ALLIANCE DEFENDING FREEDOM

FOR FAITH. FOR JUSTICE.

February 27, 2014

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

RE: Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities

Dear Sir/Madam:

We write to comment on the proposed changes to regulations governing organizations exempt pursuant to I.R.C. §501(c)(4). We submit this comment on behalf of the following 501(c)(3) organizations:

- Alliance Defending Freedom as a 501(c)(3) organization that legally represents numerous churches and pastors and other 501(c)(3) organizations.
- Focus on the Family as a 501(c)(3) organization
- The Cardinal Newman Society as a 501(c)(3) organization
- The Family Action Council of Tennessee, Inc., David Fowler, Esq., President
- Florida Family Policy Council, Inc., John Stemberger, President
- Minnesota Family Institute, John Helmberger, CEO
- Colorado Family Institute
- Indiana Family Institute
- The Family Leader, Bob Vander Plaats, President and Chuck Hurley, VP and Chief Council
- Pennsylvania Family Institute, Michael Geer, President
- Palmetto Family Council, Oran P. Smith, PhD, President
- New Jersey Family Policy Council, Len Deo, Founder & President
- New Yorker's Family Research Foundation, Rev. Jason J. McGuire, President
- Wisconsin Family Council, Julaine K. Appling, President
- Citizens for Community Values, Phil Burress, President
- Christian Education League of Maine
- Cornerstone Family Council, Julie Lynde, Executive Director
- Family Institute of Connecticut, Peter Wolfgang, Executive Director
- Maryland Family Alliance, Derek McCoy, President
- California Family Alliance, Jonathan Keller, Executive Director

- North Dakota Family Alliance, Tom Freier
- Delaware Strong Families
- Cornerstone Policy Research
- Massachusetts Family Institute
- Montana Family Foundation
- The Family Foundation
- Missouri Family Policy Council

Our comment focuses on the Treasury Department and the IRS' request for comments regarding whether the proposed 501(c)(4) regulations should also be applied in some way to section 501(c)(3) organizations. We recommend that the Treasury Department and the IRS not apply the proposed regulations on 501(c)(3) organizations because the proposed regulations create very serious constitutional burdens on the First Amendment rights of freedom of religion and speech of exempt organizations.

We agree with the Treasury Department and the IRS that greater clarity is necessary concerning what constitutes prohibited political activity by exempt organizations. In fact, we believe that the current 501(c)(3) political activity prohibition is unconstitutional and severely restricts the First Amendment rights of numerous exempt organizations. The proposed new regulations, in essence, seek to "double down" on the unconstitutionality of the current regulations. Thus, they should be withdrawn in favor of a better approach that grants much-needed clarity in this area.

The current 501(c)(3) regulations on candidate-related activity violate the First Amendment rights of 501(c)(3) exempt organizations.

The current regulations defining impermissible political intervention activities of 501(c)(3) organizations are unconstitutionally vague and impose a severe chill on the speech of exempt organizations and their leaders. The Treasury Department and the IRS must remember that the 501(c)(3) candidate prohibition[1] is a restriction on speech. The language of the candidate prohibition specifically applies to "the publishing or distributing of statements." I.R.C. §501(c)(3). Thus, any attempt to enforce the prohibition will result in a restriction on speech.

The current IRS focus on reviewing all the "facts and circumstances"[2] of a particular situation to determine whether the 501(c)(3) candidate prohibition has been violated raises significant constitutional concerns. The Supreme Court has noted the concerns with vague laws that restrict speech:

[1] The particular portion of §501(c)(3) that we refer to in this comment as the "candidate prohibition" is the portion that requires the exempt organization to "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).

[2] *See* Rev. Ruling 2007-41.

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). All of the problems identified by the Supreme Court are present in the candidate prohibition.

First, there is no precision in the prohibition or its accompanying regulations that defines with clarity what speech is impermissible. The "facts and circumstances" approach exacerbates the vagueness of the law and regulations by injecting uncertainty in the process. A 501(c)(3) organization and its leaders must simply guess at what speech the IRS will find to be in violation of the prohibition.

Second, the "facts and circumstances" approach allows for selective enforcement of the prohibition. Although the IRS has attempted to add some clarity to the "facts and circumstances" approach through the years, there are no sufficiently clear guidelines to govern and restrain the discretion of the agents enforcing the prohibition. Indeed, the IRS has been confronted in litigation with claims of selective enforcement of the candidate prohibition. *See Branch Ministries v. Rossotti*, 211 F.3d 137, 144-45 (D.C. Cir. 2000). It is generally agreed that the IRS' record of enforcement of the candidate prohibition has been at times lax, and at best selective or spotty. The "facts and circumstances" approach lends itself to this type of enforcement. A speech prohibition that allows for selective enforcement is highly problematic under the First Amendment.

Finally, the vagueness of the candidate prohibition and the selective nature of the IRS' enforcement through the years have resulted in a real and distinct chill on speech. Exempt organizations and their leaders steer clear of permissible speech related to candidates just to avoid any question as to whether they are in violation of the candidate prohibition.

Alliance Defending Freedom has seen this chill on speech among the pastors of churches we represent. ADF frequently receives inquiries from pastors confused as to what they can preach in their sermon during an election season. Many pastors simply refrain from saying anything at all out of fear of potentially violating the candidate prohibition. The chill on speech and the "self-censorship" is real and widespread.

Additionally, the current law and regulations violate the Free Exercise clause of the First Amendment when it comes to pastors who desire to preach freely from the pulpit on how their religious faith requires them to act during an election. The current law and regulations prohibit pastors (and other religious organizations) from speaking freely on these issues. As such, they significantly infringe, and indeed in many cases, outright prohibit the free exercise of religion.[3]

Much more could be said about the unconstitutionality of the current candidate prohibition.[4] But it is enough to say at this point that we agree with the Treasury Department and the IRS that clarity is necessary in this area. However, the proposed regulations mostly trade the vagueness problems of the current regulations[5] with overreach and over-regulation of speech in the proposed regulations.

The Proposed Regulations widen the scope of "candidate-related political activity" beyond even the current regulations, and would exacerbate the severe burden on the constitutional rights of 501(c)(3) exempt organizations.

The proposed regulations bring clarity in some areas, retain vagueness in others, but overall substantially overreach and over-regulate constitutionally protected speech and exercise of religion. The proposed regulations purport to create a new term called "candidate-related political activity" and provide examples of activities that fall within the meaning of that term. Because the candidate prohibition in §501(c)(3) is absolute, any expansion of what constitutes candidate-related activity would serve to further restrict the activities of 501(c)(3) organizations. As the scope of candidate-related activity increases, the permissible activities of 501(c)(3) organizations correspondingly (and unconstitutionally) decreases. In the case of the proposed regulations, the permissible activities of 501(c)(3) decreases dramatically with severe consequences on the First Amendment rights of those organizations.

1. Proposed definition of election-related activities.

The proposed regulations include a new definition of "election-related activities" that includes non-partisan and neutral activities such as get-out-the-vote drives, voter registration activities, and voter guides. This proposed definition greatly widens the scope of activities prohibited for 501(c)(3) organizations.

[3] For the same reasons, the current candidate prohibition also violates the federal Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1, which prohibits government from substantially burdening a person's exercise of religion.

[4] For an in-depth analysis of how recent Supreme Court precedent highlights the unconstitutionality of the candidate prohibition, *See* Erik W. Stanley, *LBJ, the IRS, and Churches: The Unconstitutionality of the Johnson Amendment in Light of Recent Supreme Court Precedent*, 24 REGENT UNIV. L. REV. 237 (2012).

[5] Although, as we point out below, the proposed regulations still contain substantial vagueness problems, especially in relation to the definition of who is considered a "candidate" for purposes of defining candidate-related activities.

Under current regulations, 501(c)(3) organizations can conduct all the activities that would be prohibited under this proposed regulation. Thus, this proposal would dramatically narrow the scope of permissible activities for 501(c)(3) organizations. It is worth noting that the proposal only applies to 501(c)(4) groups, and the Treasury Department and the IRS have only requested comment on whether this restriction should apply to 501(c)(3) groups instead of also asking whether the proposal should also apply to 501(c)(6) groups like unions who frequently conduct very aggressive voter registration and get out the vote campaigns.

Pastors, churches, and exempt educational institutions, from elementary and high schools to colleges and universities, would not be allowed to hold candidate forums under the proposed regulations even though those forums are valuable ways for citizens to evaluate the candidates running for office. In addition, pastors or college officials could not even refer to an upcoming election to encourage their congregation to exercise their responsibility to vote without running afoul of the proposed regulations. An example of how this would negatively impact the free exercise of religion is in relation to churches who believe that the Bible mandates their civic involvement. Pastors of churches who hold to this theological belief routinely encourage their people to vote in elections as a means of fulfilling this Scriptural mandate. Yet the proposed regulations would prohibit such speech in a pastor's sermon. This is a direct and substantial burden on the free exercise of religion.

Many 501(c)(3) organizations produce neutral, non-partisan voter guides in accordance with current IRS regulations. The proposed regulations would prohibit this activity for no apparent reason other than "clarity," which can be achieved in a much less restrictive way.

Under the proposed regulations, an exempt educational institution, from elementary and high schools to college and universities, would not be able to allow voter registration tables on its campus. Nor would it be permitted to have individuals come speak at commencement or campus gatherings who might meet the definition of a "candidate."

A U.S. Senator or Representative who has been repeatedly reelected to public office may not be permitted to speak on the campus of an exempt educational institution if that official could be considered a presumptive candidate for the next election.

Overall, the regulations prohibit a wide array of speech and religious activities that are currently permissible. Prohibiting such speech and religion violates the constitutional rights of 501(c)(3) organizations.

2. Proposed Definition of "Candidate"

The proposed definition of who constitutes a "candidate" is overly broad and unconstitutionally vague. A person who is mentioned in the news as a possible candidate, but never runs, never has an intention to run, and thus is never elected will nevertheless be considered a candidate and beyond the reach of

statements that could potentially be construed as support or opposition for the person or his/her policies. Even under the current regulations governing 501(c)(3), it is difficult for organizations to define who constitutes a "candidate." The proposed regulations broaden this definition and introduce additional uncertainty.

As an example, suppose a TV commentator who has wide and substantial influence, but has never run for political office and never held political office, proposes a legislative policy that would directly and negatively impact a particular 501(c)(3) organization in its operation and mission. Under the proposed regulation, a 501(c)(3) organization would be hamstrung from responding until they conducted an exhaustive search to determine whether anyone had ever proposed that the TV commentator run for or be appointed to public office. If only one person had publicly suggested that the commentator run for or be appointed to office, then the 501(c)(3) organization would be prohibited from directly opposing the policy proposed by the commentator because doing so would constitute opposition to the commentator, thus triggering the candidate-related prohibition in 501(c)(3).[6] Attorneys who routinely advise 501(c)(3) organizations would advise their clients to remain silent to avoid potential tax liability or loss of exempt status.

The vagueness and overbreadth of the proposed "candidate" definition works a severe hardship on organizations such as Alliance Defending Freedom, Focus on the Family, The Cardinal Newman Society, and others participants in this comment who comment on current events as they relate to the mission of their organization. The proposed definition also restricts the ability of exempt educational institutions, from elementary and high schools to colleges and universities, from inviting individuals to speak who may be considered a "candidate." Determining who is a "candidate" if the proposed regulations were to be adopted would be virtually impossible and would simply result in a chill on speech, or selective and absurd prosecution by the IRS.

3. Public Communications Close in Time to an Election

The proposed prohibition on public communications within 60 days before a general election or 30 days before a primary election, if applied to 501(c)(3) organizations, would drastically reduce the amount of speech by the organization. Essentially, the proposal would create a black-out period during which a 501(c)(3) organization cannot even utter the name of a candidate[7] without triggering the absolute prohibition on candidate-related activity in 501(c)(3).

[6] The IRS specifically takes into consideration, among other things, whether a communication from a 501(c)(3) organization "identifies one or more candidates for a given public office," and whether a communication "expresses approval or disapproval for one or more candidates' positions and/or actions" in determining whether the communication constitutes prohibited political campaign intervention. *See* Rev. Rul. 2007-41. Thus, the broader the definition of "candidate," the broader the scope of prohibited communications is.

[7] And, as we point out above, that term can be broadly defined to encompass a large group of people who are not even running for office.

The proposed regulation would include anything that an exempt organization puts on its website as well. The IRS currently holds 501(c)(3) organizations responsible for maintaining links put on the organization's website even if they do not control the content of the information on the sites they link to. *See* Rev. Rul. 2007-41. Thus, an organization can be found to have violated the current candidate prohibition in 501(c)(3) if it maintains a link to a website that changed its content after the organization established the link, and that includes material supporting or opposing candidates for office. The burden on 501(c)(3) organizations is substantial in attempting to police their past website links to ensure compliance with IRS regulations.

That burden would increase exponentially under the proposed black-out period before an election, requiring a 501(c)(3) organization to remove any link that even mentions a candidate or party name even if the link is neutral, non-partisan, or was established prior to the election for reasons that were unrelated to the election. One can imagine the impact this would have on an educational organization exempt under 501(c)(3) who advocates for socially unpopular opinions or at an exempt educational institution, from elementary and high schools to colleges and universities, who discusses the election in general terms during a government or political science course. Would an organization like Alliance Defending Freedom be required to remove all links and documents discussing the lawsuits it has filed against the current administration[8] if one of the Defendants in those lawsuits met the definition of a candidate? Would an organization like Focus on the Family that broadcasts on the radio and publishes relevant content in its magazines be required to refrain from discussing some elected officials or mentioning a bill that an elected official proposed? Would Focus on the Family be prohibited from having certain guests on its radio broadcasts or from referring to specific pieces of legislation that are supported by a person who could be deemed a candidate? Would an exempt educational institution be required to remove all materials that even mention a candidate's or political party's name, such as course materials in a government or political history course? What if the candidate was a major donor to the exempt educational institution and had a building named after him/her? Could a pastor of a church who is running for political office preach in his own church, even if the sermon was non-political, under the proposed regulations? The reach of this proposal is staggering and would place an insurmountable burden on 501(c)(3) exempt organizations.

The Treasury Department and the IRS must remember that the proposed regulations are restrictions on speech and the exercise of religion. As such, they cannot be overbroad and sweep within their ambit more speech than is necessary to accomplish their purpose. The proposed black-out period before an election sweeps within its ambit even speech that does not support or oppose a candidate for office. The unconstitutional reach of this black-out period is substantial and would curtail and chill the constitutionally protected speech of 501(c)(3) organizations if it were applied to them.

[8] For example, Alliance Defending Freedom currently is representing clients in 19 cases challenging the contraceptive and abortifacient mandate of the Affordable Care Act. One of those cases, *Conestoga Wood Specialties Corporation et al v. Sebelius et al.*, is pending before the United States Supreme Court on the merits.

The clarity the Treasury Department and the IRS seek to achieve for 501(c)(3) organizations can be accomplished in a manner that is less restrictive and that does not violate the First Amendment rights of exempt organizations.

The clarity sought by the Treasury Department and the IRS can be achieved in ways that do not place such a substantial burden on free speech and free exercise of religion. We recommend that the Treasury Department and the IRS consider the proposal by the Commission on Accountability and Policy for Religious Organizations which presented a report to Congress in August, 2013, that contained a proposal to remedy the constitutional problems inherent in the current candidate prohibition without further burdening speech and religious exercise.

The Commission carefully considered and debated solutions to the current candidate prohibition and, with virtually unanimous agreement, recommended a proposal that would bring much-needed clarity to this area while reducing or eliminating the First Amendment violations of the current law and regulations. The Commission's well-reasoned proposal can be found at http://religiouspolicycommission.org. We recommend that the Treasury Department and the IRS support the Commission's recommendation instead of pursuing possible application of the proposed regulations to 501(c)(3) organizations.

Thank you for carefully considering these comments and we hope that the Treasury Department and the IRS will come to a resolution of this issue that brings clarity but also protects the First Amendment rights of 501(c)(3) organizations.

Sincerely,

Erik W. Stanley
Senior Legal Counsel
Alliance Defending Freedom