

2014

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## Recommended Citation

Zwak, Julia D., "A Manageable Solution with Meaningful Results: Illuminating Irs Enforcement of § 501(C)(3)'s Prohibition on Political Intervention" (2014). *Minnesota Law Review*. 240.  
<https://scholarship.law.umn.edu/mlr/240>

## Note

### **A Manageable Solution with Meaningful Results: Illuminating IRS Enforcement of § 501(c)(3)'s Prohibition on Political Intervention**

*Julia D. Zwak\**

Over 1,200 pastors speak openly to their congregations in support of political candidates, hoping to prompt investigations by the Internal Revenue Service (IRS) and revocation of their organizations' tax-exempt status.<sup>1</sup> Catholic Answers, a non-profit religious website, sues the IRS for assessing a tax penalty based on the organization's allegedly political statements even though the IRS had reversed its position and refunded the tax just days before.<sup>2</sup> The NAACP files for a tax refund of \$17.65, baiting the IRS into a federal court battle over its public condemnation of a political figure.<sup>3</sup> These real-life examples

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1. See Editorial, *The Pulpit Should be Free of Politics*, L.A. TIMES (Sept. 8, 2013), <http://www.latimes.com/opinion/editorials/la-ed-irs-church-political-campaign-johnson-amendm-20130908-story.html> (“[P]reachers have endorsed or opposed candidates by name during religious services, daring the IRS to sanction them.”); Alliance Defending Freedom, *Pulpit Freedom Sunday 2013 Participating Churches*, <http://www.speakupmovement.org/Church/Content/pdf/PFS2013FinalParticipantListforPublishing.pdf>.

2. Catholic Answers, Inc. v. United States, No. 09-CV-670-IEG (AJB), 2009 WL 3320498 (S.D. Cal. Oct. 14, 2009), *aff'd*, 438 Fed. App'x 640 (9th Cir. 2011).

3. COMM'N ON ACCOUNTABILITY & POLICY FOR RELIGIOUS ORGS., GOVERNMENT REGULATION OF POLITICAL SPEECH BY RELIGIOUS AND OTHER 501(C)(3) ORGANIZATIONS 25 (2013), <http://religiouspolicycommission.org/>

demonstrate the unusual lengths to which § 501(c)(3) tax-exempt organizations have gone in attempting to force the IRS to clarify its application of 26 U.S.C. § 501(c)(3), the prohibition on political activity for tax-exempt charities, churches, and educational institutions.<sup>4</sup> The rule, applied by the IRS under an imprecise and malleable facts and circumstances test, prohibits these organizations from participating or intervening in “any political campaign on behalf of (or in opposition to) any candidate for public office.”<sup>5</sup>

Penalties for violating § 501(c)(3)’s political activity prohibition include a warning letter from the IRS,<sup>6</sup> a tax penalty, or even revocation of tax-exempt status.<sup>7</sup> Given the severity of this last possibility, organizations should have clear guidance to ensure compliance.<sup>8</sup> In reality, the guidance is far from clear.<sup>9</sup> The precise contours of the ban on political activity are difficult to define for three primary reasons. First, § 501(c)(3) was enacted with minimal legislative history and Congress has not precisely articulated its rationale for imposing the ban.<sup>10</sup> Second, the IRS uses a facts and circumstances analysis to determine whether an organization has engaged in political activity, and it provides little guidance to assist organizations seeking to comply.<sup>11</sup> Third, few courts have considered the prohibition, and it is unlikely that a court will have an opportunity to impose a more

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CommissionReport.aspx [hereinafter COMMISSION REPORT] (citing Press Release, Nat’l Ass’n for the Advancement of Colored People, NAACP Will Challenge the IRS Threat in Fed. Court (Mar. 30, 2006)).

4. See 26 U.S.C. § 501(c)(3) (2012).

5. *Id.*

6. COMMISSION REPORT, *supra* note 3, at 53.

7. See Tax Guide for Churches and Religious Organizations, I.R.S. Publication 1828, at 7 (2013) [hereinafter Tax Guide], available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>.

8. See, e.g., Michael Fresco, Note, *Getting to “Exempt!”: Putting the Rubber Stamp on Section 501(c)(3)’s Political Activity Prohibition*, 80 FORDHAM L. REV. 3015, 3053 (2012) (proposing a bright-line rule to determine when revocation of tax-exempt status is appropriate).

9. Cf. Janice Ryan, *With Election Around the Corner, Charities Must Tread Carefully*, NONPROFIT TIMES (Sept. 4, 2012), <http://www.thenonprofittimes.com/news-articles/with-election-around-the-corner-charities-must-tread-carefully> (“[T]he line between prohibited and permissible activities is murky and can be easily crossed . . .”).

10. See Jennifer Rigterink, Comment, *I’ll Believe It When I “C” It: Rethinking § 501(c)(3)’s Prohibition on Politicking*, 86 TUL. L. REV. 493, 517 (2011) (“[The] politicking ban was introduced as a floor amendment, without any documented necessity or rationalization.”).

11. See Rev. Rul. 2007-41, 2007-1 C.B. 1421.

specific test because the IRS has consistently avoided litigation concerning the § 501(c)(3) political activity ban.<sup>12</sup>

Despite recurring debates over these issues and periodic attempts at legislative reform, the prohibition remains a source of frustration for organizations seeking to advance their missions.<sup>13</sup> Given the scarcity of case law or administrative rulings on the application of § 501(c)(3)'s political activity ban, scholarly criticisms of the provision have largely been confined to analysis of hypothetical scenarios or the few existing instances of the rule's application.<sup>14</sup> More specific details about the nature and extent of § 501(c)(3) political activity ban violations could better inform scholarly criticism and improve proposals for legislative reform.

This Note suggests procedural changes that the IRS should implement to increase transparency and improve regulated organizations' understanding of its enforcement efforts. Part I discusses the history of the political activity ban, including recent enforcement efforts by the IRS. Part II examines proposals for reform posed by scholars, practitioners, and the IRS itself. Part III proposes enhanced administrative procedures that encourage the IRS to consistently report its investigations of § 501(c)(3) political activity ban violations. In particular, this Note suggests that the IRS publish reports detailing its application of the facts and circumstances test to illuminate its enforcement efforts. Such procedures will assist § 501(c)(3) tax-exempt organizations seeking to tailor their activities to the tax code's current guidelines and will solve many of the problems posed by the § 501(c)(3) political activity ban.

### I. A BRIEF HISTORY OF § 501(C)(3)'S POLITICAL ACTIVITY BAN

To further illustrate the problems underlying IRS enforcement of the political activity ban, this Part provides a brief his-

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12. See Erik W. Stanley, *LBJ, the IRS, and Churches: The Unconstitutionality of the Johnson Amendment in Light of Recent Supreme Court Precedent*, 24 REGENT U. L. REV. 237, 260 (2012) (describing how the IRS has avoided litigation of its enforcement efforts relating to the political activity ban).

13. See generally COMMISSION REPORT, *supra* note 3, at 3–4 (“Given the untenable mix of vagueness in the law, violations without consequences, limited and inconsistent enforcement, and the lack of respect for the law and its administration that inevitably results, something needs to change.”).

14. See *id.* at 22–26 (providing examples of “the rare and controversial cases in which the IRS has initiated enforcement action”).

tory of the ban since its inception in 1954. Section A describes the basic textual parameters of the ban and how they developed over time. Section B identifies existing sources of guidance for organizations attempting to comply with the provision. Section C concludes with a description of IRS enforcement efforts in the past decade and recent public debate around the provision.

#### A. THE PARAMETERS OF THE PROHIBITION

This Note begins its analysis with the text of this problematic rule. Both the legislative history of § 501(c)(3)'s political activity ban and the text of the provision itself are brief. This Section describes each in turn.

##### 1. Congressional Origins

Based on “the benefit the public obtains from their activities,” Congress has granted tax privileges to religious, charitable, scientific, and educational organizations since the early twentieth century.<sup>15</sup> In 1913, Congress determined that non-profit entities “organized and operated exclusively for religious, charitable, scientific, or educational purposes” would be exempt from federal income taxation.<sup>16</sup> Through the War Revenue Act of 1917, taxpayers making contributions to such organizations were granted a deduction in calculating their annual income tax.<sup>17</sup> These benefits have persisted for the past century, although Congress has made some modifications.

In 1934, Congress enacted a new rule limiting the lobbying activities of organizations exempt from taxation under § 501(c)(3).<sup>18</sup> If a substantial part of an organization's activities consisted of “carrying on propaganda, or otherwise attempting, to influence legislation,” it could no longer qualify for tax-exemption.<sup>19</sup> This provision was enacted in response to a 1930 decision by the Second Circuit, which held the American Birth Control League was not entitled to exemption because it engaged in propaganda seeking to influence legislation, an action which went beyond an exclusively religious, educational, or scientific purpose.<sup>20</sup> Congress considered placing additional re-

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15. *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 854 (10th Cir. 1972).

16. Revenue Act of 1913, ch. 16, § II.G(a), 38 Stat. 114, 172 (1913).

17. War Revenue Act of 1917, ch. 63, 40 Stat. 300, 330 (1917).

18. Income Tax Act of 1934, ch. 277, § 101(6), 48 Stat. 700, 700 (1934).

19. *Id.*

20. *See Slee v. Comm'r*, 42 F.2d 184, 185–86 (2d Cir. 1930).

strictions on “participation in partisan politics”<sup>21</sup> but chose to only limit lobbying activities because the ban would otherwise be “too broad.”<sup>22</sup>

Twenty years later, Congress again had the opportunity to consider whether § 501(c)(3) organizations should be further restrained in the political sphere. Lyndon B. Johnson proposed the political activity ban in the midst of his 1954 reelection campaign for U.S. Senate.<sup>23</sup> Johnson’s campaign was threatened by the involvement of two particularly active § 501(c)(3) organizations that were outwardly supportive of Johnson’s opponent and critical of Johnson’s politics.<sup>24</sup> In what many scholars have characterized as an attempt to silence his opponents,<sup>25</sup> Johnson proposed an amendment to 26 U.S.C. § 501(c)(3) which would deny tax-exempt status to “those who intervene in any political campaign on behalf of any candidate for any public office.”<sup>26</sup> The amendment’s legislative history is sparse; Johnson briefly stated his proposal with no explanation of its rationale or motivation.<sup>27</sup> Further, as one commentator has pointed out, “[t]here was no referral to a committee for further study and hearings,” and “[t]here was no legislative analysis of the effect of the Amendment on tax-exempt organizations.”<sup>28</sup> Unlike the lobbying restrictions imposed in 1934, this amendment imposed a complete ban on political activity of any kind.<sup>29</sup> Despite the significant restriction this presented for § 501(c)(3) organizations and the lack of informed debate on the proposal, the Johnson Amendment became law in 1954.<sup>30</sup>

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21. STAFF OF S. COMM. ON FINANCE, 73D CONG., REVENUE ACT OF 1934, at 32 (Comm. Print 1934).

22. 78 CONG. REC. 7831 (1934) (statement of Rep. Samuel B. Hill).

23. Stanley, *supra* note 12, at 244–46.

24. *Id.*

25. See, e.g., Ellen P. Aprill, *Why the IRS Should Want To Develop Rules Regarding Charities and Politics*, 62 CASE W. RES. L. REV. 643, 671–72 (2012) (“Many who have examined the legislative record have concluded that its motive was simply political animus . . . .”); Fresco, *supra* note 8, at 3020 (“It is now acknowledged that Johnson likely proposed the amendment in response to the support that certain exempt organizations gave to his rival . . . .”); cf. Dallas Dean, *A Little Rule That Goes a Long Way: A Simplified Rule Enforcing the 501(c)(3) Ban on Church Campaign Intervention*, 28 J.L. & POL. 307, 315 (2013) (“The motivation for this ban has been criticized as suspect . . . .”).

26. 100 CONG. REC. 9604 (1954).

27. *Id.*

28. Stanley, *supra* note 12, at 248.

29. 100 CONG. REC. 9604 (1954).

30. Internal Revenue Code of 1954, ch. 1, § 501(c)(3), 68A Stat. 163, 163 (1954).

## 2. The Text of the Ban

Congress has since made only one minor change to the political activity ban, adding that § 501(c)(3) tax-exempt organizations are prohibited from not only supporting but also opposing any candidate for public office.<sup>31</sup> In its present form, the political activity ban limits § 501(c)(3) tax-exempt organizations to those “which [do] not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”<sup>32</sup>

Congress delegated the task of enforcing the Internal Revenue Code to the IRS, which has the authority to promulgate regulations that carry the force of law.<sup>33</sup> The IRS regulations under § 501(c)(3) provide minor clarifications relating to the political activity ban. First, the regulations prohibit political activity that “directly or indirectly” intervenes in any political campaign.<sup>34</sup> Second, the regulations provide a definition of “candidate for public office.”<sup>35</sup> Finally, the regulations provide that prohibited activities under the political activity ban “include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.”<sup>36</sup> Using a term not found in the statute itself, the regulations label organizations that violate the political activity ban as “action organizations.”<sup>37</sup> These regulations and the statute itself contain the complete authoritative text of the political activity ban.

### B. GUIDANCE FOR ORGANIZATIONS SEEKING TO COMPLY WITH THE BAN

Along with the text of the statute and regulations, tax-exempt organizations have some guidance for understanding the § 501(c)(3) political activity ban from the IRS and the courts. As this Section will show, however, this guidance is lim-

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31. See Revenue Act of 1987, Pub. L. No. 100-203, § 10,711, 101 Stat. 1330-382, 1330-464 (1987).

32. 26 U.S.C. § 501(c)(3) (2012).

33. *Id.* § 7805(a).

34. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (2012).

35. *Id.* (“The term candidate for public office means an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local.” (emphases omitted)).

36. *Id.*

37. *Id.* § 1.501(c)(3)-1(c)(3).

ited. First, this Section describes the most useful IRS guidance for § 501(c)(3) tax-exempt organizations in this area. Next, it discusses the limited case law interpreting the rule.

### 1. IRS “Guidance”

In addition to Treasury Regulations, the IRS publishes Revenue Rulings, which examine hypothetical scenarios to clarify how the IRS thinks the law applies to a given set of facts.<sup>38</sup> In 2007, the IRS published its most comprehensive attempt to clarify the political activity ban through such guidance.<sup>39</sup> Revenue Ruling 2007-41 provides twenty-one hypothetical scenarios and addresses whether the hypothetical organizations “participated or intervened in a political campaign on behalf of (or in opposition to) any candidate for public office within the meaning of section 501(c)(3).”<sup>40</sup> The scenarios are grouped into categories covering activities such as voter education, individual activity by organization leaders, candidate appearances, and issue advocacy.<sup>41</sup> Some categories include lists of factors that will be taken into account to determine whether improper political activity has taken place.<sup>42</sup>

The examples in Revenue Ruling 2007-41 demonstrate that the IRS uses a case-specific facts and circumstances analysis to determine whether an organization has violated § 501(c)(3)’s political activity ban.<sup>43</sup> This method of analysis builds on prior Revenue Rulings addressing specific areas of activity such as voter education<sup>44</sup> and candidate forums.<sup>45</sup> The determination in these examples often depends on such factors as the timing of

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38. *Id.* § 601.601(d)(2)(iii) (“The purpose of publishing revenue rulings and revenue procedures in the Internal Revenue Bulletin is to . . . assist taxpayers in attaining maximum voluntary compliance.”).

39. Rev. Rul. 2007-41, 2007-1 C.B. 1421.

40. *Id.* at 1421.

41. *Id.* at 1422–24.

42. *Id.* at 1424.

43. *See id.* at 1422 (“[A]ll the facts and circumstances are considered in determining whether an organization’s activities result in political campaign intervention.”).

44. *See, e.g.*, Rev. Rul. 78-248, 1978-1 C.B. 154 (describing voter education activities that will not be deemed political activity under § 501(c)(3)); Rev. Rul. 80-282, 1980-2 C.B. 178 (illustrating circumstances under which a newsletter identifying the voting records of Congressional incumbents will be deemed appropriate activity under the political activity ban).

45. *See, e.g.*, Rev. Rul. 86-95, 1986-2 C.B. 73 (describing how a § 501(c)(3) tax-exempt organization can present a candidate forum without violating the political activity prohibition).



the activity, whether the activity is part of the organization's usual activities outside of election season, and whether the activity relates to an issue that has divided political candidates for a specific office.<sup>46</sup>

For a number of reasons, Revenue Ruling 2007-41 falls short in providing practical guidance for § 501(c)(3) organizations. First, many of the hypothetical scenarios fail to identify a rationale for the conclusion regarding whether political activity has occurred.<sup>47</sup> Second, the facts and circumstances test is not articulated in any specific form; no comprehensive list of factors is presented, and the factors identified under certain categories are not weighed in terms of importance.<sup>48</sup> Third, the twenty-one examples are presented as isolated occurrences involving only one type of activity.<sup>49</sup> The Revenue Ruling specifically addresses this fact, stating that “[i]n the case of an organization that combines one or more types of activity, the interaction among the activities may affect the determination.”<sup>50</sup> The IRS has clarified that the conclusions in a Revenue Ruling are “directly responsive to and limited in scope by the pivotal facts” presented.<sup>51</sup> Therefore, unless an organization finds itself in the precise factual situation as one of the hypothetical organizations, it cannot rely on Revenue Ruling 2007-41 as an authoritative guide. While Revenue Ruling 2007-41 sheds some light on what the IRS considers to be a violation of the political activity ban, it also leaves much open to interpretation.

Another potential source of IRS guidance is a private letter ruling. Tax-exempt organizations may request a private letter ruling to seek an explanation of how the IRS might treat certain activities under § 501(c)(3).<sup>52</sup> A letter ruling is “a written statement issued to a taxpayer by [the IRS] that interprets and applies the tax laws or any nontax laws applicable to . . . exempt organizations to the taxpayer's specific set of facts.”<sup>53</sup> For two reasons, however, this option may be infeasible and un-

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46. See Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1423–24.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 1422.

51. Treas. Reg. § 601.601(d)(2)(v)(a) (2012).

52. See *Exempt Organizations - Private Letter Rulings and Determination Letters*, IRS (Aug. 20, 2014), <http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Exempt-Organizations-Private-Letter-Rulings-and-Determination-Letters>.

53. Rev. Proc. 2014-4, 2014-1 I.R.B. 125, 129.

workable for tax-exempt organizations attempting to comply with § 501(c)(3)'s prohibition on political activity.

First, the expense of a private letter ruling request is not insignificant. The IRS requires organizations to submit a fee of \$10,000 before it will consider a request for a private letter ruling.<sup>54</sup> In addition, an organization cannot request a private letter ruling through a simple phone call or letter to the IRS. The IRS requires organizations to follow a complex process involving many detailed steps in order to obtain a private letter ruling.<sup>55</sup> Many of these steps involve legal analysis for which an organization would likely wish to seek the advice of an attorney.<sup>56</sup> Combined with the \$10,000 fee, the expense of legal advice would likely be insurmountable for many tax-exempt organizations, particularly small charities and non-profit organizations.<sup>57</sup>

Second, a private letter ruling may not be an ideal source of guidance for organizations attempting to respond to time-sensitive policy issues approaching the line of candidate-related political activity. Private letter rulings are processed as the IRS receives them, and requests for expedited processing are “granted only in rare and unusual cases.”<sup>58</sup> The IRS thus “urges all taxpayers to submit their requests well in advance of the contemplated transaction.”<sup>59</sup> A tax-exempt organization may

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54. Rev. Proc. 2014-8, 2014-1 I.R.B. 242, 247; *see also* Rev. Proc. 2014-4, 2014-1 I.R.B. 125, 139.

55. *See* Rev. Proc. 2014-4, 2014-1 I.R.B. 125, 163–65 (listing the required steps for obtaining a private letter ruling in a three-page checklist containing thirty-three separate items); *id.* at 130 (explaining that the IRS will not issue private letter rulings in response to oral requests).

56. *See id.* at 139–45. Each private letter ruling request must contain the following components: a statement of facts, all documents related to the transaction, a statement of supporting and contrary legal authorities, an analysis of the issue, a statement describing whether the issue has been ruled on or dealt with in a previous return, a statement regarding pending legislation that may affect the ruling, a statement identifying any requested deletions to be made for the public record of the letter ruling, the signature of the taxpayer or a representative, and a statement affirming the veracity of all statements under penalty of perjury. *See id.*

57. *Cf. IRS Affirms That It Only Provides Assurance on Changes in Activities by Private Letter Ruling*, NONPROFIT WATCHMAN (Spring 2013), <http://www.nonprofitcpa.com/irs-affirms-that-it-only-provides-assurance-on-changes-in-activities-by-private-letter-ruling> (“[T]he total cost of obtaining a PLR may be significant. For larger organizations or organizations for which the risk of noncompliance could be great, the cost may be justified in order to obtain the assurance of affirmation by the IRS.”).

58. Rev. Proc. 2014-4, 2014-1 I.R.B. 125, 146.

59. *Id.* at 147.

not be able to do so, however, if it wants to make a timely response or statement regarding important pending policy matters. Further, organizations cannot proactively request a letter ruling about potential situations they might encounter in the future since the IRS refuses to issue letter rulings on “alternative plans of proposed transactions or on hypothetical situations.”<sup>60</sup> And even if an organization presents a factual scenario with a live question to the IRS, the agency may decline to issue a letter ruling altogether if it determines that issuing a letter ruling would not be “appropriate in the interest of sound tax administration.”<sup>61</sup> Given the significant expense and unpredictable timing involved in requesting a private letter ruling, this source of guidance cannot adequately address the problems posed by § 501(c)(3)’s political activity ban.

## 2. Judicial Review: An Unlikely Source of Clarification

Another potential source of authority for interpreting § 501(c)(3)’s political activity ban is judicial opinions. As noted by a number of scholars, however, “[o]nly a very small number of court decisions have involved the campaign intervention prohibition.”<sup>62</sup> The mechanics of the prohibition demonstrate why this may be so. When an organization violates the political activity ban, the IRS may respond by sending a warning letter,<sup>63</sup> imposing an excise tax for any expenditures incurred,<sup>64</sup> or revoking the organization’s tax-exempt status.<sup>65</sup> A warning letter in itself would not likely provide the taxpayer with standing to sue the IRS as there is no injury in fact based on receiving a letter.<sup>66</sup> An organization faced with the latter two penalties may

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60. *Id.* at 138.

61. *Id.* at 132; *see also id.* at 149 (explaining that the IRS may decline to issue a private letter ruling).

62. Aprill, *supra* note 25, at 655.

63. COMMISSION REPORT, *supra* note 3, at 53.

64. *See* 26 U.S.C. § 4955 (2012).

65. *See id.* § 501(c)(3).

66. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (providing that a plaintiff “must have suffered an ‘injury in fact,’” meaning “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical,’” in order to bring a lawsuit (citations omitted) (internal quotation marks omitted)). It is not likely that the receipt of a warning letter, without more, would be deemed a concrete invasion of a legally protected interest. *But see* Edward Sherman, “No Injury” Plaintiffs and Standing, 82 GEO. WASH. L. REV. 834, 835–36 (2014) (summarizing various types of cases in which plaintiffs have struggled to establish standing and illustrating ways the “no injury” barrier might be overcome).

have a basis to challenge the IRS determination in court, but the IRS can easily avoid such litigation as described below.

In the case of an excise tax,<sup>67</sup> an organization that seeks to challenge the imposition of the tax in federal court must first pay the tax and request a refund by filing an administrative claim.<sup>68</sup> After these steps are taken, the organization may then challenge the tax by filing a lawsuit.<sup>69</sup> The United States District Court for the Southern District of California dealt with this scenario in *Catholic Answers, Inc. v. United States*.<sup>70</sup> Catholic Answers, Inc., a nonprofit religious organization, posted letters on its website critiquing Senator John Kerry's views on a variety of political issues such as abortion.<sup>71</sup> The IRS initiated a lengthy investigation and determined that Catholic Answers had engaged in political activity warranting the imposition of an excise tax in May 2008.<sup>72</sup> Catholic Answers paid the tax but sought a refund from the IRS in September 2008.<sup>73</sup> In March 2009, the IRS notified Catholic Answers that it was abating the tax because it had determined that "the political intervention . . . was not wilful and flagrant and was corrected."<sup>74</sup> Catholic Answers initiated a federal lawsuit less than one week later challenging the IRS's determination that it had engaged in political activity.<sup>75</sup> The District Court did not reach the merits of this claim, however, finding that the IRS's tax abatement rendered the refund suit moot and that the case presented no "issues capable of repetition yet evading review."<sup>76</sup> This case demonstrates how the IRS can avoid judicial review of its determination that political activity has taken place by simply re-

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67. See 26 U.S.C. § 4955 (2012) (providing that the IRS may impose a tax on political expenditures of § 501(c)(3) organizations). See generally BLACK'S LAW DICTIONARY 646 (9th ed. 2009) (defining "excise" as "[a] tax imposed on . . . an . . . activity").

68. 26 U.S.C. § 7422 (2012).

69. *Id.*

70. *Catholic Answers, Inc. v. United States*, No. 09-CV-670-IEG (AJB), 2009 WL 3320498 (S.D. Cal. Oct. 14, 2009), *aff'd*, 438 Fed. App'x 640 (9th Cir. 2011).

71. *Id.* at \*1.

72. *Id.*

73. *Id.*

74. *Id.* at \*2.

75. *Id.*

76. *Id.* at \*8. *But see* *Church of Scientology v. United States*, 485 F.2d 313, 316 (9th Cir. 1973) (2-1 decision) (illustrating how an issue apparently mooted by a tax refund may be deemed "capable of repetition yet evading review" in limited circumstances (internal quotation mark omitted) (citing *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911))).

versing its position or deciding that the intervention was not serious enough to warrant a tax penalty.<sup>77</sup>

In a few prominent cases, courts have reviewed the IRS's decision to revoke an organization's tax-exempt status based on the political activity ban. These cases illustrate that the courts give substantial deference to the IRS's determinations in this area. In 2000, the IRS revoked the tax-exempt status of Branch Ministries, a § 501(c)(3) tax-exempt church, based on its involvement in political activity.<sup>78</sup> Leading up to the 1992 presidential election, Branch Ministries placed a full-page advertisement in two national newspapers urging Christians not to vote for Bill Clinton.<sup>79</sup> A statement at the bottom of the ad stated: "Tax-deductible donations for this advertisement gladly accepted."<sup>80</sup> After an investigation of the church's activities, the IRS revoked its tax-exempt status.<sup>81</sup> Branch Ministries challenged the revocation as an exercise of selective prosecution in violation of the Equal Protection Clause.<sup>82</sup> The D.C. Circuit Court of Appeals upheld the revocation, deferring to the IRS's judgment in this area.<sup>83</sup>

The court's treatment of Branch Ministries' selective prosecution claim illustrates the significant deference granted to the IRS in applying the facts and circumstances test. To support its claim, Branch Ministries submitted "several hundred pages" of newspaper articles reporting on church political activity that had failed to come under IRS scrutiny.<sup>84</sup> The IRS admitted that

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77. See Elizabeth J. Kingsley, *Challenges to "Facts and Circumstances"—A Standard Whose Time Has Passed?*, TAX'N EXEMPTS, Mar./Apr. 2010, at 43, 47–48 (describing obstacles to judicial review for § 501(c)(3) and § 501(c)(4) organizations, drawing on the *Catholic Answers* case as one example).

78. See *Branch Ministries v. Rossotti*, 211 F.3d 137, 139 (D.C. Cir. 2000).

79. *Id.*

80. *Id.* at 140.

81. *Id.*

82. *Id.* at 141–42. Branch Ministries also challenged the revocation as a violation of the First Amendment's Free Exercise Clause. A discussion of the First Amendment implications of the ban is beyond the scope of this Note. For thorough discussions of the First Amendment issues around the political activity ban, see generally NINA J. CRIMM & LAURENCE H. WINER, *POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS* (2011); Keith S. Blair, *Praying for a Tax Break: Churches, Political Speech, and the Loss of Section 501(c)(3) Tax Exempt Status*, 86 DENV. U. L. REV. 405 (2009); H. Chandler Combest, *Symbolism as Savior: A Look at the Impact of the IRS Ban on Political Activity by Tax-Exempt Religious Organizations*, 61 ALA. L. REV. 1121 (2010).

83. *Branch Ministries*, 211 F.3d at 145.

84. *Id.* at 144.

some of these examples could have resulted in a finding that the organization violated the political activity ban,<sup>85</sup> but the court rejected Branch Ministries' selective prosecution claim because it "failed to demonstrate that it was similarly situated to any of those other churches."<sup>86</sup> As the court emphasized, "[n]one of the reported activities involved the placement of advertisements in newspapers with nationwide circulations opposing a candidate and soliciting tax deductible contributions to defray their cost."<sup>87</sup> Admittedly this activity by Branch Ministries presents a particularly egregious example of prohibited political activity under § 501(c)(3). Nevertheless, the court's decision highlights how difficult it would be for an organization to obtain meaningful judicial review of the IRS's facts and circumstances analysis. Because the IRS has such latitude and flexibility in considering the unique facts of a given case, a court will be unlikely to impose a more exacting analysis or implement a more specific test.

Another reason that courts would be unlikely to challenge the IRS's revocation of tax-exempt status is that the IRS likely reserves this penalty for the most clear—and obviously political—violations.<sup>88</sup> Although IRS guidance on the prohibition is not altogether clear, Branch Ministries' advertisement could not be understood as anything other than an attempt to intervene in an election.<sup>89</sup> Other cases similarly illustrate the clearly political circumstances warranting revocation. The Tenth Circuit Court of Appeals upheld the IRS's revocation of a religious organization's § 501(c)(3) tax-exempt status when it "attacked President Kennedy . . . and urged its followers to elect conservatives like Senator Strom Thurmond."<sup>90</sup> The organization went on to name more specific candidates in its publications and broadcasts.<sup>91</sup> In another case, the Second Circuit upheld the IRS's decision to deny tax-exempt status to an organization when it published ratings of judicial candidates identifying whether they were "approved," "not approved," or "approved as

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85. *Id.*

86. *Id.*

87. *Id.*

88. *Cf.* Aprill, *supra* note 25, at 655 (describing how *Branch Ministries* involved "undisputed express intervention").

89. *See id.*

90. *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 856 (10th Cir. 1972).

91. *Id.*

highly qualified.”<sup>92</sup> In each of these examples, the organizations engaged in activity that can clearly be identified as an attempt to intervene in or influence an election. Judicial review of the IRS’s decisions in these cases, therefore, does little more than reiterate the obvious.

### C. RECENT ATTEMPTS AT REFORM

In response to the problems posed by the political activity ban, the IRS has taken action in the past decade to enhance its enforcement efforts against § 501(c)(3) organizations. This Section first describes the IRS’s efforts and then identifies existing debates around the remaining problems with the prohibition. It concludes with a description of recent developments in a related area—IRS regulation of politically active § 501(c)(4) social welfare organizations.

#### 1. The Political Activities Compliance Initiative

Acknowledging that “[t]he issue of political campaign intervention by § 501(c)(3) organizations presents unique challenges,”<sup>93</sup> the IRS developed a program known as the Political Activities Compliance Initiative (PACI) to “promote compliance with the IRC § 501(c)(3) prohibition against political campaign intervention.”<sup>94</sup> The IRS repeated this initiative during three successive elections in 2004, 2006, and 2008.<sup>95</sup> PACI involved a “fast track” process through which IRS agents would screen referrals of § 501(c)(3) violations on an expedited basis.<sup>96</sup> The team identified the cases as complex, non-complex, or not warranting examination.<sup>97</sup> PACI also involved a separate methodology for examining churches as required under the Church Audit Procedures Act.<sup>98</sup> Through PACI, the IRS hoped to establish its “enforcement presence” and “reinforce [its] education efforts.”<sup>99</sup>

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92. N.Y.C. Bar Ass’n v. Comm’r, 858 F.2d 876, 877 (2d Cir. 1988).

93. IRS, POLITICAL ACTIVITIES COMPLIANCE INITIATIVE FINAL REPORT 1 (2006), [http://www.irs.gov/pub/irs-tege/final\\_paci\\_report.pdf](http://www.irs.gov/pub/irs-tege/final_paci_report.pdf) [hereinafter 2004 PACI REPORT].

94. *Id.*

95. Aprill, *supra* note 25, at 659–62 (describing the PACI program).

96. 2004 PACI REPORT, *supra* note 93, at 2.

97. *Id.* at 6.

98. *See id.* at 2; *see also* 26 U.S.C. § 7611 (2012) (outlining the methodology the IRS follows for a church tax inquiry).

99. 2004 PACI REPORT, *supra* note 93, at 1.

The IRS prepared reports summarizing its findings in both the 2004 and 2006 PACI initiatives,<sup>100</sup> but failed to do so for the 2008 election cycle.<sup>101</sup> During the three PACI cycles, the IRS investigated more than 250 organizations.<sup>102</sup> Seven organizations had their tax-exempt status revoked based on violations of the political activity ban.<sup>103</sup> As the IRS explained in its 2004 PACI Report,<sup>104</sup> it is unable to discuss the specific details of these investigations based on 26 U.S.C. § 6103, which ensures the confidentiality of tax returns and information contained therein.<sup>105</sup> Detailed information is only available when organizations publicly acknowledge that they have been selected for IRS scrutiny.<sup>106</sup>

Despite its inability to publicize the specific facts and circumstances involved in the 250 PACI investigations, the IRS used PACI data to develop the twenty-one hypothetical scenarios identified in Revenue Ruling 2007-41.<sup>107</sup> In its 2010 Annual Report, the IRS Exempt Organizations Division suggests that future PACI initiatives will be incorporated into more formal processes as the IRS “move[s] review of allegations of political

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100. *Id.*; IRS, 2006 POLITICAL ACTIVITIES COMPLIANCE INITIATIVE (2007), [http://www.irs.gov/pub/irs-tege/2006paci\\_report\\_5-30-07.pdf](http://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf) [hereinafter 2006 PACI REPORT].

101. See EXEMPT ORGANIZATIONS, IRS, TAX EXEMPT AND GOVERNMENT ENTITIES (2010), [http://www.irs.gov/pub/irs-tege/fy2011\\_eo\\_workplan.pdf](http://www.irs.gov/pub/irs-tege/fy2011_eo_workplan.pdf) [hereinafter 2010 ANNUAL REPORT]; cf. Aprill, *supra* note 25, at 662 (“The 2010 Annual Report from the director of exempt organizations provides the only information on the 2008 PACI.”).

102. 2010 ANNUAL REPORT, *supra* note 101, at 20.

103. *Id.*

104. 2004 PACI REPORT, *supra* note 93, at 2.

105. 26 U.S.C. § 6103 (2012); see also Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1355–56 (2007) (“Under section 6103 of the Internal Revenue Code, the IRS is prohibited from releasing taxpayer information in all but very limited circumstances . . . [and] is therefore prohibited from disclosing whether a particular 501(c)(3) organization is being investigated or, if it is, the resolution of any case.”).

106. See, e.g., Blair, *supra* note 82, at 429–32 (describing the IRS’s investigation of All Saints Church, which consciously chose to make the investigation public).

107. See *Political Activity Compliance Initiative (2006 Election)*, IRS (June 25, 2014), [http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Political-Activity-Compliance-Initiative-\(2006-Election\)](http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Political-Activity-Compliance-Initiative-(2006-Election)) (“Building on the experience gained through its compliance projects, the IRS issued Revenue Ruling 2007-41.”).



campaign intervention from project to process.”<sup>108</sup> It is not clear at this time whether these processes have been put in place.

## 2. Current Dialogue: The Debate Is Not Over

Although the PACI program has faded out of the public’s attention, debates surrounding the political activity of § 501(c)(3) tax-exempt organizations persist. The Pulpit Freedom Sunday initiative<sup>109</sup> is an extreme example of the public call for reform. Started in 2008 by Alliance Defending Freedom, a national conservative nonprofit organization that seeks to defend religious liberty, Pulpit Freedom Sunday encourages pastors and other religious leaders to speak openly about political candidates to their congregants once per year.<sup>110</sup> The goal of this movement is “to generate test cases [to] carry to the U.S. Supreme Court” in order to challenge the constitutionality of the political activity ban.<sup>111</sup> In response to such church political activity, the Freedom From Religion Foundation filed a federal lawsuit urging the IRS to actively enforce its own regulations.<sup>112</sup> Although the IRS has largely ignored Pulpit Freedom Sunday for many years,<sup>113</sup> it recently affirmed that it “does not have a policy at this time of non-enforcement specific to churches and religious institutions.”<sup>114</sup> Some commentators have nonetheless called for more aggressive enforcement against such politically active tax-exempt organizations. For example, a September 2013 *L.A. Times* editorial argues that “[f]ar from needing to be

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108. 2010 ANNUAL REPORT, *supra* note 101, at 20.

109. Alliance Defending Freedom, *supra* note 1.

110. See Alliance Defending Freedom, *Speak Up: Pulpit Freedom Sunday Frequently Asked Questions* 1–2, [http://www.adfmedia.org/files/ChurchFAQ\\_PulpitFreedom.pdf](http://www.adfmedia.org/files/ChurchFAQ_PulpitFreedom.pdf) (last visited Oct. 17, 2014).

111. *Id.* at 1.

112. See Kate Tracy, *IRS to Atheists: Okay, We’ll Investigate Pulpit Freedom Sunday Pastors*, CHRISTIANITY TODAY (July 25, 2014, 11:33 AM), <http://www.christianitytoday.com/gleanings/2014/july/irs-to-atheists-okay-well-investigate-pulpit-freedom-sunday.html>.

113. See Joan Frawley Desmond, *U.S. Supreme Court Denies Appeal in First Amendment Case*, NAT’L CATHOLIC REG. (Nov. 21, 2012), <http://www.ncregister.com/daily-news/u.s.-supreme-court-denies-appeal-in-first-amendment-case> (“Many sources indicate the IRS has not taken action against electioneering churches for three years.”).

114. Decision and Order, *Freedom from Religion Found., Inc. v. Koskinen*, No. 12-C-0818, 2014 WL 3811050, at \*1–2 (W.D. Wis. Aug. 1, 2014), available at <http://ffrf.org/uploads/legal/IRS-Politicking-Decision.pdf> (granting a joint motion for dismissal in a case filed by the Freedom From Religion Foundation against the IRS for its persistent failure to investigate church political activity).

repealed, the ban on politics in the pulpit ought to be enforced more aggressively.”<sup>115</sup> Although the most vociferous appeals seem to surround the activity of churches in particular, secular charities and nonprofit institutions have also weighed in. For example, two commentators criticized the IRS’s “amorphous” facts and circumstances test in a recent article in *The Chronicle of Philanthropy*.<sup>116</sup> One author suggested that under current rules, IRS staff have “no clearer a criterion than ‘knowing political activity when they view it.’”<sup>117</sup> With opinions along all points of the spectrum, it appears that both the public and the tax-exempt organizations subject to the rule are ready to see significant changes in IRS enforcement of § 501(c)(3)’s political activity ban.

Despite the continued debate in the public sphere, Congress has not acted to alter the political activity ban. In the years preceding PACI up until the present, many legislators have proposed bills seeking to repeal or amend the rule, but none of these proposals has led to a change.<sup>118</sup> A recent example introduced by Representative Walter B. Jones seeks to repeal the political activity ban in its entirety “[t]o restore the Free Speech and First Amendment rights of churches and exempt organizations.”<sup>119</sup> This bill was referred to the House Ways and Means Committee in January 2013,<sup>120</sup> but appears to have stalled without further comment. In early 2011, Senator Charles Grassley commissioned a report addressing potential changes to the political activity ban.<sup>121</sup> This comprehensive report, drafted by the newly formed Commission on Accountability and Policy for Religious Organizations, was completed in August 2013.<sup>122</sup> Another group of tax law experts and practitioners known as the Bright Lines Project also recently submitted proposed rule changes to Congress.<sup>123</sup> It remains unclear, however, what will be done with these new proposals.

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115. Editorial, *supra* note 1.

116. Ellen P. Aprill & Lisa Gilbert, *Fixing the IRS: Clarify the Rules on Political Involvement*, CHRON. OF PHILANTHROPY (June 3, 2013), <http://philanthropy.com/article/article-content/139583>.

117. *Id.*

118. See generally Rigterink, *supra* note 10, at 500–01 (summarizing Congressional proposals to amend § 501(c)(3) since 2001).

119. H.R. 127, 113th Cong. (1st Sess. 2013).

120. *Id.*

121. COMMISSION REPORT, *supra* note 3.

122. See *id.*

123. See Gregory L. Colvin, *Bright Lines Project Submits Legislation to*

### 3. New Proposed Rules for § 501(c)(4) Social Welfare Organizations

A recent development at the IRS has raised new opportunities for continued debate around the political activity ban. In May 2013, the IRS admitted to applying greater scrutiny in reviewing conservative organizations' applications for tax-exempt status over a period of three years.<sup>124</sup> This news prompted a public outcry, a criminal investigation, and overhaul of the IRS administration.<sup>125</sup> Responding to these events, the IRS issued a set of Proposed Treasury Regulations seeking to alter the rules governing the political activity of § 501(c)(4) social welfare organizations.<sup>126</sup>

Organizations exempt from taxation under § 501(c)(4) are those "operated exclusively for the promotion of social welfare."<sup>127</sup> An organization qualifies as a social welfare organization if "it is primarily engaged in promoting in some way the common good and general welfare of the people of the community."<sup>128</sup> Under existing regulations, "[t]he promotion of social welfare does not include "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."<sup>129</sup> The IRS applies this rule using a facts and circumstances analysis, similar to the § 501(c)(3) political activity ban.<sup>130</sup> Unlike § 501(c)(3) organizations, however, social welfare organizations may engage in some amount of political activity.<sup>131</sup> Due to the unclear definition of political intervention and the difficulty of quantifying a

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*Congress To Fix Tax Law on Political Activity*, NONPROFIT L. MATTERS (July 16, 2013), <http://bit.ly/19LvLng>.

124. See generally Sean Sullivan, *Everything You Need To Know About the IRS Scandal*, FIX-WASH. POST (May 21, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/05/21/what-we-know-and-what-we-dont-about-the-irs-scandal> (providing a summary of the targeting scandal and explaining what was known about it within the first few weeks after the IRS announced its activities).

125. See *id.*

126. I.R.S. News Release IR-2013-92 (Nov. 26, 2013); see also Stephen Dinan, *IRS Moves To Clean Up Scandal of Tea Party Targeting*, WASH. TIMES (Nov. 26, 2013), <http://www.washingtontimes.com/news/2013/nov/26/irs-moves-clean-tea-party-targeting-scandal-proble>.

127. 26 U.S.C. § 501(c)(4)(A) (2012).

128. Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (2012).

129. *Id.* § 1.501(c)(4)-1(a)(2)(ii).

130. See Prop. Treas. Reg. § 1.501(c)(4)-1, 78 Fed. Reg. 71,535, 71,536 (Nov. 29, 2013) (comparing the application of the facts and circumstances test for § 501(c)(3) and § 501(c)(4) organizations).

131. *Id.*

§ 501(c)(4) organization's social welfare activity compared to its political intervention, these rules have also been a source of significant confusion.<sup>132</sup>

In late November 2013, the IRS proposed new regulations to clarify its enforcement in this area. In its proposed regulations, the IRS uses a new term—"candidate-related political activity"—to describe what will be deemed political intervention.<sup>133</sup> This term is defined by a list of specific activities such as expressly advocating for a candidate or making contributions.<sup>134</sup> The IRS acknowledges that this set of rules may be over- or under-inclusive when compared with a facts and circumstances analysis, but argues that "adopting rules with sharper distinctions . . . would provide greater certainty and reduce the need for detailed factual analysis."<sup>135</sup> This approach marks a major shift from the amorphous facts and circumstances approach that the IRS has used for decades and indicates a potential for widespread reform of IRS enforcement against politically active tax-exempt organizations.

However, the IRS has made it clear that its new regulations would not apply to § 501(c)(3) organizations. In the IRS's view, "because [political] intervention is absolutely prohibited under section 501(c)(3), a more nuanced consideration of the totality of the facts and circumstances may be appropriate in that context."<sup>136</sup> The IRS hinted that it may consider changing this view by inviting the public to comment specifically on whether the proposed rules or a similar set of regulations would be appropriate in the § 501(c)(3) context.<sup>137</sup>

The public welcomed this invitation with zeal. The IRS received a record-setting number of public comments on the proposed regulations<sup>138</sup>—greater than 150,000 based on recent estimates.<sup>139</sup> Along all points of the political spectrum, the

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132. *Id.*

133. *Id.* § 1.501(c)(4)-1(a)(2)(iii), 78 Fed. Reg. 71,535, 71,541.

134. *See id.*

135. *Id.* § 1.501(c)(4)-1, 78 Fed. Reg. at 71,536–37.

136. *Id.* at 71,537.

137. *See id.*

138. Rick Cohen, *143,764 Comments Submitted to IRS on Proposed 501(c)(4) Regulations*, NONPROFIT Q. (Mar. 11, 2014, 2:48 PM), <http://nonprofitquarterly.org/policysocial-context/23825-143-764-comments-submitted-to-irs-on-proposed-501-c-4-regulations.html>.

139. Julie Patel, *IRS Chief Promises Stricter Rules for "Dark Money" Non-profit Groups*, CENTER FOR PUB. INTEGRITY (June 18, 2014), <http://www.publicintegrity.org/2014/06/18/14960/irs-chief-promises-stricter-rules-dark>

comments offered robust criticisms of the proposed regulations, noting their overbreadth, potential to inhibit civic engagement, and likely collateral effects on § 501(c)(3) organizations.<sup>140</sup> The IRS's proposed regulations have been widely recognized as a failed attempt, with one commentator suggesting that they are "dead in the water"<sup>141</sup> and another deeming them "an abomination."<sup>142</sup> The IRS intends to publish a new set of proposed rules in early 2015 and will seek additional public input before moving forward with any final regulations.<sup>143</sup> The November 2013 proposed regulations applied to § 501(c)(4) tax-exempt organizations alone, and the IRS does not plan to include § 501(c)(3) organizations in its next round of rulemaking.<sup>144</sup> Nevertheless, the proposed regulations have renewed vigorous debate over the appropriate boundaries of § 501(c)(3)'s political activity ban.

The IRS has scaled back its aggressive enforcement efforts around § 501(c)(3)'s political activity ban and appears content with its existing guidance in Revenue Ruling 2007-41. It has seen room for reform in its enforcement against § 501(c)(4) social welfare organizations, but explicitly expressed a desire to maintain the facts and circumstances analysis under § 501(c)(3). Meanwhile, Congress has not significantly changed the ban for over fifty years. In the midst of this stagnation, § 501(c)(3) organizations and the public are calling for change. Part II of this Note considers some of these proposals for reform.

## II. SOLUTIONS PROPOSED BY SCHOLARS, PRACTITIONERS, AND THE IRS

The problems inherent in the § 501(c)(3) political activity ban have persisted for several decades. Acknowledging the complexity of the issues involved, one scholar has noted that meaningful reform would require a "conversation between

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-money-nonprofit-groups.

140. See Cohen, *supra* note 138.

141. Matea Gold, *IRS Plan To Curb Politically Active Groups Is Threatened by Opposition from Both Sides*, WASH. POST (Feb. 12, 2014), [http://www.washingtonpost.com/politics/irs-plan-to-curb-politically-active-groups-threatened-by-opposition-from-both-sides/2014/02/12/99dcfd2a-932a-11e3-b46a-5a3d0d2130da\\_story.html](http://www.washingtonpost.com/politics/irs-plan-to-curb-politically-active-groups-threatened-by-opposition-from-both-sides/2014/02/12/99dcfd2a-932a-11e3-b46a-5a3d0d2130da_story.html).

142. *Id.*

143. Chris Vest, *IRS Sheds Light on Next Attempt at Nonprofit Political Activity Rules*, ASSOCIATIONS NOW (June 23, 2014), <http://associationsnow.com/2014/06/irs-sheds-light-next-attempt-nonprofit-political-activity-rules>.

144. See *id.*

lawmakers, religious and charitable leaders, and people of faith to reshape the foundation of American policy dealing with the interaction between tax exemption and politics.”<sup>145</sup> This conversation has indeed taken place, and various groups have come forward with proposed solutions. This section will discuss some of these proposals for reform. Section A identifies a variety of scholarly proposals to reform § 501(c)(3)’s political activity ban. Section B highlights two recent comprehensive proposals developed by groups of scholars and practitioners. Section C assesses the IRS’s PACI program with a view toward future alternatives.

#### A. SCHOLARLY PROPOSALS FOR REFORM

Reflecting the variety of perspectives in the conversation, scholars have posed a wide range of solutions to the political activity ban. This Section first analyzes proposals that focus on religious organizations. Next, this Section considers proposals to alter the tax consequences for engaging in political speech. This Section concludes by identifying proposals that call for new rules to clarify the § 501(c)(3) political activity ban.

##### 1. Religious-Specific Proposals

Many scholars have considered the § 501(c)(3) political activity ban as it relates to churches in particular, proposing rules that would have their sole or primary impact on religious organizations. One proposal suggests that Congress create a new tax classification for houses of worship to free them from restrictions on their internal partisan political speech.<sup>146</sup> Under this proposal, churches could opt into the new tax classification to receive the benefits of tax-exemption as long as they agree not to engage in political speech or agree to limit their political speech to purely internal communications.<sup>147</sup> Along similar lines, scholars have suggested safe harbors allowing religious leaders to freely engage in political speech “directed internally to [their] congregants or others who willingly seek out such

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145. Jerome Park Prather, *Tax Exemption of American Churches and Other Nonprofits: One Election Cycle After* Branch Ministries v. Rossotti, 94 KY. L.J. 139, 159 (2005).

146. See CRIMM & WINER, *supra* note 82, at 323, 337–52.

147. *Id.* This suggestion is part of a larger proposal which would also replace the political activity ban with a rule that eliminates the tax benefits for donors to § 501(c)(3) organizations that engage in political speech, whether secular or religious. See *id.* at 326–37.

communication”<sup>148</sup> or to speak “directly to their members on matters that walk the line between purely ‘religious’ and purely ‘political’” speech.<sup>149</sup> Others would “allow religious organizations to engage in political speech so long as it is related to their religious purpose.”<sup>150</sup> On the other end of the spectrum, some would argue that the IRS should more strictly enforce the law as it relates to churches and revoke their tax-exempt statuses if they engage in any political speech.<sup>151</sup> Finally, some suggest that the ban should not apply to churches at all because it is an unconstitutional infringement on First Amendment speech and free exercise rights.<sup>152</sup>

As these proposals indicate, the IRS faces unique challenges in enforcing the political activity ban against religious organizations. Many religious organizations engage in charitable activities that closely mirror the activities of secular organizations,<sup>153</sup> suggesting that similar enforcement makes sense. On the other hand, important differences exist based on the First Amendment concerns of limiting religious speech or subsidizing religion through special tax treatment. Any solution must take these considerations into account, but proposals that only address church political activity will not improve the situation for the rest of the § 501(c)(3) organizations struggling to comply with the rule. Without discounting the viability of these proposals, this Note encourages a solution with broader applicability to all § 501(c)(3) tax-exempt organizations.

## 2. Altering Financial (Dis)incentives for Engaging in Political Speech

Commentators have also introduced proposals that seek to address the problems inherent in the political activity ban through tax incentives. Some suggest restricting tax deductions

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148. Dean, *supra* note 25, at 328 (emphasis omitted).

149. Blair, *supra* note 82, at 437.

150. 4 WILLIAM W. BASSETT, W. COLE DURHAM, JR. & ROBERT T. SMITH, *RELIGIOUS ORGANIZATIONS AND THE LAW* § 17:20 (2013).

151. See, e.g., Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed To Satisfy the Requirements for the Religious Tax Exemption?*, 43 CATH. LAW 29, 79 (2004).

152. E.g., Stanley, *supra* note 12, at 282.

153. See Kara Backus, Note, *All Saints Church and the Argument for a Goal-Driven Application of Internal Revenue Service Rules for Tax-Exempt Organizations*, 17 S. CAL. INTERDISC. L.J. 301, 306 (2008) (“[C]hurches are able to provide a vast array of services to the community. They are involved in, among many other things, the prevention of teen pregnancy, fighting crime and substance abuse, community development, education, and child care.”).

for donors contributing to politically-engaged charities or churches.<sup>154</sup> Under this proposal, the political activity ban would be lifted, but organizations choosing to engage in political activity could not receive tax-deductible contributions.<sup>155</sup> Another creative suggestion proposes allowing § 501(c)(3) organizations to elect to pay a “self-directed tax” in order to avoid being subject to penalties under the political activity ban.<sup>156</sup> Organizations electing this option would pay a tax for engaging in political speech and could dictate which areas of spending the government should support with its tax dollars.<sup>157</sup>

These proposals ignore a central problem with the political activity ban—the lack of clarity around what constitutes political intervention. In order for these tax consequences to apply, organizations and the IRS must still identify when their activities cross the line into political activity. A lasting solution to the political activity ban must address this issue by giving § 501(c)(3) organizations clearer guidance about how the rule is applied.

### 3. Rule Clarification Proposals

A third category of proposed solutions seeks to clarify the application of the political activity ban to improve IRS regulation and enforcement. One scholar suggests that the IRS must produce “a more robust set of rules” to replace the current vague standards that govern compliance.<sup>158</sup> Rules, she suggests, are better suited than standards based on “the low level of enforcement, the large number of affected parties, and the number of affected parties unlikely to seek legal advice.”<sup>159</sup> Multiple scholars have similarly proposed that Congress or the IRS adopt bright-line rules for enforcing the political activity ban.<sup>160</sup>

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154. CRIMM & WINER, *supra* note 82, at 322–23.

155. *Id.*

156. W. Edward Afield, *Getting Faith out of the Gutters: Resolving the Debate over Political Campaign Participation by Religious Organizations Through Fiscal Subsidiarity*, 12 NEV. L.J. 83, 101 (2011).

157. *See id.*

158. Aprill, *supra* note 25, at 680.

159. *Id.* at 682.

160. *See, e.g.,* Kay Guinane, *Wanted: A Bright-Line Test Defining Prohibited Intervention in Elections by 501(c)(3) Organizations*, 6 FIRST AMEND. L. REV. 142, 155 (2007) (“There are strong public policy reasons for developing bright-line rules defining impermissible campaign intervention.”); *see also* Fresco, *supra* note 8, at 3053 (proposing the bright-line rule that “[s]peech will constitute revocable political intervention when it refers to a clearly identified candidate and reflects a view on that candidate”).



Developing such rules would certainly improve clarity for organizations seeking to comply with the ban. As the following Section will illustrate, however, such rules may not completely clarify the situation and depend largely on the willingness of Congress or the IRS to undertake comprehensive reform.

#### B. TWO RECENT PROPOSALS SUBMITTED TO CONGRESS

Two different groups of commentators have recently developed proposals to reform IRS enforcement of the political activity ban. These proposals are worth highlighting in detail because they collectively represent the input of a broad range of individuals—tax professionals, academics, and leaders of nonprofit and religious organizations. Both proposals offer solutions that seek to resolve the myriad concerns underlying the debate through legislative or regulatory change.

##### 1. The Bright Lines Project

In 2009, a group of tax experts, practitioners, and nonprofit leaders convened to discuss changes to § 501(c)(3)'s political activity ban.<sup>161</sup> Since that time, nine of these individuals continued to meet to develop a proposal for change.<sup>162</sup> This group, the Bright Lines Project (BLP), submitted its proposed rule changes to Congress in July 2013.<sup>163</sup> The group's proposal advocates six bright-line rules that will give § 501(c)(3) tax-exempt organizations greater guidance in complying with the political activity ban.<sup>164</sup>

First, the BLP proposes a clarification of the term “candidate” and extends the rule's application to foreign election campaigns.<sup>165</sup> Next, it suggests that the definition of “political intervention” be modified consistently throughout the tax code, not only in § 501(c)(3).<sup>166</sup> Third, the proposal adopts the bright-line rule that it is political intervention to “expressly advocate” for the election, defeat, nomination, or recall of a clearly-identified candidate or candidates affiliated with a specific par-

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161. See Bright Lines Project, *The Bright Lines Project: Clarifying the IRS Rules for Political Intervention 1* (May 2013) (draft report), [http://www.citizen.org/documents/Bright-Lines-Proposal-\(May%202013\).pdf](http://www.citizen.org/documents/Bright-Lines-Proposal-(May%202013).pdf) [hereinafter BLP Draft Report].

162. See *id.*

163. See Colvin, *supra* note 123.

164. See BLP Draft Report, *supra* note 161, at 2.

165. *Id.*

166. *Id.*

ty.<sup>167</sup> This proposed rule also considers it to be political intervention when an organization expressly advocates that voters select candidates based on one or more criteria that clearly distinguish certain candidates from others or expressly advocates political expenditures.<sup>168</sup> Fourth, if an organization is not engaged in express advocacy under rule three, its speech will be deemed political intervention if “(a) it refers to a clearly-identified candidate and (b) it reflects a view on that candidate.”<sup>169</sup> Along with this rule, the BLP proposes four safe harbor exceptions to such speech if the organization is attempting to influence an official’s actions in his or her current term of office, comparing candidates in a voter education effort, responding in self-defense to a candidate’s statement about the organization, or when the statements are personal, oral remarks at official meetings.<sup>170</sup> Fifth, the BLP proposes that it should be deemed political intervention to provide resources to support or oppose any candidate’s election.<sup>171</sup> Finally, the BLP suggests that communications which are political speech under rule four, do not fall under a safe-harbor provision, and “are targeted to voters in states, districts, or other locations, where close election contests are occurring, are conclusively political intervention.”<sup>172</sup> In other situations, organizations may provide evidence of other facts and circumstances to defend their actions as non-political.<sup>173</sup>

In short, these rules “seek to establish a new definition of political intervention that uses bright lines and safe harbors. If the organization’s speech is not clearly covered by that definition, it can fall back on the current ‘facts and circumstances’ approach in its defense.”<sup>174</sup>

## 2. The Commission on Accountability and Policy for Religious Organizations

Undertaking a similar effort as the BLP, the Commission on Accountability and Policy for Religious Organizations (The Commission) prepared a report for Senator Charles Grassley

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167. *Id.*

168. *See id.*

169. *Id.* at 3.

170. *See id.*

171. *See id.* at 4.

172. *Id.*

173. *See id.*

174. *Id.* at 1.

with recommendations to Congress and the IRS.<sup>175</sup> This report was released in August 2013,<sup>176</sup> shortly after the BLP presented its recommendations. The Commission, comprised of fourteen members and sixty-six panel members from legal, nonprofit, and religious communities,<sup>177</sup> sought to “strike a necessary balance” between permitting organizations to engage in speech relevant to their organizations while expending funds consistent with their tax-exempt purposes.<sup>178</sup> The Commission’s report makes five related recommendations to achieve this goal.

First, the report recommends that the political activity ban should not be repealed.<sup>179</sup> Next, it proposes an exception to the ban for “no-cost political communications.”<sup>180</sup> Under this exception, “certain communications that are made in the ordinary course of a 501(c)(3) organization’s regular and customary exempt-purpose activities and that do not involve an expenditure of funds do not constitute participation or intervention in a political campaign.”<sup>181</sup> Third, for activities outside of the no-cost political communications exception, the Commission suggests that only the following actions should be deemed prohibited political intervention: (a) a communication that involves an expenditure of funds, clearly identifies a political candidate, party, or organization and contains express words of advocacy to elect, defeat, or make a political contribution, or (b) a contribution of money, goods, services, or facilities to a political candidate, party, or organization.<sup>182</sup> Fourth, the Commission proposes that the appropriate sanction for political intervention should be an excise tax under § 4955 rather than revocation of tax-exempt status unless the intervention is “willful and substantial or frequent in relation to an organization’s activities as a whole.”<sup>183</sup> Finally, the Commission recommends the repeal of

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175. See COMMISSION REPORT, *supra* note 3.

176. See Press Release, Comm’n on Accountability & Policy for Religious Orgs., New Solutions Proposed to Congress on Political Speech of Clergy and Religious Leaders by National Commission of Religious and Nonprofit Leaders (Aug. 14, 2013), <http://religiouspolicycommission.org/Content/Commission-Press-Release-8-14-2013>.

177. See *id.*

178. COMMISSION REPORT, *supra* note 3, at 5.

179. See *id.* at 27.

180. *Id.* at 28.

181. *Id.*

182. See *id.* at 31–32.

183. *Id.* at 33.

26 U.S.C. § 7409, which gives the IRS authority to obtain an injunction prohibiting a § 501(c)(3) organization from making political expenditures.<sup>184</sup>

### 3. Brighter Lines but an Imperfect Solution

A comparison of these proposed sets of rules illustrates that they have some points of agreement but approach the solution differently. Both agree to an extent that expending an exempt organization's resources to support a candidate should be deemed political intervention.<sup>185</sup> Both also draw on the notion of "express advocacy" to narrow the definition of political intervention.<sup>186</sup> The Commission's most significant change would be the creation of the no-cost political communication exception to the political activity ban.<sup>187</sup> This proposal significantly broadens the activities that an organization can undertake without fear of crossing the line into prohibited political activity. The BLP's proposed rules would also expand the scope of protected activities but would do so through a more complex set of rules and safe harbors. Both groups use the phrase "brighter lines" in describing their proposed rules,<sup>188</sup> qualifying any claim that the new rules are completely clear. Indeed, each proposal leaves open some gray areas in which organizations may be left confused. For example, under the BLP proposal, rule six refers to "close election[s]" as a factor for determining when an organization is engaged in political intervention.<sup>189</sup> Whether something is a "close election" may depend on the particular race, the number of candidates, and the importance of the outcome for a

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184. *See id.* at 34.

185. *Compare* BLP Draft Report, *supra* note 161, at 4 (proposing that it is political intervention "to provide any of the organizations resources . . . if the transferee uses such resources to support or oppose any candidate's election to public office," with a few exceptions), *with* COMMISSION REPORT, *supra* note 3, at 31–32 (proposing that it should be deemed political intervention to "contribut[e] money, goods, services, or use of facilities to one or more political candidates, political parties, or political organizations").

186. *Compare* BLP Draft Report, *supra* note 161, at 2 (suggesting that "[i]t is political intervention to expressly advocate" for a specific candidate or party), *with* COMMISSION REPORT, *supra* note 3, at 31–32 (proposing that it should be deemed political intervention to expend funds and communicate "express words of advocacy" on behalf of a candidate).

187. *See* COMMISSION REPORT, *supra* note 3, at 28.

188. *Id.* at 32; *see* Bright Lines Project, The Bright Lines Project: Clarifying IRS Rules on Political Intervention: Drafting Committee Explanation 6 (July 2013) (interim draft), <http://www.citizen.org/documents/Bright%20Lines%20Project%20Explanation.pdf>.

189. BLP Draft Report, *supra* note 161, at 4.

particular community.<sup>190</sup> In addition, rule six allows organizations to raise defenses to IRS enforcement based on the unique facts and circumstances surrounding their activity.<sup>191</sup> This again leaves room for discretion in considering what factors may warrant a deviation from the other bright-line rules. The Commission's definition of "no-cost political communications" also raises issues for clear enforcement because it requires the IRS and organizations to identify which activities are "in the ordinary course of a 501(c)(3) organization's regular and customary exempt-purpose activities."<sup>192</sup> These ambiguities do not render these proposed sets of rules ineffective in clarifying the contours of the political activity ban. They are simply worth noting to illustrate that even the most comprehensive and carefully-drafted rules leave room for interpretation. A new set of rules may answer many questions but would still leave room for IRS discretion in enforcing the prohibition.

Although they indeed provide brighter lines for implementing the ban, both proposals also depend on a Congressional revision to § 501(c)(3) or the development of new IRS regulations. Without either institution taking the necessary steps to implement comprehensive reform, the political activity ban will remain unchanged and organizations will continue to be left without meaningful guidance. This Note does not challenge that these proposals might legitimately resolve the ambiguities in the political activity ban but suggests that the IRS adopt a smaller change with a more immediate impact. The next Section illustrates what such a change might involve by revisiting the IRS's enforcement activities in PACI.

### C. REVISITING PACI

The IRS's efforts to increase compliance with § 501(c)(3)'s political activity ban through the PACI initiatives in 2004, 2006, and 2008 might be characterized as an attempted solution to the problems inherent in the provision. This Section will review that attempt and explain how the IRS missed its opportunity to clarify its enforcement of the rule. It will first illustrate how PACI failed to resolve the ambiguities in its application of the facts and circumstances test. It will then conclude by discussing the taxpayer privacy protections that limited the

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190. *See id.*

191. *See id.*

192. COMMISSION REPORT, *supra* note 3, at 28 (internal quotation marks omitted).

IRS's ability to comprehensively report its activities in a meaningful way.

### 1. PACI's Limited Success

The IRS's first PACI Report illustrates that it was aware of the problems generated by the rule. The IRS identified several challenges it faced in implementing the rule, including First Amendment concerns,<sup>193</sup> limited sanctions and the harsh effects of revocation,<sup>194</sup> and the ambiguity of the facts and circumstances approach.<sup>195</sup> Despite acknowledging these many problems, the IRS did not make any particularly meaningful steps toward a solution through PACI.

The PACI reports do little to clarify how the facts and circumstances test may be applied in any given scenario. At best, they give § 501(c)(3) organizations an idea of which general categories of activity may be more likely deemed political than others. For example, the 2004 PACI Report identifies the following data patterns: out of twenty-four cases relating to the distribution of printed documents, nine cases were deemed political intervention; out of seven cases relating to political contributions made to a candidate, five were deemed political intervention; out of eleven cases relating to candidates speaking at exempt organization functions, nine were deemed political intervention; and out of fourteen cases involving distribution of voter guides, four were deemed political intervention.<sup>196</sup> Similar data is presented for nine categories of intervention.<sup>197</sup> This data does little more than suggest that when the IRS enforces § 501(c)(3)'s political activity ban, the answer is almost always "it depends."

The IRS's PACI efforts did appear to have an influence on preventing repeat offenses by particular organizations. As the 2006 PACI Report states, "[t]he 2006 review of the organizations identified in the 2004 PACI found no instances of repeat

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193. See 2004 PACI REPORT, *supra* note 93, at 1 ("The activities that give rise to questions of political campaign intervention also raise legitimate concerns regarding freedom of speech and religious expression[.]").

194. See *id.* at 2 ("The existing sanctions are limited to assessing penalties based on the amount spent on the intervention, which is often de minimis, or revocation, which may not be in the public interest.").

195. See *id.* at 1 ("The Code contains no bright line test for evaluating political intervention.").

196. See *id.* at 16–17.

197. See *id.*

political intervention.”<sup>198</sup> For those particular organizations investigated in 2004, therefore, perhaps the PACI efforts helped them to better understand what activities they should avoid in the future. On the other hand, it may be that these organizations were simply more cautious in subsequent years and avoided activities that might be deemed political intervention. Regardless of what this outcome suggests, it applies only to those organizations investigated in 2004. For the remaining § 501(c)(3) tax-exempt organizations throughout the country seeking to comply with the ban, PACI was not much help.

## 2. Privacy as a Barrier to Understanding

Another problem that the IRS acknowledged in its PACI efforts was its limited ability to discuss its enforcement actions based on the disclosure restrictions under 26 U.S.C. § 6103.<sup>199</sup> The relevant restriction prohibits the IRS from disclosing “[r]eturns and return information.”<sup>200</sup> The statute defines “return information” with a lengthy list including a taxpayer’s identity, exemptions, liability, and any written determination not otherwise subject to public inspection.<sup>201</sup> This subsection concludes with the exception that return information “does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.”<sup>202</sup>

Court precedent provides some clarification regarding the types of information protected under § 6103 and that which may be properly disclosed. In *Church of Scientology of California v. IRS*, the Supreme Court clarified the scope of the exception to the general rule against disclosure, suggesting that “Congress did not intend the statute to allow the disclosure of otherwise confidential return information merely by the redaction of identifying details.”<sup>203</sup> Rather, the exception was intended to allow the IRS to disclose “statistical studies and other compilations of data” similar to those that the IRS had routinely prepared prior to the adoption of § 6103.<sup>204</sup> Subsequent cases have similarly drawn a distinction between taxpayer-specific

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198. 2006 PACI REPORT, *supra* note 100, at 5.

199. See 2004 PACI REPORT, *supra* note 93, at 1 (“The disclosure restrictions of IRC section 6103 limit IRS’s ability to discuss its enforcement actions.”); see also 26 U.S.C. § 6103 (2012).

200. 26 U.S.C. § 6103(a).

201. *Id.* § 6103(b)(2).

202. *Id.*

203. *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 16 (1987).

204. *Id.* (internal quotation marks omitted).

information and aggregate taxpayer information compiled for analysis.<sup>205</sup> Such data compilations need not only include raw numbers, charts, and graphs; such data may also include substantive information about relevant investigative facts and the IRS's own legal analysis.<sup>206</sup> The key distinction between taxpayer-specific information and analytical data compilations explains why the IRS was able to report trends in its PACI enforcement activities but felt constrained by § 6103 from providing further detail.

Commentators have highlighted § 6103 as a major limitation in effective enforcement of the political activity ban.<sup>207</sup> To remedy this issue, scholars have suggested solutions ranging from creating an independent Commission to investigate political activity ban violations and report on its decisions<sup>208</sup> to simpler solutions such as making redacted versions of revocation notices available to the public.<sup>209</sup> As one scholar suggests, “the IRS must take steps to consider how to create a public record of investigative results and investigative reasoning while maintaining the integrity of the privacy statute.”<sup>210</sup> This Note will build on these proposals to suggest practical ways that the IRS

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205. *Compare* *Tax Analysts v. IRS*, 117 F.3d 607, 614–16 (D.C. Cir. 1997) (allowing disclosure of legal analysis contained within IRS memoranda because such analysis was not taxpayer specific), *with* *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1137 (D.C. Cir. 2001) (prohibiting disclosure of a third party's requests for information about audits of tax-exempt organizations due to the requests' “taxpayer-specific character”).

206. *See, e.g., Tax Analysts*, 117 F.3d at 614 (cataloguing various interpretations of the word “data” in Supreme Court cases).

207. *See, e.g.,* OMB WATCH, THE IRS POLITICAL ACTIVITIES ENFORCEMENT PROGRAM FOR CHARITIES AND RELIGIOUS ORGANIZATIONS: QUESTIONS AND CONCERNS 10 (2006) (“Because Section 6103 of the tax code prohibits the IRS from disclosing information about its investigations, the exact facts and circumstances the agency believes constitute partisan electioneering remain a mystery.” (emphasis omitted)); Blair, *supra* note 82, at 427 (“Because of the confidentiality requirement, churches do not have clear guidance regarding the circumstances under which an investigation will be started or what activities are permissible or impermissible.”); Tobin, *supra* note 105, at 1355–56 (summarizing the effect of § 6103's privacy provision on the enforcement of the political activity ban).

208. *See* Tobin, *supra* note 105, at 1359–60.

209. *See* OMB WATCH, *supra* note 207, at 13 (“[R]edacted versions of advisory letters or notices of revocation of exempt status would give charities and religious organizations a clearer idea of what activities they should avoid.”); Guinane, *supra* note 160, at 167 (“Redacted copies of IRS determinations and warning letters would at least give 501(c)(3)s some idea of how the IRS applies the ‘facts-and-circumstances’ test to specific situations.”).

210. Backus, *supra* note 153, at 335.



can communicate its enforcement efforts to increase transparency and understanding.

Although the IRS knew the problems underlying its enforcement of the political activity ban, it failed to directly respond with a permanent solution. However, this missed opportunity should not be understood to suggest that the IRS has completely lost its chance at contributing to reform. The IRS was able to develop the PACI program without adopting new regulations or waiting for Congressional change. With minor improvements to its processes, the IRS can implement a new solution that more appropriately responds to the problems with the political activity ban.

For decades scholars have proposed solutions to improve IRS enforcement of the political activity ban, approaching the issue from a variety of perspectives. Momentum has increased in the past year as the BLP and the Commission submitted formal rule change proposals to Congress and the IRS. The IRS itself has sought to address the problem through the PACI program and experienced limited success. Building on these developments, Part III of this Note proposes procedural changes that the IRS should adopt to increase transparency and understanding among § 501(c)(3) organizations.

### III. GREATER TRANSPARENCY IS NEEDED IN IRS ENFORCEMENT EFFORTS

This Part proposes that the IRS adopt new procedures to routinely publicize useful information about its enforcement efforts against § 501(c)(3) organizations engaging in potentially prohibited activity. Section A describes the mechanics of the proposed procedures. Section B identifies the benefits of the proposal, considering short-term and long-term results.

#### A. PROPOSED PROCEDURES TO ENHANCE TRANSPARENCY AND UNDERSTANDING

Organizations exempt from taxation under § 501(c)(3) must have appropriate guidance for complying with the political activity ban. A comprehensive rule change may address this problem, but there is a more manageable solution that would provide consistent and useful information for these organizations. In order to clarify its enforcement efforts around the § 501(c)(3) political activity ban, the IRS should adopt the following procedures:

1. Reporting on section 501(c)(3) investigations.

Twice annually, the Internal Revenue Service will release a report identifying every completed investigation of a tax-exempt organization under the political activity ban. The report will identify—

- (a) the events leading to the investigation,
- (b) the facts and circumstances that the Internal Revenue Service considered in its determination regarding whether political intervention occurred,
- (c) whether the Internal Revenue Service determined that political intervention occurred and why,
- (d) what, if any, penalties were imposed, and
- (e) whether the organization was religious or secular.

2. Inviting disclosure of protected information.

(a) For every completed investigation initiated under section 501(c)(3)'s prohibition on political activity, the Internal Revenue Service will invite organizations to waive their disclosure protections under § 6103 as they relate to the investigation.

(b) To avoid improper disclosure of protected information for organizations that choose not to waive these protections, the Internal Revenue Service must present its results in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

The IRS's 2004 and 2006 PACI Reports revealed similar information such as the number of investigations it pursued, results of its investigations, sanctions imposed, types of activities investigated, and trends among secular and religious organizations.<sup>211</sup> This Note builds on the PACI Reports to suggest that the IRS increase its transparency by providing more useful information for § 501(c)(3) organizations such as the actual facts and circumstances the IRS considers in its investigations. Although the IRS may not disclose return information under 26 U.S.C. § 6103, it can lawfully report on its enforcement activities within the parameters of § 6103's limitations by crafting its reports to avoid improper disclosure.<sup>212</sup> Such reports would pro-

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211. See 2004 PACI REPORT, *supra* note 93; 2006 PACI REPORT, *supra* note 100.

212. For example, the IRS could report its § 501(c)(3) enforcement activities in a similar form as the manner in which it publishes Technical Advice Memo-

vide useful and much-needed information to affected organizations about the IRS's enforcement of the political activity ban.

#### B. SHORT-TERM AND LONG-TERM BENEFITS OF THE PROPOSED REGIME

A primary benefit of the proposed solution is that it will have immediate results for organizations seeking to plan their activities while avoiding improper involvement in political affairs. In addition, the proposal will have lasting benefits if the IRS or Congress moves forward in amending the rule. This Section describes these immediate and long-term benefits.

##### 1. Immediate Benefits

First, the proposed procedures will clarify how the IRS applies the facts and circumstances test to enforce the political activity ban. By reporting the details of each investigation it conducts, the IRS will give organizations a much clearer sense of how it applies the rule. As mentioned, the IRS has made attempts to provide similar information to organizations through guidance such as Revenue Ruling 2007-41.<sup>213</sup> It has also published various guides that reiterate the facts and circumstances test along with example scenarios.<sup>214</sup> The examples in these sources provide only limited guidance because they are not necessarily based on actual investigations. They also oversimplify the real-life circumstances that organizations encounter by analyzing individual activities in isolation.<sup>215</sup> Reported instances of real activities would better advise organizations seeking to understand what is permissible.

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randa, guidance issued by the Office of Chief Counsel that “provide[s] the interpretation of proper application of tax laws, tax treaties, regulations, revenue rulings or other precedents” to a specific taxpayer’s situation. *Technical Advice Memorandum*, IRS (Jan. 16, 2014), <http://www.irs.gov/Businesses/Technical-Advice-Memorandum>. When publishing such information, the IRS removes information that could identify a particular taxpayer and replaces it with a generic identifier. *Id.*; see, e.g., I.R.S. Tech. Adv. Mem. 201350033 (Dec. 18, 2013) (illustrating the method by which the IRS replaces identifying information with identifiers such as “Taxpayer” or “Company A”). The specific information that the IRS must remove before publishing Technical Advice Memoranda is governed by statute. See 26 U.S.C. § 6110(c) (2012). See generally *Tax Analysts v. IRS*, 117 F.3d 607, 615–16 (D.C. Cir. 1997) (discussing Technical Advice Memoranda in considering how § 6103 should apply to legal analyses contained in IRS documents).

213. See Rev. Rul. 2007-41, 2007-1 C.B. 1421.

214. See, e.g., Tax Guide, *supra* note 7, at 7–15.

215. See Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1422 (“Note that each of these situations involves only one type of activity.”).

Some may argue that this proposal fails to clarify the ambiguity in the § 501(c)(3) political activity ban by allowing the IRS to maintain its case-by-case facts and circumstances approach. Many scholars and practitioners, including those involved in the Commission on Accountability and Policy for Religious Organizations and the Bright Lines Project, advocate replacing the current approach with a set of more clearly defined rules.<sup>216</sup> Current IRS enforcement of the political activity ban under the facts and circumstances test is admittedly vague and unpredictable, but it can be clarified without adopting a new set of rules. The IRS enforces many of its provisions based on fact-specific inquiries, and taxpayers must often comply with rules interpreted under a facts and circumstances analysis.<sup>217</sup> In these situations, taxpayers turn to case law or revenue rulings to predict how the law will apply to their specific circumstances. Given the shortage of case law on the application of the § 501(c)(3) political activity ban, these procedures will fill the gap by providing a comprehensive body of real-life examples that organizations can consider in planning their activities.<sup>218</sup>

Second, the proposed solution can be implemented without a formal rule change by the IRS or Congress. Like the 2004, 2006, and 2008 PACI programs, the IRS can implement these procedures and publicly report the results of its investigations on its own.<sup>219</sup> Separate from the more formal guidance contained in Treasury Regulations or Revenue Rulings,<sup>220</sup> the IRS routinely reports the results of its enforcement activities to the

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216. See *supra* notes 158–60 and accompanying text.

217. See generally Richard J. Kovach, *Bright Lines, Facts and Circumstances Tests, and Complexity in Federal Taxation*, 46 SYRACUSE L. REV. 1287, 1312–17 (1996) (describing the “[w]idespread use of facts and circumstances determinations” in tax law and noting the challenges for practitioners and taxpayers who regularly encounter such tests).

218. Cf. Tobin, *supra* note 105, at 1358 (“Because practitioners generally use case law to advise taxpayers with regard to tests that rely on facts and circumstances, the dearth of cases makes it very difficult for a practitioner to determine what is, and what is not, permissible political activity.”).

219. See generally 26 U.S.C. § 7801 (2012) (delegating enforcement of the Internal Revenue Code to the Secretary of the Treasury); *The Agency, Its Mission and Statutory Authority*, IRS (Feb. 12, 2014), <http://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority> (“The IRS is organized to carry out the responsibilities of the secretary of the Treasury under section 7801 of the Internal Revenue Code.”).

220. For a concise summary of the most common sources of formal IRS guidance, see *Understanding IRS Guidance - A Brief Primer*, IRS (Feb. 2, 2014), <http://www.irs.gov/uac/Understanding-IRS-Guidance-A-Brief-Primer>.

public.<sup>221</sup> This Note recommends that the IRS regularly engage in such reporting in the area of § 501(c)(3) political activity. These informal reports may not be authoritative precedent which would bind the IRS in its subsequent enforcement activities, but they could greatly increase organizations' understanding of how the IRS enforces § 501(c)(3)'s political activity ban.

Developing a new set of comprehensive Treasury Regulations would not be an easy task,<sup>222</sup> and the success of any Congressional change would depend on how the IRS actually implemented it.<sup>223</sup> The proposed procedural changes provide a manageable alternative that could be adopted prior to the next election cycle. Because the political activity ban raises sensitive issues ranging from free speech and religious freedom to the transparency of campaign financing and intervention, any new proposal will invite more debate and criticism. In the hopes of limiting such criticism, this Note offers a moderate step with practical results.

Although they could be easily adopted, the proposed procedures may raise privacy concerns by making information about § 501(c)(3) tax-exempt organizations publicly available. A few considerations indicate why this may not be such a serious issue. As mentioned, the IRS regularly reports on its enforcement activities in other areas<sup>224</sup> and did so following the 2004 and 2006 PACI programs.<sup>225</sup> In addition, multiple organizations singled out for enforcement under the political activity ban have willingly revealed information relating to IRS enforcement activities in the past.<sup>226</sup> Following these examples, some

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221. See, e.g., *Compliance & Enforcement News*, IRS (Aug. 28, 2014), <http://www.irs.gov/uac/Compliance-&-Enforcement-News>.

222. The IRS's recent effort to adopt new political intervention rules for § 501(c)(4) social welfare organizations illustrates the arduous task of developing regulations. As the IRS emphasized in its press release announcing the proposed regulations, "[t]here are a number of steps in the regulatory process that must be taken before any final guidance can be issued." I.R.S. News Release IR-2013-92 (Nov. 26, 2013); cf. Aprill, *supra* note 25, at 683 ("The IRS should undertake the difficult work of writing a set of rules for the campaign intervention prohibition.").

223. See, e.g., Fresco, *supra* note 8, at 3055 ("The effectiveness of any proposal will depend largely on how the IRS enforces the prohibition.").

224. See *Compliance & Enforcement News*, *supra* note 221.

225. See 2004 PACI REPORT, *supra* note 93; 2006 PACI REPORT, *supra* note 100.

226. See, e.g., COMMISSION REPORT, *supra* note 3, at 25–26 (describing how the NAACP publicly announced that it was being investigated by the IRS and released a letter it had received from the IRS to the public); see also Blair, *supra* note 82, at 430–32 (explaining how an IRS investigation of church political

organizations will likely be willing to reveal information about the investigations in order to increase transparency around the IRS's enforcement actions. Further, for activities that are already public in nature (publishing literature, maintaining a website, making public comments), organizations would be revealing little about their own activities by allowing the IRS to report publicly on its investigation.<sup>227</sup> Despite these considerations, some organizations may legitimately wish to keep their actions private and maintain the taxpayer privacy protections under 26 U.S.C. § 6103. The proposed solution gives organizations this option while encouraging disclosure as a valid alternative.

A final short-term benefit of this Note's proposal is its impact on the continued debate over IRS enforcement in this area. The proposed reports would inform public debate around the ban by providing concrete information about the number and type of investigations being pursued by the IRS. The current secrecy around IRS enforcement in this area raises questions about selective enforcement and may lead to misunderstandings about the actual number of violations by § 501(c)(3) tax-exempt organizations. The IRS acknowledged this problem in its 2004 PACI Report, suggesting that "media reports on the activities of a small representation of [over one million 501(c)(3) organizations] can, rightly or wrongly, create an impression of widespread noncompliance."<sup>228</sup> Because PACI involved a concerted effort to increase investigations and enforcement, however, its results did not necessarily clear up any of these misconceptions. This Note's proposal would provide a more accurate picture of the extent of prohibited activity taking place. This in turn would inform the public debate and allow a more reasoned analysis of the current situation.

## 2. Long-Term Benefits

As one scholar has suggested, "[s]hort term improvements can help provide better guidance while the long-term task of developing bright-line rules is underway."<sup>229</sup> Although a com-

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activity became public when the church issued a press release).

227. See 2004 PACI REPORT, *supra* note 93, at 2 ("The questionable activities are public."). *But see id.* ("The activities . . . can be difficult to document, because they often involve events and statements that may not be recorded or otherwise captured.").

228. 2004 PACI REPORT, *supra* note 93, at 2.

229. Guinane, *supra* note 160, at 167.

prehensive rule change would be much harder to implement, scholars and the public are indeed pressing for such a change. If Congress or the IRS chooses to promulgate new rules in this area, the proposed reporting procedures will lay important groundwork for embarking on this task. The § 501(c)(3) political activity ban was adopted with no study or debate about the rationale behind the rule or its practical effects on § 501(c)(3) organizations. This may explain why the current rule has proven so difficult for the IRS to enforce. As one commentator suggests, the laws relating to the political activity ban could be rewritten “to better reflect the current state of political involvement by section 501(c)(3) organizations.”<sup>230</sup> Adopting the proposed procedural changes would shed light on the current situation and ensure that any new rules reflect reality.

The proposed procedures could also provide a better picture of how secular and religious organizations vary in their political involvement. As mentioned, much of the debate around the political activity ban singles out churches and religious organizations for unique consideration. The current rule is applied in the same manner regardless of whether the organization is secular or religious. Without a clear body of examples on how the § 501(c)(3) political activity ban is enforced and applied against secular and religious organizations, Congress may have difficulty discerning whether a separate rule is appropriate. This Note’s proposed reports would allow Congress and the IRS to see whether a separate rule for religious organizations is needed and would illuminate what differences, if any, exist in the political engagement of secular and religious § 501(c)(3) organizations.

Although this Note’s proposal may prove useful in facilitating a more formal rule change, it should not be seen as a solution that will become unnecessary after the adoption of new guidelines for § 501(c)(3) organizations. Twice-annual reporting on the IRS’s enforcement in this area would be useful regardless of whether the current standard is maintained or new rules are adopted. Section 501(c)(3) tax-exempt organizations—particularly small charities, churches, and schools—are less likely to seek out formal legal advice in planning their activities than other organizations with more resources to spare.<sup>231</sup>

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230. Prather, *supra* note 145, at 159.

231. See Aprill, *supra* note 25, at 667 (explaining that a large number of § 501(c)(3) organizations are very small and thus “unlikely to devote scarce

Transparent enforcement will continue to be useful for these organizations even if a more concrete set of rules is adopted. Further, continued reporting will allow the IRS and the public to assess whether any new rules are being implemented in a fair and consistent manner.

The IRS should adopt this proposal by reporting consistently on its enforcement of the § 501(c)(3) political activity ban. Such increased transparency will clarify how the IRS applies the facts and circumstances test in enforcing the prohibition, and it can be implemented without a complex rule change. Further, this proposal will inform public and scholarly debate and will have long-term benefits if Congress or the IRS decides to amend the prohibition.

### CONCLUSION

The political activity ban codified in 26 U.S.C. § 501(c)(3) has caused confusion and frustration for § 501(c)(3) tax-exempt organizations for decades. The prohibition's sparse legislative history and ambiguous text, limited Revenue Rulings, and minimal case law offer little guidance for compliance. Although the IRS has attempted to enforce the provision rigorously through its PACI efforts, § 501(c)(3) organizations and the public remain confused.

In response to this lack of clarity, scholars have proposed a variety of reforms, including two comprehensive sets of proposed rules recently submitted to Congress. Although these measures may provide some clarification, they depend on Congress or the IRS to be fully implemented. This Note proposes a more immediate and manageable solution to increase transparency and understanding. To clarify its application of the § 501(c)(3) political activity ban, the IRS should consistently report on its investigation and enforcement activities in this area. This solution offers an immediate response to the problem, allowing § 501(c)(3) tax-exempt organizations to focus on their charitable, religious, and educational goals.