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WANTED: A BRIGHT-LINE TEST DEFINING PROHIBITED INTERVENTION IN ELECTIONS BY 501(C)(3) ORGANIZATIONS

KAY GUINANE*

INTRODUCTION

Under current law, charities, educational, and religious organizations exempt under § 501(c)(3) of the Internal Revenue Code cannot intervene in elections for candidates for public office. The Internal Revenue Service uses “all the facts and circumstances of each case”¹ to determine whether prohibited intervention has occurred. Partisan intervention can be either direct or indirect, and it is “not limited to[] the publication or distribution of written statements or the making of oral statements on behalf of or in opposition to candidates.”² A candidate is defined as anyone “who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, state, or local.”³ The tax code spells out only two possible sanctions for violating the ban on partisan activity: revocation of exempt

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1. Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

2. *Id.* at 2.

3. 26 C.F.R. § 1.501(c)(3)-1 (c)(3)(iii) (2007). 501(c)(3) organizations are allowed to campaign for or against referendums or ballot initiatives, since the IRS considers this activity to be direct lobbying.

status and/or imposition of excise taxes on the organization and its managers.⁴

But what does “intervention” mean? What activities or combination of activities push a nonprofit’s voter education or mobilization activities over the line from nonpartisan to partisan? This article will argue that a bright-line rule would not only give charities and religious organizations notice of what is and is not permitted, but it would also provide better constitutional protection for issue advocacy and voter mobilization efforts. This could lead to more civic engagement by 501(c)(3) organizations, which would strengthen the democratic process.

There are no IRS regulations that clearly define political intervention and there is very little case law in this area. The combination of vague standards and a new enforcement process that gives 501(c)(3) organizations limited ability to challenge IRS action raises serious constitutional concerns. In short, the current IRS enforcement regime poses serious First Amendment problems for 501(c)(3) organizations.

If 501(c)(3) organizations have lived with this problem for so long, why does this problem demand resolution now? Two fundamental changes have occurred since 2002 that combine to heighten the burden that the lack of clear standards places on this sector. The first change was passage of the Help America Vote Act⁵ (HAVA), which became effective in October 2002. The Act addresses improvements in the administration of elections and is meant to prevent the kinds of problems experienced in the 2000 presidential election. Nonprofit organizations have been active in monitoring and promoting effective implementation of HAVA. The second change was the emergence of new IRS enforcement procedures in the 2004 and 2006 elections. These changes have “raised serious questions about the agency’s interpretation of the law, about evenhanded enforcement, and about the appropriateness of an

4. The IRS also began using a new written advisory letter process in its 2004 and 2006 enforcement programs, which, while not authorized by statute, serves a very useful purpose by addressing one-time or minor violations in a way that allows the organization to correct errors and to continue its charitable or religious work. *See infra* Part II(B).

5. Help America Vote Act of 2002, 42 U.S.C. § 15301 (2002).

approach aimed at deterring speech. The Political Activities Compliance Initiative (PACI), has resulted in unresolved audits and lingering questions about the standards used.”⁶

Part I of this article reviews the state of current law and guidance on political intervention for 501(c)(3) organizations. Part II makes the case for why change is needed now, focusing especially on the constitutional questions raised by the way this legal regime is applied. Part III argues that a bright-line test offers the most benefit to both the IRS and the non-profit sector while still protecting constitutionally protected speech. Part IV examines some of the arguments against a bright-line test. Finally, Part V looks at the Supreme Court’s decision in *Federal Election Commission v. Wisconsin Right to Life, Inc.*⁷ (WRTL). That decision might offer more concrete standards and guidance that can be applied in regulating political intervention by charities, religious organizations, and other 501(c)(3) organizations.

I. THE CURRENT STANDARD IS TOO VAGUE

The IRS has interpreted the prohibition against partisan intervention to be absolute,⁸ but it has flexibility regarding sanctions. It may either impose taxes or revoke the exempt status of the offending organization.⁹ Some things are clearly forbidden, such as contributing cash to candidates, endorsing candidates, providing free facilities, or lending employees to campaigns.¹⁰

The courts have upheld revocation of tax exempt status in cases of clear violation. For example, in *Branch Ministries v. Rossotti*¹¹ the United States Court of Appeals for the District of Columbia stated that newspaper advertisements run by a church four days before the 1992

6. OMB Watch, *The IRS Political Activities Enforcement Program for Charities and Religious Organizations: Questions and Concerns* (2006), <http://www.ombwatch.org/article/articleview/3496/1/432?TopicID=3>.

7. 127 S. Ct. 2652 (2007).

8. IRS Exempt Organizations Handbook (IRM 7751) Sec 370(2).

9. 26 U.S.C.A. § 4955; I.R.S. Tech. Adv. Mem. 96-35-003 (Apr. 19, 1996).

10. See BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 705-17 (9th ed. 2007).

11. 40 F. Supp. 2d 15, 27 (D.D.C. 1999), *aff’d*, 211 F.3d 137 (D.C. Cir. 2000).

presidential election constituted prohibited intervention. The Church at Pierce Creek in Binghamton, New York, operated by Branch Ministries, ran the ad in *USA Today* and *The Washington Times* saying “Christians Beware.” The ad went on to describe then-Governor Bill Clinton’s positions on abortion and other moral issues as contrary to Biblical teachings. The ads solicited tax-deductible contributions to cover their cost, and they generated hundreds of such donations. The court held that the IRS sanctions did not violate Branch Ministries’ rights to free exercise of religion or freedom of speech.¹²

Things are rarely so clear. A February 21, 2006, Congressional Research Service report concluded that “neither tax law nor the regulations offer much insight as to what activities are banned for 501(c)(3) organizations prohibited from intervening in political campaigns.”¹³ As a result, 501(c)(3) organizations must draw on a hodge-podge of resources in order to piece together a best guess of how the IRS might view their advocacy or voter education and mobilization activities. These resources include limited case law and IRS Revenue Rulings, Technical Advice Memorandums and, for attorneys or the intrepid nonprofit employee or board member, the IRS Continuing Education Program (CEP).

Even groups that can afford to pay for legal advice cannot obtain certainty, because the lawyers can only give their best estimate on how the IRS might view the facts and circumstances. Attorney Gregory L. Colvin, who specializes in tax-exempt organizations law, pointed out, “There is still not a bright line. At the very least, we’d like to have the ability to tell our clients that there are specific gray areas and there are specific things that will get you in trouble.”¹⁴

12. *Id.* at 25-26.

13. CONGRESSIONAL RESEARCH SERVICE, 110TH CONG., REPORT ON TAX EXEMPT ORGANIZATION: POLITICAL ACTIVITY RESTRICTIONS AND DISCLOSURE REQUIREMENTS 12-13 (Updated Jan. 25, 2007) (prepared by Erika Lunder).

14. Peter Panepento, *Tax Lawyers Ask IRS to Clarify Election Rules for Nonprofit Groups*, THE CHRONICLE OF PHILANTHROPY: News Updates, Aug. 6, 2007, <http://philanthropy.com/news/updates/2806/tax-lawyers-ask-irs-to-clarify-rules-for-nonprofit-groups-on-election-activities>.

A. Case Law

A small body of case law in addition to the *Branch Ministries* case cited above provides some degree of guidance. *Christian Echoes National Ministry, Inc. v. United States* held that a 501(c)(3) organization cannot broadcast communications to the public that attack liberal candidates and incumbents and endorse conservatives.¹⁵ The United States Court of Appeals for the Tenth Circuit also found that the bar against intervention in elections did not infringe on the Ministry's free exercise of religion, because tax exemption is a privilege the Ministry could forego if it wished to engage in partisan activities.¹⁶ Similarly, *Association of the Bar of the City of New York v. Commissioner* held that rating candidates is campaign intervention, even when no political parties are involved.¹⁷ *Fulani v. League of Women Voters Education Fund* held that the sponsor of candidate debates is not required to invite independent or minor-party candidates to participate in debates for nomination in primary elections.¹⁸ The court held that holding separate debates for each of the major party's candidates for nomination "was a logical consequence of the nature and role of primary contests in the electoral process" and Fulani was not a candidate in either primary.¹⁹ In its opinion the court pointed out that "the prohibition against partisan activity in section 501(c)(3) bars more than the partisan promotion of certain candidates over other candidates, and we agree that an organization's selective promotion of certain *parties* over others would be inconsistent with its section 501(c)(3) tax-exempt status."²⁰ The court did not address the issue of whether the League was required to provide independent and minor-party candidates with an opportunity equal to what was provided for the major parties, leaving that issue unresolved.

15. 470 F.2d 849, 857-58 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

16. *Id.* at 856.

17. 858 F.2d 876, 880 (2d Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989).

18. 882 F.2d 621, 630 (2d Cir. 1989).

19. *Id.*

20. *Id.* at 629 (emphasis in original).

B. IRS Regulations

What do IRS regulations tell us? Very little. The term “charitable” in § 501(c)(3) of the tax code is broad and includes relief of the poor, advancement of religion, education or science. But advocacy on public-policy issues is clearly included within the scope of charitable activity. For example, IRS Reg. § 1.501(c)(3)-(d)(2) says, “The fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3).”

The regulations’ definition of what is an exempt-purpose “educational” activity also embraces issue advocacy. IRS Reg. § 1.501(c)(3)-(d)(3)(b) says education includes “[t]he instruction of the public on subjects useful to the individual and beneficial to the community.” It goes on to make it clear that 501(c)(3) organizations are not required to be neutral about policy issues, stating:

An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.²¹

The regulations give examples of educational activities that do not address policy-related issues or nonpartisan voter education and mobilization programs. The only place the regulations address the issue of electoral activity is in their definition of an “action organization.”²² Action organizations are not eligible for 501(c)(3) status if more than a substantial part of the group’s activities consist of attempts to influence

21. Treas. Reg. § 1.501(c)(3)-(d)(3)(b).

22. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (defining an action organization as one that “participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office”).

legislation or the group “participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.”²³ The regulation goes on to define who is a “candidate”²⁴ and what are prohibited “activities,” which “include, but *are not limited to*, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.”²⁵

The IRS’s lack of detail in this area of its regulations contrasts sharply with comparatively detailed rules defining scientific research in the public interest.²⁶ While not exhaustive, the definitions of what is and is not considered exempt-purpose scientific research provide much more clarity and guidance than the minimal information on political campaign activity.

The contrast in detail and helpful guidance is even greater when the regulation is compared to rules for charities that opt to use the expenditure test under IRC § 501(h) to measure their lobbying limits. In addition to detailed definitions of all terms, the regulations offer numerous examples of how they impact day-to-day situations faced by organizations involved in legislative advocacy. This is appropriate for regulation of core First Amendment speech. Because the prohibition on campaign intervention involves similar First Amendment concerns, the IRS regulations in this area should provide similar notice and guidance.

C. Revenue Rulings

Prior to June 2007, when the IRS issued Revenue Ruling 2007-41, 501(c)(3) organizations had limited guidance in two areas: (1) voter guides and education materials and (2) candidate debates and forums. As to voter guides and education materials, Revenue Ruling 78-248 covers candidate questionnaires and voter guides, focusing on content and structure, and Revenue Ruling 80-282 addresses factors that indicate bias in timing and distribution. Preparation and distribution of voter guides

23. *Id.*

24. *Id.* (defining a candidate as “an individual who offers himself, or is proposed by others, as a contestant for an elective public office . . .”).

25. *Id.* (emphasis added).

26. Treas. Reg. § 1.501(c)(3)-(d)(5).

and other educational materials are permissible if “conducted in a non-partisan manner.” Regarding candidate debates and forums, Revenue Ruling 66-256 and Revenue Ruling 74-574 make it clear that sponsoring debates and forums is permissible when the event is one that is “held for the purpose of educating and informing voters, which provides fair and impartial treatment of candidates, and which does not promote or advance one candidate over another” Revenue Ruling 86-95 states that a series of forums is permissible if the content and form are neutral.

Other sources of guidance from the IRS state that a 501(c)(3) organization cannot evaluate the qualifications of candidates or support a slate of candidates for school boards²⁷ or make an interest bearing loan to a group that uses the money for partisan political purposes.²⁸

In June 2007 the IRS released Revenue Ruling 2007-41,²⁹ the first new guidance in more than twenty years. It uses twenty-one examples to illustrate permissible and impermissible activities of voter education, registration and participation efforts, activities involving individuals, candidate appearances, issue advocacy, renting facilities, mailing lists and other business activities, and websites. While it leaves many gray areas undefined, it makes two important points: (1) “Section 501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office;” and (2) Issue advocacy communication “is particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election.”³⁰

The scenarios in the Revenue Ruling are fairly simple, and each one illustrates only one type of activity. When different activities are combined, the IRS states that “the interaction among the activities may affect the determination of whether or not the organization is engaged in political campaign intervention.”³¹ This forces 501(c)(3) organizations facing more complex situations to guess what the IRS would think and to risk an investigation if they guess incorrectly.

27. See Rev. Rul. 67-71, 1967-1 C.B. 125.

28. See I.R.S. Tech. Adv. Mem. 98-12-001 (Aug. 21, 1996).

29. Rev. Rul. 2007-41, 2007-25 I.R.B. (June 18, 2007).

30. *Id.* at 9.

31. *Id.* at 3.

D. IRS Continuing Education Program (CEP)

The CEP is the annual technical update for revenue agents. The IRS releases the information to the public, and while it is extremely helpful and detailed, it cannot be relied on as precedent. In 1993 and 2001 the CEP included chapters entitled “Election Year Issues” covering the history of the law, general definitions, sanctions and application of the facts and circumstances test to seventeen different fact situations. While these descriptions are very useful in making a more informed guess about how the IRS might view any specific communication or activity, they are often qualified by references to the facts-and-circumstances test, or they address factors that “tend to show” a nonpartisan nature.

E. Lack of Transparency

Because § 6103 of the tax code³² prohibits the IRS from disclosing information about its investigations, the exact facts and circumstances the agency believes constitute partisan electioneering remain a mystery. While this provision protects the privacy of individual charities and religious organizations, it also prevents the IRS from adequately informing the public of the agency’s interpretation of the law. This exacerbates the problems caused by the lack of a clear definition of what is and is not permissible.

F. Contradictory Holdings and Guidance Create Confusion

When 501(c)(3) organizations attempt to make sense out of the court cases, IRS Revenue Rulings, and other sources of guidance, they can easily encounter contradictory information. For example, in 1972 the United States Court of Appeals for the Tenth Circuit held that Christian Echoes National Ministry was not eligible for 501(c)(3) status because it attacked liberals such as President John F. Kennedy and Senator Hubert Humphrey, while urging the public to vote for

32. 26 U.S.C. § 6103 (2007).

conservatives.³³ The group endorsed one conservative candidate, Sen. Barry Goldwater, at its annual convention. On the other hand the IRS Chief Counsel's office did not move to revoke the exempt status of a charity that sponsored a 1984 voter education program that it stated "could be viewed as demonstrating a preference for one of the debating candidates,"³⁴ even though it occurred close to the election. But then the IRS found that the language and timing of fundraising mailings violated the prohibition because the group had a clear policy orientation, the mailings were sent close to the election, and they targeted their constituency and were biased against candidates of opposing views. The IRS said that the letters implied donations would be used to promote candidates with like policy views.³⁵

How does a charity or religious organization that is motivated by issues and/or values apply these shifting standards? This problem is long standing. As a 1985 law review article stated,

IRS interpretations [of the political campaign prohibition] make compliance extremely difficult and are highly intrusive on 'free exercise' and other constitutional rights. In particular, churches must act at their peril as they attempt to walk the obscure line between loss of exemption and faithfulness to the obligation to speak out on the moral dimension of important social issues.³⁶

33. *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 856 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

34. I.R.S. Tech. Adv. Mem. 89-36-002 (May 24, 1989).

35. *See* I.R.S. Tech. Adv. Mem. 96-09-007 (Dec. 6, 1995).

36. Wilfred R. Caron & Deirdre Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POL. 169, 178 (1985) (alteration added).

II. WHY CHANGE IS NEEDED NOW

A. The Help America Vote Act and Nonprofit Civic Engagement

Passage of the Help America Vote Act (HAVA),³⁷ which became effective in October 2002, prompted many 501(c)(3) organizations to become involved in activities aimed at improving the administration of elections, protecting voters' rights, and encouraging more people to vote.³⁸ For example, they helped recruit new poll workers, challenged attempts to intimidate or deceive voters, hosted candidate fora, and produced educational materials.

Despite this increase in nonpartisan activity by 501(c)(3) organizations, many groups remain reluctant to take on these kinds of civic responsibilities out of fear of IRS investigations. Charities and religious organizations often err on the side of caution in this area because it is not clear what they can and cannot do. For example, survey research of 501(c)(3) organizations shows that 43 percent incorrectly believe that they cannot host a candidate debate or forum.³⁹ If HAVA's ambitious goals are to be realized, greater participation from the nonpartisan sector will be needed.

B. New IRS Enforcement Procedures

Since 2004 the IRS has shifted its overall enforcement strategy from education and prevention to enforcement. The public first learned about how this new approach was being applied to the ban on political intervention in 2004 when the NAACP announced that it was being investigated by the IRS. The IRS said the investigation was the result of a convention speech by the NAACP chairman that included critical

37. Help America Vote Act of 2002, 42 U.S.C. § 15301 (2002).

38. OMB WATCH, HOW NONPROFITS HELPED AMERICA VOTE: 2006, at 3 (2006), <http://www.ombwatch.org/npadv/PDF/nphelpedamericavote2006.pdf>.

39. GARY D. BASS, DAVID F. ARONS, KAY GUINANE & MATTHEW F. CARTER, SEEN BUT NOT HEARD: STRENGTHENING NONPROFIT ADVOCACY 20 (Aspen Institute 2007) (2007).

remarks about President Bush's war and domestic policies.⁴⁰ During the public outcry that followed, the IRS revealed that it had initiated a Political Intervention Program (PIP) that put enforcement proceedings on a "fast track."⁴¹ The program was continued for the 2006 election as the Political Activities Compliance Initiative (PACI).⁴²

The IRS has stated that the goals of the PACI program are deterrence and action "while the issue remains prominent, so that there are no reoccurrences and so correction could occur prior to the relevant election."⁴³ This is reflected in what the IRS calls its "expedited" or "fast track" process. Prior to the PIP and PACI programs, the IRS did not begin investigations until after the annual informational return (Form 990) for a tax year was filed. Now the IRS sends letters notifying 501(c)(3) organizations of pending investigations within fourteen days after a case is assigned to an agent for investigation, or for cases classified as egregious, within ten days. A slightly longer process is used for religious organizations, which must undergo a special review by the IRS Director of Exempt Organizations under IRC Section 7611.⁴⁴ However, the PACI program has no timeframe or deadline for an IRS agent to complete an investigation.

"A PACI case may be resolved with a written advisory if the taxpayer exhibits an understanding of the IRS's position that a prohibited activity occurred, the violation was a one time, isolated, unintentional event, the organization corrected the violation (e.g. recovered the funds), and the organization is *not likely to violate the prohibition again*."⁴⁵ The written advisory must include a warning and pertinent facts. The

40. Letter from IRS to NAACP (Oct. 8, 2004) Letter 3934 (8-2004) Catalog Number 28970X (on file with author).

41. I.R.S., *Tax-Exempt Organizations and Political Activities* (Oct. 2004), <http://www.irs.gov/newsroom/article/0,,id=130652,00.html>.

42. I.R.S., *IRS Releases New Guidance and Results of Political Intervention Examinations* Feb. 24, 2006), <http://www.irs.gov/newsroom/article/0,,id=154780,00.html>.

43. I.R.S., *Political Activities Compliance Initiative Procedures for 501(c)(3) Organizations*, 1 (2004), http://www.irs.gov/pub/irs-tege/paci_procedures_feb_22_2006.pdf.

44. *Id.* at 7-8.

45. *Id.* at 5 (emphasis in original).

organization is not obligated to admit wrongdoing. It can also result in revocation of tax-exempt status.

These procedures have been criticized as a fundamental part of the problems faced by 501(c)(3) organizations. Marcus Owens, attorney and former Director of the IRS Exempt Organizations Division, has represented several organizations that have undergone PACI examinations. At an August 2007 panel discussion on the current IRS enforcement regime, he criticized the “absurdity of the current IRS approach” because it has made 501(c)(3) organizations afraid to speak out on important issues, such as the war in Iraq or global warming.⁴⁶ At the same panel, Karl Sandstrom, former commissioner of the Federal Election Commission and lawyer, said, “The IRS confuses itself with the Centers for Disease Control, treating political discussions by nonprofit organizations as symptoms that must be examined In cutting out the tumor, they tend to cut out vital organs.”⁴⁷

C. The IRS’ Evolving Standard Regarding Issue Advocacy

News stories about the IRS examination of the NAACP and other audits in 2004 indicated that the IRS might be blurring the line between partisan intervention in elections and legitimate issue advocacy. This could have a chilling effect on charities and religious organizations that want to express points of view on current issues of interest to their constituencies. The PACI raised additional questions.

Issue advocacy is one of the most difficult areas for nonprofits because the IRS is vague about the standard, especially when there is criticism of an elected official’s actions or policy positions when he or she is also running for office. An IRS warning states that an issue advocacy communication “is particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election.”⁴⁸

46. Audio file: Panel on The Pros and Cons of an IRS Bright Line Rule for Campaign Activities for Charities and Religious Organizations, held by OMB Watch (Aug. 3, 2007), available at <http://www.npaction.org/article/articleview/779>.

47. *Id.*

48. Rev. Rul. 2007-41, 19, 2007-25 I.R.B. 1421.

Revenue Ruling 2007-41 uses examples that illustrate the extremes between the ways a variety of factors combine to make an activity issue advocacy or impermissible intervention. A 501(c)(3) organization wishing to communicate with the public about an issue should consider whether or not: (1) the communication refers to an elected official who is in a position to act on pending legislation (by vote or veto); (2) the elected official is running for reelection; (3) there is a pending bill, vote, or other decision; (4) the communication appears shortly before the election; (5) the 501(c)(3) takes a position on the bill and refers to the elected official in a position to act; (6) the communication mentions the election, a political party, or another candidate; (7) the communication includes a call to action urging the public to contact the elected official; (8) the public official's position on the issue differs from that of the 501(c)(3); (9) the issue addressed distinguishes the candidates in a campaign; and (10) the communication is part of "an ongoing series of substantially similar advocacy communications" about the same subject.⁴⁹

While the examples help illustrate the factors the IRS considers, they do not address many common situations faced by 501(c)(3) organizations that are engaged in genuine issue advocacy campaigns, including grassroots lobbying. For example, votes on bills are often not officially scheduled until the last minute, so the fact that an ad addresses a bill not yet set for vote should not tip the balance from grassroots lobbying to prohibited intervention in an election. Similar problems arise when any one of these factors change. This leaves a gray area for charities and religious organizations to navigate the best they can.

III. THE CASE FOR A BRIGHT LINE: POLICY AND CONSTITUTIONAL CONSIDERATIONS

There are strong public policy reasons for developing bright-line rules defining impermissible campaign intervention. Clarity will lead to more widespread compliance since the guess work will be taken out. More organizations will be willing to engage in voter education and

49. *Id.* at 8-10.

mobilization efforts because the risk of revocation of tax exempt status will be reduced.

Most importantly, 501(c)(3) organizations will feel secure in expressing their opinions and ideas about public policy issues, contributing to the marketplace of ideas. As Justice Holmes stated in *Abrams v. United States*, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁵⁰ This marketplace of ideas principle assumes input of a variety of ideas that can then generate debate, leading to the best outcome.

Scholar and free speech advocate Alexander Meiklejohn emphasized the importance of freedom of political expression in making the democratic process function.⁵¹ Government cannot be held accountable unless the citizens are informed and involved. In the case of charities and religious organizations, this speech touches on three facets of the First Amendment—people who have *associated* together in organizations to *speak* publicly in order to *petition* the government. The IRS must keep this in mind in its enforcement efforts.

A. Courts Have Upheld Speech Limits on 501(c)(3) Organizations—For Now

While it appears that the statutory prohibition on partisan intervention might be constitutional, the current regulatory regime raises serious questions about the infringement of the rights of free speech and association. Limited IRS guidance, lack of transparency, broad IRS discretion, and questionable enforcement procedures all contribute to a chill on the exercise of these fundamental rights. While this article does not attempt to definitively define or resolve these constitutional issues, it does raise questions for further analysis and discussion.

In *Branch Ministries*, the D.C. Circuit held that the IRS did not violate Branch Ministries’ right to free exercise of religion or freedom of speech for several reasons.⁵² First, the government’s withdrawal of a

50. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

51. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (Harper 1948).

52. *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15, 27 (D.D.C. 1999) *aff’d*, 211 F.3d 137, 139 (D.C. Cir. 2000).

conditional privilege for failure to meet the condition is not in itself an unconstitutional burden on the right to free exercise of religion unless the privilege is “conditioned upon conduct proscribed by a religious faith . . . putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.”⁵³ Moreover, the court said, the church has alternative means of communicating its views about candidates for public office by creating a 501(c)(4) affiliate, which can in turn create a political action committee and use non-deductible dollars.⁵⁴ Finally, the prohibition on intervention in partisan electoral activity does not violate free speech rights because it is “viewpoint neutral.”⁵⁵ It “prohibit[s] intervention in favor of all candidates for public office by all tax-exempt organizations, regardless of candidate, party, or viewpoint.”⁵⁶

In addressing the free speech claim the court cited the Supreme Court case *Regan v. Taxation With Representation of Washington*,⁵⁷ (TWR) which upheld the constitutionality of limitations on the amount of legislative lobbying in which 501(c)(3) organizations may engage. The *Regan* case, decided in 1983, did not address the ban on political intervention. However, the rationale used to uphold the limits on lobbying can be extended to apply to the prohibition on partisan speech by 501(c)(3) organizations as well.

In upholding the lobbying limits, the Court said that both tax-exempt status and the ability to receive tax deductible contributions “are a form of subsidy that is administered through the tax system.”⁵⁸ Congress, the Court said, did not infringe the First Amendment rights of 501(c)(3) organizations by limiting their ability to engage in a substantial amount of lobbying, but “has simply chosen not to pay for TWR’s lobbying.”⁵⁹ According to the Court, this decision not to subsidize exercise of a First Amendment right was not irrational and is not subject to strict scrutiny.⁶⁰ The Court also pointed out that TWR had the right to

53. *Id.* at 142.

54. *Id.* at 143.

55. *Id.* at 144

56. *Id.* (alteration added).

57. *See* 461 U.S. 540 (1983).

58. *Id.* at 544.

59. *Id.* at 546.

60. *Id.* at 548-49.

carry on its substantial lobbying through an affiliate organization exempt under 501(c)(4), which, as an action organization, would not be eligible to receive tax-deductible contributions. Finally, the Court denied TWR's claim that since veterans' organizations have no limit on the amount of lobbying in which they can engage the limitation violated equal protection under the Fifth Amendment.⁶¹ The Court held such a distinction to be within the power of Congress to establish rational classifications.

These two cases indicate that the prohibition on intervention in elections is constitutional. However, in *Branch Ministries* the court did not address the question of whether the government has a compelling interest in restricting religious exercise in this manner, and, as a result, did not address whether the prohibition is the least restrictive means of accomplishing that interest. The Supreme Court has not addressed the issue in the context of an as-applied challenge that considers the IRS vague rules and enforcement procedures.

In addition, the Supreme Court may someday disagree with the *Branch Ministries* court's holding that the prohibition is not content based. That case had clear-cut facts. But often the facts involve speech about issues, values and criticism of elected officials for actions or policies in their official capacity. For example, a large number of cases that led to IRS examinations in 2004 and 2006⁶² involved gray areas of the law, such as allowing candidates to speak at organizational functions or distributing printed materials.

B. FEC v. Wisconsin Right to Life and the Future of the Facts-and-Circumstances Test

The *WRTL* case addresses how genuine issue advocacy can be distinguished from partisan electioneering, and it could have implications for IRS enforcement of the ban on partisan intervention. It makes a significant contribution to the evolving definition of what constitutes

61. *Id.* at 548.

62. IRS, FINAL REPORT PROJECT 302: POLITICAL ACTIVITIES COMPLIANCE INITIATIVE [hereinafter FINAL REPORT PROJECT 302], 15-17, http://www.irs.gov/pub/irs-tege/final_paci_report.pdf.

issue advocacy as opposed to partisan electoral messages. Its analysis also suggests that the IRS's case-by-case, facts-and-circumstances approach to enforcement should be reconsidered. Chief Justice Roberts' majority opinion said the standard "must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect."⁶³

The case was an as-applied challenge to the electioneering communications rule, which is part of the Bipartisan Campaign Reform Act of 2002 (BCRA).⁶⁴ The rule bars corporations, including nonprofits, from funding broadcasts that mention federal candidates sixty days before a general election or thirty days before a primary. WRTL's radio ads encouraged listeners to contact their senators on the issue of judicial filibusters. Because Senator Russell Feingold was running for re-election at the time, WRTL had to discontinue the ads when the sixty-day black out period began even though the ad was not about support or opposition to Feingold's election.

The Court found that the ban could not be applied to grassroots lobbying broadcasts that do not favor or oppose candidates. The Court emphasized the presumption in favor of speech, with Chief Justice Roberts saying, "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor."⁶⁵

During oral argument Justice Anthony Kennedy pointed out the practical reality that public attention is often more focused on issues prior to elections, making it a strategic time to air issue ads.⁶⁶ Solicitor General Paul Clement, representing the FEC, responded that groups can air ads without mentioning the official who is also a federal candidate. But Justice Kennedy pointed out that a group might want to target an

63. *FEC v. Wis. Right To Life (WRTL)*, 127 S. Ct. 2652, 2666 (2007).

64. Bipartisan Campaign Reform Act of 2002 (McCain-Feingold), 2 U.S.C.S. § 431 (2002).

65. *WRTL*, 127 S.Ct. at 2669 (alteration added).

66. Transcript of Oral Argument at 14-16, *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-969.pdf.

official “in order to affect his conduct or her conduct once they’re reelected, so that they’ll take a different position, a second look.”⁶⁷

In contrast, the IRS’ presumptions about issue advocacy go in the other direction, interpreting criticism of public officials on issues as particularly suspect.

C. There is no compelling government interest that justifies “fast track” enforcement

The prohibition on intervention in elections was passed in 1954 with no debate, so there is minimal legislative record to establish what Congress meant to achieve. It is widely understood that the ban, sponsored by then-Senator Lyndon Johnson, was the result of his frustration with the campaign of an opponent.⁶⁸ After the *TWR* case the legal justification for the ban was seen as avoiding a taxpayer subsidy for partisan activities. Other governmental interests, not formally recognized, include preventing undue pressure on 501(c)(3) organizations to donate to campaigns and maintaining a nonpartisan sector of society. Interests in free speech and association must be balanced against these government objectives in crafting a narrowly drawn approach to achieving these interests.

The IRS has justified its stepped-up enforcement program based on what its February 2006 report on the 2004 program says was “a high level of noncompliance.”⁶⁹ However, an OMB Watch analysis of program data released by the IRS shows that the overall violation rate was 39 percent.⁷⁰ The IRS’ claim of a higher rate did not account for 106 cases that were dismissed after two rounds of investigation. The vast majority (sixty-nine of eighty-five) of cases involving violations were resolved by written advisories. Only six were severe enough to merit revocation of tax exempt status.⁷¹

67. *Id.* at 16.

68. HOPKINS, *supra* note 10, at 584.

69. See FINAL REPORT PROJECT 302, *supra* note 62.

70. OMB Watch, *supra* note 6.

71. IRS, 2006 Political Activities Compliance Initiative (2007), http://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf.

So far the pattern for 2006 is similar. The IRS report says it received 237 complaints for the 2006 election season. Of these, 137 were dismissed after the initial review, and fourteen more were dismissed after further investigation. The IRS has completed forty investigations, and none merited revocation of exempt status. Written advisories were issued in twenty-six cases.

In 2006 the IRS divided the cases into three categories: Type A (single issue/non-complex), Type B (multiple issues/complex) and Type C (egregious/repetitive alleged violations). Only four cases were classified as Type C in the 2006 investigations. Section 6852 allows the IRS to seek an injunction in federal district court to stop egregious violations of the ban on intervention in elections.⁷² OMB Watch's research has not found any news reports that indicate the IRS has used this authority. As a result, we can only assume that the Type C violations were not severe enough to merit court action. This is contrary to the IRS' claims that there is widespread non-compliance. It also undermines the IRS' arguments about the need for deterrence.

D. Vagueness

The facts-and-circumstances test fails to adequately inform nonprofits of prohibited conduct. This makes it difficult for charities and religious organizations to know how the IRS will view any particular communication or activity. The IRS has extremely broad discretion in applying the test, so that groups engaged in voter education and mobilization activities cannot be sure how to avoid sanctioning. This is a procedural due process issue as well as a First Amendment issue.

A 2006 complaint against the Pennsylvania Pastors Network (PPN) illustrates the difficulties with the current vague standards. In that case, the network of religious groups sponsored an event aimed at getting out the vote for a ballot initiative, which is permissible as a lobbying activity. The public official they invited to speak, Senator Rick Santorum, was also running for reelection and numerous references to the election were made. Was the event promoting Santorum, the ballot initiative, or both? How could PPN plan its event in a way that ensures it

72. 26 U.S.C.S. § 6852.

will not be subject to an IRS investigation? What factors will the IRS consider as it reviews the complaint filed against PPN?

The facts-and-circumstances test includes consideration of the context of any activity or communication. This may need to be re-examined in light of the *WRTL* decision, even though the government has greater regulatory power over speech when tax-exemption is involved. The electioneering communications ban involved in *WRTL* applied to all corporations, not just tax-exempt organizations.

During oral argument in the *WRTL* case Justice Souter asked, “Why should we ignore the context?”⁷³ James Bopp, Jr., attorney for *WRTL*, responded that “that test . . . would invite ads to be prohibited based upon the varied understandings of the listener”⁷⁴ Justice Souter replied, “[I]t is impossible to know what the words mean without knowing the context in which they are spoken.”⁷⁵ Bopp also pointed out: “If there is no workable test that is reasonably ascertainable by small grassroots organizations that separates genuine issue ads from sham issue ads—this court said in *Ashcroft* you cannot throw out the protected speech in order to target the unprotected speech.”⁷⁶ Bopp noted that Congress continues to meet during the blackout periods. Justice Souter’s view did not prevail in the court’s majority opinion.

E. Lack of due process in PACI procedures

The new expedited IRS process is not specifically authorized by the tax code or IRS regulations. The NAACP argues that the IRS must wait until a group files its annual Form 990 before taking adverse action.⁷⁷ In cases of flagrant violations, the IRS already has the authority to seek an injunction, ordering the 501(c)(3) organizations to cease the activity immediately.⁷⁸ This process, while forcing a charity or religious

73. Transcript of Oral Argument, *supra* note 66, at 35.

74. *Id.*

75. *Id.* (alteration added).

76. *Id.* at 32-33.

77. Letter from Marcus Owens and Lloyd Mayer, NAACP attorneys to Kenneth Bradley, Exempt Organization Division, I.R.S. (Jan. 27, 2005), citing I.R.C. §§ 7602 and 6852(a)(1)(A) and (13).

78. 26 U.S.C.S. § 6852.

organization into court, at least provides it with some form of due process and a guarantee of impartiality. Under the PACI program, on the other hand, the IRS becomes prosecutor, judge, and jury.

There are no rights to appeal within the PACI process. A group that wishes to challenge an adverse IRS finding must either wait and contest revocation of exempt status, or pay the excise tax that would be imposed if the IRS found a violation, and then seek a refund. If the IRS does not refund the excise tax within six months the organization can then file suit.⁷⁹ The NAACP used this process to force a resolution of their case. The IRS dropped that investigation before the end of the six-month period, avoiding a confrontation in the courts.

The lack of deadlines for closing PACI cases once a group has been contacted by the IRS means that long investigations can remain open, even in subsequent election cycles. All Saints Episcopal Church in California is among 2004 cases that remained open through 2006. In that case the investigation was launched after a sermon criticized the war in Iraq and both presidential candidates the weekend before the 2004 election. The organizations subject to these endless investigations remain unsure about how the IRS may view their current activities, even though there has been no finding of wrongdoing. Charities and religious organizations should not have to cease legitimate activities while the IRS investigation is pending.

F. Is PACI a prior restraint on 501(c)(3) speech?

The earliest understanding of the First Amendment reflected a belief that there should be no censorship before publication. If speech is deemed to have violated the law, sanctions can be imposed after the fact. This protects the marketplace of ideas that is essential to the democratic process.⁸⁰

The IRS's stated objective of deterring speech in order to prevent repeat violations before an election implies an expectation that organizations notified of pending investigations cease the activities in

79. IRS Form 4720.

80. See *Walker v. Birmingham*, 388 U.S. 307, 315 (1967); *Near v. Minnesota*, 283 U.S. 697, 713-14 (1931).

question. This is true even though no determination of wrongdoing has been made. This raises prior restraint concerns, and the burden is on the IRS to justify it.

The agency's 2006 procedures⁸¹ acknowledge that, in some cases, a group being examined will not agree that a violation occurred. According to those procedures, "[i]n these situations, depending on the nature of the violation, if it is clear the organization intends to continue the activity, revocation and/or excise tax under section 4955 should be considered."⁸² In cases where no violation has occurred, this approach could result in silencing legitimate, constitutionally-protected speech.

Two cases involving public protests illustrate the definition of prior restraint. *Madsen v. Women's Health Center Inc.* upheld a state court injunction barring anti-abortion protesters from entering a thirty-six foot buffer zone around an abortion clinic because the rule was not content-based and protesters could still express their views.⁸³ *Schenck v. Pro-Choice Network of Western New York* had similar facts to *Madsen*. In that case the court upheld similar restrictions, but struck down a "moving buffer zone" on First Amendment grounds because of a lack of certainty about where the zone actually was.⁸⁴

The Supreme Court has held that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."⁸⁵ The court has dealt with this issue in the context of protests, news publications, control of obscene material, and regulation of meetings and parades. Cases involving parades and meetings upheld permit systems when the decision-maker had clear limits on his or her discretion.⁸⁶ Under the PACI program, the IRS has extremely broad discretion in applying the facts-and-circumstances test

81. IRS, *2006 Political Activities Compliance Initiative* (2007), http://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf.

82. *Id.* (alteration added).

83. 512 U.S. 753 (1994).

84. 519 U.S. 357 (1997).

85. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (alteration added).

86. *See, e.g., Freedman v. Maryland*, 380 U.S. 51, 60 (1965) ("The Maryland scheme fails to provide adequate safeguards against undue inhibition of protected expression, and this renders the § 2 requirement of prior submission of films to the Board an invalid previous restraint.").

and no timeframe for when it must act, further contributing to the program's prior restraint problem.

The IRS' statements that an organization's tax-exempt status is more likely to be revoked if it continues the activities in question while the IRS investigation is pending may well amount to censorship through intimidation. IRS action in the case of All Saints Episcopal Church suggests this has happened. In that case, the IRS told church officials that if they admitted wrongdoing and agreed not to allow sermons critical of public officials during future election seasons, the IRS would not pursue the case further. All Saints rejected the offer.⁸⁷

G. *The right of association*

In addition to free speech, the First Amendment protects the right of association. In *NAACP v. Alabama*⁸⁸ the Supreme Court held, "[i]t 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."⁸⁹

More recently in *Meyer v. Grant*,⁹⁰ the Court voided a Colorado statute barring use of paid workers to collect signatures for a ballot initiative, saying the restriction barred one-on-one communication.⁹¹ In *Burson v. Freeman*,⁹² the Court upheld a Tennessee restriction on campaigning within 100 feet of a polling place because it served a governmental interest in preventing voter intimidation or election fraud.⁹³ But there are limits on such restrictions. In *Anderson v. Celebreeze*, the Court said political stability is a compelling interest that can justify

87. OMB Watch, <http://www.ombwatch.org/article/articleview/3167> (last visited Oct. 7, 2007).

88. 357 U.S. 449 (1958).

89. *Id.* at 460 (alteration added).

90. 486 U.S. 414 (1988).

91. *Id.* at 424.

92. 504 U.S. 191 (1992).

93. *Id.* at 205-06.

restraints on speech and association but the restraint must be the least burdensome available.⁹⁴

The IRS could establish a less restrictive enforcement regime by developing bright-line rules and foregoing its goal of deterrence. The same factors that suggest the PACI program and the facts-and-circumstances test infringe on free speech also suggest an infringement of the right of association.

IV. THE CASE AGAINST A BRIGHT LINE

Policy arguments against a bright-line rule defining prohibited political intervention include fear that bad actors will take advantage of “loopholes,” concern that increased regulation of 527 political committees may put pressure on 501(c) organizations to accept money for partisan activity, and the difficulty of developing a precise definition. In addition, some organizations prefer to operate with gray areas, willing to exchange the risk of an IRS audit for the ability to push the envelope.

In the cases involving the media, the Court noted that the fact that a bad actor may abuse the system does not justify prior restraint. The same principle should apply to IRS enforcement. As Justice Scalia stated in the *WRTL* oral argument:

I thought when we're dealing with the First Amendment we give wide scope to the principle that it is, it is better to allow, you know, some bad speech than it is, in the effort to get rid of the bad speech, to eliminate any good speech that is justified. So even if there is something that might sneak through that does achieve what Congress didn't want to achieve, the answer in the First Amendment is that's too bad. There's some stuff you just can't get at. There's a lot of bad speech that is allowed all the time because you can't get at it without suppressing the good speech.⁹⁵

94. 460 U.S. 780 (1983).

95. See Transcript of Oral Argument, *supra* note 66, at 45-46.

Fear of abuse for partisan purposes is unfounded, based on experience during the 2004 election cycle when 501(c)(3)s had an exemption from the electioneering communications rule. During that cycle, despite the dire warnings of reform groups, there were no allegations of 501(c)(3)s being used to funnel soft money into federal elections.

Striking the right balance between a rule broad enough to prevent partisan activity and narrow enough to protect issue advocacy and grassroots lobbying will not be easy. Neither will developing a consensus that the sector and the bar will support and promote to the IRS. However, this does not mean that the effort should not be made.

V. WHAT NEXT

Short term improvements can help provide better guidance while the long term task of developing bright-line rules is underway. For example, the IRS does not publish copies of letters when it rules a 501(c)(3) has crossed that undefined line. Redacted copies of IRS determinations and warning letters would at least give 501(c)(3)s some idea of how the IRS applies the “facts-and-circumstances” test to specific situations.

This kind of transparency does not violate the privacy regulations. These letters should be posted on the IRS website in an accessible place, rather than requiring charities to request them through the Freedom of Information Act.

Procedural improvements can also diminish the chilling effect of the PACI program. Some administrative appeal rights should be established for 501(c)(3)s that disagree with the findings in a warning letter. In addition, the IRS should impose a deadline for PACI cases after which an investigation would be considered closed, and the organization involved can move on.

A. The WRTL Opinion: A Framework for Development of a Bright-Line Rule

The Supreme Court’s decision in *WRTL* has made the task of drafting bright-line rules easier. The opinion listed the major factors the

court believes define genuine issue advocacy, as follows:⁹⁶ (1) the focus of the broadcast is on a legislative issue, takes a position on the issue, urges a federal officeholder to support that position, and calls on the public to contact the officeholder;⁹⁷ (2) there is no reference to the “election, candidacy, political party, or challenger;” (3) the broadcast takes no position on a candidate’s character, fitness for office or qualifications.

These principles should guide any proposed rule. In addition, the court made it clear that the fact that issue advocacy occurs close to the time of the election does not weaken constitutional protections. Similarly, the relevance of the issue to election debates cannot be considered. Both of these factors are cited as considerations in IRS Rev. Rul. 2007-41.

The *WRTL* case held that enforcement of the electioneering communications rule cannot unduly burden nonprofit or corporate speakers. An enforcement process must “entail minimal if any discovery to allow the parties to resolve disputes quickly without chilling speech”⁹⁸

B. Safe harbor v. bright-line rule?

Safe harbors define activity that can be engaged in without sanction, but do not encompass the entire range of permissible activity. While it would be useful to know some of the facts and circumstances the IRS considers permissible, a large gray area remains. There is a danger that the safe harbor become the de facto rule, since 501(c)(3) organizations are risk averse when it comes to electoral activity. This is due to both the severity of possible sanctions and the high cost of time, money, and negative publicity caused by an IRS examination.

Two legal experts in the area of exempt organizations have proposed safe harbors. Both proposals exclude important types of issue advocacy speech. Professor Ellen Aprill suggests that, unless there is

96. *FEC v. Wis. Right to Life, Inc.*, 127 S.Ct. 2652, 2669 n.7 (2007).

97. This is essentially the same as the IRS regulation defining grassroots lobbying.

98. *Id.* at 2666.

explicit support for or opposition to a named candidate, a 501(c)(3) organization may express support for voting and encourage its audience to vote if: (1) any remarks made avoid criticism of current political administration and keep the policy discussion broad based; (2) the remarks advance the organization's mission and principles; (3) remarks by a speaker who tells the audience that he/she is speaking for him/herself and not for the organization; (4) the remarks can be shown to be similar to remarks made by the organization in a non-election cycle; (5) the remarks do not take a side on any candidates' policy positions.⁹⁹

Attorney Gregory Colvin addresses general issue advocacy communications as well. Colvin suggests that 501(c)(3) communications must: (1) further the organization's tax exempt purpose; (2) not violate any other existing tax law; (3) not directly endorse any person's candidacy over another's; and (4) not criticize the position of the public official that is the target of a grassroots lobbying effort.¹⁰⁰

While safe harbors may move the law in the right direction, they should not substitute for bright-line rules that encompass the types of statements necessary to effective issue advocacy. Justice Kennedy recognized this problem during oral argument in the *WRTL* case. He pointed out the practical reality that public attention is often more focused on issues prior to elections, making it a strategic time to air issue ads. When Solicitor General Clement responded that groups can air ads without mentioning the official who is also a federal candidate Kennedy pointed out that a group might want to target an official, "in order to affect his conduct or her conduct once they're reelected, so that they'll take a different position, a second look."¹⁰¹

99. Letter from Prof. Ellen Aprill, Loyola School of Law, to the IRS (Nov. 29, 2005), reprinted in *TAX NOTES TODAY*, Dec. 2, 2005.

100. Gregory Colvin, Draft Memorandum to American Bar Association Exempt Organizations Subcommittee, *Safe Harbor: Nonpolitical Speech by Exempt Organizations* (Feb. 1, 2006), <http://www.ombwatch.org/npadv/SafeharbornonpoliticalspeechColvin.pdf>.

101. Transcript of Oral Argument at 16, *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (No. 06-969).

C. One set of rules v. options as in § 501(h) Lobbying Rules?

After Congress passed § 501(h) of the tax code in 1976 the IRS and nonprofit sector engaged in a lengthy back-and-forth process to develop a set of rules that are clear, specific, and include numerous examples to provide guidance. Charities must exercise an option to use these rules, or they are subject to the vague standard that “no substantial part” of their activities be attempts to influence legislation.

A similar approach could be taken in developing bright-line rules for intervention. That would allow organizations that prefer the flexibility of the vague definition and facts-and-circumstances test currently in use to continue their operations without change. At the same time, it would also provide organizations desiring greater clarity with the means of obtaining it. As attorney Beth Kingsley suggested at the August panel,¹⁰² 501(c)(3)s will have to push the IRS to take action and get support from lawmakers if there is to be change before the 2008 election.

CONCLUSION

As American society’s only nonpartisan sector, the charities, educational institutions and religious organizations that make up the 501(c)(3) universe provide a vital service to the public through their voter education and mobilizations efforts, as well as advocacy on important public policy issues. The current IRS enforcement regime discourages this activity because of its vague standards, lack of transparency, broad discretion, and procedures in the PACI program. Development of bright-line rules that clearly define permissible activity, along with changes in the PACI process, would lift the chilling effect that results from the current situation. Society would benefit from the increased civic participation of this nonpartisan sector.

102. *See supra* note 46.