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February 27, 2014

John A. Koskinen
Commissioner of Internal Revenue
CC:PA:LPD:PR (REG-134417-13), Room 5205
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

Re: *IRS-2013-0038, Guidance for Tax-Exempt Social Welfare Organizations on
Candidate-Related Political Activities*

Dear Commissioner Koskinen:

The Brennan Center for Justice at NYU School of Law¹ respectfully submits these comments in response to the Notice of Proposed Rulemaking (the “NPRM”) issued by the Internal Revenue Service and the Treasury Department on November 29, 2013.²

The Brennan Center strongly supports the effort by the IRS to create a clear definition of political activity for nonprofit organizations, which is needed to bring agency regulations back in line with the governing statute and improve transparency in elections.

Congress created the various forms of tax-exempt entities for different purposes. The NPRM focuses on organizations governed by § 501(c)(4) of the tax code, which requires that they be “operated exclusively for the promotion of social welfare.”³ Other 501(c) organizations have distinct purposes, such as organizations formed to promote a common

¹ The Brennan Center is a nonpartisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center is at the center of the fight to preserve and expand the right to vote for every eligible citizen. Through practical policy proposals, litigation, advocacy, and communications, the Brennan Center works to ensure that voting is free, fair, and accessible for all Americans. The Brennan Center’s Money in Politics project works to reduce the real and perceived influence of special interest money on our democratic values. Project staff defend federal, state, and local campaign finance and disclosure laws in courts around the country, and provide legal guidance to campaign finance reformers through counseling, testimony, and public education. These comments do not purport to convey the position of NYU School of Law.

² Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. Part 1) (hereinafter Proposed 26 C.F.R. § ____).

³ 26 U.S.C. § 501(c)(4).

business interest.⁴ Congress authorized a distinct tax-exempt entity under § 527 for organizations devoted to political activity and required that contributions to and expenditures by 527 groups be disclosed.⁵

In the 1950s, the IRS ruled that 501(c)(4)s can engage in some political activity as long as it is not the organization's primary purpose.⁶ For decades afterward, political spending by (c)(4)s remained insignificant. But once the Supreme Court allowed corporations to spend directly on elections in *Citizens United v. FEC*,⁷ political expenditures by (c)(4)s exploded. With (c)(4) election spending in 2012 at \$256 million, it is clear that the regime Congress created is being flouted.⁸ Their massive election spending flies in the face of the congressional requirement that (c)(4)s be operated exclusively for social welfare. And since (c)(4)s are not required to disclose their donors, Congress's scheme to ensure that election spending be transparent is being frustrated, depriving voters of information they need to determine how to interpret the messages they are bombarded with. The nonprofit form was created to foster organizations that are devoted to the general welfare of their communities, not to furthering partisan political goals.

The proposed IRS rules are needed to help ensure that the nonprofit form is not abused by those who want to anonymously spend massive sums on elections. While the NPRM is a promising first step, the Brennan Center offers several suggestions for improvement. We strongly recommend limiting social welfare groups to an insubstantial amount of political activity and applying the same definition of political activity across all 501(c) groups. In addition, it is crucial that nonpartisan voter engagement be excluded from the definition of political activity to avoid discouraging vital civic services that are not designed to influence election outcomes. Other recommendations are also discussed below. We request that the NPRM be revised and that the public be given an opportunity to comment on the revised version.

1. The NPRM is Needed to Fulfill the Congressional Command that 501(c)(4)s Be Operated Exclusively for Social Welfare and to Limit the Use of Those Organizations as a Source of Dark Money

After *Citizens United* issued an invitation to wealthy interests to spend unlimited sums on elections, the nonprofit form became an attractive vehicle for those who preferred that their spending remain anonymous. Congress commanded that (c)(4)s *only* engage in social welfare activities, and the IRS deviated from that command with its primary purpose test. What is worse, the IRS has not given clear guidance on what counts as political activity or how much is enough to make it an organization's primary purpose. Instead, the facts and circumstances of each case are examined by agency staff, leading to confusion and inconsistency. In recent

⁴ 26 U.S.C. § 501(c)(6); 26 C.F.R. § 1.501(c)(6)-1.

⁵ 26 U.S.C. § 527.

⁶ 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i).

⁷ 558 U.S. 310 (2010).

⁸ Ctr. for Responsive Politics, Outside Spending – 2012, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2012.

years, savvy political operators have taken advantage of the situation and twisted the purpose of the (c)(4) form, making it into a vehicle for secret election spending. The IRS has the chance to fix this and return to the congressional design by clearly defining political activity and placing limits on it.

In addition to the deviation from Congress's plan for (c)(4)s that has come about due to the interaction of the primary purpose test and post-*Citizens United* spending, the health of our democracy is suffering as well. Transparency in election spending is in decline. There has been a dramatic decrease in the percentage of outside political spending subject to full disclosure of the source of funds, from nearly 100% in 2004 down to approximately 40% in 2012.⁹ At the same time, the dollar amount of anonymous outside spending or "dark money" has increased several times over in recent years, to more than \$300 million in 2012.¹⁰ That number does not even include so-called issue ads that attack or praise a candidate without expressly calling for a vote for or against the candidate, unless they were aired close to an election. And this massive spending was highly concentrated: the ten highest spending organizations accounted for over three-quarters of the total.¹¹

In fact, it seems that the difference in disclosure requirements is the reason that so much spending flows through nonprofits rather than political committees. One example illustrates both problems: the deviation from the statutory scheme and the dangers for our elections. In the spring of 2012, the executive director of a group that would spend millions on the election that year showed attendees at a luncheon ads attacking Barack Obama and then solicited contributions while promising, "We don't make our donors' names available."¹² This group was apparently devoted to bringing about a particular outcome in the presidential election, not the general welfare of the community. And voters who saw the ads were kept in the dark about the identities of the funders and their agenda.

a. A Clear Definition of Political Activity Will Benefit Social Welfare Organizations, and Ensure Fair and Uniform Enforcement of the Law

The NPRM would create a new, bright-line definition of "candidate-related political activity" for 501(c)(4)s to replace the current test that requires an individualized investigation into the facts and circumstances of each case. IRS rulemaking in this area is to be applauded. Clarity will make enforcement more predictable and efficient, and will limit the ability of political groups to abuse the (c)(4) form for political purposes. The rules should make clear that any nonprofit that exceeds the allowable amount of political activity has the option of registering as a 527 political committee or setting up a segregated fund registered as a 527 and disclosing only donors to that fund. With a clear definition and rules keeping 501(c) groups to no more

⁹ *Outside Spending by Disclosure, Excluding Party Committees*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/disclosure.php>.

¹⁰ *Id.*

¹¹ *2012 Outside Spending, By Group*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=O&type=U&chrt=D>.

¹² Kim Barker, *How Nonprofits Spend Millions on Elections and Call it Public Welfare*, PROPUBLICA, Aug. 18, 2012, <http://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare>.

than an insubstantial amount of political activity, substantial electioneering will be done through political committees subject to disclosure rules, as it should be.

Some have claimed that the IRS proposal is an attempt to give the agency the power to eliminate groups based on their political viewpoint. On the contrary, the creation of a bright line that will apply in the same way to everyone is the polar opposite of an attempt to target political enemies. A clear definition will reduce discretion and confusion, making it more likely that 501(c) groups will experience uniform and predictable enforcement.

In recent years, the lack of a clear definition of political activity has made it extremely difficult to ensure that social welfare organizations are legitimate nonprofits primarily devoted to furthering the common good, as required by law. It has created confusion, as organizations report different amounts of political spending to the IRS and the Federal Election Commission.¹³ And reports indicate that some groups spend more than half of their expenditures on politics, raising the question of whether the current regime is an effective limit on 501(c)(4) political activity.¹⁴ The lack of clarity makes enforcement by the agency time consuming and inconsistent, and it has led to accusations of political targeting.¹⁵ Ambiguity regarding what constitutes political activity represents bad policy and makes it difficult for individuals and organizations to know what is expected of them, under both the tax code and the election code.

b. New Rules Are Compatible With the First Amendment

The IRS effort to create a bright-line rule defining “candidate-related political activity” has been disingenuously attacked by some as a violation of free speech, but this charge is misguided. Although there are problems with the NPRM that must be fixed, a bright-line rule in this area will not offend the First Amendment. In *Citizens United v. FEC*, the Supreme Court held that corporations must be allowed to spend money on politics, but it also recognized that the Constitution protects not only the rights of speakers, but the rights of listeners to know who is speaking: “The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”¹⁶ As Justice Antonin Scalia has explained, “Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which . . . campaigns anonymously . . . and even exercises the direct democracy of initiative and

¹³ Robert Maguire & Vivica Novak, *Shadow Money Magic: Five Easy Steps That Let You Play Big in Politics, Hide Your Donors and Game the IRS - Step 2*, OPENSECRETS.ORG, Apr. 16, 2013, <http://www.opensecrets.org/news/2013/04/shadow-money-magic-five-easy-steps-1.html>.

¹⁴ Robert Maguire & Vivica Novak, *ATR's Tax Forms Raise Questions About Use of Crossroads Grant, "Social Welfare" Purpose*, OPENSECRETS.ORG, Nov. 18, 2013, <http://www.opensecrets.org/news/2013/11/atrs-tax-forms-raise-questions-about-use-of-crossroads-grant-social-welfare-purpose.html> (Americans for Tax Reform reported different amounts of political spending to the IRS and FEC; the higher number constituted more than half of its 2012 spending).

¹⁵ Deirdre Shesgreen, *1959 IRS rule is at the center of Tea Party scandal*, USA TODAY, June 20, 2013, <http://www.usatoday.com/story/news/politics/2013/06/20/irs-nonprofits-rule-politics-1959/2439177>.

¹⁶ *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.”¹⁷

Furthermore, the NPRM defines political activity by nonprofits in order to facilitate enforcing the limits on how much electioneering they can do—it is not a ban on that activity. Organizations that find the 501(c) rules limiting have the option of creating a political committee under Section 527 and complying with campaign finance law. Thus the regulation will not silence speech but rather help to further the First Amendment value of an informed electorate.

The changes the NPRM would bring about will increase the obligation on groups participating in politics to disclose their donors, as political committees do. Increased disclosure has also been attacked by opponents of the NPRM, who claim that it will unconstitutionally burden speech. But disclosure of political contributions and spending is indisputably constitutional. In *Citizens United*, an 8-1 majority of the Supreme Court held that disclosure is constitutional, saying that “disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking.”¹⁸

The Supreme Court has protected anonymous speech in certain circumstances, but not in the area of large spending on elections.¹⁹ The public has a vital interest in knowing who is trying to influence their elected officials, particularly by means of money rather than persuasion. Certainly exceptions should be made when individuals will be subject to threats of violence for engaging in political speech.²⁰ But those who spend millions of dollars trying to influence election outcomes should not be permitted to hide their identities, at least not without some specific showing of harm.²¹

The Brennan Center applauds the IRS for moving to better police the boundaries of the various forms of tax-exempt entities. Greater clarity in the rules will discourage big election spenders from using 501(c)(4) organizations as an end-run around campaign finance laws, and will make enforcement uniform across organizations. Importantly, the Brennan Center’s criticisms of the current version of the proposed rules should not be construed as disapproval of IRS rulemaking in this area generally. To the contrary, new rules regarding political spending by 501(c) organizations are vital to ensuring the integrity of our elections and the tax code.

¹⁷ *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring).

¹⁸ *Citizens United*, 558 U.S. at 366 (internal citations and quotation marks omitted).

¹⁹ See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 337 (1995); *NAACP v. Alabama*, 357 U.S. 449, 451 (1958).

²⁰ The Supreme Court has said such an exception exists. See *Doe v. Reed*, 130 S. Ct. 2811, 2821 (2010).

²¹ See also David Earley, *Malloy Should Stand Up for Election Transparency*, CONN. MIRROR (June 19, 2012), <http://ww3.ctmirror.org/node/16673>.

2. *Political Activity by 501(c)(4)s Should Only Be Permitted in Insubstantial Amounts*

Though the proposed rules better define candidate-related political activity, they do not alter the so-called “primary purpose test,” which is used to determine whether an organization can continue to qualify as a (c)(4) under the tax code. Consequently, the IRS has requested comments on “what proportion of an organization’s activities must promote social welfare for an organization to qualify under section 501(c)(4) and whether additional limits should be imposed on any or all activities that do not further social welfare.”²²

As the IRS has explained in the NPRM,²³ the existing primary purpose test stems from the statutory language of the tax code, which specifies that 501(c)(4) organizations shall consist of “[c]ivic leagues or organizations not organized for profit but operated *exclusively* for the promotion of social welfare . . . and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.”²⁴ The IRS promulgated rules specifying that a 501(c)(4) was considered to be 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.”²⁵ The rules explicitly state 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.”²⁶

These rules have remained the same since they were first promulgated in 1959,²⁷ and consequently predate both *Citizens United*²⁸ and even the Supreme Court’s seminal campaign finance case, *Buckley v. Valeo*.²⁹ In short, the regulations were finalized in an era that had not even begun to conceive of the campaign finance environment we have today.

It has been claimed that the existing primary purpose test allows nonprofits to maintain their (c)(4) status so long as their political spending does not reach 50% of their budget.³⁰ However, this threshold has never been officially confirmed by the IRS.

²² 78 Fed. Reg. 71,538 (Nov. 29, 2013).

²³ 78 Fed. Reg. 71,537-58 (Nov. 29, 2013).

²⁴ 26 U.S.C. § 501(c)(4)(A) (emphasis added).

²⁵ 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i) (emphasis added).

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

²⁷ 78 Fed. Reg. 71,536 (Nov. 29, 2013).

²⁸ *Citizens United v. FEC*, 558 U.S. 310 (2010).

²⁹ 424 U.S. 1 (1976).

³⁰ See, e.g., Civic Organizations and Local Associations of Employees, 26 C.F.R. § 1.501(c)(4)-1(a)(ii)(2)(i) to -(ii); Diane Freda, *IRS Offers First Sign 501(c)(4) Political Activity Rules Could Be Updated*, BLOOMBERG BNA, July 24, 2012,

http://www.bnasoftware.com/News/Tax_News/Articles/IRS_Offers_First_Sign_501%28c%29%284%29_Political_Activity_Rules_Could_Be_Updated.asp (“IRS rules for Section 501(c)(4)s are generally considered to allow political spending of up to 49 percent. While the 49 percent rule does not appear in published IRS guidance, IRS officials have alluded to it in some public forums.”); Miriam Glaston, *When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867, 876 n.29 (2011).

Regardless, it is clear that the current legal environment allows (c)(4)s to spend significant amounts of money on political activity without endangering their nonprofit status. Nonprofits claiming 501(c)(4) status collectively reported spending \$92 million in the 2010 federal elections³¹ and \$256 million in the 2012 federal elections.³² Significant amounts were likely spent in state elections during this period as well.³³

Substantial political spending was undertaken by specific 501(c)(4)s on both the right and left in 2012. On the right, Crossroads GPS and Americans for Prosperity spent \$71 million and \$36 million, respectively. On the left, the League of Conservation Voters spent \$11 million while Patriot Majority USA spent \$7 million.³⁴ Beyond this, many 501(c)(4)s supported a single candidate — both Republicans and Democrats — with over \$100,000 in political spending.³⁵ Hence, new regulations would affect organizations of all political stripes, not just those of a particular ideology.

a. The IRS Should Use a Hybrid Approach to Ensure Insubstantial Political Activity

The IRS should replace the primary purpose test with an insubstantial amount test that sets clear limits on political activity. We recommend a hybrid approach. Namely, once a (c)(4) organization exceeds *either* a dollar-amount threshold of spending *or* spends a certain percentage of its budget, such as 15%, on political activity, it should be required to choose between establishing a 527 for any political spending over the limit or losing tax-exempt status.

The hybrid approach recognizes that spending over a specified dollar amount may be sufficient to influence the outcome of an election or be perceived that way. On the other hand, an organization that spends a large percentage of its budget on political activity is hardly primarily devoted to “social welfare,”³⁶ regardless of the dollar amount.³⁷

³¹ *Outside Spending – 2010*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2010.

³² *Outside Spending – 2012*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2012.

³³ For the most comprehensive database of spending in state elections, see Nat’l Inst. on Money in State Politics, FOLLOWTHEMONEY.ORG, <http://www.followthemoney.org>.

³⁴ *Political Nonprofits: Top Elections Spenders – 2012*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/nonprof_elec.php?cycle=2012.

³⁵ TAYLOR LINCOLN, PUBLIC CITIZEN, SUPER CONNECTED 51-53 (updated Mar. 2013), *available at* <http://www.citizen.org/documents/super-connected-march-2013-update-candidate-super-pacs-not-independent-report.pdf> (listing single-candidate supporting outside spenders and indicating at least twenty-six 501(c) organizations spent at least \$100,000 supporting a single candidate); *Political Nonprofits: Top Elections Spenders – 2012*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/nonprof_elec.php?cycle=2012 (indicating which of those organizations are 501(c)(4)s).

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

³⁷ 26 U.S.C. § 501(c)(4).

b. Analogous Rules Should Apply to Other 501(c) Entities

Similar rules should apply to other 501(c) groups, except for 501(c)(3) organizations, which are prohibited from engaging in political activity altogether.³⁸ Congress created each of these tax-exempt categories for specific purposes, and it provided a vehicle for political activity in § 527, subject to specific disclosure requirements. Therefore, the IRS is warranted in policing the amount of political activity by all 501(c)s to prevent them from being used as a massive loophole to escape the regime Congress created for tax-exempt political activity. As discussed in the next section, if analogous spending rules are not applied to other 501(c) groups, large anonymous election spending will simply move to forms of nonprofit other than 501(c)(4).

3. *The Same Definition of Political Activity Should Be Applied To All 501(c) Entities*

The proposed rule changes apply only to 501(c)(4)s, but the IRS has asked for comments regarding whether the same definition of “candidate-related political activity” should extend to other entities organized under § 501(c), including (c)(3)s, (c)(5)s, and (c)(6)s.³⁹ The Brennan Center recommends that the same definition for political activity be applied to all nonprofit organizations. Using different definitions will invite further abuse of § 501(c), particularly through the use of (c)(5)s and (c)(6)s.

The vast majority of dark money in recent elections was spent by groups organized under 501(c)(4), which expended \$256 million on the 2012 election, tripling their total for 2008.⁴⁰ But 501(c)(4)s are not the only vehicle for anonymous political spending. In fact, two of the five highest spending nonprofits in 2012 were organized under 501(c)(6).⁴¹ The Chamber of Commerce, one such 501(c)(6), reported more than \$35 million in political spending to the FEC; 501(c)(6)s altogether reported over \$55 million.⁴² Labor unions organized under 501(c)(5) reported spending approximately \$24 million on the 2012 elections.⁴³ These numbers are likely to increase if political spending by (c)(4)s becomes more tightly regulated, but rules surrounding (c)(5)s and (c)(6)s remain unchanged under the NPRM.

Recent history provides evidence that political nonprofits will change their behavior to try to avoid disclosure. For a few months in 2012, a court decision required organizations engaged in distributing a type of issue ad called an “electioneering communication” to disclose their

³⁸ We recommend that every type of 501(c) organization operate under a clear rule governing how much can be spent on politics, although we state no view about whether other categories of 501(c) entities should be subject to the same limit as (c)(4)s.

³⁹ 78 Fed. Reg. 71,537.

⁴⁰ Richard Rubin, *Big-Money Politics Groups Get Clarity From IRS They Hate*, BLOOMBERG, Feb. 19, 2014, <http://www.bloomberg.com/news/2014-02-19/big-money-politics-groups-get-clarity-from-irs-they-hate.html>.

⁴¹ *Political Nonprofits: Top Election Spenders*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/nonprof_elec.php.

⁴² *Outside Spending – 2012*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2012.

⁴³ *Id.*

donors.⁴⁴ Americans for Prosperity, the 501(c)(4) organization with the second highest amount of political spending in 2012,⁴⁵ changed its ads from electioneering communications to independent expenditures immediately after the decision was issued, avoiding the disclosure requirement.⁴⁶ When an appellate court overturned the decision and restored the status quo, Americans for Prosperity reverted back to issue ads by announcing a \$1.3 million issue advocacy campaign “to inform citizens of Obama’s Failing Agenda.”⁴⁷

In addition, the nonprofit community would benefit from uniform rules and predictable enforcement. Many organizations are comprised of an affiliated (c)(3) and (c)(4), and others look to revenue rulings applying to one form to fill in gaps in guidance for the other. Both enforcement and compliance would be less burdensome if uniform rules applied.

4. Nonpartisan Voter Engagement Activities Should Not Be Considered Political Activity

The proposed rules define candidate-related political activity to include voter registration drives, get-out-the-vote activities,⁴⁸ distributing voter guides,⁴⁹ and hosting events at which a candidate appears.⁵⁰ So long as these activities are conducted in a *nonpartisan* manner, they should be excluded from the definition of “candidate-related political activity.”

Voting is at the very core of our democracy and any free and open society. Civic organizations have a long and proud history of working to increase voter registration and turnout in their communities. Consequently, nonpartisan efforts conducted to enhance voter registration and voter turnout should not be considered political activity and should instead

⁴⁴ *Van Hollen v. FEC*, 851 F. Supp. 2d 69 (D.D.C. Mar. 2012) (declaring invalid 11 C.F.R. § 104.20(c)(9), which regulates electioneering communications).

⁴⁵ See *Political Nonprofits: Top Elections Spenders – 2012*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/nonprof_elec.php?cycle=2012.

⁴⁶ Alex Engler, *Dark Money Organizations Change Strategies to Keep Donors Secret*, SUNLIGHT FOUND. BLOG, Sept. 25, 2012, <http://sunlightfoundation.com/blog/2012/09/25/dark-money-organizations-change-strategies-to-keep-donors-secret/>. A staff member for Americans for Prosperity explained that required disclosure of donors was “off the table.” Andy Kroll, *Karl Rove’s Catch-22*, MOTHER JONES, July 27, 2012, <http://www.motherjones.com/politics/2012/07/karl-rove-crossroads-gps-dark-money-disclosure>. See also Seth Cline, *Court Overturns Only Rule Requiring Secret Groups Disclose Donors*, U.S. NEWS & WORLD REP., Sept. 18, 2012, <http://www.usnews.com/news/articles/2012/09/18/court-overturns-only-rule-requiring-secret-groups-disclose-donors> (“The U.S. Chamber of Commerce, for example, made it very clear it would tweak its ad strategy to avoid disclosure at a media breakfast following the ruling. ‘It’s full steam ahead,’ Bruce Josten, the Chamber’s executive vice president for government affairs, told reporters when asked how the Chamber would respond to the ruling. ‘The only thing that may switch is you’re forced to do express advocacy using the magic words ‘vote for,’ ‘vote against’ as opposed to highlighting a given member’s legislative record.’”). The U.S. Chamber of Commerce is a 501(c)(6).

⁴⁷ *AFP Launches \$1.3 Million Issue Advocacy Push to Educate Citizens About Obama’s Failing Policies*, AMS. FOR PROSPERITY, Sept. 24, 2012, <http://americansforprosperity.org/newsroom/afp-launches-1-3-million-issue-advocacy-push-to-educate-citizens-about-obamas-failing-policies/>.

⁴⁸ Proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(A)(5).

⁴⁹ Proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(A)(7).

⁵⁰ Proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(A)(8).

be recognized for what they are—furthering social welfare. “[M]ore than 50 million Americans, or 1 in 4 eligible citizens, are not registered to vote,”⁵¹ and only 53.6% of the voting age population voted in the 2012 presidential election.⁵² Efforts to improve these numbers are vitally important and clearly fall within the ambit of “the promotion of social welfare.”⁵³

Similarly, nonpartisan voter guides should not be considered political activity. Such guides are designed to empower voters to make informed choices for themselves, rather than to influence election outcomes. Providing information to voters is a key element of civic engagement for many nonprofits. In a time where billions of dollars are spent on election advertising that is heavy on rhetoric, mudslinging, and distortion, civic groups provide a desperately needed service in the form of nonpartisan, objective information about candidates. To lump nonpartisan voter education together with electioneering would senselessly risk chilling a vital nonprofit activity that benefits many communities.

The Brennan Center recommends that objective criteria be used to determine whether voter guides are nonpartisan and therefore nonpolitical. To this end, the Brennan Center recommends the approach adopted by the Bright Lines Project, which is primarily concerned with whether speech refers to a clearly identified candidate and expresses a view on that candidate.⁵⁴ In practice, this would mean that nonpartisan guides will cover all candidates or all those candidates that meet some objective threshold of viability. Nonpartisan voter guides report objective information like legislative voting records or candidate statements. Guides consisting of candidate statements should only be considered nonpartisan if candidates are given equal opportunity to participate and equal time or space and the organization does not endorse or critique any of the candidates.

Finally, the NPRM defines hosting an event at which at least one candidate appears within 30 days of a primary election or 60 days of a general election as candidate-related political activity.⁵⁵ Just as with voter guides, nonprofits can play a vital role in giving members of their communities opportunities to hear candidates speak and interact with them. Nonprofits like

⁵¹ WENDY WEISER ET AL., BRENNAN CTR. FOR JUSTICE, HOW TO FIX THE VOTING SYSTEM 2 (2013), *available at* <http://www.brennancenter.org/publication/how-fix-voting-system> (citing PEW CENTER ON THE STATES, INACCURATE, COSTLY AND INEFFICIENT: EVIDENCE THAT AMERICA’S VOTER REGISTRATION SYSTEM NEEDS AN UPGRADE 2 (2012), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election_reform/Pew_Upgrading_Voter_Registration.pdf).

⁵² Michael McDonald, *2012 General Election Turnout Rates*, U.S. ELECTIONS PROJECT, http://elections.gmu.edu/Turnout_2012G.html (last updated July 22, 2013). The Bipartisan Policy Center estimates that voter turnout in 2012 was 57.5%. Press Release, Bipartisan Policy Ctr., 2012 Election Turnout Dips Below 2008 and 2004 Levels: Number of Eligible Voters Increases by Eight Million, Five Million Fewer Votes Cast (Nov. 8, 2012), <http://bipartisanpolicy.org/sites/default/files/2012%20Voter%20Turnout%20Full%20Report.pdf>.

⁵³ 26 U.S.C. § 501(c)(4)(A).

⁵⁴ BRIGHT LINES PROJECT, THE BRIGHT LINES PROJECT: CLARIFYING IRS RULES ON POLITICAL INTERVENTION – DRAFTING COMMITTEE EXPLANATION 3-4, 12-24 (2013), *available at* <http://www.citizen.org/documents/Bright%20Lines%20Project%20Explanation.pdf>.

⁵⁵ Proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(A)(8).

the League of Women Voters host debates as part of their voter education and engagement efforts.

And as with voter guides, objective criteria can be used to demarcate nonpartisan events. Events at which all candidates have an equal opportunity to appear—or all candidates who meet an objective threshold of viability—and at which the host organization does not express a view on the relative merits of the candidates should not be deemed political activity.⁵⁶

5. The Definition of “Public Communication” Should Be Narrowed

The NPRM defines as candidate-related political activity any “public communication” that clearly identifies a candidate within 30 days of a primary election or 60 days of a general election.⁵⁷ “Public communication” is defined to encompass communications in certain media including websites, broadcasts, and print periodicals, by paid ad, or to more than 500 people.⁵⁸

The Brennan Center agrees with the approach of deeming communications aimed at the general public close to an election to be political activity, and we agree that paid advertising should be included. But we are concerned that the proposed definition of “public communication” is too broad and could sweep up inadvertent mentions of candidates during the 30/60-day window that are not intended to influence an election. The recent abuses of the nonprofit form have involved heavy political spending on mass media. Candidate mentions in communications aimed at small audiences or audiences that seek out the organization’s speech do not pose the same concerns.

Including candidate mentions on websites is problematic for two reasons. First, websites are unlike communications that appear in periodicals or broadcast media in that they are passive: they are only seen by those who visit the website. Communications that reach only those who seek them out pose less of a concern that the speaker is attempting to influence an election. Second, an organization whose website mentions an individual for reasons having nothing to do with an election will be deemed to engage in candidate-related political activity once the 30/60-day window begins. For example, an organization might post a press release mentioning a senator’s vote on a bill relevant to the organization’s mission. Five years later, the release is still available on the organization’s website as the senator stands for reelection, and under the NPRM it would be treated the same as an attempt to influence the upcoming election. Therefore, we recommend that websites not be included in the definition of “public communication,” unless the use of a website constitutes a paid advertisement.

In addition, the NPRM’s definition of “public communication” would include speeches where the audience is composed of more than 500 people. As with websites, the audience

⁵⁶ See BRIGHT LINES PROJECT, THE BRIGHT LINES PROJECT: CLARIFYING IRS RULES ON POLITICAL INTERVENTION – DRAFTING COMMITTEE EXPLANATION 14 (2013), *available at* <http://www.citizen.org/documents/Bright%20Lines%20Project%20Explanation.pdf>.

⁵⁷ Proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(A)(2).

⁵⁸ Proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(B)(5).

for a speech is generally only those who are seeking out the speaker's message. The concern that nonprofits might be used to funnel money into political activities that evade campaign finance laws is not as pressing with oral communications. We recommend that speeches be excluded from the definition of "public communication."

For much the same reason, communications to an organization's members (other than through paid advertising) should be excluded from the definition of "public communication."

These issues could be addressed by adopting the definition of "public communication" found in federal campaign finance law. It covers communications "by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising."⁵⁹

Note that we agree with the NPRM that express advocacy in any of these forms of communication should be considered candidate-related political activity.

6. The Rule Covering Candidate Mentions in Public Communications Should Cover a Longer Period of Time

The NPRM defines as candidate-related political activity public communications that refer to a candidate or political party within 30 days of a primary election or 60 days of a general election.⁶⁰ Outside that window, only communications that contain express advocacy or are susceptible of no reasonable interpretation other than as support or opposition to a candidate would be considered candidate-related political activity.⁶¹

This regime would allow significant electioneering through ads that stop short of express advocacy well into the time when campaigns are active. The 30/60-day window has become obsolete given the increasing length of elections. Partisans have decided it is never too early to try to influence voters' choices. Some likely candidates have even been attacked in paid media before they even declare their candidacy.⁶²

In the current election cycle, spending is already high, many months before the general election. As of November, outside spending by nonprofits was almost five times higher than at the same point in the 2012 cycle—in spite of the fact that 2014 is an off-year election.⁶³

⁵⁹ 2 U.S.C. § 431(22); *see also* 11 C.F.R. § 100.26.

⁶⁰ Proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(A)(2).

⁶¹ Proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(A)(1).

⁶² *See, e.g.*, Scott Powers, *Attacks Begin Before Gubernatorial Candidates Declare*, ORLANDO SENTINEL, July 25, 2013, http://articles.orlandosentinel.com/2013-07-25/news/os-dueling-governor-ads-20130725_1_democrats-republican-party-charlie-crist; Lindsey Boerma, *Rove group slams Clinton on Benghazi in first 2016 attack ad*, CBS NEWS, May 13, 2013, <http://www.cbsnews.com/news/rove-group-slams-clinton-on-benghazi-in-first-2016-attack-ad/>.

⁶³ Robert Maguire, *Liberal Dark Money Dominating 2014 Elections*, OPENSECRETS.ORG, Nov. 7, 2013, <https://www.opensecrets.org/news/2013/11/liberal-dark-money-dominating-2014-elections.html>.

Senators up for reelection in swing states have already been targeted by attack ads paid for by 501(c) groups.⁶⁴ One 501(c)(4), Americans for Prosperity, has already spent more than \$27 million on ads since August.⁶⁵

Therefore, we respectfully recommend that the window during which candidate mentions count as candidate-related political activity be made longer than 30 days before a primary election and 60 days before a general election. Instead, candidate mentions that take place within 60 days of a primary election or 90 days of a general election should count as candidate-related political activity so long as they also satisfy the other criteria for regulation of public communications.

In the alternative, the IRS might also consider adopting the Bright Lines Project proposal of regulating most communications that clearly refer to a candidate and express a view on that candidate.⁶⁶ Such an approach would abolish the 30/60-day window and would instead look at the contents of the communication with limited reference to context. An expansion of the 30/60-day window to a 60/90-day window, however, represents the stronger approach.

7. Contributions Should Not Be Considered Political Activity If They Are Limited to Nonpolitical Uses

The NPRM includes within the definition of “candidate-related political activity” a contribution to a 501(c) organization that engages in anything the regulation defines as candidate-related political activity.⁶⁷ The underlying basis for this rule is sound. As the Center for Responsive Politics has documented, churning money through multiple 501(c) organizations is becoming an increasingly popular tactic to hide the origin of political funds.⁶⁸ Hence, transfers to politically-active 501(c) organizations should, as a general matter, be considered political activity.

But the rule as it is currently written would generate absurd results: If a 501(c)(4) donated \$100 million to another group that engaged in a de minimis amount of candidate-related political activity, the donor organization’s entire \$100 million grant would be considered candidate-related political activity. Even worse, since the provision covers contributions to all 501(c) groups, it would needlessly burden contributions to 501(c)(3)s. The NPRM’s definition of “candidate-related political activity” is broader than the current definition of

⁶⁴ Matt Viser, *Early start to TV ads war in midterm elections*, BOSTON GLOBE, Dec. 15, 2013, <http://www.bostonglobe.com/news/politics/2013/12/15/barrage-underway-for-midterms-with-anti-health-care-themes-aimed-female-voters/njicRyvKHOWKxUUjHB7MtK/story.html>.

⁶⁵ Matea Gold, *With early attacks against Senate Democrats, AFP emerges as GOP’s most powerful ally*, WASH. POST, Feb. 4, 2014, http://www.washingtonpost.com/politics/with-early-attacks-against-senate-democrats-afp-emerges-as-gops-most-powerful-ally/2014/02/04/fce5f7ae-8dd6-11e3-833c-33098f9e5267_story.html.

⁶⁶ BRIGHT LINES PROJECT, THE BRIGHT LINES PROJECT: CLARIFYING IRS RULES ON POLITICAL INTERVENTION – DRAFTING COMMITTEE EXPLANATION 13 (2013), *available at* <http://www.citizen.org/documents/Bright%20Lines%20Project%20Explanation.pdf>.

⁶⁷ Proposed 26 C.F.R. § 1.501(c)(4)-1(a)(4)(iii).

⁶⁸ Robert Maguire, *New Filings Shed Light on Hundreds of Millions in Dark Money Spending*, OPENSECRETS.ORG, Nov. 21, 2013, <http://www.opensecrets.org/news/2013/11/new-filings-shed-light-on-hundreds.html>.

political intervention for 501(c)(3)s. Thus, under the NPRM, a contribution from a 501(c)(4) to a 501(c)(3) for voter registration efforts would be deemed candidate-related political activity for the 501(c)(4) even though the activity being funded is not considered political intervention by the recipient 501(c)(3).

The Brennan Center recommends that contributions to nonprofits not be counted as candidate-related political activity if the contributing organization places a written restriction on the funds limiting them to activities that do not constitute candidate-related political activity and the recipient organization agrees to abide by the restriction. And as noted, we recommend that the definition of political activity be uniform for all 501(c) groups, to prevent contributions from being deemed political for a donor when the activity is not considered political for the recipient. Additionally, if the IRS sets sufficiently low thresholds for permissible amounts of total political activity by 501(c) organizations as we recommend, inter-organization transfers will be limited in amount. At small amounts, the concern that these transfers would constitute a loophole allowing organizations to evade the limits on political activity is far less pressing.

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The Brennan Center is committed to promoting our nation's democratic values by having a full and fair public debate about candidates and issues in which all citizens can participate. Unfortunately, after *Citizens United*, some have come to see the nonprofit form as an end-run around the transparency requirements of campaign finance laws. The Brennan Center hails the commitment of the IRS to improving the regulation of nonprofits. Although care must be taken to avoid limiting nonpartisan civic engagement and genuine issue advocacy, the NPRM is a welcome step forward.

Respectfully submitted,

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