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Speak Up: Issue Advocacy in Increasingly Politicized Times

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SPEAK UP: ISSUE ADVOCACY IN INCREASINGLY POLITICIZED TIMES

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"Congress shall make no law . .. . abridging the freedom of speech . . ." (U.S. Constitution, First Amendment)

"Where the First Amendment is implicated, the tie goes to the speaker, not the censor." Federal Election Commission v. Wisconsin Right to Life, Inc. (2007)

I. INTRODUCTION: THE INTERSECTION OF TAX-EXEMPT ORGANIZATIONS, THE FIRST AMENDMENT, AND POLITICS

May nonprofit organizations speak up as they wish? Not really. Although nonprofits enjoy some constitutionally recognized First Amendment rights of free speech, the price tag of Section 501(c)(3) tax exemption includes (a) an absolute prohibition on political campaign advocacy, and (b) lobbying restricted to only "insubstantial" levels.[1] Historically, Section 501(c)(4) "social welfare" organizations have had it easier. At least for now, they may engage in limitless lobbying and significant political campaign activities, so long as they remain primarily engaged in activities beneficial to society's welfare.[2] Section 501(c)(4) organizations have garnered increased scrutiny over the last few years, triggered by the Supreme Court's decision in *Citizens United* that unleashed their enormous political potential,[3] and culminating with the IRS's proposed rule-making in 2013 to hem in politically related communications, which were subsequently retracted amidst a firestorm of publicly filed comments.

Both types of tax-exempt organizations face distinct constitutional tensions between the IRS's regulation of their tax-exempt limitations and the U.S. Supreme Court's interpretation of their First Amendment rights (albeit more constrained for section 501(c)(3) public charities). This tension is perhaps most evident for "issue advocacy," which is the term coined for nonprofits' educational communications on public policy matters related to their tax-exempt goals. Problems for Section 501(c)(3) and 501(c)(4) organizations arise when their issue advocacy becomes politically tinged. The First Amendment cries out, "Free speech!" The IRS warns, on the other hand, "Not so fast!" The Supreme Court continues to affirm our country's "profound national

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[1] 26 U.S.C. § 501(c)(3) (2012).

[2] 26 U.S.C. § 501(c)(4).

[3] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[4] At the same time, however, the IRS has been allowed to engage in often-questionable content-based scrutiny of "issue advocacy" communications that endangers our free speech rights.

What can responsible nonprofits say and do? How should they be organized under the Internal Revenue Code, particularly if they wish to educate, inform, and advocate on politically sensitive issues within the public arena? This article is intended to help answer these questions within the context of issue advocacy, so that nonprofits can be encouraged to speak up on important issues in the public arena without being chilled in their free speech activities or jeopardizing their tax-exempt status.

This article first provides a brief primer on current constraints affecting Section 501(c)(3) and 501(c)(4) organizations' communications within the context of what has become known as "issue advocacy."[5] It then sets forth the problem of increasing politicization of nonprofits' issue advocacy activities.[6] The article next evaluates related constitutional tensions for politically tinged issue advocacy, through the lens of the Supreme Court's free speech decisions.[7] It concludes by addressing how the IRS's different content-based standards for issue advocacy are susceptible to abuse, are otherwise constitutionally suspect, and therefore warrant reform.[8]

II. CURRENT IRS REQUIREMENTS FOR SECTION 501(C)(3) AND SECTION 501(C)(4) ORGANIZATIONS

A. Background: Different Standards for Different Tax-Exempt Organizations

Notwithstanding the First Amendment, the law recognizes varying degrees of free speech restrictions for different types of tax-exempt organizations. Section 501(c)(3) public charities are the most restricted, due to their right to receive tax-deductible

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[4] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[5] *See infra* Part II and accompanying notes 10–31.

[6] *See infra* Part III and accompanying notes 32–35.

[7] *See infra* Part IV and accompanying notes 36–68.

[8] *See infra* Part V and accompanying notes 69–104.

contributions. Under what has become known as "tax expenditure" theory, the idea is that public charities should not be able to use dollars that presumably would otherwise be taxed to engage in political activities.[9] Consequently, they are absolutely prohibited from actions intended to influence political campaigns.[10] In addition, they are restricted to only "insubstantial" legislative lobbying.[11]

On the other hand, Section 501(c)(4) organizations, which are not eligible for tax-exempt charitable contributions, can spend money for a wide variety of lobbying activities and even some political campaign activity. These "social welfare" organizations fall into the Tax Code's broad catchall category for organizations that benefit society but do not fit within its other exemption categories.[12] The key restriction is that they must be "primarily" engaged in promoting the common good and general community welfare,[13] and not be "primarily" engaged in political campaign activities. Section 501(c)(4) organizations are generally free to promote "social welfare" as they deem fit, even if that means extensive lobbying efforts.[14]

On the other end of the tax-exempt spectrum are Section 527 political organizations, which, by contrast, must be primarily operated to influence the election or appointment of political candidates.[15] Unlike the other tax-exempt organizations, Section 527 organizations must publicly disclose their donors' identities.[16] While keeping Section 527 organizations in mind, this article focuses on Section 501(c)(3) and Section 501(c)(4) organizations'

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[9] *See* Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983). In *Regan*, the Court ruled that the "substantial lobbying" prohibition on Section 501(c)(3) organizations did not violate the First Amendment as an "unconstitutional burden." *Id.* Instead, it reflected Congress' decision not to subsidize lobbying out of public funds, i.e., tax expenditures. *Id; see also* Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, 133 S. Ct. 2321 (2013) (following *Regan*'s tax expenditure logic and recognizing validity of special restrictions on Section 501(c)(3) organizations).

[10] *See Regan*, 461 U.S. 540.

[11] *Id.*

[12] *See Chapter G, "Social Welfare: What Does It Mean? How Much Private Benefit is Permissible?"* 1981 CPE Text; CHICK & HENCHEY, *Chapter M, "Political Organizations and IRC 501(c)(4)*, 1995 CPE Text.

[13] Prop. Treas. Reg. § 1.501(c)(4)-1(a)(2)(i), 55 Fed. Reg. 35588 (as amended in Aug. 31, 1990).

[14] 26 U.S.C. § 501(c)(4) (2012).

[15] 26 U.S.C. § 527.

[16] *Id.*

engagement in issue advocacy in relation to their legal restrictions on free speech as interpreted by the U.S. Supreme Court and the IRS.[17]

B. Issue Advocacy for Section 501(c)(3) Organizations

As part of their qualified tax-exempt activities, Section 501(c)(3) organizations may legitimately share information through educational "issue advocacy."[18] In a nutshell, that means that they may educate people about a wide variety of public policy issues, in order to promote their tax-exempt purposes.[19] Both Section 501(c)(3) organizations—and the individuals who work for them—enjoy First Amendment free speech rights to do so.[20]

Per IRS regulations, an organization's issue advocacy is a qualified tax-exempt activity if it "presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion."[21] As the IRS acknowledged in Revenue Procedure 86-43, however, this content-based regulatory language was held unconstitutionally vague, as applied in the appellate case of *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980).[22]

The IRS subsequently designed a "methodology test" for applying this regulation.[23] The same D.C. Court of Appeals later recognized that the new IRS test is still content-based but better avoids the unconstitutional vagueness problem.[24] The IRS's methodology test is currently the applicable standard for whether an organization is "educational" under Section 501(c)(3).[25] At its core, this test requires the IRS to "[l]ook to the method used by the

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[17] Other tax-exempt organizations such as Section 501(c)(5) unions and Section 501(c)(6) trade associations may engage in issue advocacy and political campaign advocacy as well. 26 U.S.C. §§ 501(c)(5)–(6). Their treatment is beyond the scope of this article.

[18] Treas. Reg. § 1.501(c)(3)-1(d)(3) (2008).

[19] As defined by the IRS, the term "educational" relates to "(a) the instruction or training of the individual for the purpose of improving or developing his capabilities; or (b) the instruction of the public on subjects useful to the individual and beneficial to the community." *Id.*

[20] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 (1978).

[21] *See* Treas. Reg. 1.501(c)(3)-1(d)(3) (2008).

[22] Rev. Proc. 86-43, 1986-2 C.B. 729.

[23] *See* Nat'l Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983).

[24] *See id.*

[25] *See* Rev. Proc. 86-43, 1986-2 C.B. 729.

organization to develop and present its views," rejecting it as a qualified "educational" activity only if "it fails to provide a factual foundation for the viewpoint or position being advocated, or if it fails to provide a development from the relevant facts that would materially aid a listener or reader in a learning process."[26] For example, if the views presented are not supported by fact, they are significantly distorted, or they are grossly disparaging, they may be rejected as not sufficiently "educational" in nature.[27]

C. Section 501(c)(4) "Action" Advocacy

According to the IRS, "little difference exists between the types of 'educational' activities considered exempt" under both sections 501(c)(3) and 501(c)(4)."[28] Section 501(c)(4) organizations thus may similarly engage in issue advocacy, albeit without the significant benefit of tax-deductible contributions. Typically, they are known as "action" organizations, engaged primarily in lobbying and limited political campaign activity in order to attain their goals through politics rather than nonpartisan activities.[29]

Again, however, the IRS has discretion to engage in content-based scrutiny by considering "all the surrounding facts and circumstances."[30]

III. FALLING INTO THE RABBIT HOLE OF POLITICIZATION

A key question exists for any nonprofit's issue advocacy: if its educational communications address issues that are also politically tinged, then may the IRS therefore question—or even prohibit—such speech? An organization's involvement in such issues should not necessarily trigger such government scrutiny. In other words, just because a political party or candidate latches on to public

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[26] *Id.* § 3.02.

[27] *See id*. § 3.03.

[28] *See* CHICK & HENCHEY, *supra* note 13, at 2 n.1.

[29] Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii)(a)–(b), (c)(3)-1(c)(3)(iii), (c)(3)-1(c)(3)(iv) (2008); s*ee also* Rev. Rul. 81-95, 1981-1 C.B. 332 (noting there is no ban on political campaign activities of Section 501(c)(4) organizations, so long as they are primarily engaged in activities to promote social welfare.).

[30] Treas. Reg. 1.501(c)(3)-1(c)(3)(iv) (2008); Rev. Proc. 2004-6, 2004-1 C.B. 197 (superseded by multiple later rulings).

policy issues does not render them "political" per se.

Consider a hypothetical "Free Market America," a public charity dedicated to promoting free markets, capitalism and related economic principles, and educating people about them.[31] Such principles are not inherently political. Indeed the organization's activities include purely apolitical expressions of the principles involving moral, spiritual, philosophical, and practical applications. These include human creativity, healthy community development, and personal fiscal responsibility. The organization also promotes debate and advocacy of issues addressed through politics, such as government debt, legislative approaches to health care reform, and labor-related laws.[32] Notwithstanding these political overlays, Free Market America should still qualify as a Section 501(c)(3) public charity and be able to speak out on issue advocacy. It should not be limited to the less favorable Section 501(c)(4) status or, worse, loss of tax-exempt status altogether.

Or consider environmental, pro-life, and religious liberty organizations, all of which likewise engage in substantial educationally oriented communications on politically sensitive issues. For example, environmental groups may emphasize protecting precious natural resources and promoting energy alternatives. (E.g., "Drive electric" and "Fracking is Bad [or Good]."). Faith-based groups may focus on helping people understand and live out moral and spiritual values. (E.g., Abortion kills a human life and is therefore wrong, regardless of what the law may say.) In the face of legislative and other political involvement in these potentially divisive issues, all of these organizations' informational efforts could potentially be interpreted as highly politicized. Nevertheless, such political attention should not mandate a communications muzzle on these organizations, as a condition of protecting their tax-exempt status.

Nonprofits that address politically sensitive issues thus need not be inexorably drawn into political dimensions. Rather, they can focus instead on the moral, spiritual, and intellectual aspects of such issues. Such aspects transcend both politics and partisanship,

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[31] *See What is FreeMarketFlorida.org*, FREE MARKET FLORIDA, http://freemarketflorida.org/about/whatisfmf/(last visited April 8, 2014).

[32] *See* Ryan Houck, *Our Nation's Environmental and Economic Crossroads*, THE DAILY CALLER (April 20, 2012, 11:44 AM), http://dailycaller.com/2012/04/20/our-nations-environmental-and-economic-crossroads/; *About Us*, FREE MARKET AMERICA, http://www.freemarketamerica.org/about-us.html (last visited April 8, 2014).

as may be played out through the media. But regaining such non-political perspective in issue advocacy, and making it clear to the IRS and others, may be challenging in light of the intensifying politicization of so many issues.

IV. THE U.S. SUPREME COURT FIERCELY GUARDS FREE SPEECH RIGHTS FOR TAX-EXEMPT ORGANIZATIONS.

A. Politics and Free Speech

A critical safeguard for nonprofit organizations should be the U.S. Supreme Court's decisions on politically related speech. While the Court has grappled with the contours of restrictions on political campaign activities and related free speech considerations, it has steadfastly affirmed the value of politically related speech to our democratic system. "Freedom of speech plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech 'is the matrix, the indispensable condition, of nearly every form of freedom.'"[33] As recognized by the Court in *Citizens United*, the First Amendment prohibits the government from unduly interfering in the "marketplace of ideas," particularly since "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."[34]

In relation to tax-exempt organizations, the Supreme Court has determined that constitutional protection depends on which category a communication fits into, as follows:

> (a) "express advocacy," which consists of speech that explicitly calls for the election or defeat of a clearly identified political candidate;
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> (b) the "functional equivalent of express advocacy;" or
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> (c) "issue advocacy," which is educational in nature, may mention a candidate, or may otherwise touch on political issues.[35]

Only the first two categories, "express advocacy" or its

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[33] Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 264 (1986) (quoting Palko v. Connecticut, 312 U.S. 319, 327 (1937)).

[34] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339, 354 (2010).

[35] *See* Buckley v. Valeo, 424 U.S. 1, 80 (1976); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 190–94 (2003) (citing *Buckley*, 424 U.S. at 80), *overruled in part by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

"functional equivalent," may be constitutionally constrained.[36] Issue advocacy is to be left alone, as constitutionally protected free speech.[37]

As the Court noted in its landmark *Buckley v. Valeo* decision, however, the distinction between campaign advocacy and issue advocacy "may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions."[38] Consequently, the Court has instructed that when drawing any line between campaign advocacy and issue advocacy, "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it."[39]

Likewise, as the Court ruled more than twenty years before, "[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on the speech that does not pose the danger that has prompted regulations."[40] Only an objective test such as provided in *Federal Election Commission v. Wisconsin Right to Life, Inc.* thus can truly afford adequate protection of First Amendment values, with the "benefit of any doubt given to protecting rather than stifling speech."[41]

B. Lessons from Wisconsin Right to Life: Issue Advocacy v. Political Campaign Advocacy

The Supreme Court's ruling in *Federal Election Commission v. Wisconsin Right to Life, Inc.*[42] is instructive, particularly in light of the IRS' very troubling proposed regulations issued in November 2013.[43] In that decision, the Court addressed the issue of whether a Section 501(c)(4) organization exceeded its legal limits by using corporate funds for an ad that encouraged listeners

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[36] *Mass. Citizens for Life, Inc.*, 479 U.S. at 248 (distinguishing between issue advocacy and campaign advocacy, within the context of protecting free speech rights of nonprofit corporations).

[37] *See Mass. Citizens for Life, Inc.*, 479 U.S. at 271 n.6.

[38] *Buckley,* 424 U.S. at 42.

[39] Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 457 (2007).

[40] *Mass. Citizens for Life, Inc.*, 479 U.S. at 265.

[41] *Wis. Right to Life, Inc.*, 551 U.S. at 469 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964)).

[42] *Id.*

[43] Treasury, *supra* note 4.

to contact their senators and oppose a filibuster.[44] The ads aired within 30 days of a primary election, in violation of the Bipartisan Campaign Reform Act of 2002, which makes such violations punishable as a federal crime.[45] The Court framed the issue as whether such communication was the "functional equivalent" of express advocacy, and therefore could be regulated.[46] Rejecting the notion that it was the functional equivalent of express advocacy, the Court determined, instead, that governmental interests justifying regulation of political campaign speech, including its "functional equivalent," did not apply to issue advocacy.[47]

As the Court instructed, "Where the First Amendment is implicated, the tie goes to the speaker, not the censor."[48] Any test regarding politically oriented speech thus should "reflect[] our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[49] On this basis, the Court applied the high-level "strict scrutiny" constitutional test, requiring the government to show that regulation of speech in this case furthered a "compelling governmental interest" and was "narrowly tailored to achieve that interest."[50]

In doing so, the Court specifically rejected any "intent-based," subjective test based on factors such as timing and relevance of the issues to the election at hand.[51] As the Court warned, "[f]ar 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 . . . , on the theory that the speaker actually intended to affect an election."[52]

Instead, the Court imposed an objective test that affirmed broad freedom of expression: "[A] court should find that an ad is

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[44] *Id*. at 457–460.

[45] *See* 2 U.S.C. § 441b(b)(2) (2006) (held unconstitutional by Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010)).

[46] *Wis. Right to Life, Inc.*, 551 U.S. at 456.

[47] *Id.* at 457 (quoting and citing McConnell v. Fed. Election Comm'n, 540 U.S. 93, 206 & n.88).

[48] *Id.* at 474.

[49] *Id*. at 468 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[50] *Id*. at 451.

[51] *Id*. at 468 ("A test turning on the intent of the speaker does not remotely fit the bill.").

[52] *Id.* at 468.

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."[53] Accordingly, the Court instructed that the focus should be on the *substance* of the communication at issue, not "amorphous considerations of intent and effect."[54] In doing so, the Court specifically rejected "the open-ended rough-and-tumble of factors that could invite complex arguments."[55] Furthermore, the Court held that any information about the speech's context is constitutionally irrelevant, such as its timing in relation to any election or the speech's relevance to election issues.[56]

Applying these considerations, the Court concluded the speech was not "express advocacy" that would be subject to regulation, but rather constitutionally protected "issue advocacy."[57] First, the content was consistent with genuine issue advocacy, focusing on a legislative issue, taking a position, exhorting the public to adopt such position, and urging the public to contact public officials about it.[58] Second, the content lacked any indicia of express advocacy: there was neither any mention of any election, candidacy, political party, or challenger, nor any position expressed about a candidate's character, qualifications, or fitness for office.[59] The Court noted that an appeal to contact one's elected representative does not amount to the functional equivalent of express advocacy.[60] As the Court further instructed, "Issue advocacy conveys information and educates. 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 decision."[61]

The Court concluded by holding that no compelling

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[53] *Id.* at 470 (emphasis added).

[54] *Id*. at 469.

[55] *Id.* at 451 (citing Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 547 (1995)); s*ee also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336 (2010) (citing *Wis. Right to Life, Inc.* and criticizing such a "rough-and-tumble" fact-based approach as effectively chilling otherwise constitutionally protected speech).

[56] *Wis. Right to Life, Inc.*, 551 U.S. at 472–73.

[57] *Id.* at 476.

[58] *Id*. at 470.

[59] *Id.*

[60] *Id*.

[61] *Id.*

government interest existed that was sufficient to pass constitutional muster to disqualify issue advocacy speech.[62] In doing so, the Court specifically rejected the applicability of any bright-line test as being constitutionally appropriate under the requisite strict scrutiny test.[63] "[T]he desire for a bright-line rule . . . hardly constitutes the compelling state interest necessary to justify any infringement on First Amendment freedom."[64] As Justice Scalia more poetically agreed:

> I recognize the practical reality that corporations can evade the express-advocacy standard. I share the instinct that "[w]hat separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." But the way to indulge that instinct consistently with the First Amendment is either to eliminate restrictions on independent expenditures altogether or to confine them to one side of the traditional line – the express-advocacy line, set in concrete on a calm day . . . . It is perhaps our most important constitutional task to assure freedom of political speech.[65]

V. HOW THE IRS CONTINUES TO ENDANGER CONSTITUTIONAL RIGHTS

As the U.S. Supreme Court recognized nearly two hundred years ago, the "power to tax is the power to destroy.[66] The IRS's regulatory power over Section 501(c)(3) and 501(c)(4) organizations has similar destructive potential. Keep in mind that the IRS's primary function is to operate as a revenue collection agency, not an arbiter of constitutional rights, and that it has limited resources to evaluate issues of constitutional magnitude affecting tax-exempt organizations. From a structural standpoint, it is thus highly problematic that the IRS has the discretionary power to engage in content-based scrutiny regarding these tax-exempt organizations' constitutionally protected speech (as well as

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[62] *Id.* at 481.

[63] *Id.* at 479.

[64] *Id.* at 479 (quoting Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986)). In *Massachusetts Citizens for Life, Inc.*, the Court further recognized that business and nonprofit corporations are qualitatively different with respect to any potential corruption. *Mass. Citizens for Life, Inc.*, 479 U.S. at 263. Whereas financial resources amassed by business corporations in the economic marketplace could have a "corrosive influence" on politics, nonprofits' resources are developed through successful ideas and missions. *Id.*

[65] *Wis. Right to Life, Inc.*, 551 U.S. at 499, 503 (Scalia, J. concurring) (citing McConnell v. Fed. Election Comm'n, 540 U.S. 93, 126 (2003)); *see also* NAACP v. Button, 371 U.S. 415, 433 (1963) ("First Amendment freedoms need breathing space to survive.").

[66] McCulloch v. Maryland, 17 U.S. 316, 431 (1819).

their participants' religious liberty and associational rights).

Contrary to the Supreme Court's clear directives endorsing free speech values as constitutionally paramount, the current legal framework allows for abusive IRS treatment of exemption applicants (as evidenced by the 2013 IRS tax scandal),[67] inconsistent IRS enforcement,[68] and overly complicated content-based inquiries.[69] In short, the IRS can and does overstep its constitutional boundaries, to the detriment of both tax-exempt organizations and our country's dearly held constitutional values. The IRS's willingness to disregard constitutional free speech values was starkly demonstrated by the IRS's 2013 proposed regulations for Section 501(c)(4) organizations whereby, among other things, the IRS sought to impose an unconstitutional "bright-line" test for political activity[70] and to prohibit such organizations from providing otherwise permissible voter education materials.[71] An unprecedented volume of public notice comments and other extensive commentary from conservatives, liberals, and many other concerned citizens, resoundingly criticized these proposed IRS regulations as being both legally invalid and politically

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[67] *See, e.g.*, DANIEL WERFEL, IRS, CHARTING A PATH FORWARD AT THE IRS: INITIAL ASSESSMENT AND PLAN OF ACTION 1 (2013) ("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 . . . . 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.") (citing MICHAEL E. MCKENNEY, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW (2013)).

[68] *See* Ellen P. Aprill, *Why the IRS Should Want to Develop Rules Regarding Charities and Politics*, 62 CASE W. RES. L. REV. 643 (2012). For example, the IRS's inconsistent and controversial treatment of church leaders who speak out from the pulpit on political candidates (as was commonly done during our country's founding years), particularly through recent initiatives like the "Pulpit Freedom Sunday" sponsored by the Alliance Defending Freedom and the IRS' own "Political Activities Compliance Initiative" (PACI). *Id.* at 274–75 (summarizing both activities and noting that the IRS is still trying to enforce vague "facts and circumstances" tests, which chills speech and undermines freedom of association).

[69] *See, e.g.*, Rev. Rul. 2007–41, 2007–25 I.R.B. 1421, which provides 21 different scenarios for potential impermissible political campaign activity of Section 501(c)(3) organizations. With respect to whether issue advocacy may amount to prohibited political activities, the IRS warns that an organization could be "at risk" if it makes "any message favoring or opposing a candidate," whether such message is express or subjectively implied, based on "look[ing] at all the facts and circumstances." *See also* IRS, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATION 8 (2009) (providing guidance for general public; same standards), *available at* http://www.irs.gov/pub/irs-pdf/p1828.pdf.

[70] *See Wis. Right to Life, Inc.*, 551 U.S. 449 (rejecting bright-line test for such speech-related constitutional issues).

[71] *See* Treasury, *supra* note 4.

driven.[72]

A. The IRS's Unconstitutional Restrictions on Section 501(c)(3) Organizations

As identified above, greater constraints on Section 501(c)(3) organizations have been held to be constitutionally permissible, due to their unique eligibility to receive tax-deductible contributions. They are absolutely prohibited from engaging in any speech that favors or disfavors a political candidate, and they can engage in only "insubstantial" lobbying.[73] On the other hand, they enjoy free speech rights to engage in issue advocacy, to inform and educate listeners on a wide variety of subjects including those otherwise addressed through politics.[74] How does this constitutional tension play out in practical application?

First, as explained above within the context of U.S. Supreme Court cases, it can be quite challenging to identify what constitutes issue advocacy versus political campaign advocacy.[75] In addition, the legal distinction between "substantial" versus "insubstantial" lobbying is inherently vague.[76] As a result, public charities are left to wonder where the "line" exists between legally permissible and impermissible speech. Given the specter of losing (or not getting) tax-exempt status, the inevitable logical result is that Section 501(c)(3) organizations will err on the side on not engaging in potentially controversial activities.

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[72] The outrage quickly surfaced and continued throughout the public comment period. *See, e.g.*, Kimberley A. Strassel, *IRS Targeting: Round Two,* WALL ST. J. (Dec. 13, 2013), http://online.wsj.com/news/articles/SB10001424052702303932504579254521095034070 (contending that the proposed IRS regulations blatantly demonstrate the current White House administration targeting of conservative political groups, in the wake of the 2013 IRS scandal); s*ee also The Bright Lines Project*, PUBLIC CITIZEN, www.brightlinesproject.org (last visited March 18, 2014) (advocating alternative "bright line" standards in order to promote clarity for charities and social welfare organizations with respect to political activity, whereby safe harbors would be allowed for certain speech and the IRS's "facts and circumstances" test would be used for other speech). Reportedly, more than 140,000 comments were filed by the February 28, 2014 public comment deadline, with still more trickling in. Among other things, a plethora of critics have called the IRS's proposed regulations illegitimately conceived, aimed at more inappropriate targeting, chock-full of defects, and a serious threat to constitutionally protected political speech.

[73] *See* Treas. Reg. § 1.501(c)(3) –1(c) (2008).

[74] Treas. Reg. § 1.501(c)(3)-1(d)(3) (2008).

[75] *See supra* Part IV.B.

[76] IRS, *supra* note 72, at 6. A Section 501(c)(3) organization may file a "Section 501(h) lobbying election" as a safe harbor, but additional recordkeeping and IRS reporting requirements then arise. *Id.* Notably, churches may not file such an election. *Id.*

Second, the IRS cannot be trusted to handle this important responsibility regarding free speech rights. Rather than applying Supreme Court's "tie goes to the speaker, not the censor" approach,[77] the IRS uses a content-based "facts and circumstances" test[78] that allows for too much discretion – and therefore abuse.[79] Taken together with the IRS's limited resources that keep it from effectively and appropriately parsing through speech-related issues of constitutional dimension,[80] the IRS's approach is highly problematic.

For example, remember that it is official IRS policy "to maintain a position of disinterested neutrality" with respect to examining a Section 501(c)(3) organization's issue advocacy activities, and to look instead at the methods by which the organization develops and presents its views.[81] This "methodology test" is itself subject to a constitutional challenge on the grounds it is not neutral enough.[82] Even worse, however, the IRS does not

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[77] Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 474 (2007).

[78] *See* Rev. Rul. 2007–41, 2007-25 I.R.B. 1421; J. KINDELL AND J.F. REILLY, ELECTION YEAR ISSUES, EO CPE Text (2002).

[79] As the author learned from one particular tax controversy, deciding what is and is not "substantial" lobbying is highly discretionary within the eye of an IRS beholder. For example, in 2012, a nonprofit organization filed an IRS Form 1023 application for Section 501(c)(3) tax-exempt recognition and disclosed that it would engage in minimal grass roots lobbying as one among six charitable programs. In response (and after the application languished for over a year), the IRS examiner informed the applicant that it qualified instead under Section 501(c)(4) as a lobbying organization. The applicant responded that lobbying would constitute less than five percent of the organization's activities, but the IRS examiner held firm. Only after legal counsel got involved and further challenged the IRS examiner did the applicant find success: the favorable Section 501(c)(3) determination letter was issued promptly thereafter.

[80] *See* Gene Tagaki, *Hearing on IRS Exempt Organizations Division Post-TIGTA Audit,* NONPROFIT LAW BLOG (Nov. 30, 2013), http://www.nonprofitlawblog.com/hearing-on-the-irs-exempt-organizations-division-post-tigta-audit/. The IRS reportedly has a current backlog of over 65,000 pending Section 501(c)(3) and Section 501(c)(4) tax exemption application. *Id.*

[81] Rev. Proc. 86-43, 1986-2 C.B. 729.

[82] *See* ERIKA K. LUNDER, CONG. RESEARCH SERV., ORGANIZATIONS: WHAT QUALIFIES AS "EDUCATIONAL"? 5 (2012) (citing Laura B. Chisholm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 219–20 (1987)) ("[S]ome have questioned if the methodology test can be fairly categorized as objective or content neutral when it requires looking into such things as whether the organization uses 'particularly inflammatory' language or distorts facts.").

> [C]onsidering, in addition, the uncertain lines between the dissemination of opinion and legislative activity or election campaign intervention, it appears that organizations hoping to bring about social change by raising public awareness of their causes continue to be vulnerable to loss of exemption based upon a subjective IRS evaluation of the controversiality and validity of the position taken, as well as the style in which the viewpoint is expressed.

appear to be following it.

Instead, the IRS seems to be using the even more content-intensive "full and fair exposition" test, even though it has acknowledged that the test has been ruled unconstitutional.[83] According to a report provided by Tax Analysts, IRS EO training materials released pursuant to a Freedom of Information Act request directs that in cases of "education vs. advocacy" under Rev. Proc. 86-43, the IRS is to engage in a content-based review of whether a nonprofit presents a "full and fair exposition" of facts, rather than the more neutral methodology test.[84] Thus, although no Section 501(c)(3) organization should be subjected to any question of whether it educates listeners on "all aspects" of an issue, as required by the "full and fair exposition" test, the IRS imposes this erroneous standard on them anyway.[85] In this practitioner's experience, the IRS has repeatedly done so in tax-exemption applications involving controversial matters, resulting in free speech infringements and unnecessary delays.

Likewise, with respect to determinations of whether Section 501(c)(3) organization advocacy amounts to impermissible political campaign speech, the IRS delves impermissibly into a content-oriented "facts and circumstances" test. Among other complicated factors, the IRS looks at the following highly factual considerations:

> Whether a statement expresses approval or disapproval of a candidate's positions or actions;
>
> Whether a statement is delivered close in time to an election;
>
> Whether the issue addressed is one that has distinguished the candidate;

Id. at 5 n.33.

[83] *See* Rev. Proc. 86–43, 1986-2 C.B. 729; Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980). While *Big Mama Rag* was decided by the D.C. Circuit Court of Appeals and not the U.S. Supreme Court, it nonetheless stands as quite authoritative as issued by a well-respected federal appellate court that often decides important issues affecting government agencies. *Id.* Certainly its view of what is and is not constitutionally protected speech should be accorded far greater deference than a bureaucratic agency charged with collecting tax revenue. *Id.*

[84] *See Exempt Organizations Determinations Unit 2*, IRS STUDENT GUIDE, Lesson 11, http://www.taxanalysts.com/www/freefiles.nsf/Files/EO%204.pdf/$file/EO%204.pdf.

[85] This standard is ludicrous on its face. Can anyone seriously imagine the IRS requiring Planned Parenthood to advocate that abortion really is killing a human life, or the IRS requiring a religious nonprofit to advocate that pregnant women should consider getting abortions in order to protect their health? How about the IRS requiring an environmental group to provide information about how coal burning may not, in fact, cause global warming?

> Whether the communication is part of an ongoing series of communications by the organization on the same issue; and
>
> Whether the communication's timing is related to a non-electoral event. [86]

As explained above, however, it is constitutionally suspect to use such context-based factors that allow for subjective, discretionary scrutiny.

Given that the penalties for crossing the current political speech line may be complete loss of tax-exempt status, with no eligibility even for the less favorable Section 501(c)(4) status,[87] the upshot is that speech is chilled, applications are delayed,[88] and—as our country recently learned all too clearly—the IRS is allowed to abuse its discretion. To protect and affirm our country's democratic free speech values, Section 501(c)(3) organizations deserve the same protections as the Supreme Court has accorded to Section 501(c)(4) organizations. The IRS thus needs to move back the proverbial line, to keep in step with the Constitution.

B. The IRS's Unconstitutional Restrictions on Section 501(c)(4) Organizations

While the above limitations on Section 501(c)(3) organizations arguably may be justified by their special tax-exempt status, the IRS's stance as reflected in its proposed restrictions on Section 501(c)(4) organizations warrant grave concern.[89] As Justice Blackmun once observed, Section 501(c)(4) organizations are supposed to provide an escape valve for free speech interests.

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

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[86] I.R.S. Fact Sheet FS-2006-17 (Feb. 2006), *available at* http://www.irs.gov/uac/Election-Year-Activities-and-the-Prohibition-on-Political-Campaign-Intervention-for-Section-501(c)(3)-Organizations; *see also* I.R.S. Publ'n 1828 (Nov. 2009), *available at* http://www.irs.gov/pub/irs-pdf/p1828.pdf.

[87] 26 U.S.C. § 504(a) (2012).

[88] Witness the widely publicized interminable delays at the backlogged IRS, with tax-exempt applications taking a year or many months more. *See also Exempt Organizations Determinations Unit 2*, *supra* note 87 (discussing that issues such as government spending, peace, separation of church and state, abortion, birth control, and gay and lesbian rights are now reportedly subject to IRS "mandatory review," which cannot bode well for a hoped-for timely IRS determination letter).

[89] See Treasury, *supra* note 4 (proposed Section 501(c)(4) regulations).

Amendment problems would be insurmountable.[90]

The restraints on Section 501(c)(4) organizations' speech face similar problems of vagueness and IRS abuse. First, with respect to the requirement that they engage "primarily" in promotion of social welfare, the parameters of their legally permissible speech are far from clear.[91] The IRS itself recognized, in the wake of the 2013 tax scandal, that the "no precise definition exists in relevant revenue rulings, cases, or regulations for 'primarily' in this specific context and that the statute does not provide clear guidance on how the determination should be made."[92] Second, the IRS likewise applies its problematic "facts and circumstances" standard, including timing and voter targeting.[93] Worse, the IRS now seems determined to head backwards into unconstitutional territory armed with its new proposed regulations.

The IRS's proposed guidance stated that the term "candidate-related political activity" is outside the boundaries of a Section 501(c)(4) organization's legitimate promotion of "social welfare."[94] Such action was aimed squarely at addressing the explosion of Section 501(c)(4) corporate political activity allowed by the Supreme Court in *Citizens United.* The IRS, however, overreached. Without so much as a nod to free speech values, the IRS instead trumpeted the purported benefits of a bright-line test for politically oriented speech, continued to rely on impermissibly context-based and subjective factors, and even disallowed voter

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[90] Regan v. Taxation with Representation of Wash., 461 U.S. 540, 553 (1983) (Blackmun, J., concurring); s*ee also* Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*,* 133 S. Ct. 2321 (June 20, 2013) (following *Regan* logic and noting that nonprofits may still lobby Congress through a Section 501(c)(4) counterpart instead).

[91] *See, e.g.*, Prop. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii), 55 Fed. Reg. 35588 (as amended in Aug. 31, 1990) (organization is operated exclusively for social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community); Rev. Rul. 81-95, 1981-1 C.B. 332 (stating that 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").

[92] WERFEL, *supra* note 70, at 25. The IRS further offered a self-disclosure "safe harbor," whereby Section 501(c)(4) could gain fast-track processing of their exemption applications, upon representing that less than forty percent of their activities consist of political campaign activity. *Id.* That still does not satisfy the definitional questions surrounding political-related activity for social welfare organizations, and it includes constitutionally problematic timing-related considerations. *See id.* at 24–25 and App. E.

[93] *See* Rev. Rul. 2004-6. 2004-4 I.R.B. 328; CHICK & HENCHEY, *supra* note 13.

[94] *See* Treasury, *supra* note 4.

education related activities.[95]

The IRS appears to be tone-deaf to the sound of Supreme Court's instructions, as supreme arbiter of constitutional protections. The Supreme Court has already ruled that no bright-line test provides the requisite "compelling government interest" sufficient to satisfy the applicable "strict scrutiny" standard for First Amendment rights of Section 501(c)(4) organizations.[96] In addition, the Supreme Court has likewise already ruled that context-related factors such as a communication's timing in relation to an election are not appropriate considerations for speech by Section 501(c)(4) organizations.[97]

Nevertheless, the IRS has turned its back on the correct constitutional standard of whether a communication "is susceptible *of no reasonable interpretation* other than as an appeal to vote for or against a specific candidate."[98] Instead, the IRS has sought to prescribe a bright-line 60/30-day test that applies "without regard to whether a public communication is intended to influence the election or some other, non-electoral action (such as a vote on pending legislation) and without regard to whether such communication was part of a series of similar communications."[99] Consequently, under the IRS's proposed regime, a Section 501(c)(4) organization could criticize an elected leader's stand on moral, environmental, or other principled grounds at any time, but only until an election is 60 days (or 30 days, in some cases) away.[100] It then must be silent until the election is over.[101]

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[95] *Id.*

[96] *See* Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449 (2007); Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986).

[97] *Wis. Right to Life, Inc.,* 551 U.S. 449 at 472–73.

[98] *Id.* at 451 (emphasis added). This is the correct constitutional standard for whether a Section 501(c)(4) organization's communications constitute the "functional equivalent" of express advocacy and therefore may be regulated. *Id.* at 493.

[99] Treasury, *supra* note 4.

[100] *See id.* More specifically, a Section 501(c)(4) could not engage in any communications that "express a view, whether for or against a clearly identified candidate (or on candidates of a political party)." *Id.*

[101] *Id.* As many critics have observed, this new standard would require Section 501(c)(4) organizations to scrub their websites of anything written about a candidate, even postings made before the 60/30-day windows. *See, e.g., The Latest IRS Political Crackdown*, WALL ST. J. (Nov. 28, 2013), http://online.wsj.com/news/articles/SB10001424052702304747004579223933628024344 ("Outside the IRS, that's called censorship."). Further, given that many state elections are staggered across different dates, long-term communications blackouts could effectively result for national nonprofits. *See* Ernest Istook, *IRS to Get "License to Kill" Groups that Oppose Obama Agenda*,

The legal standards for Section 501(c)(4) free speech interests are already problematic. The IRS's proposed regulations would have only made matters worse. Notwithstanding its ostensible interest in "clarity," the IRS's approach clashed instead with Section 501(c)(4) organizations' constitutionally recognized First Amendment rights and, indeed, the rule of law.

VI. CONCLUDING RECOMMENDATIONS

Section 501(c)(3) and Section 501(c)(4) organizations have broad First Amendment freedom of speech rights, but they are subject to varying degrees of constraint when politics get into the mix. Organizations that wish to engage vigorously in speech and other activities affecting public policy issues would be wise to steer as clear of restricted activities like political campaign activity and lobbying. Instead, they can—and often do—appeal to broader interests and considerations such as moral, spiritual, and philosophical dimensions and non-political solutions. In short, why not change hearts and minds, instead of the law?

The IRS's vague standards for tax-exempt organizations' speech, and its evident potential for abuse, remain disturbing. With the release and subsequent withdrawal of the IRS's 2013 proposed regulations for Section 501(c)(4) organizations' speech, the debate on these issues will likely continue. If the IRS is truly interested in a bright-line test and clarity as it claims, then it should comply with the U.S. Supreme Court's directive to let the proverbial tie go to the speaker, not the censor. More specifically, the IRS should stay out of all questions of politically-oriented speech short of (a) express advocacy for or against a candidate and (b) lobbying distinctions between Section 501(c)(3) and Section 501(c)(4) organizations. By moving the "line" in this direction, we can better preserve and guard our country's deeply valued First Amendment free speech rights.

WASH. TIMES (Jan. 7, 2014) http://communities.washingtontimes.com/neighborhood/ernest-istook-knowing-inside/2014/jan/8/irs-get-license-kill-groups-oppose-obama-agenda/.