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Bobby R. Burchfield
Attorney at Law
bburchfield@mwe.com
+1 202 756 8003

February 26, 2014

The Honorable John A. Koskinen
Commissioner of Internal Revenue Service
CC:PA:LPD:PR [REG-134417-13], Room 5205
Internal Revenue Service
111 Constitution Avenue NW
Washington, D.C. 20224

Re: Comments on IRS NPRM REG-134417-13

Dear Commissioner Koskinen:

The rule proposed by the Department of Treasury and the Internal Revenue Service would effect a stunning and unprecedented restriction on core political speech by thousands of nonprofit organizations. The proposed rule would sweep broad categories of previously exempt activities into a newly-created category called "candidate-related political activity" ("CRPA"), which would not be considered tax exempt "social welfare" activity. By this one bold stroke, the proposal would flout the mandate of Congress in numerous respects, effect an inappropriate partisan agenda, and impose restrictions on protected First Amendment activities more pervasive and intrusive than ever considered, to our knowledge, by any Congress or any federal agency. The apparent assumption that "anything goes" in restricting political speech in exchange for a tax exemption is seriously mistaken. The proposed rule must be withdrawn and abandoned.

On behalf of the Center for Individual Freedom ("CFIF"), American Commitment, and American Encore, Inc. we respectfully submit these comments in response to the Notice of Proposed Rulemaking ("NPRM") by the Internal Revenue Service published at 78 Fed. Reg.

71,535 (Nov. 29, 2013), denominated REG-134417-13. For the reasons set forth below, the commenters vigorously oppose the proposed rule. In addition, so they may have an opportunity to be heard in opposition, CFIF, American Commitment, and American Encore, Inc. request that the IRS hold a public hearing on the NPRM.

EXECUTIVE SUMMARY

CFIF, American Commitment, and American Encore, Inc. strongly urge the Department of Treasury and Internal Revenue Service to withdraw and abandon the proposed rule. As set forth below, the rule is procedurally deficient, contrary to law, and unconstitutional for many reasons. Among the many serious flaws discussed below, this summary highlights just three.

First, the rule is contrary to the intent of Congress. Throughout the 100-year history of the social welfare exemption, Congress has never authorized limits on the ability of section 501(c)(4) entities to engage in political activities. This is true even though Congress has explicitly limited the ability of 501(c)(3) organizations to engage in such activity. The language, history, and structure of section 501(c) and section 527 further confirm this point. Moreover, the proposed regulation violates an express instruction in the Bipartisan Campaign Reform Act that the electioneering communications provision in the federal campaign laws must not be "construed to establish, modify, or otherwise affect the definition of political activities . . . for purposes of the Internal Revenue Code of 1986." 2 U.S.C. § 434(f)(7). The proposed rule also ignores the explicit instructions in section 107 of the recent Consolidated Appropriations Act of 2014. The proposal to rewrite the law so substantially at this moment in time is suspect.

Second, if adopted, the proposed rule would create numerous inconsistencies and anomalies in relation to other provisions of the tax code and the federal election laws. Some

items that the proposed rule would deem "campaign-related political activity" ("CRPA") for a section 501(c)(4) entity would be acceptable non-political activity for a section 501(c)(3) entity, and would not be considered "exempt function" activity for a section 527 entity. Likewise, certain "campaign-related political activities" would be considered non-campaign activity under the Federal Election Campaign Act, and some CRPA would even qualify as official business by office-holders. The confusion and basic oddness that the rule would engender strongly counsel against adoption.

Finally, and most fundamentally, the proposed rule targets core political speech and association in a way more expansive and breathtaking than any governmental initiative of which we are aware. Although purporting to start with BCRA's definition of "electioneering communication," which the Supreme Court has already ruled cannot be used to restrict speech, the proposed rule dramatically expands the definition to create a concept of "campaign-related political speech" that unabashedly sweeps in speech and associational activities at the very heart of the First Amendment. The apparent assumption that the IRS can decide, without Congressional authorization, to grant tax exemptions only to those entities that abandon their First Amendment rights of speech and association is based on a serious misunderstanding of First Amendment law. By changing the longstanding requirements for a 501(c)(4) tax exemption, on which thousands of entities are relying, in a way explicitly targeted at First Amendment speech and association, the IRS is in effect imposing a new tax on protected activity. That is certainly not allowable.

For all these reasons, and others set forth in more detail below, the rule must be withdrawn and abandoned.

I. About CFIF, American Commitment, and American Encore, Inc.

The Center for Individual Freedom is a 26 U.S.C. § 501(c)(4) organization that was founded in 1998 as a non-partisan, non-profit organization dedicated to protecting and defending individual freedoms and individual rights guaranteed by the United States Constitution and state constitutions. CFIF pursues its mission through major litigation supporting the protection of fundamental freedoms, legislative advocacy on issues affecting constitutional rights and economic freedom, and education through publications, seminars, issue papers and briefings, news bulletins, and broadcasts, among other media.

Because of its intensive focus on contemporary issues of public policy, CFIF publications regularly mention officeholders and candidates for office at the state and federal levels, it has sponsored and often participates in panel discussions and forums that discuss and sometimes feature officeholders and candidates, and its personnel frequently publicly discuss officeholders, candidates, and appointees in the context of discussing and debating public policy. CFIF also makes, and sometimes receives, grants to and from other 501(c) organizations.

CFIF employs fewer than ten full-time staff and also contracts with several independent researchers and freelance writers on public policy topics. CFIF has more than 200,000 supporters and activists nationwide, many of whom subscribe to its weekly e-newsletter, the *Liberty Update*, and other CFIF e-mail alerts, respond to calls to action on legislative and policy matters, and often support the efforts of CFIF. A large component of CFIF's operations involves public communication through the media and the press on policy matters. It maintains a news and opinion website that discusses current issues relevant to its mission. It also uses direct mail to further its discussion of public policies, and these mailings frequently discuss pending

legislation, including the names of members of Congress (many of whom are candidates for re-election) who sponsor and oppose the legislation. On average, each of CFIF's individual mailings is sent to between 30,000 and 300,000 recipients, and it mails on average between one to two million pieces of mail per year.

CFIF also pursues its mission through its e-mail advocacy program, which educates the public on numerous consequential policy issues. To better connect with its audience, these communications frequently mention legislators or executive branch officials. Each communication goes to many thousands of recipients.

Moreover, CFIF is active in placing opinion pieces in the print media and maintains a website and public policy blog with daily postings. CFIF sponsors a biweekly radio show entitled "Your Turn, Meeting Nonsense with Commonsense," which is hosted by CFIF's Corporate Counsel and Senior Vice President, and airs on a 25,000-watt radio station in Florida. The broadcasts cover a range of public policy topics and often feature guest commentators. Many of the interviews conducted on the radio show are then posted to CFIF's website and distributed in its weekly e-newsletter.

Notably, CFIF engages with issues at the federal, state, and local levels. This engagement includes employing limited electioneering communications and in some instances express advocacy that refer to federal candidates, as well as issue advertisements addressing important state-level issues bearing upon individual freedom.

American Commitment was founded in April 2012 as a 501(c)(4) organization. It engages in critical public policy debates over the size and intrusiveness of government through direct advocacy, strategic policy analysis, and grassroots mobilization. Working with key

partners, American Commitment delivers timely, effective public policy research to the broader free market movement. American Commitment is designed to fill the capabilities gap between think tanks engaged in pure public policy work and grassroots organizations engaged in mobilizing citizen activists. Its public papers, website "action center," and e-mail alerts are distributed directly to approximately 80,000 activists and frequently refer to officeholders and candidates in the context of public policy discussions. As a natural extension of its public policy advocacy, American Commitment also engages from time to time in limited political campaign interventions including electioneering communications and express advocacy to advance the principles of limited government and individual freedom.

American Encore, Inc., formerly known as the Center to Protect Patient Rights, Inc., was founded in April 2009 as a 501(c)(4) organization and received approval of its application for tax exempt status in December 2009. American Encore advocates limited government and free enterprise and is committed to protecting individual liberty, including the rights of patients to choose and use their desired medical care providers.

Since its founding, American Encore has primarily advanced its policy interests by investing in and conducting research, as well as providing financial support to other organizations in support of shared policy interests. In 2010, American Encore provided grants to twenty-two 501(c)(4) organizations totaling over $44 million or 74% of its total expenditures for the year. In 2011, American Encore provided grants to twenty 501(c)(4) and (c)(6) organizations totaling nearly $15 million or 64% of its total expenditures for the year. In 2012, American Encore provided grants to forty-eight 501(c)(3), (c)(4) and (c)(6) organizations totaling over $112 million or 82% of its total expenditures for the year. Where appropriate, American Encore

provides support and assistance, including in some instances in-kind contributions, to grant recipients in furtherance of their shared mission, particularly with regard to research, strategy, planning, and coalition-building.

For all these reasons, CFIF, American Commitment, and American Encore, Inc. know about the tremendous burdens, and the very real threats to their existence, posed by the proposed rule.

II. General Description of the Proposed Rule.

The proposed rule would supersede regulations governing 501(c)(4) entities adopted in and unchanged since 1959. It would radically change the way the IRS interprets section 501(c)(4), and the way many 501(c)(4) organizations conduct their affairs. The proposed rule would exclude a broad category of so-called "candidate-related political activity" ("CRPA") from the definition of "social welfare."

In defining "candidate-related political activity," the rule purports to rely on the definition of "electioneering communications" under the Bipartisan Campaign Reform Act ("BCRA"). *See* 78 Fed. Reg. at 71,539. But the proposed rule's definition of CRPA would go much further than the electioneering communications definition from the BCRA. For example, it would define "candidate" to include not just announced candidates, but persons "proposed by another" for office. *Id.* at 71,538. That would encompass not just those seeking or proposed for federal office, but also those seeking or proposed for state and local office. It would include, as well, all appointees or nominees for public office, including not just Cabinet Secretaries and federal judges but also including the many thousands of appointees to federal positions. Any express advocacy or functionally equivalent speech involving any individual falling into one of

these broad classes would be deemed CRPA whenever it occurred. *Id.* CRPA would include all voter registration and get-out-the vote activity, voter guides, grants to certain 501(c) organizations, and—if undertaken within 30 days of a primary election or 60 days of a general election—all paid advertising (not just broadcast but print and even billboard advertising) and web postings mentioning any "candidate" as it defines that term. *Id.* at 71,539. If undertaken within 30 days of a primary election or 60 days of a general election, candidate debates sponsored by 501(c)(4) organizations would be excluded from the definition of "social welfare." *Id.* at 71,539-40. Whereas BCRA's definition of electioneering communications applies only when "targeted to the relevant electorate," the proposed rule contains no such limitation. The CRPA definition would lower the audience level necessary to qualify as a "*public*" communication by 100-fold, from BCRA's 50,000 to just 500. *Compare* 2 U.S.C. § 434(f)(3)(c), *with* 78 Fed. Reg. at 71,541.

In short, the proposed rule uses the BCRA definition of electioneering communication as a mere starting point, and then drastically expands it to encompass far more core political speech and association than any Congress has ever considered regulating. In addition, the NPRM requests comment on the current requirement that a 501(c)(4) organization be "primarily engaged" in promoting social welfare, and on applying this same expansive definition of "candidate-related political activity" to 501(c)(3), (5), and (6) organizations.

III. Congress Did Not Intend To Preclude 501(c)(4) Organizations from Political Activity.

The tax exemption currently found in 26 U.S.C. § 501(c)(4) for organizations operated exclusively for the promotion of "social welfare" was part of the original Tariff Act of 1913, 38

Stat. 114, 172 ("Nothing in this section shall apply . . . to any civic league or organization not organized for profit, but operated *exclusively for the promotion of social welfare*") (emphasis added). The Tariff Act of 1913 also contained an exemption for organizations "operated exclusively for religious, charitable, scientific or educational purposes," *id.*, a provision that later became section 501(c)(3).

These provisions went substantially unchanged until 1934, when Congress added a provision to the charitable exemption, but not the social welfare exemption, limiting it to organizations "no substantial part of the activity of which is carrying on propaganda, or otherwise attempting, to influence legislation." Revenue Act of 1984, 48 Stat. 680, 700.

Then, in 1954, Senator Lyndon Johnson proposed an amendment to the charitable exemption limiting it to organizations "which [do] not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." 100 Cong. Rec. 9603 (July 2, 1954) (Statement of Sen. Johnson, and reading by Chief Clerk). The amendment was added to what became section 501(c)(3). *See* 68A Stat. 163-64. Importantly, no corresponding amendment was proposed or made to section 501(c)(4).

Indeed, political activities by 501(c)(4) organizations during the 1950s appear to have been non-controversial. In Rev. Rul. 55-269, 1955-1 C.B. 29, the Service addressed a 501(c)(4) organization that distributed literature encouraging national, state, and local governments to practice wise economy and public spending, to encourage business leaders and others to participate in public affairs, and to assist in the development of an informed public opinion on major political, social and economic issues. Although the Service concluded that contributors to the 501(c)(4) organization could not deduct their contributions, even though the 501(c)(4) entity

distributed some of its literature to 501(c)(3) organizations, the Service raised no question about the participation of the 501(c)(4) organization in political activity.

In 1956, the Treasury Department published proposed rules in the Federal Register to govern 501(c) organizations. Among other things, the proposed regulation relating to 501(c)(4) organizations described them as "those which are operated primarily for the purpose of *bringing about social changes or for purposes relating to the private rights of individuals and to human relationships generally*, and which cannot meet the requirements of section 501(c)(3)." 21 Fed. Reg. 460, 465 (January 21, 1956) (emphasis added). The 1956 proposals were withdrawn in February 1959. In their place, the Department proposed new language to the 501(c)(4) regulations stating that "[a]n 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*," and "is one which is *operated primarily for the purpose of bringing about civic betterments and social improvements*," but that "the 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." 24 Fed. Reg. 1421, 1424 (February 26, 1959) (emphasis added). Those regulations became final on June 26, 1959, and remain in effect today.

Thus, in 1959, for the first time in its forty-six year history, the Department and IRS interpreted section 501(c)(4) as excluding "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office" from the definition of "social welfare." 24 Fed. Reg. 5217 (June 26, 1959). Neither the NPRM in February 1959 nor the Federal Register notice of the final regulation in June 1959 provided an

explanation or justification for excluding political activity from the definition of "social welfare."

In 1975, Congress created section 527, expressly giving a tax exemption to political organizations. Pub. L. No. 93-625, 88 Stat. 2108, 2116. When it adopted section 527, Congress made no change in section 501(c)(4).

In 1996, section 501(c)(4) was amended for the first and only time since its enactment to clarify that "no part of the net earnings of such entity inures to the benefit of any private shareholder or individual." Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452, 1478. Congress did not then amend, and has never amended, section 501(c)(4) to eliminate "political activity" from the definition of social welfare, or otherwise to restrict the ability of 501(c)(4) organizations to engage in political discussion or other political activity.

In 2000, Congress amended section 527 to require certain disclosures of donors. Pub. Law. No. 107-126, 116 Stat. 1929. Again, Congress neither considered nor adopted any amendment to section 501(c)(4) to restrict political activities or to require public disclosure of donors.

Apart from the legislative history confirming that Congress has never authorized restrictions on the political activities of section 501(c)(4) entities, other statutory authority precludes the proposed rule. In particular, the proposed rule flouts a recent directive from Congress. In the Consolidated Appropriations Act of 2014, signed by the President on January 17, 2014, Congress instructed in section 107 that "[n]one of the funds made available under this Act may be used by the Internal Revenue Service to target citizens of the United States for exercising any right guaranteed under the First Amendment to the Constitution of the United

States." H.R. 3547, 113th Cong. (2014) (enacted). Yet, that is exactly what the proposed rule would do.

Further, the use of the "electioneering communications" standard, even as a starting point, violates an explicit provision of BCRA: "Nothing in this subsection may be construed to *establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office)* for purposes of the *Internal Revenue Code of 1986*." 2 U.S.C. § 434(f)(7) (emphasis added).

In short, the proposed rule would ignore the carefully structured relationship among the subsections of section 501, and would violate express congressional directives.

IV. "Social Welfare" Does Not Exclude the Activities Denominated as "Candidate-Related Political Activities."

Like the proposed rule, the existing regulation restricting the political activities of 501(c)(4) organizations is an "interpretative" rule, not a legislative rule. *See* 24 Fed. Reg. 1423-24 (Feb. 26, 1959); 78 Fed. Reg. 71,540 (Nov. 29, 2013) ("[I]t also has been determined that Section 553(b) of the Administrative Procedure Act . . . does not apply to these regulations."). As an interpretative rule, the regulation is "not controlling upon the courts," and is entitled only to such weight as appropriate based upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See also Gonzales v. Oregon*, 546 U.S. 243, 256 (2006); *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111, 116 (1st Cir. 2009). Because the IRS provided no

reasoning or explanation for excluding political activity from the definition of "social welfare," the 1959 interpretative regulation is not persuasive.

Notably, the Service's determination in 1959 that political activity does not promote social welfare has never been subjected to judicial review. Yet as the United States Court of Appeals for the D.C. Circuit made clear earlier this month in *Loving v. Internal Revenue Service*, No. 13-5061 (D.C. Cir. Feb. 11, 2014), it is inappropriate for the IRS to deviate from statutory text. This is especially true in view of the numerous opportunities that Congress has had, but failed to take, to exclude political activity from section 501(c)(4), as it did sixty years ago from section 501(c)(3). "The IRS may not unilaterally expand its authority through such an expansive, atextual, and ahistorical reading" of the statute. *Id.*, slip op. at 17.

The premise that political activity does not promote social welfare was and remains ill-considered and unpersuasive. Considering the proper definition of "social welfare" in section 501(c)(4), the Fourth Circuit resorted to the dictionary:

> In this context 'social' is defined as: "Concerned with, interested in, the constitution of society and the problems presented (thereby)." Oxford Dictionary, supra, Vol. IX. 'Society' is "the aggregate of persons living together in a more or less ordered community . . . A collection of individuals composing a community or living under the same organization or government." *Ibid.* 'Welfare' means "Well-being (of a person, community, or thing)." *Id.*, Vol. XII. In short, 'social welfare' is the well-being of person as a community.

Comm'r v. Lake Forest, Inc., 305 F.2d 814, 818 (4th Cir. 1962). In a much later decision, the same court found the IRS's substitution of "common good and general welfare of the people of the community" in its current regulation to be "of limited value since it merely substitutes one

amorphous term (i.e., 'community') for another ('social welfare')." *Flat Top Lake Ass'n v. United States*, 868 F.2d 108, 110 (4th Cir. 1989).

However considered, "social welfare" is undeniably a broad concept that encompasses the "good" or "welfare" of "society" or the "community." The regulations seem to recognize this, requiring only that the organization promote social welfare "in some way," and the IRS has historically recognized an extremely diverse group of politically and non-politically oriented nonprofits as being adequately focused on the good of the community to qualify.[1] Outside the context of political campaign activity, the authorities do not impose restrictions on the type of community good sought or the means by which the organization seeks to further its purpose of bringing about social improvements. Rather, the dominant inquiry is whether the organization is organized or operated for the narrow benefit of its membership or whether its primary purpose is to confer a benefit on the larger community—and even on that point, the mere fact that those in control of the organization have some special interest in the community benefit sought has not been disqualifying.[2] Having interpreted the term "social welfare" to encompass such a broad

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[1] *See, e.g.,* Rev. Rul. 66-148, 1966-1 C.B. 143 (organization formed to maintain community water supply); Rev. Rul. 66-273, 1966-2 C.B. 222 (community rifle range); Rev. Rul. 78-69, 1978-1 C.B. 156 (organization formed to secure rush hour bus service for a community); Rev. Rul. 78-429, 1978-2 C.B. 178 (airport serving rural needs); Rev. Rul. 67-293, 1967-2 C.B. 185 (organization promoting legislation on animal rights); Rev. Rul. 76-81, 1976-1 C.B. 156 (organization advocating anti-abortion legislation); Rev. Rul. 68-656, 1968-2 C.B. 216 (organization seeking legalization of currently illegal activity); Rev. Rul. 71-530, 1971-2 C.B. 237 (organization advocating changes in the tax law).

[2] *Monterey Public Parking Corporation v. United States*, 481 F. 2d 175 (9th Cir. 1973) (organization established largely by downtown businesses to operate a public parking facility and remedy a lack of downtown parking); Eden Hill Farms v. United States, 389 F. Supp. 858 (W.D. Pa. 1975) (organization providing "country holidays" for working women in a particular community was exempt under section 501(c)(4) notwithstanding primary use by employees of one large company); Rev. Rul. 75-286, 1975-2 C.B. 210 (an organization created by the property owners on a city block to beautify its common areas was exempt under section 501(c)(4), because the community as a whole would benefit, even though the block residents might also be motivated by the potential increase to their property values).

range of activities, the Service has a heavy burden to show why—of all those activities—only core political speech protected by the First Amendment should be singled out for disfavor.

It seems obvious that promoting "social welfare" requires at least some involvement with politics and the government. After all, "man," Aristotle wrote, "is by nature a political animal." Aristotle, *Politics* (Book One), 350 B.C.E. With spending by federal, state, and local governments comprising, in the aggregate, 35% of Gross Domestic Product, *see* Exhibit 1 (Augustino Fontevecchia, *Volcker: Government Makes up 35% of GDP, Mortgage Markets Are Now A State & Subsidiary*, Forbes (May 15, 2013 2:31 PM), http://www.forbes.com/sites/afontevecchia/2013/05/15/volcker-government-makes-up-35-of-gdp-mortgage-markets-are-now-a-state-subsidiary/), and government regulation pervasive in all, or virtually all, industries, almost every effort to promote social welfare—"social betterment and civic improvements"—will involve or at least touch upon the political sphere.

Further, as the United State Supreme Court has repeatedly emphasized, free and unfettered debate by itself promotes the public welfare. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), the Court emphasized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, wide-open." In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court ruled that these First Amendment protections are fully applicable to political debate. "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*." *Id.* at 14 (emphasis added) (citations and internal quotations omitted). The Court

further recognized that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Id.* at 42. Accordingly, the premise that "social welfare" excludes political debate is unfounded.

In fact, the IRS has already recognized that this kind of debate furthers social welfare, approving a variety of organizations that have sought to advance their vision of what would be best for our community by pushing for change in the law through the political process.[3] Even when the vision advanced is controversial or unpopular, the historic position of the IRS was that advocacy in favor of policy change would still promote social welfare because it would "increase the knowledge and understanding of the public" on a "matter of public concern"[4] and "because society benefits from an informed citizenry."[5] These rulings have been explicit that ideological neutrality on the issues discussed is not a condition of exemption.

Although these rulings concerned organizations that advocated legislation, we can see no legitimate basis for distinguishing legislative advocacy from electoral advocacy designed to encourage the election of candidates who favor the organization's policies. In a democratic system, the two are simply different stages in the same process of seeking a change in governmental policy, which is clearly a way—and often the only way—of "bringing about civic betterments and social improvements." And both kinds of advocacy seem equally capable of

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[3] *See, e.g.*, Rev. Rul. 76-81, 1976-1 C.B. 156 (organization advocating anti-abortion legislation); Rev. Rul. 68-656, 1968-2 C.B. 216 (organization seeking legalization of currently illegal activity); Rev. Rul. 71-530, 1971-2 C.B. 237 (organization advocating changes in the tax law).
[4] Rev. Rul. 76-81, 1976-1 C.B. at 157.
[5] Rev. Rul. 68-656, 1968-2 C.B. at 216.

increasing the knowledge of the public about matters of public concern, which is the rationale by which the IRS justifies treating legislative advocacy organizations as tax exempt under section 501(c)(4).

Thus, there is no statutory basis to conclude that electoral advocacy is a less permissible means of furthering an organization's social welfare purpose than legislative advocacy.[6] It is a constrained and unjustifiable view of "social welfare" that attempts to exclude political debate, issue advocacy, and the encouragement of civic engagement during the critical months leading up to elections.

V. The Motivation for Changing the Regulations at This Moment in Time Is Suspect.

Notwithstanding its scope and importance to the 501(c)(4) community, the NPRM provides only a scant explanation for undertaking a comprehensive rewrite of the standards governing 501(c)(4) organizations. It states:

> A recent IRS report relating to IRS review of applications for tax-exempt status states that "[o]ne of the significant challenges with 501(c)(4) [application] review process has been the lack of a clear and concise definition of 'political campaign intervention.'"

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[6] One IRS legal memorandum subsequent to the regulation's promulgation suggested the purpose of the regulation is to maintain the distinction between a section 501(c)(4) organization and a political party:

> In the case of activities constituting direct or indirect participation or intervention in political campaigns, another factor comes into operation in evaluating an organization's qualification for section 501(c)(4) status, namely, that an organization whose primary activity is of this nature would seem to be properly characterized as a political party (unless, perhaps, it were a nonpartisan organization such as the League of Women Voters). The Service has maintained the position that a political party does not qualify for an exemption from tax under section 501(c)(4) . . . . The [political activity] portion of the regulations is reflective of this long-standing position of the Service.

G.C.M. 33495 (Apr. 27, 1967). Since Congress added section 527 to the Code over thirty years ago, the IRS has allowed section 527 political organizations, including political parties, to exist side by side with section 501(c)(4) social welfare organizations that engage in some political activity.

> Internal Revenue Service, "Charting a Path Forward at the IRS: Initial Assessment and Plan of Action" at 20 (June 24, 2013).
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> In addition, "[t]he distinction between campaign intervention and social welfare activity, and the measurement of the organization's social welfare activities relative to its total activities, have created considerable confusion for both the public and the IRS in making appropriate section 501(c)(4) determinations." *Id.* at 28. The Treasury Department and the IRS recognize that both the public and the IRS would benefit from clearer definitions of these concepts.

78 Fed. Reg. at 71,536. *See also id.* at 71,536-37 ("adopting rules with sharper distinctions in the area would provide greater certainty and reduce the need for detailed factual analysis"); *id.* at 71,538 ("justified by the need to provide greater certainty to section 501(c)(4) organizations").

The purported justification for this significant regulatory rewrite is not persuasive. As explained below in Part VIII.A., the proposed regulation would add little if any clarity, but would severely restrict the political speech and association of section 501(c)(4) organizations, and impose heavy compliance burdens and tax consequences. The current regulations governing 501(c)(4) organizations date back fifty-five years, and a considerable body of regulatory interpretation and understanding within the regulated community has developed over that time. There has been no outcry from the 501(c)(4) community for the IRS to clarify the definition of "social welfare."

Rather, the cry for greater restriction on 501(c)(4) organizations has come largely from some Democratic members of Congress and from a few groups committed to reducing money in politics. Almost as soon as the effort to pass the so-called "DISCLOSE Act" failed, Democratic Senators and Congressman turned to the IRS to do by executive branch fiat what they could not do through proper legislation channels. Thus, the IRS has received a steady stream of

correspondence from Capitol Hill in the last few years urging the IRS to "rein in" the political activities of 501(c)(4) organizations.

In September 2010, leading into that year's midterm elections, Senator Max Baucus wrote to Commissioner Shulman expressing his concern that the "tax code is being used to eliminate transparency in the funding of our elections," and referring to news reports discussing nonprofit groups that were planning to speak in opposition to Senator Baucus's agenda. *See* Exhibit 2 (Letter from Senator Max Baucus to Commissioner Douglas H. Shulman (September 28, 2010)). Weeks later, Assistant Senate Majority Leader Dick Durbin wrote to the IRS singling out an organization that opposed his agenda, Crossroads GPS, and requesting that the IRS "quickly examine the tax status of Crossroads GPS and other (c)(4) organizations that are directing millions of dollars into political advertising." *See* Exhibit 3 (Press Release, Senator Richard Durbin, Durbin Urges IRS to Investigate Spending by Crossroads GPS (October 11, 2010), *available at* http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=833d8f1e-bbdb-4a5b-93ec-706f0cb9cb9). Then, leading into the 2012 elections, a group of Democratic Senators wrote to Commissioner Shulman demanding the IRS "immediately change" the administrative framework for enforcement of the tax code as applied to social welfare organizations. *See* Exhibit 4 (Press Release, Senator Charles Schumer, Senate Democrats Urge IRS to Impose Strict Cap on Political Spending—Vow Legislation If Agency Doesn't Act (March 12, 2012), *available at* http://www.schumer.senate.gov/record.cfm?id=336270). Senator Carl Levin, as Chairman of the Senate Permanent Subcommittee on Investigations, also wrote a series of letters to the IRS in 2012—both to Lois G. Lerner, former Director of Exempt Organizations, and to Commissioner Shulman—expressing his concern about "the extent to

which 501(c)(4) 'social welfare' organizations can engage in partisan political activity." *See* Exhibit 5 (Letters between Senator Carl Levin and Commissioner Schulman). Thirty-two House Democrats also wrote to Commissioner Shulman, requesting that in "light of recent reports about the political activities of certain social welfare organizations," the IRS "investigate and stop any abuse of the federal tax laws" by such groups. *See* Exhibit 6 (Press Release, Representative Peter Welch, Welch Leads 32 Democrats in Effort to Crack Down on Wild West Campaign Atmosphere in Post-Citizens United World (March 28, 2012), *available at* http://www.welch.house.gov/press-releases/welch-leads-32-democrats-in-effort-to-crack-down-on-wild-west-campaign-atmosphere-in-post-citizens-united-world/).

These efforts have continued even as the proposed rule is pending. Senator Schumer, appearing at a Center for American Progress forum on January 23, 2014, called on the IRS to adopt the proposed rule as a means of muzzling "Tea Party elites": "Obviously, the Tea Party elites gained extraordinary influence by being able to funnel millions of undisclosed dollars into campaigns, with ads that distort the truth and attack government . . . But there are many things that can be done by the IRS and other government agencies, and we have to re-double those efforts; we have not worked hard enough on this." *See* Center for American Progress Action Fund, *Remarks by Senator Charles Schumer: The Rise of the Tea Party and How Progressives Can Fight Back*, http://www.americanprogressaction.org/events/2014/01/16/82507/remarks-by-senator-charles-schumer-d-ny/ (video excerpt at 49:53-50:23). *See also* Exhibit 7 (Alana Goodman, *Schumer Calls for Using IRS to Curtail Tea Party Activities*, Washington Free Beacon (Jan. 23, 2014 5:38 PM), http://freebeacon.com/schumer-calls-for-using-irs-to-curtail-tea-party-activities/).

Moreover, the President himself has repeatedly criticized such groups for their involvement in elective politics. *See* Exhibit 8 (Byron Tau, *Obama: Campaign Cash 'Ridiculous'*, Politico (Oct. 25, 2012 10:38 PM), http://www.politico.com/politico44/2012/10/obama-campaign-spending-ridiculous-147303.html). And finally, one Democratic congressman joined a lawsuit against the Internal Revenue Service seeking a judicial order that would require the IRS to disallow any and all political activity by 501(c)(4) organizations. *Van Hollen v. IRS*, No. 13-cv-01276 (D.D.C.).

On May 10, 2013, IRS official Lois Lerner revealed that the IRS had targeted for extra scrutiny the applications of so-called Tea Party organizations seeking 501(c)(4) tax exempt status. *See* Exhibit 9 (Sean Sullivan, *Everything You Need to Know About the IRS Scandal*, Wash. Post (May 21, 2013 1:15PM), http://www.washingtonpost.com/blogs/the-fix/wp/2013/05/21/what-we-know-and-what-we-dont-about-the-irs-scandal/). Ms. Lerner's revelation led to an investigation and report by the Treasury Inspector General for Tax Administration ("TIGTA"). That report found: "The IRS used inappropriate criteria that identified for review Tea Party and other organizations applying for tax exempt status based upon their names or policy positions instead of indications of potential political campaign intervention." Exhibit 10 (Treasury Inspector General for Tax Administration, Ref. No. 2013-10-053, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013) (see "Highlights" page)). Significantly, the NPRM's only support for the purported need to "clarify" the regulatory landscape is an internal IRS report responding to the TIGTA report. Rather than clarifying the existing standards for the benefit of the 501(c)(4) community, the NPRM appears to accede to the demands of Democratic members of Congress to limit the

activities of that community. If adopted, the new regulation would continue the inappropriate and constitutionally suspect efforts by the IRS to limit free speech and discussion by the Administration's conservative adversaries.

Recent disclosures confirm the connection among the congressional demands to investigate conservative organizations, the targeted review of certain 501(c)(4) entities, and the NPRM. In a February 4, 2014, letter, Oversight and Government Reform Committee Chairman Darrell Issa and Subcommittee on Economic Growth, Job Creation and Regulatory Affairs Chairman Jim Jordan expressed grave concern about the proposed rule and requested documents and information related to it no later than February 18. Exhibit 11 (Letter from Representative Darrell Issa and Representative Jim Jordon to Commissioner John Koskinen (Feb. 4, 2014)). In their letter, they compellingly demonstrated that the proposed rule arose from the same effort to suppress speech of conservative organizations that led to the targeting controversy. They wrote: "In June 2012, Ruth Madrigal of the Treasury Department Office of Tax Policy wrote to several IRS leaders about potential § 501(c)(4) regulations. She wrote: **'Don't know who in your organization is keeping tabs on c4s, but since we mentioned potentially addressing them (off-plan) in 2013, I've got my radar up and this seemed interesting.'**" *Id.* at 10 (citing E-mail from Ruth Madrigal, Dep't of the Treasury, to Victoria Judson, Internal Revenue Serv. (June 14, 2012) (emphasis in original)). During a recent hearing earlier this month with Commissioner Koskinen, Chairman Camp stated: "If Treasury and the IRS fabricated the rationale for a rule change it would tend to raise questions about the integrity of the rule-making process." *See* Exhibit 12 (Press Release, Rep. David Camp, Chairman of House Ways & Means Committee, Camp Blasts Treasury & Lois Lerner for Developing 501(c)(4) Rules "Off-Plan"

(Feb. 5, 2014), *available at*

http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=369014). Unless and until the IRS fully assures Congress and the public that the rule is not part of an inappropriate political agenda, it should be deferred or abandoned.

In curious timing, the proposed rule, if finalized and made effective this summer, would impose immediate blackout periods on 501(c)(4) entities. Those blackout periods include the 30-day blackouts for federal, state, and local primary elections, which are ongoing throughout the spring, summer, and fall, and a 60-day blackout prior to this year's midterm elections on November 4, 2014. The proposed rule would also immediately limit or prohibit involvement by 501(c)(4) entities in voter registration, get-out-the-vote, and other activities. CFIF, American Commitment, and American Encore, Inc., do not consider the timing of the rule coincidental.

VI. The NPRM is Procedurally Deficient.

In addition to making clear that the proposed rule is an interpretative rule rather than a legislative rule, and thus need not comply with 5 U.S.C. § 553(b), the NPRM also asserts that the proposed rule "will not have a significant economic impact on a substantial number of small entities." 78 Fed. Reg. at 71,540. This conclusion is predicated on the assertion that "only a minimal burden would be imposed by the rule." *Id.* To the contrary, as CFIF has demonstrated in comments to the Office of Management and Budget, the proposed rule would impose substantial burdens on CFIF, American Commitment, American Encore, Inc., and thousands of 501(c)(4) organizations. Exhibit 13 (Letter from Bobby R. Burchfield to Desk Officer for the Department of the Treasury Office of Information and Regulatory Affairs, Office of Management and Budget (Jan. 27, 2014)). The NPRM also asserts that "a regulatory flexibility

analysis under the Regulatory Flexibility Act (5 U.S.C. Chapter 6) is not required." 78 Fed. Reg. at 71,540. This conclusion is also not sound.

If issued, the proposed ruling would ignore clear guidance within Executive Orders 12866 and 13563. The proposed rule constitutes a "significant regulatory action" as defined in Executive Order 12866 and reaffirmed by Executive Order 13563. Significant regulatory actions include regulations that will have an annual effect on the economy of $100 million or more (or adversely affect one sector of the economy). In 2010 alone—the last year for which the IRS has provided aggregate statistics—501(c)(4) organizations spent a total of over $79 billion dollars. Exhibit 14 (Internal Revenue Service, *SOI Tax Stats – Charities & Other Tax-Exempt Organizations Statistics*, http://www.irs.gov/uac/SOI-Tax-Stats-Charities-and-Other-Tax-Exempt-Organizations-Statistics (last visited Feb. 26, 2014) (under "501(c)(3) through 501(c)(9) Organizations: Form 990-Balance Sheet and Income Statement Items," follow "2010" link)). According to one source, during the 2012 election cycle 501(c)(4) organizations spent more than $250 million dollars supporting or opposing candidates. Exhibit 15 (Center for Responsive Politics, *Political Nonprofits*, http://www.opensecrets.org/outsidespending/nonprof_summ.php (last visited Feb. 26, 2014)). Because of the very broad definition of CRPA in the proposed rule, application of the CRPA definition to spending in 2012 would no doubt lead to a figure greatly exceeding $250 million. Further, if the broad definition of CRPA were applied to the activities of section 501(c)(4) entities, many of them would likely fail the "primarily engaged" test for exemption under section 501(c)(4), or would need to scale back on those activities to stay within the

exemption. Accordingly, the NPRM's impact is likely to have an annual effect on the economy far greater than $100 million.

Accordingly, Executive Order No. 12866 requires the IRS and the Treasury Department to justify their actions by (1) describing the need for regulatory action and (2) providing an explanation of how the regulation will meet that need. Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1983). This assessment also requires analysis of the costs and benefits of the proposed regulation and a description of how the regulation is "consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities." *Id.* at 51,741.

The NPRM meets none of these requirements. Quite the contrary, in a section entitled "Special Analyses," the NPRM states that "[i]t has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required." 78 Fed. Reg. at 71,450. Just as the NPRM fails to comply with the Paperwork Reduction Act, it fails to provide the necessary regulatory assessment. It must therefore be withdrawn, and if re-proposed, it must be republished with a complete analysis of its costs and benefits.

VII. Imposition of the Proposed Restrictions on 501(c)(4) Organizations Would Create Serious Anomalies.

Congress constructed a statutory framework that would be wholly unsettled by adoption of the proposed rule. Under current law and regulations, section 527 provides a tax exemption for the "exempt function" income of "political organization[s]." 26 U.S.C. § 527(a) ("A political organization shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes."). Section 527(e)(1) defines

"political organization" as "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." 26 U.S.C. § 527(e)(1) (emphasis added). In turn, section 527(e)(2) defines "exempt function" as "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 . . . ." 26 U.S.C. § 527(e)(2). Thus, to qualify as a section 527 political organization, an entity must be "primarily" engaged in the defined election-related activity. Organizations that are not "primarily" engaged in that activity do not qualify for exemption under section 527.

Section 501(c)(4) provides a tax exemption for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare," as well as certain other organizations "devoted exclusively to charitable, educational, or recreational purposes." 26 U.S.C. § 501(c)(4). Under the current regulations, a 501(c)(4) organization must be "*primarily* engaged in promoting in some way the common good and general welfare of the people of the community," Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (as amended 1990) (emphasis added), but "promotion of social welfare does not include direct or indirect participation or intervention in political campaigns," *id.* § 1.501(c)(4)-1(a)(2)(ii). Thus, today, organizations that engage in *some* political activity, but are not "*primarily*" engaged in political activity, may qualify for tax exemption under 501(c)(4).

By so broadly defining "candidate-related political activity" and thus dramatically expanding the range of actions excluded from "social welfare," the proposed rule would

adversely affect many 501(c)(4) organizations, potentially including CFIF, American Commitment, and American Encore, Inc. Those organizations may no longer be *primarily* engaged in the much narrower class of allowable "social welfare" activities, and thus may not qualify for exemption under 501(c)(4). But because the definition of "candidate-related political activity" in the proposed rule is far broader than the definition of "exempt function" in section 527, some 501(c)(4) organizations, again potentially including CFIF, American Commitment, and American Encore, Inc., may not qualify for exemption under either section 527 or 501(c)(4).

Applying the definition of CRPA to 501(c)(4) entities would create another anomaly between section 501(c)(4), which applies to organizations primarily engaged in social welfare activities, and section 527, which applies to organizations primarily involved in political activities. The "exempt functions" in which section 527 entities must be primarily engaged are much narrower than the "candidate-related political activities" exempted from the definition of social welfare. Currently, 501(c)(4) entities are allowed to engage in, but must pay tax on, exempt function activities, so long as the organizations remain "primarily engaged" in social welfare activity. Under the proposed rule, 501(c)(4) entities could not count CRPA as social welfare activity, but would be required to pay tax only on the narrower class of exempt function activities, including, but not limited to, genuine issue advocacy that happens to identify a "candidate," or potential "candidate." And section 527 entities would have a narrower range of exempt function activities to qualify for tax exemption than those excluded from the definition of social welfare. For a rule purportedly driven by a desire for clarity, the proposal would inject considerable confusion and untoward results in the administration of the nonprofit provisions.

More troubling, the NPRM requests comment on (but the proposed rule does not address) whether the 501(c)(4) regulations should be modified to change the requirement that 501(c)(4) entities must be "primarily engaged" in social welfare activity. Some have suggested that 501(c)(4) organizations must be "exclusively" engaged in "social welfare activity" and conduct no "candidate-related political activity." If the regulations were changed to effect that result, any 501(c)(4) organization that engaged in a small amount of political activity would lose its 501(c)(4) exemption, but also not qualify for an exemption under section 527 unless it increased its "exempt function activity" to constitute more than half of its activity. In other words, in contravention of congressional intent, entities that engage primarily in social welfare activity and some candidate-related political activity would be denied any tax exemption. Only nonprofits that *primarily* engaged in political activities qualifying as "exempt function activity," on the one hand, or *exclusively* engaged in the narrower class of social welfare activity, on the other, could qualify for a tax exemption. Many 501(c)(4) organizations, potentially including CFIF, American Commitment, and American Encore, Inc., would fall through the cracks. Such a result unsettles a century of practice, is not a sensible application of the statutory scheme, and is irrational.

Even with no change in the "primarily engaged" standard, the proposed rule creates inexplicable anomalies. As noted, unlike section 501(c)(4), section 501(c)(3) by its terms disallows a tax exemption to anyone who "participate[s] in, or intervene[s] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. § 501(c)(3). But the proposed rule would allow more political activity by 501(c)(3) entities than by 501(c)(4) entities. Less than seven years

ago, the IRS published Revenue Ruling 2007-41, addressing twenty-one hypothetical situations under section 501(c)(3) to determine if the facts and circumstances of those situations constituted intervention in a political campaign on behalf of or in opposition to a candidate. Rev. Rul. 2007-41, 2007-1 C.B. 1421. Notwithstanding the clear congressional prohibition in section 501(c)(3) of *any* political campaign intervention, the IRS concluded that at least nine of the twenty-one situations —nos. 7, 8, 10, 11, 12, 14, 17, 19, and 20—did *not* involve political campaign intervention. In stark contrast, under the proposed rule at issue here, a 501(c)(4) organization engaging in identical conduct *would* be deemed *in all nine instances* to have engaged in "candidate-related political activity." *See, e.g., id.* (Situation 7 (candidate appearances prior to an election); Situation 8 (same); Situation 10 (candidate attendance at regular meeting before an election); Situation 11 (same); Situation 12 (publication of unsolicited announcement of candidacy in regular newsletter); Situation 14 (paid mass media advocacy that criticizes Senator C's position on legislation and encourages a call to him about an upcoming vote in Congress shortly before an election in which he is a candidate); Situation 17 (non-discriminatory rental of facility to a candidate); Situation 19 (links to candidate websites); Situation 20 (links to websites containing articles about treatment programs, but also containing editorials endorsing candidates)).

Thus, unless and until the same definitions of "candidate-related political activity" are applied to 501(c)(3) organizations—and we do not advocate applying an improper rule more broadly merely for purposes of consistency—the proposed rule would restrict *more* activity by social welfare organizations that *are not* statutorily prohibited from engaging in political activity than by charitable 501(c)(3) organizations that *are* statutorily proscribed from engaging in *any*

political activity. Moreover, analysis of Revenue Ruling 2007-41 drives home the point that the purpose of the proposed rule is not to "clarify" the definition of political activity, but to impose far greater restrictions on the political activity of social welfare organizations than are imposed on 501(c)(3) entities.

Like section 501(c)(4) organizations, section 501(c)(3) organizations must serve "a public rather than a private interest"; as in the case of section 501(c)(4) organizations, "[t]he common element in all charitable organizations is that they are designed to accomplish objectives which are beneficial to the community and area." *National Right to Work Legal Defense & Education Foundation v. United States*, 487 F. Supp. 801, 807 (E.D.N.C. 1979) (citing *Bank of Carthage v. United States*, 304 F. Supp. 77, 80 (W.D. Mo. 1969)). Indeed, the IRS has deemed this public interest under section 501(c)(3) to be more, not less, restrictive than the community benefit standard applicable under section 501(c)(4).[7] It is well-settled principle that nonpartisan candidate forums, voter guides, and voter registration activities provide a sufficient community benefit to qualify as section 501(c)(3) activity.[8] Under the proposed rule, however, the IRS would *reverse* this basic understanding by deeming such nonpartisan activities nonexempt under section 501(c)(4).

The proposed rule creates further anomalies in relation to the federal campaign laws. Under the Federal Election Campaign Act, many activities that the proposed rule would deem "candidate-related political activity" are excluded from the election laws. *See, e.g.*, 2 U.S.C. §

[7] *See, e.g.*, Rev. Rul. 75-286, 1975-2 C.B. 210 (property owners' block cleanup organization is exempt under section 501(c)(4), but not section 501(c)(3), because it served a private not public interest).
[8] *See, e.g.*, Rev. Rul. 74-574, 1974-2 C.B. 161 ("The provision of broadcasting facilities to bona fide legally qualified candidates for elective public office, under the circumstances described above, furthers the education of the electorate by providing a public forum for the exchange of ideas and the debate of public issues which instructs them on subjects useful to the individual and *beneficial to the community*.").

431(9)(B)(ii) (excluding "nonpartisan activity designed to encourage individuals to vote or to register to vote" from the definition of "expenditure"); *id.* § 431(8)(B)(i) (excluding volunteer activity from definition of "contribution"); *id.* § 431(9)(B)(iii) (excluding communications to members from definition of "expenditure"); *id.* § 441b(b)(2) (allowing corporation to use corporate treasury funds to communicate with restricted class "on any subject," and to engage in voter registration and get-out-the-vote activities with the restricted class).

Even more oddly, the proposed rule would impose greater restrictions on 501(c)(4) organizations than are imposed on officeholders running for re-election. A few examples illustrate the point. One would think that an event held by a 501(c)(4) organization that qualifies as "candidate-related political activity" would also be campaign activity for any officeholders or candidates appearing for the event. Not necessarily so. The proposed rule deems *any* candidate appearance hosted by a 501(c)(4) entity within 30 days of a primary or 60 days of a general election to be CRPA. 78 Fed. Reg. at 71,541 (proposed rule § 1.501(c)(4)-1(a)(2)(iii)(A)(8)). In contrast, a federal officeholder running for re-election need pay the costs for travel to the event from campaign funds only if actual campaign activity occurs at the event. Regulations issued by the Office of Personnel Management govern mixed purpose travel. *See* 5 C.F.R. § 734.503. Federal employees covered by the regulation must apportion the costs of mixed travel based on the time spent on political activities and the time spent performing official duties. *See* 5 C.F.R. § 734.503(c). Under 11 C.F.R. § 734.101, "political activity" means "an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan

political group."[9] If the officeholder attends an event—even within the 30- and 60-day windows—but engages in official rather than political activity, the taxpayers pick up the tab. Meanwhile, a 501(c)(4) host of the same event must deem the event "candidate-related political activity."

The proposed rule would also treat 501(c)(4) organizations differently than other businesses. Federal Election Commission regulations allow candidate visits to an organization's premises to communicate with employees outside of its restricted class, if, upon request, it provides an opportunity to all candidates seeking the same office to do the same. 11C.F.R. § 144.4(b)(i). Unless impractical, the organization must make equal time and location available to all candidates who wish to appear. 11 C.F.R. § 114.4(b)(1)-(2). FEC regulations do not consider costs incurred by the business for such appearances to be campaign contributions or expenditures. If a 501(c)(4) organization held an identical event within the 30- or 60-day

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[9] When determining the nature of a trip for presidential or vice presidential travel, the White House follows the reasoning of the Office of Legal Counsel in the Department of Justice, which, in 1982, recommended that:

> As a general rule, Presidential and Vice Presidential travel should be considered 'political' if its primary purpose involves their [the President's and Vice President's] positions as leaders of their political party. Appearing at party functions, fundraising, and campaigning for specific candidates are the principal examples of travel which should be considered political. On the other hand, travel for inspections, meetings, non-partisan addresses, and the like ordinarily should not be considered 'political' travel even though [these activities] may have partisan consequences or concern questions on which opinion is politically divided. The President cannot perform his official duties effectively without the understanding, confidence, and support of the public. Travel and appearances by the President and Vice President to present, explain, and secure public support for the Administration's measures are therefore an inherent part of the President's and Vice President's official duties.

Payment of Expenses Associated with Travel by the President and Vice President, 6 Op. O.L.C. 214, 217 (1982) (quotation omitted). *See also* 11 C.F.R. § 106.3(d) (costs for travel by candidate for the United States Senate or House of Representatives between Washington, D.C. and the state or district in which he or she is a candidate need not be reported unless paid by the candidate's authorized campaign committee or another political committee).

windows, the event would be deemed CRPA. Moreover, a report about the meeting appearing on the website of a 501(c)(4) entity during the 30- or 60-day windows would be deemed CRPA, even if the event itself happened months before.

VIII. By Severely Restricting and "Chilling" Core Political Speech and Association, the Proposed Rule Would Infringe the First Amendment.

A. The Proposed Rule Would Not Add Clarity.

The NPRM contends that the proposed rule would clarify the standards governing activities of section 501(c)(4) organizations. It makes this point repeatedly. *See, e.g.*, 78 Fed. Reg. at 71,536 ("both the public and the IRS would benefit from clearer definitions of these concepts."); *id.* at 71,538 (referring to "the goal of providing greater clarity"); *id.* ("[t]he proposed approach is justified by the need to provide greater certainty to section 501(c)(4) organization."). The NPRM suggests that "the approach taken in these proposed regulations, while clearer, may be *both more restrictive* and *more permissive* than the current approach." *Id.* at 71,538 (emphasis added). After thorough review of the proposed rule, CFIF, American Commitment, and American Encore, Inc. have discovered no respect in which the proposed rule is "more permissive" than the current regulation. Rather, it attempts to substitute oppressive restrictions on "deemed" political activities by 501(c)(4) organizations for the flexibility in the current regulation, but fails utterly to achieve clarity.

The lack of clarity begins with the proposed regulation's failure to define "social welfare activity." Rather than saying what "social welfare activity" *is*, the proposed rule extensively describes what the IRS believes "social welfare" *isn't*. And then, it warns that "the fact that an activity is not candidate-related political activity under these proposed regulations does not mean

that the activity promotes social welfare. *Whether such an activity promotes social welfare is an independent determination.*" 78 Fed. Reg. at 71,538 (emphasis added). Thus, even if a 501(c)(4) organization were to limit its speech in accordance with the proposed rule, an "independent determination"—apparently using the same "facts and circumstances test" that the NPRM decries—may still find that the organization's activities do not promote social welfare. Thus, the proposed rule hardly supersedes the "facts and circumstances" test.

Further, the proposed regulation would sweep a vast array of activities into the definition of "candidate-related political activities," suggesting that all those activities will somehow count against the organization's qualification for 501(c)(4) status. Although the proposed rule does not directly address this issue, it is likely that the CRPA activities would be reportable on the organization's Form 990. Worse yet, the proposed regulation would force 501(c)(4) organizations to "hedge and trim" their communications to avoid risking their tax exempt status. And, the rule does nothing to suggest how an organization might place a value on these newly-defined CRPA activities for reporting or for evaluating continued compliance with the primarily engaged standard. For example, how much is a link to a third-party website that includes CRPA worth? What is the value of a one-minute guest appearance on a news feature that includes CRPA? What is the value of a guest column that includes CRPA? What is the value of a public comment left on an organization's Facebook or Twitter page? How will the organization value the volunteer time spent stuffing envelopes with flyers containing CRPA? How will the IRS determine an organization's overall level of political activity if it engages in these disparate types of CRPA? Organizations, tax professionals, and attorneys are left guessing.

Finally, as shown at pages 26-30 above, the proposed rule would create serious confusion within the nonprofit community about, for example, the relationship between CRPA and exempt function activities.

Thus, it is simply not accurate to assert, as the NPRM does, that the proposed rule is intended to achieve, much less achieves, greater clarity. In fact, it does exactly the opposite. Worse yet, the proposed rule would succeed only at stifling the speech and associational activity of 501(c)(4) organizations. These restrictions raise severe First Amendment concerns.

B. The Proposed Rule Would Severely Restrict the Speech and Associational Freedoms of 501(c)(4) Organizations.

It would be impossible to catalog definitively the restrictions, intended and perhaps unintended, of the proposed rule, but we set forth some of the more serious examples of ways in which the proposed regulation will impact the operations of CFIF, American Commitment, and American Encore, Inc. The NPRM repeatedly states that the proposed rule purports to incorporate the notion of "electioneering communications" from the Bipartisan Campaign Reform Act ("BCRA"), found at 2 U.S.C. § 434(f)(3). It does so even though Congress instructed that the "electioneering communications" definition was not to be used by the IRS. *See* 2 U.S.C. § 434(f)(7). Moreover, the Supreme Court of the United States found all but the reporting restrictions in the electioneering communications provision to be offensive to the First Amendment in *Citizens United v. FEC*, 558 U.S. 310 (2010). It is reckless and irresponsible, therefore, for the Department of Treasury and the Internal Revenue Service so casually to venture into a realm known to raise serious First Amendment concerns.

As shown at pages 8-9 above, the proposed rule is even more expansive than the electioneering communications provision of BCRA. To begin, whereas BCRA focuses on federal candidates and elections, the proposed rule sweeps in a much broader class of individuals. It defines "**candidate**" as a person who "publicly offers himself, or is proposed by another, for selection nomination, election, or appointment to any federal, state, or local public office or office in a political organization, or to be a Presidential or Vice-Presidential elector." 78 Fed. Reg. at 71,541 (proposed rule section 1.501(c)(4)-1(a)(2)(iii)(B)(1)). Thus, the proposed rule covers not just federal candidates, but also state and local candidates. *Id.* It covers not just announced candidates for elective office, but persons "proposed by another" for such office, as well as nominees and even putative nominees for public office. *Id.* And it covers not only candidates for public office, but also candidates for office in a political organization. *Id.* Like many aspects of the proposed rule, the scope of this intentionally expansive definition is breathtaking: Coupled with other provisions of the regulation, it would preclude mention in a public communication of any individual running for county animal control commissioner or precinct captain in the local Republican party, regardless of whether the public communication directly or indirectly supports or opposes those candidates. It is of no moment that the covered individuals might be appropriate subjects for comment independent of their run for office.

The proposed rule also would limit the communications by 501(c)(4) entities that mention or refer to political parties in the 60 days before a general election in which those parties are represented. 78 Fed. Reg. at 71,541 (proposed rule § 1.501(c)(4)-1(a)(2)(iii)(A)(2). In view of the large number of local and state regular and special elections nationwide that include

Democratic and Republican candidates, this could easily restrict any mention of the political parties—even as part of factual reporting on the status of negotiations in Congress—for much of each year.

The proposed rule expansively defines "**clearly identified**" to include not only the name of the candidate, but also a photograph or drawing, reference to the candidate by status or office, or "by reference to an issue or characteristic used to distinguish the candidate from other candidates." 78 Fed. Reg. at 71,541 (proposed rule § 1.501(c)(4)-1(2)(iii)(B)(2)). This definition is much more expansive, and far less precise, than the definition of "clearly identified" in the Federal Election Commission regulations. *See* 11 C.F.R. § 100.17 (not including identification "by reference to an issue or characteristic use to distinguish the candidate from other candidates"). As just one example, a reference to "supporters of the debt limit increase" would be CRPA if it occurred within the blackout windows.

The proposed rule defines "**public communications**" in a manner that is far broader than the electioneering communications provision. While the electioneering communications provision of BCRA encompasses only "broadcast, cable, or satellite communication" meeting the specified criteria, 2 U.S.C. § 434(f)(3)(A)(i), the proposed rule would add communications on an internet website, newspaper, magazine, or other periodical, any paid advertising, and any other communication, including even a yard sign, that "reaches, or is intended to reach, more than 500 persons." 78 Fed. Reg. at 71,541 (proposed rule § 1.501(c)(4)-1(a)(2)(iii)(B)(5). Because many telephonic polls are "intended to reach" more than 500 people to obtain a statistically valid sample, American Encore's polling activity would be restricted. But the

proposed rule also encompasses *any* communication—*anywhere* and at *any time*—that contains express advocacy or is "susceptible of no reasonable interpretation" other than a call for election of an identified candidate. *Id.* (proposed rule § 1.501(c)(4)-1(a)(2)(iii)(A)(1)(ii)). This functional equivalence standard is vague and will certainly be difficult to apply.

Nor does the proposed rule's incorporation of the **30- and 60-day windows** from BCRA add any clarity. Under the proposed rule, any public communication that refers to a clearly identified candidate, within 30 days of a primary election or 60 days of a general election would be considered "candidate-related political activity." *Id.* (proposed rule § 1.501(c)(4)-1(a)(2)(iii)(A)(2)). But because the scope of the term "candidate" and "election" have been expanded beyond federal candidates and elections to encompass federal, state, local, and political party candidates, nominees, appointees, and political parties, covered election activity will be ongoing all the time. Moreover, it is noteworthy that there is *no geographic limitation* in the proposed rule on where the public communication must occur to be covered. Whereas BCRA considers speech during a covered time period to be an "electioneering communication" only if "**targeted to the relevant electorate**"—meaning the district in a House race or the state in a Senate race—the proposed rule contains no such limitation whatsoever. A newspaper advertisement in Georgia referring to the "Smith bill" would be deemed "candidate-related political activity" if candidate Smith is running for re-election to the Senate in Ohio.

The proposed rule would deem "candidate-related political activity"—and not the promotion of social welfare—all **voter registration or get out the vote drives**, even if nonpartisan. 78 Fed. Reg. at 71,541 (proposed rule § 1.501(c)(4)-1(a)(2)(iii)(A)(5)). It is the

unquestioned policy of the United States to encourage voter registration and voting, and many public and private resources have been devoted to that goal for at least the last fifty years. As the Supreme Court observed in *Burson v. Freeman*, 504 U.S. 191, 198 (1992), the right to vote is "a right at the heart of our democracy." *See also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (finding "right to vote freely for the candidate of one's choice is the essence of a democratic society"). The NPRM does not explain why those activities are not "social welfare activities" and why engagement in them should threaten the tax exempt status of any 501(c)(4) organization.

Likewise, voter guides, whether partisan or nonpartisan, would be deemed "candidate-related political activity." 78 Fed. Reg. at 71,541 (proposed rule § 1.501(c)(4)-1(a)(2)(iii)(A)(7)). Officeholder scorecards are a common device used by 501(c)(4) organizations, as well as the media, to provide succinct information about the performance of elected representatives. Educating the electorate is, again inexplicably (or at least without explanation) deemed not to promote social welfare.

Hosting any event within 30 days of a primary or 60 days of a general election at which one or more candidates appear as part of the program would be deemed "candidate-related political activity." 78 Fed. Reg. at 71,541 (proposed rule § 1.501(c)(4)-1(a)(2)(iii)(A)(8)). Thus, any 501(c)(4) organization that sponsored a **candidate debate or forum** within the window, or even hosted the local Congressman or mayor at any event whatsoever, would face a threat to its tax exempt status.

One of the most oppressive aspects of the proposed rule is its requirement that web postings be counted as CRPA if they remain on the site during the 30- or 60-day windows, even

if the content was created and posted months or years before. If the NPRM were not so clear about this intention, one might be inclined to dismiss this concern as mere hyperbole. But the NPRM could not be more clear: "The Treasury Department and the IRS *intend* that content previously posted by an organization on its Web site that clearly identifies a candidate and *remains on the Web site during the specified pre-election period would be treated as candidate-related political activity.*" 71 Fed. Reg. at 71,539 (emphasis added).

As an integral part of its mission, CFIF continually posts items referring to officeholders on its website. A few examples illustrate the extraordinary scope of the proposed rule.

To begin, CFIF periodically participates in litigation in furtherance of its mission of protecting individual rights and freedoms, including litigation related to campaign finance. Such litigation often involves current holders of a state or federal elected office. For example, CFIF intervened as a defendant in *Van Hollen v. FEC*, a case brought by Congressman Chris Van Hollen seeking to compel the Federal Election Commission to require certain organizations to disclose the identity of all their donors if the organizations engage in any electioneering communications. After the District Court for the District of Columbia ruled in favor of Representative Van Hollen, CFIF appealed and won reversal of the lower court's decision. Both of these items were discussed on CFIF's website. *See* Exhibit 16(CFIF, *Van Hollen v. FEC, CFIF Files Motion to Preserve Core Speech and Association Rights in Federal Court* (June 17, 2011), http://cfif.org/v/index.php/press-room/1038-cfif-files-motion-to-preserve-core-speech-and-association-rights-in-federal-court); Exhibit 17 (CFIF, *CFIF Scores Legal Victory Against Campaign Finance Regulations, Vindicating First Amendment* (Sept. 21, 2012), http://cfif.org/v/index.php/commentary/42-constitution-and-legal/1586-cfif-scores-legal-victory-

against-campaign-finance-regulations-vindicating-first-amendment). Representative Van Hollen is up for re-election this year. Under the proposed rule, CFIF would be required to remove these press releases related to this significant victory and any other material related to CFIF's litigation efforts simply because a candidate was involved in these cases. *See, e.g.*, Exhibit 18 (CFIF, *CFIF Secures First Amendment Victory for Core Speech in West Virginia* (July 21, 2011), http://cfif.org/v/index.php/press-room/1078-cfif-secures-first-amendment-victory-for-core-speech-in-west-virginia) (referencing *Center for Individual Freedom, Inc. v. Tennant*, Case No. 1:08cv00190 (S.D.W.Va.); West Virginia's Secretary of State Natalie Tennant is running for Senate in West Virginia this year, so any references to her would be subject to the blackout windows).

CFIF also takes positions on legislation pending before Congress. To support those positions, CFIF sends letters to Members of Congress asking them to support or oppose legislation. CFIF posts these letters on its website. *See, e.g.*, Exhibit 19 (CFIF, *CFIF Endorses "Right to Refuse" Constitutional Amendment* (Feb. 28, 2013), http://cfif.org/v/index.php/press-room/1764-cfif-endorses-qright-to-refuseq-constitutional-amendment-); Exhibit 20 (CFIF, *CFIF Joins Free Market Coalition in Support of Digital Goods and Services Tax Fairness Act* (Apr. 25, 2012), https://cfif.org/v/index.php/press-room/1423-cfif-joins-free-market-coalition-in-support-of-digital-goods-and-services-tax-fairness-act). These letters would be subject to the blackout windows.

CFIF also publishes policy papers on its website, including numerous items addressing the Bipartisan Campaign Reform Act, often referred to as "McCain-Feingold." *See, e.g.*, Exhibit 21 (CFIF, *Now Available! A Web Friendly, Printable Document of: Campaign Finance and the*

First Amendment,

http://www.cfif.org/htdocs/legislative_issues/federal_issues/hot_issues_in_congress/campaign_finance_reform/legis_federal_cfrdoc.htm (last visited Feb. 26, 2014)); Exhibit 22 (CFIF, *Hot Issues in Congress: Campaign Finance Reform*,

http://www.cfif.org/htdocs/legislative_issues/federal_issues/hot_issues_in_congress/campaign_finance_reform/ (last visited Feb. 26, 2014)). Under the proposed rule, any references to Senator John McCain would be subject to the blackout windows any time Senator McCain is running for election. The same is true for any other bill or statute strongly associated with one or more particular legislators.

The proposed rule also makes clear that a 501(c)(4) organization engages in CRPA if its website links to another website—even a bona fide news site—that contains CRPA. CFIF's site links to articles in other publications like *The New York Times* and *Washington Post*, which daily discuss officeholders and candidates in the context of legitimate news stories. CFIF includes a "Quote of the Day" on its website, which refers to third-party sources that often refer to or quote officeholders themselves. *See* Exhibit 23 (CFIF, *Notable Quotes*,

http://cfif.org/v/index.php/commentary/notable-quotes (last visited Feb. 26, 2014). Under the proposed rule, many of these third-party quotes would be considered CRPA during the blackout windows.

CFIF occasionally posts articles written by members of Congress, often about pending legislation. *See, e.g.*, Exhibit 24 (Senator Jeff Sessions, *Ten Things You Need to Know About S. 3827, The DREAM Act* (Nov. 18, 2010), http://cfif.org/v/index.php/commentary/58-

immigration/821-ten-things-you-need-to-know-about-s3827-the-dream-act). Under the proposed rule, these articles would be considered CRPA and subject to the blackout windows.

On its website, American Commitment encourages its supporters to sign and submit petitions regarding pending legislation, which often name the sponsor of the pending bill. Under the proposed rule, American Commitment would need to remove any materials from its website that refers to a bill sponsor who is running for re-election. For example, American Commitment currently is seeking signatures for a petition in support of Senator David Vitter's legislation prohibiting members of Congress from receiving a subsidy to participate in Obamacare exchanges. *See* Exhibit 25 (American Commitment, *No Washington Exemption from Obamacare*, http://action.americancommitment.org/1164/no-washington-exemption-from-obamacare/ (last visited Feb. 26, 2014). This would likely be considered CRPA if not removed from the website during pertinent blackout windows because David Vitter has announced he will run for Governor in 2015. American Commitment also has posted information on how particular members of Congress voted on a bill. *See, e.g.*, Exhibit 26, (American Commitment, *Keep Your Health Plan Act Passes the House 261 to 157*, http://www.americancommitment.org/content/keep-your-health-plan-act-passes-house-261-157 (last visited Feb. 26, 2014) (listing 39 members of the House who voted in favor of bill). The proposed rule would forbid any 501(c)(4) organization from posting information during the blackout windows on how a particular member of Congress voted on a measure. Finally, the proposed rule would require American Commitment to remove the many links to third-party news sources referring to a candidate in the period leading up to the election. *See, e.g.*, Exhibit 27 (American Commitment, *$1.3 Billion in 'Clean Energy' Subsidies Produce 288 Permanent*

Jobs, Quadruple Cost of Electricity in Nevada (Aug. 6, 2012), http://www.americancommitment.org/content/13-billion-%E2%80%98clean-energy%E2%80%99-subsidies-produce-288-permanent-jobs-quadruple-cost-electricity (referencing Senator Harry Reid)). In short, the regulation would require American Commitment to fundamentally alter the way it speaks to the public through its website.

In short, the proposed rule would require CFIF, American Commitment, and American Encore, Inc. to conduct comprehensive reviews of their websites prior to each pre-election period—which as noted are ongoing—and to purge all content even from the archives that fits the definition of CRPA. They would also need to monitor any linked websites constantly, since news sites change many times each day. Alternatively, they could simply shut down their websites during those extensive blackout periods; in view of the broad definition of "election," the website would be active very little during an even-numbered year and might not be worth the cost of maintaining.

The ACLU has shown that, from December 4, 2011, through Election Day on November 6, 2012, there were only 41 Republican and 61 Democrat "non-CRPA days." Exhibit 28 (Letter from Laura W. Murphy, ACLU, to Commissioner John A. Koskinen (Feb. 4, 2014)). We agree with this analysis so far as it goes, but note that it covers only federal candidates and elections; it does not evaluate the blackout periods due to state and local candidates or federal, state, or local appointees. We are aware of no analogous rule by any branch or level of government that imposes such a severe burden on web content.

Finally, the "attribution" provision of the proposed rule would severely restrict the associational freedoms of 501(c)(4) groups. Section 1.501(c)(4)-1(a)(2)(iii)(C) would deem the

activities of an "officer, director, or employee acting in that capacity or by volunteers acting under the organization's direction or supervision" to be the activities of the organization for purposes of "candidate-related political activity." 78 Fed. Reg. at 71,541 (proposed rule § 1.501(c)(4)-1(a)(2)(iii)(C)). In other words, if an officer, director or employee of CFIF, American Commitment, or American Encore, Inc. appeared on a news broadcast or interview show and were identified by his or her affiliation with the entity—as frequently occurs—any discussion of candidates by that officer, director, or employee could be deemed "candidate-related political activity" attributable to the entity, unless perhaps the officer, director, or employee disclaimed participation on behalf of the organization. As discussed in Part I, CFIF's Corporate Counsel and Senior Vice President host a weekly radio show, discussing current issues and often discussing public officeholders and candidates. That program falls directly in the proposed rule's crosshairs.

Equally troubling is the suggestion that volunteer activities could be attributed to the organization. This will create incentives for strict management of volunteers lest they appear to be engaged in candidate-related political activity on behalf of the 501(c)(4) organization with which they are working, and such strict management is often not feasible given resource constraints. *See id.* For 501(c)(4) organizations that engage volunteers, the risks could be so significant as to counsel against further use of volunteers. This depends, of course, on how volunteer CRPA activity would be taken into account in determining whether the organization has too much total CRPA activity—a topic on which there is as yet no guidance.

As shown in Part I above, American Encore, Inc. makes dozens of grants to dozens of other 501(c)(4) and (c)(6) organizations totaling tens of millions of dollars. Section 1.501(c)(4)-

1(a)(2)(iii)(D), entitled "special rule regarding contributions to 501(c) organizations," would place severe restrictions on this activity. 78 Fed. Reg. at 71,541 (proposed rule § 1.501(c)(4)-1(a)(2)(iii)(D)). Any grant to a 501(c) entity engaged in even *de minimis* CRPA would convert the grant into CRPA for American Encore, Inc. This restriction would apply even if the "primarily engaged" standard remains unchanged. Thus, even if the grantee were "primarily engaged" in non-CRPA social welfare activity, and even if the grant money were not even used for CRPA, American Encore, Inc. would need to consider *the full amount* of any such grant to be CRPA, in turn threatening American Encore, Inc.'s own tax exempt status. This provision of the proposed rule would severely restrict American Encore, Inc.'s right to support and associate with like-minded organizations.

As CFIF pointed out in its January 28, 2014 comments to the Office of Management and Budget in connection with the Paperwork Reduction Act of 1995, 44 U.S.C. § 3507(d), the burdens of complying with the proposed rule are extreme. Those comments are attached and we will not reiterate them here. *See* Exhibit 13.

C. These Burdens Severely Restrict the First Amendment Rights of 501(c)(4) Organizations.

Even if the proposed rule provided clarity, the cost of this clarity is far too high. "Shut up" is, after all, clear. The notion that "social welfare" excludes any and all "political activity" is unpersuasive and unjustifiable. In an economy in which federal, state, and local government spending accounts for 35% of the Gross Domestic Product, and in which federal, state, and local governments regulate pervasively, the proposed rule attempts to limit the promotion of social welfare to an unrealistically small arena of activity. In this era, it is difficult to specify any

human endeavor or concern that is unaffected by government spending or regulation at some level. Mandating that social welfare organizations avoid, on threat of losing their tax exempt status, commentary on government policy and those who make it will seriously constrain their ability to function.

It should go without saying that the activities that would be regulated by the proposed rule are core political speech at the heart of the First Amendment. Justice Brandeis discussed the scope of our Nation's commitment to free discussion, and the importance of this commitment to the Republic, in *Whitney v. California*, 274 U. S. 357, 375 (1927):

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

In the political context, the Supreme Court of the United States has repeatedly emphasized that "there is practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quotation omitted). Further, 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." *Buckley*, 424 U.S. at 14 (citation and internal quotation marks

omitted). This First Amendment guarantee of unfettered speech "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Id.* at 15 (citation and internal quotation marks omitted).

There should also be no question that these First Amendment protections apply fully to nonprofit entities. In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court held that corporate political speech is entitled to full First Amendment protection, and overruled *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990). Citizens United was itself a nonprofit corporation, 558 U.S. at 319, so the Court's holding certainly applies to both for-profit and non-profit corporations. The Court could not have been more clear. "No sufficient governmental interest justifies limits on the political speech of *non-profit or for-profit corporations*." *Id.* at 365 (emphasis added). The Court reaffirmed *Citizens United* in *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam). *See also Emily's List v. FEC*, 581 F.3d 1, 4 (D.C. Cir. 2009) ("[T]he First Amendment . . . safeguards the right of citizens to band together and pool their resources as an unincorporated group or non-profit organization in order to express their views about policy issues and candidates for public office.").

In *Emily's List*, the D.C. Circuit comprehensively reviewed the Supreme Court's precedents addressing nonprofit political activity. It concluded on the basis of that review that "nonprofit entities, like individual citizens, are constitutionally entitled to raise and spend unlimited money in support of candidates for elected office." 581 F.3d at 9. *See also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 261-62 (1986); *FEC v. National Conservative Political Action Committee,* 470 U.S. 480, 495 (1985); *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 296-99 (1981); *California Medical Ass'n v. FEC*, 453 U.S. 182, 202-03

(1981) (opinion of Blackmun, J.). Removal, limiting, or conditioning the tax exemption currently available to a large group of nonprofit entities exempt from tax under section 501(c)(4) is a direct assault on these constitutional protections. *Cf. Agency for Int'l Dev. v. Alliance for Open Society*, 133 S. Ct. 2321, 2328 (2013) (citing *Rumsfeld v. Forum for Academic and Institutional Rights,* 547 U.S. 47, 59 (2006) (public health nonprofits seeking declaratory relief were not required to take a position against prostitution as required by federal law and had a First Amendment right to stay neutral; First Amendment places "a limit on Congress' ability to place conditions on the receipt of funds") .

The current proposal would directly restrict the way 501(c)(4) entities spend their resources. The proposed restrictions go far beyond any restrictions on election-related activities ever proposed in the campaign context, sweeping in activities that expressly advocate election of clearly identified candidates (and many activities that do not), but also speech about nominees for judgeships and other offices, nonpartisan voter registration and get-out-the-vote activities, non-political candidate appearances to discuss official business if they occur within the prescribed windows, and even website materials posted months or years before an election season if they deign to remain on the website during a restricted election period.

Restrictions on spending for political speech and association are subject to strict scrutiny. *Citizens United*, 558 U.S. at 340. They can stand only if the Government proves that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* (citations omitted). Remarkably, the NPRM advances no such compelling interest for restricting the speech of 501(c)(4) entities. The only interest it does advance—"clarity"—is both a weak

basis for such a restriction standing alone and, as shown above in Part VIII.A., is not achieved by the proposed regulation.

The proposed rule cannot survive First Amendment scrutiny merely because it involves a tax exemption. *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), is often cited as allowing restrictions on the First Amendment rights of organizations receiving tax exemptions, but *Regan* would not salvage this proposed rule. To begin, *Regan* addressed section 501(c)(3), which allows both a tax *deduction* for donors and a tax *exemption* for the recipient organization. Absent the conduct of unrelated business activities, the funds held by a 501(c)(3) organization have *never been taxed.* This is not so for a 501(c)(4) organization, whose donors receive no tax deduction and thus donate after tax dollars.

Moreover, *Regan* addressed a challenge to the long-standing interpretation of section 501(c)(3). The taxpayer, Taxation With Representation, was seeking recognition as a 501(c)(3) entity so that its donors could obtain a tax deduction. That is a far different situation from the one presented by the proposed rule, which attempts to rewrite a century of understanding about activities allowable for 501(c)(4) organizations. Thousands of 501(c)(4) organizations have relied on the existing statutory and regulatory framework to engage in protected speech and associational activities. Adoption of the proposed rule would impose great burdens on them either to cease or dramatically change their *current* activities. The rule change is thus tantamount to a new tax. "A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest." *Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 582 (1983) (citing *United States v. Lee,* 455 U.S. 252 (1982)).

Further, Justice Blackmun's concurring opinion in *Regan*, joined by Justices Brennan and Marshall, emphasized that limitations on the lobbying activities of 501(c)(3) organizations were permissible *only* because such organizations were still allowed to pursue constitutionally protected lobbying activities through related 501(c)(4) organizations. Justice Blackmun noted that "[s]hould the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4) affiliates, the First Amendment problems would be insurmountable." *Regan*, 461 U.S. at 553 (Blackmun, J., concurring). Indeed, "an attempt to prevent § 501(c)(4) organizations from lobbying explicitly on behalf of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. In my view, any such restriction would render the statutory scheme unconstitutional." *Id.* at 553-54 (Blackmun, J., concurring). But that is exactly what the proposed rule would do. It would deprive the nonprofit community of an outlet for political speech and association through section 501(c)(4) organizations that is statutorily foreclosed to section 501(c)(3) organizations, and that section 527 may not allow.

It is no answer to say that a 501(c)(4) entity could convert to section 527 status. As shown above at pages 25-28, it is far from clear that every, or even most, 501(c)(4) organizations could satisfy the requirement of being "primarily" engaged in political activity, let alone the requirement that no substantial portion of their nontaxed contributions be used for such activity. Even for those that could change status, the change of status would change the very nature of those organizations from primarily social welfare organizations to primarily political organizations, and would raise serious First Amendment concerns.

Nor would formation of an affiliated section 527 entity address the problem. To begin, it is unclear how an "affiliated" entity would operate in this context. Under the "attribution" section of the proposed regulation, 78 Fed. Reg. at 71,541 (proposed rule § 1.501(c)(4)-1(a)(2)(iii)(C)), the section 501(c)(4) entity might be deemed responsible for all activities of the affiliated section 527 entity. The line between mere "collaboration," which *would not* attribute the 527 entity's activities to the 501(c)(4) entity, and "direction or supervision," which *would* attribute the 527 entity's activities to the 501(c)(4) entity, is very vague. Few 501(c)(4) organizations would risk a tax exemption trying to walk such an indefinite line.

Moreover, in the lobbying context, it is relatively easy to collect the disfavored speech advocating specific legislation in the less-subsidized entity, but it is far more complicated when originally non-political speech suddenly becomes political whenever its dissemination continues into any of the 30- and 60-day windows. Even if the 501(c)(4) entity could transfer all materials referring to candidates over to a 527 entity at the precise times the windows opened, the 501(c)(4) entity might still be responsible for those materials because it originally created the material that subsequently became CRPA. In similar contexts in which the costs associated with the subsidized and unsubsidized speech cannot easily be separated, the Supreme Court has rejected the government's attempts to argue that creating an affiliate would solve the constitutional infirmity. *See FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984).

Moreover, the Supreme Court addressed and rejected an analogous argument in *Citizens United*, in which the government argued that corporate speech could be restricted because corporations can form a separate segregated fund, commonly called a political action committee or "PAC." *See* 558 US. at 337-39. The Court first noted that as a separate organization, the

PAC would not speak for the corporation. *Id.* at 337. It continued: "Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with [2 U.S.C. § 441b]. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations." *Id.* Similarly here, setting up a separate section 527 organization, the speech of which will not be attributed to the original section 501(c)(4) organization, would entail considerable burdens, and would require disclosure of contributors to a degree not required of section 501(c)(4) entities. Donor disclosure would raise additional First Amendment issues. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 357 (1995) (anonymous speech protected by First Amendment); *NAACP v. Alabama*, 357 U.S. 449, 461-66 (1958) (finding state law requiring donor disclosure as condition for in-state operation was unconstitutional).

Given the lack of an adequate alternative channel to engage in CRPA speech, the proposed rule would impose an unconstitutional condition. To maintain tax exempt status, existing 501(c)(4) organizations must forego, or severely limit, their political speech. *See Agency for Int'l Dev.*, 133 S. Ct. at 2328 (noting that, to evaluate an unconstitutional condition "the relevant distinction . . . is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself"). The proposed regulation would plainly have the effect of limiting protected speech of the entity as a whole as a condition of receiving a government benefit—not only speech paid for out of the

organization's earned income, which benefits from the indirect subsidy of tax exemption, but also speech funded with after tax funds provided by third-party donors, which does not. [10]

Moreover, the proposed regulation interferes with the ability of individuals to associate. The Supreme Court has frequently recognized the fundamental nature of associational speech under the First Amendment. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) ("[T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."). Limits on the ability to engage in voter registration and get-out-the-vote activities, as well as restrictions on the use of volunteers—both of which are excluded from the definition of "expenditures" by the Federal Election Campaign Act—are only a few examples of the burden the proposed rule would place on associations. *See Randall v. Sorrell*, 548 U.S. 230, 259 (2006) (plurality opinion of Breyer, J.) (expressing great concern about Vermont statute that restricted use of volunteers).

Finally, as shown above at pages 45-46, the restriction on grants from 501(c)(4) entities to other nonprofits would severely restrict the associational rights of the grantor. But it would also burden the speech of actual and potential grant recipients. To be eligible for grants from

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[10] Available authority indicates that contributions to an exempt organization would not be taxable income even if the organization's tax exempt status were revoked. *See* G.C.M. 39813 (Mar. 20, 19990); *Branch Ministries v. Comm'r*, 211 F.3d 137 (D.C. Cir. 2000); *Bail Fund of the Civil Rights Congress v. Comm'r*, 26 T.C. 482 (1956), nonacq., 1956-2 C.B. 10, acq., 1969-1 C.B. 20.

501(c)(4) entities, a 501(c)(3), (4), (5), or (6) entity would need to avoid any and all CRPA. For smaller section 501(c)(4) organizations dependent on grant funding, the pressure to give up their First Amendment rights prophylactically to be attractive candidates for grant funding will be considerable. This use of limited tax subsidies provided to section 501(c)(4) organizations to coerce grantees into giving up their rights to speak, even with funds they have received from non-501(c)(4) sources, is exactly what the Supreme Court has rejected last year in *Agency for International Development*, discussed above, and its other decisions on unconstitutional conditions.[11]

IX. The Proposed Definition of "Candidate-Related Political Activity" Should Be Rejected, and Should Not Be Applied in Other Contexts.

The NPRM requests comments on whether the proposed CRPA should be similarly extended to section 501(c)(3), 501(c)(5), and 501(c)(6) organizations and encompassed within the definition of section 527(f) "exempt" activities. It also seeks comments about whether the "primarily engaged" or "primary purpose" test should be revised or retained. 71 Fed. Reg. at 71,538 ("[T]he Treasury Department and the IRS invite comments from the public on what proportion of an organization's activities must promote social welfare for an organization to qualify under section 501(c)(4)."). For all the reasons set forth above, the expansive and unjustifiable definition should be rejected outright, and certainly not extended to other organizations. Applying a bad rule more broadly solely for purposes of consistency is not sensible.

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[11] *Rust v. Sullivan*, 500 U.S. 173, 196 (1991); *FCC v. League of Women Voters,* 468 U.S. 364, 400 (1984).

Changing or eliminating the "primarily engaged" standard would be inappropriate and inconsistent with congressional intent. As shown in Parts III and IV above, there is no basis in the statute or legislative history for interpreting "social welfare" in 501(c)(4) to exclude political activity. Congress incorporated such an exclusion in 501(c)(3) in 1954, but has never done so in 501(c)(4). Further, the term "social welfare" is broad both in concept and practice. The Treasury and IRS have never provided an adequate explanation for why that term should categorically exclude political activities, let alone the broad set of activities deemed "CRPAs" by the proposed rule.

Adoption of the CRPA definition would, by itself, reduce the amount of "social welfare activity" that many 501(c)(4) entities engage in because it would move many activities now considered "social welfare" activities into the category of CRPA. Thus, to comply with the "primarily engaged" standard under the CRPA definition, many 501(c)(4) entities will need to modify their operations, and some—potentially including CFIF, American Commitment, and American Encore, Inc.—would need to do so very substantially. The additional step of modifying the "primarily engaged" standard to reduce or eliminate the portion of CRPA activity that 501(c)(4) organizations can pursue would seriously compound this error. All the harms of finalizing the CRPA definition would be multiplied if the primarily engaged standard were modified. And, as shown at pages 25-28 above, conversion to section 527 status would not be a reasonable option.

X. The Proposal To Make the Proposed Rule "Effective upon Publication" Would Be Extremely Disruptive and Burdensome.

The NPRM indicates that the proposed rule would "apply on and after the date of publication of the Treasury decision adopting these rules as final regulations in the Federal Register." 78 Fed. Reg. at 71,542. Even if the proposed rule were adopted, which would be unconstitutional, inappropriate and unjustifiable for the reasons set forth above, CFIF, American Commitment, and American Encore, Inc. strongly object to making the rule effective upon publication for several reasons.

First, assuming as we do that the Department and IRS will give serious, good faith consideration to the tens of thousands of comments opposing the rule, but decide to move forward with a rule change anyway, it is quite likely that some changes will be made to the proposed rule before it is finalized. If so, the 501(c)(4) community will see the final rule for the first time upon publication. It will take time for each affected organization to evaluate the final rule and determine how to implement it. And, because CFIF, American Commitment, and American Encore, Inc., like other 501(c)(4) organizations, assume the comments will be taken seriously and that adoption of the rule is not a foregone conclusion, it is not required, sensible, or practical to begin preparations to comply with it now.

Second, if made effective upon publication, the proposed rule would fall within the tax years of all, or almost all, 501(c)(4) entities. It would be mere coincidence if the rule happened to be published at the beginning of the tax year of a particular 501(c)(4) entity; for the great majority of such entities the publication would likely take effect midyear. The consequences of such a midyear effective date are severe. To begin, the organization would need to classify and

account for the same activities differently within the same tax year. Until publication of the rule, for example, voter registration activity would be "social welfare" activity; after publication, it would be CRPA. Further, publication of the final regulation this year—a federal election year—would place many activities within or proximate to the primary or general election windows from day one. Any planned activities, even those that had been prefunded, would need to be reconsidered or cancelled at great expense to the organization. Finally, a midyear effective date raises numerous questions about compliance with the "primarily engaged" test. Does the test apply for the entire tax year (allowing those activities conducted before publication and formerly considered social welfare activities to count for the full year) or would the entity need to comply with the primarily engaged test from the date of publication forward? Would spending commitments entered prior to the date of publication but paid after the date of publication be judged under the old rule or the new? Would the website purging apply to postings before the date of publication, or would those be grandfathered?

Third, the sequential approach suggested by the NPRM is disruptive. The NPRM leaves the primarily engaged standard in limbo. Entities affected by the final rule would be stymied in their planning—and their First Amendment activities would be chilled—until they knew the status of that test. Delaying the effective date of the CRPA definition until the status of the primarily engaged standard is settled would be far less disruptive and more sensible, especially in the absence of any stated justification for expediting the effective date.

If, contrary to these and the many other comments in opposition, the Treasury and IRS decide nevertheless to proceed with the final rule, the fair and reasonable effective date would be for each organization's first tax year beginning after *both* (i) the final CRPA definition becomes

effective *and* (ii) final resolution of the status of the primarily engaged standard. After a century of 501(c)(4) entities being engaged in political activities, and 55 years since the IRS first limited their involvement in political activity, there is no stated or apparent reason why the rule must be effective immediately upon publication.

CONCLUSION

For all the reasons set forth above, the Center for Individual Freedom, American Commitment, and American Encore, Inc. strongly urge the Department of Treasury and the Internal Revenue Service to reject this ill-considered and oppressive rule. We look forward to an opportunity to participate in the public hearing.

Sincerely,

Bobby R. Burchfield

Attachments