the burden of rebutting that presumption by resorting to the nebulous and problematic "facts and circumstances" test that, ironically, prompted the need for the Bright Lines Project in the first place.[15]

A speech-protective rule should set forth specific, narrow, bright-line standards that allow non-profit groups to easily determine what constitutes political intervention without consulting an attorney. Instead, the Bright Lines proposal takes the opposite approach, by setting forth a vague, free-ranging, open-ended general speech prohibition, from which specific activities are carved out. Although the carve-outs are styled as "safe harbors," they actually throw non-profits into the shark-infested regulatory waters with

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[13] Bright Lines Project, Interim Draft at 14.
[14] Bob Bauer, "Controversial Speech and the Education of Voters," More Soft Money Hard Law, Jun. 3, 2013, at http://www.moresoftmoneyhardlaw.com/2013/06/controversial-speech (last visited Jun. 12, 2013).
[15] *Id.* at 5.

nothing more than a life vest, because none of the protections applies to "paid mass media advertising."[16]

"Paid mass media advertising" is defined as:

> A communication to the general public, placed for a fee on one of the following media, operated by another person: a broadcast, cable, or satellite facility, newspaper, magazine, outdoor advertising facility, mass mailing service, telephone bank, or another person's web site or internet communications service.[17]

The proposed "safe harbors" are as follows:

1. Influencing official action

Under the Bright Lines proposal, a non-profit may attempt to influence official action without engaging in political intervention, but it must limit itself to "commentary on a public official that has a direct, limited, and reasonable relationship to specific actions the official may yet perform within his or her current term of office, without mention of any election or voting, or the person's candidacy or opponent."[18]

There are at least three glaring problems with this provision. The first is its extraordinary subjectivity. What constitutes a "direct," "limited," and, more importantly, a "reasonable" relationship between a communication and a specific official act? The proposal leaves non-profits at the mercy of IRS bureaucrats to determine the answers to these questions. With the tax laws running close to four million words (the equivalent of seven copies of *War and Peace*),[19] the IRS has enough on its plate simply administering the tax law Leviathan. The last thing the agency needs is to be forced to examine the content of speech to determine whether it is "reasonably" related to official actions.

The second obvious problem is that this exception is far too underinclusive. For one thing, the provision is limited only to future official actions. The National Archives

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[16] *Id.* at 3.
[17] *Id.* at 14. Every two years, the proposal would give the IRS the authority to revise the list to account for changes in technology. *Id*. The proposal (at 15) notes that it draws on existing FEC rules for its treatment of paid media, which begs the question: If the FEC's bright-line rules are sufficient to draw on for the proposal's mechanisms, why does the substance of the proposal go much further than the FEC's rules on express advocacy and political expenditures?
[18] *Id.* at 3 (emphasis added).
[19] Kelly Phillips Erb, "Tax Code Hits Nearly 4 Million Words, Taxpayer Advocate Calls It Too Complicated," Forbes.com, Jan. 10, 2013, *at* http://www.forbes.com/sites/kellyphillipserb/2013/01/10/tax-code-hits-nearly-4-million-words-taxpayer-advocate-calls-it-too-complicated (last visited Jun. 11, 2013).

building bears the following inscription from Shakespeare's "The Tempest": "What is past is prologue." A public official's prior actions may very well have a significant bearing on how she acts in the future. Thus, it is perfectly reasonable for non-profits attempting to influence official action to comment on a public official's prior record.

Additionally, this provision is not available for critiques of challengers. The Bright Line authors address this shortcoming by suggesting that a group could demonstrate its communication is not election-related by resorting to the facts and circumstances test.[20] As discussed more fully below, this would be very difficult to do. But the difficulty would be made even more so by the fact that many candidates' policy positions often only become apparent as a result of their campaign for elected office.

The limitation of this "safe harbor" to commentary on incumbents is unwise and unfortunate, since government officials generally are expected to govern as they campaigned. Thus, attempting to influence a potential policymaker's positions during a campaign may be a particularly effective means for effectuating change.

Lastly, although not as apparent a shortcoming as the two problems noted above, this safe harbor would also task the IRS agents with becoming experts on the likelihood of whether an endless constellation of policy issues will come up for legislative or executive action – an issue that has so vexed the media and certain members of Congress recently.[21] As the Bright Lines authors explain, a communication is a genuine attempt to influence official action, if and only if, "within [the official's] term of office . . . there are objective, ascertainable facts that make it reasonable to conclude there is a significant chance that an opportunity to take or not take the action [urged by the group] will be presented to or initiated by the official"; there must be "something more than a theoretical possibility" that the opportunity will come to pass.[22]

In "Example 4," the proposal goes on to narrow this safe harbor even more, by specifying that the opportunity to take action, in the case of a legislative issue, must be a "legislative vote or other major legislative activity" concerning the issue that is scheduled in the legislature at the time the communication is sent.[23]

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[20] Bright Lines Project Interim Draft at 15.
[21] *See* Eric Wang, "Political Intelligence: The New Oxymoron," *Roll Call*, May 13, 2013, *available at* http://www.rollcall.com/news/political_intelligence_the_new_oxymoron_commentary-224727-1.html?pos=lopilr.
[22] Bright Lines Project Interim Draft at 15-16.
[23] *Id.* at 16.

These limitations render this safe harbor comically underinclusive and nonsensical. In order to determine whether there is "more than a theoretical possibility" or a "significant chance" that a government official will take action on an issue during the official's current term of office, the IRS (as well as non-profit groups) would be put in the position of prognosticating secretive backroom agreements about the legislative and executive calendar.

Moreover, there is no explanation as to why this "safe harbor" is limited to an official's current term of office. Under this provision, a non-profit group cannot, with any degree of safety, urge a government official who is up for reelection to take action on an issue if the issue is certain to emerge in a subsequent (but not current) legislative session or executive term.

Officials, if reelected, or elected to a different office, can still change their minds, and a group can have a perfectly legitimate reason to try to impact future policies. For example, during the 2008 Democratic presidential primary, then-Senator Barack Obama opposed the "individual mandate" for health insurance.[24] Under this proposal (and especially under "Example 4"), a group supporting the "individual mandate" would not have been able to press Mr. Obama to support such a regime because there was no serious individual mandate proposal pending in Congress at the time. As we all know, Mr. Obama changed his position once he became president, and the "individual mandate" was arguably the most controversial issue in the monumental debate over "Obamacare."

In short, the temporal limitation of this "safe harbor" not only prohibits groups from looking back, but it also prohibits groups from looking too far ahead (i.e., into a subsequent term of office). To think – as the Bright Lines authors apparently do – that genuine issue advocacy could only occur within a narrow window of time is just plain silly. Great movements pressing for changes in government policies usually take years to come to fruition.

Setting aside for the moment the question of whether an issue is ripe for imminent official action, it would also be extremely difficult to determine what constitutes a "significant chance" that an official will take a requested action. For example, could the Sierra Club ask a Senator who favors oil drilling in the Gulf of Mexico to support a moratorium on offshore drilling, or is there no "significant chance" the Senator would do so?

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[24] *See* Andrew Cline, "How Obama Broke His Promise on Individual Mandates," *The Atlantic*, Jun. 29, 2012, *available at* http://www.theatlantic.com/politics/archive/2012/06/how-obama-broke-his-promise-on-individual-mandates/259183.

Of course, all of these concerns are largely academic, since this so-called "safe harbor" does not apply to paid mass advertising, so non-profits are left to shout their messages from their rooftops or perched on top of a street corner soapbox. The Bright Lines proposal forecloses a broad swath of media as being unsafe for issue advocacy groups, even if paid mass media is the best means for promoting a policy change.

2. Voter education comparing candidates

The second Bright Lines Project safe harbor is:

> Voter education that compares two or more candidates for an office, and may include the organization's views on such issues, if the communication consists solely of content in which the time, text, and/or space is offered in equal shares to each of the participating candidates, and the organization's share of content is no greater than the share available to any of the participating candidates.[25]

In theory, this provision is a good idea, especially since the IRS's current facts and circumstances test suggests that comparisons of candidates' positions may, in fact, constitute political intervention.[26] However, it is important to note that, under this safe harbor, candidates must be given a chance to actually provide material to the organization.[27] The organization cannot simply set forth the candidates' positions as they have been expressed on the campaign trail, in the news media, or on the candidates' own websites. If this information can be compiled from public sources, it makes little sense to impose this burden. The burden could be significant, because groups might feel the need to use certified mail and keep records proving they contacted each campaign and gave it adequate time to respond.

The proposal also is unclear as to how the candidate comparison provision squares with the "General Speech Rule" discussed above, under which expressing a view about a candidate is political intervention. In this respect, the proposal may be internally contradictory, for elsewhere in the proposal, it states that if an organization asks candidates to make a pledge (e.g., no new taxes), and some candidates respond affirmatively and others negatively, the organization could not present those results without expressing a view, and thus "must refrain from publicizing the candidates'

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[25] Bright Lines Project, Interim Draft at 3.
[26] *See* Internal Revenue Service, "Election Year Issues" at 370; *available at* http://www.irs.gov/pub/irs-tege/eotopici02.pdf.
[27] Bright Lines Project Interim Draft at 18.

responses . . . to avoid the threshold definition of political intervention."[28] Under the voter education / candidate comparison safe harbor, however, it would seem like publishing pledge results would not constitute political intervention. It is also unclear what a group must do if the candidate responds to the pledge request with a long statement that could not fit in the voter guide.

3. Self-defense

Under the Bright Lines proposal, an organization may respond to attacks that are made by candidates against the organization itself or against the organization's policies. An organization also may respond to press inquiries made to the organization about such attacks.[29] The response must be limited in its magnitude and reach so that it is no greater than the original attack.[30]

This appears to be a fairly straightforward provision, but in reality it is fairly restrictive. Consider that a candidate who attacks the organization probably will use hyperbole and may even use offensive accusations. The candidate may even lie, repeatedly. Yet in "expressing its reaction, the organization must be educational."[31]

If a candidate launched an expensive paid media campaign vilifying an organization, then under the Bright Lines proposal a paid media campaign to defend its reputation would be considered political campaign intervention. Even if the provision were amended to allow a paid response, there could be a great deal of uncertainty about the magnitude and reach of the original attack. After all, a candidate who attacked such a group will not share information about its reach, much less his future plans.

If a candidate called a news conference to attack the group and sent press releases to an unknown number of news outlets and only one newspaper reported on the attack, the targeted group would be limited to contacting that one newspaper after the news report was published, and could not widely distribute a press release countering the original attack. Effectively, the group would have to wait to see if news outlets reported on the attack before it could respond, though the group would be allowed to respond to press inquiries about the attack. This is a strange form of permissible self-defense, to say the least.

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[28] *Id.* at 14.
[29] *Id.* at 4.
[30] *Id.* at 19.
[31] *Id.*

4. Personal, oral remarks

The last safe harbor protects personal, oral remarks that are made at organization meetings. So long as a disclaimer is provided stating that the remarks are the speaker's personal opinion and not those of the organization, such remarks would not constitute political intervention by the organization.[32]

Even this apparently commonsense provision may not go far enough. The safe harbor does not appear to allow group members to participate by telephone or Internet streaming audio or video, even if such forms of meetings are regularly used by the group. As footnote 4 in the proposal states, "participants [are required to] be in a single room" under this safe harbor, and "reasonable accommodations" appear to be allowed only for "disabled participants to use text-based or other communications technologies or to participate from a remote location." Additionally, "mass conference calls, webinars or other broad, open public meetings would not qualify for the safe harbor.[33] And, if a reporter were to learn of the statement and reproduce it in any way, it would also possibly transform the remarks into political intervention.

C) Existing IRS Authorities

Notwithstanding any of the safe harbors, if a communication or activity is specifically treated as not being political intervention under existing IRS guidance, it would continue to be protected under the Bright Lines proposal.[34]

On the one hand, in instances where even the IRS has said an activity is not political intervention, it is nice for organizations that have come to rely on such determinations to be able to continue to do so. However, if there are instances where the IRS's blessing of certain activities directly contradicts the proposal's general framework or its particulars, this may be a recipe for new confusion. Rather than force non-profits to comb through the countless numbers of IRS revenue rulings and "technical advice memoranda" – which are not exactly easy to access – the Bright Lines Project should harmonize its proposed rules with the IRS determinations where the agency has deemed activities not to be political intervention.

[32] *Id.* at 4.
[33] *Id.* at 23 n. 4.
[34] *Id.* at 22.

D) Facts and Circumstances Backstop

If an organization's communication qualifies under the "General Speech Rule" (i.e., it refers to a clearly identified candidate and reflects a view on such candidate), and does not fall under one of the safe harbors, then the Bright Lines Project comes up with its own version of the IRS's deeply troubled facts and circumstances test as a backstop to see if that communication can be saved from the political intervention shipwreck.

As Bob Bauer has written:

> The Project in its promotion of "bright lines" leaves the reader with the hope that a new rule has sailed and left the facts and circumstances test to wave good-bye on the dock—only to discover that "facts and circumstances" have snuck into steerage and are ready to be summoned back on deck as needed.[35]

That, in and of itself, is bad enough. Even worse, however, is that the Project's own "facts and circumstances" test may be even broader than the IRS's version, and includes factors that the IRS did not articulate in its two seminal rulings on political intervention, as cited by Mr. Colvin previously.[36]

For example, the Project proposes that a communication disseminated in "locations where close election contests are occurring" could be "conclusive[]" evidence of political intervention.[37] Discussion of "wedge issues," "use of political code words," an organization's "factual credibility," an organization's "impartiality," "external events," and "the reaction of candidates and the media" are other factors the Project proposes for consideration in determining political intervention.[38] However, these factors have never been part of the IRS's "facts and circumstances" test.[39]

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[35] Bob Bauer, "The IRS and 'Bright Lines'," More Soft Money Hard Law, May 28, 2013, *at* http://www.moresoftmoneyhardlaw.com/2013/05/irs-bright-lines (last visited Jun. 11, 2013).
[36] Letter from Gregory L. Colvin, Partner, Adler & Colvin, to Lois G. Lerner, Director, Internal Revenue Service Exempt Organizations Division (Aug. 24, 2012), *available at* http://electionlawblog.org/wp-content/uploads/IRS-Rev-Ruls-on-Issue-Ads-GIL-request-00430120-1.pdf (citing IRS Rev. Rul. 2004-6 and 2007-41).
[37] Bright Lines Project Interim Draft at 5 and 29.
[38] *Id.* at 5 and 30.
[39] In Rev. Rul. 2007-41, the IRS did cite, *inter alia*, the following considerations for determining political intervention: "impartial treatment of candidates," " issue[s] distinguishing candidates for a given office," and "[w]hether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a

Do we really want to force the IRS into the business of being fact checkers and determining an organization's "factual credibility?" Do we really want to empower the IRS with being the speech police and determining what constitutes "political code words?" (We saw how well that worked when the agency decided the phrase "Tea Party" was code for political intervention.) And what issues should be considered "wedge issues?" Abortion? Guns? Gay marriage? Sequestration? Where does it begin or end? Would the IRS publish an annual list of "wedge issues" like its standard mileage rates for the business or charitable use of a car? Would the IRS also publish a weekly list of "close election contests?" Do we really want the IRS deciding these questions?

E) *Per se* Political Intervention

Unlike communications that meet the "General Speech Rule" threshold, but which can be saved by one of the "safe harbors," the Bright Lines proposal also includes the following two activities that are *per se* political intervention:

1. Express Advocacy

Under the Bright Lines proposal, express advocacy occurs when an organization expressly advocates "the election, defeat, nomination, or recall of a clearly-identified candidate" or "the election or defeat of candidates affiliated with a specific political party."[40]

If the Project had limited itself to this traditional test for express advocacy, there would be little to object to. However, it goes on to propose that express advocacy also include expressly advocating "that voters select candidates for support or opposition based on one or more criteria that clearly distinguish certain candidates from other candidates."[41]

This is broader than the formulation of express advocacy that the Supreme Court set forth in *FEC v. Massachusetts Citizens for Life* (*MCFL*).[42] In *MCFL*, a group distributed a newsletter urging recipients to "Vote Pro-Life" and then identified specific candidates as being pro-life.[43] As the Court explained:

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candidate for public office." *See* IRS Rev. Rul. 2007-41, *available at* http://www.irs.gov/pub/irs-tege/rr2007-41.pdf. The Project puts a far broader gloss on these factors.

[40] Bright Lines Project Interim Draft at 3.

[41] *Id.*

[42] 479 U.S. 238 (1986).

[43] *Id.* at 243.

> The publication not only urges voters to vote for "pro-life" candidates, but also identifies and provides photographs of specific candidates fitting that description. The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates.[44]

By contrast, under the Bright Lines proposal, a communication could be considered express advocacy even if it does not name any specific candidates. For example, if the League of Conservation Voters or the Sierra Club were to ask their members to vote for environmentalists in general, that would be political intervention that could jeopardize their tax status. Whether or not this should be the proper rule is debatable, but it is a formulation of express advocacy that neither the Supreme Court has blessed nor that the FEC has used.[45]

The proposal also defines two other new and novel forms of express advocacy. This would include urging voters to take pledges to vote for or against candidates depending on the candidate's view on an issue, even without listing particular candidates. It would also cover exhortations to contribute to candidates, even if no specific candidates were mentioned, and even if it was a general exhortation such as "donate to the candidates you believe would lead to better government."[46]

The creation of new forms of "express advocacy" that fail to match the Supreme Court or FEC definitions will create more confusion in an area that is already too complex.

2. Use of Resources

The second way in which an organization engages in *per se* political intervention is if it uses its resources to support or oppose candidates (other than through sponsoring communications), or if it is reasonably foreseeable that its resources will be used to support or oppose candidates and the organization has not taken reasonable steps to prevent such use.[47]

This is a fairly straightforward and unremarkable provision that does not require much discussion.

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[44] *Id.* at 249.
[45] *See* 11 C.F.R. § 100.22.
[46] Bright Lines Project, Interim Draft at 10.
[47] *Id.* at 4.

Miscellaneous Provisions

A) Definition of "Candidate"

The proposal provides that an individual is a "candidate" only if that person has officially announced his or her candidacy.[48] Thus, unless an organization explicitly puts forth an individual as a candidate, commentary about individuals who have not declared for office would not constitute political intervention. The proposal correctly notes that, "[a]t any given time, there are dozens if not hundreds of prominent [individuals] that 'others' have stated ought to run for [office]," but who are not actual candidates.[49] In contrast to all of the other broad, open-ended provisions proposed by the Project, we support this definition of "candidate."

B) Foreign Elections

The proposal also provides that an American non-profit organization's activities with respect to foreign elections could constitute political intervention if it would constitute political intervention with respect to a domestic election.[50] We question whether this would improvidently hamper the activities of pro-democracy organizations that oppose sham elections in authoritarian regimes like China, Cuba, Russia, Venezuela, etc. These organizations include groups like the National Democratic Institute and International Republican Institute, which not only enjoy 501(c)(3) status, but were founded by and receive funding from the federal government as (c)(3) entities. In June 2013, both groups had workers that were convicted by the Egyptian government on charges the groups were using foreign monies to create political unrest.

Conclusion

The wisdom of the ages admonishes us not to judge a book by its cover. The genesis of the current IRS scandal is the agency's failure to heed that adage and, instead, to go after groups on the basis of their names, among other things. Similarly, one cannot draw any conclusions about the Bright Lines Project based on its name. In fact, the Project's proposed rule for determining political intervention by non-profits falls far short of the group's laudable ambition. Rather than create a narrowly tailored, clear and objective, easy-to-understand and easy-to-administer rule, the Project introduces another broad, open-ended, and vague standard, along with expansive new variations on comparatively clear existing concepts. As if that were not enough, the proposal would

[48] *Id.* at 6.
[49] *Id.*
[50] *Id.* at 6-7.

retain and even expand the IRS's nebulous "facts and circumstances" test where activities do not fall within one of the proposal's limited and deceptively captioned "safe harbors." As a whole, the Project would still leave the IRS in charge of regulating the timing, manner, and content of issue advocacy, thereby chilling speech that is at the core of the First Amendment's protections.