Will the IRS Silence Free Speech in 2016?

Congressional protections for nonprofits expire October 1st, 2016.

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EXECUTIVE SUMMARY

The IRS is attempting to issue a rule that would redefine the meaning of political activity to allow the government to regulate free speech and redefine the discussion of issues as electioneering. Doing so would put the IRS in direct conflict with the landmark Supreme Court decision, *NAACP v. Patterson*; eliminate the political freedom of non-profit organizations; lay the groundwork for further speech restrictions, and effectively silence hundreds of thousands of organizations that discuss, analyze, or advocate for public policy.

In November 2015, Congress temporarily de-funded the IRS from pursuing the proposed rule. This gave tax-exempt organizations a reprieve until October 2016, but the IRS has announced it will resume pursuit of the rule once the de-funding prohibition expires.

Congress should act immediately to protect the right of private associations to engage in political speech, by defining “political activity” to mean only express advocacy and electioneering.

Grassroots organizations will need to press lawmakers to protect their freedom of speech. The principal beneficiaries of the proposed quashing of political speech would be incumbent politicians who prefer that their voting records are not exposed to public scrutiny. A critical mass of directed effort will be needed to protect our First Amendment rights.
In November 2013, the Internal Revenue Service (IRS) announced plans to re-define “political activity” in a newly proposed rule.

If the rule is enacted, then non-profit organizations – including, but not limited to, educational institutions, policy advocacy groups, labor unions, and business leagues – could be prohibited by their tax status from engaging in what is now constitutionally protected free speech, including even making basic, factual statements about the records of public officials.

For example, a non-profit organization making nothing more than a factual statement like “Rep. Smith voted for the Such-and-Such Act,” within 60 days of a general election or 30 days of a primary election, would be considered to be engaging in “candidate-related political activity,” i.e. electioneering, under the proposed rule. While these periods are generally known as “election season,” the date ranges are arbitrary.

Depending on their particular type of non-profit status, groups are either entirely prohibited from electioneering, or are permitted to electioneer in a strictly limited fashion. The expanded definition would thereby prohibit, or severely restrict, the educational and advocacy work that is performed by many groups as part of their mission.

The proposed rule is staggeringly broad. Any communication that even named an elected official during election season could be considered electioneering. Any event featuring a candidate for office – even featuring candidates from both of the major parties – could be considered electioneering. Even strictly nonpartisan groups like the League of Women Voters, which hosts candidate forums and publishes voter guides that note public statements made by candidates, would lose their non-profit status under the rule change if they continued to do so.

Voter registration and “get out the vote” drives, even if unaffiliated with any candidate or party, could also be considered electioneering activity that is subject to limitation or prohibition.

Even more radically, the Notice of Proposed Rulemaking (NPR) stated that the IRS intended that any reference to a candidate by name on a website that remained on its website during election season would be treated as electioneering.
Specifically, the proposed rule would prohibit any communications within 60 days of a general election or 30 days of a primary where: “the name of the candidate involved appears, a photograph or drawing of the candidate appears, or the identity of the candidate is apparent by reference, such as by use of the candidate’s recorded voice or of terms such as ‘the Mayor,’ ‘your Congressman,’ ‘the incumbent,’ ‘the Democratic nominee,’ or ‘the Republican candidate for County Supervisor.’ In addition, a candidate may be ‘clearly identified’ by reference to an issue or characteristic used to distinguish the candidate from other candidates.”

The IRS would therefore mandate that during the candidate’s election season, organizations “search and destroy” any content that names or even references a candidate or a candidate’s position on an issue. This would require organizations to determine in every election period whether any individual who is named on their website is running for office.

“The Treasury Department and the IRS intend that content previously posted by an organization on its Web site that clearly identifies a candidate and remains on the Web site during the specified pre-election period would be treated as candidate-related political activity,” the IRS declared.

Although originally written as “guidance” to apply to only what are known as 501(c)(4) organizations – social welfare organizations, referred to herein as C4s for short – the IRS later argued that such prohibitions ought to apply also to educational institutions, labor unions, business leagues, and even non-tax-exempt groups such as Political Action Committees (PACs).

If implemented, the rule would force all tax-exempt organizations to make a painful choice: Surrender your free speech or your non-profit status.

Expanding the definition of electioneering to swallow up many protected forms of political expression raises profound constitutional issues. The matter would likely go to the Supreme Court. One should be optimistic from case history that such a rule would be struck down, but nobody would be certain.

Congressional intervention is needed. Congress acted in November 2015 to temporarily suspend the IRS’ proposed rule change through September 2016, but IRS Commissioner Koskinen told reporters in January 2016 that the IRS will continue to pursue the rule in the coming October. Congress should positively define “candidate-related political activity” as express electioneering, and settle the matter once and for all.
Unfortunately, elected politicians have a powerful incentive to let the IRS proceed as it will: if the IRS successfully re-defines the meaning of political activity to include discussing the legislative record of candidates, then non-profit groups could be restricted from informing the public about how their lawmakers voted – and a great many politicians would very much like to keep the public in the dark about their voting record.

BACKGROUND

Different types of organizations play different roles in politics and policy, and are accorded tax status based upon those roles. The IRS refers to these groups by the section of the tax code that describes them. PACs, known to the IRS as “527” political organizations, typically engage in electioneering: express advocacy for the election or defeat of a candidate for public office. They are for-profit entities, and their political speech is limited by federal and state election law – not by tax law. They are required to disclose donors.

501(c)(3) organizations, or “C3s” for short, may advocate for (or against) public policy from an educational standpoint: they may inform the public of the merits of legislation, but they may not lobby Congress or any other legislature to pass any particular bill. In this respect, C3 groups have the least political freedom. C3s are considered educational institutions. They are tax-exempt non-profit entities, and contributions to C3s are tax-deductible. Because they engage in no electioneering, they are not required to disclose their donors under election law.

501(c)(4) organizations (“C4s”) fall between PACs and C3s. Unlike C3s, they can lobby for or against specific legislation. They are permitted to contact voters and inform them of matters of both fact and opinion. They may even engage in electioneering, as long as it is not their primary activity. This is understood to mean that no more than half of their resources may be spent on electioneering, and most C4s avoid electioneering altogether to avoid uncertainty. C4s enjoy non-profit tax status, but contributions to C4s, unlike those to C3s, are not tax-deductible. Thus, C4s have a tax status that falls between those of PACs and C3s, and intermediate political freedom as well.

527 Organizations:
More commonly known as PACs, but known to the IRS as “527” by by the section of the tax code that applies to them. PACs can spend money to electioneer for or against a candidate or ballot question, subject to election law.

501(c)(3) “C3” Organizations:
Educational institutions, considered charities for tax purposes. Some policy-oriented C3 organizations are described as “think tanks.” C3 groups may propose and endorse policies, but may not lobby for them.

501(c)(4) “C4” Organizations:
Non-profit organizations that can advocate for public policy changes as part of their mission of improving social welfare.
<table>
<thead>
<tr>
<th>ORGANIZATION TYPE</th>
<th>SHORTHAND</th>
<th>NON-PROFIT?</th>
<th>DONATIONS TAX-DEDUCTIBLE?</th>
<th>DONOR DISCLOSURE</th>
<th>CAN LOBBY?</th>
<th>CAN ELECTIONEER?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Candidate Committee</td>
<td>Campaign</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Could, but not interested in doing so</td>
<td>Yes</td>
</tr>
<tr>
<td>Political Action Committee</td>
<td>PAC, or 527</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Independent expenditure only PAC</td>
<td>Super PAC</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes, but may not coordinate with campaign</td>
</tr>
<tr>
<td>501(c)(4) Social welfare organization</td>
<td>C4</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Limited</td>
</tr>
<tr>
<td>501(c)(5) Labor Union</td>
<td>C5</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Limited</td>
</tr>
<tr>
<td>501(c)(6) Business League</td>
<td>C6</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Limited</td>
</tr>
<tr>
<td>501(c)(3) Education Institution</td>
<td>C3</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

C4 organizations are defined by the tax code as “social welfare organizations,” and can include non-political groups like the Lions Club, local fire departments, and even the Miss America Organization. It’s estimated that fully two-thirds of the roughly 86,000 C4 organizations are not public policy-oriented. There is no legal distinction between policy-oriented C4s and those that are not.

But the freedom of the substantial number of policy-oriented C4s that advocate for (and sometimes against) changes in public policy is at risk, as is that of any such organization that may in the future endeavor to influence legislation.

Policy-oriented C4s are issue advocacy groups. They are permitted unlimited lobbying as long as it is related to their tax-exempt purpose. Because they have the best tax status attainable for their purpose, C4 is the preferred organizational form for groups that are interested in affecting public policy.

Policy-oriented C4s are often criticized by other types of organizations. The Center for Responsive Politics refers to C4s simply as “dark money groups.”

We argue the contrary: Policy advocacy is an integral part of civil society. The Supreme Court agrees.
FREE SPEECH IS ESSENTIAL TO SOCIAL WELFARE

C4 organizations can advocate for policy change in ways that C3 organizations cannot. In doing so, they play a vital role in promoting the social welfare of the American people.

C3s can educate the public and promote ideas. In the long run, these ideas can lead to policy change. But they cannot support or oppose active legislation. They cannot say “Tell Senator Smith to support the Such-and-Such Act,” much less “Senator Smith voted for the disgraceful Such-and-Such Act.”

C4s are permitted to say all of these things, and in doing so, promote political outcomes that favor their policy goals. A politician may feel pressured by these public statements, and vote accordingly.

C4 organizations are an important voice in public policy-making. They hold politicians accountable for their votes. As one can imagine, politicians might prefer those voices be silent.

The “dark money” labeling of C4s simply because they don’t have to disclose donors is a misunderstanding of the importance of nonprofits in public policy. The notion of donor privacy was integral to the success of the civil rights movement in America. In National Association for the Advancement of Colored People (NAACP) v. Patterson, the Supreme Court had to intervene when the NAACP refused to comply with an Alabama court order that demanded disclosure of its membership list. The State of Alabama had sued the NAACP, intending to remove the NAACP from the state, claiming that its activities in organizing the Montgomery Bus Boycott, clearly a political activity, caused “irreparable injury to the property and civil rights of the residents and citizens of the State of Alabama for which criminal prosecution and civil actions at law afford no adequate relief.”

The Supreme Court held that “Immunity from state scrutiny of petitioner’s membership lists is here so related to the right of petitioner’s members to pursue their lawful private interests privately and to associate freely with others in doing so as to come within the protection of the Fourteenth Amendment.”

For the NAACP during the civil rights era, it was plain to see that forcing the organization to disclose its members would 1) harm its members by making them possible targets of physical violence, and 2) harm the organization by causing fewer people to join.
The same principles still hold true today. Depriving people of their anonymity discourages political participation. Individuals may feel pressured by their employers, their social networks, and even their families to participate in, or refrain from, political activity.

For these individuals, non-profit organizations often provide the only avenue to exercise their free speech in the public policy process by accepting anonymous contributions. This is a fundamental right of free assembly, thereby protecting the fundamental right to free speech. Both of these rights are essential to social welfare.

C4s are also criticized because they are permitted to electioneer, provided that electioneering is not the primary purpose of the organization. Therefore, critics argue, to some degree C4s are able to influence elections without disclosing their donors.

The concern is reasonable, but in practice, C4s avoid electioneering whenever possible. This is because C4s face the threat of losing their non-profit status if audited and found to be electioneering as their primary activity. These groups want to be nowhere near the 50% limit to ensure that any investigation would find them safely below that limit. Furthermore, because they must engage in a primary activity more than they electioneer, electioneering isn’t worth the risk to the primary mission.

Thus, the practical effect of the allowance of limited electioneering is little more than protection against the contingency that a policy advocacy activity, made in good faith, be ruled electioneering after the fact.

C4s are not major actors in the campaign industry. Of over $6.5 billion in reported expenditures in the congressional and presidential races in 2012—the biggest year for C4 spending in elections in history—C4s spent only 4 percent. Another specious charge against C4 organizations is that they do not match the IRS’ description of “social welfare organizations”, whereby public policy is, supposedly, unrelated to “social welfare.”

This is clearly false – and it’s time policy-oriented organizations stand up for themselves and say so.

Advancing public policy is essential to social welfare. Public policy is the framework under which we all live. Every aspect of economic and social activity is governed in countless ways by public policy. Every product we buy has its own story of taxes and regulation, whose chapters are written at every stage of the supply chain. Our American prosperity is the result of success in economic policy, social policy, and foreign policy.
Furthermore, the Supreme Court has repeatedly held that *of course, points of view are protected speech.*

For instance, in *NAACP v. Patterson* XI, the Court said:

*Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.* [...] XII

*It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.* [Emphasis added.] [...] XIII

Of course, it *is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.*

**THE LINE BETWEEN FREE SPEECH AND ELECTIONEERING**

The definition of “political activity” is so important because it delineates protected speech from speech subject to regulation.

What makes speech “political”? What is “electioneering”? What is “educating”? What is ordinary speech? And how can the law distinguish them all? How can a policy-oriented organization identify protected speech and speech that is subject to regulation?

The landmark *Buckley v. Valeo* Supreme Court ruling of 1976 sought to eliminate confusion. It defined political speech, as could be restricted by campaign finance laws, to the speech of candidates, party committees, PACs, and those whose speech “expressly” advocated for the election or defeat of a political candidate or ballot question. It is a common sense position. To prevent ambiguity, the Court even described a bright-line test, listing what came to be known as “eight magic words” that render the intent of a message unmistakably electoral in nature.
These “eight magic words” are: “vote for”, “vote against”, “elect”, “defeat”, “support”, “reject”, “cast your ballot for”, and “Smith for Office.”

The “eight magic words” were not intended to limit electioneering to only the usage of these particular terms. For example: “Evict Mr. Smith from the Capitol in November,” while not using any of the “magic words,” is still, undeniably, a statement of express advocacy.

The bright-line test established, however, that only unambiguous support or opposition to a candidate for public office or a question on the ballot could be considered electioneering.

The ruling was upheld in 2007 in Federal Election Commission v. Wisconsin Right to Life, Inc., where Chief Justice John G. Roberts, arguing for the majority, argued that it would improperly chill political speech to allow Congress to limit speech beyond “express advocacy or its functional equivalent.”

What is not “express advocacy” (i.e. electioneering) is simply “political expression.” It is focused on policy, rather than on a candidate.

To say “Representative Smith voted for such-and-such” is not electioneering. It is simply an observation, and as such, it is free speech.

Yet, with the stroke of a pen, the IRS would flout all jurisprudence on the subject.

Then there is the issue of electioneering as a legitimate side activity of C4s. The IRS originally announced that the proposed rule would “define the term ‘candidate-related political activity,’ and would amend current regulations by indicating that the promotion of social welfare does not include this type of activity.”

Because C4 organizations are required to act exclusively to promote social welfare, this could easily be interpreted by a court as a ban on all electioneering.

As we have seen, C4s seldom purposely engage in electioneering, so this would principally serve simply to remove the legal protection C4s enjoy should a limited amount of their political expression be determined after the fact to have been electioneering.
But more fundamentally, we should question the IRS’ assumption that it has the authority to prohibit legally permissible activity of C4 organizations. Federal regulations are intended to provide guidance where the law is unclear. Here, however, the IRS plainly seeks to change the meaning of the law as it is understood.

While the IRS claims the proposed rule would bring clarity and simplicity, the proposed limitation on speech that mentions candidates within 60 days of a general election or 30 days of a primary election would create uncertainty and complexity.

The nature of the statement “Rep. Smith voted for the Such-and-Such Act” is the same whether made ten days or ninety from an election, and the law currently treats such statements the same at all times. The proposed rule would eliminate that consistency. Organizations would need to monitor every election in the country – potentially even local elections and special elections – to ensure that not one person named anywhere on their website happens to be running for office.

It is extraordinary that the IRS might have the ability to impose such onerous requirements without any statutory basis.

The IRS’ bravado in seeking to change the law raises legitimate questions of its intent. Evidence corroborates that suspicion.

**MOTIVE**

The IRS currently applies a “facts and circumstances” approach in determining the eligibility of organizations for tax-exempt status. It reviews applications for tax-exempt status, requests detailed information from groups whose applications are pending, and occasionally performs audits. This has been its approach for years. Why did the IRS suddenly decide to change from its “facts and circumstances” approach to imposing black-letter rules against certain forms of speech?

The IRS rule reportedly stemmed from a June 24, 2013 report on its own investigation into the cause of their systematic targeting of conservative and “Tea Party” organizations that had been discovered earlier that year, entitled “Charting a Path Forward at the IRS: Initial Assessment and Plan of Action” and authored by acting commissioner Daniel Werfel. The report was cited extensively in the Notice of Proposed Rulemaking.

XVI
In the report, Werfel was on one hand contrite, noting that individuals within the IRS were “responsible for the mismanagement,” that Exempt Organizations Management “failed to identify the inappropriate activities in a timely fashion,” and that senior IRS leadership failed “to take appropriate, proactive steps to identify and help address significant emerging operational risks.” On the other hand, he claimed that the investigation had “not found evidence of intentional wrongdoing on behalf of IRS personnel.”

The report made no assertion of wrongdoing, real or perceived, by any of the exempt organizations in their application for non-profit status.

Instead, it asserted that the “inappropriate behavior” of IRS officials was the unhappy consequence of a lack of clear guidelines, and seemingly concluded that the lawful activities of private organizations needed to be curtailed to prevent error on the part of its own examiners.

With no citation, Werfel declared: “It has been a common refrain from Congress and the public that the rules that are applicable for 501(c)(4) eligibility are ambiguous and confusing, both for the taxpayer and for the staff within the IRS whose responsibility it is to administer those laws and regulations.”

On the contrary, as we have seen, the rules were well-understood and clear since the Buckley case established that C4s were permitted unlimited lobbying and limited electioneering as determined by the bright-line test.

Yet the IRS insisted in its announcement of the proposed rule change: “These proposed rules reduce the need to conduct fact-intensive inquiries, including inquiries into whether activities or communications are neutral and unbiased.”

This was an absolutely stunning admission by the IRS. It was a confession of overreach.

Again, as we have seen, political activity is already well defined and established as express advocacy. There is no requirement that issue discussion be “neutral” or “unbiased,” whatever those terms might be interpreted by the IRS to mean.

“Neutral” and “unbiased” are meaningless terms in law. Neutrality is subjective, and C4 organizations have no obligation to be “neutral” in the first place.

**Key point:** In issue discussion, there is no such thing has being perfectly neutral or unbiased, and C4 groups have no obligation to be neutral or unbiased.
So in saying it needed to conduct “fact-intensive inquiries” “into whether activities or communications are neutral and unbiased,” the IRS admitted that it was exceeding the limit of lawful inquiry.

This begs the question: How many applications for non-profit status were wrongfully denied by the IRS on the illegitimate basis that their communications were “biased”?

It appears it was the IRS – and not the C4 organizations – that was confused about what is lawful legislative activity.

Yet the IRS’ own documents show that it does indeed understand lobbying versus electioneering. In a presentation, “Starting Off Right: What New Non-501(c)(3) Organizations Need to Know,” the IRS makes clear to prospective non-profit organizations that it understands exactly what activity is allowed and what is prohibited.

“What is lobbying? Activities intended to influence legislation,” the presentation declares.²²

“An organization is ‘lobbying’ if it contacts, or urges the public to contact, members or employees of a legislative body to propose, support or oppose legislation,” it continues.

The IRS seems to understand that candidates’ names may be mentioned in the course of tax-exempt lobbying for the purposes of social welfare.

And as it expressly states, C4s, C5s, and C6s are permitted unlimited lobbying, related to the organization’s exempt function, without jeopardizing its exempt status.

Plainly, the IRS understands the distinction between lobbying and electioneering.

The IRS was embarrassed by revelations that its own documents suggested that terms that could only define an ideology, such as “tea party,” which carried no inherent meaning as to the groups’ eligibility for non-profit status, were used in wrongfully targeting applicants for C4 status for undue scrutiny.

By proposing to “clarify” the meaning of political activity, the IRS could claim that “the lack of a clear and concise definition of ‘political campaign intervention’” was the problem all along.
In summary, it appears the IRS sees confusion where none exists:

- The distinction between issue advocacy and electioneering is simple and well-understood by all parties.
- The claim of widespread electioneering abuse by C4s is not documented. There is no track record of abuse, and no body of literature to demonstrate that C4 groups systematically engage in illegal behavior.
- The IRS has subjected groups to undue scrutiny over legitimate, lawful activities, such as exhibiting “bias” in their communications.
- The supposed confusion happens to serve as a convenient excuse for the IRS’ having improperly delayed applications for political C4s.

Given these facts, it seems at least plausible that one of the IRS’ motivations for proposing the rule change is simply to excuse its own admitted mistakes.

Amazingly, the IRS even acknowledged that its proposed rule would alter the scope of organizations’ permissible actions, and brushed it off as a lesser concern.

“Although more definitive rules might fail to capture (or might sweep in) activities that would (or would not) be captured under the IRS’ traditional facts and circumstances approach, adopting rules with sharper distinctions in this area would provide greater certainty and reduce the need for detailed factual analysis in determining whether an organization is described in section 501(c) (4),” the IRS wrote.XXI

The IRS bluntly contended that changing rules to “sweep in” and define as electioneering what is currently considered free speech would be great, because it would be convenient.

It was a remarkably cavalier statement indicative of the IRS’ lack of concern for how it would undermine free speech in the United States of America.

**BLOWBACK**

Response to the IRS’ Notice of Proposed Rulemaking was swift and overwhelming, with a record 175,885 public comments submitted to the IRS in its comment period, of which the vast majority opposed the rule change.XXII

The IRS initially seemed to back off, saying in May 2014 “we have concluded that it would be more efficient and useful to hold a public hearing after we publish the revised proposed regulation.”
But in 2015, the IRS made clear that it intended to pursue the rule and even expand its scope.

The IRS later announced it was considering expanding the definition, initially intended to apply only to C4s, to apply to all tax-exempt organizations.

“We’re looking at, I say to be fair, applications across the entire spectrum, so it shouldn’t just be C4s. We need to make sure that as Congress has legislated in all of these areas, there’s a consistent and appropriate framework for C3, C4, C5, C6, 527s,” said IRS commissioner John Koskinen in March 2015. These are educational institutions, social welfare organizations, labor unions, business leagues, and PACs, respectively.

Finally, Congress intervened. The issue was temporarily frozen in November 2015, when Congress passed legislation to de-fund and thereby prevent the IRS from implementing the rule through the fiscal year. This was a provision in HR 2029, the Consolidated Appropriations Act of 2015, in Title I, now Public Law No. 114-113.

But upon closer inspection, the law was too narrow in scope to truly put the matter to rest. The relevant language read:

**Translation from legalese:**

Until October 1, 2016—

1) The Department of Treasury, including the IRS, may not take any further steps to change the standards that allow an organization to obtain C4 non-profit status.

2) The standards presently in place shall continue to apply for determining eligibility for C4 status.

During fiscal year 2016—

(1) none of the funds made available in this or any other Act may be used by the Department of the Treasury, including the Internal Revenue Service, to issue, revise, or finalize any regulation, revenue ruling, or other guidance not limited to a particular taxpayer relating to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of section 501(c)(4) of the Internal Revenue Code of 1986 (including the proposed regulations published at 78 Fed. Reg. 71535 (November 29, 2013)); and

(2) the standard and definitions as in effect on January 1, 2010, which are used to make such determinations shall apply after the date of the enactment of this Act for purposes of determining status under section 501(c)(4) of such Code of organizations created on, before, or after such date.

The most obvious shortcoming is the law’s expiration date of September 30, 2016 – just in time for election season, when public attention is focused on the presidential race, and followed by the “lame duck” period when the outgoing legislature feels least pressured by voters. This is generally the period when Congress passes the most controversial laws, because members are least vulnerable just after their election.
Second, the de-funding of IRS implementation does not prevent the President from implementing the rule change by Executive Order, to take effect at the start of the new fiscal year. The “lame duck” period includes the President’s last days in office, and the current President’s Chief of Staff has already said that the President intends to use Executive Orders “audaciously” in his final year. Without a public act to prevent it, the rule could be implemented by decree at the end of the year.

Third, the protection applies only to 501(c)(4) organizations, and not to the broader range of organizations that the IRS has announced it intends to regulate similarly.

If the IRS is able to proceed unchecked, it is certainly possible and perhaps even likely that organizations of all types will find themselves censored in the coming year.

Fortunately, organizations are watching and challenging the IRS. In a trenchant comment, the American Jewish Committee noted:

The rigid and arbitrary nature of the proposed black-letter rules, with black-out dates substituting for the currently applied, and as far as we can tell, reasonable and workable, “intense fact-based determinations” is overkill. It is no doubt true that such rules may appear easier for the IRS to administer than the currently applied—and for some reason denigrated—fact intensive standard. They are no doubt attractive to the IRS because they are more likely to foreclose controversy about any particular decision. But the IRS is using a blunt instrument when far more precise tools are available—and work well. When speech is suppressed, precision of regulation is desirable. In most contexts it is constitutionally required. Sheer administrative convenience is simply not an adequate reason to ban speech far beyond what Congress mandated.

The comments opposing the rule change, mostly gathered by organized grassroots efforts, broadly cited encroachment on the right to free speech and free assembly. These are indeed the basic arguments against the rule.

But even concerned citizens demonstrated a limited understanding of the enormity and the radical nature of such a rule change. Many commenters seemed to believe the rule change would legitimize the targeting of political C4 groups. Treating all political discussion as electioneering would indeed accomplish this, but in a more wholesale way than what the people submitting the comments intended.
Compounding the confusion, the issue was muddled with the controversial ruling in *Citizens United v. FEC*, 558 U.S. 310 (2010).

The *Citizens United* case took up the question of whether or not corporations and other associations of individuals had the same right as individual citizens to influence an election by spending money. But it did not consider the definition of electioneering.

All of this led to considerable confusion over the intended outcome of the IRS’ rule change (conveniently, for the IRS.) It was perceived as an effort to overturn *Citizens United*, when in fact it would have no bearing on it.

Groups opposing the IRS’ changing the meaning of political speech have not, by and large, made a clear argument to rally the public: “We have the right to free speech, and that includes the right, as individuals and groups, to criticize politicians, both during election season and at any other time of the year.”
CONCLUSION

Prohibiting non-profit groups from so much as mentioning the names of elected officials would drastically curtail them from carrying out their social welfare missions.

Nobody stands to benefit more from this prohibition than the politicians themselves. They would prefer fewer outside actors criticize them during election season. Silencing policy-oriented groups would achieve that. Despite a Congressional reprieve through September 2016, policy-oriented organizations cannot rest on their laurels in this matter. The respite is temporary.

Groups should organize now for a long-term solution, which must be an act of Congress that defines political activity as nothing more than express advocacy. Only this can prevent the IRS or the President from silencing them.

Organizations should focus their messaging on not just defense of free speech, but also the separation of powers. The Executive Branch and certainly the IRS have no authority to overrule Congress and the Supreme Court.

Most of all, organizations should defend their right to hold politicians accountable.

The Supreme Court wrote in *Buckley v. Valeo*: “Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order ‘to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” These issues included “political association as well as political expression.”

All citizens and associations of citizens who value their free speech and their ability to change public policy must mobilize quickly and boldly to force the passage of legislation to protect their freedom of political association before the IRS destroys it.
ENDNOTES


V. Urban Institute. (2013, May 24.) “There are a lot of 501(c)(4) nonprofit organizations. Most are not political.” Retrieved from http://www.urban.org/urban-wire/there-are-lot-501c4-nonprofit-organizations-most-are-not-political


VIII. NAACP v. Patterson, 357 U.S. 449, p. 452. (1958)

IX. Ibid. p. 466.


XI. NAACP v. Patterson, 357 U.S. 449, 460 (1958)


XVIII. Werfel, pages 28.


XX. IRS slide presentation.


