U.S. CHAMBER OF COMMERCE

1615 H Street, NW
Washington, DC 20062

February 27, 2014

Via Federal eRulemaking Portal

The Honorable John A. Koskinen
Commissioner of Internal Revenue
CC:PA:LPD:PR (REG-134417-13)
Room 5305
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

Re: "Notice Of Proposed Rulemaking, Guidance For Tax-Exempt Social Welfare Organizations On Candidate-Related Political Activities," Reg-134417-13

Dear Commissioner Koskinen:

These comments are submitted on behalf of the U.S. Chamber of Commerce (the "Chamber"). The Chamber is the world's largest business federation, representing the interests of more than three million companies of every size, sector, and region.

The Chamber is a tax-exempt organization under Section 501(c)(6) of the Internal Revenue Code ("IRC" or the "tax code"). Although the Notice of Proposed Rulemaking ("NPRM" or the "proposal")[1] addresses only Section 501(c)(4) civic groups, the questions accompanying the proposal indicate that the same or similar standards could be extended to Section 501(c)(6) organizations. Accordingly, these comments address all aspects of the proposal.

EXECUTIVE SUMMARY

The proposed rule is an unprecedented attempt to broadly suppress constitutionally protected speech by tens of thousands of organizations on core issues of government decision-making and public policy. It would overturn regulatory standards that have been in place for more than 50 years, even though the governing statute does not grant any authority to regulate speech and Congress has recently, and repeatedly, refused to enact a statute embodying similar speech regulations.

[1] Notice of Proposed Rulemaking, Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities REG-134417-13, 78 Fed. Reg. 71,535 (Nov. 29, 2013).

This breathtaking assertion of Executive Branch authority to regulate political speech is all the more remarkable given the recent history of politically-biased enforcement activity by the Internal Revenue Service and the Treasury Department, which has revived longstanding concerns about use of tax authority for political ends. Far from restoring the nonpolitical status of the IRS, this proposal would put that agency at the center of a new speech-regulation system overseen by one political party—directly contrary to our country's longstanding tradition of allocating such responsibility to the bipartisan Federal Election Commission ("FEC"), precisely to avoid one-party regulation of political speech. The IRS and the Treasury Department should withdraw the proposal and focus their attention on putting in place protections against political decision-making under the existing regulatory standards.

In particular, our comments focus on the following specific points:

- The proposal should be withdrawn because it arrogates to the IRS unprecedented authority to regulate, and to ban, speech at the core of the First Amendment and therefore violates our nation's longstanding tradition that such regulations should be put in place by Congress or by the FEC, an agency with a unique bipartisan structure specifically designed to guard against abuse of power to serve political ends (*see* pages 3-6).

- Rather than addressing the concerns about the IRS's politically-motivated enforcement activities, the proposal would entrench the IRS as a politically-oriented regulator of speech (*see* pages 6-8).

- By proposing a definition of "candidate-related political activity" ("CRPA") but leaving open how the IRS and the Treasury Department propose to use that definition—either as a substitute for the current "facts and circumstances" test for determining an organization's "primary purpose"; or as a category of activities that are banned or permitted only on a *de minimis* basis—the proposal is arbitrary and irrational. It is impossible for anyone to comment meaningfully on a standard for regulating speech without knowing the purpose for which that standard will be used (*see* pages 9-11).

- The CRPA definition is exceedingly broad. It sweeps in not only election-related speech but also huge quantities of issue advocacy. To cite just one example, the definition would have captured any speech mentioning or referring to the President for all but 34 days from December 2011 through the November 2012 election—even statements simply urging that the President be contacted to veto or support legislation or take some administrative action. And it would encompass even an organization's internal communications to its own members (as long as its membership exceeds 500 individuals) (*see* pages 12-15).

- The proposed definition of CRPA also includes communications relating to Executive Branch and judicial appointments (*see* pages 15-16), get-out-the-vote efforts, and other core First Amendment activities (*see* pages 17-18).

- The effect of the proposal would be to create a "no speech zone"; as a result of the combined effect of the proposed rule and Section 527 of the IRC, groups that wish to engage in issue advocacy will not be entitled to a tax exemption under either provision (*see* pages 16-17).

- The proposal's statement that any new rule will take effect upon promulgation is a blatant effort to chill constitutionally-protected speech by forcing 501(c)(4) organizations to curtail their speech—during an election year—even before any rule is issued (*see* pages 18-19).

- The IRS and the Treasury Department lack statutory authority to promulgate the proposed rule. *First*, Congress's enactment of Section 527 constituted legislative ratification of the then-existing administrative interpretation of Section 501(c)(4) (which is the interpretation in effect today). *Second*, even if Congress did not ratify the current administrative interpretation, the language and history of Section 501(c)(4) demonstrate that Congress did not intend to grant the IRS broad discretion to regulate speech under that provision. Instead, the statute can only be interpreted to *prohibit* the IRS's restriction of the speech activities of 501(c)(4) organizations (*see* pages 19-26).

- The proposed rule also violates the First Amendment by conditioning an organization's tax-exempt status upon impermissible prohibitions on constitutionally-protected speech (*see* pages 26-30).

- Although the current proposal applies only to 501(c)(4) organizations, the rulemaking notice indicates that similar standards could be extended to 501(c)(5) labor unions and 501(c)(6) entities, which include "business leagues, chambers of commerce, [and] real estate boards." The IRS and the Treasury Department have no statutory authority to regulate the speech activities of these organizations, because of the very different statutory language, history, and purpose of Section 501(c)(6) (*see* pages 30-37).

DISCUSSION

I. The Proposal Violates The Longstanding Congressionally-Established Principle That Federal Agencies Controlled By One Political Party Should Not Exercise Discretionary Authority To Regulate Political Speech.

Given the critically important role of political speech in our democracy, Congress has been quite specific when it legislates in this area, delegating little discretion to administrative agencies.[2] To the extent it has delegated such authority, moreover, Congress has conferred it on

[2] *See McConnell v. FEC*, 540 U.S. 93, 94 (2003) (describing "nearly a century of federal enactments" by Congress designed to regulate campaign and election activity).

the FEC, an agency with a unique bipartisan structure, specifically designed to guard against abuse of government power to serve political ends.

The proposal would arrogate to the IRS—an Executive Branch agency, subject to plenary control by the Secretary of the Treasury, the President, and their political appointees, that has a history of misuse for political purposes—the authority to regulate, and to ban, speech at the core of the First Amendment. That purported authority, which the IRS has never exercised in the nearly 100 years since Section 501(c)(4) was first enacted, violates Congress's clear intent to preclude politically biased decision-making by the Executive Branch. For that reason alone, the proposal should be withdrawn and this rulemaking terminated.

Concern about the Executive Branch's use of the IRS to retaliate against political enemies has a long history. In 1974, for example, Congress found that "[President Nixon] ha[d], acting personally and through his subordinates and agents, endeavored 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."[3] Similar concerns were raised before 1974, and have been raised since that time.[4]

Congress, in 1974, created the FEC as an independent agency—with the unique structure of an equal number of commissioners from different political parties—charged with implementing rules to regulate campaign speech.[5] Importantly, and consistent with Congress's concerns about the potential abuse of executive power, the FEC was granted "*exclusive* jurisdiction over civil enforcement" of the Federal Election Campaign Act ("FECA").[6] In the four decades since the FEC was created, Congress has used that agency—through intermittent

---

[3] H.R. Rep. No. 93-1305, at 3 (1974).

[4] *See, e.g.*, John Sbardellati, *Power to Destroy: The Political Uses of the IRS from Kennedy to Nixon*, 7 J. COLD WAR STUDIES 158, 159 (2005) ("On the advice of Walter Reuther of the United Auto Workers, John and Robert Kennedy ordered the IRS to launch what eventually became known as the Ideological Operations Project [], a systematic attempt to undercut funding for rightwing organizations by challenging their tax-exempt status.…Under Lyndon Johnson, the IRS, functioning as an intelligence resource for the FBI and the [CIA], began targeting New Left and antiwar groups."); *see also* David Burnham, Op-Ed., *Misuse of the IRS: The Abuse of Power*, N.Y. TIMES (Sept. 3, 1989) ("[I]n many cases the personal views of IRS officials have determined how the tax agency interpreted tax laws. The result: The IRS, which regularly intrudes on the lives of more Americans than any other Federal agency, has arguably become the single most powerful instrument of social control in the United States, deciding on a wide range of matters that are far removed from the collection of taxes.")

[5] *See* Final Report of the Select Committee on Presidential Campaign Activities, S. Rep. No. 93–981, 93d Cong., 2d Sess., 564 (1974) ("Probably the most significant reform that could emerge from the Watergate scandal is the creation of an independent nonpartisan agency to supervise the enforcement of the laws relating to the conduct of elections.").

[6] FECA, 2 U.S.C. § 437 (1974) (emphasis added); *see also FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 199 (1982).

amendment of FECA—to implement regulations to address campaign finance, disclosure requirements, and classes of political speech subject to governmental constraint.

Congress has *not* delegated similar discretionary authority to the IRS. Indeed, since 1974, Congress has enacted only one tax code provision regulating political speech—Section 527.[7] But that provision is extremely specific, defining in detail the types of "political organization[s]" and "exempt function[s]" to which the provision applies.[8] Congress thus specifically and intentionally declined to confer upon the IRS or the Treasury Department broad discretionary authority in the domain of political speech regulation.

The specificity of Section 527 reflects Congress's concern about the potential for partisan abuse occasioned by a less constrained delegation of speech-regulating power to the Executive Branch, and conclusively forecloses any implicit grant of broader authority. As the United States Court of Appeals for the District of Columbia recently explained in *Loving v. IRS*, courts do not "lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies."[9]

The current proposal is particularly improper, moreover, because it was issued after both the bipartisan FEC and Congress itself refused to adopt essentially equivalent rules.

The FEC's existing regulations impose disclosure obligations solely when donations exceeding $1,000 are made to a corporation or labor organization "for the purpose of furthering electioneering communications."[10] By their terms, these obligations do not cover all candidate-related political activity; they apply only to disbursements made for purposes of actual electoral advocacy, and they do not extend to donations made to corporations or labor groups that have more general purposes or activities. In upholding this regulatory interpretation, the courts have

---

[7] Two other provisions of the tax code apply to political activity, but only in limited contexts. These provisions too are significantly detailed, suggesting they carry no implicit grant of broad authority. *See* IRC § 501(c)(3) (describing certain charitable, educational and other organizations that are exempt from federal income taxation provided that such organization "does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."); *see also* IRC § 162(e) (generally denying businesses an income tax deduction for certain types of political expenditures). Viewing the IRC as a whole, it is plain that Congress intended to limit the IRS's regulatory authority to restrict political speech to only two types of groups: 527 political organizations and 501(c)(3) charities.

[8] By its terms, Section 527 applies only to "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for … the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed."

[9] *Loving v. IRS*, __ F.3d__, 2014 WL 519224 at *8 (D.C. Cir. Feb. 11, 2014) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

[10] 11 C.F.R. § 104.20(c)(9).

acknowledged the FEC's primacy in the area of campaign finance law and have granted the FEC considerable deference to "apply its expert judgment" as it deems appropriate.[11] The current proposal is an improper attempt to circumvent the FEC's judgment—which has been substantially endorsed by the judiciary—not to impose further onerous restrictions in this area.

Congress also has declined to adopt these obligations. Following the Supreme Court's *Citizens United* decision, the proposed DISCLOSE Act[12] would have imposed additional requirements on groups claiming tax-exempt status under Sections 501(c)(4), (c)(5), and (c)(6) that engaged in political activity. This legislative proposal engendered a lengthy and vigorous debate about the proper role of tax-exempt organizations in politics. Activists on all sides petitioned Congress and expressed their views on the bill, with many civil rights groups, including the ACLU, aggressively opposing the bill as unacceptably burdening political speech. Hearings and markups were held, and the issue was hotly debated in Congress. Ultimately, following an extensive and deliberative legislative process, the measure was rejected by a margin of 59–39 on the floor of the Senate. When proponents of the measure attempted to resurrect the DISCLOSE Act two years later, it failed to command enough votes for cloture.

The fact that Congress *repeatedly considered and specifically declined to enact* restrictions on the speech of civic groups forecloses any Executive Branch rule that would have the same effect. The Constitution does not permit executive agencies to impose a new law that Congress has deliberately opted not to adopt through legislation. This end-run around the legislative process would be improper in any context. But it is especially improper here given the extreme sensitivity of restricting First Amendment speech and Congress's established practice of addressing these issues itself.

II. The Proposed Rule Will Not Prevent The Recurrence Of Ideological Targeting; Instead, It Appears To Be An Effort To Impose Even Broader Restrictions On Political Speech.

The rulemaking proposal purports to be a consequence of the "considerable confusion"[13] that supposedly led to the IRS's recent selective targeting of conservative-leaning civic groups for disparate treatment under the IRC. As the Treasury Inspector General for Tax Administration (the "Inspector General") found (and as the IRS has since conceded), the criteria used to investigate such groups gave "the appearance that the IRS is not impartial in conducting its

---

[11] *Center for Individual Freedom v. Van Hollen*, 694 F.3d 108, 111 (D.C. Cir. 2012) (overturning a preliminary challenge to the FEC's "purpose" requirement under 11 C.F.R. § 104.20(c)(9), and applying the primary jurisdiction doctrine to refer further interpretation questions to the FEC in the first instance, as the "agency that knows more about the issue").

[12] DISCLOSE Act, H.R.5175 and S.3628, 111th Cong. (2010).

[13] NPRM at 9.

mission."[14] But the proposal cannot be justified on the ground that, if implemented, it will eliminate concerns about the IRS's uneven application of the tax laws.

The proposed rule includes subjective criteria that could be misused by IRS personnel (*e.g.*, whether a communication is "susceptible of no reasonable interpretation" other than advocacy,[15] or whether a candidate is "apparent by reference" in a communication[16]). And the proposal fails to include any procedural mechanism for detecting or deterring politicized enforcement in the future. Instead, the proposal appears to assume that the entire fault for ideological targeting lies with the language of the existing rules, not with the directions given to the individuals who selectively applied them. Respectfully, we find this to be a dubious position given that other Democratic and Republican administrations have successfully applied the existing Section 501(c)(4) regulations on an evenhanded basis for over five decades.

There is also considerable evidence that—although the NPRM is being depicted as an attempt to address the issues identified by the Inspector General—it was in fact developed long before the Inspector General's findings ever came to light.

The House Committee on Oversight's February 4, 2014, letter to the Commissioner sets forth compelling evidence that the current rulemaking is the product of a longstanding effort to "codify and systematize targeting of organizations whose views are at odds with those of the Administration."[17] Specifically, the letter details how the proposal emerged from the very same undisclosed "c4 project," begun as early as September 2010, that led to the targeting of conservative groups.[18] In interviews conducted by the Committee, IRS staff confirmed that the proposal was developed by some of the same employees who authorized selective targeting and had been secretly vetted by the IRS chief counsel's office before 2012, well before the release of the Inspector General's report.[19] Indeed, the Inspector General himself told the Committee that "the proposed rule was not responsive to any recommendation of his office's audit."[20]

---

[14] *See* David Ingram and Matt Spetalnick, *FBI opens criminal probe of tax agency, audit cites disarray*, REUTERS (May 15, 2013) ("The report by the Treasury Inspector General for Tax Administration sharply criticized the way the IRS had screened the conservative groups, citing poor management and processing delays. The report suggested that such practices could damage public confidence in the agency.").

[15] NPRM at 28.

[16] NPRM at 30.

[17] Letter to Commissioner Koskinen, House Committee on Oversight, 1 (Feb. 4, 2014), available at: http://oversight.house.gov/wp-content/uploads/2014/02/2014-02-04-DEI-JDJ-to-Koskinen-IRS-c4-Rule.pdf.

[18] *Id*. at 2-3.

[19] *Id*. at 7-8.

[20] *Id*. at 9.

In addition, the proposal was developed "off plan," meaning that the IRS and the Treasury Department concealed the rulemaking plan from public view by excluding it from the agencies' publicly-disclosed rulemaking agendas.[21] And perhaps most troubling of all, documents and testimony before the Committee confirm that the rulemaking was precipitated by complaints from Democratic members of the United States Senate, who pressured the IRS to pursue conservative 501(c)(4) groups more aggressively.[22] These facts raise the disturbing probability that the proposal is itself a partisan project to stifle the speech of conservative groups.

Implementing the proposal will permanently codify selective restraints on speech and plunge the IRS into the highly-charged partisan debate surrounding campaign finance and election law, areas in which the IRS has no legal authority, no experience, and no expertise. Far from remedying the public perception that the IRS is "not impartial," adoption of this proposal will make that perception significantly worse.

III. The Proposed Rule Is Arbitrary And Irrational.

Speech regarding government officials' exercise of their duties, and about candidates and prospective appointees for public office, lies at the core of the First Amendment's protections.[23] "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[24]

The First Amendment also protects associative rights because the "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[25] If a regulation imposes an unjustified burden on either speech or

---

[21] *Id*. at 10-11.

[22] *Id.* at 9 (quoting testimony from former Acting Commissioner Miller) ("[W]e had you know, Mr. Levin complaining bitterly to us about—Senator Levin complaining bitterly about our regulation that was older than me, where we had read 'exclusively' to mean 'primarily' in the 501(c)(4) context. And, you know, we were being asked to take a look at that. And so we were thinking about what things could be done.").

[23] *See*, *e.g.*, *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 913 (1982) ("[E]xpression on public issues has always rested on the highest rung of the hierarchy of First Amendment values."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position[.]") (Stevens, J., concurring); s*ee also Citizens United v. FEC*, 558 U.S. 310, 365 (2010) ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of speech … does not depend upon the identity of its source, whether corporation, association, union, or individual.").

[24] *Buckley v. Valeo*, 424 U.S. 1, 13 (1976) (internal citations omitted).

[25] *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

association, or "if it operates to chill or suppress the exercise of those freedoms by reason of vague terms or overbroad coverage, it is invalid."[26]

The proposed rule would dramatically restrict the exercise of these central First Amendment rights. At its heart is an entirely new and extremely broad category of "Candidate Related Political Activity" ("CRPA") that would be restricted for significant periods prior to any election, precisely when political speech is most important.[27] This new category of restricted speech would include a great deal of "pure" issue advocacy, which the government has no legitimate interest in regulating. The proposal would also result in a number of inconsistencies with existing law, conflicts that will result in more—not less—confusion about the speech rights of tax-exempt groups. And worse, the proposal will chill a great deal of socially beneficial speech, as groups that now serve important public advocacy functions will abandon their roles for fear of running afoul of the new rule. In this Section, we discuss each of these fatal flaws.

A. Adopting A Definition Of Political Activity Without First Specifying How The Definition Will Be Used Is Arbitrary And Capricious.

Although the NPRM contains considerable discussion of the proposed *definition* of CRPA, it scrupulously avoids indicating just *how* that definition will be used. Instead, the proposal obliquely remarks that the IRS and the Treasury Department are "considering . . . whether the [primary purpose] standard should be defined with more precision or revised to mirror the standard under the section 501(c)(3) regulations."[28]

Under current law, an organization's eligibility for 501(c)(4) status is determined under the "primary purpose" test:

> An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community. An organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements.[29]

---

[26] *Nevada Commission on Ethics v. Carrigan*, 131 S. Ct. 2343, 2352 (2011) (Kennedy, J., concurring).

[27] *See Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) ("[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.") (internal citation omitted).

[28] *See* NPRM at 14 (stating only that the agencies are "considering…whether the standard should be defined with more precision or revised to mirror the standard under the section 501(c)(3) regulations").

[29] 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i).

The IRS has concluded that "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office,"[30] and it applies a "facts and circumstances" standard to decide whether an organization is "primarily engaged in activities that promote social welfare."[31]

The IRS's enforcement authority under Section 501(c)(4), therefore, is limited to determining whether a civic group actually serves its purported beneficial purpose. In this context, the existing "primary purpose" and "facts and circumstances" standards are simply means of identifying a civic group's true purpose. They are not *per se* prohibitions on the means by which civic groups may pursue their goals.

To illustrate, a group that believes in the social benefits of environmental preservation can pursue this beneficial purpose in a number of ways. It might purchase and conserve endangered habitat. It might hold debates to educate the public on environmental issues. It might lobby Congress for stricter environmental regulation. And it might endorse candidates for office who support environmental policies and initiatives. All of these activities are intended to advance the group's beneficial purpose of environmental preservation. And under the primary purpose test, all of these activities are permitted.

Only when the group devotes so much of its activity to partisan politicking that it becomes doubtful whether the group's true goal is environmental preservation, as opposed to electing particular political candidates, does the primary purpose test place the group's tax-exempt status in question. In other words, the primary purpose test provides a mechanism for identifying sham civic groups, based on comparing their claimed purposes with their actual activities.

The IRS Training Manual articulates the test this way: civic organizations "may generally make expenditures for political activities so long as such activities, in conjunction with any other non-qualifying activities, do not constitute the organization's primary activity (51%)." Thus, the rules allow for civic groups to engage in a considerable amount of political activity (up to 49% of their total activities).[32]

The proposed CRPA definition is broader than the IRS's current definition of political activity—as we discuss in detail below. But the consequences of adopting that definition differ tremendously depending upon whether it (a) replaces the "facts and circumstances" test as a mechanism for identifying an organization's "primary activity" and therefore will continue to permit 501(c)(4) organizations to devote up to 49% of their total activities to those falling within

---

30 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii).

31 Rev. Rul. 81-95, 1981-1 C.B. 332.

32 As we discuss below, a 49% cap on political activities may be invalid as applied to Section 501(c)(6) organizations because it is inconsistent with the governing statute. *See* pages 30-33, *infra*.

CRPA; or (b) will not be used to determine an organization's "primary activity," but instead to impose a new, more restrictive limitation on 501(c)(4)'s activities—for example, allowing only 5% of an organization's total activities to fall within the definition of CRPA.

Separating the proposed *definition* of CRPA from the proposed *percentage* of CRPA to be permitted under the new rule is completely irrational. It would transform a context-specific factual inquiry designed to ascertain an organization's primary purpose into a sweeping bar against political speech by even *unquestionably legitimate* social-welfare-oriented civic groups, and would install the IRS as the permanent censor for all political speech by such groups.

The rulemaking proposal does not even attempt to provide a reasoned justification for eliminating the longstanding primary purpose approach to determining 501(c)(4) eligibility (and the accompanying authority for qualified groups to engage in political speech for up to 49% of their total activity). As we discuss in detail below, any such change would be irrational, arbitrary, contrary to the governing statutes, and unconstitutional.

Moreover, it is impossible to comment meaningfully on a definition in the abstract. To illustrate the point, if Section 501(c)(4) groups are permitted to devote up to 95 percent of their activity to CRPA, then even the proposed definition of CRPA would minimally burden speech. If, however, the definition is paired with a *de minimis* percentage test, the result would be a near-total ban on all political speech by covered groups. The public has a right to know *in advance* which one of these courses the IRS and the Treasury Department are proposing to take. By withholding from public view whether they intend to impose a new cap on activities, whether directly or through a wholesale revision of the primary purpose test, the IRS and the Treasury Department are depriving the public of its ability to meaningfully assess the *actual* impact of the NPRM proposal. This is a fatal defect under the Administrative Procedures Act ("APA"), which at a minimum requires a separate opportunity for meaningful public comment before the agencies do anything to alter the primary purpose test.[33]

Given the sleight of hand with which the IRS and the Treasury Department have concealed their ultimate intention with respect to the primary purpose test, we can only assume that the NPRM is a stalking horse designed to prepare the ground for a complete ban on all CRPA by Section 501(c)(4) entities (or the equivalent of a ban—permitting only *de minimis* or 5-10% of activities falling within CRPA). Our analysis of the definition's impact proceeds under this assumption.

---

[33] *See Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) ("Under the APA, agencies are obliged to engage in notice and comment before formulating regulations … To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements.").

B. The Proposal's Definition of "Candidate-Related Political Activity" Is Overbroad, Unprecedented, And Arbitrary.

The proposed definition of CRPA is shockingly overbroad—it would capture huge amounts of issue advocacy as well as all election-related speech. Although the NPRM professes to "draw upon existing definitions of political campaign activity,"[34] the proposed definition of CRPA has no analog anywhere in existing campaign finance law. Instead, the definition creates an entirely new class of prohibited speech that is far broader than the category of express "electioneering communications" to which the Supreme Court has limited all prior attempts at campaign finance regulation.[35]

The proposal defines CRPA to include *both* (a) any express advocacy for the election or defeat of any candidate *and* (b) any "public communication" that refers to one or more clearly identified candidates (or one or more clearly identified political parties) within a 30-day period before a primary or 60-day period before a general election.[36] The definition of "public communication" includes any "communication" (1) by broadcast, cable, or satellite; (2) on an internet website; (3) in a newspaper, magazine, or periodical; (4) in the form of paid advertising; or (5) that otherwise reaches or is intended to reach more than 500 persons. Communication is further defined as any communication by whatever means, including written, printed, electronic, video, or oral.[37] "Candidate" is defined as any federal, state, or local candidate or nominee for public office, in any recall election, or for any office in a political organization.[38] And "clearly identified" is defined to include any (1) express reference to the candidate, including through photograph or visual representation, (2) identification apparent by reference (by, for example, referring to an incumbent's office), or (3) reference to an "issue or characteristic" that serves to differentiate a candidate or group of candidates from their opponents.[39]

These broad definitions work together to capture all direct electoral advocacy and–in addition—considerable amounts of speech relating to issues of public concern that happen to coincide with the lengthy "blackout" periods surrounding elections.

Any issue ad that references an incumbent would fall under the definition, even when such a statement is unquestionably *not intended* to influence his or her reelection. For example, a

---

[34] NPRM at 10.

[35] *See Buckley*, 424 U.S. at 44-45 (endorsing the distinction between electioneering communications and issue advocacy by explaining that the government's legitimate interest in regulating speech is limited to those "communications that in plain terms advocate the election or defeat of a clearly identified candidate").

[36] NPRM at 28.

[37] *Id*. at 30.

[38] *Id.* at 29.

[39] *Id.* at 30.

civic group that distributes 500 leaflets outside of a city hall urging the mayor to open a new park would be engaging in CRPA if it was within 60 days of city elections.

Even simple informational statements that patently have nothing to do with partisan politics would fall under the broad definition of CRPA (*e.g.*, "Senator X has introduced a new piece of legislation" or "your congressman supports restricting free speech").

The definition of CRPA is not limited to *external* communications. For a group with over 500 members or supporters, the plain language of the definition would apply even to statements made in a closed-door membership meeting, emailed to an internal listserv, or posted on a members-only section of a group website. This dramatic intrusion into the internal associative and speech rights of private organizations is entirely unprecedented and is far broader than the range of speech currently regulated by the FEC, which is limited to electioneering communications transmitted by "broadcast, cable, or satellite."[40]

The breadth of this definition is one reason why the American Civil Liberties Union has aptly described the proposal as an "electioneering-communications-plus" prohibition that "goes beyond impracticability and raises First Amendment concerns of the highest order."[41]

The most immediate consequence of the proposal will be to black out public advocacy by 501(c)(4) civic groups for 30 days prior to any primary election and 60 days prior to any general election. Although the blackout periods appear intended to mirror restrictions on "electioneering communications" contained in FECA,[42] the definition of CRPA is so much broader that the new standard imposes a much greater burden on speech.

Most importantly, the proposal does not contain any limiting principle like the one applied by the Supreme Court, which restricts FECA's pre-election blackouts to "express [electoral] advocacy or its functional equivalent."[43] In *Wisconsin Right to Life*, the Supreme Court held that genuine issue ads that mention candidates are "not the functional equivalent of express campaign speech" and that no governmental interest "justif[ies] restricting issue

---

40 *See* 2 U.S.C. § 434(f)(3)(A).

41 *See* ACLU Comments on Draft Guidance, 11 (Feb. 3, 2013); *see also id*. at 6 ("[T]he capacious definitions of 'public communication' and 'communication' dramatically expand the scope of the proposed regulation. CRPA would encompass an enormous amount of ACLU material that has absolutely nothing to do with partisan politicking.")

42 *See* 2 U.S.C. § 441b(b)(2) (held unconstitutional in part by *Citizens United v. FEC*, 558 U.S. 310 (2010)).

43 *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 457 (2007) ("This Court has never recognized a compelling interest in regulating [issue] ads … that are neither express advocacy nor its functional equivalent.")

advocacy."[44] Ignoring this holding, the proposed rule prohibits *all speech* referring to a candidate *in any context* during a blackout. Such an expansive prohibition is constitutionally indefensible.

To be sure, it can be difficult to distinguish genuine issue advocacy from express campaign speech. "Candidates, especially incumbents are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest."[45] But the potential for uncertainty militates in favor of a more *permissive* approach to speech, not a more restrictive one. "In drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it."[46]

Many Section 501(c)(4) civic groups exist for the purpose of educating citizens and policymakers on issues implicating the public interest. That work does not become less important or beneficial in the months before an election. If anything, the educational and advocacy efforts of civic groups are most critical around elections, when the citizenry is actively engaged in the process of democratic decision-making. Forbidding or chilling core speech during this critical time is wholly irrational and cannot be justified merely because it is "too hard" for the IRS to readily distinguish between genuine issue advocacy and express campaign speech.

The proposed blackouts are also unduly burdensome in another respect: their duration and geographic scope. Unlike the periods specified in FECA,[47] the proposed rule's blackouts would apply everywhere in the United States for the 30 days before a primary in *any* single state. In a presidential election year, the proposal would ban political speech by civic groups regarding an incumbent President (or any candidate for President) for virtually the entire year. In 2012, for example, the Iowa caucuses were held on January 3, meaning the nationwide speech blackout would have started on December 4, 2011. Due to staggered primaries, there was no 30-day window between that date and June 26, 2012 (the day of the final major party primary) during which the blackout would not have applied nationwide. For six consecutive months, any issue ad mentioning the President's name, or referring to him in any way, would have been banned.

The blackout clock would have started again on July 28, 2012, thirty days before the first major party convention, continuing through the second major party convention on September 5, 2012. After that, the blackout would have restarted two days later on September 7, 2012, sixty days before the general election. All told, therefore, civic groups would have been prohibited

---

[44] *Id.* at 456-57 ("We conclude that the speech at issue in this as-applied challenge is not the 'functional equivalent' of express campaign speech. We further conclude that the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy.") (internal citations omitted).

[45] *Buckley*, 424 U.S. at 45.

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

[47] *See* 11 C.F.R. § 100.29 (limiting restrictions to communications that are "targeted to the relevant electorate" in advance of a primary or general election).

from political activity for all but slightly more than a month—from late June to late July and for two days in September—out of the entire 11-month period between December 4, 2011, and Election Day, November 6, 2012.[48]

It goes without saying that an incredible amount of activity on matters of public interest occurred during that 11-month timeframe. By way of example, Congress held over 900 roll-call votes on issues including: the debt limit (H.J. Res. 98); payroll taxes (H.R. 3630); reforming the social security system (H.R. 1173); addressing the budget deficit (H.R. 3578); healthcare reform (H.R. 5); energy and environmental impacts (H.R. 3408); small business development (H.R. 3606); economic stimulus (H.R. 3606); postal service reform (S. 1789); implementing new insider-trading prohibitions (S. 2038); enhancing airline safety (H.R. 658); funding new highway construction (S. 1813); renewing the Violence Against Women Act (S. 1925); extending the National Flood Insurance Program (H.R. 5740), addressing Department of Defense spending (H.R. 4310); and controlling student loan interest rates (S. 2343) among other things.[49]

Had the current proposal been in effect in 2012, civic groups would have been barred from commenting on any of these issues in a way that risked "differentiat[ing]" an incumbent from his/her election opponent. In effect, civic groups would have been barred from commenting on government policy issues or activities for almost the entire year. This sweeping prohibition would constitute a betrayal of our "profound national commitment . . . that debate on public issues should be uninhibited, robust, and wide-open."[50]

C. The Proposal's Prohibition Of Speech Related To Appointments Of Judges And Other Government Officials Is Similarly Arbitrary And Irrational.

The current proposal also categorizes "activities relating to the appointment or confirmation of Executive Branch officials and judicial nominees" as CRPA.[51] This too is an unprecedented prohibition on speech. The FEC has never sought to regulate speech with respect to nominations or appointments. And the Treasury Department's own regulations currently permit even Section 501(c)(3) charitable groups—which are subject to an express bar on election-related activity—to comment upon nominees and appointed officials.[52] It makes no sense to create this entirely new and proscriptive standard for Section 501(c)(4) groups, particularly when there is no statutory basis for the prohibition.

---

48 *See* ACLU Comment, *supra* n. 41, at 8-9 (showing a chart containing the "limited number of days that escape the rolling 30/60-day blackout periods").

49 *See* Roll Call Votes (112th Congress), available at: https://www.govtrack.us/congress/votes#session=296.

50 *NY Times v. Sullivan*, 376 U.S. 254 (1964).

51 NPRM at 17.

52 *See* 26 C.F.R. § 1.501(c)(3)-1(c)(3)(iii).

Again, the impact on issue advocacy would be dramatic. Local bar associations—which are typically organized as either 501(c)(4)s or 501(c)(6)s—have been publicly rating the qualifications of municipal, state, and federal judges for decades. By the same token, civic groups concerned with agricultural issues regularly comment on the activities of the Agriculture Secretary. Groups concerned with international trade comment on the Trade Representative and Secretary of Commerce. In doing so, they perform a significant public service: appointees are not subject to the public scrutiny of an election, so civic organizations are a vital mechanism by which important information about the appointees is disseminated to the public. This socially beneficial activity is wholly germane to many groups' social welfare purposes and has never been shown to raise any anticorruption concern that would justify a governmental prohibition.

D. The Proposal Is Arbitrary And Irrational Because It Creates A "No Speech Zone" That Imposes An Especially Weighty Burden On Speech That Qualifies As CRPA But Falls Outside Section 527's "Exempt Function" Test.

Imposing burdensome prohibitions on the political activities of Section 501(c)(4) groups appears designed to force civic groups that want to engage in such speech to register as political organizations under Section 527. As drafted, however, the proposed rule is inconsistent with Section 527.

The "exempt function" standard of Section 527 includes only "influencing or attempting to influence the selection, nomination, election, or appointment of any individual" to public office.[53] It does *not* encompass the other categories of speech that are included within the proposed, extremely-expansive CRPA standard, such as issue advocacy—which is intended to educate the public on particular topics, not to influence electoral outcomes—or voter education. And while current Section 527 regulations permit political organizations to engage in limited non-exempt-function activities, such activities must be an "insubstantial" amount of the group's overall program activities.[54]

Under the proposal, therefore, a group that engages in *substantial* amounts of issue advocacy or voter education would be excluded from Section 501(c)(4) by the new definition of CRPA *and also* outside the exemption provided by Section 527. Such groups will face the Hobson's choice of either discontinuing a significant portion of their advocacy work or losing their tax exemption with respect to that work. The tax code will no longer provide any tax-exempt outlet for a huge amount of socially beneficial speech and activity that is currently tax-exempt.

This sea-change in the treatment of civic organizations will both create significant confusion about the tax treatment of many beneficial activities and chill large amounts of core

---

[53] 26 U.S.C. § 527(e), *see also supra* n. 8.

[54] 26 C.F.R. § 1.527-2(a)(3).

First Amendment speech. As the ACLU correctly observed, for a significant number of civic groups, compliance with the proposed CRPA standard "isn't just unworkable, it's impossible."[55] These civic groups will be substantially silenced to the extent their activities are covered by neither Section 501(c)(4) nor Section 527.

There is a second, extremely serious consequence of the disconnect between the two sections that will further restrict the First Amendment rights of civic groups. Under current regulations, a Section 501(c)(4) group is permitted to engage in an unlimited amount of direct lobbying activity on legislation that is germane to the group's beneficial purpose. Lobbying, however, is not an exempt function activity under Section 527, meaning that a group registered under this section is not permitted to engage in any *significant* lobbying activity.[56] Thus, the proposal would require politically active tax-exempt groups to choose between either exercising their First Amendment right to speak publicly (by, for example, engaging in issue advocacy) or exercising their First Amendment right to petition government for the redress of grievances. They will not be able to do both. Disaggregating these two *linked* First Amendment freedoms makes absolutely no sense.

"The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression."[57] If Section 501(c)(4) contemplates that civic groups can legitimately advance their social purposes by lobbying government directly on issues, then surely it must also contemplate that they may lobby the government indirectly by issue advocacy and grassroots efforts that enlist the populace in supporting their goals. Drawing an artificial line between these activities is unreasonable, and will result only in a regime that needlessly and unlawfully undermines the effectiveness of tax-exempt groups in both spheres.

E. Imposing Restrictions On 501(c)(4) Groups Greater Than Those Imposed On 501(c)(3) Groups Is Arbitrary And Capricious.

The proposal recognizes that the sweeping definition of CRPA includes "certain specified election-related activities, including the conduct of voter registration, and get-out-the-vote drives" that are currently permitted by Section 501(c)(3) groups under the Treasury Department's interpretation. To avoid this obvious conflict, the NPRM seeks comments on whether any such activity "should be excepted from the definition of [CRPA] as voter education

---

55 ACLU Comment, *supra* n. 41, at 7.

56 26 C.F.R. 1.527-2(a)(3)(i).

57 *McDonald v. Smith*, 472 U.S. 479, 482 (1985); *see also Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011) (recognizing "the extensive common ground in the definition and delineation of these rights").

activity" and how such exceptions could be implemented so as to "avoid a fact-intensive analysis."[58]

Barring 501(c)(4) groups from engaging in activities permitted under 501(c)(3) is irrational and unlawful: the statutory language of Section 501(c)(3)—which contains an express prohibition on political speech—cannot possibly be less restrictive of election-related activity than the language of Section 501(c)(4), which contains no prohibition.[59] And there is no constitutional way to distinguish between "voter education" and "issue advocacy" in this context. Both are intended "to improve our society and keep it free."[60] Both "serve as a powerful antidote to any abuses of power by governmental officials" by keeping the populace informed and ready to hold their government to account.[61]

This conflict demonstrates the fatal flaw underlying this entire rulemaking enterprise. Speech is *inherently* context-specific.[62] And our Constitution assumes that it is inherently beneficial. When government attempts to draw lines, the First Amendment requires it to err on the side of protecting speech to the greatest possible extent. The only constitutionally permissible way to reconcile Section 501(c)(3) with Section 501(c)(4), therefore, is to withdraw the current arbitrary, irrational, and overbroad definition of CRPA.

F. The Proposed Effective Date Is Arbitrary, Capricious, And An Obvious Effort To Chill Constitutionally Protected Speech.

The NPRM indicates that the new rule will go into effect "on or after the date of publication of the Treasury decision adopting these rules as final regulations."[63] In other words, the new rule will not be implemented at the start of the new tax year for the organizations it covers. Nor will it provide for an adjustment period during which covered groups may meaningfully assess their options. Instead, the rule will simply go into effect at the time of the Treasury Department's say-so.

This presents a number of practical problems. Immediate implementation would make it virtually impossible for 501(c)(4)s to restructure their public communications efforts—many of

---

58 NPRM at 22.

59 *See* pages 23-25, *infra* (discussing the construction of the two provisions).

60 *Mills v. State of Alabama*, 384 U.S. 214, 219 (1966).

61 *Id*.; The IRS has previously endorsed this very socially beneficial purpose. *See, e.g*., Rev. Rul. 76-456. 1976-2 C.B. (holding that political education efforts are legitimate socially beneficial behavior because they assist citizens to "increase their knowledge and understanding of our election processes and participate more effectively in their selection of government officials").

62 *See, e.g*., *Connick v. Meyers*, 461 U.S. 138, 147 (1983) (determining whether "speech addresses a matter of public concern must be determined by the content, form, and context of a given statement").

63 NPRM at 32.

which are already planned or underway—so as to avoid running afoul of the new rule in the coming election season. Many groups plan their communications strategy or purchase advertising time months in advance, and cannot turn on a dime to match a sudden change in regulations.

The proposed effective date also presents grave concerns that the new rule is deliberately timed to coincide with the campaign cycle in order to gain a partisan advantage. The Administration's views on many Section 501(c)(4) groups are well known.[64] Many such groups hold conservative views and have expressed criticism of the President and his party. The proposed effective date raises the specter that—rather than a genuine attempt to address ambiguities within the IRC—the proposal is an attempt to muzzle these groups immediately before a hotly contested midterm election. The tax authority of the United States government should not be used to gain a partisan advantage for those in political power. While we earnestly hope that is not the case here, we urge the IRS and the Treasury Department to dispel the appearance of a partisan motivation by withdrawing the proposal as drafted. The existing regulations have stood for over five decades. There is no possible urgency to justify a last-minute change just prior to elections.

IV. The IRS And The Treasury Department Lack The Statutory Authority To Implement The Proposal.

The proposed rule is unlawful for an additional reason: neither the IRS nor the Treasury Department possess statutory authority to promulgate the proposed rule. As courts have long recognized, principles of constitutional avoidance and longstanding legislative practice require that Congress be "scrupulously clear" in stating its intent to delegate the authority to regulate speech to the Executive Branch.[65] Ignoring Congress's intent and unilaterally implementing a new rule to essentially bar civic groups from engaging in core protected speech is beyond the statutory power of the IRS and the Treasury Department.

A. Congress's Enactment and Amendment of Section 527—Without Altering Section 501(c)(4) In Any Way—Constitutes A Binding Legislative Ratification Of The Existing 501(c)(4) Regulations.

By enacting Section 527 and then by amending it to impose additional obligations upon groups registered under that section—but not those organized under Section 501(c)—Congress has endorsed the existing interpretation of Section 501(c)(4), including the "primary purpose" test and "facts and circumstances" standard. The legislative record plainly shows that Congress

---

64 *See*, *e.g.*, The White House, Remarks by President Obama (Oct. 14, 2010) (referring to one conservative civic group by name and saying: "[Y]ou have these innocuous-sounding names, and we don't know where this money is coming from. I think that is a problem for our democracy. And it's a direct result of a Supreme Court decision that said they didn't have to disclose who their donors are.").

65 *Motion Picture Ass'n of Amer. v. FCC.*, 309 F.3d 796, 805 (2002) (collecting cases).

was fully aware of the IRS's treatment of 501(c)(4) civic groups and the types of political activities in which those groups were permitted to engage. With this awareness, Congress both (a) deliberately chose not to alter Section 501(c)(4), and (b) drafted Section 527 based on the then-existing administrative construction of Section 501(c)(4) so that the two provisions would operate effectively in tandem.

Once Congress has ratified a statutory interpretation through subsequent legislative action, an agency no longer has the discretion to change it.[66] Given Congress's ratification of the current interpretation of Section 501(c)(4)—in connection with its enactment of Section 527—the IRS and the Treasury Department cannot now unilaterally amend that interpretation.

When Congress enacted Section 527, it set forth extremely detailed definitions of the types of groups and activities that it intended to cover:

> (e) Other definitions.--For purposes of this section--
>
> (1) Political organization.--The term "political organization" means a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.
>
> (2) Exempt function.--The term "exempt function" means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed. Such term includes the making of expenditures relating to an office described in the preceding sentence which, if incurred by the individual, would be allowable as a deduction under section 162(a).[67]

Section 527's use of the phrase "organized and operated primarily for the purpose of…" demonstrates Congress's approval of the primary purpose test applied under Section 501(c)(4).

---

[66] *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000) (congressional action to enact related legislation over time with a knowledge of then-existing agency interpretation "effectively ratifie[s] the [agency's] previous position"); *see also Mass. Mut. Life Ins. Co. v. United States*, 288 U.S. 269, 273 (1933) (legislative action "taken with knowledge of the construction placed upon the section by the official changed with its administration" adopts that construction as though enacted).

[67] 26 U.S.C. § 527(e).

Congress intended Section 527 to serve as a companion section to Section 501(c)(4), and took care to ensure that the primary purpose tests applied under the two provisions were compatible.

Thus, if 51 percent of an exempt organization's activities are aimed at influencing the election of an individual to public office, that organization is required to register as a Section 527 group. If a group is engaged in the same type of political activity but to a lesser extent (*i.e.*, 49 percent), the group may register under Section 501(c)(4).

This perfect fit between the primary purpose tests of Section 527 and Section 501(c)(4) is not a coincidence. It reflects a deliberate calibration of the two provisions by Congress. As noted on pages 16-17, *supra*, the NPRM proposal would destroy this careful balance and create a "no speech zone," under which many currently tax-exempt groups would not fall under either 501(c)(4) or Section 527. Congress could not have intended this result. Instead, reading Section 527 and Section 501(c)(4) in concert, it is obvious that Congress meant for these provisions to employ compatible standards.[68]

Section 527(f) further confirms Congress's endorsement of the existing primary purpose framework allowing 501(c)(4) groups to engage in political activity. That provision applies a net investment tax on any "organization described in [S]ection 501(c) which is exempt from tax" that engages in exempt function political activity.[69] In other words, Congress deliberately anticipated that some 501(c)(4) groups would engage in electioneering-type activities. Rather than prohibiting these activities or requiring groups to re-register as 527 organizations—which Congress could have done—the provision merely applies a slightly different tax treatment to such activities while recognizing the distinct status of 501(c) groups. The existence of this provision confirms that Congress was fully aware of the rules being applied to civic groups, and that Congress legislated based on the existence of those rules.

The legislative history of Section 527(f) provides additional confirmation of Congress's ratification. The Report of the Senate Finance Committee, which marked up the bill that became Section 527 (Pub. L. 96-62), states:

---

[68] The NPRM (at 12) requests comments on the advisability of revising the IRS's and the Treasury Department's regulations under Section 527 as well. This too is plainly beyond the agencies' discretion. Congress used the word "primarily" in Section 527(e) deliberately to enact a primary purpose test. The IRS cannot now construe "primarily" to mean "substantially" or some other lesser percentage of activity.

[69] In relevant part, Section 527(f) states: "If an organization described in section 501(c) which is exempt from tax under section 501(a) expends any amount during the taxable year directly (or through another organization) for an exempt function (within the meaning of subsection (e)(2)), then, notwithstanding any other provision of law, there shall be included in the gross income of such organization for the taxable year, and shall be subject to tax under subsection (b) as if it constituted political organization taxable income, an amount equal to the lesser of-- (A) the net investment income of such organization for the taxable year, or (B) the aggregate amount so expended during the taxable year for such an exempt function."

> Exempt organizations which are not political organizations. – Under present law, certain tax-exempt organizations (such as sec. 501(c)(4) organizations) may engage in political campaign activities. The bill generally treats these organizations on an equal basis for tax purposes with political organizations. Under the bill, organizations which are exempt under section 501(a) and are described in section 501(c), that engage in political activity, are to be taxed on their net investment income in part as if they were political organizations….[70]

Congress thus understood that the then-existing application of the primary purpose test allowed 501(c)(4) groups to engage in political campaign activities. The goal of Section 527(f), therefore, was to provide for the tax treatment—not the prohibition—of such activities. The words themselves are plain: 501(c)(4) groups "may engage in political campaign activities." This is a crystal clear statement of Congress's understanding and intent.

Congress reaffirmed this intent yet again in 2000, when it amended Section 527 to impose disclosure requirements on Section 527 organizations, while leaving Section 501(c)(4) undisturbed.[71] Legislators' statements during the debate on the amendment again leave no doubt that Congress fully understood the different treatment of Section 527 groups and Section 501(c) groups under the IRC. For example, Senator Joseph Lieberman, the sponsor of the amendment, explained:

> [T]here are real differences between 527 organizations and other tax-exempts…. First and foremost, section 527 organizations are different because they are the only tax-exempts that exist primarily to influence elections. That is not my characterization. That is the statutory definition. 527s are not lobbying organizations. They are not public-interest issue organizations. They are not labor organizations or business organizations. They are election organizations, plain and simple. You can't say the same about the AFL-CIO or the Chamber of Commerce, or Handgun Control or the NRA, whose primary purpose is to advocate a policy position or to represent specific constituencies. So I say to anyone who claims these groups are just like other tax-exempts, "Read the tax code."[72]

---

70 S. Rep. No. 93-1358 at 29 (1974).

71 *See* Pub. L. 106-230, 114 Stat. 477 (July 1, 2000) (amending Section 527(j) to require that political organizations disclose the name, address and occupation of each contributor who gives more than $200 in the aggregate, as well as the name and address of each recipient of more than $500 in aggregate expenditures).

72 146 Cong. Rec. S5994 at S5995-96 (daily ed. June 28, 2000) (statement of Sen. Lieberman).

Senator Lieberman also recognized that the distinct treatment of 527 groups, whose primary purpose was to influence elections, from other tax-exempt groups whose primary purpose was not election-related, accorded with the Supreme Court's decision in *Buckley v. Valeo*: "To begin with, the Supreme Court in [*Buckley*] made absolutely clear that Congress may require organizations whose major purpose is to elect candidates to disclose information about their donors and expenditures."[73] This point was echoed by Senator John McCain, another supporter of the measure, who explained that applying greater speech restrictions to Section 501(c) groups would bring "concerns about vagueness and overbreadth . . . into play."[74]

As this debate illustrates, Congress's adoption of special rules for 527 political organizations contrasted with its recognition that such rules were not appropriate for 501(c)(4) organizations that engaged in political activities. Accordingly, the IRS and the Treasury Department do not possess the statutory authority to alter the 501(c)(4) standards.

B. If Congress Has Not Ratified The Long-Standing Interpretation Of Section 501(c)(4), The Provision Can Only Be Construed To Prohibit The IRS And The Treasury Department From Limiting The Political Activities of Civic Groups.

If Congress has not ratified the current regulatory interpretation of Section 501(c)(4), then the government's power to promulgate the proposed rule depends on the meaning of the statutory language. As the United States Court of Appeals for the District of Columbia observed in *Loving*, courts must and do closely scrutinize "whether the agency has stayed within the bounds of its statutory authority"[75]—especially when the agency's interpretation deviates from its longstanding construction of a statute.[76] This scrutiny requires that courts "employ all the tools of statutory interpretation, including text, structure, purpose, and legislative history."[77] Here, all of these considerations demonstrate that the IRS has no statutory authority to prohibit the political speech of 501(c)(4) groups.

Section 501(c)(4) has never included any express prohibition on political activity. The precursor to Section 501(c)(4), part of the original Tariff Act of 1913, was understood to broadly apply to a wide range of civic organizations, most of whom were engaged in significant amounts of political speech and activity. The interpretation later promulgated by the Treasury Department under the Revenue Act of 1924 demonstrates the capacious nature of the 501(c)(4) exemption:

---

73 *Id*. at S5995.

74 146 Cong. Rec. S6041 at S6045 (daily ed. June 29, 2000) (statement of Sen. McCain).

75 *Loving*, __ F.3d__, 2014 WL 519224 at *2 (quoting *Arlington v FCC* 133 S. Ct. 1863, 1868 (2013)).

76 *Id*. at *8 (placing emphasis on "the IRS's past approach to th[e] statute").

77 *Id*. at *2.

> Civic leagues entitled to the exemption comprise those not organized for profit but operated exclusively for purposes beneficial to the community as a whole. In general, organizations engaged in promoting the welfare of mankind, other than organizations 'exempt under the so-called charitable clause' are included within this paragraph.[78]

Notably, neither the statute nor the regulatory interpretation made any attempt to define "promoting the welfare of mankind," and neither contained any suggestion that groups organized for such a purpose were prohibited from engaging in political activity. Nor did the regulations suggest that the use of the word "exclusively" was intended as an implicit limitation on speech.

To the contrary, the interpretation gives a clear meaning to the phrase "exclusively for purposes beneficial to the community" that has nothing to do with political speech or activity: the phrase is meant to distinguish civic groups from entities "organized for profit."

Civic organizations that were not "organized for profit" but that devoted their revenue to the pursuit of some social welfare goal were permitted to pursue that goal through any means, including political action. In other words, nothing in the early interpretation of the statute was understood to abridge the speech rights of civic organizations.

This interpretation makes sense in context, because the civic leagues of the period were generally understood to be *inherently political*. For example, in southern cities, African-American civic leagues were heavily engaged in political activism as a means of increasing democratic participation and challenging discriminatory laws.[79] For such groups—as well as for many other groups to whom the Treasury Department's interpretation of Section 501(c)(4) then applied—political action was considered inseparable from their socially beneficial purpose (*i.e.*, advocating for social change and challenging the unlawful practices of their government).

Operating against this historical backdrop, Congress reenacted the IRC in 1954. At that time, Congress made no effort to alter the Treasury Department's then-existing interpretation of

---

[78] Art. 518, Reg. 65 (1924).

[79] *See, e.g.*, Kimberley Johnson, REFORMING JIM CROW: SOUTHERN POLITICS AND STATE IN THE AGE BEFORE BROWN, 213-14 (2010) ("Throughout the 1930s and more rapidly in the 1940s civic leagues and voters groups were created by African Americans throughout the South. In almost every state in the South by the mid-1940s African American civic leagues and voters groups, both partisan and nonpartisan, existed in every major city…. The goal of all these groups was to create a new sense of engagement in American democracy."); *see also* Charles E. Connerly, "THE MOST SEGREGATED CITY IN AMERICA" CITY PLANNING AND CIVIL RIGHTS IN BIRMINGHAM 1920-1980, 266-67 (2005) (describing 1940s efforts by civic groups to influence the makeup of the Birmingham city council through advocacy, petitions, and voter drives, and explaining that "[s]ince the 1930s, the black community had sought to increase black voter registration and participation, the civic leagues played a significant role in helping blacks to overcome the obstacles to registration and voting").

Section 501(c)(4) or to impose new prohibitions or limitations on political activity by civic organizations. Congress simply adopted the existing provision *in toto*. This action—reenacting Section 501(c)(4) exactly as it had been applied under the pre-1954 regulations which contained no political limitation—demonstrates Congress's original intent not to impose prohibitions on speech.[80]

Congress's intent is further confirmed when the language of Section 501(c)(4) is compared to the language of Section 501(c)(3), a provision that Congress *did amend* to include an express prohibition on political activity. The 1954 amendment to Section 501(c)(3)—introduced by then-Senator Lyndon Johnson and adopted without debate—limits the Section 501(c)(3) public charity exemption to organizations for which "no substantial part of the[ir] activities … is carrying on propaganda, or otherwise attempting, to influence legislation …, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[81] This statutory language evinces Congress's clear intent to prohibit Section 501(c)(3) charities from engaging in "substantial" lobbying activities or any political campaign intervention.

Section 501(c)(4), by contrast, contains no similar condition for civic groups, either with respect to lobbying activities or participation in political campaigns. Instead, Congress reenacted Section 501(c)(4) to broadly apply to "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare."

"[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another."[82] Here, the inclusion of an express prohibition on political activity in Section 501(c)(3) shows that Congress knew how to draft such a provision when it wanted to. Under standard canons of construction, therefore, Congress's decision not to include a similar prohibition in nearby Section 501(c)(4) must be construed as manifesting an intent *not to bar* 501(c)(4) groups from political participation. Consistent with this congressional purpose, the IRS and the Treasury Department have "a duty to refrain from reading a phrase into the statute when Congress has left it out."[83]

The IRS's past approach to Section 501(c)(4) further demonstrates the limited nature of its discretionary authority in this area. For over 50 years, the IRS's interpretation of Section

---

80 *See Cammarano v. United States*, 358 U.S. 498, 510 (1959) ("[T]he 1954 action of Congress is significant as indicating satisfaction with the interpretation consistently given the statute by the Regulations here are issue and in demonstrating its prior intent.").

81 26 U.S.C. § 501(c)(3).

82 *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (internal citation and quotation marks omitted).

83 *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

501(c)(4) has not sought to prohibit civic groups from engaging in substantial amounts of election-related political activity. Nor has the IRS "ever suggest[ed] that it possessed this authority but simply chose, in its discretion, not to exercise it."[84] This history and context militates strongly against finding some long dormant delegation of authority that could justify the proposal.

In sum, "the traditional tools of statutory interpretation—including the statute's text, history, structure, and context—foreclose and render unreasonable" the IRS's new re-interpretation of Section 501(c)(4).[85]

V. The Proposed Rule Would Violate The First Amendment.

The proposal is plainly unconstitutional because it would condition the availability of tax-exempt status upon impermissible restrictions on political speech.

The government "may not deny a benefit to a person because he exercises a constitutional right."[86] Although the contours of this doctrine are uncertain in some contexts,[87] the Supreme Court has been quite clear in applying it to speech limitations imposed by the tax code. The critical question, the Court has explained, is whether a speech restriction imposed in one section of the tax code allows for an adequate alternative channel for speech elsewhere. A restriction that fails to provide an alternative channel is presumptively invalid. The proposal here fails that basic test.

A. There Is No Alternative Outlet For Speech.

The seminal decision in this area, *Regan v. Taxation With Representation of Washington* ("*TWR*"),[88] illustrates the unconstitutional conditions principle. It involved First Amendment and Equal Protection challenges to the lobbying restrictions imposed on charitable groups by Section 501(c)(3). In upholding the restriction on lobbying, the Court explained that the restriction did not impose an impermissible burden on speech because Section 501(c)(3) groups could form associated groups under Section 501(c)(4), which were permitted to engage in lobbying.[89] The

---

84 *Loving*, __ F.3d__, 2014 WL 519224 at *8.

85 *Id*. at 9.

86 *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 552 (1983); *see also FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) (statute that prohibited publicly-funded broadcast stations from "editorializing" imposed an unlawful condition that unconstitutionally burdened First Amendment rights).

87 *See*, *e.g*., Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996).

88 *Supra* n. 86.

89 461 U.S. at 544.

requirement that a charitable group form a related civic group in order to engage in lobbying was not unduly restrictive of speech.[90]

In a footnote, the Court acknowledged concerns voiced by "some amici" that the IRS might someday impose more "stringent requirements" on Section 501(c)(4) groups to effectively eliminate the availability of this provision as an alternative avenue for speech.[91] Given the IRS's current proposal, these concerns now appear to be quite prescient. At the time of the *TWR* decision, however, the Court viewed them as overly speculative and not ripe for consideration.

Based on the then-existing regulations, the Court explained, it was easy enough for a charitable group to form a Section 501(c)(4) affiliate for the purpose of lobbying.[92] In other words, the Court blessed the existing structure of Section 501(c) by recognizing that Section 501(c)(4) provided a crucial outlet for speech that saved the more restrictive approach of Section 501(c)(3).

In a concurring opinion, Justice Blackmun (joined by Justices Brennan and Marshall) emphasized that the elimination of Section 501(c)(4) as an alternative speech outlet would have rendered the entire statutory scheme unconstitutional. As Justice Blackmun explained:

> [T]he result under the First Amendment, depends entirely upon the Court's necessary assumption—which I share—about the manner in which the Internal Revenue Service administers 501.
>
> If viewed in isolation, the lobbying restriction contained in 501(c)(3) violates the principle, reaffirmed today "that the government may not deny a benefit to a person because he exercises a constitutional right." Section 501(c)(3) does not merely deny a subsidy for lobbying activities; it deprives an otherwise eligible organization of its tax-exempt status and its eligibility to receive tax-deductible contributions for all its activities, whenever

---

90 There is some question as to whether today's Court might reevaluate this position in light of its decision in *Citizens United v. FEC*, 558 U.S. 310 (2010). There, the Court held that FECA requirements forcing a corporation to form an affiliated PAC in order to engage in political speech were unduly burdensome because "they are expensive to administer and subject to extensive regulations." *Id.* at 337. If the Court were to apply this reasoning to the proposal here, it might very well find the prohibition of political speech to be unconstitutional even if there were some alternative outlet for speech available. Ultimately, regardless as to whether the proposal is evaluated under the alternative outlet test of *TWR* or the more speech-protective reasoning of *Citizens United*, the Court would be extremely likely to strike down the proposal as unconstitutional.

91 461 U.S. at 544-45 n. 6.

92 *Id*. at n. 6 ("The IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying. This is not unduly burdensome.").

> one of those activities is "substantial lobbying." Because lobbying is protected by the First Amendment, 501(c)(3) therefore denies a significant benefit to organizations choosing to exercise their constitutional rights.
>
> The constitutional defect that would inhere in 501(c)(3) alone is avoided by 501(c)(4). As the Court notes, TWR may use its present 501(c)(3) organization for its nonlobbying activities and may create a 501(c)(4) affiliate to pursue its charitable goals through lobbying. The 501(c)(4) affiliate would not be eligible to receive tax-deductible contributions.[93]

In the view of Justices Blackmun, Brennan, and Marshall, therefore, the Constitution *required* that a tax-exempt group be able to set up another tax-exempt affiliate subject to fewer restrictions on constitutionally protected speech. Affirming this reading, more recent Supreme Court decisions have treated the concurrence and its emphasis on alternative outlets for speech as part of the core holding of *TWR*.[94]

The proposed rule here would have the precise effect that Justice Blackmun found to be unconstitutional. By imposing additional onerous speech restrictions on Section 501(c)(4) groups, the proposal dismantles the dual structure that the Court endorsed in *TWR*. The permissive alternative speech outlet provided by Section 501(c)(4) would effectively be eliminated. Section 501(c)(3) groups would still be able to lobby through an affiliated Section 501(c)(4) organization, but they would no longer be able to engage in substantial amounts of political speech or issue advocacy, activities that are just as central to their First Amendment rights. Had these additional restrictions existed when the Court decided *TWR*, the Court would have invalidated the entire statutory scheme.

Moreover, by failing to provide an equivalent alternative speech outlet for 501(c)(4) groups to engage in political speech, the proposal independently fails the *TWR* test. As detailed above (at pages 16-17), one of the immediate consequences of the proposal would be the lack of a tax-exempt entity permitted to engage in the many issue advocacy and voter education activities that are now permitted to Section 501(c)(4) groups. These activities fall into the "no speech zone" between the broad definition of prohibited CRPA and Section 527's narrower

---

[93] 461 U.S. at 552-53 (Blackmun, J. concurring) (internal citations omitted).

[94] *See USAID v. Alliance for Open Society Int'l*, 133 S. Ct. 2321, 2328-29 (2013) ("In rejecting the nonprofit's First Amendment claim, the Court highlighted . . . the fact that the condition did not prohibit that organization from lobbying Congress altogether. By returning to a 'dual structure' it had used in the past—separately incorporating as a §501(c)(3) organization and §501(c)(4) organization—the nonprofit could continue to claim §501(c)(3) status for its nonlobbying activities, while attempting to influence legislation in its §501(c)(4) capacity with separate funds. Maintaining such a structure, the Court noted, was not 'unduly burdensome.' The condition thus did not deny the organization a government benefit 'on account of its intention to lobby.'").

definition of "exempt function" activity. The only option for those Section 501(c)(4) groups that substantially engage in these activities would be to stop engaging in these First Amendment-protected activities or risk losing their tax exempt status.

In other words, because of the gap between the proposal and Section 527, there is no constitutionally-acceptable alternative outlet for CRPA that is not "exempt function activity." This defect renders the proposal unconstitutional under the reasoning of *TWR*. Without an alternative outlet for speech, the proposal's sweeping prohibition imposes an undue burden.

B. The Proposal Cannot Be Defended As The Mere Withdrawal Of A Subsidy.

Ignoring Justice Blackmun's warnings, some supporters of the proposed rule argue that it merely constitutes the permissible withdrawal of a governmental subsidy rather than an unconstitutional penalty for speech. That position is based on a fundamental misunderstanding of the proposal's actual tax implications.

In *TWR*, the Court explained that Congress was not required to subsidize speech by granting *tax deductions for contributions* to tax-exempt groups that were subsequently used for lobbying.[95] This is a completely separate issue from whether the groups themselves were entitled to *tax-exempt status*, which is what concerned the concurring justices and what is at stake in the current proposal.

The deduction for contributions that applies to Section 501(c)(3) charitable groups allows those organizations to fund their activities with *pre*-tax dollars, meaning the money is neither taxed as income when it is earned by the contributor nor when it is transferred to the tax-exempt group. Contributions to Section 501(c)(4) civic groups, in contrast, are not tax deductible. These organizations' operations are funded only with *after*-tax dollars.

Because contributors to civic groups are not entitled to deduct their contributions, all contributed monies are taxed as income when those monies are first earned. Recognizing the tax-exempt status of the civic organization merely avoids *double taxation* by not taxing the monies a second time when they are transferred to the group. In this way, the tax code avoids penalizing individuals who pool their money to engage in a shared purpose.

Removing a 501(c)(4) group's tax-exempt status imposes a penalty that subjects the group's members to an *additional tax*, which they would not be required to pay if each of them pursued their shared purposes individually rather than collectively. And eliminating a group's exemption because it has engaged in political speech would subject the group's members to a double-taxation penalty for doing precisely what the First Amendment guarantees them the right to do: assemble for the purpose of discussing and influencing the workings of their government.

---

95 461 U.S. at 544.

This double-taxation penalty is particularly problematic because, under the proposed rule, only *political speech* would be treated in this disadvantageous manner. The proposal would impose no penalty upon civic groups that meet to discuss their hobbies or literature or any other number of socially beneficial pursuits. Only those groups that pursue their social welfare mission through political speech will lose their tax-exempt status and be singled out for double taxation. Put another way, those socially beneficial groups whose activities are deemed *most important* by the First Amendment will be treated *worse* than any other type of organization under the tax code.

VI. Applying This Flawed Proposal To Section 501(c)(6) Trade Associations Would Be Arbitrary, Capricious, And Unlawful.

The NPRM states that the IRS and the Treasury Department are "considering whether to amend the current regulations under Sections 501(c)(5) and 501(c)(6) to provide that exempt purposes under those regulations" would no longer include CRPA.[96] Such a step would be irrational and unlawful.[97]

All of the practical, statutory, and constitutional concerns set forth in Parts I through V above apply with equal force to Section 501(c)(6) trade associations.[98] Moreover, the lack of statutory authority to regulate the political activities of trade associations is even clearer. The plain and unambiguous language of Section 501(c)(6) does not contemplate any limitation on political speech. And the history and purposes of the Section confirm that Congress purposely created the tax exemption for trade associations with the understanding that such groups would engage in substantial amounts of political speech. Indeed, as Congress understood when it created Section 501(c)(6), engaging in political speech and advocacy is *one of the primary reasons why trade associations exist.*

Consistent with the statutory language and intent of Section 501(c)(6), eligibility determinations should focus on two inquiries: (1) is the group a genuine business league or chamber of commerce,[99] and if so, (2) is the group's political activity germane to the shared

---

96 NPRM at 13.

97 The NPRM (at 13) states that any change in regulations to be applied to Section 501(c)(6) groups will first "be introduced in the form of proposed regulations to allow an additional opportunity for public comment." The APA requires that the IRS and the Treasury Department honor this commitment. For that reason, the Chamber's comments with respect to this question are preliminary—and the Chamber would provide substantial additional comments in the event such a rule were proposed.

98 The same concerns apply to Section 501(c)(5) labor unions.

99 *See Bluetooth SIG Inc., v. United States*, 611 F.3d 617, 622 (9th Cir. 2010) (describing a six-factor test that "requires a business league to be an association (1) of persons having a common business interest; (2) whose purpose is to promote the common business interest; (3) not organized for profit; (4) that does not engage in a business ordinarily conducted for profit; (5) whose activities are directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons; (6) of the same general class as a chamber of commerce or a board of trade").

business interests of its members, trade industry, or community. If the answer to both of these questions is "yes," then the IRS has no statutory authority to regulate or limit the group's political activity in any way.[100]

A. The Plain Language Of Section 501(c)(6) Precludes Any Limitation On the Political Activities Of Trade Associations.

The analysis of Section 501(c)(6) must begin with the plain language of that provision, which provides an exemption for "business leagues, chambers of commerce, [and] real estate boards, boards of trade, . . . which are not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."[101]

Section 501(c)(6) contains the same language prohibiting private inurement also found in Sections 501(c)(3) and 501(c)(4). But unlike Section 501(c)(3), Section 501(c)(6) contains no express prohibition or limitation on lobbying, political speech, or election activities. And unlike Section 501(c)(4), the provision does not reference the permissible "exclusive purpose[s]" of groups organized under the provision. This differing statutory structure demonstrates that Congress did not intend the Section 501(c)(6) exemption to be subject to the same limitations on purpose and activity that apply to groups organized under Sections 501(c)(3) or 501(c)(4).

---

100 "Germaneness" *was* the standard that the IRS used to evaluate political activity by trade associations up until 1969. In December of that year, IRS Chief Counsel K. Martin Worthy issued a General Counsel Memorandum replacing the germaneness standard for political activity. With minimal explanation, the opinion says simply: "[S]upport of a candidate for public office necessarily involves the organization in the total political attitudes and positions of the candidate. In our opinion, that involvement transcends the narrower business interests of an organization described in section 501(c)(6)." The Worthy memorandum cites no statutory authority or history in support of this position. To this day, the questionably-reasoned Worthy opinion is the sole basis supporting the IRS' position that political activities, even when their purpose is to further common business interests, cannot be the primary activity of a 501(c)(6) group. The legislative ratification of the current regulatory construction of Section 501(c)(4) (discussed at pages 19-23, *supra*) does not extend to the Worthy opinion's statements regarding Section 501(c)(6). The predicate for legislative ratification is a determination that Congress knew of and endorsed the administrative interpretation of the statute. *See* n. 66, *supra*. The IRS regulations construing Section 501(c) were referenced in the legislative history of Section 527, and Congress plainly designed Section 527 to "fit" with that construction by incorporating the "primary purpose" approach applied to Section 501(c)(4) (*see* pages 20-22, *supra*). With respect to Section 501(c)(6), by contrast, the regulations known to Congress (and still in existence today) contained no restriction on political activity. There is no evidence that Congress was even aware of the Worthy opinion (and, given the informal nature of the opinion and its inconsistency with prior statements by the IRS, Congress likely was not aware of it). Thus, there simply is no basis for finding legislative ratification. Finally, because the Worthy opinion is inconsistent with the plain language of the statute (as we next discuss), it is invalid and should be withdrawn. Of course, the CRPA standard would go much farther than the Worthy opinion in restricting the protected speech of 501(c)(6) entities, for the reasons above discussing its impact on 501(c)(4) organizations. That is another reason why application of the CRPA standard to 501(c)(6) organizations would be arbitrary, irrational, and unlawful.

101 26 U.S.C. § 501(c)(6).

The language of Section 501(c)(6), instead, creates an exemption based on the organization's *status* as a genuine "business league" or "chamber of commerce," etc. The statutory language does not authorize an investigation into a 501(c)(6) organization's *exclusive purpose*, because exclusive purpose is not the statutory test.

The conditions for eligibility under Section 501(c)(6) have nothing to do with politics. They require that the organization conduct activities appropriate for a "business league" or "chamber of commerce," etc., that it not be organized for profit, and that its earnings not inure to the benefit of any private individual. As commentators have long observed, this last condition "must be loosely construed, as was no doubt intended by Congress from the outset. Strictly construed, these limits would close the door to organizations serving the business of an industry, since these activities inure to the benefit of their profit-motivated members.… [The conditions], therefore, have not been interpreted to preclude commonly understood objectives of chambers of commerce or similar organizations."[102]

Put another way, the private inurement condition denies tax exemption only when organizations masquerading as "business leagues" actually serve the narrow interests of private individuals or entities. Genuine chambers of commerce and business leagues that promote the common business interests of a region or industry cannot run afoul of the private inurement condition. Any benefit bestowed upon private parties from their activities is merely ancillary to the group's pursuit of the shared business interests of its members, industry, and community.[103]

The IRS may have an interest under the statute in distinguishing illegitimate trade organizations from real ones, but Section 501(c)(6) contemplates that it will do so by examining a group's makeup and governing structure and considering whether its activities further the common business purposes of an industry rather than the narrow profit-seeking interests of a private individual. The statutory language does not restrict the *means* by which a genuine business league may pursue a legitimate common business purpose.

For similar reasons, the private inurement condition does not impose an implicit limitation on the political activities of trade associations. When a trade association engages in

---

[102] Boris I. Bittker & George K Rahdert, *The Exemption of Nonprofit Organizations From Federal Income Taxation*, 85 YALE L.J. 299 (1976).

[103] The current implementing regulations recognize this distinction by defining a business league as an "association of persons having a common business interest, whose purpose is to promote the common business interest and not to engage in a regular business of a kind ordinarily carried on for profit. Its activities are directed to the improvement of business conditions of one or more lines of business rather than the performance of particular services for individual persons." 26 C.F.R. 1.501(c)(6)-l; *see also* Rev. Rul. 73-411, 1973-2 C.B. 180 ("chambers of commerce and boards of trade direct their efforts at promoting the common economic interests of all the commercial enterprises in a given trade or community")

political speech—even in the form of express electoral advocacy—it does so, for the statutorily-authorized purpose of promoting common business interests. That does not implicate the private inurement prohibition any more than any other activity undertaken by the group. To the extent that an electoral benefit is bestowed upon the candidates that the trade association supports, such a benefit is purely ancillary to the group's pursuit of its members' shared common business interests.

To take just one example, the Chamber supports a number of incumbents and political candidates who oppose excessive tariffs and other restraints on international trade. It does this not to benefit any particular candidate or political party, but because the business community benefits from public policies that facilitate international commerce and free trade. The Chamber furthers these purposes by encouraging candidates to pledge their support for these policies and by informing the electorate of the candidates' positions on these policies.

Thus, the Chamber's political action plainly has the purpose of advancing the common interests of the business community. Express electoral advocacy in this context is no different than any of the many other lobbying, public advocacy, training, or educational efforts that the Chamber undertakes. Any benefit to an individual candidate or party that results from this activity is merely a collateral consequence of the Chamber's mission to further the shared interests of the business community.

As long as an activity is undertaken to pursue the group's common business interests, therefore, it is fully consistent with the plain statutory language of Section 501(c)(6), regardless of whether that activity is political in nature or whether it refers to a clearly identified candidate for political office. Given the unambiguous language of this provision, neither the IRS nor the Treasury Department has the statutory authority to limit the political activity of a 501(c)(6) organization.

B. The Statutory History of Section 501(c)(6) Confirms That Congress Did Not Limit Political Activity By Trade Associations.

The history of Section 501(c)(6) further confirms that the provision does not limit trade associations' speech activities. From its initial enactment, Section 501(c)(6) was directed at groups—and at the U.S. Chamber of Commerce specifically—that were known and assumed by Congress to be engaging in political advocacy.

The Chamber has particular expertise regarding Section 501(c)(6), because the predecessor to the modern statute was enacted at the Chamber's request as part of the Tariff Act of 1913—principally to exempt the Chamber from the federal government's new power to tax income.[104] Specifically, the exemption was created after the Chamber's first secretary, Elliot H. Goodwin, requested that it be added to the Tariff Act in a May 12, 1913 letter to the Chairman of

[104] Tariff Act of 1913, ch.16, § II (G)(a), 38 Stat. 72.

the Senate Finance Committee. The letter itself was placed into the congressional record by the Finance Committee as the Committee's only comment on the provision.[105] It reads, in part:

> [Business leagues] should be exempted from the tax. The [business league] of the present day is not organized for selfish purposes, and performs broad patriotic and civic functions. Indeed, it is one of the most potent forces in each community for the improvement of physical and social functions. While its original reason for being is commercial advancement, it is not in the narrow sense of advantage to the individual, but the broad sense of building up the trade and commerce of the community as a whole and with the fullest recognition of the facts that business cannot prosper at the expense of other classes, and that what is expended in improving the city in which it is situated and the conditions of its inhabitants will inevitably rebound to the benefit of its commercial interests.

As this comment reflects, the Congress that enacted Section 501(c)(6) was fully aware of the range of speech activities then engaged in by trade groups. They were engaged in "broad patriotic and civic functions," which included publicly advocating "for the improvement of physical and social functions" and "building up the trade and commerce of the community as a whole."

The history of the Chamber demonstrates that the functions of a trade group, as recognized by Section 501(c)(6), are fundamentally inseparable from political speech and activity. The idea of a national chamber of commerce had taken root just a year before the enactment of the original exemption, in 1912, when President William H. Taft wrote to Congress of the need for a "central organization in touch with associations and chambers of commerce throughout the country and able to keep purely American interests in a closer touch with different phases of commercial affairs."[106] In other words, President Taft contemplated an organization that would communicate to federal officials in Washington on behalf of the American business community, *and* would communicate with the American business community in order to coordinate its policy and advocacy efforts. This notion necessarily encompassed grassroots organizing, communication with members, and other forms of political speech that would be prohibited under the proposed definition of CRPA.

---

105 *See* Hearings on Tariff Schedules of the Revenue Act of 1913 Before the Subcomm. of the Comm. of Finance, 63d Cong., 1st Sess. at 2001 (1913); *see also* John F. Reilly, *IRC 501(c)(6) Organizations*, IRS TECHNICAL INSTRUCTION PROGRAM, 1 (2003) ("There is no legislative comment on the statute. It is generally assumed, however that its passage was the result of a U.S. Chamber of Commerce request for an exemption for nonprofit 'civic' and 'commercial' organizations—a request that resulted in the enactment of what is now IRC 501(c)(4) (for nonprofit 'civic' organizations) and IRC 501(c)(6) (for nonprofit 'commercially oriented' organizations).").

106 President W.H. Taft, Address to Congress (Dec. 7, 1911).

At President Taft's urging, on April 22, 1912, over 700 delegates from various commercial and trade organizations met in Washington to create the unified body that today is the U.S. Chamber of Commerce. From its beginnings, the Chamber was understood to be intrinsically linked with political activity. Its first executive officer, Charles Nagel, served *simultaneously* as head of the Chamber, delegate to the Republican National Committee, and as President Taft's Secretary of Commerce and Labor.[107] Like President Taft, Nagel publicly identified the Chamber's purpose as speaking on behalf of a unified business community on the important political issues of the day. At its initial April 1912 conference, Nagel described the Chamber's role this way: "[I]t must speak, when it does speak, for the commerce and industry of the United States."[108] President Taft echoed these sentiments when, at a Chamber event in 1925 (when serving as Chief Justice of United States Supreme Court), he called the Chamber "a center of influence that has made and will continue to make for the great good of this country."

Consistent with this role, the Chamber has regularly engaged in public advocacy that references public officials at all levels of government as a matter of course. The Chamber's archives are replete with examples of political activity that would meet the proposal's definition of CRPA. On the eve of the 1924 presidential election, for example, the Chamber announced an education effort designed to help its members "not only in the exercise of the ballot but particularly in actively aligning themselves with the political agencies of their choice in making the preliminary selections of candidates for office."[109]

The Congress that enacted Section 501(c)(6) in 1913 for the express purpose of creating a tax exemption for the Chamber surely understood that the Chamber was intended to serve as the leading advocate of America's business community on issues of public interest. In this context, Congress must have anticipated that the Chamber would publicly refer to public officials and/or candidates for public office—the precise communications that fall within the CRPA definition in the proposed rule.

Congress reenacted the language of Section 501(c)(6) without change or comment in 1954. That Congress too was well aware of the Chamber's political activities. Throughout the 1950s—and particularly during the lead up to the 1956 and 1960 presidential elections—the Chamber conducted a "political participation program" designed to encourage Chamber

---

107 *See* Wilbur B. Jones, *Charles Nagel and the United States Chamber of Commerce*, 26 WASH. U. L. Q. 177 (1941).

108 *Id*. at 187. ("I trust you will never accept the idea that a mere board or committee, no matter how strong in itself, located here in Washington, no matter how well supported financially, can give what is here proposed. Whatever the representative body may be, whatever its shape, and whatever its strength, it must speak, when it does speak, for the commerce and industry of the United States, not by delegated authority, but on important occasions it must be prepared to say 'We now register the decision which has been deliberately made after discussion and consultation.'")

109 Board of Directors Resolution, U.S. Chamber Archives (July 1, 1924).

members to actively engage with the activities of political parties.[110] Although these efforts were expressly nonpartisan, they plainly entailed a large amount of activity and speech that would fall within the proposed broad definition of CRPA. The Congress that renewed the language of Section 501(c)(6) in full against the backdrop of the Chamber's and other trade groups' substantial preexisting political activities could not have intended to restrict these efforts.

More recently, when debating the 2000 amendment to Section 527 that imposed additional disclosure requirements on political organizations, the sponsors of that amendment recognized that trade associations like the Chamber should not need to be subjected to comparable regulations. As Senator Lieberman put it, speaking on the Senate floor:

> When the AFL[-CIO] or the Chamber of Commerce runs an ad, we know exactly who is behind it and where their money came from: union dues in the case of the AFL, and business member dues in the case of the Chamber. These groups provide the basic information the public needs to evaluate the motivation of the messenger. The absolute opposite is the case with 527s.[111]

As Senator Lieberman's statement recognizes, the Chamber has had a clear and transparent role in the political process since its inception: speaking on behalf of the business community in both the election and the issue advocacy context. The public and Congress have been familiar with that role for over 100 years. Congress's refusal to enact legislation attempting to limit this role during this time evinces its original intent in passing Section 501(c)(6) to impose no restrictions or limitations on the speech rights of the Chamber or any other trade association that is properly constituted under that provision.

C. The Statutory Purpose of Section 501(c)(6) Precludes A Restriction On Trade Associations' Political Speech.

Trade associations are "mutual-benefit organizations."[112] They exist to promote the common economic interests of their own members as well as the interests of their industry or community.[113] The purpose of Section 501(c)(6), therefore, does not rest on any notion of a governmental subsidy. Rather, it is rooted in the principle that the tax code should not punish

---

110 *See*, *e.g.*, Report of 310th Annual Meeting, U.S. Chamber Archives, (Sept. 26-27, 1958) ("On behalf of the Special Committee on Political Participation, Mr. Motley reported on recent activities of the Chamber to encourage businessmen to participate actively in the political parties of their choice during the pre-election period. He also presented a proposed long-range program of National Chamber leadership in aiding local business organizations or groups to conduct political participation workshops that would encourage more effective participation by businessmen in the political parties of their choice.")

111 146 Cong. Rec. S5994 at S5995-96 (June 28, 2000).

112 *See* Bittker, *supra* n. 102, 85 YALE L.J. at 348.

113 *See* Rev. Rul. 73-411, 1973-2 C.B. 180.

individuals who elect to pursue their shared interests collectively by taxing those joint activities more than the same activities would have been taxed if undertaken individually. As the Chamber put it in its 1913 request to Congress that precipitated the enactment of Section 501(c)(6): "The business men who make up [the Chamber's] membership are [already] subject to the tax." Taxing their membership dues and other payments would impose double taxation for acting collectively.

Given the distinct policy underlying the Section 501(c)(6) exemption, it makes no sense to treat political speech by trade associations in the same way as political speech by charitable groups. Even if one were to conclude that political speech is inconsistent with social benefit (which we do not, as discussed above), that would not justify restrictions on the speech of a trade group, whose role is to promote the common interests of the business community. It cannot be said that political speech or activity is fundamentally inconsistent with advancing common business interests. So long as the group's political efforts serve the common business purpose of its members, the policy underlying Section 501(c)(6) supports maintaining the exemption.

The IRS has already recognized the centrality of the political process to the economic concerns of trade group members. That is why it permits Section 501(c)(6) organizations to engage in an unlimited amount of lobbying. As the IRS has said in that context:

> There is no requirement by statute or regulations, that a business league, chamber of commerce, etc., in order to be considered exempt as such, must refrain from carrying on propaganda or influencing legislation. The objective sought by the instant organization can be attained only through legislation. It follows, therefore, that its legislative activities are germane to the attainment of its objectives. [114]

There is no logically defensible basis for distinguishing lobbying activities from political and policy speech. If certain business objectives can be achieved only through legislation, as the IRS recognizes, then it follows that a trade association should be able to support the election of legislators who will further those objectives and to oppose legislators that will hinder them. Those express advocacy activities are plainly germane to the trade association's legitimate purpose. Thus, the same standard should apply to both lobbying and political speech for trade associations: if germane to the attainment of the group's common business objectives, both lobbying and political activity should be permitted to an unlimited extent. This is the only standard that is consistent with the language, history, and purpose of Section 501(c)(6).

* * * * *

[114] *See* Rev. Rul. 61-177, 1961-2 C.B. 117.

The proposed rule is arbitrary, irrational, and overbroad; beyond the statutory authority of the IRS and Treasury Department; and unconstitutional. The proposal should be withdrawn, and consideration of these issues left where they belong—in Congress.

Very truly yours,

U.S. CHAMBER OF COMMERCE
LILY FU CLAFFEE
Senior Vice President, Chief Legal Officer & General Counsel
RYAN P. MEYERS
Senior Associate General Counsel

MAYER BROWN LLP
ANDREW J. PINCUS
1999 K Street, NW
Washington, DC 20006

cc: The Hon. Jacob J. Lew, Secretary of the Treasury
The Hon. Christopher J. Meade, General Counsel for the Treasury
The Hon. Mark J. Mazur, Assistant Secretary of the Treasury
The Hon. William J. Wilkins, Assistant General Counsel for the Treasury & Chief Counsel for the Internal Revenue Service
Ms. Lisa Zarlenga, Tax Legislative Counsel
Ms. Ruth M. Madrigal, Attorney-Advisor
Ms. Amy F. Giuliano, Attorney-Advisor