LAW OFFICES
WEINBERG, JACOBS & TOLANI, LLP
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
TELEPHONE (301) 468-5500
FAX (301) 468-5504
WEB SITE: WJLAW.COM

10411 MOTOR CITY DRIVE, SUITE 500
BETHESDA, MARYLAND 20817

BARNABY ZALL, DC MD
BZALL@BZALL.COM
DIRECT DIAL: 301-231-6943

February 23, 2014

The Hon. Jacob Lew
Secretary of the Treasury
CC:PA:LPD:PR (REG-134417-13) Room 5205
Internal Revenue Service
P.O. Box 7604 Ben Franklin Station
Washington, DC 20044

RE: COMMENT ON IRS NOTICE OF PROPOSED RULEMAKING REG-134417-13 ON "GUIDANCE FOR TAX-EXEMPT SOCIAL WELFARE ORGANIZATIONS ON CANDIDATE-RELATED POLITICAL ACTIVITIES", 78 FED. REG. 71535 (NOV. 29, 2013)

Dear Mr. Secretary:

These comments are directed to the proposed regulations circulated by the Department of the Treasury and the Internal Revenue Service in a Notice of Proposed Rulemaking issued November 29, 2013 defining political activities that are not permissible as "social welfare" for organizations exempt from tax under Internal Revenue Code § 501(c)(4). These comments are directed solely to the question of "litigation risk" generated by the proposed regulations.

OVERVIEW:

It is not difficult to estimate the litigation risk in these proposed regulations, and that risk is extraordinarily high. To use just one simple and stark example: **THE IRS PROPOSES TO BAN BOOKS**. (*See* P. 27, *infra*.)

And not just ban books by political candidates, but any written or recorded material by anyone proposed for appointment to any federal, state or local public office. The proposed regulations forbid "Distribution of any material prepared by … a candidate …, including, without limitation, written materials, and audio and video recordings." 78 Fed. Reg. 71541, Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(A)(*6*). But the expanded definition of "candidate" sweeps in "an individual who … is proposed by another, for … nomination … or appointment to any federal,

state, or local public office." *Id.*, Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(B)(*1*). A § 501(c)(4) organization, for example, could not distribute any written or recorded information by a person who is proposed for appointment as dog-catcher in a small town, including blog posts or books.

This is most ironic since recent disclosures of internal IRS and Treasury emails reveal that the proposed regulations were first considered as a reaction to the Supreme Court's then-recent decision in *Citizens United v. Fed. Election Comm.*, 558 U.S. 310 (2010) ("*Citizens United*"). (*See,* P. 33, *infra*.) It is widely believed that the government lost the *Citizens United* case at its first oral argument when Malcolm Stewart, a Deputy Solicitor General, told the Court that the government could ban books. (*See,* P. 27, *infra*.) When the case was re-argued, then-Solicitor General Elena Kagan was asked about book banning; she replied: "The government's position has changed." Yet here the IRS is proposing to ban books by persons who might be proposed for appointment to public office.

The first question in any constitutional analysis is whether the agency has the power to promulgate the rule. The proposed regulations are a direct challenge to two different but complementary lines of Supreme Court cases; one on the power of the IRS to limit speech that is not paid for by tax-deductible contributions, and the other on the power of the government to define political activity as anything more than "express advocacy" and its functional equivalent. The proposed regulations are likely to be litigated immediately upon promulgation, and, given both the current state of the law and the IRS's recent actions, are likely to be found unconstitutional under one or both of those lines of Supreme Court cases.

SUMMARY OF DETAILED COMMENTS:

1) The IRS must respect the First Amendment even in tax classification. (*See* P. 6.)

Although courts usually defer to the IRS's expertise in tax regulation, regulations must be based on a reasonable interpretation of congressional intent. Congress has never said that § 501(c)(4) organizations cannot engage in political activity, as it has for § 501(c)(3) charities. Instead Congress has not only recognized that § 501(c)(4) organizations can and do engage in political activity, it has chosen to tax their political activities. Courts, including the Supreme Court, have also recognized that § 501(c)(4) organizations can engage in political activity.

It is no defense of the proposed regulations to say that they are only a "tax classification," and not a regulation of speech. The current regulations governing § 501(c)(4) organizations' political activities were enacted soon after the Supreme Court's 1958 decision in *Speiser v. Randall*. "The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech." *Speiser v. Randall*, 357 U.S. 513, 518 (1958). *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), is often

misquoted as empowering the IRS to ignore speech infringements in tax classifications, but *Regan* did not reverse *Speiser*; the decision simply says that the IRS has such power only in cases where the speech uses direct or indirect government funding. Because there is no government "subsidy" of speech by § 501(c)(4) organizations – which is both funded by non-deductible contributions and taxed under Internal Revenue Code § 527 – *Regan* does not provide authority to the IRS to block § 501(c)(4) speech. *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, __ U.S. __, 133 S.Ct. 2321, 2328-30 (June 20, 2013) ("*Open Society*") (distinction between government funding to a "project" or to a "grantee").

2) The Supreme Court Has Become Much More Protective of Political Speech By Tax-Exempt Organizations. (*See*, P. 19.)

The NPRM does not write on a blank slate. In recent years, the Supreme Court has issued several decisions with clear and explicit direction on what speech can be limited and how. The most likely judicial conclusion is that the proposed regulations are unconstitutional under the Supreme Court's rulings on exempt organizations' ability to engage in express advocacy political campaign intervention, such as *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"). The Supreme Court has already defined a sufficient interest to permit the government – including the IRS – to suppress political speech, and these regulations go far beyond that interest: "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election." *WRTL*, 551 U.S. at 474.

The *WRTL* test has only two parts: 1) is the speech of the tax-exempt organization either "express advocacy" or the "functional equivalent" of "express advocacy?" In other words, can the speech **only** be understood as an appeal to vote for or against a specific political candidate? And 2) if there is any ambiguity or question about whether the speech is express advocacy or its functional equivalent, the decision must be resolved in favor of permitting the speech. "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *WRTL*, 551 U.S. at 474. The proposed regulations challenge both parts of the *WRTL* test, by including substantial areas of speech that are neither express advocacy nor its functional equivalent, and by resolving ambiguities in favor of prohibiting the speech.

3) The IRS's Litigation Risk Is Substantially Increased By Procedural and Substantive Defects in the NPRM and Recent IRS Actions. (*See,* P. 24.)

The proposed regulations make significant changes in prior regulation and practice. In addition to activities that have traditionally been recognized as "political," the proposed regulations expressly "sweep in" many non-political activities, simply to reduce the "fact-intensive determinations" made by trained IRS personnel. Yet "the desire for a bright-line rule ... hardly constitutes the *compelling* state interest necessary to justify any infringement on First

Amendment freedom." *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 263 (1986) ("*MCFL*"). More importantly, "[t]his Court has never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent." *WRTL*, 551 U.S. at 476.

In addition, the IRS's actions prior to issuing the NPRM greatly weaken its rationale. The NPRM proposing new definitions of permissible political activity by § 501(c)(4) organizations was viewed as a reaction to the ongoing IRS "scandal" over targeting organizations by name or ideology, but it does not address the actual concerns raised in the investigation of the "scandal." In addition, the new regulations were not actually triggered by the "scandal" in application processing; recently revealed internal documents show that they had been in process for several years and were actually sparked by concern over the Supreme Court's decision in *Citizens United*. Making a major change in law that affects speech is a choice for Congress, not the IRS, and the IRS's record behind this NPRM further endangers its litigation chances.

The proposed regulations present the Supreme Court with a clear question: will the Court's traditional deference to IRS regulatory determinations overwhelm its recent and traditional decisions finding that the IRS could not substantially restrict speech by § 501(c)(4) organizations without unconstitutionally offending the First Amendment rights of speech, association, assembly and petition. By proposing regulations that expressly "sweep in" non-political speech – in other words, by including both speech that the Court has recognized as regulable "express advocacy" and speech that the Court has recognized as far outside compelling governmental interests – the IRS has asked the Supreme Court to make yet another decision on whether it has the power to limit core protected speech. The litigation risk is high.

The IRS and Treasury have lost the public trust necessary to merely amend or "tweak" these proposed regulations. The secret drafting and incomplete NPRM violate the Administrative Procedures Act and other procedural protections. The substance of the regulation is *ultra vires*, since there is no evidence that Congress intended to delegate the legislative power to block speech that was already taxed. And the substance of the proposed regulations has drawn almost universal criticism, even from those who have asked the IRS to do something about political activities by § 501(c)(4) organizations.

The IRS should withdraw the proposed regulations. Instead, the IRS should issue what it planned to do all along: guidance clarifying existing rules, applying the rules laid down by the Supreme Court in *WRTL* and other cases.

THE COMMENTER:

Barnaby Zall is an experienced tax-exempt organization attorney, a long-time member of the American Bar Association's Section of Taxation, Committee on Exempt Organizations, and its Subcommittee on Political Organizations. He is also an experienced appellate litigator, having participated in dozens of Supreme Court cases. Marcia Coyle, "Brief of the Week: Group Wants to Lift Limits on Political Giving," *National Law Journal*, July 17, 2013, http://www.nationallawjournal.com/id=1202611293322?slreturn=20140116112348#. He is co-convener of the First Tuesday Lunch Group, an informal monthly discussion group of tax-exempt and campaign finance lawyers from across the political and ideological spectrums. He filed comments with the Office of Management & Budget on the Paperwork Reduction and Regulatory Flexibility Act requirements for this NPRM. http://www.campaignfreedom.org/wp-content/uploads/2013/12/Comments-on-PRA-and-RFA-Barnaby-Zall.pdf. These comments are not submitted on behalf of any client.

HEARING REQUESTED

A public hearing should be held on the proposed regulations.

I. THE IRS MUST RESPECT THE FIRST AMENDMENT EVEN IN TAX CLASSIFICATION:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011).

The first question about any regulation of political speech by nonprofit or other organizations is whether the federal government has the power to do so. The ultimate authority is the Constitution, and in this case, the First Amendment:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONST., amdt I.

> The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (*quoting Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)); see *Buckley [v. Valeo*, 424 U.S. 1, 14 (1976)] ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution"). For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest."

Citizens United, 558 U.S. at 339-40.

> By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of "destroying the liberty" of some factions is "worse than the disease." THE FEDERALIST No. 10, p. 130 (B. Wright ed.1961) (J. Madison). Factions should be checked by permitting them all to speak, see *ibid.*, and by entrusting the people to judge what is true and what is false.

Citizens United, 558 U.S. at 354-55.

The burden of establishing the required compelling interest supporting governmental power is on the government, not the speaker. Where "a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, ... 'the burden is on the government to show the existence of [a compelling] interest'" *WRTL*, 551 U.S. at 464-65, *quoting, First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

A. Courts Generally Defer to the IRS on Tax Matters If the Statute Is Ambiguous or Silent, and the Regulation Is a "Reasonable Construction" of the Statute:

Congress may delegate to the IRS the authority to craft implementing regulations to help it administer the Internal Revenue Code. It has done so in I.R.C. § 7805(a), authorizing the Secretary of the Treasury to: "prescribe all needful rules and regulations for the enforcement" of the tax laws. Internal Revenue Code ("I.R.C.") § 7805(a).

Courts generally respect the delegated power of the Internal Revenue Service to regulate speech and association in the tax area. *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (courts defer to agency's full Due Process interpretations within its areas of delegated authority to "speak with the force of law"); *Mayo Foundation for Medical Education and Research v. U.S.*, 131 S.Ct. 704, 713 (2011) ("The principles underlying our decision in *Chevron* apply with full force in the tax context."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 596 (1983) ("[I]n an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems").

But the agency cannot just impose its own construction of the statute; it must be a **permissible** construction of the statute. *Chevron*, 467 U.S. at 843; *Holder v. Gutierrez*, 132 S.Ct. 2011, 2017 (2012). It cannot go outside the statute, nor can its interpretation be unreasonable. "No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). The "fox-in-the-henhouse syndrome is to be avoided . . . by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority." *Id.*, 133 S. Ct. at 1874.

Generally, this permits the IRS to adopt a regulation if it is a "reasonable interpretation of the enacted text" of the statute. *Mayo Foundation*, 131 S.Ct. at 714. The questions are whether the challenged regulation "is one to which Congress has not directly spoken, and [whether] the Treasury Department's rule is a reasonable construction of what Congress has said." *Mayo Foundation*, 131 S.Ct. at 715.

B. Congress Has Never Said, Directly or Indirectly, That § 501(c)(4) Organizations Cannot Engage in Electioneering, as It Did for § 501(c)(3) Organizations; Instead Congress Chose to Permit and Tax Electioneering by § 501(c)(4) and Other Organizations:

Congress has not said that § 501(c)(4) organizations cannot engage in political campaign intervention. Section 501(c)(4) of the I.R.C. reads, in relevant part:

> (4)(A) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

I.R.C. § 501(c)(4).

Section 501(c)(4) does not contain an express prohibition on political activity. The other sections of Section 501(c) which have been interpreted as including a "primary purpose" test on political activities, also don't contain express language on political activity. *See, e.g.,* I.R.C. 501(c)(5): "(5) Labor, agricultural, or horticultural organizations"; I.R.C. 501(c)(6): "(6) Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."

In contrast, Section 501(c)(3) contains an express prohibition on political activity:

> (3) …, **which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office**.

I.R.C. § 501(c)(3) (emphasis added).

Section 527 of the Code also affects Congressional treatment of political activities of exempt organizations. Section 527 is, in essence, the mirror image of Section 501(c)(4), requiring political organizations subject to its terms to engage primarily in political activity, and to keep non-political activity to a less-than-primary level. Unlike Section 501(c)(4), which does not mention political activity, however, Section 527(e) defines political activity in express terms, though with a different name:

> (e) (2) Exempt function
>
> The term "exempt function" means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or

> the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.

I.R.C. § 527(e).

In other words, Congress knows how to reference political activity, either generally or less explicitly, when it means to include it within a tax-related prohibition or limitation. It did not do so in the text of Section 501(c)(4).

When 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." *Levin v. U.S.*, __ U.S. __, 133 S.Ct. 1224, 1233 (March 4, 2013); *Russello v. United States*, 464 U.S. 16, 23 (1983); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452-53 (2002) ("as demonstrated by other sections of the Act").

Not only did Congress know about and permit § 501(c)(4) organizations to electioneer, it chose to tax them, removing any governmental subsidy or involvement from those organizations' speech. I.R.C. § 527(b), (e), (f). Section 527, which was added by Pub.L. 93-625, January 3, 1975, 1975-1 C.B. 510, 515, and amended by Pub.L. 95-502, October 21, 1978, 1978-2 C.B. 393-395, imposes a tax on "exempt function activity." I.R.C. § 527(e)(2).

Section 527 has a relevant legislative history. The report of the Senate Finance Committee on Public Law 93-625 specifically indicates that the provisions of section 527(f) apply to organizations that are exempt under section 501(c)(4). It states:

> "Exempt organizations which are not political organizations. - **Under present law, certain tax-exempt organizations (such as sec. 501(c)(4) organizations) may engage in political campaign activities.** The bill generally treats these organizations on an equal basis for tax purposes with political organizations. Under the bill organizations which are exempt under section 501(a) and are described in section 501(c), that engage in political activity, are to be taxed on their net investment income in part as if they were political organizations. ..."

S. Rep. No. 93-1358, 93d Cong., 2d Sess., 29 (1974), 1975-1 C.B. 517, 533 (emphasis added). The tax mentioned in the Senate Report is now codified in I.R.C. § 527(a), made applicable to § 501(c)(4) and other § 501(c) organizations by Section 527(f). I.R.C. § 527(f)(1).

Section 501(c)(4) organizations are subject to the § 527 tax on their "exempt function" activities, even if they are not political organizations (because their "primary purpose" is not political activity, as required under § 527(e)(1), which defines "political organization"). I.R.C. § 527(f)(1). After the Supreme Court held, in *FEC v. Massachusetts Citizens for Life*, 479 U.S.

238, 255-56 (1986) ("*MCFL*"), that prohibitions against "independent expenditures" (express advocacy statements made without coordination with a candidate or party) could not be enforced against some § 501(c)(4) organizations, Section 527 was amended to expressly exempt "qualified" organizations. I.R.C. § 527(e)(5).

The flip side of that analysis is that Congress noted that § 501(c)(4) organizations "may engage in political campaign activities." Nothing that Congress has passed since 1974 undercuts that analysis.

The only ground on which the IRS could limit political speech of § 501(c)(4) organizations is that it was simply implementing the law as Congress intended it. The test is whether the interpretation is a "reasonable interpretation of the enacted text" of the statute. *Mayo Foundation,* 131 S.Ct. at 714. It cannot go outside the statute, nor can its interpretation be unreasonable. *Id*., 131 S.Ct. at 715.

One simple test of the boundaries on interpretation is whether a particular interpretation has been long settled, or has been recognized by the Supreme Court. There has never been an interpretation that bars political activity by § 501(c)(4) organizations. The IRS has implemented § 527 through regulations that include the statutory definition of "exempt function" activity. Treas. Reg. § 1.527-1. The Regulations provide that Section 527 taxation does not "sanction the intervention in a political campaign by an [§ 501(c)] organization if such activity is inconsistent with its exempt status under section 501(c)." Treas. Reg. § 1.527-6(g).

The IRS has also issued guidance for § 501(c)(4) organizations demonstrating the interplay between "issue advocacy" fully permissible under I.R.C. § 501(c)(4) with the rules under § 527. Rev. Rul. 2004-6, IRB 2004-4 (January 26, 2004), http://www.irs.gov/irb/2004-04_IRB/ar10.html. The guidance demonstrates in its first paragraph that some activities which Congress determined to tax under § 527 are not considered by the IRS to be prohibited activities for § 501(c)(4) and other tax-exempt organizations: "Because public policy advocacy may involve discussion of the positions of public officials who are also candidates for public office, a public policy advocacy communication may constitute an exempt function within the meaning of § 527(e)(2). If so, the organization would be subject to tax under § 527(f)." *Id*.

The fact that the IRS has enforced the current regulation for five decades and there has been no change in the underlying statute is additional evidence that a dramatic change in the regulations is likely not a reasonable reflection of congressional intent. *Barnhart v. Walton*, 535 U.S. 212, 220 (2002)("normally accord particular deference to an agency interpretation of

'longstanding' duration"). The Supreme Court has long recognized that § 501(c)(4) organizations can engage in some amount of political campaign intervention:

> Section 501(c)(4)(A) grants exemption to "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, ... the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes." **An organization "may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is primarily engaged in activities that promote social welfare."** Rev. Rul. 81–95, 1981–1 Cum. Bull. 332, 1981 WL 166125. Unlike contributions to § 501(c)(3) organizations, donations to those recognized under § 501(c)(4) are not tax deductible. See *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 543, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983).

Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 150 n. 1 (2003) (emphasis added). *See, also, MCFL*, 479 U.S. at 253 n.6 ("Its central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates.").

C. Congress Has Denied A Federal Subsidy for Political Speech, and the IRS May Protect That Subsidy Through Careful, But Not Burdensome, Enforcement:

> It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. … It is settled that speech can be effectively limited by the exercise of the taxing power. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech.

Speiser v. Randall, 357 U.S. 513, 518 (1958). The current IRS regulations governing § 501(c)(4) political activities were promulgated in 1959, the year after the *Speiser* decision.

Nevertheless, the Court has recognized a narrow exception from First Amendment protections for those speakers who receive government funds, either directly or through a tax subsidy. *Regan*, 461 U.S. at 545. In *Regan*, a § 501(c)(3) charity challenged the limitation on lobbying by the charity, on the grounds that veterans organizations are not so limited. 461 U.S. 540, 545 (1983). The case was limited only to one point: "Rather, TWR seeks to force Congress to subsidize its lobbying activity." 461 U.S. at 544. "TWR contends that Congress' decision not to subsidize its lobbying violates the First Amendment." 461 U.S. at 545. The Court disagreed. "Congress has merely refused to pay for the lobbying out of public monies." *Id*. The Court held in very precise terms: "The issue in this case is not whether TWR must be permitted to lobby,

but whether Congress is required to provide it with public money with which to lobby. For the reasons stated above, we hold that it is not." 461 U.S. at 551.

The Court, in its main opinion, explained that the refusal was not an "unconstitutional condition" denying a right to speak, because the § 501(c)(3) charity had easy access to another channel for speech – a "sister" § 501(c)(4) organization that could speak. *Regan*, 461 U.S. at 546.

> It appears that TWR could still qualify for a tax exemption under § 501(c)(4). It also appears that TWR can obtain tax deductible contributions for its non-lobbying activity by returning to the dual structure it used in the past, with a § 501(c)(3) organization for non-lobbying activities and a § 501(c)(4) organization for lobbying. TWR would, of course, have to ensure that the § 501(c)(3) organization did not subsidize the § 501(c)(4) organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize.[6]
>
> > FN6. TWR and some amici are concerned that the IRS may impose stringent requirements that are unrelated to the congressional purpose of ensuring that no tax-deductible contributions are used to pay for substantial lobbying, and effectively make it impossible for a § 501(c)(3) organization to establish a § 501(c)(4) lobbying affiliate. No such requirement in the code of regulations has been called to our attention, nor have we been able to discover one. The IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying. This is not unduly burdensome.

Regan, 461 U.S. at 543-44.

Regan has often been looked at as validating the IRS's authority to limit speech that involves any tax classification, and the IRS does have some power to discriminate in making tax classifications. *See, e.g., Leathers v. Medlock*, 499 U.S. 439, 450-51 (1991) ("*Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983), stands for the proposition that a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas.").

But *Regan* did not eviscerate *Speiser*; it simply said that the organization was not unconstitutionally foreclosed from speaking because it could use a § 501(c)(4) organization to which tax deductions were not permitted. That requirement to use a § 501(c)(4) organization so that there was no federal "subsidy" was not "unduly burdensome." *Regan*, 461 U.S. at 544 n. 6. This is not the same as the power to make unfettered tax classifications.

D. The Power to Protect Against Subsidies for Speech Does Not Extend to Cutting Off Organizations That Use Non-Deductible Funds to Speak, Such As § 501(c)(4) Organizations:

A three-Justice concurrence (Justices Blackmun, Brennan and Marshall) in *Regan* was more specific about requirements for IRS restraint:

> I write separately to make clear that in my view the result under the First Amendment depends entirely upon the Court's necessary assumption – which I share – about the manner in which the Internal Revenue Service administers § 501.
>
> …
>
> The constitutional defect that would inhere in § 501(c)(3) alone is avoided by § 501(c)(4). As the Court notes, *ante* at 544, TWR may use its present § 501(c)(3) organization for its nonlobbying activities and may create a § 501(c)(4) affiliate to pursue its charitable goals through lobbying. The § 501(c)(4) affiliate would not be eligible to receive tax-deductible contributions.
>
> …
>
> Any significant restriction on this channel of communication, however, would negate the saving effect of § 501(c)(4). It must be remembered that § 501(c)(3) organizations retain their constitutional right to speak and to petition the Government. Should the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4) affiliates, the First Amendment problems would be insurmountable.

461 U.S. at 551-54 (Blackmun, J., concurring).

The significance of these three Justices joining in the *Regan* result, even in a concurrence, is that they represented the dissent in earlier cases on the use of affiliates for advocacy. *See, e.g., Maher v. Roe*, 432 U.S. at 464, 484 (1977) (Brennan, Marshall and Blackmun, JJ., dissenting); David Currie, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, Univ. of Chicago Press, 1990, at 473-74. The *Regan* discussion in the main opinion and the forceful concurrence is the beginning of a series of decisions that forged the links between the denial of tax exemption in *Speiser* and the limits on the IRS power of tax classification where there are no government funds used for the questioned speech.

In a later case, the Court noted both the main opinion and the Blackmun concurrence, and solidified the "affiliate" speech alternative:

> In [*Regan v.*] *Taxation With Representation*, the Court found that Congress could, in the exercise of its spending power, reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations by prohibiting such organizations from using tax-deductible contributions to support their lobbying efforts. In so holding,

> however, we explained that such organizations remained free "to receive [tax-]deductible contributions to support nonlobbying activit[ies]." 461 U.S., at 545. Thus, a charitable organization could create, under § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), an affiliate to conduct its nonlobbying activities using tax-deductible contributions, and, at the same time, establish, under § 501(c)(4), a separate affiliate to pursue its lobbying efforts without such contributions. 461 U.S., at 544; *see also id*., at 552–553 (BLACKMUN, J., concurring). Given that statutory alternative, the Court concluded that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity; [it] has simply chosen not to pay for TWR's lobbying." *Id*., at 546.
>
> In this case, however, unlike the situation faced by the charitable organization in *Taxation With Representation*, a noncommercial educational station that receives only 1% of its overall income from CPB grants is barred absolutely from all editorializing. Therefore, in contrast to the appellee in *Taxation With Representation*, such a station is not able to segregate its activities according to the source of its funding. The station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity.
>
> Of course, if Congress were to adopt a revised version of § 399 that permitted noncommercial educational broadcasting stations to establish "affiliate" organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid under the reasoning of *Taxation With Representation*. Under such a statute, public broadcasting stations would be free, in the same way that the charitable organization in *Taxation With Representation* was free, to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities. *Cf. id*., at 544. But in the absence of such authority, we must reject the Government's contention that our decision in *Taxation With Representation* is controlling here.

FCC v. League of Women Voters of Calif., 468 U.S. 364, 399-401 (1984).

Similarly, in *Rust v. Sullivan*, 500 U.S. 173, 197-98 (1991), the Court repeated its *FCC v. League of Women Voters* explanation of the affiliate, adding that the IRS does have some power to prevent any subsidy of the non-deductible activities by the use of tax-deductible dollars:

> Similarly, in *Regan* we held that Congress could, in the exercise of its spending power, reasonably refuse to subsidize the lobbying activities of tax-exempt charitable

> organizations by prohibiting such organizations from using tax-deductible contributions to support their lobbying efforts. … We also noted that appellee "would, of course, have to ensure that the § 501(c)(3) organization did not subsidize the § 501(c)(4) organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize." *Id*., at 544.

Rust v. Sullivan, 500 U.S. at 197-98.

Similarly, in *MCFL*, the Court reiterated that a tax-exempt organization could engage in political campaign intervention with nondeductible funding:

> The Commission relies on *Regan v. Taxation With Representation*, 461 U.S. 540, (1983), in support of its contention that the requirement that independent spending be conducted through a separate segregated fund does not burden MCFL's First Amendment rights. *Regan*, however, involved the requirement that a nonprofit corporation establish a separate lobbying entity if contributions to the corporation for the conduct of other activities were to be tax deductible. If the corporation chose not to set up such a lobbying arm, it would not be eligible for tax-deductible contributions. Such a result, however, would infringe no protected activity, for there is no right to have speech subsidized by the Government. *Id*., at 545–546. By contrast, the activity that may be discouraged in this case, independent spending, is core political speech under the First Amendment.

MCFL, 479 U.S. at 256 n. 9.

MCFL is especially significant, because it is a case dealing with political campaign intervention, rather than lobbying, but the rationale was the same. "The regulation imposed as a result of this concern is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)." *MCFL*, 479 U.S. at 259 n. 12. And the effect, as noted above, was to require changing the tax on political activities to exempt certain nonprofit organizations. I.R.C. § 527(e)(5) (exempting "qualified" tax-exempt organizations).

Thus, the First Amendment limits the ability of the IRS to restrict political speech that is not "subsidized" by tax-deductible dollars. The agency may take steps to avoid the use of deductible dollars to fund political speech, but may not cut off political speech that is funded from non-deductible sources. As shown above, § 501(c)(4) political speech is not only funded by non-deductible sources, it is taxed. IRC §§ 162(e), 527(f).

Last June, the Supreme Court again turned to this question of "tax subsidy" vs. free speech. *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, __ U.S. __, 133 S.Ct. 2321, 2327-29 (June 20, 2013) ("*Open Society*"), was noted mostly for its holding that the

federal government cannot force organizations which it supports with grants, in exchange, to oppose prostitution and sex trafficking. This decision was based on long-settled principles of "government speech," – if the government is paying for speech, it can dictate what is said. "[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995) (internal citations removed).

But funding "government speech" does not allow the government to force or limit speech paid for by other, non-governmental funds. *Open Society*, 133 S.Ct. at 2329-31. "In the present context, the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself." 133 S. Ct. at 2328.

> In *Regan v. Taxation With Representation of Washington*, the Court upheld a requirement that nonprofit organizations seeking tax-exempt status under 26 U.S.C. § 501(c)(3) not engage in substantial efforts to influence legislation. The tax-exempt status, we explained, "ha[d] much the same effect as a cash grant to the organization." 461 U.S. at 544. And by limiting § 501(c)(3) status to organizations that did not attempt to influence legislation, Congress had merely "chose[n] not to subsidize lobbying." *Ibid.* In rejecting the nonprofit's First Amendment claim, the Court highlighted — in the text of its opinion, but see *post*, at 2326 — the fact that the condition did not prohibit that organization from lobbying Congress altogether. By returning to a "dual structure" it had used in the past — separately incorporating as a § 501(c)(3) organization and § 501(c)(4) organization — the nonprofit could continue to claim § 501(c)(3) status for its nonlobbying activities, while attempting to influence legislation in its § 501(c)(4) capacity with separate funds. *Ibid.* Maintaining such a structure, the Court noted, was not "unduly burdensome." *Id.*, at 545, n. 6. The condition thus did not deny the organization a government benefit "on account of its intention to lobby." *Id.*, at 545.

Open Society, 133 S. Ct. at 2328-29. The Court in this recent opinion again noted both the main *Regan* opinion and the concurrence, and pointed out that funding "with separate funds" is not "unduly burdensome."

In *Open Society*, the Court explained the distinction between restrictions on a government-paid "project" and on a "grantee" using other funds:

> In making this determination, the Court stressed that "Title X expressly distinguishes between a Title X *grantee* and a Title X *project*." *Id.*, at 196. The

> regulations governed only the scope of the grantee's Title X projects, leaving it "unfettered in its other activities." *Ibid.* "The Title X *grantee* can continue to ... engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds." *Ibid.* Because the regulations did not "prohibit[ ] the recipient from engaging in the protected conduct outside the scope of the federally funded program," they did not run afoul of the First Amendment. *Id.*, at 197.

133 S. Ct. at 2329-30.

"[W]e hold that when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." *Speiser*, 357 U.S. at 528-29. This "speech be unencumbered" doctrine, putting the justification onus on the government, is an important principle in determining the constitutionality of federal efforts to control § 501(c)(4) organizations' speech.

Some observers argue that the "subsidy" of tax exemption (known to some as "tax expenditures" as non-grant assistance provided by foregoing some amount an organization would otherwise pay in tax) provides the government with sufficient interest to regulate speech even by organizations that do not receive tax deductible contributions. Ellen Aprill, "Regulating the Speech of Nonprofit Corporations after *Citizens United*," Loyola-LA Legal Studies Paper No. 2010-57, December 17, 2010, http://papers.ssrn.com/so3/papers.dfm?abstract_id=1727565. Several Supreme Court decisions, including *League of Women Voters*, *Rust v. Sullivan*, and *MCFL*, would likely have mentioned any such "tax expenditure" theory, and they did not, finding instead that the question was tax-deductibility of contributions and upholding the use of § 501(c)(4) organizations to conduct the speech impermissible to the charities.

Finally, last June the *Open Society* analysis slammed the door on a claim that tax-exemption for the organization as a whole, rather than deductibility of contributions for particular projects, is the dividing line between permissible speech regulation and impermissible reaching outside the limits of the "project" funded by tax dollars. Since the "tax expenditure" theory depends entirely on the existence of the organization's tax exemption as a "subsidy," the theory cannot survive the *Open Society* "project" vs. "grantee" test.

There is no "tax subsidy" of a § 501(c)(4)'s political speech. Funds used for political activities, even by a § 501(c)(4) organization, are not tax-deductible; in addition, they are taxed at the highest corporate rates. There are no "tax expenditures" except the most tenuous "fungibility" argument. I.R.C. §§ 162(e), 527(a), (f).

"Tax classification" is, in essence, the consideration of the tax-exemption of the organization as a whole. If tax classification is the sole ground for regulating the speech of an organization to which contributions are not deductible, the regulation "prohibits the recipient from engaging in the protected conduct outside the scope of the federally-funded program." *Open Society*, 133 S. Ct. at 2329-30. If the organization is already taxed on the speech and the speech is not offset by a government subsidy, under a long line of Supreme Court cases, tax classification does not support a restriction on speech.

Regan did not supersede *Speiser.* "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech." *Speiser*, 357 U.S. at 518.

The IRS cannot simply argue that it can limit speech because it is only making a tax classification. The IRS does not have an "unfettered" hand to decide what constitutes impermissible political activity for a § 501(c)(4) organization; instead the IRS must leave § 501(c)(4) organizations "unfettered in their [non-deductible] activities." *Open Society*, 133 S. Ct. at 2329-30. The IRS must respect the First Amendment rules laid down by Congress and the Supreme Court.

II. THE SUPREME COURT HAS BECOME MUCH MORE PROTECTIVE OF THE TYPE OF SPEECH ADDRESSED IN THE PROPOSED REGULATIONS.

> It has become apparent that a major factor in this systematic breakdown of the review process was the lack of clear, neutral, objective standards by which IRS employees and managers could determine whether applicants were engaged in political intervention. In other words, the difficulty experienced in the nonprofit world, with many organizations very unsure of how to comply with the IRS' vague "facts and circumstances" approach to cases of political intervention, was mirrored inside the IRS, with line staff concocting their own selection criteria and managers unable to communicate useful guidance to them.

Public Citizen, "The Bright Lines Project," August 8, 2013, http://www.brightlinesproject.org/.

There is certainly some support for that belief. The recent TIGTA report said: "We also believe that Determinations Unit specialists lacked knowledge of what activities are allowed by I.R.C. § 501(c)(3) and I.R.C. § 501(c)(4) tax-exempt organizations." Treasury Inspector General

for Tax Administration, Dept. of the Treasury, "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review," May 14, 2013, No. 2013-10-053, P. 18 ("TIGTA Report"), www.treasury.gov/tigta/auditreports/2013reports/201310053fr.html.

But these complaints are different in kind and application from the analyses in First Amendment decisions. As shown above, even the IRS can't simply use administrative convenience to over-rule the First Amendment. If complexity and administrative decision-making are necessary to enforce limits on political speech, that is because the First Amendment requires them. "[T]he desire for a bright-line rule ... hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *MCFL*, 479 U.S., at 263.

Nor does the Supreme Court permit limits on political speech to spill over into protected nonpolitical speech. "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *WRTL*, 551 U.S. at 474. This is one of the foundational elements entirely missing from the proposed regulations.

As noted above, even the IRS must have a "compelling interest" in regulating particular speech that does not involve a tax subsidy. That compelling interest is difficult to find, absent either "express advocacy" or "its functional equivalent." *WRTL*, 551 U.S. at 476 ("This Court has never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent."). "That a compelling interest justifies restrictions on express advocacy tells us little about whether a compelling interest justifies restrictions on issue advocacy." 551 U.S. at 478. "In short, it must give the benefit of any doubt to protecting rather than stifling speech. *See New York Times Co. v. Sullivan, supra*, at 269–270." *WRTL*, 551 U.S. at 469.

This is a change from just a few years ago, when the Supreme Court used to scrub campaign finance restrictions to uncover circumstances in which political money could go unregulated. *See, e.g., McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 173 (2003), *overruled, in part, by Citizens United*.

The more recent Supreme Court decisions do not attempt to cover every possible circumstance with a rule or definition. Nor do they try to capture every possible way that someone could speak about political activity. In fact, the Supreme Court requires the balance to swing in the other direction: "a court should find that an ad is the functional equivalent of express advocacy

only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL,* 551 U.S. at 469 (emphasis added).

In other words, under *WRTL*, the Court does not stretch to see if an ad is likely to be a "stealth" political ad or might be "political" under some hypothetical circumstances. It first looks to see if there is any "reasonable" non-political interpretation for the communication. If it finds a reasonable non-political interpretation for the communication, that ends the inquiry; the government has no "compelling interest" in limiting that speech. Only if it finds "no reasonable interpretation" is the communication problematic.

For example, the *WRTL* Court said that "factor"-based tests, especially intent or effect, are inadequate to protect First Amendment interests:

> Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue**.** … An intent-based standard "blankets with uncertainty whatever may be said," and "offers no security for free discussion." *Buckley,* [424 U.S.] at 43.

WRTL, 551 U.S. at 468.

The Court also rejected a test based on "objective" observers, because:

> "Such a test "'puts the speaker ... wholly at the mercy of the varied understanding of his hearers.'" [*Buckley*,] 424 U.S. at 43. It would also typically lead to a burdensome, expert-driven inquiry, with an indeterminate result. Litigation on such a standard may or may not accurately predict electoral effects, but it will unquestionably chill a substantial amount of political speech**.**

WRTL, 551 U.S. at 469.

As these rejections of "factors" and "objective observers" show, the Court is concerned about any test that would lead to extensive and expensive proceedings. *Citizens United*, 558 U.S. at 324 ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day."). Any burden on speech:

> must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. See *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). And it must eschew "the open-ended rough-and-tumble of factors,"

which "invit[es] complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). *WRTL*, 551 U.S. at 469.

In the tax context, as shown in *Regan*, the Supreme Court, in its main opinion, noted that the use of non-deductible funds for speech was not "unduly burdensome." "The IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying. This is not unduly burdensome." *Regan*, 461 U.S. at 544.

To find regulable speech, the *WRTL* Court applied a text-based inquiry, looking for references to elections, parties, candidates or an individual's character or fitness for office:

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

551 U.S. at 469-70 (emphasis added).

This is not *Buckley*'s inquiry about "magic words" of express advocacy: "vote for," "vote against." *Buckley*, 424 U.S. at 45. If a communication includes the "magic words" of express advocacy, it has the "indicia of express advocacy."

WRTL is a case about going beyond "magic words" to the "functional equivalent of express advocacy." But *WRTL*'s definition of the "functional equivalent of express advocacy" is very narrow, based principally on the terms used in communication, rather than some contextual analysis. "[T]he functional-equivalent test is objective: "a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Citizens United*, 558 U.S. at 324-25, *quoting WRTL*, 551 U.S. at 469-70.

The *WRTL* Court uses a particular phrase to distinguish issue activity that does not include the "indicia of express advocacy:" "An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—**uninvited by the ad**—to factor it into their voting decisions." *WRTL*, 551 U.S. at 470 (emphasis added). This is a text-based

inquiry, looking for particular words of invitation to vote a particular way – an "appeal for a vote."

In *Citizens United*, for example, the Court analyzed a video to determine if it were the "functional equivalent of express advocacy." It did so by looking for – and finding – the "indicia of express advocacy:" did the video "mention an election," or "take a position on a candidate's character, qualifications, or fitness for office"?

> Under this test, *Hillary* is equivalent to express advocacy. The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President. … It calls Senator Clinton "Machiavellian," App. 64a, and asks whether she is "the most qualified to hit the ground running if elected President," *id*., at 88a. The narrator reminds viewers that "Americans have never been keen on dynasties" and that "a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House," *id*., at 143a–144a. … The movie's consistent emphasis is on the relevance of these events to Senator Clinton's candidacy for President. The narrator begins by asking "could [Senator Clinton] become the first female President in the history of the United States?" App. 35a. And the narrator reiterates the movie's message in his closing line: "Finally, before America decides on our next president, voters should need no reminders of ... what's at stake—the well being and prosperity of our nation." *Id*., at 144a–145a.

Citizens United, 558 U.S. at 325.

Compare those "appeals for a vote" on a specific candidate to the text in the ads reviewed in *WRTL*: "WRTL's ads … take a position on the filibuster issue and exhort constituents to contact Senators Feingold and Kohl to advance that position. Indeed, one would not even know from the ads whether Senator Feingold supported or opposed filibusters." *WRTL*, 551 U.S. at 470 n. 6 (emphasis added).

WRTL, in other words, established a clear and definitive set of text-based characteristics for "indicia of express advocacy," as opposed to an issue or lobbying communication: there cannot be **any** reasonable interpretation of the substance of the communication that is not political. The review of the text, without context or reference to other factors, is sufficient. So, a finding that a non-express advocacy communication has a non-political interpretation ends the inquiry. There is no authority to conduct an intensive mission to search out any possible communications that might be intended to affect an election.

The *WRTL* standard actually is very simple: "As should be evident, we agree with Justice SCALIA on the imperative for clarity in this area; that is why our test affords protection unless

an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 468-69. This standard was, in the Court's mind, a "bright line" that give the tie to the speaker, not the censor, and that was enough.

In fact, the *WRTL* test in practice can be distilled to:

Does the organization have a reasonable non-political reason for the non-express advocacy communication?

If so, the communication is highly-unlikely to be considered "political" by the Supreme Court. If not, it is likely regulable "functional equivalent of express advocacy."

Some may argue that this simple test is too open, too permissive, especially for a tax agency that must decide how to classify organizations. But any such criticisms must deal with the fact that the IRS must conform to the First Amendment, and the Supreme Court has been fairly clear in its requirements, even for the IRS, to protect First Amendment rights.

III. BOTH IN SUBSTANCE AND IN PROCEDURAL HISTORY, THE PROPOSED REGULATIONS ARE VULNERABLE TO LEGAL CHALLENGE.

The regulations at issue in this Comment were proposed in a Notice of Proposed Rulemaking on November 29, 2013. 78 Fed. Reg. 71535. The NPRM proposed "guidance to tax-exempt social welfare organization on political activities related to candidates that will be considered to promote social welfare. These regulations will affect tax-exempt social welfare organizations and organizations seeking such status." *Id*.

Section 501(c)(4) organizations are currently entitled to conduct a certain amount of "electioneering" activities, including intervention in political campaigns, so long as the political activities are not the "primary" activity of the organization. "Under present law, certain tax-exempt organizations (such as sec. 501(c)(4) organizations) may engage in political campaign activities." S. Rep. No. 93-1358, 93d Cong., 2d Sess., 29 (1974), 1975-1 C.B. 517, 533. An organization "may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is primarily engaged in activities that promote social welfare." Rev. Rul. 81–95, 1981–1 Cum. Bull. 332; *FEC v. Beaumont*, 539 U.S. at 150 n. 1.

For half a century, the IRS has enforced several definitions of political activity, including definitions for § 501(c)(3) organizations, for other § 501(c) organizations, and for the taxation of political activities under I.R.C. § 527. The IRS has issued detailed information on how to determine whether activities of § 501(c)(4) and other non-501(c)(3) organizations are "political" under I.R.C. §§ 501(c), 162(e) and 527. *See, e.g.*, Rev. Rul. 2004-6, *supra*. Now it seeks change.

A. The Proposed Regulations Make Significant Changes in Existing Regulations and Definitions of Political Activities That Violate the First Amendment:

The proposed regulations substitute new, more encompassing and inflexible standards for determining when an activity of a Section 501(c)(4) organization will be deemed impermissible "political candidate-related activity." These new standards were not drawn from the IRS's own experiences; instead Treasury and the IRS crafted these definitions in part from experiences of the Federal Election Commission and in part from "unsolicited public comments." IRS, "Treasury, IRS Will Issue Proposed Guidance for Tax-Exempt Social Welfare Organizations," IR-2013-92, Nov. 26, 2013, http://www.irs.gov/uac/Newsroom/Treasury,-IRS-Will-Issue-Proposed-Guidance-for-Tax-Exempt-Social-Welfare-Organizations. This outside involvement in drafting the proposed regulations has drawn congressional inquiries and a Freedom of Information Act lawsuit. Complaint, *Cause of Action v. IRS*, No. 1:14-cv-00178, (D.D.C. Feb. 5, 2014), ¶¶ 22, 23. "Upon information and belief, the 'unsolicited public comments' included communications and meetings with Administration partisans that support limiting or silencing political speech by citizens with 'conservative,' 'constitutional,' 'right-wing' or 'Tea Party' views." *Id.*, ¶ 23.

In addition to express advocacy activities and their functional equivalent, the proposed regulations add other activities that have not previously been recognized as "political," including:

2. Grants and Contributions

- Grants to section 527 political organizations and other tax-exempt organizations that conduct candidate-related political activities (note that a grantor can rely on a written certification from a grantee stating that it does not engage in, and will not use grant funds for, candidate-related political activity).

3. Activities Closely Related to Elections or Candidates

- Voter registration drives and "get-out-the-vote" drives.
- Distribution of any material prepared by or on behalf of a candidate or by a section 527 political organization.
- Preparation or distribution of voter guides that refer to candidates (or, in a general election, to political parties).
- Holding an event within 60 days of a general election (or within 30 days of a primary election) at which a candidate appears as part of the program.

IR-2013-92, *supra*.

An example from the IRS's most recent guidance on interpreting the activities of Section 501(c)(4) organizations, Revenue Ruling 2004-6, http://www.irs.gov/irb/2004-04_IRB/ar10.html, shows the net effect of this change:

> Situation 5. … Under the facts and circumstances in Situation 5, the advertisement is not for an exempt function under § 527(e)(2). S's advertisement identifies Governor F, appears shortly before an election in which Governor F is a candidate, targets voters in that election, and identifies Governor F's position as contrary to S's position. However, the advertisement is part of an ongoing series of substantially similar advocacy communications by S on the same issue and the advertisement identifies an event outside the control of the organization (the scheduled execution) that the organization hopes to influence. Further, the timing of the advertisement coincides with this specific event that the organization hopes to influence. The candidate identified is a government official who is in a position to take action on the public policy issue in connection with the specific event. Based on these facts and circumstances, the amount expended by S on the advertisements is not an exempt function expenditure under § 527(e)(2) and, therefore, is not subject to tax under § 527(f)(1).

Rev. Rul. 2004-6, IRB 2004-4 (January 26, 2004), Example 5. In other words, in this IRS guidance document example, the broadcast advertisement shortly before an election was not political, it was grassroots lobbying or even issue advocacy (depending on the applicable state law).

But under the proposed regulations, the content of the message does not matter. Because it "appears shortly before an election" and identifies a candidate in that election, under proposed regulation § 1.501(c)(4)-1(a)(2)(iii)(2), the advertisement is impermissible "candidate-related political activity."

Similarly, the ads that the Supreme Court held were permissible "issue advocacy" in *WRTL*, 551 U.S. at 469-70, would be impermissible under the new regulations. Those ads had all the hallmarks of issue advocacy, and had no "indicia of express advocacy," and so were held protected by the First Amendment. *WRTL*, 551 U.S. at 476 ("This Court has never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent."). But they, too, were run shortly before an election and identified a public official who was also a candidate.

These are significant changes in permissible behavior of § 501(c)(4) organizations. For example, the proposed regulations expand the definition of "express advocacy," a well-understood term since Buckley's "magic words." 424 U.S. at 45. "Express advocacy" has always been restricted to "a clearly identified candidate," who was always a candidate for elective public

office. *See, e.g.*, 11 C.F.R. § 100.22. This "specific candidate" requirement was echoed in *WRTL*'s "susceptible of no reasonable interpretation of other than as an appeal to vote for or against **a specific candidate.**" *WRTL*, 551 U.S. at 470 (emphasis added). The proposed regulations, on the other hand, both lose the specificity and expand the coverage:

> These proposed regulations draw from Federal Election Commission rules in defining "expressly advocate," but expand the concept to include communications expressing a view on the selection, **nomination, or appointment** of individuals, or on the election or defeat of one or more candidates or of candidates of a **political party**."

78 Fed. Reg. 71538 (emphasis added).

The proposed regulations go far beyond express advocacy and its functional equivalent, instead defining as "political" activities that are neither express advocacy nor remotely like its functional equivalent. In fact, they explicitly expect to "sweep in" activities that are neither express advocacy nor its functional equivalent. 78 Fed. Reg. 71536.

For example, the proposed regulations forbid "Distribution of any material prepared by … a candidate …, including, without limitation, written materials, and audio and video recordings." 78 Fed. Reg. 71541, Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(A)(*6*). But the expanded definition of "candidate" sweeps in "an individual who … is proposed by another, for … nomination … or appointment to any federal, state, or local public office." *Id.*, Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(B)(*1*).

Thus, under this definition of express advocacy, the IRS would prohibit a § 501(c)(4) organization from discussing or distributing a book by someone proposed as a member of a federal advisory commission, or as a judge, or as an ambassador. Or even as a dog-catcher in a small town. In other words, the IRS is proposing to ban books.

It is widely believed that the government lost the *Citizens United* case when Malcolm Stewart, a Deputy Solicitor General, told the Court during oral argument that the government could ban a corporation from publishing a book. *See, e.g.*, George F. Will, "The Supreme Court's Chance to Dump McCain-Feingold and Aid Free Speech," *The Washington Post*, Sept. 13, 2009, "When the argument turned to such First Amendment horrors as banning books, banning Internet expression, and banning even Amazon's book-downloading technology, "Kindle," the members of the Court seemed instantly to recoil from the sweep of arguments made by Deputy Solicitor General Malcolm L. Stewart." Lyle Denniston, "Analysis: Campaign films may get OK," *SCOTUSBlog*, Mar. 24, 2009, http://www.scotusblog.com/2009/03/analysis-campaign-films-may-get-ok/. When the case was re-argued, then Solicitor General Elena Kagan was asked about book banning; she replied: "The government's position has changed." Transcript of Oral

Argument, No. 08-205, Sept. 9, 2009, P. 64, lines 24-25, http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205[Reargued].pdf.

Now the IRS is proposing to do the same thing: ban books. (Or more precisely, prohibit § 501(c)(4) organizations from counting the publication of such a book as "social welfare.") And not even by political candidates, as was the case in *Citizens United*, but by anyone "proposed by others" for "appointment to any federal, state, or local public office."

The rationale for banning books: to avoid "fact-intensive analysis." 78 Fed. Reg. 71536. While the Supreme Court in *WRTL* wanted to avoid factual disputes and litigation, *WRTL*, 551 U.S. at 479, that was to ease the burden on organizations, not to "sweep in" more activities that would not otherwise meet the definition of political activity:

> At the outset, we reject the contention that issue advocacy may be regulated because express election advocacy may be, and "the speech involved in so-called issue advocacy is [not] any more core political speech than are words of express advocacy." ... This greater-includes-the-lesser approach is not how strict scrutiny works.

WRTL, 551 U.S. at 477. This expansion of the definition of express advocacy does not meet strict scrutiny; it is neither narrowly-tailored, nor supported by a compelling interest.

The government faces great risk if it appears in the Supreme Court claiming to be empowered to ban books even if it's just a "tax classification" or because they want to avoid "fact-intensive determinations." 78 Fed. Reg. 71538. As noted above, the Supreme Court will not accept limiting non-political activities because political activities may be regulated. "It would be a constitutional "bait and switch" to conclude that corporate campaign speech may be banned in part because corporate issue advocacy is not, and then assert that corporate issue advocacy may be banned as well, pursuant to the same asserted compelling interest, through a broad conception of what constitutes the functional equivalent of campaign speech, or by relying on the inability to distinguish campaign speech from issue advocacy." *WRTL*, 551 U.S. at 480.

In addition, the proposed regulations do not include a requirement that the "tie go to the speaker, not the censor." The Supreme Court requires that any ambiguity or doubt about whether a particular communication includes express advocacy or its functional equivalent should be resolved "in favor of the speaker, not the censor." *WRTL*, 551 U.S. at 474. This requirement would be the antithesis of the "sweeping in" of non-political activities into the definition of political activities. And the use of "bright line" tests to avoid "factual analysis" is unlikely to provide that the benefit of the doubt will go to speakers.

The proposed regulations also add significant burdens on the speech of § 501(c)(4) organizations, posing a direct challenge to the *Regan* concurrence and its progeny. The inclusions of volunteer labor calculations alone mean that many § 501(c)(4) organizations will no longer be willing to participate in protected conduct; this is an unconstitutional "chill" on speech.

B. The Proposed Regulations Are Also Vulnerable Because Their Development and Promulgation Suggests Improper Motives and Inaccurate Public Statements.

1) The Public Rationale for the Proposed Regulations Is Not Accurate and Insults IRS Employees:

The Internal Revenue Service is recovering from public disclosure of its prior practice of targeting § 501(c)(4) organizations based on their perceived ideology and political activities. *See, e.g.*, Treasury Inspector General for Tax Administration, Dept. of the Treasury, "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review," May 14, 2013, No. 2013-10-053, ("TIGTA Report"), www.treasury.gov/tigta/auditreports/2013reports/201310053fr.html; Internal Revenue Service, "Charting a Path Forward at the IRS: Initial Assessment and Plan of Action," June 24, 2013, ("Charting a Path Forward"), www.irs.gov/pub/newsroom/Initial%20Assessment%20and%20Plan%20of%20Action.pdf.

The proposed regulations, citing the TIGTA Report, are intended to help the IRS and the public "benefit from clearer definitions of these concepts." 78 Fed. Reg. 71536.

> Although more definitive rules might fail to capture (or might sweep in) activities that would (or would not) be captured under the IRS' traditional facts and circumstances approach, adopting rules with sharper distinctions in this area would provide greater certainty and reduce the need for detailed factual analysis in determining whether an organization is described in section 501(c)(4). Accordingly, the Treasury Department and the IRS propose to amend Treas. Reg. § 1.501(c)(4)–1(a)(2) to identify specific political activities that would be considered candidate-related political activities that do not promote social welfare distinctions in this area.

Id. In other words, the IRS intends to "sweep in" activities that do not constitute political activities under current Section 501(c)(4) rules, so that trained IRS employees would not have to make difficult factual determinations. As shown above, that intent would be constitutionally vulnerable on its face.

But that "uncertainty" was not the problem at the IRS. This is an inaccurate and misleading reading of the investigations of prior IRS "**management failures**", "Charting a Path Forward, P. 4, instead just echoing the original false claims that it was only "low-level" "line" employees in IRS field offices who made mistakes. Josh Hicks, "IRS e-mails show IRS official

fuming over Lois Lerner comments," *The Washington Post*, November 20, 2013, http://www.washingtonpost.com/blogs/federal-eye/wp/2013/11/20/irs-emails-show-cincinnati-official-fuming-lois-lerner-comments/. As the June 2013 report by the acting IRS Commissioner noted:

> Several key leaders, including some in the Commissioner's Office, **failed in multiple capacities to meet their managerial responsibilities** at various points during the course of these events. Most notably, there was insufficient action by these leaders to identify, prevent, address, and disclose the problematic situation that materialized with the review of applications for tax exempt status. The full extent of these **management failures** and any further inappropriate actions that may have taken place are the subject of various ongoing reviews and investigatory efforts.

Charting a Path Forward, P. 4 (emphasis added). And the Treasury Inspector General was even more clear about origin of the problems in assessing "political" activity on the basis of ideology or terminology:

> The 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**. **Ineffective management**: 1) allowed inappropriate criteria to be developed and stay in place for more than 18 months, 2) resulted in substantial delays in processing certain applications, and 3) **allowed unnecessary information requests to be issued**.

TIGTA Report, What We Found, P. 1 (emphases added).

Note that this was not "confusion" about how to define political activity. Judging an application "based upon their names or policy positions instead of indications of potential political campaign intervention" is by definition not judging the organization on "indications of potential political campaign intervention." Thus, existing regulations did not justify the criteria used to judge applications, and the revisions to existing regulations would not solve the problem of judging applications on names or policy positions.

In September 2013, *USA Today* published leaked records from a "low-level" IRS employee, including a spreadsheet describing specific organizations caught up in the IRS scandal. Gregory Korte, "IRS list reveals concerns over Tea Party propaganda," *USA Today*, September 18, 2013, http://www.usatoday.com/story/news/politics/2013/09/17/irs-tea-party-target-list-propaganda/2825003/. The leaked spreadsheet did reveal that the IRS employee was confused about what to look for in reviewing applications for recognition of exemption, including "anti-Obama rhetoric" but also including concerns about excessive lobbying by § 501(c)(4) organizations (which can engage in unlimited amounts of lobbying). http://www.usatoday.com/story/news/politics/2013/09/17/irs-tea-party-target-list-

document/2827925/. But, as the heading "screened by EO Technical" clearly shows, that document came from an employee in the Washington office of the Technical Branch of the Exempt Organization Division, not from a "low-level" "Determinations" employee in Cincinnati.

And, again, neither existing regulations nor the proposed regulations would have stopped an IRS employee from being "confused" about whether a § 501(c)(4) organization was engaged in excessive lobbying. Section 501(c)(4) organizations can lobby without limitation without losing their tax-exemption, so long as their lobbying funding is not deductible. Treas. Regs. § 1.162-29. That was, after all, the Supreme Court's holding in *Regan* and several other cases.

This spreadsheet's origin is consistent with the testimony of the IRS screening employees who said that they were quite comfortable applying the existing criteria, and that any problems were caused by the interference from managers from Washington. Bernie Becker, "Cincinnati IRS staffer: DC showed interest in Tea Party cases," *The Hill*, June 7, 2013, http://thehill.com/blogs/on-the-money/domestic-taxes/304313-cincinnati-irs-staffer-washington-showed-unusual-interest-in-tea-party-cases. The delays were not caused by confusion or uncertainty about whether the targeted groups were engaged in political activity, as evidenced by the sworn testimony of the IRS attorney in charge of the screening review process: "Hull told investigators that he had already requested additional information from the applicants at that point and felt he had enough facts to make a determination about their eligibility, according to the transcripts. Josh Hicks, "IRS Chief Counsel's office involved in targeting controversy," *The Washington Post*, July 17, 2013, http://www.washingtonpost.com/blogs/federal-eye/wp/2013/07/17/irs-chief-counsel-involved-in-targeting-controversy/.

The House Oversight Committee issued this analysis indicating that the IRS scandal rests entirely on delays for "review" by senior management, not experienced or "low-level" employees, who had adequate information and had already determined, months before, what to do with particular organizations:

Key points from testimony of career IRS officials:

- Carter Hull, a tax law specialist and self-described 501(c)(4) expert with 48 years of experience, testified that he sent development letters, and once he received responses, based on his decades of experience, determined he had enough facts to make recommendations whether to approve or deny the applications.
- Mr. Hull's recommendations were not carried out. Instead, according Michael Seto, the head of Mr. Hull's unit in Washington D.C., Lois Lerner instructed that the Tea Party applications should go through a multi-layer review that included her senior advisor and the Chief Counsel's office.

- According to Mr. Hull, sometime in the winter of 2010-2011, the senior advisor to Lois Lerner told him the IRS Chief Counsel's office would need to review these applications. Mr. Hull also indicated this was the first time in his 48 year career at the IRS he was told to send an application to Ms. Lerner's senior advisor.
- It was not until August 2011 that the Chief Counsel's office held a meeting with Mr. Hull, Ms. Lerner's senior advisor, and other Washington D.C. officials to discuss these test applications. During the intervening months, these applications languished.
- The Chief Counsel's office instructed Mr. Hull that they needed updated information to evaluate the applications. Since the applications were up-to-date months earlier, when Mr. Hull made his recommendations, Mr. Hull testified that he found this request from the Chief Counsel's office surprising. The Chief Counsel's office also discussed the possibility of a template letter to develop all the Tea Party applications, including those being held in Cincinnati. Mr. Hull explained that all the applications were different and that a template was impractical.
- Mr. Hull's supervisor, Ronald Shoemaker, provided insight on the type of additional information sought by the Chief Counsel's office—namely, information about the applicants' political activities leading up to the 2010 election.
- The lengthy review of the test applications in Washington created a bottleneck and caused the delay of other Tea Party applications in Cincinnati. Indeed, multiple IRS employees in Cincinnati – including Elizabeth Hofacre — have told the Committee they were waiting on guidance from Washington on how to move the applications forward.
- Mr. Hull explained that he could not provide advice to Ms. Hofacre because his hands were tied by his superiors in Washington. Therefore, none of these applications were approved or denied during the time he worked with Ms. Hofacre on the cases.
- The head of the Cincinnati office, Cindy Thomas, testified that she continuously asked senior Washington officials when guidance was coming, but it was to no avail.

Committee on Oversight and Government Reform, "IRS Chief Counsel's Office Demanded Information on 2010 Election Activity of Tea Party Applicants," July 17, 2013, http://oversight.house.gov/release/irs-chief-counsels-office-demanded-information-on-2010-election-activity-of-tea-party-applicants/.

The net result of this unfounded blame for "low-level" IRS employees is diminished respect for IRS competence among the American public. Lydia Saad, "Americans Think Officials Knew About IRS Political Targeting," *Gallup Politics*, June 7, 2013, (59% of Americans polled thought "high-ranking IRS officials were aware" of political targeting) http://www.gallup.com/poll/162962/americans-think-officials-knew-irs-political-targeting.aspx?utm_source=tagrss&utm_medium=rss&utm_campaign=syndication.

It is that loss of trust in the IRS – not IRS employee incompetence – that is the cause of the scandal. IRS employees have been able to accurately discern impermissible political activity for fifty years. Something else must have been driving the desire for the major regulatory changes.

***2) The Claimed Rationale Is Not Accurate, As the Proposed Regulations Were Always Intended to Challenge the Supreme Court's Decision in* Citizens United.**

Recent investigations by congressional committees, however, indicate that the proposed regulations were not, in fact, sparked by the TIGTA Report or even by the IRS scandal that preceded the TIGTA Report. The regulations were a direct result of the IRS's internal concern about the effect of the *Citizens United* decision. "The Committee's interim report into the IRS's targeting scandal explained how the *Citizens United* decision caused the IRS to handle conservative tax-exempt applicants in a distinct and unfair manner. The regulation released today continues this Administration's unfortunate pattern of stifling constitutional free speech." Committee on Oversight & Government Reform, U.S. House of Representatives, "Issa Statement on Treasury/IRS Proposed Tax Exempt Status Rule Change," Nov. 26, 2013, http://oversight.house.gov/release/issa-statement-treasuryirs-proposed-tax-exempt-status-rule-change/.

The Chairmen of the House Committee on Oversight and Government Reform and its Subcommittee on Economic Growth, Job Creation and Regulatory Affairs, recently wrote to IRS Commissioner John Koskinen saying, in part:

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

Letter to the Hon. John Koskinen, Feb. 4, 2014, P. 3, http://oversight.house.gov/wp-content/uploads/2014/02/2014-02-04-DEI-JDJ-to-Koskinen-IRS-c4-Rule.pdf.

Indeed, in a February 1, 2011, email to Michael Seto, Lois Lerner wrote: "1. Tea Party Matter very dangerous. This could be the vehicle to go to court on the issue of whether Citizen's United overturning the ban on corporate spending applies to tax exempt rules." http://www.scribd.com/doc/167727241/IRS-February-emails-1.

The Chairmen's February 4, 2014, letter also notes:

> By April 2013, the Exempt Organizations Division had finished an analysis of the trends in 501(c)(4) groups with indications of political activity. This document grounded the concern in *Citizens United*, stating: "Since Citizens United (2010) removed the limits on political spending by corporations and unions, concern has arisen in the public sphere and on Capitol Hill about the potential misuse of 501(c)(4)s for political campaign activity due to their tax exempt status and the anonymity they can provide to donors."
> …
> The Administration's rule can only be properly understood in this context. As such, the proposal is merely an outgrowth of a multi-year effort to "fix the problem" of nonprofit political speech. By April 2013 – a month before TIGTA released its audit report – Lois Lerner's Exempt Organizations Division already developed an analysis of political speech by tax-exempt organizations. The rule is merely the result of "everybody" – led by the President of the United States – "screaming" at the IRS to fix the perceived problem of nonprofit political speech.

Letter to the Hon. John Koskinen, *supra*, Pp. 3-4 (citations omitted).

In addition, other IRS officials testified that proposed regulations had been actively considered prior to the IRS scandal. Former IRS Commissioner and head of the Exempt Organizations Division Steve Miller testified on November 13, 2013, that one concern was that donors to § 501(c)(4) organizations were not disclosed:

> A. … But under the rules, 501(c)(4) donors are not disclosed to the public. And there is an argument made here and elsewhere that that's a reason why money is flowing into those organizations for political purposes – for purposes of spending on politics." … But in terms of brainstorming things that would **level the playing field** between 527 organizations and 501(c)(4) organizations, that was one thing that was talked about.

Letter to the Hon. John Koskinen, *supra*, P. 8 (emphasis added).

And an August 23, 2010, e-mail from Ruth Madrigal in the Chief Counsel's office to Jeffery Van Hove, shows that there was no tax concern about the changed situation; it was a concern about whether the Federal Election Commission would be able to limit campaign-related speech:

> Before *Citizens United*, corporations (including c4s) were limited by the FEC rules re: campaign spending and disclosure and subject to immediate FEC enforcement action. Fear of FEC enforcement in real time may have served to limit the political activities of aggressive c4s more than fear of IRS TEGE enforcement action. … Now that the FEC cannot prohibit corporations (including c4s) from making such expenditures …, there is some concern that aggressive c4s will be bolder and multiply, intervening in campaigns with relative impunity.

Id., P. 9. It was fear of "aggressive c4s," not IRS employee incompetence or some concern about tax policy, that drove the new regulations.

Citizens United is a mis-understood decision, with public opinion often turning on mistaken statements like "The Supreme Court said that corporations are people," or "Corporations can contribute to candidates," which are not, in fact, in the decision. Some public opinion polls show that *Citizens United* is not popular, even among those who otherwise support free speech. "People … are not buying into that idea that at least big money from corporations or unions equates to speech." First Amendment Center, "Unlimited campaign spending gets thumbs down in poll," Vanderbilt University, July 18, 2012, http://www.firstamendmentcenter.org/unlimited-campaign-spending-gets-thumbs-down-in-poll.

But the First Amendment protects speech, especially when it is unpopular, or even "hurtful." *Snyder v. Phelps*, 131 S.Ct. at 1220. This protection from popular censorship is most critical for tax-exempt organizations, many of whom exist for the sole purpose of educating the public about ideas that may not be "mainstream" or "conventional," and may even be revolutionary when first presented. These concepts have protected tax-exempt corporations for decades. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 428 (1963) ("We think petitioner may assert this right on its own behalf, because, **though a corporation**, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail.").

The regulations themselves are already vulnerable to constitutional challenge. These secretive and ill-advised efforts to challenge Supreme Court decisions by limiting speech are not likely to help the IRS if there is a challenge.

CONCLUSION

The IRS is facing a substantial litigation risk with this NPRM. The proposed regulations are *ultra vires*, unconstitutional, and burdensome. Their promulgation was neither fair nor procedurally valid. They should be withdrawn.

Sincerely,

Barnaby W. Zall