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The Bright Lines Project: Clarifying IRS Rules on Political Intervention

Drafting Committee Explanation

Interim Draft
May 8, 2014

Built upon five years of discussion and feedback, a committee of nine tax law experts, chaired by Greg Colvin (with Beth Kingsley as vice chair), has developed a set of six proposed rules which are designed to clarify the IRS regulations governing nonprofit organizations' political activities. This document contains the proposed rules, as well as explanations and a number of examples prepared by Committee members and Public Citizen staff.

The Colvin Committee also includes Eve Borenstein, Terence Dougherty, Rosemary Fei, Jim Joseph, Abby Levine, John Pomeranz, and Ezra Reese. Craig Holman and Lisa Gilbert, of Public Citizen's Congress Watch, have also contributed. Others, too numerous to mention, have offered helpful comments and suggestions that have influenced the proposal and this explanation.

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This draft represents the current state of the project as of December, 2013.

Introduction

Last year, a report by the Treasury Inspector General for Tax Administration revealed that over a two year period, improper search criteria were used by inadequately supervised IRS agents to select the exemption applications of 501(c)(4) organizations, as well as some 501(c)(3), (c)(5), and (c)(6) groups, for special scrutiny. The criteria were intended to identify advocacy organizations that might be involved in political campaign activity, but some of the terms used (e.g. "tea party") were biased in that they were more likely to refer to conservative than to liberal applicants. It has become apparent that a major factor in this systematic breakdown of the review process was the lack of clear, neutral, objective standards by which IRS employees and managers could determine whether applicants were engaged in political intervention.

In other words, the difficulty experienced in the nonprofit world, with many organizations very unsure of how to comply with the IRS' vague "facts and circumstances" approach to cases of political intervention, was mirrored inside the IRS, with line staff concocting their own selection criteria and managers unable to communicate useful guidance to them.

The Bright Lines Project aims to remedy both the internal and external problems created by the lack of a framework of definitions, exceptions, and analytical steps for recognizing and regulating political intervention within the tax-exempt sector.

In the wake of the *Citizens United* court decision (588 U.S. 310 (2010)), it seemed certain that there would be increased interest in how federal tax law defines and limits political activity by exempt organizations. Events of the 2012 campaign confirmed this. We have a clear indication from the majority of the Supreme Court that they are not happy with the chilling effect on First Amendment speech of complex rules with "open-ended rough-and-tumble" factors.

We don't know whether the Court would, in some future test case, invalidate the 1954 statutory ban on political campaign intervention by 501(c)(3) organizations, or uphold it based on the "subsidy" theory of *Regan v. Taxation with Representation of Washington,* 461 U.S. 540 (1983). But even if the subsidy theory would support the prohibition on charitable electioneering, the complex, multi-factor, open-ended "facts and circumstances" test that the IRS uses to interpret the prohibition must now be considered highly vulnerable.[1]

We think it's time to move to safe harbors, bright lines, predictability, simplicity and ease of understanding. Our draft proposal for new IRS regulations to redefine "political intervention" (as an alternative to those proposed by IRS and Treasury on November 29, 2013) is summarized in six rules below.

Our central principle is this: the federal tax definition of political speech, aimed at withdrawing the subsidy of tax-exemption from political candidate-related activity, reaches beyond express advocacy and covers all speech that supports or opposes a candidate for elective public office. That broader test should be modeled on the test for lobbying activity that the IRS adopted in 1990, successfully drawing bright lines—any communication to any part of the electorate that (a) refers to a clearly identified candidate and (b) reflects a view on that candidate. Safe harbor exceptions should be constructed for commentary aimed at a public official's performance in office, for candidate comparisons based on an equal opportunity to speak, for responses to candidates who attack an organization or take aim at its issues, and for personal, oral expressions of opinion that may occur at an organization's meetings. Criteria distinguishing partisan from nonpartisan voter engagement activities should be enunciated.

[1]We use "political intervention" as a consistent term of art to refer to candidate-related activity that is prohibited by Section 501(c)(3), may not be the primary purpose of other 501(c) organizations, is subject to the proxy tax under Section 6033(e), and is referenced elsewhere in the Internal Revenue Code.

Now, the IRS "facts and circumstances" approach is vague and ambiguous, most of the time. We seek a new definition of political intervention that is clear and predictable, most of the time.

The Six Rules

1. Scope: Federal, state, local, and foreign election campaigns are included. "Candidate" is defined as a person who offers himself or herself for election to public office or whose election the organization expressly proposes, supports, or opposes.

2. Application: The definition applies consistently to (a) the prohibition on IRC 501(c)(3) organizations and the tax penalties under 4955 and 4945, (b) political intervention that is not within exempt purposes for other 501(c) groups, (c) the proxy tax paid by some 501(c) entities under 6033(e), and (d) the denial of a business expense deduction under 162(e)(1)(B).

3. *Per Se* Intervention: It is political intervention to expressly advocate:

(a) the election, defeat, nomination, or recall of a clearly-identified candidate;

(b) the election or defeat of candidates affiliated with a specific political party;

(c) that voters select candidates for support or opposition based on one or more criteria that clearly distinguish certain candidates from other candidates;

(d) the making of contributions to a candidate, party, or any organization that has the primary purpose of engaging in political intervention.

4. Candidate Advocacy: If an organization's action is a form of communication, other than *per se* intervention described above, the threshold definition of political intervention is: any communication to any part of the electorate that meets a two-part test --

(a) it refers to a clearly-identified candidate and

(b) it reflects a view on that candidate.

A communication (not described in Rule 3 above) that lacks either element is not intervention. Four safe harbor exceptions are available, but only if the communication does not consist of paid mass media advertising (defined on pages 14-15):

(i) **Influencing Official Action**: Commentary on a public official that has a direct, limited, and reasonable relationship to specific actions the official may yet perform within his or her current term of office, without mention of any election or voting, or the person's candidacy or opponent.

(ii) **Comparing Candidates**: Voter education that compares two or more candidates for an office, and may include the organization's views on such issues, if the communication consists solely of content in which the time, text, and/or space is offered in equal shares to each of the participating candidates,

and the organization's share of content is no greater than the share available to any of the participating candidates. The opportunity to participate must be given, including a full description of the opportunity and a copy of the organization's content, to all current candidates (or to those meeting an objective threshold of viability) for election (or nomination) to the office a reasonable time in advance of the final preparation of the communication (which in no case may be less than 72 hours).

(iii) **Self-Defense**: A response, as limited below, by an organization to a public or publicly-reported statement by a candidate that either (a) attacks the organization itself, or (b) comments upon a specific public policy position that the organization has taken publicly in furtherance of its exempt purpose within the prior year, or (c) results in press inquiries to the organization that were not solicited by the organization in the wake of the candidate's statement. The response by the organization must be educational, limited topically to addressing the candidate's statement, and as to (a) or (b), disseminated in a manner commensurate in medium and scale, and proximate in time, to the publicity of the candidate's statement, and as to (c), limited to dissemination to the requesting press organization.

(iv) **Personal, Oral Remarks at Official Meetings:** Oral remarks made by anyone (other than a candidate) who is present in person at an official meeting of an organization held in a single room or location, so long as no announcement of the meeting refers to any candidate, party, election, or voting. This exception covers only oral remarks about candidates made by and to persons in attendance, not any other form of communication of those remarks, whether written, electronic, recorded, broadcast, or otherwise transmitted. A prominent disclaimer must be made to those attending, stating that such remarks are the speaker's personal opinion and are not made on behalf of the organization, and that the speaker is not advocating any of the actions set forth in Rule 3.

Evidence of intent in relation to the speech is irrelevant. A communication that refers to and reflects a view on a candidate, if not within an exception or specifically allowed under an existing Revenue Ruling or other federal tax authority, is subject to further analysis under Rule 6 below in which the organization bears the burden of proof to show why the speech is not political intervention.

Speech covered by Rule 4 includes "voter engagement," defined as communications directed to potential voters, offering to assist or explicitly encouraging them to register or vote in an election for public office. Voter engagement is political intervention if it is covered by Rule 3, it refers to and reflects a view on a candidate or political party, or it is targeted based on the voter's expressed candidate or party preference. Voter engagement is not political intervention if it meets both a targeting and a content test. It must be untargeted, targeted to the organization's natural constituency, or targeted to voters under-represented in prior elections. As to content, any references to specific contests for

a public office or to public policy issues must be neutral, that is, not indicate any preference for a candidate or party, and, if any view is reflected on a candidate, it is within the safe harbor for comparing candidates in (ii) above. All other voter engagement is subject to further analysis under Rule 6 below to determine if it is or is not political intervention.

5. Use of Resources: This rule covers only transactions and activities that contain no significant element of speech. It is political intervention to provide any of the organization's resources, whether monetary or in-kind, goods, services, or facilities, tangible or intangible, by gift, loan, sale, rental, or any other method of transfer to another person or entity, if the transferee uses such resources to support or oppose any candidate's election to public office, if such use is reasonably foreseeable, and if the transferor has not taken reasonable steps to prevent such use.

Such transfers are not intervention, however, if the transfer is (a) made at no less than fair market value, (b) similar to other transactions conducted by the organization and (c) without preference for or against any candidate. Any other transfer recognized under applicable campaign finance law as a reportable contribution to a candidate for elective public office, or to an organization that has the primary purpose of engaging in political intervention, is political intervention.

Other uses of an organization's resources (transferred or not) in support of or in opposition to a candidate, if not specifically allowed under an existing Revenue Ruling or other federal tax authority, are subject to further analysis under Rule 6 below in which the organization bears the burden of proof to show why the use of resources is not political intervention.

6. Facts and Circumstances: Communications that reflect a view on a candidate, do not come within an exception, and are targeted to voters in states, districts, or other locations where close election contests are occurring, are conclusively political intervention. In other cases, evidence of other facts or circumstances, such as timing, the range of issues discussed, disclaimers and disclosures, the organization's history, the impartiality of its methods, or corrective steps taken, shall be considered only in the organization's defense:

(a) to meet its burden of proof that intervention did not arise from its communications or use of resources, by showing that the conduct furthered a proper exempt or business purpose and was unrelated to intervening in the campaign of any candidate for public office or

(b) as mitigating factors affecting the penalty or remedy to be imposed upon violations.

Reasoning, Implications, Examples

Taking each of the six rules in turn:

***1. Scope**: Federal, state, local, and foreign election campaigns are included. "Candidate" is defined as a person who offers himself or herself for election to public office or whose election the organization expressly proposes, supports, or opposes.*

A. Section 501(c)(3) of the Internal Revenue Code (IRC) states that a charitable organization must "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office. No change to that brief statutory definition of "political intervention" is needed. It is understood that "campaigns" refers to electoral campaigns in which voters cast ballots to elect, nominate, recall, or confirm individuals seeking to hold public office.

B. The current Treasury Regulation interpreting this prohibition, set forth in § 1.501(c)(3)-1(c)(3)(iii), consists of only 113 words:

> An organization is an *action* organization if it participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office. The term candidate for public office means an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local. Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate 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.

C. This regulation tells us very little beyond what is in the statute, only that:

1) Intervention can be direct or indirect.

2) A candidate is an individual who offers himself or is proposed by others as a contestant for elective public office.

3) Such office may be federal, state, or local.

4) Statements for or against a candidate may be oral or written.

D. The current definition of "candidate" is too broad, because it reaches anyone who may be "proposed by" someone else as a contestant. At any given time, there are dozens if not hundreds of prominent actors, business executives, athletes, governors, senators, authors, and other public figures that "others" have stated ought to run for president. The same is no doubt true in cities and towns as people mention the names of individuals who ought to be the next mayor. Mischief is not inconceivable—someone may be proposed as a candidate for a public office simply to prevent charitable organizations from promoting or criticizing them in a particular community.

E. Therefore, a brighter-line definition of "candidate" is needed, reaching only those who have announced themselves as candidates and those "whose election the organization expressly proposes, supports, or opposes." Political intervention, then, would only pertain to unannounced candidates if the organization itself expressly took a position favoring or disfavoring their election to office. We decided against following the widely-disparate definitions used by various jurisdictions to determine who has qualified to appear on a ballot or who must file campaign finance reports (although any candidate who is on the ballot or has registered or maintained a campaign committee—actions tantamount to announcing their candidacy—would almost certainly meet the standard of "offers himself"). Thus, to offer oneself as a candidate does not turn on whether the person makes a formal announcement; to be legally regarded as a candidate under applicable election law would be enough. This standard can be applied consistently across all jurisdictions. It probably means that most members of the U.S. House of Representatives are candidates at all times, since they maintain campaign committees unless they plan to resign or not to run for re-election.

F. The current regulation does not mention foreign elections. Yet American-based organizations do sometimes get involved in foreign elections, including in Israel, South Africa, and the recent example of a U.S. social welfare group favoring the election of a candidate in South Korea which the IRS denied 501(c)(4) exemption due to excessive political intervention (PLR 201214035). The regulation should encompass candidate elections in countries outside of the United States. That is confirmed by the requirement under Revenue Ruling 92-94 that a foreign organization, in order to receive a public charity equivalency determination to be relied upon by American foundations, be subject to a prohibition on political candidate campaign intervention in their country.

***2. Application**: The definition applies consistently to (a) the prohibition on IRC 501(c)(3) organizations and the tax penalties under 4955 and 4945, (b) political intervention that is not within exempt purposes for other 501(c) groups, (c) the proxy tax paid by some 501(c) entities under 6033(e), and (d) the denial of a business expense deduction under 162(e)(1)(B).*

A. In proposing bright line rules for political intervention under IRC 501(c)(3), we intend that the same definition be applied universally throughout the Internal Revenue Code where political campaign activity is subject to special tax treatment. That includes IRC 4945(d)(2), imposing excise taxes on amounts paid or incurred by private foundations "to influence the outcome of any specific public election" and IRC 4955, imposing excise taxes on political intervention by public charities.

B. IRC 501(c)(4) social welfare organizations, as well as (c)(5) labor unions, and (c)(6) trade associations, are required to primarily engage in promoting social welfare (or qualifying 501(c)(5) or 501(c)(6) functions) to qualify for federal tax exemption – often referred to as a "primary purpose" test. Under Treasury Regulation § 1.501(c)(4)-1(a)(2), the promotion of social welfare does not include political intervention. Thus, the same

definition of political intervention should be used to describe the non-qualifying activity for the 501(c)(4) and other non-charitable exempt organizations. Beyond (c)(5) and (c)(6) organizations, there are (c)(7) social clubs and more than twenty other non-charitable categories, of which only (c)(29) health care organizations have a prohibition on political intervention.

C. However, this project does not seek to define the quantity of political intervention that would be permissible and consistent with tax exemption for these non-charitable 501(c) categories. There is a range of views on that subject in the nonprofit world, from those who translate "less-than-primary" into 49% of annual expenditures (an approach that seems to be tacitly accepted by the IRS at present) to those who are distressed at the amount of anonymous "dark money" flowing through (c)(4)'s for political intervention and insist that "exclusively" in the statutory phrasing of 501(c)(4) should permit no substantial political spending or none at all. We focus only on the qualitative definition of political intervention and welcome the participation of those with widely differing positions on the quantitative debate.

D. Expenditures (mainly by for-profit businesses and their associations) that are taxable (under IRC 6033(e)) and non-deductible (under IRC 162(e)(1)(B)) include both lobbying activities (which are reasonably well-defined under existing regulations) and political intervention, which is not. Our universal tax definition of political intervention should be applied with equal force to the business realm.

E. We have considered that the one exception to universal application of our definition might be Section 527, both as to what constitutes an exempt activity for a Section 527 organization, and for what activities by other types of exempt organizations do not generate expenditures subject to tax under Section 527(f). For historical reasons related to the effort in 1976 to follow a pattern established by the Federal Election Campaign Act, and language that reaches beyond elections to appointive and political party offices, Section 527 has not been congruent with the other provisions that apply to political activity in the Internal Revenue Code. In practice, anything with a "nexus" to the candidate selection process has come within Section 527--even activities that might otherwise be deemed non-political, acceptable, and unlimited for 501(c) entities (*see* PLR 199925051 involving ballot measures). Section 527 is the least advantageous tax-exempt status, and so more borderline activities have been embraced. In part, the expansive "nexus" has resulted from language in Section 527, discussed below, that seems to effectively prevent a 527 political organization from engaging in anything more than an insubstantial degree of non-political activity.

F. Nonetheless, while leaving open the possibility that a Section 527 organization may, under the "nexus" test, be permitted to treat as "political" a broader set of activities than would other entities, we believe the Section 527 definition should be aligned with the definition of political intervention at least to the extent that anything classed as political intervention under these rules would also be considered appropriate Section 527 activity. Similarly, we recognize that if our proposal is adopted via rulemaking rather than legislation, the covered offices for Section 527 organizations will continue to be

broader than the elected public office to which political intervention applies. Nonetheless, we consider it beneficial to apply for purposes of Section 527 a similar standard to assessing communications and other activities related to those covered offices, rather than maintaining the current "facts and circumstances" analysis. Thus, Section 527 activity would include political intervention, plus advocacy relating to appointive and other offices covered in that Code section that meets the same tests, plus any activity with respect to which the organization can reasonably assert a nexus to its political purposes.

G. In the event that our proposal is considered not just by the IRS but also by Congress, we would support extending our bright line rules in the form of statutory amendments to Section 527, so that the tax-exempt purpose (which could be more sensibly renamed “political function”) of a 527 organization would be congruent with the definition of political intervention that would apply throughout the rest of the Internal Revenue Code. Doing so would remove the troubling divergent elements in the Section 527 definition (such as the unwarranted and intrusive coverage of appointive offices) and better define expenditures subject to tax under Section 527(f) in order to simplify recordkeeping and compliance for affected 501(c) organizations. However, we recommend continuing the exemption of internal member communications and indirect fundraising and administrative costs, currently tax-free for 501(c) groups under the 527 regulations. We also suggest that any organization that cannot qualify for 501(c) tax-exemption due to excessive political activities (however that line may be drawn by the IRS and/or by Congress) should be able to qualify as a 527 organization.

H. Without our suggested amendments to Section 527, an organization must effectively engage almost exclusively in political activities to be covered. This results from the wording of Section 527(c)(3), that provides an exemption for a political organization from income tax on four types of traditional political income (donations, dues, etc.), but only “to the extent such amount is segregated for use” for its “exempt” (political) function. To meet the segregation requirement, any non-political activity must be “insubstantial” for the 527 exemption to be valid. This creates a gap, where organizations fall if they undertake too much political activity to qualify for exemption under Section 501(c) but not enough to qualify under Section 527. As a policy matter, we believe that an organization willing to comply with the disclosure rules of Section 527 and accept its very limited tax exemption should not be disqualified for that status by virtue of engaging in an activity (such as lobbying or other policy advocacy) that by itself could qualify the organization for exemption under a different and more beneficial Code section. Finally, the political function of a 527 entity could be worded so as preserve its option to include any activity that it claims to have a reasonable nexus to its political function.

I. Our initial draft of amendments to Section 527, to bring it into better alignment with the political intervention provisions found in the rest of the Code, is attached as Exhibit A. By treating an organization as exempt under Section 527 if it engages in too much political intervention to qualify for 501(c) exemption, this amendment would reduce the need for a broader interpretation of the 527 exempt function, which is driven by a desire to avoid having the troublesome gap between 527 and 501(c).

***3. Per Se Intervention**: It is political intervention to expressly advocate:*

(a) the election, defeat, nomination, or recall of a clearly-identified candidate;

(b) the election or defeat of candidates affiliated with a specific political party;

(c) that voters select candidates for support or opposition based on one or more criteria that clearly distinguish certain candidates from other candidates;

(d) the making of contributions to a candidate, party, or any organization that has the primary purpose of engaging in political intervention.

A. Historically, the IRS interpretation of the ban on political intervention by charities has been widely understood to go beyond the election law concept of "express advocacy," to be absolute and prohibit all speech favoring or disfavoring a candidate. However, it is important to capture those instances of speech that do constitute express advocacy as a starting point for determining what speech undeniably should be within the definition of political intervention, without exception and without further consideration of any facts and circumstances.

B. The type of *per se* intervention in (a) above is intended to be congruent with the regulation created by the Federal Election Commission defining "express advocacy"[2] as a communication that expressly advocates the election or defeat of a clearly identified candidate if it:

1) uses phrases such as 'vote for the President,' 're-elect your Congressman,' 'support the Democratic nominee,' 'cast your ballot for the Republican challenger for U.S. Senate in Georgia, 'Smith for Congress,' 'Bill McKay in '94;' or

2) uses electioneering words in general phrases followed by a means of identifying specific candidates as targets, such as 'vote Pro-Choice' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, 'vote against Old Hickory,' 'defeat' accompanied by a picture of one or more candidate(s), 'reject the incumbent;' or

3) uses campaign slogan(s) or individual word(s), which in context, can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'

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[2]The concept of "express advocacy" is drawn from the key Supreme Court campaign finance ruling in *Buckley v. Valeo*, which held that to avoid constitutional infirmity restrictions on corporate communications under the Federal Election Campaign Act ("FECA") must be read to apply only to such "express advocacy." 424 U.S. 1 at 43-44.

The IRS definition of political intervention must work effectively at the state and local levels, not just the federal level. Thus, court interpretations of "express advocacy" that arise with respect to state and local campaign finance laws are relevant, unified perhaps by the necessity to pass muster under the U.S. Constitution. It is important to bear in mind, however, that while these decisions may in many cases be setting the outermost reach of the relevant campaign finance laws, in the tax context they would only be defining one type of activity that is considered political intervention.

C. "Express advocacy" that we treat as *per se* intervention also includes the functional equivalent of express advocacy: communications that are susceptible of no reasonable interpretation other than a call to vote for or against a candidate, even if some other kind of action besides voting for or against a candidate is also encouraged. Thus, in our view, "dual function" communications that include both the functional equivalent of express advocacy plus an ostensible grass roots lobbying call to contact an incumbent legislator could not avoid treatment as *per se* intervention.

Example 1

An organization runs a newspaper ad with the following text:

> The President of the United States continues degrading the electoral process and lessening the prestige of the office.
>
> He continues to cultivate the fears, not the hopes, of the voting public by suggesting the choice is between "peace and war," "black or white," "north or south," and "Jew or Christian." His meanness of spirit is divisive and reckless McCarthyism at its worst. And from a man who once asked, "Why Not the Best?"
>
> It is an attempt to hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT.

This is political intervention because it contains explicit campaign phrasing ("four more years") that is not subject to a reasonable interpretation other than express advocacy.

Example 2

An organization in State X runs a television advertisement with the following text:

> What kind of leader is Senator Doe? Ineffective. Ultra-liberal. Unrepresentative of our state's values. Senator Doe voted for increasing Tricare premiums to nickel and dime America's heroes. Veterans and service men and women know better than to trust Senator Doe. This November: support new voices, support your military, support State X values."

This is also political intervention because it contains explicit electoral references ("this November") and so is not reasonably interpreted as anything but a call to vote against Senator Doe.

D. Internal Revenue Code provisions on political intervention refer only to "any candidate for public office" (singular, not plural), not to any undefined group of candidates, such as a political party. Party labels are often used in legislative and other policy discussions, and should not be automatically treated as a reference to candidacy. However, where a political party label is used to identify specific candidates or groups of candidates in a message expressly advocating their election or defeat, this is *per se* intervention. Other speech that favors or disfavors a party does not necessarily come within the definition of political intervention. (There is a second federal tax doctrine that captures situations where a charity provides significant support to a political party: more than incidental "private benefit" to a private interest violates 501(c)(3) under the *American Campaign Academy* decision, which found that a campaign school operated for the benefit of the Republican Party was not charitable. *See American Campaign Academy v. Commissioner of Internal Revenue,* 92 T.C. 1053 1076(1989))

E. So, a charity could make statements for or against Democratic or Republican reforms or ideology or legislative conduct without violating 501(c)(3), but favoring election of "the Democrat" or "the Republican" for president, or favoring a change in the party in power is *per se* political intervention in support of a candidate. Likewise, statements such as "vote Democratic" or "vote Republican" without reference to a specific office, but in the context of an election in which candidates representing each party are competing for various offices, are *per se* intervention.

F. Considerable debate has been generated by the IRS position as described by the court in the *Catholic Answers* case regarding the legitimacy of "litmus tests" in which an organization expressly advocates selecting or rejecting candidates based on certain criteria, but without naming any such candidates and without referring to a specific election contest where it is clear which candidate is identified. *See Catholic Answers Inc. v. U.S.,* 2009 WL 3320498, 9-10 (S.D. Cal. 2011) *aff'd* 438 Fed.Appx. 640 (9th Cir. 2011). Instructing people how to vote in this way should be *per se* political intervention. A charity should be able to suggest that voters consider such features as the candidate's military background, position on abortion, views on climate change, age, willingness to raise taxes, ethnicity, etc., so long as it does not expressly advocate voting for or against them based on those criteria. "Deny communion to pro-choice candidates" would not be *per se* intervention. "No good Christian should vote for a pro-choice candidate" would be *per se* intervention.

G. Likewise, "voter pledges," where an organization asks voters to pledge not to vote for a candidate who would raise taxes, or to vote for a candidate who favors single-payer health care, are express advocacy under part (c) of the standard above and therefore *per* se political intervention.

H. Finally, even if the message does not call for the election or defeat of a candidate, it should be *per se* intervention to expressly advocate for the making of

contributions to a candidate, party, or Section 527 political organization of any kind, because it is impossible to do so without supporting or opposing one or more candidates for elective office.

4. Candidate Advocacy*: If an organization's action is a form of communication, other than per se intervention described above, the threshold definition of political intervention is: any communication to any part of the electorate that meets a two-part test--*

(a) it refers to a clearly-identified candidate and

(b) it reflects a view on that candidate.

A communication (not described in Rule 3 above) that lacks either element is not intervention. Four safe harbor exceptions are available, but only if the communication does not consist of paid mass media advertising (defined on pages 14-15):

(i) ***Influencing Official Action****: Commentary on a public official that has a direct, limited, and reasonable relationship to specific actions the official may yet perform within his or her current term of office, without mention of any election or voting, or the person's candidacy or opponent.*

(ii) ***Comparing Candidates****: Voter education that compares two or more candidates for an office, and may include the organization's views on such issues, if the communication consists solely of content in which the time, text, and/or space is offered in equal shares to each of the participating candidates, and the organization's share of content is no greater than the share available to any of the participating candidates. The opportunity to participate must be given, including a full description of the opportunity and a copy of the organization's content, to all current candidates (or to those meeting an objective threshold of viability) for election (or nomination) to the office a reasonable time in advance of the final preparation of the communication (which in no case may be less than 72 hours).*

(iii) ***Self-Defense****: A response, as limited below, by an organization to a public or publicly-reported statement by a candidate that either (a) attacks the organization itself, or (b) comments upon a specific public policy position that the organization has taken publicly in furtherance of its exempt purpose within the prior year, or (c) results in press inquiries to the organization that were not solicited by the organization in the wake of the candidate's statement. The response by the organization must be educational, limited topically to addressing the candidate's statement, and as to (a) or (b), disseminated in a manner commensurate in medium and scale, and proximate in time, to the publicity of the candidate's statement, and as to (c), limited to dissemination to the requesting press organization.*

(iv) Personal, Oral Remarks at Official Meetings: *Oral remarks made by anyone (other than a candidate) who is present in person at an official meeting of an organization held in a single room or location, so long as no announcement of the meeting refers to any candidate, party, election, or voting. This exception covers only oral remarks about candidates made by and to persons in attendance, not any other form of communication of those remarks, whether written, electronic, recorded, broadcast, or otherwise transmitted. A prominent disclaimer must be made to those attending, stating that such remarks are the speaker's personal opinion and are not made on behalf of the organization, and that the speaker is not advocating any of the actions set forth in Rule 3.*

Evidence of intent in relation to the speech is irrelevant. A communication that refers to and reflects a view on a candidate, if not within an exception or specifically allowed under an existing Revenue Ruling or other federal tax authority, is subject to further analysis under Rule 6 below in which the organization bears the burden of proof to show why the speech is not political intervention.

Speech covered by Rule 4 includes "voter engagement," defined as communications directed to potential voters, offering to assist or explicitly encouraging them to register or vote in an election for public office. Voter engagement ***is*** *political intervention if it is covered by Rule 3, it refers to and reflects a view on a candidate or political party, or it is targeted based on the voter's expressed candidate or party preference. Voter engagement* ***is not*** *political intervention if it meets both a targeting and a content test. It must be untargeted, targeted to the organization's natural constituency, or targeted to voters under-represented in prior elections. As to content, any references to specific contests for a public office or to public policy issues must be neutral, that is, not indicate any preference for a candidate or party, and, if any view is reflected on a candidate, it is within the safe harbor for comparing candidates in (ii) above. All other voter engagement is subject to further analysis under Rule 6 below to determine if it is or is not political intervention.*

Candidate Advocacy Threshold Speech Rule

A. The threshold speech rule we propose to define "candidate advocacy" goes well beyond *per se* intervention, but uses a logical word formula limited to speech that favors or disfavors a candidate, then determines whether the speech comes within a stated exception, and only if the speech does not, allows application of a "facts and circumstances" analysis in the organization's defense.

B. We are proposing a bright line "gateway" rule for the broader category of political intervention: the "refer to and reflect a view" two-part test. This test has worked well for over twenty years as the definition of lobbying used by the IRS in regulations that apply to public charities, private foundations, as well as business taxpayers and their associations. It works in the election context also, where initiatives, bonds, and other ballot measures are up for a public vote. The following describes the two prongs of this test.

C. The first prong of this speech test requires reference to a clearly-identified candidate—by name, image, title, voice, or other reference that is unambiguous in the context of the communication. Communications that reflect the organization's views about campaign issues are permitted if they don't refer to any candidate and are not otherwise captured by Rule 3. Thus it is not political intervention for an organization to attempt to inject its issues into a campaign; it may make public statements indicating that the candidates should address these issues in a certain way, but not (under Rule 3) explicitly urge voters to support only candidates who take a specific position on a given issue. An organization also may suggest that members of the public ask the candidates for a specific elective office what their views are on an issue of interest to the organization including in communications in which the organization expresses its own view on those issues, so long as it does not expressly advocate that people select candidates using those views as criteria (see Rule 3(c)).

D. The second prong of the threshold speech rule — reflect a view — is a broad standard. It would cover any form of speech (such as endorsements, paid ads, websites, mailings, books, films, sermons, speeches, journals, and signs) that indicates a bias or favoritism of any kind. The view could be positive, negative, or nuanced, and it could be expressed internally to members or externally to the public.

1) A reference would be considered to reflect a view if a reasonable reader/listener/viewer could discern the speaker's candidate preference based on the contents of the communication knowing the contemporary context in which it is made. This does not mean that one needs to assess all relevant "facts and circumstances," but that plainly understandable references to campaign slogans, widely publicized current events, or a campaign's latest gaffe need not be ignored. To avoid reflecting a view, the communication must be completely neutral. Even a statement of undisputed fact could reflect a view if a reasonable person would infer from it that the speaker has a preference for or against the candidate. For instance, statements such as "would take office at an age older than Ronald Reagan was" or "was elected the first female governor of Texas with 65% of the vote" would reflect a view.

2) This standard does not require that the communication reflect a view about the candidate as a candidate explicitly. The rule would cover speech that reflects a view about a candidate, e.g., as an incumbent legislator, as a human being, as a parent, as an orator, or in any other former or current profession or capacity, unless it is clear from the content and context that the favorable or unfavorable view is entirely unrelated to the desirability of his or her election to public office.[3]

[3]Speaking critically of a former actor's performance in a particular film might "reflect a view," but if that person is now a candidate it is not intervention if the film criticism is clearly not relevant to any assessment of him or her as a candidate or officeholder. Another example would be the glowing biography of a member of a charity's board of directors, posted on its website, which need not be removed during the time the person is running for local city or county office.

3) This speech test is stricter than express advocacy, stricter than the functional equivalent of express advocacy, stricter than the *Furgatch* test (*see Federal Election Comm'n v. Furgatch,* 807 F.2d 857, 865 (9th Cir. 1986))., and stricter than the "promote, support, attack, or oppose" rubric that appears in certain federal election laws (*see* the Bipartisan Campaign Reform Act of 2002, Pub. Law 107-155 *codified at* 2 U.S.C. § 431(20)(A)(iii)). Any view reflected, favorable or unfavorable, any bias or tilt toward an identified *candidate* in the communication to voters, crosses the line, unless it fits within a safe harbor exception. For example, the rating of candidates for judicial office was found to be political intervention, regardless of the organization's nonpartisan intent, in *Association of the Bar of the City of New York* v. *Commissioner*, 858 F.2d 876 (2d Cir. 1988).

4) On the other hand, merely identifying an officeholder who is also a candidate as a person's representative, such as in a lobbying communication, would not be considered to reflect a view.

5) Implementation of this rule would mean that organizations would no longer need to guess, at their peril, about the IRS' judgment regarding whether their expression of their view on an issue of importance to the organization constitutes political intervention. The current multiple-factor rules applicable to issue advocacy in Revenue Rulings 2004-6 and 2007-41—e.g., whether the organization is a "wedge" issue distinguishing the candidates, whether the organization had a past record of advocacy on an issue, whether the communication was "close" to an election—would no longer be applicable if the communication did not refer to and reflect a view on a candidate.

6) The threshold speech test allows a broad range of voter education activities that refer to specific candidates but do so neutrally, without favoritism. Educating the public about candidates' views on issues of importance to the public or to the organization would be permissible as long as it is done in a manner that does not reflect a view on the candidates. To avoid the "gateway" speech test, the organization would not include its own view on the issue in the communication since that would be seen as reflecting a view by allowing the audience or readers to compare the candidates' views to the organization's view (but see the safe harbor below for comparing candidates' positions on an issue to the organization's position). Further, the organization must use reasonable, objective criteria to decide which candidates' positions to include in the communication, and must not give certain candidates more space/time/text than others, or give a greater opportunity to participate in the communication or event to some candidates compared to others.

7) This would mean that an organization may engage in voter education activities such as (1) preparing and disseminating a candidate questionnaire in which the organization publishes the responses of at least two candidates to questions of importance to the organization or to the general public (a video questionnaire also would be permissible), (2) compiling and disseminating statements made to the public by candidates on their own initiative about campaign issues, (3) distributing information that is factual only, without any element of opinion, such as data from campaign finance reports showing the sources and amounts of each candidate's contributions, (4) conducting and presenting

the results of scientific surveys of public opinion, including voters' candidate preferences prior to elections, and (5) sponsoring and preparing the questions to be asked during a candidate debate—all without reflecting the organization's view on the candidates in the communication or during the event. This is consistent with, and generalizes the logic of, Revenue Ruling 78-248 on voter education, but avoids the troublesome "broad range of issues" requirement.

8) Asking a candidate to make a pledge (no new taxes), endorse a policy (single-payer health care), or take a stand (on genocide in Darfur), can be done as a method of gaining the candidates' acceptance of the organization's position and asking them to take a public stand. Revenue Ruling 76-456, which prohibits even asking the question, should be modified so that it is not intervention to ask candidates for their pledge or endorsement on an issue. Whether this results in the organization "reflecting a view" depends on the responses. If all the candidates say "yes," there's no bias in presenting that result to the public. If no candidate says "yes," that could be presented neutrally, i.e. the organization is still pursuing a policy despite the fact no candidate yet favors it. If some say yes and others no, the organization's presentation of that result would reflect a view, and so it must refrain from publicizing the candidates' responses (although some candidates may decide to take a public stand on their own) to avoid the threshold definition of candidate advocacy.

9) The applications of the "reflect a view" principle described above reveal a key characteristic of this prong of the threshold speech test: it is a "net" view that favors one candidate over another that we are concerned about. If the outcome of the voter education activity or the candidate pledge is to create an equally favorable or unfavorable view of all contestants, the organization may achieve its objective of injecting its issues into the election campaign without engaging in candidate advocacy.

E. If the communication does refer to a clearly-identified candidate and reflects a view on that candidate, the general speech rule has four safe harbor exceptions, but not for paid mass media advertising. A proposed definition of paid mass media advertising is the following: "A communication to the general public, placed for a fee on one of the following media, operated by another person: a broadcast, cable, or satellite facility, newspaper, magazine, outdoor advertising facility, mass mailing service, telephone bank, or another person's web site or internet communications service. As of January 1 of even-numbered years, the Internal Revenue Service shall issue a public notice modifying the list as needed to include substantially similar media as changes in communications technology occur."

1) Because this rule is so broad at the outset, we consider that certain exceptions are necessary to protect appropriate non-political speech. However, because a safe harbor absolutely protects any speech that it covers, without regard to any other facts, and because by definition that speech already is known to reflect a view on a candidate, these exceptions present a potential avenue for abuse. Surreptitious campaign speech potentially covered by these safe harbors seems most likely to rely on paid mass media rather than, for example, statements on an organization's own web site, or speeches at a

membership meeting. The proposed definition draws on existing FEC rules, which seem reasonably calibrated to cover the mechanisms most used by political operatives.

2) However, we live in a time where the very nature of mass media is evolving. More and more commercial television, for example, is viewed via Internet delivery than broadcast or cable. Given the rapid pace with which technology is developing, it would be a mistake to adopt a fixed definition of "paid mass media." Any definition that applies to early 21st century technology and consumer habits will likely be obsolete well before the middle of this century. Therefore, we propose that the IRS should revisit the types of communications media that are covered in order to keep pace with contemporary developments. Similarly, utilization patterns may change, and some organizations may be able to take high-impact media in-house, ranging from phone banks and mass mailings to television stations or channels. The IRS should be able to include such media operations on the bi-annual list of paid mass media advertising instrumentalities.

Safe Harbor: Influencing Official Action

Commentary on a public official that has a direct, limited, and reasonable relationship to specific actions the official may yet perform within his or her current term of office, without mention of any election or voting, or the person's candidacy or opponent.

F. Considering the strong First Amendment protection of the right to "petition the Government for a redress of grievances," public officials should not be shielded from criticism by tax-exempt organizations, even if the official is also running for re-election or for election to another public office. Therefore, the first exception to the speech test should be constructed to allow communications that reflect a view on a public official who is also a candidate, so long as the speech has a direct, limited, and reasonable relationship to specific actions the official may yet perform within his or her current term of office, without mention of any future election or voting, or the person's candidacy or opponent. The speech is *direct* if it refers expressly to the specific action. It is *limited* if it does not go beyond facts and arguments that pertain to the specific action that the organization is attempting to influence. It is *reasonable* if the speech has a logical and visible connection, apparent to the audience, between the portrayal of the public official and persuading him or her to take the specific action.

G. This exception is broad enough to permit grass roots lobbying on legislation or other policy choices, even if the messaging does call attention to an officeholder's good or bad stance on an issue that may also be prominent in that officeholder's campaign for re-election or higher office. Note that this safe harbor is not equally available to criticism of the positions of a candidate who is not a sitting officeholder. However, as discussed below in Rule 6, an organization criticizing a challenger who is not a public official may be able to demonstrate that its activity was not political intervention by showing that its communication was unrelated to the election campaign and was merely an extension and integral part of its exempt activities.

H. An official may yet perform an action within his or her term of office if there are objective, ascertainable facts that make it reasonable to conclude there is a significant chance that an opportunity to take or not take the action will be presented to or initiated by the official. It is not required to be a certainty, but something more than a theoretical possibility is required.

I. This safe harbor is not available for communications disseminated via paid mass media advertising. For paid mass media advertising communications, grassroots advocacy must avoid reflecting a view on a clearly-identified candidate to avoid meeting the threshold definition of political intervention. Alternatively, an organization sponsoring mass media ads may use all the facts and circumstances to demonstrate that its activity was not political intervention, as described more fully below under Rule 6. Following are examples showing the operation of this safe harbor exception, using communications other than paid mass media ads:

Example 3

University O, a Section 501(c)(3) organization, is located in State V. Senator C represents State V in the United States Senate. Shortly before an election in which Senator C is a candidate, University O places a blog post on its website stating that S. 24, a pending bill in the United States Senate, would provide additional opportunities for State V residents to attend college, but Senator C has opposed similar measures in the past. The post ends with the statement "Call or write Senator C to tell him to vote for S. 24." S. 24 is scheduled for a vote in the United States Senate soon after the date that the blog post is published. Even though the post identifies Senator C's position on the issue as contrary to O's position, thereby expressing a view on Senator C, University O has not violated the political campaign intervention prohibition because the post does not mention the election or the candidacy of Senator C, her opponent, or voting, and the timing of the message and the identification of Senator C have a direct, limited and reasonable relationship to the specifically identified legislation University O is supporting. For the purposes of this example, it does not matter whether education in general or this issue in particular has been made into a campaign issue by Senator C or her opponents; a Section 501(c)(3) organization need not be silent on issues merely because they have been discussed in a campaign context.

Example 4

Organization R sends an e-mail urging an increase in state funding for public education in State X, which requires a legislative appropriation. Governor E is the governor of State X. The e-mail is sent to individuals residing in State X in which Governor E is a candidate for re-election. The people on the list who received the e-mail have signed up to receive action alerts from R. The e-mail cites numerous statistics indicating that public education in State X is underfunded, and describes Governor E's position as against more funding for public education. The e-mail ends: "Tell Governor E what you think about our under-funded schools" and provides a link to Governor E's official website. At the time the e-mail is sent, no legislative vote or other major legislative activity is scheduled in the State X legislature

on state funding of public education. Organization R's message is not within the safe harbor for influencing official action and may be political intervention because the e-mail identifies Governor E, reflects a view on her position, and does not have a limited, reasonable, and direct relationship to specific actions the Governor may yet perform. Political intervention could be avoided by either removing reference to the Governor's current position, or – if facts permit – limiting the criticism to a position on a particular bill that will soon be subject to the Governor's signature or veto, or to a budget proposal that the Governor has made or is expected to make soon (before the election or before her term ends).

Example 5

Organization S prepares and distributes a posting on a social media site criticizing the fact that state C's two U.S. senators voted against the Marriage Protection Amendment, and asking viewers to call them to urge them to support it. One is running for re-election in November of the current year. Contemporary news reports indicate that it is likely, but not certain, that a vote will be scheduled on the Marriage Protection Amendment in the near future. Organization S has not engaged in political intervention. However, if there was no reasonable chance that a vote on the issue would be held before the end of the candidate senator's term, the communication would not qualify for the safe harbor.

Example 6

Organization Z sends a letter to its members referencing Congressman Y. Although Congressman Y is a candidate for re-election, the letter is not sent close to an election. The letter discusses Congressman Y's history of spousal abuse and asks viewers to call him to support family values. The letter is not within the exception for influencing official action and may constitute political campaign intervention. Although Congressman Y will, as part of his official duties, consider issues regarding family values, the letter's criticism of him does not have a direct, limited, or reasonable relationship to any official action. A reference to an upcoming, specific vote on family values legislation would not make this letter permissible, as the criticism of Congressman Y is a broad, personal attack that would lack a limited, reasonable relationship to the official action.

Example 7

Organization Q produces and distributes a pamphlet that compares and contrasts two candidates for Congress. It attacks the incumbent Congressman for his stance on corporate pension funds, and praises his opponent for promoting legislation on the issue. The pamphlet asks individuals to "call or visit our website to find out more." The pamphlet is not within the safe harbor for influencing official action and may be political intervention, even assuming it referred to a specific action the incumbent may yet perform, because it references his opponent.

Example 8

Organization L supported the passage of healthcare reform legislation. After Congressman B voted for the legislation, Organization L sent a letter to its members commending him for this vote and asking them to call him and thank him for his stance. This letter does not meet the safe harbor, because there is no direct, limited or reasonable relationship to any future official action. However, as discussed below, the organization may be able to carry its burden to demonstrate no political intervention by showing that the "thank you" message was unrelated to the election campaign and was merely an extension and integral part of its lobbying on the legislation.

Example 9

The Ethical Watchdog organization in a certain state is devoted to exposing legal and ethical violations by public officeholders in the state and pursuing official action by authorized government review panels. Very often, the official who is the subject of an ethics complaint filed by Ethical Watchdog is a candidate for re-election, and obviously the complaint would reflect negatively on him or her. In some cases, the organization's ethics complaint about a legislative member is directed to the chair of the responsible legislative ethics subcommittee, and the chair may also be running for re-election. The exception for influencing official action could apply to a message addressed to the legislative committee chair requesting an investigation, and it would apply to a message aimed at the subject of the ethics complaint to the extent it urged him or her to cooperate, to turn over records, to fire the subordinates involved, or even to resign—all official actions that could be taken rather immediately. The organization's accusation of wrongdoing without asking the accused to take official action would not be protected by the safe harbor, but it could be defended in an analysis under Rule 6 as related to its tax-exempt purpose and unrelated to any pending election.

Safe Harbor: Comparing Candidates

Voter education that compares two or more candidates for an office, and may include the organization's views on such issues, if the communication consists solely of content in which the time, text, and/or space is offered in equal shares to each of the participating candidates, and the organization's share of content is no greater than the share available to any of the participating candidates. The opportunity to participate must be given, including a full description of the opportunity and a copy of the organization's content, to all current candidates (or to those meeting an objective threshold of viability) for election (or nomination) to the office a reasonable time in advance of the final preparation of the communication (which in no case may be less than 72 hours).

J. This safe harbor exception is intended to allow candidate comparisons that may, in their resulting presentation to voters, reflect a "net" view that is favorable or unfavorable to one or more of the candidates. However, the candidate comparisons covered by this exception are constructed so as to provide a fair and even-handed opportunity to the candidates to participate and to react to the viewpoints expressed by the organization. The theory is that the candidates each have an equal opportunity to control the content of their share of the communication and to present themselves

favorably and so if they not do so, it is not the fault of the organization conducting the comparison. This exception is also designed for organizations that have a single-issue focus and for groups that cannot avoid being known to have a position on the issues discussed by the candidates. Such organizations need a vehicle to engage the candidates on issues of importance to them and educate the public, without the risk of IRS prosecution for political intervention. Voter education activities that are structured to be completely neutral (as discussed above) in their end result would not be captured by the candidate advocacy threshold speech test and would not need the protection of this safe harbor.

1) A candidate comparison covered by this exception could be a candidate debate, a request for a 30 second video statement from each candidate on a topic, responses to a questionnaire, voter guides based on material from each candidate's website, or the results of asking candidates to take a pledge on an issue.

2) The organization itself could take a position on the matters presented to the candidates, even though it may indicate the its own preferred view, because each candidate has an opportunity equal to that of the organization to counteract its stance. So, to the extent that the organization conveys its opinion, slant, or bias in the presentation of questions to the candidates, the candidates would have an amount of time or space to respond that is equivalent to that taken by the organization.

3) The invitation to the candidates to participate must be given a reasonable time to prepare a response before the presentation to the public is finalized. While the legal minimum is proposed at 72 hours, the time that would be considered reasonable may be longer, depending on the circumstances. Attempting to schedule a Presidential candidate three days in advance for a live, broadcast candidate debate is not likely to be reasonable. Ultimately, the time allowed for response must be set to allow all candidates a fair opportunity to participate if they choose, with an equal amount of advance notice.

4) We have stated that none of the safe harbors may be used to protect communications that are paid mass media advertising. We think an exception is appropriate for the postal mailing of candidate comparisons, however, as a traditional form of dissemination of voter education materials that does not pose the same potential for abuse as broadcast advertising.

Safe Harbor: Self-Defense

A response, as limited below, by an organization to a public or publicly-reported statement by a candidate that either (a) attacks the organization itself, or (b) comments upon a specific public policy position that the organization has taken publicly in furtherance of its exempt purpose within the prior year, or (c) results in press inquiries to the organization that were not solicited by the organization in the wake of the candidate's statement. The response by the organization must be educational, limited topically to addressing the candidate's statement, and as to (a) or (b), disseminated in a manner commensurate in medium and scale,

and proximate in time, to the publicity of the candidate's statement, and as to (c), limited to dissemination to the requesting press organization.

K. A third safe harbor would apply to certain communications that reflect a view on a candidate when they are made in self-defense by the organization. An organization should not be required to be silent when a candidate makes statements the organization reasonably believes to be critical of the organization or puts the organization in a bad light. Nor should it be required to be silent when a candidate makes a statement on a public policy position that the organization has taken publicly (e.g., in press releases, publicly-available newsletters, on its website, or in other public statements, in legislative testimony, in comments on proposed rulemaking, and in documents filed in connection with litigation matters) in furtherance of its exempt purpose within the prior year, or if the organization receives press inquiries triggered by the candidate's statement and not solicited by the organization.

1) However, in such case, the organization's ability to reflect a view must be limited to expressing its disagreement (or agreement) with the candidate's statement. It may not otherwise reflect a view on the candidate.

2) Further, in expressing its reaction, the organization's communication must be educational, as opposed to polemical, by meeting the requirements of educational methodology set forth in Rev. Proc. 86-43. As explained in more detail that Revenue Procedure, a communication is less likely to be deemed educational under this standard if it expresses views unsupported by facts, distorts facts to support its views, relies heavily on inflammatory language, offers conclusions based on appeals to emotion rather than objective evaluation, or does not appear to be aimed at developing the recipient's understanding of the subject matter.

3) In situations covered by this safe harbor, where the organization's response reflecting its view is permitted either because (i) the candidate made a statement the organization reasonably believes to be critical of the organization or puts the organization in a bad light or (ii) the candidate made a statement on a public policy position that the organization has taken publicly in furtherance of its exempt purpose within the prior year, the organization's response must not go beyond the scope of the triggering communication:

a. The organization's response must be disseminated through a medium that does not exceed the level of audience engagement through which the triggering communication by the candidate was disseminated.

<u>Example 10</u>

A candidate for statewide office makes a derogatory statement about Organization Q that is reported in single a local newspaper article and not picked up by any other media outlets. Q's communications staff manages to book its Executive Director for an extended interview slot on a major national Sunday morning news show. This response does not qualify for

the safe harbor because it exceeds the level of audience engagement of the triggering communication.

b. The response must not deliberately exceed the scale of the triggering communication in terms of attempting to reach more outlets than did the original communication

Example 11

Same facts as Example 10, but Q holds a press conference in the state capital to which it invites hundreds of print, online, and broadcast journalist, and sends an alert to hundreds of national media outlets. This reaction does not qualify for the safe harbor because it deliberately exceeds the scale of the triggering communication by attempting to reach more outlets.

c. The response must follow the triggering communication closely in time.

Example 12

Same facts as above, but the article appears in April. In October, Q responds with a scathing rebuttal posted on the home page of its web site. This response does not qualify for the safe harbor because it is not close in time to the triggering communication.

4) In situations where the organization's response is permitted solely because of press inquiries unsolicited by the organization in the wake of the candidate's statement, the organization may only respond to the inquiring press organizations and allow the media outlet to disseminate its response.

Example 13

Same facts as above, but Q has not responded to the article. It accepts an unsolicited press invitation for its executive director to appear on a TV talk show to comment on the candidate's statement. Her statements on the talk show do reflect a view on the candidate, but if Q limits its response to the invited talk show appearance only, the safe harbor would apply. Any further dissemination of the interview via Twitter, YouTube, or Q's website would not qualify for the safe harbor.

Example 14

A candidate says "my opponent is a card-carrying member of the XYZ religious brotherhood," and the brotherhood reasonably believes that statement to be critical of this fact, and therefore by implication critical of the brotherhood. The organization may respond within the safe harbor by saying "All our supporters are proud to be members of the XYZ brotherhood and we are proud to have their support."

Example 15

Organization P has represented the defendant in a high-profile death penalty defense case. A candidate publicizes the defendant's crime to illustrate how the judicial system is soft on criminals and should pay more attention to the victims. P may promptly respond to the candidate's comments regarding the crime with a description of its version of the case and its implications without otherwise reflecting a view on the candidate, within the safe harbor.

Example 16

Same facts as in 15, but the case was one that P worked on many years ago and the candidate's statements publicizing the crime were made many years prior. P's revival of its dispute with the candidate during the election would not fall within the safe harbor.

Example 17

Same facts as 16, except the news media have unearthed the old statement and turned it into a fresh controversy. In light of the extensive coverage being given in the press to the candidate's negative comments about P, P holds a series of meetings with editorial boards to encourage them to write supportive editorials highlighting the good work P does and explaining its view of the facts of the criminal case. P's response qualifies for the safe harbor because it is responding to current coverage, and the resulting editorials will be disseminated in a similar medium to the triggering news coverage, and will not deliberately exceed the scale of the audience for the triggering communication.

Example 18

In the wake of a widely reported controversy about a museum's display of art featuring religious symbols, a candidate urges de-funding of the National Endowment for the Arts for its support of "offensive" art. W, an arts organization eligible for receiving NEA funding responds by issuing a press release to major media outlets in support of NEA funding, specifically referencing the recent comments by the candidate and disagreeing with them. So long as it does not otherwise reflect a view on the candidate, and so long as the major media outlets to which the press release is directed fairly reflect the media that had covered the candidate's attack on the NEA, W's commensurate response would fall into the safe harbor and not be political intervention.

Example 19

A candidate promotes a proposal for a flat tax as a centerpiece of her campaign, appearing on several television talk shows. The policy director of Z, an organization whose major program activity is to analyze and educate the public on tax policy accepts an (unsolicited) invitation to appear on a television program, criticizing the candidate's proposal, and calling the policy "unworkable and naïve." So long as the policy director does not otherwise

reflect a view on the candidate, Z is protected by the safe harbor and would not be engaged in political intervention.

Example 20

E is an organization that focuses on the impact of environmental policy decisions on low-income communities. Following a statement made by a candidate that the fact of anthropogenic climate change is not backed by science, a reporter calls E and asks whether the organization agrees with the candidate's statement. E does not consider climate change a major priority area and has not previously taken a position on this issue, although similar organizations consider climate change a major threat to low income people around the globe. It responds to the reporter's question including disagreeing with the statement made by the candidate without otherwise reflecting a view on the candidate. E's response is not political intervention because it is a response to a press inquiry within the safe harbor.

Example 21

P is an organization that monitors and reports on the activities of violent anti-immigrant groups. P reports on its website that an individual who is currently a candidate for public office was, ten years previously, a featured speaker at a rally sponsored by a group promoting a shoot-on-sight policy to halt illegal crossings of the U.S.-Mexican border. P's report is not covered by the safe harbor because this communication is not proximate in time with the candidate's statement at the rally. However, P may be able to defend its website report based on facts and circumstances under Rule 6, showing how it furthered its exempt purpose in a manner unrelated to the pending election.

Example 22

Candidate X is seeking nomination from her party to run for election to the presidency. During a candidate debate that is widely covered in the national print media, Candidate X states that global climate change is not backed by science. Following the debate, an organization whose mission is educating the public about the realities of global climate change flies a plane over the arena in which the Candidate X's party's convention is being held dragging a banner that states, "CANDIDATE X IS IN DENIAL!" This communication does not qualify for the safe harbor because it is not educational within the meaning of Rev. Proc. 86-43.

Example 23

V is an organization whose mission is ensuring women's access to contraception. Following publication on the website of a small village newspaper of Candidate Y's statement during a stump speech at an Elk's Club that doctors should be able to refuse to provide contraceptives to women, the president of V appears on the Today Show and criticizes Candidate Y's statement. Candidate Y has not made this statement in other contexts. This statement does not qualify for the safe harbor because it is not similar in scale to the candidate's stump speech as reported on a local newspaper's website.

Safe Harbor: Personal, Oral Remarks at Official Meetings

Oral remarks made by anyone (other than a candidate) who is present in person at an official meeting of an organization held in a single room or location, so long as no announcement of the meeting refers to any candidate, party, election, or voting. This exception covers only oral remarks about candidates made by and to persons in attendance, not any other form of communication of those remarks, whether written, electronic, recorded, broadcast, or otherwise transmitted. A prominent disclaimer must be made to those attending, stating that such remarks are the speaker's personal opinion and are not made on behalf of the organization, and that the speaker is not advocating any of the actions set forth in Rule 3.

L. This exception would not allow express advocacy, barred by Rule 3 in all situations. It would permit a pastor to express his or her personal views on candidates from the pulpit or in other meeting situations where the relevant religious authority allows for clergy to make their own unofficial remarks. It would also allow parents at a PTA meeting, including officers, to express their views on candidates for school board. It would permit speeches, sermons, or discussions at any meeting of any tax-exempt organization to include expressions of opinion on those running for public office in upcoming elections, so long as such views were not made officially or on behalf of the organization.

M. It would not require that meetings be limited wholly or primarily to "members" or that such meetings be held at the organization's building or that such meetings be regularly scheduled. However, the meeting must be held in one, not multiple, rooms or locations.[4] No announcement of the meeting, in any advance publicity, invitation, bulletin, signage, or other form of message, would alert attendees that the subjects discussed at the meeting may include commentaries on candidates. This is to prevent the organization from using the exception to magnify the impact of the speakers' remarks by advertising the potential political content of the event. The two-part disclaimer we propose would help ensure that both the speaker and the audience understand that the safe harbor protects only personal, not official, remarks and that it does not protect express advocacy statements.

N. This exception does not currently exist under IRS interpretations. Revenue Ruling 2007-41 indicates that statements made by officers of an organization at official meetings can never be personal and would always be attributed to the organization. This exception would provide a protected space for the private expression of personal views (without express advocacy) at such meetings without adverse consequence to tax-exempt status. Personal or official comments at meetings conducted in other ways, or with advance publicity, or with candidates present, or without disclaimers, may still be

[4] The requirements that the participants be in a single room and that remarks be “oral” should nonetheless allow reasonable accommodations to allow disabled participants to use text-based or other communications technologies or to participate from a remote location, but not to permit mass conference calls, webinars or other broad, open public meetings.

defensible under another exception, under a Revenue Ruling or other federal tax authority, or under the facts and circumstances offered by the organization in its defense under Rule 6.

O. In addition to our four specifically described exceptions, we believe that any communications that are explicitly allowed under existing guidance should continue to be permitted, even if the speech meets the basic speech test for political intervention. The rule that paid mass media advertising cannot qualify for a safe harbor would not disqualify a message from protection under this part of the rule. If it is specifically treated as not political intervention under existing federal tax authority, it would not be treated as intervention. For instance, a legislative report card that meets the criteria of Revenue Ruling 80-282 would be permitted. A communication treated as not intervention in any of the examples of Revenue Ruling 2004-6 or 2007-41[5] would similarly continue to be treated as not political intervention, whether or not the communication met the criteria for any safe harbor exceptions. In contrast, communications treated as intervention under existing rulings might be considered not to be intervention depending upon the application of these new rules. (For example, a voting record that meets the criteria of Revenue Ruling 78-248 Situation 4 could qualify for a safe harbor exemption if it is published on an organization's own web site as part of a lobbying effort.)

P. Other safe harbors have been suggested to us, and we plan to consider whether there are more clusters of circumstances that can be described analytically to protect important forms of civic speech while not at the same time opening up avenues for abuse. Here are some possibilities, so long as express advocacy and paid mass media advertising are not involved:

1) An exception for communications made more than one year before the general election at which the candidate might be elected, including any runoff election.

2) An exception for communications received by fewer than 500 persons.

3) An exception for academic functions within educational institutions, in which views on candidates may be expressed in political science research, in scholarly articles, in classroom exercises and in student newspapers, or in academic awards given to distinguished alumni.

4) A press exception for views on candidates expressed in regularly published or broadcast news media that conduct daily news coverage, investigative reporting, and editorial opinion.

[5]Only the specific examples approved as not intervention are to be retained, not the imprecise multi-factor tests of Revenue Rulings 2004-6 and 2007-41.

5) An exception for the filing of official documents with and submission of evidence to government agencies having jurisdiction to receive them, such as court complaints, affidavits, depositions, testimony, briefs, and oral arguments, as well as ethics referrals, whistle-blowing statements, and the like, not including press releases, blog postings, and other means of publicizing the official filing.

6) An exception for the distribution of books written by or about persons who are candidates at the time of distribution, so long as the book exceeds a certain page length and presents dominant themes other than the person's suitability or unsuitability for elective public office, and makes only incidental references to upcoming elections, voting, or the person's candidacy.

However, we are wary of attempting to define various "lines of business" or categories of charitable public service to be cloaked with safe harbor protection. There are likely to be far too many of them and they could be ripe for partisan exploitation if defined too broadly. We would expect that in those miscellaneous cases when an organization expressed a view on a candidate and needed to justify doing so on the basis of pursuing a charitable function unrelated to the outcome of an election, it could readily do so under Rule 6.

Q. Evidence of intent in relation to the speech is irrelevant, as stated in many IRS pronouncements and in court decisions regarding Section 501(c) organizations.[6] A communication that refers to and reflects a view on a candidate, if not within a safe harbor exception or specifically allowed under existing authority, meets the threshold definition of political intervention. On further analysis the organization may draw on all relevant facts and circumstances to demonstrate why the speech is not political intervention as discussed in Rule 6, but it bears the burden of proof to do so.

R. To be clear about those instances in which a view may be expressed on a candidate, and yet the speech is "specifically allowed under an existing Revenue Ruling or other federal tax authority," we refer to those particular fact patterns that the IRS (or a court) has ruled to be not political intervention. An example would be the legislative scorecard described in Revenue Ruling 80-282; even if the scorecard reflects well or badly on an incumbent running for re-election, if the organization took the steps set forth in the Revenue Ruling, the speech would not be political intervention. So, Rule 4 protects activities expressly allowed under prior precedential guidance existing at the time regulations are adopted to define political intervention. However, where past guidance describes open-ended multi-factor tests (in parts of Revenue Ruling 2007-41 other than its specific examples, for instance), this rule does not serve to re-import that "facts and circumstances" analysis.

Voter Engagement

[6] *Ass'n of the Bar of the City of New York v. Comm'r*, 858 F.2d 876 (2d Cir. 1988).

Speech covered by Rule 4 includes "voter engagement," defined as communications directed to potential voters, offering to assist or explicitly encouraging them to register or vote in an election for public office. Voter engagement ***is*** *political intervention if it is covered by Rule 3, it refers to and reflects a view on a candidate or political party, or it is targeted based on the voter's expressed candidate or party preference. Voter engagement* ***is not*** *political intervention if it meets both a targeting and a content test. It must be untargeted, targeted to the organization's natural constituency, or targeted to voters under-represented in prior elections. As to content, any references to specific contests for a public office or to public policy issues must be neutral, that is, not indicate any preference for a candidate or party, and, if any view is reflected on a candidate, it is within the safe harbor for comparing candidates in (ii) above. All other voter engagement is subject to further analysis under Rule 6 below to determine if it is or is not political intervention.*

S. Rules 3 and 4 are also meant to encompass voter registration and get-out-the-vote communications and drives ("voter engagement"). Voter engagement includes:

- communications to individual potential voters urging them to register to vote, urging voters to turn out to vote, or providing them with information regarding when, where, or how to vote;[7]
- efforts to actively assist registration[8] or turnout, such as the distribution or collection of voter registration, vote-by-mail, or absentee ballot applications, or helping to complete these documents;
- easing the burden of voting, such as by providing rides to the polls, or by offering help with childcare; and
- other efforts to help voters on an individual basis, such as helping felons apply to regain the right to vote, or aiding voters in providing documentation to have provisional votes counted.

1) Voter engagement does not include efforts to change public or private policies to encourage voting, such as advocacy regarding accessibility of voting, when polls are open, or policies regarding methods of voting; or efforts to encourage employers to provide time off to vote. Nor does voter engagement include broad public appeals to vote, which would be analyzed solely under Rule 4.

2) Voter engagement will be political intervention under these rules if it includes express advocacy as defined by Rule 3; or if under Rule 4 if it refers to and reflects a view on a clearly identified candidate, unless it is covered by a safe harbor. (Going beyond Rule 4, voter engagement would also be *per se* intervention if it refers to and

[7]The get-out-the-vote activity covered by our Rule includes only candidate elections. Where elections concern only ballot measures, such as school bonds, initiatives, or referenda, these voter engagement rules do not apply to get-out-the-vote efforts, but other regulations on the lobbying activity of exempt organizations (*e.g.*, IRC 4911, 4945, and 6033(e)) may come into play.

[8] Voter registration drives are a specific kind of voter engagement activity that is subject to particular regulations under Section 4945 for private foundations. New regulations to define political intervention across the board for all exempt organizations should be made consistent with the foundation rule to the extent that a definition of voter registration already exists.

reflects a view on a political party.) The only Rule 4 safe harbor applicable to voter engagement would be even-handed candidate comparisons. Note that the candidate comparison safe harbor goes well beyond the voter guides approved by the Service in Revenue Ruling 78-248, as the safe harbor in Rule 4 permits both a focus on narrow issues and, more importantly, an opportunity for the sponsoring organization to weigh in on the issue so long as the candidates have an equal opportunity to respond both to each other and to the organization's position. For in-person canvassing drives, both handouts and in-person scripts must avoid political intervention as defined under Rules 3 and 4.

3) However, the method (and particularly the targeting) of voter engagement is also highly determinative of its effect on elections. A voter engagement communication that is entirely neutral — or that does not mention particular candidates, political parties, contests, or issues at all — but that is targeted only to supporters of one candidate or political party has long been recognized as *per se* political intervention, and the intent of these rules is not to change that approach. On the other hand, to be treated as clearly not political intervention, voter engagement must meet a targeting test as well as the content test described above. If both tests are met, the activity is protected by a safe harbor we have created for voter engagement. A voter engagement effort will be safe if it does not include communications that constitute political intervention under Rule 3 or Rule 4 (using no exceptions but the one for candidate comparisons), does not reflect a view on a political party, contains no references to public offices or public policy issues that indicate a candidate or party preference, and if it is conducted through one of three methods:

a. **Untargeted**: The voter engagement effort attempts to reach all eligible voters who are not registered where they reside (for a voter registration effort) or all registered voters (for a get-out-the-vote effort). The boundaries of cities or counties may be used to delineate the scope of voter engagement efforts; but electoral districts may not be used. State boundaries may be used, except in relation to Presidential elections where states serve as electoral districts; they may not be selected based on being swing states. Thus, a voter engagement effort that focused on an entire city could fall under the safe harbor, but a voter engagement effort that focused only on a specific ward within the city would not qualify for the safe harbor.

b. **Targeted to the Organization's Natural Consistency**: The voter engagement effort is designed to reach an organization's entire membership or contact list, or materials are made available to them at times when and locations where the organization is conducting its regular, non-electoral programs. This will apply even if an organization's members may be thought to naturally favor one candidate or political party over another. To be specific, we suggest that a natural constituency be defined as members (using the IRC 4911 definition), employees, students, patients, clients, visitors, subscribers, event attendees, customers, donors, and shareholders, because these categories and others who have provided contact information to the organization in the ordinary course of its tax-exempt program, trade, or business, have done so apart from any political intervention activity.

c. **Targeted to Under-Represented Voters**: The voter engagement effort is designed to increase participation by targeting based on demographic segments that under-register, or are under-represented in the voting population based on prior elections, in comparison with the voting-age population of the area. This will apply even if a particular demographic is thought to naturally favor one candidate or political party over another, so long as the demographic is genuinely under-represented in the registered or voting population.

4) If voter engagement uses some other method of targeting, or if its content includes interests or views that may tend to be aligned toward or away from a candidate or party, it will be subject to Rule 6 to determine whether it is political intervention under a facts and circumstances analysis.

5) Voter engagement efforts aimed at preventing ineligible people from voting, such as by challenging an individual's eligibility at the polls or by aiding efforts to exclude felons from voting on an individual basis, shall not be considered political intervention only so long as they are conducted in an untargeted manner. Challenging voters on the basis of their political party, candidate or issue preference would constitute political intervention.

Example 24

Organization B creates a website that aids voters in finding their polling places and encourages them to vote. The website includes a passage that praises the position of the President on an environmental issue and encourages voters to "make sure your voice is heard on election day." The President is a candidate for re-election. This website constitutes political intervention because it reflects a view on a public official who is a candidate for re-election and references voting and the election.

Example 25

School Q, a publicly funded charter school, encourages the parents of all of its students to turn out in the mayoral primary election. The communication does not mention the candidates running or the issues in the election, but funding of charter schools is one of the fundamental differences between the candidates and has been discussed in the media extensively. School Q expects that the parents of its students are likely to support the candidate who supports charter school funding. The voter engagement is not political intervention because School Q has targeted its entire constituency, and because its communication does not refer to candidates and does not meet the *per se* intervention test under Rule 3.

Example 26

Organization Y distributes voter guides to all eligible voters of Congressional District 2. The state has more than one congressional district. The voter guides offer equal space to each candidate to express his or her views on each subject. The voter guides meet the

candidate comparison safe harbor under Rule 4; however, the voter engagement does not qualify for the targeting safe harbor because it is focused on a legislative district. The voter engagement effort will be measured on a facts and circumstances basis under Rule 6.

Example 27

Organization B sponsors a radio advertisement that exhorts listeners to vote on election day. The advertisement also includes a fair description of two candidates' positions on one particular issue in their own words, as well as Organization B's own position on that issue. As a general exhortation to vote, this advertisement is not treated as voter engagement and would be analyzed under Rule 4. The content of the communication meets the candidate comparison safe harbor under Rule 4; however, because this is a mass media advertisement, the safe harbor is not applicable and the advertisement must be analyzed under Rule 6's facts and circumstances test.

5. Use of Resources*: This rule covers only transactions and activities that contain no significant element of speech. It is political intervention to provide any of the organization's resources, whether monetary or in-kind, goods, services, or facilities, tangible or intangible, by gift, loan, sale, rental, or any other method of transfer to another person or entity, if the transferee uses such resources to support or oppose any candidate's election to public office and the transferor has not taken reasonable steps to prevent such use.*

Such transfers are not intervention, however, if the transfer is (a) made at no less than fair market value, (b) similar to other transactions conducted by the organization and (c) without preference for or against any candidate. Any other transfer recognized under applicable campaign finance law as a reportable contribution to a candidate for elective public office, or to an organization that has the primary purpose of engaging in political intervention, is political intervention.

Other uses of an organization's resources (transferred or not) in support of or opposition to a candidate, if not specifically allowed under an existing Revenue Ruling or other federal tax authority, are subject to further analysis under Rule 6 below in which the organization bears the burden of proof to show why the use of resources is not political intervention.

A. There are ways that an organization can intervene in a candidate election that do not involve speech by the organization, but rather constitute the use of the organization's resources to help or hurt a candidate. This proposed rule has five analytic steps:

1) It begins with a basic two-part test applied to any form of transfer of the organization's resources to another person or entity: (a) were the resources used by the transferee to support or oppose a candidate and, if so, (b) did the organization take reasonable steps to prevent such use? It is followed by two specific rules: one that provides a safe harbor and another that results in an automatic finding of intervention.

2) The safe harbor test applies if all three prongs are met--the transfer is at no less than fair market value, it is similar to other transactions conducted by the organization (outside of any political context), and it is made without candidate preference.

3) A finding of political intervention occurs automatically if the transfer is a reportable political contribution related to a candidate election under applicable federal, state or local (or foreign) campaign finance laws, unless it is safe under the prior three-prong test.

4) Other uses of resources to support or oppose a candidate, not involving any transfer, would be examined under a facts and circumstances analysis in which the organization has the burden of proof to show that its action was not political intervention under Rule 6.

5) However, if an existing Revenue Ruling or other tax precedent treats the specific use as not political intervention, then it is not. So, if a charity rents out space to the public, including candidates, on the same terms, as set forth in Revenue Ruling 2007-41 for business activities, Situation 17, it is not intervention. This would also include IRS guidance allowing employees generally to make minor, incidental uses of their employer's resources (taking phone calls, making photocopies) for personal matters as a *de minimis* fringe benefit of employment, not treated as an action done on behalf of the organization.

B. The initial two-part test is similar to wording found in the regulations for Section 527 organizations, which state that an expenditure by a 501(c) organization that is taxable under 527(f) may be made directly or indirectly through another organization. If the transferee eventually uses the asset for political activities, the transferor is not absolutely liable for tax if it takes "reasonable steps" to ensure that the transferee does not use the resource for political activities. What is "reasonable" under 527(f) depends upon all the facts and circumstances, but we should provide some safe harbors for transfers such as those that qualify under other Treasury Regulations as controlled grants (under Section 4911)or as expenditure responsibility grants (under Section 4945) which prescribe certain steps for oversight by grantors (e.g. prohibiting use of grant funds for political intervention in a written agreement).

C. The safe harbor addresses and employs some of the same concepts that appear as "business activity" issues in Revenue Ruling 2007-41. However, that Ruling is an open-ended multi-factor test and the proposed safe harbor is stricter, with three definite prongs. The proposed rule requires that the transaction be at fair market value rather than customary and usual rates, which could be below market and contain an element of subsidy. The second prong would require a history or practice of providing the resource to others, not just candidates. The third prong simply requires no preference for or against any candidate. As in Revenue Ruling 2007-41, that means that the resource is available to candidates in the same election on an equal basis. The organization can provide the resource to one candidate, and is not required to affirmatively take steps to offer it to other candidates, nor to provide it to other candidates if no others request to use it. The organization cannot decline similar requests from other candidates, and must demonstrate

even-handedness, i.e., it cannot reach out to offer the resource to one candidate and not to opposing candidates in the same way.

D. An organization that makes a contribution to support or oppose a candidate, or a group of candidates via a party committee or a multiple-candidate political fund, must expect that using its resources in such a way would constitute political intervention. Unlike speech, where the tax law standard is much broader than the election law standard of express advocacy, it is helpful to look to applicable federal, state, or local election law standards for the recognition and measurement of material values applied to the end of supporting or opposing a candidate. Using the applicable election law standard for intervention as the guide for the tax rule is beneficial because, under many factual situations, it would mean that the taxpayer would have one rule to follow for both tax and election law purposes.

E. Thus, any transfer of the organization's funds or resources that does not qualify under the three-pronged safe harbor and is reportable under applicable jurisdictional law regulating the reporting of political contributions (i.e., federal, state, or local) is conclusively political intervention. If the value of the use of the organization's funds or resources is below the dollar threshold for reporting in any such jurisdiction, the use may still constitute political intervention under the initial two-part test for transfers; in other cases the taxpayer has the burden of proof to show that the use of its resources was NOT political intervention. The rule is intended to cover gifts of cash, cash equivalents, services, and use of materials, goods, or facilities, and also exchange transactions where the organization transfers goods or services on a fee basis, but receives less than fair market value in return, if the transfer is made in support of or in opposition to a candidate. This rule applies both to financial or in-kind support to candidates, parties, and political organizations, including coordinated communications or other activities if treated as a contribution under the relevant campaign finance law. Thus, payments for certain broadcast ads ("electioneering communications") required to be reported to the FEC (or communications reportable but not treated as contributions under similar state laws) would not automatically be treated as political intervention; such speech would be tested under Rule 4.

F. If the transfer of valuable support to a candidate, political party, or other 527 group that has the primary purpose of engaging in political intervention is not monetary but is treated as an in-kind contribution under applicable election law, it is political intervention. This covers providing services, materials, goods, or facilities of the organization, as well as that provided from others under the organization's direction, and includes speech and non-speech activities coordinated with a candidate's campaign. However, if the activity qualifies for one of the safe harbors we describe in Rule 4 or Rule 5, it would not be political intervention even though federal or state laws may cause it to be reported as a contribution.

G. Applying these standards, these are some results:

1) The use of an organization's staff time in a campaign would not be *per se* intervention under the IRS rule if there is a *de minimis* exception under applicable federal, state or local election law which makes this non-reportable as a political contribution. If the *de minimis* use of time is not protected by the fair-market-value safe harbor and is not allowed under a Revenue Ruling or other federal tax authority then the analysis proceeds to examine any facts and circumstances indicating that the use of resources is not political intervention (an analysis in which the organization bears the burden of proof).

2) Even without speech that refers to and reflects a view on a candidate, the use of an organization's resources to do selective or targeted GOTV in a federal election directed to neighborhoods or other groups suggested by a candidate's campaign would come under the federal election law's definition of an in-kind (coordinated) contribution and thus would be intervention under the IRS use of resources rule. A similar analysis would need to be done under applicable state or local law for state or local elections. If there is no coordination with the candidate's campaign and no transfer is made, but the organization on its own decides to target its GOTV to voters it believes are going to vote for a certain candidate, that activity would be deemed political intervention under the set of voter engagement standards set forth at the end of Rule 4.

3) The use of an organization's name, trademarks, brands, goodwill, and other intangible assets (for instance, in the name of an affiliated 501(c)(4) entity or PAC conducting political activities), if not recognized as a contribution under applicable campaign finance laws, would not automatically be intervention under our proposed IRS rule on the use of resources.[9] It would still be treated as intervention if the organization is not able to bear its burden of proof under Rule 6, but we would carve out an explicit exception allowing sharing of name and marks with a related 501(c)(4), and allowing the 501(c)(4) in turn to share the name with a connected PAC. The use might also escape treatment as intervention if it is protected by some other existing federal tax authority.

4) Renting facilities or mailing lists, or selling other goods or services to a candidate's campaign at fair value, without offering the resource to the market generally or to competing candidates specifically, is still within the safe harbor and not intervention if: the goods or services are made available at fair market value and made available to other third parties, even if not rented or sold to other candidates (so this would be similar to other transactions conducted by the organization). As long as the organization is not refusing to rent or sell such items to an opposing candidate, the organization is doing this without preference for or against any candidate.

Example 28

[9]When use of resources DOES constitute a campaign or political contribution under applicable campaign finance law, but is not reportable under such law's relevant thresholds (and is not allowed under a Revenue Ruling or other federal tax authority), that use may still constitute political intervention should the organization (which bears the burden of proof in such instances) not be able to show why the use of resources is not political intervention under a facts and circumstances test.

Save the Canines, a tax-exempt organization, allows City Council Member W to use its auditorium, free of charge, for a Town Hall Forum to discuss City Council business, including a proposed dog park. W is running for reelection, and her campaign sets up a table in the auditorium handing out campaign literature, bumper stickers, and requests for campaign contributions. There is no written rental agreement, and Save the Canines officials are present at the event and do not say anything about the campaign activity. Under local election law, in-kind contributions of $500 or more must be reported as campaign contributions.

Because the cost of renting Save the Canines' auditorium is less than $500, providing free use of the space is not a reportable campaign contribution under local law. This is a use of the organization's resources in support of a candidate that is not specifically allowed under a Revenue Ruling or other federal tax authority. Save the Canines did not take any steps to prevent the use of the auditorium for campaign purposes and it did not receive fair market payment for the rental. Save the Canines has engaged in political intervention.

Example 29

Following the forum, Save the Canines had DVDs made of the event and mailed it out to every household in the city, at a cost of $2,500. The mailing is considered a reportable campaign contribution under local election law, Save the Canines has intervened in the City Council election by making and mailing the DVDs.

Example 30

After serving on the City Council and as Mayor, W became her party's nominee to be Vice President of the United States. During the campaign, W's campaign sends out an email calling for a constitutional amendment that would impose proportional representation on the election of U.S. senators. The Executive Director of Save the Canines forwards W's email to Save the Canines' 1.5 million person email list without adding any comments. Under federal campaign finance law this is a republication of campaign materials and is considered a contribution to the candidate. Save the Canines has engaged in political intervention.

Example 31

Z, the Chair of Save the Canines' Board of Directors, hears a press report about high turnover rates among W's campaign staff. Knowing that Save the Canines' staff is loyal and resilient, Z asked those on the staff to volunteer on a full-time basis for the W campaign. Z and the Save the Canines Board feel that this would be a wonderful grass roots organizing experience for these staff members and would build the organization's contacts in the community and in government, so they vote to continue to pay the staff's salary during the period of time in which they would volunteer with the campaign. Save the Canines has engaged in political intervention by allowing its paid staff time to be used to support a campaign.

Example 32

Save the Canines has a very large endowment. Knowing this, the W for Vice President campaign approaches the Executive Director and asks for a loan to help offset the high legal and other costs that the campaign, W, and her family have incurred. The W campaign offers to pay 20% interest. Save the Canines makes the loan, and it is repaid by the campaign, with the 20% interest. Despite the above-market-rate interest being charged and paid, Save the Canines is not in the business of making loans and so the fair-market-value safe harbor would not apply. Further, the making of the loan is a contribution under federal election law and would thus be political intervention.

6. Facts and Circumstances*: Communications that reflect a view on a candidate, do not come within an exception, and are targeted to voters in states, districts, or other locations where close election contests are occurring, are conclusively political intervention. In other cases, evidence of other facts or circumstances, such as timing, the range of issues discussed, disclaimers and disclosures, the organization's history, the impartiality of its methods, or corrective steps taken, shall be considered only in the organization's defense:*

(a) to meet its burden of proof that intervention did not arise from its communications or use of resources, by showing that the conduct furthered a proper exempt or business purpose and was unrelated to intervening in the campaign of any candidate for public office, or

(b) as mitigating factors affecting the penalty or remedy to be imposed upon violations.

A. The facts and circumstances approach would be completely eliminated from all IRS judgments about whether political intervention has occurred, in cases where the organization's conduct passes the bright line and safe harbor tests stated above. The only area remaining to be judged under a facts and circumstances approach would be the situation where an organization does not have the protection of the clear definitions or exceptions, there is sufficient evidence under Rule 4 or 5 to suggest that political intervention may have occurred, but the organization believes it has evidence to demonstrate nonpartisanship and promotion of exempt purposes. Rule 6 provides a pathway for an organization to defend its conduct using favorable facts and circumstances.

B. Initially, however, there is one category of speech that would be conclusively political intervention under Rule 6: communications that refer to and reflect a view on a candidate, not within an exception, but targeted to voters in states, districts, or other locations where close election contests are occurring. This would require IRS regulations to objectively define "close" contests and what distinguishes "targeted" from untargeted communications.

1) "Close" contests could be defined as election campaigns in which at least two candidates are regarded as within a few percentage points of each other in public opinion polling recently reported in the mass media that serve the state or local

jurisdiction in question (television, radio, general circulation newspapers, and web-based news outlets).

2) Alternatively, a broader set of contests could be comprehended by the term "competitive," which would not depend on the shifting existence or credibility of polls or upon setting a certain point spread to be "close." All that would be required is that two or more candidates are viable competitors in the election. This requirement would be satisfied if the communication reflects a view on a viable competitor to an incumbent. The geographical unit of analysis would be the electoral jurisdiction in which the public vote would determine the outcome. For presidential elections, this would be each of the states in which two or more candidates are viable contenders to obtain the state's electoral votes, to win the state's primary election, or to obtain delegates to the nominating convention. The organization should bear the burden of proof to show that the election is not competitive in that jurisdiction. If it does, then it may defend itself under a further analysis of the facts and circumstances under Rule 6. If it does not, then its communications referring to and reflecting a view on a candidate targeted to a particular jurisdiction would be conclusively political intervention.

3) It is our intent that "targeted" should mean that the organization has selectively chosen the location of the message, not based on criteria unrelated to the impact it might have on the outcome of the vote. Thus, if an attempt is made to focus or concentrate the reach of the communication on the basis of a given nonpartisan demographic factor, such as income levels, ethnicity, gender, or proximity to the organization's facilities, it is not selectively targeted even though some messages may reach voters in a battleground state. On the other hand, if the organization spends more money on communications in swing districts than it does elsewhere, the message has been targeted selectively. A message on national television regarding a presidential candidate would not be selectively targeted, but it would be targeted if it was limited to broadcast outlets in certain geographic regions. If the media markets selected primarily reach voters in swing states the message would be targeted to competitive races. Again, we stress that "selective targeting" is not determined by a subjective analysis of the organization's motives or intentions, but requires identifying in well-crafted regulations those objective manifestations of speech and conduct that indicate political intervention is occurring.

4) If an organization is located in only one state or city, and a competitive election happens to be occurring there, its communications about the candidates there would ordinarily not be regarded as selectively targeted. But the communications would be selectively targeted if it received funding from a donor outside the area with the understanding that the funds would be spent on such local messages, or it was directed by its national affiliate to conduct the messaging. Paid mass media advertising should be regarded as more likely to be a selectively targeted form of communication than flyers, e-mail messages, letters to the editor, and the like. However, a local organization that makes an independent decision, with local funds, to communicate about a person who is a local candidate should not be treated as conclusively engaged in political intervention and should be able to defend itself based on other facts and circumstances.

5) We recognize that communications lacking express advocacy but reflecting views on candidates, selectively targeted to competitive elections, especially those employing paid mass media advertising, have been and are likely to continue to serve as vehicles to influence elections while attempting to avoid restrictions imposed by tax laws and campaign finance laws. If such communications do not come within bright line definitions designed to capture political intervention, and instead are subject to protracted examinations under "all the facts and circumstances," the system of political tax law enforcement is likely to fail. Therefore, we recommend that the IRS and Treasury issue very precise regulations, and update them periodically as warranted, to identify and control the utilization of such evasive techniques.

C. In all other remaining situations, a variety of facts and circumstances could provide evidence of a proper exempt or business purpose unrelated to political intervention, including but not limited to timing, range of issues, whether they are "wedge" issues, use of political code words, factual credibility, disclaimers of partisanship, disclaimers of attribution of personal statements, basis for targeting (other than targeting to close elections), history, impartiality of preparation, external events, the reaction of candidates and the media, and the amount and nature of organizational resources used. The organization's past record, corrective measures, and future safeguards are also relevant.

D. Finally, a word about the burden of proof under Rule 6 and the question whether a communication that reflects a view on a candidate, and is not within a safe harbor under Rule 4, enters the facts and circumstances analysis with a "presumption" that the organization has politically intervened. We do not intend that matters considered under Rule 6 be <u>presumed</u> to be political intervention. Rather, the question as to whether the view reflected upon a candidate bears a great deal of evidentiary weight or little or none at all depends entirely upon the context in which the view was reflected. In that sense, an organization is certainly no worse off under Rule 6 than it is under the present IRS "facts and circumstances" approach, in which the facts triggering an examination are not systematically stated. To be clear, the burden of proof to be met under Rule 6 is the same burden that the organization bears as to any aspect of federal tax law: to establish that, more probably than not, it is in compliance with the Internal Revenue Code. By setting up Rule 4, we narrow the realm of suspect speech considerably by requiring reference to a candidate and the reflection of a view about the candidate, conveying a preference for or against him or her. If the speech crosses that threshold and is not protected by a safe harbor exception, it is not *per se* or presumed intervention. The speech may need to be tested in an IRS audit (or more likely in the organization's own internal review process) to see whether it has a nonpartisan justification, but it is not presumed to be partisan.

<u>Example 33</u>

Alabama Senator Smith is up for re-election in November and the race is close. He is a heart attack survivor, a former smoker, and a nationally recognized figure. The Nationwide Cancer Association (NCA) office based in Washington, DC asks runs Senator Smith to record

a public service announcement telling his story and warning about the dangers of smoking. The NCA buys air time to run the PSA nationwide in January, five months before the primary election. The PSA refers to and reflects a view on a candidate, but because the ad runs nationwide, it is not targeted and is therefore not conclusively political intervention.

Example 34

Same facts as in 33, but instead of running the PSA nationally, the NCA runs it on Alabama TV and radio channels and posts it on its state chapter's website. NCA runs no similar ads involving public figures in non-battleground locations. The PSA is targeted to a close race. This communication does not include express advocacy, but refers to a clearly-identified candidate and reflects a view on that candidate. It does not fall within any of the safe harbor exceptions in Rule 4. This is conclusively political intervention as a targeted message even though it is connected to the organization's exempt purpose.

Example 35

Same facts as in Example 33, but the PSA featuring Senator Smith was created by the NCA Alabama chapter, a legal entity separate from the national organization, and it runs in April. It is part of a series of ads sponsored by the Alabama chapter, each featuring a statewide "celebrity," that is run every April for Healthy Heart Month.

This communication does not include express advocacy, but refers to a clearly-identified candidate and reflects a view on that candidate. It does not fall within any of the safe harbor exceptions in Rule 4. The ad is not targeted since it represents only a decision by the Alabama chapter to advertise in its own state, so it is not conclusively political intervention. Applying a facts and circumstances analysis, the organization can show that based on its history, the impartiality of its methods (using a variety of notable state figures who have been affected by smoking), and the timing of the series of ads, this communication was not political intervention.

Example 36

On October 5, Louisiana Moms Against Guns runs a final newspaper ad thanking Governor D for his courageous act in signing into law a bill banning the carrying of concealed weapons on school grounds, after running a series of ads urging him to do so. Louisiana Moms makes a practice of running "thank you" ads when the target of a lobbying campaign takes the requested action. Governor D is up for re-election in November. The Governor signed the bill on October 4. The ad does not include express advocacy, but refers to a clearly-identified candidate and reflects a view on that candidate. It is a paid mass media ad and therefore cannot fall within any of the safe harbor exceptions. Considering these as the only pertinent facts and circumstances, due to the close proximity of the ad to the official action, the fact that the ad does not mention the Governor's reelection, and the organization's history of running similar ads, the organization has met its burden of proof that intervention did not occur.

Example 37

Same facts as Example 36, but the Governor signed the bill on May 4. Based on the timing of the ad, the organization has not demonstrated that the ad furthered a proper exempt or business purpose and that it was unrelated to intervening in the campaign.

Example 38

On August 5, the day after a vote in Congress, Montana Moms Against Guns posts on its website an article showing how the two Senators voted on a bill banning the carrying of concealed weapons on school grounds. Senator L, who is up for re-election in November, voted for the bill, and Senator P, who is not up for re-election, voted against it. Montana Moms has been routinely posting news articles on the progress of the legislation in Congress on its website.

The article does not include express advocacy, but refers to a clearly-identified candidate and reflects a view on that candidate. It does not fall within any of the safe harbor exceptions. The article does not refer to Senator L's re-election, and is limited to the single issue. The homepage of the organization's website indicates that it believes concealed weapons should not be allowed on school grounds. Assuming these are the only relevant facts and circumstances, the organization has met its burden of proof that posting the article was unrelated to intervening in the campaign and was in furtherance of its exempt purpose.

Example 39

In a presidential debate, Candidate X stated that the HPV vaccination causes mental retardation. This is a demonstrably false statement, but it is being repeated by multiple news outlets. Organization P runs clinics for low-income women and advocates for access to health care. P has a long history of providing educational materials about sexual health issues based upon medical research. P has often used the press to contradict this falsehood when it appears in public statements made by others, so that girls and women will not be dissuaded from being vaccinated by false information. P's communications director immediately issues a press release and buys banner ads on political websites (brief, without further educational content) saying that "Candidate X needs to get her facts straight—research conclusively disproves her statement."

The communications do not fall within the safe harbor for self-defense or any other exceptions. However, provided there are no other relevant facts and circumstances, P can meet its burden of proof that it was not intervening in the campaign based on the facts described above.

Conclusion and Next Steps

The Bright Lines Project is underpinned by a convergence of opinion among nonprofit tax law experts, practitioners, and nonprofit leaders from across the nation that changes in the IRS political activity rules governing 501(c) organizations are needed. Beginning with a June 2009 retreat and continuing through a series of "listening sessions" and interviews, we have sought not only to identify ways to reduce the ambiguity in the IRS "facts and circumstances" test, but also to design a legal framework that would be clear and comprehensible to nonprofit professionals and laypeople involved in public policy advocacy work. The framework should also serve to provide neutral, objective standards for IRS employees to apply to applications for tax-exempt recognition and to examinations of exempt tax returns. It is our hope and belief that the safe harbors, bright lines, predictability, simplicity and ease of understanding that this proposal represents would enable more charities to participate in the civic life of our country safely and with integrity and for the IRS to enforce the law even-handedly.