UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FREEDOM PATH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:20-CV-01349 (JMC)
	)	
INTERNAL REVENUE SERVICE, et al.,	)	
	)	
Defendants.	)	
	)	

AMICUS BRIEF IN SUPPORT OF NEITHER PARTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

REGULATIONS

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

Amicus Curiae the Institute for Free Speech ("IFS") is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, petition, and the press. Along with scholarly and educational work, IFS represents individuals and civil society groups in litigation securing their First Amendment liberties. *Amicus* submitted three comments in response to the Internal Revenue Service's Notice of Proposed Rulemaking for REG-134417-13, which proposed to replace the regulation at issue in this case, in 2013 and in 2014. One of those comments proposed a rule that would not only follow Supreme Court precedent but would also resolve the issues in this case. Letter from Center for Competitive Politics (IFS's prior name) to Daniel I. Werfel, Acting Commissioner of IRS (Dec. 5, 2013), https://perma.cc/2CES-JPLU [hereinafter "IFS Comment"]. *Amicus* has an interest in the IRS's regulation of political speech because this affects First Amendment protections for political speech rights.

INTRODUCTION

This Court called for "interpretations of the Primary Activity inquiry and Political Activity inquiry that are (a) not unconstitutionally vague and (b) appropriately rooted in the statutory and regulatory scheme, and constitutional principles, that govern [the 26 U.S.C. § 501(c)(4)] tax exemption in light of the Court's findings" in its prior opinion. ECF 48 at 60.

Neither party discussed 52 U.S.C. § 30111(f), which is critical to the Court's consideration and requires the IRS "to promulgate rules, regulations, and forms which are mutually consistent" with those of the Federal Election Commission. The IRS has failed to comply with this congressional command, and its recent briefing is no exception. Yet this congressional mandate is foundational to any understanding of how—and why—the law should distinguish between § 501(c)(4) and § 527 organizations. Therefore, when this Court adopts a clear bright-line rule to remedy the vagueness of today's 11-factor "dividing line," it should heed Congress' directive in 52 U.S.C. § 30111(f) and avail itself of a 50-year body of jurisprudence and administrative law distinguishing between unambiguous election-influencing speech and issue speech.

The Court could take two reasonable approaches in conformity with 52 U.S.C. § 30111(f):

- First, the Court should find that Freedom Path, Inc., is not a § 501(c)(4) organization only if the FEC classifies it as a "political committee" under FEC standards and definitions. *See infra* Part I.
- Alternatively, the Court could independently follow the FEC's standards for defining a "political committee" and find that Freedom Path is not tax-exempt under § 501(c)(4) only if more than 50% of the organization's total expenditures over the organization's existence were devoted to (a) contributions to political committees (*i.e.*, PACs) or § 527 organizations and (b) direct election expenditures to fund messages containing express advocacy or its functional equivalent.

Under either approach, pursuant to 52 U.S.C. § 30104(f)(7), the IRS is expressly prohibited from counting an organization's disbursements on "electioneering communications," broadcast ads near in time to an election merely referencing a candidate, as election intervention activities relevant to the organization's primary purpose. *See infra* Part II. No other interpretation is consistent with 52 U.S.C. § 30111(f), 52 U.S.C. § 30104(f)(7), and the First Amendment.

Importantly, these tests approximate the original congressional intent for § 501(c)(4). They follow the statutory meaning of "social welfare" in § 501(c)(4), which plainly encompasses election campaign advocacy. *See infra* Part IV. They reflect Congress's original intent in passing § 527, which was simply to codify and clarify the IRS's pre-existing practice of not treating political committee contributions as taxable, which fits seamlessly with other advocacy groups that also advance social welfare. And they adequately protect First Amendment rights to engage in political speech—a principle already well-developed in campaign finance decisions, if not in tax law. Thus, these interpretations are the only ones "appropriately rooted in the statutory" regime and relevant "constitutional principles." ECF 48 at 60.

The approach of *Amici* Campaign Legal Center ("CLC") and Citizens for Responsibility and Ethics in Washington ("CREW") to import the "promote," "attack," "support," or "oppose" ("PASO") standard from certain campaign finance *disclosure* laws fails to remedy the current vagueness concerns. In fact, it introduces additional First Amendment problems. *See infra* Part III. The Government's proposal similarly does not cure the vagueness that polluted its 11-factor test.

Finally, the Court should reject any policy arguments of *Amici* CLC/CREW about "dark money." *See infra* Part V. The comprehensive statutory disclosure requirements for organizations that engage in political activity are enough to discredit *Amici's* dramatic rhetoric. Moreover, the IRS is not the appropriate agency to regulate *Amici's* severe campaign finance ambitions.

ARGUMENT

I. The Court should adopt a bright-line rule that the IRS should deny exemption under § 501(c)(4) if the FEC classifies the organization as a political committee.

The Court seeks an appropriate replacement for the IRS's vague 11-factor test to determine whether an entity is a § 501(c)(4) or § 527 organization. ECF 48 at 60. In doing so, the Court should follow Congress's clear command to conform the IRS's tax-exempt classifications with the FEC's classifications for the same organizations. 52 U.S.C. § 30111(f). Both agencies regulate § 501(c)(4) or § 527 organizations and classify their political activities for appropriate levels of regulation. Conforming each agency's classification of the same entity would track Congress's intent when it enacted § 527 in 1974, the same year it enacted major amendments to the FECA. Tax law should track campaign finance law, not wag the dog. *See* 120 Cong. Rec. 41,819 (1974).

The best approach – the one that would most closely align the two agencies' regulatory treatment of one organization – would be for the IRS to classify Freedom Path as a § 527 (and deny its status under § 501(c)(4)) only if the FEC classifies it as a political committee under FECA. Since Freedom Path's activities are focused exclusively on federal issues, if the FEC does not treat Freedom Path as a federal "political committee," and it otherwise meets the "social welfare" requirements of § 501(c)(4), the IRS should classify it as a § 501(c)(4) tax-exempt organization.[1] This conclusion follows from the plain text of the law, congressional intent, constitutional concerns, good policy, and practical regulatory implementation.

A. The FEC, not the IRS, is the expert agency to classify a predominantly political organization.

Regulation of political speech, by any government agency for any purpose, is a "highly sensitive" task, *FEC v. Phillips Pub., Inc.*, 517 F. Supp. 1308, 1314 (D.D.C. 1981), requiring both "specialized knowledge and cumulative experience." H.R. Rep. No. 917, 94th Cong., 2d Sess. 4 (1976). Accordingly, Congress created the FEC in 1974 and vested it with "wide discretion in order to guarantee that it will be sensitive to the great trust imposed in it to not overstep its authority by interfering unduly in the conduct of elections." *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 545 (D.C. Cir. 1980). The "sole purpose of the FEC is to regulate activities involving political expression." *FEC v. Fla. For Kennedy Comm.*, 681 F.2d 1281, 1284 (11th Cir. 1982).

The FEC administers the Federal Election Campaign Act of 1971 ("FECA"), Pub. L. 92–225, 86 Stat. 3, codified at 52 U.S.C. § 30101 *et seq. See* 52 U.S.C. §§ 30106(b)(1), 30109. As part

[1] *Amicus* recognizes that a group not exclusively focused on influencing governments at both the federal and state levels and expressly advocating the election or defeat of candidates at both levels would raise different issues about the appropriate standards. *See, e.g.*, *FEC v. GOPAC*, 917 F. Supp. 851 (D.D.C. 1996). The record shows that Freedom Path's activities focused exclusively on federal policies, and the Court need not decide here which standards would apply in another case with different facts.

of that enforcement, the FEC determines which entities are "political committees" and which ones are not. *Id*. §§ 30101(4), 30106(b)(1). The FEC regulates both § 501(c)(4) social welfare organizations and § 527 political committees and tailors its regulations according to the amount and kind of political activity they conduct.

The IRS is quite different. It administers the Internal Revenue Code with the sole purpose of collecting revenues and implementing tax and fiscal policy. Its mission was never to regulate political speech or protect First Amendment rights. Yet the work of the IRS, especially in classifying tax-exempt organizations (here, between §§ 501(c)(4) and 527), inexorably draws it into the delicate space of speech regulation. The line between a "social welfare" organization under § 501(c)(4) versus a "political organization" under § 527 has no tax or revenue consequence. Both classes of organizations are tax-exempt and their donors do not receive income tax deductions for their donations. Yet as this case exemplifies, the IRS has historically struggled to define what constitutes issue versus election advocacy and how to measure an organization's primary purpose.

Congress expressed a goal of "expert, uniform enforcement" of laws regulating political speech. *FEC v. NRA*, 553 F. Supp. 1331, 1339 (D.D.C. 1983). Recognizing that the IRS and FEC's regulatory schemes would intersect, Congress explicitly required the IRS to conform its regulations with FEC regulations where they overlap. 52 U.S.C. § 30111(f). One distinct overlap is distinguishing issue advocacy from election advocacy. The FEC regulates entities who primarily engage in issue advocacy by requiring reporting of election-related spending, while it regulates organizations with the "major purpose" of influencing elections as "political committees" that must register with the FEC and file ongoing financial reports with the agency disclosing all financial activity. The standards defining this distinction have been forged over decades by courts and the FEC with great sensitivity to the First Amendment and political speech.

Other evidence makes clear that Congress intended the policies governing election campaign speech should be handled outside of the IRS. *See* 120 Cong. Rec. 41,819 (1974). In fact, the FEC was created to avoid a repeat of the political weaponization of the IRS during the Watergate scandal. FEC, *Legislative History of Federal Election Campaign Act Amendments of 1976*, at 88-89 (1977), https://perma.cc/EQ9C-TP3M [hereinafter FEC, *Legislative History*]. President Nixon was impeached for seeking "to obtain from the Internal Revenue Service, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law, and to cause, in violation of the constitutional rights of citizens, income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner." U.S. Congress, *Articles of Impeachment Adopted by the House of Representatives Committee on the Judiciary* (July 27, 1974), THE AM. PRESIDENCY PROJECT, https://perma.cc/3FTX-ZP4M. Congress sought to foreclose future presidents from weaponizing the IRS to target political opponents. FEC, *Legislative History*, *supra*, at 88-89. The IRS was bridled, while regulation of electoral activity was vested in the bipartisan, independent FEC. 52 U.S.C. § 30111(f).

IRS deference to FEC "political committee" classifications makes practical and constitutional sense. Far more than the IRS's revenue collection function, the FEC's direct regulation of political speech requires constitutional expertise. "Unique among federal administrative agencies," the FEC has "as its sole purpose the regulation of core constitutionally protected activity." *Van Hollen v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016). Congress knew that the FEC's sphere of regulation was therefore "highly sensitive." H.R. Rep. No. 917, 94th Cong., 2d Sess. 4 (1976). Political speech, which includes all "matters relating to political processes," is protected by the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). In fact, "a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). That's because "the whole concept of" a representative democracy "depends on the ability of the people to make their wishes known to their representatives." *E. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). The First Amendment preserves that ability. It is "the means to hold officials accountable to the people." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

Nowhere does that matter more than when speaking about elections. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential," *Buckley*, 424 U.S. at 14-15, so "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution," *id*. at 14. For this reason, "[t]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United*, 558 U.S. at 339 (cleaned up).

The FEC operates in this minefield that "implicates fundamental rights." *Van Hollen*, 811 F.3d at 499. Its every decision, "no matter how mundane or neutral on the surface, [is] likely to have partisan consequences affecting electoral outcomes." Bradley A. Smith, *Feckless: A Critique of Critiques of the Federal Election Commission*, 27 GEO. MASON L. REV. 503, 509 (2020). Congress, aware of "the extremely delicate nature of the tremendous power entrusted to [the FEC]," built into its very structure safeguards to make it "sensitive to the great trust imposed in it." *In re Carter Mondale Reelection Comm., Inc.*, 642 F.2d 538, 545 (D.C. Cir. 1980) (per curiam).

An "indispensable ingredient" of that design was bipartisan control over the FEC's enforcement. Smith, *supra*, at 513. "[B]oth parties feared the possibility of partisanship in enforcement," and "neither was eager to have campaign finance restrictions - even simple disclosure - that would be enforced by an agency under partisan control of the other party." *Id*.

Senator Alan Cranston, one of the chief sponsors of FECA and a speech-regulation supporter who believed "[a] strong enforcement agency [was] essential," implored Congress not to "allow the FEC to become a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate." FEC, *Legislative History*, *supra*, at 88-89. Senator Cranston, along with his "colleagues," shared "great concern . . . that the FEC has such a potential for abuse in our democratic society that the President should not be given power over the Commission." *Id*. at 89. "That concern led to Congressional adoption of the present method of selecting Commission members." *Id*.

To keep the FEC free from "prodding by . . . campaign opponents," *id*., it is run by a six-member commission, of which "[n]o more than 3 members . . . may be affiliated with the same political party." 52 U.S.C. § 30106(a)(1). And before the FEC can investigate an alleged violation, at least four members must vote to do so. 52 U.S.C. §§ 30106(c), 30107(6) & (9), 30109(a)(2). The FEC must also have four affirmative votes to bring an enforcement action. *Id*. § 30109(a). That four-vote threshold makes it impossible for purely partisan enforcement: no Democratic bloc of Commissioners can investigate Republicans, and no Republican bloc of Commissioners can investigate Democrats. "This structure was created to encourage nonpartisan decisions." FEC, *Leadership and Structure*, https://perma.cc/6ANC-NSPA.

The IRS, by contrast, lacks these protections and can more easily be co-opted by political influences or any given administration—as it was during the Watergate scandal and historically.[2]

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[2] *See, e.g.*, David Burnham, *Misuse of The I.R.S.: The Abuse of Power*, THE N.Y. TIMES MAGAZINE (Sept. 3, 1989), https://www.nytimes.com/1989/09/03/magazine/misuse-of-the-irs-the-abuse-of-power.html. A short history of how presidents have used the IRS for political purposes is available

Freedom Path itself was trapped in the IRS's attempts to investigate advocacy organizations' speech and conduct beginning in 2011. *See* ECF 48 at 12-15. At minimum, the IRS admitted it targeted groups for extra scrutiny "based on applicants' names and policy positions" during the same period. *Id*. at 14. Aside from potential political animus, it is relevant here that the IRS also saw itself as an alternative regulator to replace the FEC and fight what it saw as misguided First Amendment and campaign finance law. Then-IRS Director of Exempt Organizations Lois Lerner told staff that targeted groups like Freedom Path were "very dangerous." *See* STAFF OF H.R. COMM. ON OVERSIGHT & GOV'T REFORM, 113TH CONG., LOIS LERNER'S INVOLVEMENT IN THE IRS TARGETING OF TAX-EXEMPT ORGANIZATIONS, App. 57 (Mar. 11, 2014), https://perma.cc/77NG-LJ7M. Lerner criticized *Citizens United* as dealing a "huge blow" against campaign finance enforcement and acknowledged calls for the "IRS to fix the problem." *Id*. at 20. Lerner worried that First Amendment precedent might apply to campaign finance and tax regulation: to the IRS, then, new 501(c)(4) applicants were part of a dangerous plan to apply *Citizens United* "to tax exempt rules." *Id*. at App. 57.

Rather than conforming its review of Freedom Path's application to the FEC's treatment under campaign finance law and First Amendment standards, the IRS acted under its own view of the law, applying its own political judgments. And it did this with no political or First Amendment expertise. This sharply contrasts with FEC Commissioners, who are to be chosen based on their "experience, integrity, impartiality, and good judgment." 52 U.S.C. § 30106(a)(3).

Also, unlike the IRS, the FEC has also been given a robust framework for adjudicating disputes. *In re Carter Mondale Reelection Comm., Inc.*, 642 F.2d at 545 (noting that FECA "has

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in Mr. Burnham's 1996 testimony before the U.S. House of Representatives Ways & Means Committee. *See Full Text: Testimony of Burnham on IRS Book At W&M Hearing On Replacing Federal Income Tax*, TAX NOTES, https://perma.cc/7SNB-VCXC.

its own penalties, procedures, remedies and time schedules"); *McNamara v. Johnston*, 522 F.2d 1157, 1162 n.5 (7th Cir. 1975). As a result, the FEC has developed a longstanding body of case law, enforcement actions, advisory opinions, policies, and regulations. Accordingly, citizens have notice of permissible and impermissible conduct, depending on their organizations' political classifications. The IRS, by contrast, doesn't have the same consistent body of precedent or a robust system for adjudicating disputes.

In short, the FEC's determinations of whether an entity qualifies as a political committee are more measured, predictable, neutral, and informed than the IRS' political determinations ever could be. And yet, the IRS has tried (and is still trying) to come up with its own unique methodology to determine whether an organization engages in too much political activity to qualify as a § 501(c)(4) without the FEC's expertise, institutional knowledge, procedural constraints, or First Amendment and due process safeguards for citizens. It's not enough that the IRS is charged with collecting and processing massive amounts of revenue from citizens. The IRS has also improperly taken on the FEC's job.

B. This approach has several legal and practical advantages.

The solution is far less complicated than any 11-factor test. In the situation presented here, the IRS should hew to its own expertise, while relying on the FEC's conclusions to classify different organizations that engage in political speech under the IRC. This yields manifold fruits.

First and most importantly, it institutes the uniform federal enforcement that Congress always envisioned and mandated. 52 U.S.C. § 30111(f). Second, such a standard will often keep the IRS out of the fray of political speech regulation—a task it was never charged with or equipped to handle—and out of the FEC's "exclusive jurisdiction." 52 U.S.C. § 30106(b)(1). When the IRS guesses whether a federally focused entity, such as Freedom Path, has crossed the line into "too much" political activity, the IRS inevitably trespasses on the FEC's jurisdiction. Third, this standard creates clearer lines, avoiding the vagueness and due process concerns as eloquently explained by this Court in its recent ruling. *See generally* ECF 148. Fourth, it ensures the protection of First Amendment rights without imposing unnecessary burdens on citizens. A regime that is not "mutually consistent" with the FEC's risks imposing steeper compliance costs that chill speech and thus extinguishing more small advocacy organizations. 52 U.S.C. § 30111(f); *see also FEC v. Mass. Citizens for Life, Inc*., 479 U.S. 238, 254-55 (1986) ("*MCFL*") (plurality) (warning about "administrative costs that many small entities may be unable to bear" and that thereby "directly limit[] the ability of such organizations to engage in core political speech").

Finally, it properly recognizes that political education and civic speech qualify as "educational" activities and "social welfare" in 26 U.S.C. § 501(c)(4). In doing so, this case keeps with the original meaning of these statutory terms. *See infra* Part IV.

C. Despite ample time, the FEC never found Freedom Path was a political committee.

The FEC had data indicating that Freedom Path made both independent expenditures and electioneering communications because reports of such communications were filed, as required, with the agency. *Freedom Path Independent Expenditures 2011-2012*, Fed. Elec. Comm'n, https://perma.cc/4DS2-9DAL; *Freedom Path Electioneering Communication 2011-2012*, Fed. Elec. Comm'n, https://perma.cc/KFX8-2SDA. The Commission can, "on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities," initiate an investigation to determine if the entity was a political committee. 52 U.S.C. § 30109(a)(2). Notably, the IRS is barred by statute from considering electioneering communications in determining tax status; only the FEC may determine that such reported electioneering communications are expenditures regulated under FECA. *Id.* §§ 30104(f), 30106(b).

Finally, any person, perhaps a candidate affected by Freedom Path's independent expenditures or an *Amici* CLC staffer, could have filed a complaint alleging the group was a political committee. 52 U.S.C. § 30109(a)(1). However, the FEC's public files show no record of the agency investigating Freedom Path as a political committee, nor any complaints filed against the group. *Closed Matters Under Review*, Fed. Elec. Comm'n, https://perma.cc/V5B4-X436. Absent a contrary FEC finding, Freedom Path is not a political committee.

II. Alternatively, the Court should deny § 501(c)(4) status to an organization only if it spends over 50% of its funds on contributions to PACs or § 527s and express election advocacy or its functional equivalent.

If the IRS must make its own determination regarding an organization's political activities rather than deferring to FEC's determination, Congressional intent demands that this rule hew as closely as possible to federal campaign finance law. That means the Court should look to *Buckley v. Valeo* for guidance. When it does, the rules here are evident. The Court should apply *Buckley*'s major purpose test to the primary activity inquiry and the functional equivalence test to the political activity inquiry. If more than 50% of an organization's funds are spent on contributions to political committees or other § 527 groups and communications containing express advocacy or the functional equivalent of express advocacy, the organization is not a § 501(c)(4) organization. If not, and the organization meets the other requirements of § 501(c)(4), it is.

Buckley and its progeny provide ample guidance for this Court. That's not only because Congress said tax law and campaign finance law ought to be "mutually consistent." 52 U.S.C. § 30111(f); *see also supra* Part I. It's also because *Buckley* addresses the very concerns at issue here. As this Court's recent order recognized, when regulations are too vague (as the IRS 11-factor rule and the Government's most recent proposal in its brief are), those regulations will inevitably chill protected speech. ECF 148 at 21. *Buckley* taught that in such circumstances, courts must apply limiting constructions and, even then, regulations may not survive scrutiny. 424 U.S. at 44-45. *Buckley* carefully crafted its limiting constructions to protect issue speech—that is, speech on the most important issues of the day. *Id*. at 14-15, 42-44. While the statute here and FECA do not share the same terms, both contain vague terms that will silence issue speech. Therefore, it is appropriate to draw on *Buckley*'s lessons and its well-reasoned limiting constructions.

A. *Buckley* and its progeny established the "major purpose" test for regulation of distinctively political organizations.

In response to constitutional vagueness and overbreadth concerns, the Supreme Court in *Buckley v. Valeo* limited the classification of "political committee" in two important ways that are relevant here. 424 U.S. 1, 79 (1976). First, the Court limited the definition to organizations that spend, as a threshold, at least $1,000 on expenditures "that *expressly advocate* the election or defeat of a clearly identified candidate." *Id.* at 80 (emphasis added). Second, to protect "groups engaged in purely in issue discussion" from onerous regulation, the Court held that the definition of "political committee" "need only encompass organizations that are under the control of a candidate or *the major purpose* of which is the nomination or election of a candidate." *Id*. at 79. The Court further refined the kind of speech that evinces the purpose of electing candidates to be speech that is "unambiguously campaign related." *Id*. The Supreme Court fashioned these standards to prevent overregulation of organizations that engage in "both issue discussion and advocacy of a political [*i.e.*, electoral] result." *Id.* at 66, 79.

Ten years later the Court reiterated the "major purpose" test in *FEC v. Massachusetts Citizens for Life*, and reaffirmed the distinction between electoral groups and issue groups reasoning that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." 479 U.S. 238, 249 (1986) ("*MCFL*").

Ever since *Buckley* and *MCFL*, courts have sought to distinguish between "political committees" and non-political committees based upon their "major purpose" by reference to their spending on unambiguously election-influencing speech. *See, e.g., New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010); *Real Truth About Abortion v. FEC*, 681 F.3d 544, 558 (4th Cir. 2012); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 287-88 (4th Cir. 2008); *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2005); *FEC v. GOPAC, Inc.*, 917 F.Supp. 851, 859 (D.D.C. 1996). *But see Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1009-11 (9th Cir. 2010) (as applied to a state law imposing disclosure requirements rather than prohibiting speech, requiring only that organization have advocacy as "'a' primary purpose" rather than as its "sole major purpose").

Likewise, the FEC has analyzed the "major purpose" of organizations, according to a case-by-case basis which this Court has upheld because it is "exactly the type of question generally left to the expertise of [the FEC]." *Shays v. FEC*, 511 F.Supp.2d 19, 29-31 (D.D.C. 2007). The principal standard applied by the FEC has been the subject organization's spending on unambiguously campaign related communications – that is express advocacy and its functional equivalent as defined by the Supreme Court in *WRTL* – as a percentage of its total spending over a number of years. *See, e.g.*, Matters Under Review 6396 (Crossroads Grassroots Policy Strategy); 6589 (American Action Network); 6872 (New Models).

As Freedom Path argues, the Court should apply *Buckley*'s major purpose test to the primary activity inquiry. Only civic organizations that devote 50% or more of their activity to "political activity," as defined below, are not § 501(c)(4)s. As this Court indicated, this proposal makes good sense and is consistent with past practice. ECF 148 at 54. And as this Court noted, absent a clear dividing line between § 501(c)(4) and § 527, groups may find themselves in a no-man's-land. ECF 148 at 55. The IRS even acknowledges that its latest interpretation could create such a gap. IRS Brief at 26-27 ("The boundaries of one group should not be viewed as influencing the boundaries of another."). A clear, objective 50% threshold also comports with *Buckley*'s instruction to evaluate "*the* major purpose"—rather than *a* major purpose. 424 U.S. at 79 (emphasis added); *see also Lieu v. FEC*, 370 F. Supp. 3d 175, 178-79 (D.D.C. 2019).

B. The *WRTL* "functional equivalent" standard also should apply to the measure of an organization's unambiguous election spending.

For the foregoing reasons and those stated in Freedom Path's brief, the Court should count as political activity only an organization's direct contributions to political committees (i.e., PACs) or other § 527 organizations and direct expenditures on express advocacy and its functional equivalent. The Supreme Court has clarified the distinction between issue and electoral advocacy, concluding that the only speech that can be regulated as electoral speech "is the functional equivalent of express advocacy," defined as a message that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 470 (2007) ("*WRTL*").[3]

This Court expressed reservations about the applicability of the functional equivalence test in this context because, in its view, that would cause the Court to import FECA's "electioneering communications" concept into the tax code, which Congress has forbidden. There are several reasons that "electioneering communications" cannot necessarily be counted as election intervention by a § 501(c)(4) organization. First, Freedom Path presses a different point. Freedom Path Brief at 25-26. Second, Congress already has prohibited the IRS from counting "electioneering communications" as a test for tax status. 52 U.S.C. § 30104(f)(7). Third, an

[3] Amicus' proposed regulation to the IRS, had it been adopted, would have also resolved these issues and protected issue speech. IFS Comment, *supra*, at 15-18.

"electioneering communication" is a limited type of communication—a broadcast ad aired within 60 days of an election that merely references a candidate, even though it may contain no electoral advocacy at all. *Id*. § 30104(f)(3)(A). Fourth, the Supreme Court has clarified that the only kind of communication that manifests an electoral message is one that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," and many electioneering communications do not meet this test. *Id.*

Furthermore, the vagueness concerns underlying the electioneering communications cases also underly this case, so *WRTL*'s functional equivalence test provides a helpful means to ensure the constitutionality of this provision. "[T]he concept of express advocacy . . . [was] born of an effort to avoid constitutional infirmities." *McConnell v. FEC*, 540 U.S. 93, 192 (2003) (citation omitted). But nothing confines recognition of the issues or their solutions to FECA. They may apply wherever unconstitutional vagueness threatens issue advocacy, wherever such constitutional infirmities exist under the canon of constitutional avoidance. *United States v. Davis*, 588 U.S. 445, 463 n.6 (2019) (discussing canon).

Furthermore, for two primary reasons, there is no valid argument against the functional equivalence test based on the passage about reporting requirements in *Citizens United. See* 558 U.S. at 368-69. First, *Citizens United* addressed BCRA. Congress declared that the IRS was not to use BCRA to interpret or change its regulations. *See* 52 U.S.C. § 30104(f)(7). And the *McConnell Court* held that BCRA carried with it none of the vagueness concerns inherent in FECA. *McConnell*, 540 U.S. at 194. There was, therefore, no need for *Buckley*'s limiting construction. Second, the Supreme Court has recognized a qualitative difference between laws that "burden" political speech—that "suppress it" like the regulation at issue here—and disclosure laws. *Id*. at 340; *see id*. at 366 (stating that disclosure requirements do not suppress speech). It did not apply the functional equivalence test to BCRA's disclosure requirements because they were a "less restrictive alternative to more comprehensive regulations of speech." *Id*. at 369. By contrast, prior cases applying the functional equivalence of express advocacy test dealt with prohibitions or regulations that *did* limit speech. *See, e.g.*, *McConnell*, 540 U.S. at 206. The IRS's reading of § 501(c)(4) similarly prohibits political speech; it doesn't merely require disclosure. So the express advocacy and functional equivalence test applies, notwithstanding *Citizens United*.

This Court also expressed reservations because, in its view, the context here is tax exemptions, and there is no constitutional right to have any political speech subsidized. ECF 148 at 58. But as Freedom Path correctly argued in its brief, no tax "subsidies" are at issue here. In fact, both § 501(c)(4) groups that make political expenditures and § 527 groups pay taxes.[4] Under 26 U.S.C. § 6113, both groups must contain "an express statement" on each "fundraising solicitation" that donations "are not deductible as charitable contributions."

A group's tax liability for express advocacy usually does not change whether it is exempt under § 527 or § 501(c)(4). And the context here is not just tax exemptions—it's core political speech. The Constitution forbids the government from forcing citizens to resort to less-effective, more burdensome forms of speech. *MCFL*, 479 U.S. at 254, 256 (plurality) (noting that creating "disincentive[s] for such organizations to engage in political speech" violated the First Amendment); *id.* at 266 (O'Connor, J., concurring) (finding an unconstitutional burden because "engaging in campaign speech requires MCFL to assume a more formalized organizational form and significantly reduces or eliminates the sources of funding"); *Citizens United*, 558 U.S. at 337.

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[4] For a § 501(c)(4) organization, the tax is paid on the lesser of net investment income or total political expenditures in a tax year. 26 U.S.C. § 527(f). Similarly, § 527 groups generally pay tax on investment income. (Most of their spending is for political purposes.) 26 U.S.C. § 527(b).

Even though IFS believes Freedom Path could prevail on a freestanding First Amendment challenge, it is enough that the 11-factor test causes a vagueness injury and that a workable, constitutional standard can remedy it.

III. Any "PASO" test introduces additional constitutional problems.

The tests proposed in Parts I and II answer the Court's call for a constitutional construction of the standards governing social welfare organizations under 26 U.S.C. § 501(c)(4). By contrast, *Amici* CLC/CREW's proposal to import the "promote," "attack," "support," or "oppose" ("PASO") standard from campaign finance laws fails to remedy vagueness concerns and introduces unconstitutional overbreadth problems.

Application of PASO would reach the mere mention of an elected official (except, perhaps, those that have announced retirement), turning the logic of *McConnell* on its head. In *McConnell*, the Supreme Court rejected a challenge to the Bipartisan Campaign Reform Act of 2002's ("BCRA") use of terms such as "promote," "oppose," "attack," and "support" in regulating activity by state and local political parties. 540 U.S. at 170-71. The Court held those terms not unconstitutionally vague because they "clearly set forth the confines within which potential *party speakers* must act" and "provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id.* at 170 n.64 (quotation omitted) (emphasis added). The Court reasoned that "actions taken by political parties are presumed to be in connection with election campaigns." *Id.* (citation omitted).

McConnell's logic may work for *political party* speakers, but not here. It breaks down when extended to *any speaker* that is not a political committee, including social welfare organizations, as *Amici* CLC/CREW propose. Rather than remedy unconstitutional vagueness, the PASO standard would make it exceedingly difficult for speakers to determine what speech is regulated.

See Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1034 (D.C. Cir. 1980) ("[R]egulations authorizing tax exemptions may not be so unclear as to afford latitude for subjective application by IRS officials." (footnote omitted)); *id*. at 1040 ("The standards may not be so imprecise that they afford latitude to individual IRS officials to pass judgment on the content and quality of an applicant's views and goals and therefore to discriminate against those engaged in protected First Amendment activities." (footnote omitted)). To extend PASO to social welfare entities would fail to remedy unconstitutional vagueness and introduce unconstitutional overbreadth as well. The Court should reject *Amici's* proposal.

IV. Election campaign advocacy is civic speech and promotes the original meaning of social welfare, so any rule must permit § 501(c)(4)s to engage in such advocacy.

Deferring to the FEC's determinations regarding an organization's primary purpose or, at the very least, adopting a greater than 50% express advocacy or functional equivalent test, recognizes that Congress has chosen to let § 501(c)(4)s engage in political activity.

To qualify as a "social welfare organization" under § 501(c)(4), a "civic league or organization[]" must be "operated exclusively for the promotion of social welfare." 26 U.S.C. § 501(c)(4)(A). As Freedom Path correctly argues, civic speech—both issue advocacy and advocacy for political candidates—promotes the social welfare under § 501(c)(4) and is consistent with both the exemption's text and its historical background. Freedom Path Brief at 14-18. *Amici* CLC/CREW's assertion that the "ordinary public meaning of 'exclusively'" should be strictly construed to mean "solely" is an incorrect reading of § 501(c)(4)'s statutory context and historical development. Amici CLC/CREW Brief at 10; *see also United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor.") (Scalia, J.). Even the IRS agrees that *Amici's* reading is wrong. IRS Brief at 24 ("Congress could not have intended 'exclusively' to mean 'solely' in the strictest possible sense.").

A proper interpretation of "social welfare" in § 501(c)(4) begins with its historical background. This exemption first appeared in the Revenue Act of 1913, ch. 16, § II(G)(a), 39 Stat. 172, when Congress sought to clarify exemptions to protect groups from revenuer overreach. *See* Allison Hayward, *Eternal Inconsistency: The Stunning Variability in, and Expedient Motives Behind the Tax Regulation of Nonprofit Advocacy Groups* 9, INST. FOR FREE SPEECH (2015), https://perma.cc/2LH7-MRU8. At the time, "educational" corporations were also exempt from tax, so a non-profit educational group would not have needed to seek exemption under the "social welfare exemption." *Id*. at 10. Thus, there was no pressure to further define the scope of "social welfare" when the term entered the tax code. *Id*. However, the context surrounding the 1913 Act's addition of "social welfare" "strongly suggests Congress meant the phrase to encompass nonprofits not otherwise named in the statute, and to liberalize the Bureau of Internal Revenue's approach to nonprofit advocacy groups." *Id*. at 28.

Moreover, cutting-edge social welfare groups used election campaign advocacy in promoting social welfare. For example, the NAACP was founded in 1909. The following year, it began publishing its official magazine *The Crisis* (which is still published today). NAACP, *History of The Crisis*, https://perma.cc/DHG4-N48F. That publication contains numerous examples of election campaign speech. For example, a November 1912 editorial said "[w]e sincerely believe that . . . it is better to elect Woodrow Wilson President of the United States" instead of other candidates. Editorial, *The Last Word in Politics*, THE CRISIS, Nov. 1912, at 29, available at the INTERNET ARCHIVE, https://perma.cc/UT2B-BYZH.[5]

[5] On the eve of the 1916 presidential election, an editorial in *The Crisis* expressed dissatisfaction with the candidacy of Charles Evans Hughes and said: "*No intelligent Negro can vote for Woodrow Wilson, but* he can vote for Allan L. Benson or HE CAN STAY HOME on election day . . . ." Editorial, *Mr. Hughes*, THE CRISIS, Nov. 1916, at 12, available at HATHITRUST, https://perma.cc/9548-KWSB. That editorial was preceded by an "Advertiser" section which

Likewise, the National American Woman Suffrage Association ("NAWSA") in 1914 "blacklisted" members of Congress who failed to express support for (or openly opposed) suffrage for women. Kenneth R. Johnson, *Florida Women Get the Vote*, 48 FLA. HIST. Q. 299, 301 (1969); *Women Blacklist Foes in Congress*, N.Y. TIMES (Aug. 30, 1914), https://perma.cc/K4FQ-QSDF. Per the *Times*, the group "appeals to all suffrage organizations to concentrate their influence to defeat for re-election the men named." *Id*. Since both the NAACP and NAWSA were then social welfare groups, the original meaning of "social welfare" plainly included such electoral advocacy.

Fast forward to the mid-twentieth century. The 1954 Revenue Act specifically included a clause prohibiting charitable organizations (what are now § 501(c)(3)s) from "participat[ing] in, or interven[ing] in (including the publishing and distributing of statements) any political campaign on behalf of any candidate for public office." *Id.* at 20 (citing Internal Revenue Code of 1954 § 501(c)(3), Pub. L. No. 591, 68A Stat. 1, 163 (1954)). But importantly, no such restriction was placed on social welfare groups. *Id*. Combined with Congress's express prohibition on political activity by § 501(c)(3) organizations in 1954, "there is a strong negative implication from the presence of the express prohibition in section 501(c)(3) and the absence of one in section 501(c)(4)." Roger Colinvaux, *Political Activity Limits and Tax Exemption: A Gordian's Knot*, 34 VA. TAX REV. 1, 32–33 (2014). In short, the history of the phrase demonstrates that Congress plainly did not intend to prohibit § 501(c)(4) "social welfare organizations" from engaging in civic speech that advocates the election or defeat of candidates.

reprinted one of Hughes' 1906 speeches followed by a statement saying, "EVERY COLORED MAN Should Endorse these Lofty Sentiments by VOTING FOR CHARLES EVANS HUGHES and the Entire Republican Ticket." Advertiser, *Speech of Charles E. Hughes Delivered at Bethel A.M.E. Church, New York City November 6, 1906*, THE CRISIS, Nov. 1916, at 7-8, available at HATHITRUST, https://perma.cc/WFX6-SQEG.

Finally, the IRS argues that campaign speech was never recognized as furthering social welfare, because "§ 527 would have been superfluous because such organizations would have qualified under § 501(c)(4)." IRS Brief at 8-9. It argues, "Congress has imposed a tax on all § 501(c) organizations that engage in a § 527(e)(2) exempt function, which includes political campaign intervention." *Id*. at 9. This completely misunderstands the circumstances and purpose of § 527's enactment in 1974. Congress understood that "[h]istorically, the [IRS] has not required the filing of tax returns by political organizations." 120 Cong. Rec. 41,820 (1974). But in 1973, the IRS had begun to issue rulings that, while consistent with the net result of its historical practice, began to sow confusion. *Id*. (identifying rulings that held political contributions not to be gross income; political expenditures not to be deductions from gross income; and political organizations' investment income to be taxable). To avoid circumvention of these rules, the IRS made similar investment income taxable by § 501(c)(4) and similar entities that engaged in political activity. *Id*.

Thus, § 527 was simply meant to "clarify" the existing tax law. *Id*. It explicitly codified the IRS's existing recognition of a seamless web of non-trade and non-business activity, running from pure issue advocacy to political parties and committees, as essentially non-taxable by various not-for-profit entities. Section 527 recognized the essential continuity of these activities from a revenue perspective, rather than treating one type of advocacy as completely opposed to the other. It was not meant to change pre-existing law. *Id*. at 41,819 (in answering questions over § 527's definitions of political organizations and exempt activities, providing that "this is consistent with the body of existing law," meaning campaign finance law, but further admitting that any vagueness in existing campaign finance definitions were not addressed, since "whatever difficulties there are [in defining when issue speech becomes candidate-related speech], are already in existing law").

Thus, Congress did not intend to set up a regime wherein the definitional boundary between § 501(c) groups and § 527 groups would be important from a revenue perspective—let alone a definitional trap whose vagueness could be used by the IRS to chill speech and accomplish non-revenue-related objectives. It simply intended that candidate committees, political parties, and political committees (like all entities advocating for social welfare) should not be taxed on the income they received to further those purposes.

V. *Amici* CLC/CREW's dark money concerns are overblown.

In an attempt to justify their claim that § 501(c)(4) forbids social welfare organizations from engaging in *any* political campaign intervention, *Amici* CLC/CREW raise nakedly political considerations: the supposed specter of so-called "dark money." Billions in "dark money," *Amici* claim, is harming voters' interest in information about election spending. Amici CLC/CREW Brief at 22. But *Amici's* claims of "dark money" spending through § 501(c)(4)s make no sense in the world of campaign finance law—that is, the real world. Current laws such as FECA and BCRA define groups with a major purpose of political activity as political committees, thus requiring extensive registration and reporting requirements for contributions and spending.

For example, under FECA, a "political committee" is any "group of persons" that makes more than $1,000 in "expenditures" or receives more than $1,000 in "contributions" in a calendar year. 52 U.S.C. § 30101(4). In turn, an "expenditure" is "any purchase, payment . . . or anything of value made by any person for the purpose of influencing any election." *Id.* § 30101(9)(A)(i). And a "contribution" is "any gift . . . for the purpose of influencing any election." *Id.* § 30101(8)(A)(i). FECA's registration and reporting requirements apply to groups "that are under the control of a candidate" or that have as their "major purpose . . . the nomination or election of a candidate." *Buckley*, 424 U.S. at 79. To determine an organization's major purpose, the FEC may examine the organization's "spending, conduct, and public and private statements." *Pub. Citizen v. FEC*, 547 F. Supp. 3d 51, 53 (D.D.C. 2021); *see also Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1152 (10th Cir. 2007) ("[M]ajor purpose" can be determined by "(1) examination of the organization's central organizational purpose; or (2) comparison of the organization's independent spending with overall spending to determine whether the preponderance of expenditures are for express advocacy or contributions to candidates." (citing *MCFL*, 479 U.S. at 252 & n.6, 262 (plurality))). This means that if an entity spends any more than $1,000 per year on political activity and this represents a preponderance of its expenditures, it must register as a political committee and comply with the "extensive" and "stringent restrictions." *MCFL*, 479 U.S. at 254 (plurality). Notably, political committee status requires, among other things, the filing of reports that include the name, address, occupation, employer, and aggregate contribution amounts for donors giving more than $200. 11 C.F.R. §§ 104.3(a)(4)(i), 100.12 (defining identification).

An organization that does not qualify as a political committee is subject to disclosure requirements for contributions for independent expenditures or electioneering communications. Specifically, under FECA, an independent expenditure is "an expenditure . . . expressly advocating the election or defeat of a clearly identified candidate . . . that is not made in concert or cooperation with or at the request or suggestion of such candidate." 52 U.S.C. § 30101(17). Independent expenditures reporting requirements apply to individuals and organizations "(1) when they make contributions earmarked for political purposes" or "(2) when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 80. Such express advocacy communications are subject to FECA's disclosure requirements if more than $250 per year is spent on them. 52 U.S.C. § 30104(c)(1).

If an organization qualifies under these independent expenditure disclosure requirements, it must report: (1) the identity of all its contributors who had given it "over $ 200 in the aggregate in funds to influence elections"; (2) the names and addresses of those to whom it had given more than $200 for its independent expenditures, including information about the candidate; and (3) the identity of any donor who made more than $200 in contributions that were earmarked for independent expenditures. *MCFL*, 479 U.S. at 252 (plurality); *see also* 52 U.S.C. § 30104(c) (giving information to disclose); 11 C.F.R. §§ 104.3(b)(3)(vii), 109.10, 114.10; Press Release, Fed. Elec. Comm'n, FEC provides guidance following U.S. District Court decision in *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018) (Oct. 4, 2018), https://perma.cc/U8LE-YBGH.

Finally, groups not qualifying as political committees still must report if they engage in electioneering communications, defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general election." 52 U.S.C. § 30104(f)(3)(A). Organizations that spend more than $10,000 on electioneering communications in a calendar year are subject to the BCRA's burdensome reporting requirements. *Id*. § 30104(f)(1)-(2); *Citizens United*, 558 U.S. at 366.

Contrary to *Amici's* ominous threats of a dark money crisis, current campaign finance laws already contain multiple layers of disclosure requirements for political spending (and for relatively low dollar thresholds at that). If more disclosure is desired, that is up to Congress.

CONCLUSION

For the foregoing reasons *Amicus* requests that the Court adopt a rule "consistent" with the FEC's well-reasoned, expert determinations to safeguard political speech under the First Amendment and remedy the vagueness of the current test. 52 U.S.C. § 30111(f).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

On March 27, 2026, I caused the foregoing document to be electronically filed in the Court's CM/ECF software, which provides service to all counsel of record.

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