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**Before the Senate Finance Committee  
Subcommittee on Taxation and IRS Oversight  
United States Senate  
May 4, 2022**

Chairman Whitehouse, Ranking Member Thune, and members of the Subcommittee, on behalf of the Institute for Free Speech, thank you for inviting me to testify at this hearing on “Laws and enforcement governing the political activities of tax-exempt entities.”

The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization focused on promoting and protecting the First Amendment’s political rights of speech, press, assembly, and petition. I founded the Institute in 2005, after completing my term as Commissioner at the Federal Election Commission (FEC), because it had become clear to me, both as an academic and then in my time as a Commissioner, that the public is greatly misinformed about laws regulating political speech, including the extent and content of such laws, their real-world effects, and their enforcement. The Institute has worked tirelessly to bring an honest, nonpartisan approach to these issues.

**I. Introduction**

For many reasons, the enforcement of campaign finance and other laws regulating political speech is a highly complex issue. Most importantly, such laws must be carefully crafted in order to avoid infringing on First Amendment rights. Unfortunately, too often these laws have not been carefully written, and when such laws are combined with criminal penalties, they provide a breathtakingly powerful tool for elected officials and government employees to use to try to silence or hinder political opposition.

Ironically, the last time I was asked to testify at a hearing dedicated to political activity by tax-exempt organizations was in 2013 before the Senate Judiciary Committee’s Subcommittee on Crime and Terrorism, then chaired by Senator Whitehouse. At that hearing, a witness called by the majority Democrats noted that he was “optimistic” about the ability of the Internal Revenue Service to regulate political speech, praising the agency as “scrupulously fair and nonpartisan” and singling out the then-Director of the Exempt Organization Division, Lois Lerner, for particular praise. Committee on the Judiciary, Subcommittee on Crime and Terrorism, 113<sup>th</sup> Cong., Apr. 9, 2013, p. 70-71 (Supplemental Statement of Gregory L. Colvin). One month later, Ms. Lerner “told a stunned audience of tax attorneys in Washington that the IRS had delayed and obstructed the tax exemption applications from conservative-sounding organizations,” and later that month, the U.S. Treasury Inspector General made public a report confirming and detailing the nature of the targeting.” Michael Wyland, “Whatever Happened to the IRS Tax Exemption Scandal?”, *Nonprofit Quarterly*, Aug. 22, 2017. Now here we are again, with another Democratic Senate

majority facing fierce political headwinds, and it appears that a small group of senators is looking to respond by trying to further involve the IRS in regulating political speech.

The temptation to use regulation and enforcement for political advantage is bipartisan. Let's begin by considering the very first prosecution brought under the Federal Election Campaign Act of 1971: A suit against the National Committee for Impeachment, brought by the Justice Department under then-President Richard Nixon.

On May 31, 1972, a two-page ad appeared in the *New York Times* that featured the headline "A Resolution to Impeach Richard Nixon as President of the United States." The ad, which cost \$17,850, was paid for by a group consisting of several lawyers, at least one law professor, a former United States senator, and several other citizens of modest prominence, calling themselves the National Committee for Impeachment. In addition to criticizing President Richard Nixon, the ad recognized an "honor roll" of several congressmen who had introduced a resolution that called for the president's impeachment. In response, the United States Department of Justice moved swiftly, getting a federal district court to enjoin the National Committee for Impeachment and its officers from engaging in further political activity. Even though the ad did not discuss the upcoming election or urge anyone to vote in any particular manner, the government argued that the Committee was violating the Federal Election Campaign Act of 1971 because its efforts had the potential to "affect" the 1972 presidential election, and the Committee had not properly registered with the government to engage in such political activity.

Ira Glasser, who was an Executive Director of the American Civil Liberties Union, noted that the government "wrote a letter to The Times threatening them with criminal prosecution if they published such an ad again.... Soon after, the ACLU itself sought to purchase space in The Times in order to publish an open letter to President Nixon, criticizing him for his position on school desegregation. The letter made no mention of the election and indeed until many decades later the ACLU never supported or opposed any candidate for elective office. Fearful of government reprisal based on the government's threatening letter from the previous case, the Times refused to publish the ad."

In both cases, these groups' First Amendment rights were eventually vindicated. However, during the time it took to win these cases, much speech about elected officials and public affairs was thwarted. Further, fighting the prosecutions came at great expense and much anxiety for those who simply sought to speak out about their government.

The history of criminal and tax enforcement of campaign finance law had largely been one of political prosecutions that should serve as a warning to this body. The first case in which the U.S. Supreme Court clearly accepted the idea that regulation of political speech could be constitutional – which it did over the vigorous dissents of Justices William O. Douglas and Earl Warren – was *United States v. Auto Workers*, 352 U.S. 567 (1957). That case, as legal historian Allison Hayward has shown, was brought by the Eisenhower administration to seek to quash union political power after the merger of the AFL and the CIO. Fortunately, though the Supreme Court refused to quash the prosecution before trial as unconstitutional, the government was unable to get a conviction. See Allison R. Hayward, *Revisiting the Fable of Reform*, 45 Harv. J. Legis. 421 (2008).

The Eisenhower Administration was merely following its predecessor, the Truman Administration, which had engaged in a series of political prosecutions aimed at auto dealers in Michigan in the late 1940s. In those cases, the U.S. Attorney prosecuted only reluctantly, viewing the violations as minor (in the case of some defendants) to non-existent (in the case of others), and as raising serious constitutional issues. But politicians in Washington insisted – apparently, like today, for political reasons – on “aggressive enforcement.” Like today, the major news columnists of the day, most notably Drew Pearson, were enlisted to whip up public fervor, with Pearson presumably benefiting from a stream of leaks from the Attorney General’s office in Washington. Nevertheless, perhaps foreshadowing such prosecutions as that of John Edwards, “once in court, prosecutors could not win a conviction, and jurors expressed distaste for enforcing this criminal statute against this kind of activity.” Indeed, the entire series of prosecutions was based on the belief of large-scale violations “that, as it turned out, did not exist.” But the prosecutions were directed from Washington because “chilling auto dealers and other corporate managers from making contributions to Republicans served the Administration’s political agenda.” See Allison R. Hayward, *The Michigan Auto Dealers Prosecution: Exploring The Department of Justice’s Mid-Century Posture Toward Campaign Finance Violations*, 9 Election L. J. 177 (2010).

The IRS has frequently been the tool of choice to harass political opposition. President Franklin Roosevelt used it to harass newspaper publishers, including William Randolph Hearst and Moses Annenberg (publisher of the *Philadelphia Inquirer*). He also used the IRS investigations to harass political rivals including Huey Long and Father Coughlin, and prominent Republicans including former Treasury Secretary Andrew Mellon.

In the 1960s, President Kennedy’s IRS Commissioner Mortimer Caplin, who later founded the law firm of Caplin and Drysdale, established the “Ideological Organizations Audit Project” for the express purpose of auditing and harassing conservative opponents of the President. In a letter to Treasury Secretary Henry Fowler, Caplin noted, “We recognized the sensitivity of just going after [the] right wing, so we wanted to add both left- and right-wing groups for balance.” Illustrating the bipartisan nature of partisan abuse of the IRS, Caplin noted that adding left-wing groups was dicey because many, “had already been given a difficult time during the Eisenhower years.” The agency also requested investigations of corporate backers of various nonprofits involved in civic discussion.

Under the Nixon administration, the IRS was given a list of Nixon’s “enemies” and thousands of groups were targeted. It was because of this long chain of abuses that Congress finally made it illegal to use the IRS for political intelligence gathering and gain in the 1970s. See John A. Andrew, *The Power to Destroy: Political Uses of the IRS From Kennedy to Nixon* (Ivan R. Dee 2002); John A. Andrew, *The Other Side of the Sixties* (Rutgers Univ. Press 1997); David Burnham, *A Law Unto Itself: The IRS and the Abuse of Power* (Random House 1990).

Given this history, and additional structural problems discussed below, the Institute for Free Speech believes that the IRS should not be engaged in the minutiae of regulating political or politically related speech at all.

If an entity with a social welfare purpose is deemed a political committee (“PAC”) under federal or state law, it ought to be regulated by the IRS as a 26 U.S.C. (“IRC”) §527 organization. If it is not a political committee, its election campaign speech would not be its primary purpose and thus such a social welfare group would fall under 26 U.S.C. §501(c)(4). This straightforward

approach would harmonize the IRS's rules with those of the Federal Election Commission, the body entrusted by Congress with "exclusive jurisdiction" for civil enforcement of the nation's campaign finance laws. 52 U.S.C. §30106(b)(1).

This approach would also recognize that in a democracy, political education and the discussion of public affairs not only should but must fall within the definition of "social welfare" and "educational" activities that constitute exempt activities under §501(c)(4). Nothing in the statute requires exclusion of these functions from the definition of social welfare. Finally, and most importantly, this straightforward approach offers real clarity without dragging the IRS further into the thicket of political speech regulation, a tangle from which it – and the Service's reputation for the neutral, nonpartisan collection of revenue – might never recover.

In a 2013 special report to Congress following the IRS targeting scandal, then-National Taxpayer Advocate Nina Olson feared that the scandal came about because "[t]he IRS, a tax agency, is assigned to make an inherently controversial determination about political activity that another agency may be more qualified to make." See Nina Olson, *Special Report to Congress: Political Activity and the Rights of Applicants for Tax-Exempt Status* (2013). As she wrote in her report:

It may be advisable to separate political determinations from the function of revenue collection. Under several existing provisions that require non-tax expertise, the IRS relies on substantive determinations from an agency with programmatic knowledge.

Potentially, legislation could authorize the IRS to rely on a determination of political activity from the Federal Election Commission (FEC) or other programmatic agency. Specifically, the FEC would have to determine that proposed activity would not or does not constitute excessive political campaign activity.

In fact, no legislation is needed. The IRS could today rely on FEC determinations. The FEC is more qualified to make such determinations not only because of its expertise but also because of its structure, which poses less of a risk of partisan enforcement.

## **II. The Nature of the FEC versus the IRS**

Understanding the FEC and its design is important to understanding the problems of using another agency designed for one thing – say, the smooth functioning of securities markets, regulation of broadcasting, or tax collection – for another purpose, such as regulation of campaign spending and speech about politics and public affairs.

Perhaps the most important feature of the FEC's design is its bipartisan makeup. Most federal independent agencies are directed by a board or commission with some guaranteed level of bipartisan makeup. Only the FEC and the U.S. International Trade Commission have equal size blocks of commissioners, with 3 from each major party, and only the FEC requires four votes of out six commissioners for most actions.

The reason for the FEC's unique design should be obvious. If some measure of guaranteed bipartisanship is viewed as a valuable thing in most independent agencies, this bipartisanship would seem essential for an agency whose core mission is to regulate political speech in ways that

can determine who wins and who loses elections. This is a question both of preventing actual abuse of the agency for partisan gain and preventing the appearance that the agency's decisions are motivated for partisan gain. In short, there is a strong argument for why the FEC is structured as it is, which is to prevent one party from changing the regulatory regime or using the enforcement process for partisan gain.

The FEC also has an enforcement process that aims to resolve matters through conciliation rather than fines or litigation. This, too, has drawn much criticism from those seeking "stronger" enforcement. But this process also exists for a reason. The overwhelming number of complaints submitted to and violations found by the FEC are not due to corruption but inadvertent violations of the law. Many are nothing more than administrative violations against the state.

The cost to a political candidate of having been found to have "violated the law," however, can be great; the rewards to a zealous prosecutor or even FEC Commissioner or General Counsel who is seen to be crusading for "clean elections" are perhaps even greater in the other direction. Therefore structuring the system around voluntary conciliation agreements is an intentional means to depoliticize the complaint process. Again, placing primary enforcement responsibility with the Justice Department, the IRS, or another agency whose process is geared to leveling direct sanctions dramatically alters the balance in the direction of partisan enforcement, and does so in a way that may reward overly aggressive prosecution by government officials in this sensitive First Amendment area.

Thus, while it is true that almost all government agencies have structural features to insulate them from politics, the FEC has more political safeguards than most agencies, and it has them for very compelling reasons.

The IRS faces far fewer situations regarding election speech in its everyday business than does the FEC. Its culture and expertise are therefore quite different from that of the FEC, which regularly faces these issues. Indeed, one reason for the frustration some express with the FEC has been the critics' unwillingness to accept the constitutional restraints under which the FEC operates. Those who seek to push regulation onto other agencies often do so precisely because they seek to bypass such constitutional sensitivities that are, and ought to be, a hallmark of the FEC – the agency charged by Congress with "exclusive civil enforcement" of campaign finance laws.

### **III. Problems of Enforcement**

Vague election laws combined with criminal penalties are a recipe for abusive political prosecutions. It is a threat both to the First Amendment and to honest government. In the case of the Michigan auto dealers, which I discuss above, prosecutors were unable to gain convictions in cases that went to trial; but the threat of prison time convinced many defendants to plead no contest and pay fines.

Similarly, as the unsuccessful prosecution of John Edwards proved, much of campaign finance law is vague, complicated, or both. Because of the potential infringement on civil liberties, Congress should avoid adding criminal penalties to existing or new campaign finance laws. Arguably, there are already too many provisions that provide for criminal penalties. The Bipartisan Campaign Reform Act of 2002 extended the statute of limitations for many criminal violations of campaign finance laws, made more provisions of the law subject to criminal sanctions, and

required the United States Sentencing Commission to issue guidelines for campaign finance law violations. Other recent high-profile political prosecutions for vague allegations of campaign finance laws have similarly come apart at the seams, as in the prosecution of Ted Stevens. Unfortunately, far too often the damage is done by the time the law catches up to the hysteria. Stevens was convicted just days before the election, which he lost by less than 1% of the vote, and only vindicated posthumously after a plane crash.

The message we should send to the American people is that political participation is a good thing, not a bad thing. For half a century, the message of those who advocate for stricter campaign finance laws has been that political participation is bad, that people who donate are only out for themselves, and that political speech is, quite literally, dangerous. It is no wonder that the confidence in democratic institutions has declined.

### **The Need for Campaign Finance Law Simplification**

The federal election laws and regulations now contain over 376,000 words. But this just scratches the surface of election law. There are over 1,900 advisory opinions and 7,900 enforcement actions that provide guidance on what these vague laws might mean. As the Supreme Court noted in *Citizens United*, “Campaign finance regulations now impose ‘unique and complex rules’ on ‘71 distinct entities.’ These entities are subject to separate rules for 33 different types of political speech. The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations.” (Citing Brief for Seven Former Chairmen of FEC).

Congress’s vague laws often can’t even be interpreted by the FEC. For example, in August 2012, the FEC considered an Advisory Opinion Request for the National Defense Committee, filed by our organization asking whether seven proposed ads would trigger FEC regulation. The FEC said three of the ads would not trigger FEC regulation, but it could not render an opinion on the other four ads, and could not decide on whether the group had to register with the FEC. Last year, the FEC considered 13 Advisory Opinion Requests but failed to provide an opinion in three of those requests. In one Advisory Opinion rendered by the agency, it agreed the proposed activity was allowed by the law but could “not agree on a rationale for this conclusion.” And yet most practitioners will tell you – correctly, in my view – that the FEC regulations are clearer than the regulations that the IRS already applies when examining political activity by nonprofit organizations. The problem is not the FEC; it is the law.

The most pressing need for Congress is to make campaign finance law a lot simpler. How can we expect the FEC or Justice Department to fairly enforce laws no one can understand? It is literally impossible to navigate campaign finance laws without a lawyer, and even then, your lawyer might not be able to give you a straight yes or no answer. Worse, many lawyers without campaign finance expertise will give incorrect answers.

As a result, well-meaning citizens often stumble into breaking these laws, in part because the thresholds on regulated speech are absurdly low. For example, current law requires reporting of all independent expenditures over just \$250.

#### IV. Constitutional Considerations

In *Buckley v. Valeo*, the Supreme Court noted 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) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

The Federal Election Campaign Act (FECA) and its subsequent amendments sought to regulate such First Amendment activity. In an effort to clarify First Amendment boundaries of regulable political activity, *Buckley* set the standard for regulation of political speech and association. Consequently, *Buckley’s* examination of FECA provides an essential guide.

In *Buckley*, the Court expressed concern about the effects vague laws have upon the freedom of speech. Not only may a vague law be applied inconsistently or arbitrarily, but such a law might also “operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone.” *Id.* at 41 n. 8. Thus, a speaker may “hedge and trim” before speaking. *Id.* at 43. The First Amendment needs “breathing space to survive, [and so] government may regulate in the area only with narrow specificity.” *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). In the political arena, the specificity requirement is particularly important, because discussion of public policy issues frequently overlaps with discussion of political candidates:

“For 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. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.”

*Id.* at 42. Of course, FECA attempted to divine this difficult distinction, but the *Buckley* Court found that it failed to avoid the vagueness problem.

FECA originally attempted to impose an expenditure cap: “[n]o person may make any expenditure ... relative to a clearly identified candidate during a calendar year which ... exceeds \$1,000.” *Id.* at 39. In addition to constitutional problems with the \$1,000 cap, the Court found that the phrase “relative to a clearly identified candidate” was vague. *Id.* at 44.

The Court crafted an elegant solution. Because the phrase “relative to a clearly identified candidate” left speakers with no opportunity to know in advance whether their conduct was regulated political speech or unregulated issue speech, the Court was compelled to narrow the interpretation of the phrase. To avoid vagueness, FECA had to “be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.” *Id.* To provide clarity to this phrase, the Court included the highly influential footnote 52, which limited regulable speech to “express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [and] ‘reject.’” *Id.* at 44 n. 52.

The key, then, is recognizing that the line between discussion of issues and discussion of candidates is, at best, blurry. The harm of vague regulation is its potential to cause a would-be speaker to keep silent due to uncertainty about how the law will be applied. Thus, to remain within

the bounds of the *Buckley* decision, regulation should err on the side of avoiding such chill, by providing objective rules that can be uniformly applied and providing clarity in a manner that maximizes the free exchange of ideas guaranteed by the First Amendment. As Chief Justice Roberts has noted, in such cases “the tie goes to the speaker, not the censor.” *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 474 (2007) (“*WRTL II*”) (Roberts, C.J., concurring).

In addition to drawing a line between issue speech and political speech, the Supreme Court has recognized the need to protect freedom of association from undue and excessive disclosure, most recently in *Americans for Prosperity Foundation v. Bonta*. 594 U.S. \_\_\_, 141 S.Ct. 2373 (2021); See also, e.g., *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958).

Indeed, *Buckley* also has much to say about protecting the freedom of association in the campaign finance context. Disclosure of information about individuals who seek to involve themselves with a group – or even with a politician – implicates the freedom of association protected by the First Amendment. *Buckley*, 424 U.S. at 75.

The iteration of FECA considered by the *Buckley* Court required regular reporting and disclosure by “political committees” – organizations that made “contributions” and “expenditures.” *Id.* at 79. The definition of “expenditures,” however, was vague and implicated the confluence of spending money on issues and spending money to support candidates. *Id.* Fortunately, *Buckley* had already carefully crafted an interpretation of FECA to ensure that issue speech was not unnecessarily entangled with the regulation of political speech. *Id.* at 44.

To prevent the disclosure requirement from reaching groups that merely mentioned candidates in the context of issue speech, the *Buckley* Court construed the relevant provisions to apply only to “organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” *Id.* at 79. Expenditures by groups under the control of a candidate or with “the major purpose” of supporting or opposing a candidate “are, by definition, campaign related.” *Id.* This language, now known as “the major purpose test,” narrowed the reach of FECA’s disclosure provisions to protect the associational freedoms of individuals.

As applied to individuals and groups that did not have “the major purpose” of political activity, the *Buckley* Court narrowed the definition of “expenditures” in the same way – “to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.” *Id.* at 80. To describe the term “expressly advocate,” the Court simply incorporated the examples already listed in footnote 52. *Id.* at 80 n. 108 (incorporating *id.* at 44 n. 52).

## **V. Involving the IRS in Policing Speech May Threaten Tax Compliance**

It is particularly important that the IRS not be converted into a campaign finance enforcement agency. The IRS is responsible for the tax code, and the history of presidential abuse of the IRS and the tax code – discussed above – to target political opposition, through both Democratic and Republican administrations, make it important that Congress not look to the IRS to address perceived issues in campaign finance.

The collection of trillions of dollars in taxes each year is based on what the IRS calls the self-assessment feature of the tax laws, where citizens and businesses calculate and pay their taxes. If the agency develops a reputation as a partisan lapdog of the party in power, that could lead to more citizens cheating on their taxes, or simply failing to file, with potentially disastrous implications for the budget deficit. If the level of compliance with individual income tax laws alone were to drop just one percentage point due to a decline in the Service's reputation for fairness, that could cost the government over \$250 billion in tax collections over a 10-year period.

Contributions to 501(c)(4) organizations are not tax deductible, and the tax liability of existing 501(c)(4)s wouldn't significantly change if they were reclassified as political committees. Since the IRS's regulation of these groups has essentially nothing to do with tax collection, efforts to increase IRS regulation of political speech make little sense and are unrelated to the Service's mission of impartial revenue collection.

This dual regulatory scheme between the FEC and IRS has created confusion among nonprofit groups and the public. It would be a mistake to continue to ask the IRS to play any role – let alone an even greater role – in the enforcement of campaign finance laws.

## **VI. The Nature and Extent of the Supposed “Dark Money” Issue**

The decisions of the United States Supreme Court in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (allowing corporations and unions to make independent expenditures in political campaigns from general treasury funds) and of the United States Court of Appeals in *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (en banc, 2010) (allowing independent expenditures to be made from pooled funds not subject to PAC contribution limits) have brought a renewed focus to the issue of disclosure of political spending. The claim has largely been that the public lacks information on the sources of vast amounts of political independent spending. This concern, while serious if true, has been artificially ramped up by many mistaken comments in the media about “secret” contributions to campaigns, as well as a widely held but mistaken belief that under *Citizens United*, corporations and unions may now contribute directly to candidate campaigns. In any case, information about political donors, it is believed, can help guard against officeholders becoming too compliant with the wishes of large spenders, and provide information that might be valuable to voters in deciding for whom to vote and how to evaluate political messages.

There have been concerns that nonprofit organizations formed under Section 501(c)(4) of the Internal Revenue Code have been engaging in extensive political campaigns using “secret money.” This issue, however, is not new. Express advocacy in favor of or against candidates was allowed for certain types of 501(c)(4) organizations even before *Citizens United*, as a result of the Supreme Court's ruling in *Federal Election Commission v. Massachusetts Citizens For Life* (“*MCFL*”), 479 U.S. 238 (1986). That decision allowed qualified nonprofit corporations to conduct express advocacy through independent expenditures. These groups were significant and growing before the *Citizens United* decision and included groups such as the League of Conservation Voters and NARAL. In addition, even groups that did not qualify for the exemption pursuant to *MCFL* could and did run hard-hitting issue campaigns against candidates.

For example, in 2000, the NAACP Voter Action Fund, a nonprofit social welfare group organized under Section 501(c)(4) of the tax code, ran the following ad:

*Renee Mullins (voice over):* I'm Renee Mullins, James Byrd's daughter. On June 7, 1998 in Texas my father was killed. He was beaten, chained, and then dragged 3 miles to his death, all because he was black. So when Governor George W. Bush refused to support hate-crime legislation, it was like my father was killed all over again. Call Governor George W. Bush and tell him to support hate-crime legislation. We won't be dragged away from our future.

This thirty-second TV spot, featuring graphic reenactment footage, began running on October 25, 2000, just a few days before the 2000 presidential election. See Bradley A. Smith, *Disclosure in a Post-Citizens United Real World*, 6 U. St. Thomas J.L. & Pub. Pol'y 257 (2012).

This ad was perfectly legal to run at any time before 2003, with no donor disclosure and remained legal to run under current disclosure laws more than 30 days before a primary or 60 days before a general election between 2003 and 2007. It probably also could have been run, with no donor disclosure, at any time after the Supreme Court's 2007 decision in *Wisconsin Right to Life v. Federal Election Commission*, 551 U.S. 449 (2007).

It should also be noted that neither the *Citizens United* nor *SpeechNow.org* decisions struck down any disclosure laws; nor has Congress or the FEC loosened any disclosure rules in place at the time those two decisions were issued in the spring of 2010. There has been no change in the laws governing disclosure of political spenders and contributors.

Despite the focus on "dark money," "secret money," and "undisclosed spending," in fact, the United States currently has more political disclosure than at any time in its history. Candidates, political parties, PACs, and Super PACs disclose all their donors beyond the most *de minimis* amounts. This disclosure includes the name of the group, individual, or other entity that is contributing, the date on which it occurred, and the amount given. Indeed, these entities also report all their expenditures.

Current law also requires reporting of all independent expenditures over \$250, and of "electioneering communications" under 2 U.S.C. §30104(f). 501(c)(4) social welfare organizations must disclose donors who give money earmarked for political activity. All this information is freely available on the FEC's website.

All broadcast political ads (like, in fact, all broadcast ads, political or not) must include, within the ad, the name of the person or organization paying for the ad. Thus, it is something of a misnomer to speak of "undisclosed spending." Rather, more precisely, some ads are run with less information about the spender, and contributors to the spender, than some might think desirable. This recognition is important to understanding the scope of the issue and the importance of measures that seek to require more disclosure.

Furthermore, despite record campaign spending, 2020 saw less "dark money" than any election since *Citizens United*. After peaking in 2012 with an all-time high of \$312.5 million (still under 5% of that year's total spending on federal campaigns), "dark money" has dwindled, bottoming out in the 2020 cycle at roughly \$102 million. That equals merely 0.73% of the election campaign's estimated \$14 billion price tag. It equates to less than 4% of independent spending in the 2020 cycle.

## **VII. Certain Nonprofits Properly Engage in Limited Political Speech**

Under *Buckley*, an organization becomes a political committee only if its “major purpose” is the election or defeat of candidates, as indicated by expenditures expressly advocating the election or defeat of a candidate. These political committees operate under section 527 of the Internal Revenue Code. Meanwhile, 501(c)(3) organizations are restricted from any candidate advocacy.

There must be, therefore, some other category for organizations that do some candidate advocacy, but for which it is not the group’s “major purpose.” These are, indeed, 501(c)(4), (c)(5), and (c)(6) organizations—specifically, social welfare organizations, unions, and trade associations. To attempt to regulate such organizations as political committees, or to prohibit them from all candidate advocacy, would be unconstitutional, forcing advocacy groups to either have political advocacy as their major purpose or to engage in none at all.

## **VIII. The DISCLOSE Act Would Chill First Amendment-Protected Activity and Violate the Privacy of Nonprofit Organizations and Their Supporters**

Since 2010, members of Congress have introduced various iterations of the DISCLOSE Act, advertised as a solution to the alleged “flood” of “dark money” unleashed by *Citizens United*. The bill has failed in every session of Congress for the past decade largely because groups across the ideological spectrum consistently speak out against its constitutional infirmities. Yet, the latest version the bill would burden freedom of speech and association *more* broadly than most of the previous, failed versions.

The bill would greatly increase the already onerous legal and administrative compliance costs, liability risk, and costs to donor and associational privacy for civic groups that speak about policy issues and politicians. Organizations and their supporters will be further deterred from speaking or be forced to divert additional resources away from their advocacy activities to pay for compliance staff and lawyers. Some groups will not be able to afford these costs or will violate the law unwittingly. Less speech by private citizens and organizations means politicians will be able to act with less accountability to public opinion and criticism. Consequently, citizens who would have otherwise heard their speech will have less information about their government.

The DISCLOSE Act would unconstitutionally regulate speech that mentions a federal candidate at any time under a vague, subjective, and dangerously broad standard that asks whether the speech “promotes,” “attacks,” “opposes,” or “supports” (“PASO”) a candidate. This standard is impossible to understand and would likely regulate any mention of an elected official who hasn’t announced their retirement.

Notably, the PASO standard comes from a provision in the 2002 Bipartisan Campaign Reform Act (a.k.a. “McCain-Feingold”) that regulates the funds state and local party committees may use to pay for communications that PASO federal candidates. The Supreme Court upheld the PASO standard against a challenge that it is unconstitutionally vague on the basis that it “clearly set[s] forth the confines within which potential *party speakers* must act” because “actions taken by the political parties are presumed to be in connection with election campaigns” (emphasis added). Thus the DISCLOSE Act would apply a standard written to apply to party communications

to most nonprofits despite the fact that the presumption that expenditures are for election campaigns is inapplicable to communications by nonprofit groups.

Numerous other components of the DISCLOSE Act are problematic, as both a matter of policy and constitutional law. Specifically, these provisions would:

- Compel groups to declare on new, publicly filed “campaign-related disbursement” reports that their ads are either “in support of or in opposition” to the elected official mentioned, even if their ads are neither. This form of compulsory speech forces organizations to declare their allegiance or opposition to public officials, provides false information to the public, and is unconstitutional.
- Force groups to file burdensome and likely duplicative reports with the FEC if they sponsor ads that are deemed to PASO the president or members of Congress (except those who are not running for federal office again) in an attempt to persuade those officials on policy issues.
- Force groups to publicly identify certain donors on reports for issue ads and on the face of the ads themselves. In many instances, the donors being identified will have provided no funding for the ads. Faced with the prospect of being inaccurately associated with what, by law, would be considered (unjustifiably, in many or most instances) “campaign” ads in FEC reports and disclaimers, many donors will stop giving to nonprofits and many of these groups will self-censor.
- Focus public attention on the individuals and donors associated with the sponsoring organizations rather than on the communications’ message, exacerbating the politics of personal destruction and further coarsening political discourse.
- Force organizations that make grants to file their own reports and publicly identify their own donors if an organization is deemed to have “reason to know” that a donee entity has made or will make “campaign-related disbursements.” This vague and subjective standard will greatly increase the legal costs of vetting grants and many groups will simply end grant programs.

## **Conclusion**

Tax-exempt organizations operating under sections 501(c)(4), (5), and (6) of the Internal Revenue Code have a statutorily and constitutionally valid role to play in the discussion of both electoral politics and, more broadly, public affairs. Experience has shown that the Internal Revenue Service is not an appropriate vehicle to attempt to regulate the political activity of these organizations, and that efforts to involve the IRS in the enforcement of regulations of political speech has led to abuse and scandal – from the administration of Franklin Roosevelt through the IRS targeting scandals of this past decade.