

WRITTEN TESTIMONY of  
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The Federal Election Commission

Before the Senate Finance Subcommittee  
on Taxation and IRS Oversight

Hearing on “Laws and Enforcement Governing  
Political Activities of Tax Exempt Entities”  
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Chairman Whitehouse, Ranking Member Thune, and Distinguished Members of the  
Subcommittee:

Special tax benefits for non-profit organizations, including 501(c)(4)s and 501(c)(6)s, were intended by Congress to encourage organizations promoting and operating exclusively as social welfare organizations or business leagues and other associations not organized for profit. Since 1959, the IRS Regulations provided that an organization is operated exclusively for the promotion of social welfare if it’s engaged in promoting in some way the common good and general welfare of the community. And an IRS decision held that if an organization is primarily political, it cannot be a 501(c)(4) or a 501(c)(6) trade association.

Because federal tax law governs the extent to which tax-exempt organizations may engage in activities to support candidates without jeopardizing the organization’s tax exempt status and whether such activity requires public disclosure or payment of tax, political expenditures and activities must be reported on the Form 990.

Due to the *Citizens United v. FEC* decision, a lack of enforcement, and a new IRS rule enacted in 2020 which eliminated donor reporting requirements to the IRS for 501(c)(4) organizations, organizations that have tax exempt status are a major source of anonymous large political contributions, because donors are not required to identify themselves either to the IRS or to the public. As a consequence of these factors, some groups that receive tax benefits for “social welfare work” have been emboldened to engage in excessive political spending.

The lack of disclosure requirements has undermined some of the basis tenets of the law relating to campaign contributions and expenditures and the importance of full disclosure of the money in politics. In the *Citizens United* Supreme Court decision, Justice Kennedy upheld disclosure requirements in campaign finance, stating that disclosure “provides the electorate with information” to ensure “that voters are fully informed about the person or group who is speaking,” and also ensures that people are able to evaluate the arguments to which they are being subjected.” Notably, Justice Kennedy, supported by seven other Justices, held that “the transparency enables the electorate to give proper weight to different speakers and messages,” and “citizens can see whether elected officials are in the pocket of so-called moneyed interests.” *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 916 (2010).

After the *Citizens United* decision, there was a surge in the formation of politically focused organizations seeking to obtain IRS approval as C4s. In 2012, at least \$250 million passed through the C4s into efforts to elect candidates, an 80-fold increase from eight years prior. (Maya Miller, How the IRS Gave Up Fighting Political Dark Money Groups, ProPublica, April 18, 2019.)

Since the IRS rule enacted in 2020 eliminated donor reporting requirements to the IRS, the problem of political dark money has been exacerbated.

While the flood of money began and continued after Citizens United, more than \$1 billion in dark money flooded the 2020 elections. The lack of disclosure to the IRS of 501(c)(4) donors has also had a significant impact on the rise of political dark money. Because donors are aware that there will be no IRS enforcement of the law relating to political money, they know that they have free rein to violate the law. This dramatic increase in spending by financiers whose identities remain hidden from the very public they are paying to influence poses a serious threat to America's autonomy and the public's right to know who is influencing our elections and the policy decisions that come along afterwards.

In 2021, based on what has been reported to the FEC, there has already been \$115,817,584 million spent by 501(c)s in outside political spending, according to Anna Massoglia at Open Secrets. This figure does not include information from the recent FEC deadline.

And, more likely will be spent soon, according to a recent article in Axios. Axios reported that The Common Sense Leadership Fund, a 501(c)(4) which does not disclose donors, has already "steered half a million dollars" to its new political action committee, the Eighteen Fifty Four Fund, anticipating that its new group will spend in excess of \$10 million - and potentially much more - on midterm contests."<sup>1</sup>

In 2015, the political director, Carl Forti, of American Crossroads, which is the "sister Super PAC" to Crossroads GPS, admitted the reason for the establishment of Crossroads GPS, a 501(c)(4). He was quoted on a panel at the Annenberg Public Policy Center of the University of Pennsylvania remarking that "disclosure was very important for us, which is why the 527 [American Crossroads] was created. But some donors didn't want to be disclosed, and therefore, a (c)(4) [Crossroads GPS] was created."<sup>2</sup>

Similarly, the biggest donor to Future Forward USA was its own 501(c)(4) nonprofit group which doesn't disclose its donors.

The IRS rule eliminating donor reporting requirements has not only encouraged dark money, but the clear prohibition of foreign money influencing United States' elections will also be circumvented by foreign donors contributing to 501(c)(4)s, knowing that the IRS will make it easier for them to expend unlimited sums of money to influence our elections with no

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<sup>1</sup> Lachlan Markay, First Look: New GOP Group's 'Eight Figure' Midterm Blitz, Axios, April 20, 2022, <https://www.axios.com/gop-group-midterm-blitz-b939b84e-25d5-4f90-ae9a-0f45cee07262.html>.

<sup>2</sup> Peter Overby, Group Behind Election Ads Weighs In On Tax Deal," NPR, Dec. 14, 2010, <https://www.npr.org/2010/12/14/132060878/Conservative-Group-Wades-Into-Tax-Debate>.

consequence. The regulation has provided an easy opportunity for foreign actors to secretly funnel money to elections through such 501(c)s. This is happening at a time when our democracy is at risk, and when we know that there are ongoing campaigns by foreign actors to undermine public confidence in our democratic institutions.

A report from the Government Accountability Office, dated February 3, 2020, “Campaign Finance: Federal Framework, Agency Rules and Responsibilities, and Perspectives,” found that the IRS doesn’t even check nonprofit tax records for signs of illegal foreign money in United States elections. The government oversight office was told by IRS officials that “examiners do not review the national origin of sources of donations” in non-profit annual tax returns, claiming that the IRS “plays no role in enforcing” campaign finance rules governing foreign money in elections.<sup>3</sup>

The money spent on campaigns from undisclosed sources is an increasingly significant problem in the United States’ civic life. Dark money from anonymous sources has seeped into all levels of government and political processes, from federal and state elections, to spending to support politicians’ agendas, judicial nomination processes, redistricting, voting rights and other issues impacting America.

According to a new report by Matt Corley and Adam Rappaport at CREW, entitled “The IRS is Not Enforcing The Law On Political Nonprofit Disclosure Violation,”<sup>4</sup> their investigation found that for much of the time since *Citizens United*, “the IRS didn’t revoke any section 501(c)(4) group’s tax-exempt status for violating the law’s limits on their political spending.”

The CREW report concluded that: “The IRS appears to have been notably lenient in enforcing the basic rules on disclosure and transparency by section 501(c)(4) groups engaged in politics. CREW and others have identified dozens of these kinds of violations, many of which were brought directly to the IRS’s attention through complaint letters to the agency. Some section 501(c)(4) groups, for example, disclosed their political spending to the Federal Election Commission (FEC) and other government agencies, but told the IRS under penalty of perjury in their tax returns that they did not engage in any political activity or misrepresented the amount they spent. Others simply failed to file their tax returns or filed them only after complaints were filed against them.”

The CREW report made clear that the IRS has shirked its duty to review the FEC filings to assure that the filings of politically active 501(c)(4)s are consistent and truthful. There should be greater coordination between the IRS, the FEC, and also the DOJ, to assure that the law they each agency has responsibility to enforce is not being evaded. As the Chair and Commissioner of the Federal Election Commission from 2013-2017, I was concerned that federal agencies that have overlapping missions such as the FEC, IRS and DOJ did not consult or coordinate on

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<sup>3</sup> See also, Open Secrets, ‘Dark money’ groups steering millions to support elections, Anna Massoglia, 2/7/2020, <https://open.secrets.org/news/2020/02/dark-money-steers-millions-to-super-pacs-2020/>.

<sup>4</sup> Matt Corley and Adam Rappaport, The IRS is Not Enforcing the Law on Political Nonprofit Disclosure Violations, April 28, 2022, <https://www.citizensforethics.org/reports-investigations/crew-reports/the-irs-is-not-enforcing-the-law-on-political-nonprofit-disclosure-violations/>.

information regarding violations of federal law. This unwillingness to work together to enforce the law continues to today, and the resulting negligence is detrimental to the American people.

It is wrong for the IRS to allow partisan political operatives to establish phony social welfare organizations that do not have to pay their fair share of tax and instead collectively expend hundreds of millions of dollars from secret sources into our elections. Rather than carry out their election spending through Section 527, which was enacted for this purpose, but requires donor disclosure, political groups are masquerading as 501(c)(4)s solely to keep political spenders anonymous.

Congress never intended that social welfare organizations should exist as conduits for secret political spending. In exchange for the tax exemption, the law requires these non-profits to engage exclusively in the promotion of social welfare.<sup>5</sup> The IRS has said that social welfare activities do not include political campaign intervention.<sup>6</sup>

No bright line IRS standard exists as to how much and by what measure the IRS should evaluate a social welfare organization's furtherance of its primary purpose. Together with a lack of enforcement, this circumstance has provided the path for political organizations on the right and the left to pose as social welfare organizations and to spend enormous amounts of money from undisclosed sources on elections. The lack of a bright line standard, however, is not a justification for not enforcing the law. The IRS can and should enforce the law where there is clear and substantial information (such as from the FEC disclosures) to find a violation. To entirely abstain from enforcement is not acceptable.

Americans of both parties have consistently agreed that there is too much money in politics – and that much of that money comes from a tiny, highly unrepresentative segment of the population that purchases outsized influence over government decisions. And, there is an increasing distrust in government.

This is why we should expect the IRS to do its job and enforce the law. Impartial and consistent enforcement of the law governing nonprofit political spending is squarely within the IRS's mandate and authority. The IRS should hold political groups on all sides accountable if they misappropriate the privileges of the social welfare organization's structure.

Furthermore, donor disclosure should be reinstated on the Form 990, both for (c)(4)s, but also for (c)(6)s.

Some have observed that (c)(3) money has been granted to (c)(4)'s for "general support" but is actually ultimately used for electoral activity. Consequently, there should be better oversight over how funds from 501(c)(3) organizations are ultimately used by recipients.

Finally, the IRS and Treasury Department should update the social welfare regulations to provide clarity around the standard to determine whether an organization is operated exclusively for the promotion of social welfare. To do this, Congress would need to repeal and stop including a rider

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<sup>5</sup> 26 U.S.C. Section 501(c)(4)

<sup>6</sup> 26 C.F.R. 1.501(c)(4)-(1)(a)(2)(ii)

in must-pass appropriations that has prevented the IRS and Treasury Department from taking this step. This dark money rider has kept voters in the dark as to who is behind political spending that influences elections. The regulations that need to be updated were written decades before the Supreme Court decided *Citizens United* and changed how corporations, including nonprofit corporations can spend money in political campaigns, including by contributing to Super PACs. These social welfare organizations were never intended to operate as de facto political committees, and the regulations need to be updated to preserve voters right to know who is influencing elections.

Most critics of the IRS acknowledge that the task can be nuanced and difficult. But it is important for the IRS to do its job and provide oversight.