



February 4, 2014

The Honorable John A. Koskinen
Commissioner of Internal Revenue
CC:PA:LPD:PR (REG-134417-13), Room 5205
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

Re: Comments on Draft Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities

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Dear Commissioner Koskinen:

The American Civil Liberties Union (“ACLU”) respectfully submits these comments in response to the Notice of Proposed Rulemaking (the “Notice”) issued by the Internal Revenue Service (the “IRS” or “Service”) and the Treasury Department on November 29, 2013.¹

I. Executive Summary

As we explain in detail in our comments below, while we support replacing the current “facts and circumstances” test for political activity by affected tax-exempt organizations with a bright-line standard, we have serious concerns with the rule as proposed in the Notice, both from a First Amendment perspective and as a simple matter of workability.

We comment below on:

- The danger with the Service’s proposed “electioneering communications-plus” approach in the definition of candidate-related political activity (“CRPA”), which would cover *any* public communication that refers to a candidate within 30 days before a primary or 60 days before a general election, or, in the 60 days before a general election, refers to a political party;
- Why the proposed “functional equivalence” test, which would count as CRPA any communication that is “susceptible of no reasonable interpretation” other than one in support of or opposition to a

¹ Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1) [hereinafter *Notice*].

candidate or candidates of a party, will fundamentally undermine the bright-line approach that the Service wishes to adopt, and will produce the same structural issues at the IRS that led to the use of inappropriate criteria in the selection of various charitable and social welfare groups² for undue scrutiny;³

- The need to exclude non-partisan voter guides, get-out-the-vote (“GOTV”) drives and voter registration activity from the definition of CRPA;
- The need to exclude non-partisan candidate events during the 60/30-day blackout period from the definition of CRPA;
- The need to harmonize the definition of CRPA across all tax-exempt groups and to provide greater clarity and coordination with the definition of “exempt function” under 26 U.S.C. § 527(e)(2) (2012);⁴ and
- Why the Service should apply a real bright-line test for CRPA that limits its scope as closely as possible to “magic words” express advocacy.⁵

Despite our serious concerns with the approach in the proposed rule, the Service can and should take resolute steps to address the issues that resulted in the inappropriate targeting of conservative and progressive § 501(c)(4) (and § (c)(3)) groups, and to apply a true bright-line test for political intervention by social welfare groups. Most social welfare organizations—on both the left and right—serve exactly that function as they see it, the promotion of social welfare and community good. Based on their respective visions, they advocate for the powerless and the voiceless. They promote fiscal responsibility and good government. They serve as a check on government overreach, or as a cheerleader for sound public policy.

² Referred to herein as §§ 501(c)(3) and 501(c)(4) groups, respectively.

³ Treasury Inspector Gen. for Tax Admin., *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (2013) (the “TIGTA Audit”).

⁴ “Exempt function,” somewhat counter-intuitively, does not refer to activities conducted by a tax-exempt group. Rather, it covers political advocacy, which is *taxable* under § 527 if engaged in by a § 501(c) group. Specifically, “exempt functions” include “influenc[ing] or attempt[ing] to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.”

⁵ The “magic words” test refers to communications that use express terms of advocacy for or against a candidate, as opposed to communications that may be critical or laudatory but represent advocacy around specific legislative, regulatory or policy issues. The test has its origins in *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (“The construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”). We acknowledge that the list of express advocacy “magic words” in *Buckley* is not exhaustive, and we look forward to working with the Service to inclusively refine the definition of express advocacy.

In many of these functions, social welfare organizations praise or criticize candidates for public office on the issues and they should be able to do so freely, without fear of losing or being denied tax-exempt status, even if doing so could influence a citizen's vote. Such advocacy is at the heart of our representative democracy. To the extent it influences voting, it does so by promoting an informed citizenry. The current IRS exempt organization review system serves to chill that activity and, despite our concerns with the proposed rule, we appreciate the Service's demonstrated commitment to reforming the current rule to provide a clearer standard.

We further believe that those social welfare organizations that are serving a private benefit, or that are engaged in actual partisan political activity, can be regulated without chilling legitimate issue advocacy.

II. Interest of Commenter

The ACLU is a nationwide, nonprofit, non-partisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws.

As a matter of formal policy, we do not endorse or oppose candidates or nominees for political office. We do, however, often engage in issue advocacy on legislative and policy matters impacting civil liberties and civil rights. We frequently do so in close proximity to elections, and identify office holders, some of whom may be candidates, in these communications.⁶

We also provide extensive voter education materials, including an online ACLU "scorecard" that assigns numerical scores to all current members of Congress based on key civil liberties and civil rights votes and, prior to the 2012 presidential election, a resource called "Liberty Watch" that likewise assessed the civil liberties records of President Obama, Governor Romney and Governor Johnson, the Libertarian Party candidate.⁷ None of these materials endorse or oppose a candidate or nominee.

Further, the ACLU has an extensive state and local network, with affiliates and chapters in every state and Puerto Rico.⁸ These organizations separately advocate for civil liberties and civil rights at all levels of state and local government, and are often deeply involved in efforts to protect

⁶ See *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 793 (D.D.C. 2003) (opinion of Leon, J.), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003), *overruled in part by*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) ("[The] 60 days before a general election and 30 days before a primary . . . are often periods of intense legislative activity. During election years, the candidates stake out positions on virtually all of the controversial issues of the day. Much of the debate occurs against the backdrop of pending legislative action or executive branch initiatives." (quoting Decl. of Laura W. Murphy, director of the ACLU's national lobbying office ¶ 12)).

⁷ See Key Votes: Congress, ACLU.org, <http://bit.ly/1fsuftY> (last visited Jan. 13, 2014); ACLU Liberty Watch 2012, <http://www.aclulibertywatch.org/> (last visited Jan. 13, 2014).

⁸ Local ACLU Affiliates, ACLU.org, <https://www.aclu.org/affiliates> (last visited Jan. 15, 2014).

low-income and minority voters. These efforts include participation in legislative advocacy and voter education campaigns, including a coordinated effort called “Let Me Vote” that provides state-by-state information and resources on how voters can register, polling place locations, early and absentee voting and, crucially, abusive voter identification requirements.⁹ ACLU affiliates and chapters are likewise bound by formal policy to abstain from *any* partisan political activity.

Nevertheless, under a plain reading of the proposed rule, to the extent this activity is performed by the ACLU’s § 501(c)(4) entity, the American Civil Liberties Union, Inc. (“ACLU, Inc.”), and by state and local ACLU § 501(c)(4) affiliate and chapter groups, it may qualify as CRPA.

Additionally, based on past experience, we anticipate that both the Service and tax practitioners will look to the final rule for § 501(c)(4) groups as guidance for other tax-exempt organizations. The breadth of the proposed definition of CRPA could therefore significantly impair the ability of the ACLU’s § 501(c)(3) entity, the American Civil Liberties Union Foundation, Inc. (“ACLU Foundation, Inc.”), to engage in public communications and advocacy, despite only an insubstantial part of its activities being federal or state lobbying, and its complete avoidance of any partisan political activity.¹⁰ The ACLU Foundation, Inc. sponsors communications that mention candidates for public office as part of its issue advocacy that some may argue qualify under the proposed definition of CRPA.

Accordingly, we can say with confidence that bona fide charitable organizations, may also, under the proposed rule, be forced to seriously “hedge and trim” what should be fully protected speech in their issue advocacy to stay far clear of any potential CRPA.¹¹ Worse, this chilling effect will be more acute for smaller organizations that do not have access to legal expertise in this area.

For the past four decades, the ACLU has been involved in efforts to craft sensible campaign spending laws that respect First Amendment principles while limiting corruption. We support numerous measures to improve the integrity of our political system, including reasonable limits on direct campaign contributions, meaningful public financing, appropriate disclosure rules, reasonable bulwarks against coordination between candidates and outside political groups, enforcement of criminal laws against straw donors and measures to improve under-resourced candidates’ access to media.¹²

⁹ See Know Your Voting Rights: State-By-State Voter Information 2012, ACLU.org, <http://bit.ly/Lfpy8Q> (last visited Jan. 17, 2014). The ACLU has been at the forefront of the fight against various voter discrimination tactics, including voter identification requirements that disproportionately disenfranchise minority, low-income and elderly Americans. See Voter ID, ACLU.org, <http://bit.ly/1eQwkwW> (last visited Jan. 17, 2014).

¹⁰ The ACLU Foundation, Inc. does take an annual election under 26 U.S.C. § 501(h) (2012).

¹¹ *Buckley*, 424 U.S. at 43 (opining that, absent a truly bright line between express and issue advocacy, restrictions on political speech offer “no security for free discussion” and force speakers to “hedge and trim” (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945))).

¹² See Gabe Rottman, *Common Ground on Campaign Finance*, ACLU.org (Apr. 12, 2013), <http://bit.ly/12RpLGK>; Michael W. Macleod-Ball, *One Key to Campaign Finance Reform*, ACLU.org (June 21, 2012), <http://bit.ly/1m5JLN0>; The ACLU and Citizens United, <http://bit.ly/1eptX5n> (last visited

Since even before *Buckley*, however, we have also forcefully defended the First Amendment in the face of well-meaning but overreaching campaign finance laws that unconstitutionally restrict issue advocacy.¹³ As explained below in detail, we fear that the proposed rule will result in many of the same unintended consequences that we warn of in that context, and will impermissibly chill political speech that should receive the highest level of protection under the First Amendment.¹⁴

III. The Proposed Blackout Period in the 30 Days Before a Primary and 60 Days Before a General Election Will Sweep In Vast Amounts of Non-Partisan Issue Advocacy, and Will Pose Daunting Logistical Challenges for Tax-Exempt Groups

The proposed rules would extend the definition of CRPA to any “public communication” in the 30 days before a primary or 60 days before a general election that refers to one or more clearly identified candidates or, in the case of a general election, one or more political parties that are represented in the election.¹⁵

“Public communication,” in turn, includes any communication (1) by broadcast, cable or satellite; (2) on an internet website; (3) in a newspaper, magazine or other periodical; (4) in the form of paid advertising; or (5) that otherwise reaches, or is intended to reach, more than 500 persons.¹⁶ “Communication” is defined circularly as any communication by whatever means, including written, printed, electronic, video or oral communications.¹⁷

Jan. 15, 2014); News Release, ACLU, In New Alliance, ACLU and Public Campaign Urge Support for Full Public Financing (Oct. 26, 1999), <http://bit.ly/16Ia6cH>.

¹³ See Amicus Curiae Br. of the Am. Civil Liberties Union in Support of Appellant on Supplemental Question, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2365203; Br. Amicus Curiae of the Am. Civil Liberties Union in Support of Appellee, *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (Nos. 06-969, 06-970), 2007 WL 894817; Br. of Appellant Am. Civil Liberties Union, *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003) (No. 02-1374), 2003 WL 21649664; Br. of the Am. Civil Liberties Union, Amicus Curiae, in Support of Appellee at 14, *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), 1989 WL 1126847, at *14; Br. Amicus Curiae of the Am. Civil Liberties Union and the Civil Liberties Union of Mass., *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986), 1986 WL 727489; *Buckley v. Valeo*, 424 U.S. 1 (1976); *Am. Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom., Staats v. Am. Civil Liberties Union*, 422 U.S. 1030 (1975); *United States v. Nat’l Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972).

¹⁴ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (“Our First Amendment decision have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position”) (Stephens, J., concurring).

¹⁵ *Notice*, *supra* note 1, at 71,541 (§ 1.501(c)(4)-1(a)(2)(iii)(A)(2)).

¹⁶ *Id.* (§ 1.501(c)(4)-1(a)(2)(iii)(B)(5)).

¹⁷ *Id.* (§ 1.501(c)(4)-1(a)(2)(iii)(B)(3)).

“Candidate” is defined aggressively to include any federal, state or local candidate or nominee (including electors) in a race for (1) public office, (2) a recall election *or* (3) office in a political organization.¹⁸ “Clearly identified” includes (1) express reference to the candidate, including through a photograph, drawing or other visual representation; (2) identification apparent by reference (e.g., “the Mayor”); *or* (3) reference solely to an “issue or characteristic” that serves to differentiate candidates or nominees from their opponents.¹⁹ “Election” covers all federal, state and local caucuses and primary, general, special, run-off and recall elections.²⁰

Accordingly, and as the Service acknowledges, virtually any document, audio-visual file or graphic posted to a § 501(c)(4) group’s website that identifies a “candidate,” including documents that merely reference a hot-button issue like abortion or voting rights in a particular election, will qualify as a “public communication.”²¹ If they appear during the blackout periods, they qualify as CRPA.

The 30- and 60-day blackout periods track a similar approach in the “electioneering communications” that were regulated under the Bipartisan Campaign Reform Act,²² but the capacious definitions of “public communication” and “communication” dramatically expand the scope of the proposed regulation.

This “electioneering communications-plus” CRPA would encompass an enormous amount of ACLU material that has absolutely nothing to do with partisan politicking.

In fact, ACLU legislative counsel and representatives produce several dozen documents a week, especially in the lead up to a national election, that expressly mention an incumbent candidate or

¹⁸ *Id.* (§ 1.501(c)(4)-1(a)(2)(iii)(B)(1)).

¹⁹ *Id.* (§ 1.501(c)(4)-1(a)(2)(iii)(B)(2)).

²⁰ *Id.* (§ 1.501(c)(4)-1(a)(2)(iii)(B)(4)). Special and run-off elections used to nominate a candidate are treated as primary elections, as are conventions or caucuses; special or run-off elections that elect a candidate are considered general elections. A recall election is classified as a general election. *Id.*

²¹ *Id.* at 71,540 (“These proposed rules also provide that an organization’s Web site is an official publication of the organization, so that material posted by the organization on its Web site may constitute candidate-related political activity.”).

²² See Pub. L. No. 107-155, 116 Stat. 81, § 203 (2002) (“BCRA”). Section 203 was codified at 2 U.S.C. § 441b (2012) and amended § 316 of the Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 3 (1972) (“FECA”). It barred various entities, including non-profit corporations like the ACLU, from making any electioneering communications, defined as broadcast, cable or satellite communications that clearly identify a candidate for federal office in the 60 days before a general election or 30 days before a primary, and, with the exception of presidential races, are targeted at the relevant electorate. The restriction on electioneering communications was narrowed by the Supreme Court in *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (“WRTL”), and struck down in *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

party. ACLU affiliates and chapters do the same at the state and local level. All of this work is part of our workaday legislative analysis and advocacy; it has nothing to do with attempting to influence the outcome of any particular election.

Indeed, the Service’s proposed definition of public communication could encompass internal communications to our members, donors and supporters. For instance, “ACLU Action” seeks to mobilize existing supporters and identify potential new members through targeted communications on litigation, legislation and public policy issues. All of these communications include a requested action, which may either directly identify a sitting lawmaker running for reelection or may be deemed to identify a candidate through mention of a disputed campaign issue.²³ None of these communications are meant to influence the outcome of an election, but rather are meant to influence the debate on a particular issue. Any restriction on these communications would clearly implicate our members’ and supporters’ associational and free speech rights.²⁴

Remarkably, the Service even anticipates that communications produced and posted to a social welfare group’s website *before* the blackout period would slip into the definition of CRPA if left up *during* the blackout period.²⁵ Accordingly, the ACLU would have to purge its website of all communications identifying a federal, state or local candidate or, in the case of a general election, even a political party during the blackout period, or would have to devise a way of accounting for them as CRPA.

It’s crucial to note that the ACLU’s website includes literally hundreds of thousands of individual webpages, and the proposed blackout rules would cover vast amounts of content that has absolutely nothing to do even with issue advocacy, let alone partisan politicking. For instance, it could cover copies of publicly filed lawsuits with government defendants, requests under the Freedom of Information Act, any communication addressed to a candidate currently holding elective or appointed office or even 50-state legal surveys mentioning covered officials.

Further, were the Service to harmonize the definition of CRPA with § 527, we would have to count them as reportable exempt function expenditures under § 527(e)(2) subject to tax under § 527(f). Such a requirement isn’t just unworkable, it’s impossible.

²³ See *Notice, supra* note 1, at 71,541 (§ 1.501(c)(4)-1(a)(2)(iii)(B)(2) (explaining that communication not identifying candidate by name, image or reference may still “clearly identif[y]” candidate through reference to “issue or characteristic used to distinguish the candidate from other candidates”); see also discussion *infra* pp. 15-16.

²⁴ Cf., *Va. State Bd. of Pharm. V. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (“[W]here a speaker exists . . . the [First Amendment] protection afforded is to the communication, to its source and to its recipients both.”); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (acknowledging independent First Amendment right to “receive information and ideas”); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (affirming right of U.S. citizens to receive foreign publications).

²⁵ See *Notice, supra* note 1, at 71,539.

Additionally, during a presidential election year, the blackout period will extend *far* beyond just the 30 days before the nominating convention or 60 before Election Day.

In 2012, for instance, both major parties held their initial caucuses on January 3. The 30-day clock would therefore have begun on December 4, 2011. For both Democrats and Republicans, there was no 30-day break between primaries from January 3 through late June. In other words, the 30-day blackout period for each primary would have ended only after another blackout period had begun. Accordingly, successive 30-day primary blackout windows would have applied to all communications from early December 2011 through June 5, 2012, for Democrats (the South Dakota primary) and June 26, 2012, for Republicans (the Utah primary).

Additionally, for the Republicans, the 30-day clock before the national convention would have started ticking on July 28 (30 days before August 27), providing a mere 31-day non-blackout period between early December 2011 and late August 2012. For the Democrats, the 30-day pre-national convention blackout period would have started on August 6, 2012 (30 days before September 5), providing only a 60-day non-blackout period for communications. For both parties, the pre-*election* 60-day blackout would have started on September 7, 2012—two days after the Democratic convention began.

In Table 1 below, we use the 2012 presidential election to demonstrate the scope of the overlapping 60/30-day primary-general CRPA blackout.²⁶ We list the number of days between the first caucus and the election in which a mere mention of *any* presidential candidate, including a third party candidate, would qualify a communication as CRPA, and the limited number of days that escape the rolling 30/60-day blackout periods.

Importantly, during the last 60 days before the election, even mention of a political party represented in the election would qualify as CRPA. This would include *objectively* non-partisan communications that are supportive or critical of all represented parties equally (e.g., “neither Democrats nor Republicans have committed to reforming NSA surveillance authority” or “the ACLU applauded the bi-partisan vote today on surveillance reform, where 94 Republicans joined 111 Democrats in attempting to defund NSA bulk collection authority”).

	Iowa Caucus	Last Primary	Convention	Non-CRPA Days	CRPA Days ²⁷
D	Dec. 4, 2011	June 5, 2012	Sept. 5, 2012	61 ²⁸	278
R	Dec. 4, 2011	June 26, 2012	Aug. 27, 2012	41 ²⁹	298

²⁶ We focus on the two major parties for ease of illustration, but we note, crucially, that the rules would also apply to third parties that are able to field candidates for the presidential ticket.

²⁷ Based on a count of 339 days between December 4, 2011, and Election Day, November 6, 2012.

²⁸ That is, 60 days between the first caucus and the last state primary, plus presumably one day between the first day of the convention and the beginning of the election blackout period.

²⁹ Adding 10 days between the first day of the convention and the election blackout to the 31-day CRPA window following the last primary.

By way of further illustration, we list below a representative sampling of the types of communications that would qualify as CRPA for this extended primary and general presidential election season. As noted, *all* of the ACLU's online communications referencing a candidate or, in the case of a general election, party would be covered under the proposed rule if they remained up during a blackout period, and hundreds of communications would be captured by the "rolling" 60/30-day presidential CRPA blackout demonstrated above.

For the sake of emphasis, however, we include only communications posted to our website in the 60 days before November 6, 2012. These include:

- A blog mentioning several House members by Legislative Counsel/Policy Advisor Gabe Rottman urging a "No" vote on the Stolen Valor Act, a bill that would criminalize false statements about military decorations;³⁰
- A blog by Legislative Assistant Sandra Fulton on ACLU testimony regarding domestic drone use, which quotes Rep. Hank Johnson (D-GA) and mentions drone legislation sponsor Rep. Ted Poe (R-TX);³¹
- An ACLU letter to the Privacy and Civil Liberties Oversight Board on domestic surveillance and privacy priorities, which mentions the president;³²
- A blog by Legislative Representative Ian Thompson on the one-year anniversary of the repeal of the military's "Don't Ask, Don't Tell" policy that criticized an anti-DADT measure introduced by Rep. Todd Akin (R-MO), then in a heated race against Sen. Claire McCaskill (D-MO);³³
- Comments submitted to the Department of Health and Human Services and posted to the ACLU's website mentioning President Obama and criticizing an HHS rule that would unfairly exempt certain immigrant women and children from provisions of the new health care plan;³⁴

³⁰ Gabe Rottman, *Stolen Valor in House Today*, ACLU.org, Sept. 11, 2012, <http://bit.ly/19Z3FGr>.

³¹ Sandra Fulton, *ACLU Testifies as Congress Takes on Domestic Drones*, ACLU.org, Oct. 25, 2012, <http://bit.ly/1i7Cycs>.

³² Letter from Michael Macleod-Ball & Michelle Richardson, ACLU, to the Privacy and Civil Liberties Oversight Board (Oct. 26, 2012), available at <http://bit.ly/1f92wJZ>.

³³ Ian S. Thompson, *At DADT Repeal's One-Year Anniversary, Refusing to Turn Back the Clock*, ACLU.org (Sept. 19, 2012), <http://bit.ly/1hYIF6s>.

³⁴ Comments from Laura W. Murphy et al. to the Centers for Medicare & Medicaid Services (Oct. 29, 2012), available at <http://bit.ly/1hrNq15>.

- A detailed report by ACLU Policy Counsel Sarah Lipton-Lubet defending the Obama administration’s contraceptive coverage rule in the Affordable Care Act (“ACA”);³⁵
- A blog by Legislative Counsel/Policy Advisor Gabe Rottman praising President Obama for defending the First Amendment during the controversy over the “Innocence of Muslims” video in September 2012;³⁶
- A blog by Legislative Counsel Devon Chaffee applauding the Obama administration’s issuance of an executive order to prevent human trafficking by government contractors;³⁷
- A blog by Legislative Representative Ian Thompson and Legislative Counsel Joanne Lin noting efforts by House Minority Leader Nancy Pelosi (D-CA) and Senator Dianne Feinstein (D-CA), both up for re-election in November, to have the Department of Homeland Security consider the ties of same-sex partners and spouses as a positive factor in determining discretionary relief in deportation cases;³⁸ and
- An amicus brief submitted by the national ACLU and the D.C. affiliate, posted to the ACLU’s website, noting Sen. Harry Reid’s (D-NV) support for the contraceptive coverage rule in the ACA.³⁹

To put a finer and final point on it, we note that *these comments*, when posted to the ACLU’s website and otherwise distributed, would likely qualify as CRPA under the proposed rule during the 60/30-day blackout period, including the rolling blackout period before the 2014 election.⁴⁰ The ACLU would have to either remove *this* document from its website or otherwise determine a way to account for the expense in creating it as CRPA expenditures.

³⁵ Sarah Lipton-Lubet, Promoting Equality: An Analysis of the Federal Contraceptive Coverage Rule (Oct. 11, 2012), available at <http://bit.ly/1j7Rwlt>.

³⁶ Gabe Rottman, A “Foreign Policy Exception” to the First Amendment, ACLU.org (Sept. 28, 2012), <http://bit.ly/LeWvmJ>.

³⁷ Devon Chaffee, *President Issues Executive Order to Stop Human Trafficking in Government Contracts*, ACLU.org (Sept. 25, 2012), <http://bit.ly/LLNNMn>.

³⁸ Ian S. Thompson & Joanne Lin, *Important Breakthrough for LGBT Immigrant Families*, ACLU.org (Oct. 2, 2012), <http://bit.ly/1g4N2fb>.

³⁹ Memorandum of the Am. Civil Liberties Union and the Am. Civil Liberties Union of the Nat’l Capital Area, as Amici Curiae, *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012) (No. 12-1635(RBW)), 2012 WL 5903980, available at <http://bit.ly/19QCKws>.

⁴⁰ Because they mention a clearly identifiable political party in the case of the 60-day general blackout and/or because they potentially refer to candidates in the 2014 race. See *Notice*, *supra* note 1, at 71,514 (§ 1.501(c)(4)-1(a)(2)(iii)(A)(2)).

The Court in *Buckley* recognized the clear danger in allowing campaign finance (or, by extension, tax code) restrictions on these “pure” issue advocacy communications. As noted, the Court adopted an express advocacy standard limited to “communications that in plain terms advocate the election or defeat of a clearly identified candidate [and contain] explicit words of advocacy of election or defeat.”⁴¹ It did so precisely because it recognized the impossibility of accurately separating electoral advocacy from policy advocacy, and the constitutional threat when the government burdens speech in an attempt to do so:

The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical operation. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.⁴²

These protections for issue advocacy serve a wide array of liberty interests. They provide needed space in the public discourse for unfettered criticism of the government. Relatedly, they serve as an essential check on government abuse and corruption. They refine public policy debates, marginalize objectionable or unwise views and promote an engaged and informed citizenry. Occasionally, of course, these protections cover noxious speech and even misleading “sham” issue ads. They do so, however, to provide the greatest possible latitude for all speakers, at any point on the political and ideological spectrum.

For all these reasons, we respectfully urge the Service to abandon the “electioneering communications-plus” definition of CRPA in proposed § 1.501(c)(4)-1(a)(2)(iii)(A)(2). In addition to chilling a vast amount of core political speech about crucial issues of the day, the expanded definition of public communication will apply to virtually all documents, files and other elements of a social welfare group’s website that happen to mention a candidate or, in a general election, just a party, a requirement that will pose insurmountable compliance issues. This goes beyond impracticality and raises First Amendment concerns of the highest order.

IV. Applying a “Functional Equivalence” Test Will Effectively Restore the Unbounded “Facts and Circumstances” Standard and Will Lead to Similar Problems

In addition to communications that contain clear words of support or opposition like “vote for” or “defeat,”⁴³ the proposed rule troublingly expands the definition of “express advocacy” to communications that are “susceptible of no reasonable interpretation other than a call for or

⁴¹ *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976).

⁴² *Id.* at 42-43.

⁴³ *Notice*, *supra* note 1, at 71,541 (§ 1.501(c)(4)-1(a)(2)(iii)(A)(1)(i)).

against the selection, nomination, election, or appointment of one or more candidates *or* of candidates of a political party.”⁴⁴

The Service’s expanded definition tracks, and expands upon, the Supreme Court’s formulation in *Wisconsin Right to Life v. Fed. Election Comm’n (WRTL)*.⁴⁵ There, the Court invalidated the “electioneering communications” ban in § 203 as applied to a non-profit group engaged in bona fide issue advocacy, and held that it could only be constitutionally applied to communications that are “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”⁴⁶ This is often referred to as the “functional equivalence” or “functional equivalent” test.⁴⁷

That functional equivalence test applied to § 203 until the Court’s decision in *Citizens United*. There the Court found that a pay-per-view documentary critical of then-Senator Hillary Clinton was, indeed, the “functional equivalent” of express advocacy but still could not be constitutionally restricted under § 203. *Citizens United* overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which had upheld restrictions on express advocacy by corporations and labor unions using their own money that was not directed by a candidate or party (known technically as “independent expenditures”).⁴⁸

⁴⁴ *Id.* (§ 1.501(c)(4)-1(a)(2)(iii)(A)(1)(ii)) (emphasis added). Notably, the definition is broader than the Federal Election Commission’s (“FEC”) current regulation defining express advocacy, which only applies to communications that reference a clearly identified candidate, not “one or more candidates or candidates of a political party” (for instance, perhaps, an ACLU communication critical of the DISCLOSE Act, support for which splits along partisan lines, which mentions one or more Democratic candidates in support). 1 C.F.R. § 100.22 (2014) (defining “expressly advocating” under 2 U.S.C. § 431(17) (2012)’s definition of “independent expenditure”). It also requires that the electoral portion of the communication be “unmistakable, unambiguous, and suggestive of only one meaning” and that “reasonable minds could not differ on whether it encourages actions to elect or defeat one or more clearly identified candidates.” *Id.* And, it requires “limited reference to external events, such as the proximity to the election.” *Id.* The Service’s proposed definition contains no such limiting guidance and appears to apply to any functionally equivalent express advocacy at any time. In fact, it could even apply to communications that praise or criticize the *winner* of a presidential election, which clearly pose little to no risk of electoral corruption, because they could be construed as an exhortation to *electors*.

⁴⁵ 551 U.S. 449 (2007).

⁴⁶ *Id.* at 470.

⁴⁷ *Id.* at 481; *see also Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 325 (2010) (“[T]he functional-equivalent test is objective”); *The Real Truth About Abortion, Inc. v. Fed. Elections Comm’n*, 681 F.3d 544, 551 (4th Cir. 2012).

⁴⁸ *Citizens United*, 558 U.S. at 365. The functional equivalence test under § 100.22 is still applied in the Fourth Circuit with respect to FEC disclosure rules. *See supra* note 44; *The Real Truth About Abortion, Inc.*, 681 F.3d at 555. While the court affirmed the application of § 100.22(b)’s functional equivalence test in determining when a communication compels disclosure, it applied a lower standard of scrutiny because disclosure rules “do not restrict either campaign activities or speech.” *Id.* at 549.

The ACLU offered an amicus curiae brief in *Citizens United* solely on the supplemental question of whether § 203’s ban on electioneering communications—even as narrowed under *WRTL*—could withstand First Amendment scrutiny. We argued that any open-ended functional equivalence test would still invariably ensnare genuine issue advocacy and would therefore still be a violation of the First Amendment (with the offense of vagueness piled on top of both overbreadth and underinclusiveness).⁴⁹

Those concerns stand with the Service’s proposed rule and its inclusion of a similar functional equivalence test in the definition of CRPA.⁵⁰ In *Citizens United*, the ACLU offered several related reasons why § 203, even as narrowed to functionally equivalent express advocacy, should be declared facially unconstitutional. Several of these arguments counsel strongly in favor of dropping the functional equivalence test in the proposed rule.

First, vague “totality” tests like functional equivalence and the current “facts and circumstances” approach chill too much protected speech.⁵¹ As an abstract matter, a hypothetically reasonable speaker should be able to predict with a reasonable degree of certainty how a hypothetically reasonable listener will interpret an advertisement. History suggests otherwise.⁵² This uncertainty is compounded by the tendency of regulators to pile “prophylaxis-upon-prophylaxis” in an attempt to capture anything that could conceivably sway a vulnerable listener.⁵³ That is, in effect, the rationale behind both the functional equivalence and current facts and circumstances tests. They encourage the government to burn down the house to roast the pig.

⁴⁹ Amicus Curiae Br. of the Am. Civil Liberties Union in Support of Appellant on Supplemental Question at 13-15, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2365203, at *13-*15.

⁵⁰ Again, the definition in the proposed rule is actually broader than the functional equivalence test as articulated by Chief Justice Roberts in *WRTL* or as formulated by the FEC in 11 C.F.R. § 100.22(b) (2014). It applies not just to candidates, but to communications on nominations, appointments or to those that generically advocate for or oppose a political party (i.e., “candidates of” a political party).

⁵¹ Amicus Curiae Br. of the Am. Civil Liberties Union in Support of Appellant on Supplemental Question at 14, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2365203, at *13-*14.

⁵² Shortly before the 1972 presidential elections, the ACLU sought to run an ad in the New York Times highly critical of President Nixon for his position on court-ordered busing (the ad opened with “[w]e write because we believe that you are taking steps to create an American apartheid”). See *Am. Civil Liberties Union v. Jennings*, 366 F. Supp. 1041, 1058 (D.D.C. 1973), *vacated as moot sub nom., Staats v. Am. Civil Liberties Union*, 422 U.S. 1030 (1975). The New York Times refused to run the ad unless the ACLU registered as a political committee. The Times essentially took the position that the ad was an express advocacy wolf in issue advocacy sheep’s clothing, and treated the ad as one “on behalf” of the reelection of the lawmakers named in the ad (“on behalf” being FECA’s first attempt to restrict functionally equivalent express advocacy). The ACLU sued, and secured a declaratory judgment that the proposed interpretation of FECA violated the First Amendment. *Id.* at 1051. We attach the relevant advertisement, as published in the federal reporter, in Appendix I.

⁵³ *WRTL*, 551 U.S. 449, 479 (2007).

The *Buckley* Court rightly recognized the danger of a chilling effect in allowing the government to adopt a test based on the likely effect of the speech on a hypothetical listener:

[W]hether words intended and designed to fall short of invitation would miss that mark is a question of both intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of the hearers and consequently of whatever inference may be drawn as to his intent and meaning.

Such a distinction offers *no security for free discussion*. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.⁵⁴

In other words, listener-centric tests such as “functional equivalence” force speakers like the ACLU, the National Rifle Association or Planned Parenthood to “steer far wider of the unlawful zone” than is actually necessary because their exhortations on civil liberties, gun rights or abortion *could* lead a hypothetical voter to vote a certain way.⁵⁵

Second, and of particular import given the findings of the IRS inspector general audit report (the “TIGTA Audit”) detailing the use of inappropriate criteria, vague laws and regulations invite discriminatory enforcement.⁵⁶ This failing is particularly troubling in the context of political communications, where open-ended laws and regulations allow those in power to selectively enforce speech restrictions to disadvantage political opponents. Although the TIGTA Audit found absolutely no evidence of political motivation in this case, and we emphatically do not question that finding or impugn the integrity of the Service, the IRS has indisputably been used on multiple occasions to that end.⁵⁷

Further, even when selective viewpoint discrimination is a result of simple and honest human error, it is no less harmful as a practical and legal matter. And when applied to core political speech—by any group, on the left or right—the harm is ever greater. As the Supreme Court has

⁵⁴ *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)) (emphasis added).

⁵⁵ *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

⁵⁶ Amicus Curiae Br. of the Am. Civil Liberties Union in Support of Appellant on Supplemental Question at 14, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2365203, at *13-*14.

⁵⁷ See David Burnham, *Misuse of the I.R.S.: The Abuse of Power*, N.Y. Times, Sept. 3, 1989.

said, “speech concerning public affairs is more than self-expression, it is the essence of self-government.”⁵⁸

To illustrate the danger of a vague “functional equivalence” standard, attached to this submission as Appendix II is an advertisement sponsored by the ACLU that ran in the New York Times Magazine and the Economist in June 2004.⁵⁹ Part of an ongoing series of ads, it features the former Navy Judge Advocate General, Rear Admiral John D. Hutson (ret.), asking, “[h]ow can we fight to uphold the rule of law if we break the rules ourselves?” Although it does not expressly mention President George W. Bush by name or even hint at express electoral advocacy, under the Service’s proposed rule, it is unclear whether it qualifies as CRPA.

First, to a “reasonable” observer, it is a transparent criticism of President George W. Bush, who, at exactly that point in time, was running for reelection largely on his record in the popular “war on terror” and the then-popular Iraq War.⁶⁰ As the New York Times reported when the initial set of advertisements ran, the ads “indirectly accuse the administration of trampling on the Bill of Rights, without actually mentioning the president.”⁶¹ Accordingly, there is an argument that the ad “express[es] a view . . . against the . . . election” of a candidate, despite, again, the ACLU’s strict non-partisanship.⁶²

Indeed, there’s even an argument that the advertisement meets the requirement that it “clearly identif[y]” a candidate, despite President Bush not having been named in the advertisement. As noted, the proposed rule would find a communication that identifies a candidate not by name but “by reference to an issue or characteristic used to distinguish the candidate from other candidates” as one that “clearly identifies” that candidate.⁶³

There is no question that the issues of civil liberties, due process and, especially, the rights of detainees in Iraq and Guantanamo Bay, all of which were expressly mentioned in the Hutson advertisement, were central in the then-white hot 2004 presidential race. In fact, two days after

⁵⁸ *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

⁵⁹ News Release, ACLU, In ACLU Ad, Retired Navy Admiral Says U.S. Breaking Rules (June 16, 2004), <http://bit.ly/1asyoXk>. Note again that the functionally equivalent express advocacy provision in the definition of CRPA is not limited by the 30/60-day blackout window. This ad, however, would also qualify as CRPA under the “electioneering communications-plus” provision, assuming it meets the definition of “clearly identified,” as it ran on June 20 and 26. The last Republican primary occurred on June 26, 2012.

⁶⁰ See, e.g., Gallup Historical Trends: War on Terrorism, <http://bit.ly/1biVesx> (last visited Jan. 22, 2014); Gallup Historical Trends: Iraq, <http://bit.ly/1aJNJpJ> (last visited Jan. 22, 2014).

⁶¹ Nat Ives, *Celebrities Line Up to Criticize Bush in A.C.L.U. Campaign*, N.Y. Times, Sept. 12, 2003, available at <http://nyti.ms/1at0ll4>.

⁶² See Notice, *supra* note 1, at 71,541 (§ 1-501(c)(4)-1(a)(2)(iii)(A)(1)).

⁶³ See Notice, *supra* note 1, at 71,541 (§ 1-501(c)(4)-1(a)(2)(iii)(B)(2)).

the advertisement ran in the *Economist*, the Supreme Court dealt a significant blow to the Bush administration—one that was praised by the presumptive Democratic nominee, then-Senator and current Secretary of State John Kerry (D-MA)—in the decision *Hamdi v. Rumsfeld*, which held that U.S. citizens detained as enemy combatants retain habeas corpus rights.⁶⁴

Although we firmly believe this advertisement is far from being the “functional equivalent” of express advocacy, and, indeed, is permissible even for a § 501(c)(3) group subject to the more restrictive “facts and circumstances” test, the analysis above demonstrates the significant uncertainty that would flow from the proposed rule. And, while larger social welfare and charitable groups may have the resources to make these difficult determinations, smaller and single-issue advocacy groups have no such luxury and may totally avoid engaging in core political speech like the Hutson advertisement out of an overabundance of caution.

This hedging and trimming presents a direct restriction on non-partisan political speech—on a matter squarely in the public interest—that presents absolutely no threat of electoral corruption.

V. Non-Partisan Voter Registration Drives and Voter Education Guides Should Not Qualify as CRPA, Regardless of Any Incidental Effect on an Election

As discussed above, the ACLU engages in a significant amount of voter education and voter protection work, including our “Let Me Vote” resource and our legislative scorecard. The latter selects key civil liberties votes during each Congress and lists a numerical score for each sitting member’s voting record. We also provide voters with various “know your rights” materials on voting issues. While it is difficult to state with specificity how much is spent on such activities, it is safe to say they are much more than a negligible part of the work of both entities.

By way of preview, we recommend that non-partisan voter education, registration or mobilization drives, as well as voter education guides, should be completely exempt from the definition of CRPA and, further, the Service should also abandon the existing facts and circumstances test as applied to these efforts. To the extent any of these activities contain express advocacy, they can be regulated under the narrow bright-line test we propose.

The proposed rule would define as CRPA both “voter registration” and GOTV drives, as well as “[p]reparation or distribution of a voter guide that refers to one or more clearly identified candidates or, in the case of a general election, to one or more political parties”⁶⁵

Although these terms are not defined in the proposed rule, we anticipate that the Service may look to the definitions of “voter registration” and “get-out-the-vote” activity under the

⁶⁴ 542 U.S. 507 (2004); see also Todd S. Purdum, *In Classic Check and Balance, Court Shows Bush It Also Has Wartime Powers*, N.Y. Times, June 29, 2004, at A17 (highlighting split between candidates on issue).

⁶⁵ Notice, *supra* note 1, at 71,541 (§ 1-501(c)(4)-1(a)(2)(iii)(A)(5), (7)).

regulations implementing the BCRA’s restrictions on party funding.⁶⁶ Under such an approach, the ACLU’s non-partisan voter education and protection activity may qualify.

With respect to the definition of “voter registration activity,” among other things, the ACLU’s national organizations and affiliates encourage voters to vote,⁶⁷ provide detailed information about how to vote,⁶⁸ and offer links and/or access to voter registration materials.⁶⁹ With respect to the definition of GOTV activity, ACLU national and affiliates encourage voters to vote,⁷⁰ and inform potential voters about voting hours, polling locations and early and absentee voting.⁷¹

Despite the non-partisan nature of all of this activity, the proposed rule would nevertheless apply the definition of CRPA, meaning that all of the voter education and voter protection work could imperil our tax-exempt status. Indeed, were the Service to apply the proposed definition of CRPA to political activity by charitable groups, *any* amount of voter education by the ACLU Foundation, Inc. could result in revocation of its tax-exempt status.

Although *partisan* voter registration and GOTV activity directly or indirectly supported through tax policy raises more complicated constitutional questions,⁷² there should be no question that *non-partisan* voter education, registration, mobilization and protection activities receive full First Amendment protection, and, indeed, are central in the promotion of a healthy and informed representative democracy.

The proposed rule, however, would dramatically chill such unbiased and non-partisan activity by the ACLU and other voting rights groups. Further, the proposed rule goes against decades of IRS guidance permitting tax-exempt social welfare and charitable groups to engage in non-partisan voter education, voter registration and GOTV drives without endangering their exempt status.⁷³ Indeed, the breadth of the proposed rule may even lead groups engaged simply in

⁶⁶ 11 C.F.R. § 100.24 (2014).

⁶⁷ *Id.* § 100.24(a)(2)(i)(A) (“Encouraging or urging potential voters to register to vote . . . by any other means”).

⁶⁸ *Id.* § 100.24(a)(2)(i)(B) (“Preparing and distributing information about registration and voting”).

⁶⁹ *Id.* § 100.24(a)(2)(i)(C) (“Distributing voter registration forms or instructions . . .”).

⁷⁰ *Id.* § 100.24(a)(3)(i)(A) (“Encouraging or urging potential voters to vote . . . by any other means”).

⁷¹ *Id.* § 100.24(a)(3)(i)(B)(1)-(3).

⁷² *See infra* Part VIII.

⁷³ The main guidance on the subject pertains to § 501(c)(3) groups, but, as noted, guidance on charitable groups has often been seen by practitioners as instructive for social welfare groups (and vice-versa). Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1422; Rev. Rul. 81-95, 1981-1 C.B. 332 (citing rulings under § 501(c)(3) as authority for § 501(c)(4) political intervention determinations and allowing non-partisan voter education, registration and GOTV activity).

“know-your-rights”-style voter education, which objectively does not encourage voters to register and/or vote, to limit such activity for fear the proposed rule could apply.

The same analysis applies with equal force to voter guides, though, unlike voter registration and GOTV drives, we acknowledge that existing guidance does suggest that a voter election guide identifying specific candidates, even one without any editorial content or other evidence of bias, may potentially constitute political intervention if the guide is focused on a narrow issue or set of issues selected by a group advocating on those issues.⁷⁴ Conversely, there is also guidance suggesting that something like the ACLU’s legislative scorecard, which is maintained without regard to the timing of elections and only lists the past votes of sitting members who may incidentally be running for office, will not constitute political intervention.⁷⁵

Regardless, the First Amendment is implicated even by tax law restrictions on non-partisan voter guides, including those that are geared toward a particular election, identify sitting lawmakers running for re-election and score them based on their position on a set of issues.⁷⁶ Again, the constitutional questions raised are more difficult when a voter guide affirmatively includes explicit language of support or opposition, but the proposed rule is decidedly not so limited.

The Service asks for comment on “whether any particular activities conducted by section 501(c)(4) organizations should be excepted from the definition of candidate-related political activity as voter education activity and, if so, a description of how the proposed exception will both ensure that excepted activities are conducted in a non-partisan and unbiased manner and avoid a fact-intensive analysis.”⁷⁷

As with the impossibility of accurately cleaving issue advocacy from functionally equivalent express advocacy, we respectfully submit that one cannot and should not try. Voter guides, for instance, especially those that are intended to present a public official’s view on a narrow issue of public interest, are quintessential issue advocacy. They are designed to facilitate voter pressure on incumbents to take a particular position on legislation or regulation, and only incidentally influence voters (because some voters don’t like anti-abortion or pro-gun control

⁷⁴ Rev. Rul. 78-248, 1978-1 C.B. 154.

⁷⁵ Rev. Rul. 80-282, 1980-2 C.B. 178.

⁷⁶ That was the precise issue in *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251-52 (1986) (“*MCFL*”), in which the Supreme Court found the pre-*Citizens United* independent expenditure ban unconstitutional as applied to a narrow subset of non-profit organizations. As discussed in Part VIII *infra*, we acknowledge that the restriction here is less direct than the blanket prohibitions at issue in *MCFL* and the other campaign finance cases (though it would present a flat ban if applied to § (c)(3) groups). Nevertheless, the public policy harm of a broad CRPA definition is quite similar and, legally, the rule would be so burdensome on § (c)(4) groups that many would be forced to either forgo a sizeable amount of totally non-partisan issue advocacy or would have to disclose their donors, both of which present significant and new First Amendment concerns.

⁷⁷ *Notice*, *supra* note 1, at 71,540.

candidates). Accordingly, they should not constitute political intervention in any case. The same analysis applies with equal force to voter education, registration and GOTV activities.

In sum, with respect to voter registration and GOTV drives, we respectfully submit that the Service should remove them from the definition of CRPA completely *and* abandon the current facts and circumstances test for when they constitute political intervention. Including them in the definition of CRPA will create too great a risk that valuable, non-partisan voter protection and education activities will be harmed. To the extent these activities include actual express advocacy, the Service would be able to regulate them under the bright-line test we propose.

With respect to voter guides, we again argue that the Service should abandon both the approach in the proposed rule and the facts and circumstances test, and only consider voter guides as political intervention by all tax-exempt groups when they contain express words of advocacy.⁷⁸

Finally, we would just note the serious public policy harm in the Service applying the definition of CRPA to non-partisan voter education, registration or mobilization activities. While there may be some debate over whether the original understanding of the § (c)(4) exemption even contemplated legislative or political advocacy, there is no question that the provision was enacted to provide tax benefits for groups that may not qualify strictly as charitable, educational or religious but nevertheless provide some benefit available to the community at large.⁷⁹

It is difficult to conceive of a more publicly beneficial service than the provision of non-partisan voter information and education. Just as an expansive definition of the First Amendment is cited as a guardian of other rights and liberties, an informed, engaged and active citizenry safeguards our liberal democracy itself.⁸⁰ To the extent this proposed rule would create disincentives for groups to expend resources on non-partisan voter support, it could result in disastrous unintended consequences in areas as diverse as the promotion of civil rights, public education, health care, religious freedom and many others.

⁷⁸ That said, to the extent the Service maintains voter guides in the final rule, it should still exempt completely all publications that merely report on the legislative records of sitting lawmakers even when they focus on one set of issues, like civil liberties or the environment, and even when they list the organization's position on the vote. Although not ideal, that would provide a bright line rule and much less of a burden on speech.

⁷⁹ See generally 1981 EO CPE Text, available at <http://1.usa.gov/1lv2Hqp>; Laura Chisholm, Exempt Organization Activity: Matching the Rules to the Rationales, 63 Ind. L. J. 201, 290 (1988); Rev. Rul. 62-167, 1962-2 C.B. 142 (distinguishing non-exempt subscription provider of closed-circuit television carriage of broadcast signals from exempt organization providing such service to all members of the public).

⁸⁰ See, e.g., Jennifer L. Hochschild, *If Democracies Need Informed Voters, How Can They Thrive While Expanding Enfranchisement?*, 9 Election L. J. 111, 111-13 (2010) (describing studies on role of voter education in health of modern democracy and beneficial policy outcomes).

VI. Non-Partisan Candidate Events Should Not Qualify as CRPA

The proposed rule would extend the definition of CRPA to events hosted or conducted by a § 501(c)(4) during the 60/30-day blackout periods at which one or more candidates “appear as part of the program.”⁸¹ Under current regulations, non-partisan candidate forums would not count against a § (c)(4) group’s permissible allotment of political intervention. They are, also, protected fully by the First Amendment and quite valuable for voter education.

During the 2012 presidential election, for instance, the ACLU invited all candidates to speak at its annual staff conference as part of its “Liberty Watch” initiative. Only Libertarian candidate Gary Johnson and one time-GOP candidate Buddy Roemer showed up. The sessions with Johnson and Roemer were conducted without any of the hallmarks of a campaign event but were extremely useful in introducing civil libertarians to many of their positions on ACLU issues.⁸²

Under current rules, these events would have been permissible without any limits at any stage in the election. Under the proposed rules, they would qualify as CRPA if held during the blackout period, and would thus count against the ACLU’s permitted allotment of CRPA.

Campaign events lacking indicia of express advocacy—where multiple parties are invited, for instance, or town hall-type forums where a candidate faces unscripted questions from the audience—should be excluded from any definition of CRPA.

On the other hand, we do not oppose defining candidate forums that feature explicit indicia of express advocacy as CRPA. Such indicia would include, for instance, extending an invitation to only a single candidate to give a speech promoting her candidacy or signage at the event with *Buckley* magic words of support.

VII. The Service Should Apply a Bright-Line Definition of Political Intervention to all Relevant § 501(c) Groups and Provide Greater Clarity and Coordination With Respect to that Definition and That of Exempt Function Activity Under § 527(e)(2)

By its terms, the proposed rule would apply only to § 501(c)(4) groups.⁸³ Assuming the issues discussed above can be satisfactorily addressed, we respectfully recommend that the IRS expand the rule uniformly to all relevant organizations under § 501(c).

We further suggest that the Service should offer better clarity and coordination regarding the definition of political activity by § 501(c) groups and the definition of exempt function activity under § 527(e). If the definition of exempt function is broader than the definition of political

⁸¹ Notice, *supra* note 1, at 71,541 (§ 1-501(c)(4)-1(a)(2)(iii)(A)(8)).

⁸² Mike Riggs, *Gary Johnson Braves the ACLU*, Reason.com, Jan. 31, 2012, <http://bit.ly/1ffVH9R>.

⁸³ Though again, if past is prologue, we anticipate that the Treasury Department and the IRS will look to the § 501(c)(4) guidance for other exempt organizations, *and* that practitioners will rely on it in providing guidance to other groups.

activity for § 501(c) groups, which may be warranted given the statutory purpose of § 527, then tax pursuant to § 527(f) should only apply to § 501(c) groups on the activities that are within the definition of § 501(c) political intervention.

Assuming the rule can be properly narrowed, there are three reasons why the application of a uniform definition across all affected groups would be beneficial.

First, the Service has already been accused of political favoritism, in that the narrow application of the rule to § 501(c)(4) groups will disadvantage many conservative groups while sparing organized labor, which historically favors Democrats.⁸⁴ Regardless of the merits of this claim, and we do not suggest there are any, a special rule for § 501(c)(4) groups, especially one with a broad functional equivalence test, creates the *potential* for abuse by unscrupulous regulators against groups on both the right and left. Regulators could, for instance, cite the different standards as reason to treat the U.S. Chamber of Commerce, a § 501(c)(6) group, more leniently than the Natural Resources Defense Council, a § 501(c)(4).

Second, it actually makes sense from both a First Amendment and compliance perspective to have a unified definition across all relevant exempt organizations. Part of the problem with the facts and circumstances test historically has been confusion and lack of certainty on the part of tax practitioners as to whether the definition of § 501(c)(4) political intervention, which is allowed so long as it is not the primary activity of the entity, is coextensive with § 501(c)(3) political intervention, which is totally disallowed. Such added simplicity will reduce the need for advocacy groups to “hedge and trim,” which will serve the First Amendment interest in encouraging vigorous public debate over government policy.

Finally, the different standard for § 501(c)(4) groups promises to create odd results. Charitable groups, for instance, would not be subject to the expansive definition of “public communication” and would therefore not have to purge their websites of “electioneering communications-plus” documents and files during the 60/30-day blackout. It would be incongruous to hold § 501(c)(3) organizations, which are statutorily barred from engaging in any political intervention, to a lesser standard than § (c)(4) groups, which may conduct actual express electioneering so long as it is not their primary activity. Of course, we do not support expanding such a broad definition to § (c)(3) groups. We want conformity, but with a true bright-line rule.

Likewise, applying a different standard to labor groups and business leagues, which are now considered to be subject to similar restrictions as § 501(c)(4) groups, would result in potentially far reaching advantages to certain political constituencies, which could benefit particular parties, candidates or ideological groups.

For instance, under the rule as proposed, the AFL-CIO would be able to circulate, with no tax consequences, a legislative scorecard for citizens interested in right-to-work laws.⁸⁵ By contrast,

⁸⁴ See, e.g., Kimberly A. Strassel, *IRS Targeting and 2014*, W.S.J., Jan. 16, 2014, <http://on.wsj.com/1b1S5sQ>.

⁸⁵ Assuming it is limited to past votes and meets the criteria suggested in Rev. Rul. 80-282.

Americans for Tax Reform, a group often critical of labor, would have to count its voter guides as CRPA. Likewise, the U.S. Chamber of Commerce would remain subject to the arguably narrower “facts and circumstances” test while MoveOn.org Civil Action or the American Association of Retired Persons (“AARP”) would face the expanded IRS guidance and definition of CRPA.

VIII. The Service Should Abandon Both the Proposed Definition of CRPA *and* the “Facts and Circumstances” Test in Favor of a True Bright-Line Approach

We believe the IRS can effectively address concern over anonymous express advocacy by social welfare groups without tamping down on issue advocacy. Consequently, we urge the Service to abandon both the approach in the proposed rule and the existing “facts and circumstances” test. We respectfully submit that the Service needs to offer a clear and easily interpreted rule on what constitutes express advocacy *and* a firm answer on how much such activity will result in denial or revocation of exempt status.⁸⁶

Otherwise, the proposed rule threatens serious unintended consequences. It will result in self-censorship of fully protected speech by tax-exempt organizations fearful of imperiling their exempt status through sharply worded issue communications. Such groups will be forced to radically curtail their speech on matters of public policy during the 60/30-day blackout periods, and, during the 60 days before a general election, will not be able to even mention a political party or parties represented in the election. They will also be significantly constrained in their ability to engage in non-partisan voter support efforts, which will, under the proposed rule, count against the permitted allowance of non-social welfare activity.

The definition of CRPA should be limited to public communications that use express terms of support for or opposition to a candidate or nominee for public office.⁸⁷ The rule should only apply to voter registration or GOTV material and voter guides if they themselves include express terms of advocacy. We recognize that the *Buckley* “magic words” list is illustrative, not exhaustive, but it must clearly protect all issue advocacy.⁸⁸

⁸⁶ We offer no opinion on that question in this submission. We expect that other commenters will suggest a sliding scale approach, where a higher percentage of allowable CPRA permits a more expansive definition and vice-versa. Because we believe that the definition of CRPA should be crystalline and limited as closely as possible to magic words express advocacy, we do not have a view on the quantitative question. Were the Service to adopt a magic words definition, we stand ready to help it work through the more difficult statutory and constitutional question of when and how Congress and the Service can limit express political advocacy by § (c)(4) groups in exchange for tax-exempt status. *Cf. Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) (upholding lobbying restriction on § (c)(3) groups); *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (finding no First Amendment violation on campaign intervention ban for § (c)(3) groups); *Christian Echoes Nat’l Ministry v. United States*, 470 F.2d 849 (10th Cir. 1972) (same).

⁸⁷ *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976).

⁸⁸ We hope to issue separate comments elaborating on our view of the *Buckley* test.

In fashioning the express advocacy doctrine in election law, the Supreme Court was not wearing blinders. It knew full well that groups could devise “expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited [a] candidate’s campaign.”⁸⁹ It chose, however, to accept that risk rather than extend the restriction to all issue communications that could conceivably be seen by someone as a campaign ad.

The Court has adopted this “tie goes to the speaker, not the censor,”⁹⁰ perspective repeatedly in holding that protected speech that resembles unprotected speech cannot constitutionally be restricted to suppress unprotected speech.⁹¹ The proposed rule unabashedly does so by covering issue advocacy that inherently poses no risk of unduly influencing voters or officials.

We acknowledge that the practical effect of the lack of a bright line rule under the tax code is different than the outright muzzle on electioneering communications in the BCRA. Here, § 501(c)(4) groups are allowed to engage in express advocacy, just not too much. BCRA, by contrast, was a flat ban on corporations and labor organizations, even as narrowed to apply only to functionally equivalent express advocacy.

Regardless, the harms of a tax restriction are nonetheless similar and perhaps worse. Though they can still engage in advocacy, both express and issue, exempt organizations are at risk of denial or revocation of their status for engaging in too much genuine issue advocacy even if they *avoid* express advocacy. That clearly gives the tie to the censor.

To be clear, denial or revocation of such status can prove harmful, especially for controversial groups that rely on assurances of anonymity to attract donors. Denial or revocation is also unwarranted for the thousands of legitimate social welfare organizations that avoid electioneering but engage in policy and legislative advocacy that tangentially implicates partisan politics through mention of candidates or nominees for public office.⁹² Finally, the uncertainty generated by the proposed rule will disproportionately affect smaller and single-issue groups with limited resources. All of these consequences will chill or sanitize public debate over issues squarely in the public interest, which threatens to harm—not help—our policy outcomes.

⁸⁹ *Buckley*, 424 U.S. at 45.

⁹⁰ *WRTL*, 551 U.S. 449, 474 (2007).

⁹¹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (“The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.”).

⁹² Interestingly, our understanding is that the only “be-on-the-lookout” targeted § 501(c)(4) groups actually denied tax-exempt status were all state affiliates of Emerge America, a non-profit dedicated to training female Democratic candidates. (Several of the conservative groups whose applications were delayed withdrew, however.) The IRS found that their exclusive focus on Democrats provided a private benefit, not a community good. Oddly, while several of the denied groups’ applications were pending, *other* state affiliates of the same group, engaged in the same activity, saw their applications granted, which just serves to further illustrate the danger in a non-bright-line approach. Stephanie Strom, *3 Groups Denied Break By I.R.S. Are Named*, N.Y. Times, July 20, 2011.

Further, as a constitutional matter, while it is true that the courts apply a greater degree of deference to political speech regulations in the tax code,⁹³ and accepting for the sake of argument that this is appropriate, the rules governing what constitutes political intervention should still be limited to *political*—i.e., partisan—activities. And even if subject to a lesser standard of scrutiny than an outright prohibition on speech, such restrictions would still need to have an appropriate relationship to a legitimate or important government purpose.⁹⁴ In extending the definition of CRPA to concededly non-partisan activity, the Service cannot articulate such a purpose.

The Service’s proposed rule also fails to provide a “safety valve” for protected speech, which the courts dismissing First Amendment challenges to tax provisions limiting political speech often cite in doing so.⁹⁵

In *Regan*, an unsuccessful challenge to the lobbying restriction in § 501(c)(3), the unanimous decision by the Supreme Court found that the lobbying restriction on charities is not an “unconstitutional condition” but a rational attempt to prevent the subsidization of direct lobbying through the use of donor-deductible contributions. Groups that want to engage in substantial lobbying are just required to do so through a separate but affiliated § 501(c)(4) group where only the group enjoys the tax benefit.⁹⁶ That the Court said was okay.

In the *Regan* concurrence, however, Justices Blackmun, Marshall and Brennan stated plainly that the § 501(c)(3) lobbying restriction *absent* the § 501(c)(4) safety valve *would* have amounted to an unconstitutional condition.⁹⁷ As Justice Blackmun argued, “[i]f viewed in isolation, the lobbying restriction contained in § 501(c)(3) violates the principle . . . that the Government may not deny a benefit to a person because he exercises a constitutional right.”⁹⁸

⁹³ See *supra* note 86.

⁹⁴ *Regan v. Taxation With Representation*, 461 U.S. 540, 547 (1983).

⁹⁵ See *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 430 F. Supp.2d 222, 259 (S.D.N.Y. 2006) (using term “safety valve” to describe concurrence’s reasoning in *Regan*), *aff’d*, 651 F.3d 218 (2d Cir. 2011), *aff’d*, 133 S. Ct. 2321 (2013).

⁹⁶ *Regan*, 461 U.S. at 544, 552 (“The constitutional defect that would inhere in § 501(c)(3) alone is avoided by § 501(c)(4). [Appellant] may use its present § 501(c)(3) organization for its nonlobbying activities and may create a § 501(c)(4) affiliate to pursue its charitable goals through lobbying. . . . Given this relationship between § 501(c)(3) and § 501(c)(4), the Court finds that Congress’ purpose in imposing the lobbying restriction was merely to ensure that ‘no tax-deductible contributions are used to pay for substantial lobbying.’”) (Blackmun, J., concurring).

⁹⁷ *Id.* at 552.

⁹⁸ *Id.* (internal citations omitted).

There appears to be no such safety valve here and, indeed, the unconstitutional condition is different in kind, and much more serious, than forbearance from the use of donor-deductible contributions for lobbying activities.

The safety valve argument in the context of CRPA would be that a group that wants to have as its primary purpose the conduct of CRPA would presumably be treated as a § 527 group, subject to § 527's tax exemption. This might hold water under three conditions: (1) the proposed definition of CRPA were actually limited to express political advocacy; (2) the Service is correct that Congress intended to exclude political intervention from the definition of social welfare; and (3) Congress was able to do so without imposing an unconstitutional condition. But the definition of CRPA is not so limited and there is no indication that Congress intended to exclude *issue* advocacy from the definition of social welfare, and nor could it.⁹⁹

So, aside from the different tax treatment of § 501(c)(4) and § 527 groups, which, for the sake of argument, *might* be analogous to the difference between § (c)(3) and § (c)(4) groups in *Regan*, there is still one major difference between the two types of groups: § 527 groups have to ***publicly disclose the identity of their donors***. The proposed definition of CRPA therefore places legitimate social welfare groups in a Catch-22; either they self-censor genuine issue advocacy or they disclose their donors. It is well and long established that forced donor disclosure for any controversial political group—even partisan groups—is unconstitutional.¹⁰⁰

The proposed rule therefore may impose an unconstitutional condition on § (c)(4) groups by forcing them to disclose their donors in exchange for tax-exempt status. This could present an unconstitutional condition even in the case of express political advocacy. It almost certainly does in the case of legitimate issue advocacy.

A true bright line test—limited to actual express advocacy—is the better approach.

IX. Conclusion

In sum, the proposed “bright-line” rule offers a triple whammy for free speech. It suffers from an overabundance of clarity through application to virtually all legitimate issue advocacy during the 60/30-day blackout periods and the presidential rolling blackout. It repeats the sin of the “facts and circumstances” test through its application to all communications “susceptible of no

⁹⁹ See, e.g., *Notice*, *supra* note 1, at 71,540 (acknowledging that proposed rule will extend to non-partisan voter guides, candidate events, etc.).

¹⁰⁰ See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (recognizing constitutional right to distribute anonymous campaign literature); *Brown v. Socialist Workers ’74 Campaign Committee*, 459 U.S. 87 (1982) (requiring exemption from donor disclosure for controversial groups subject to reprisal or harassment); *Nat’l Assoc. for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958) (prohibiting state from requiring donor disclosure as condition for in-state operation). *NAACP* also expressly recognized that tax policy burdening speech could pose as severe a First Amendment concern as a direct restriction. *Id.* at 461 (“Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment.”).

reasonable interpretation” other than express advocacy. And, it paints with too broad a brush in its proposed application to unbiased and non-partisan voter registration activity, GOTV drives, voter education guides and candidate forums.

We have no doubt that the Service is acting with the best of intentions, but the proposed rule threatens to discourage or sterilize an enormous amount of political discourse in America.

* * *

We look forward to working with the Service to address these concerns. Please do not hesitate to contact Legislative Counsel/Policy Advisor Gabe Rottman at grottman@aclu.org or 202-544-1681 if you have any questions or comments.

Sincerely,



Laura W. Murphy
Director, Washington Legislative Office



Gabriel Rottman
Legislative Counsel/Policy Advisor

Appendix I (cont'd)

It took a court order to get this advertisement printed.

**An open letter to President Richard M. Nixon in
opposition to his stand on school segregation.**

Dear Mr. President:

We write because we believe that you are taking steps to create an American apartheid. That, we know, is a nasty charge. Yet that is the direction the House of Representatives took us on August 17, 1972. On that date, the House voted 282-102 to prohibit federal courts from taking effective action to end school segregation.

The reaction of every civil rights and civil liberties organization was justifiably bitter. The mood of Congress was ugly, and threatened to roll back the progress made by the federal courts during the last two decades in the effort to desegregate America.

But we do not believe that this mood could possibly have the widespread support of the American people. We believe instead that the ultimate source of pressure behind this shameful bill has been you, Mr. President.

During the last six months, you have encouraged the resentments and fears of whites, and made open enemies of blacks. You have made scapegoats of the federal courts, and attacked the rule of law itself. You have cut the middle ground out from under the feet of reasonable men. We find it hard to imagine a more cynical use of presidential power.

In the House of Representatives only 102 members stood fast against you.* Now the issue is before the Senate. We urge you to back off from the path to apartheid, and withdraw your support for this bill.

* Honor Roll of U.S. Representatives. The following 102 representatives voted against the bill to block effective action by the courts in ending school segregation. Let them hear from you. They deserve your support in their resistance to the Nixon administration's bill.

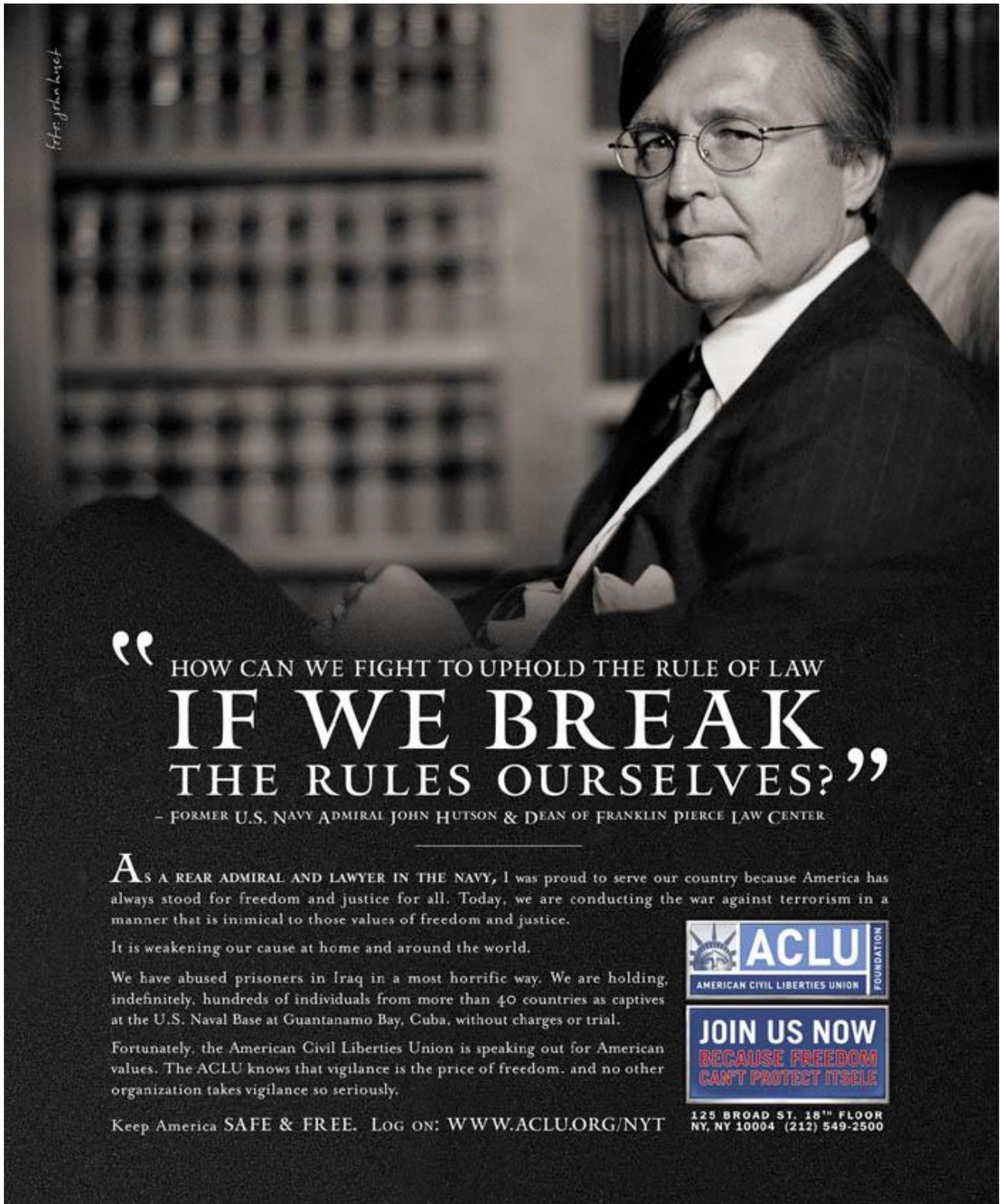
Aryeh Neier, Executive Director
American Civil Liberties Union

Ira Glasser, Executive Director
New York Civil Liberties Union

September 25, 1972

[HONOR ROLL LIST]

Appendix II: ACLU Hutson Issue Advertisement¹⁰²



John Hutson

“ HOW CAN WE FIGHT TO UPHOLD THE RULE OF LAW
IF WE BREAK
THE RULES OURSELVES? ”

— FORMER U.S. NAVY ADMIRAL JOHN HUTSON & DEAN OF FRANKLIN PIERCE LAW CENTER

AS A REAR ADMIRAL AND LAWYER IN THE NAVY, I was proud to serve our country because America has always stood for freedom and justice for all. Today, we are conducting the war against terrorism in a manner that is inimical to those values of freedom and justice.

It is weakening our cause at home and around the world.

We have abused prisoners in Iraq in a most horrific way. We are holding, indefinitely, hundreds of individuals from more than 40 countries as captives at the U.S. Naval Base at Guantanamo Bay, Cuba, without charges or trial.

Fortunately, the American Civil Liberties Union is speaking out for American values. The ACLU knows that vigilance is the price of freedom, and no other organization takes vigilance so seriously.

Keep America SAFE & FREE. LOG ON: WWW.ACLU.ORG/NYT



ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

JOIN US NOW
**BECAUSE FREEDOM
CAN'T PROTECT ITSELF**

125 BROAD ST., 18TH FLOOR
NY, NY 10004 (212) 549-2500

¹⁰²

See supra pp. 15-16.