

**United States Senate
Committee on the Judiciary
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**

Testimony of
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For the Hearing
“Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options”

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Chairman Cruz, Ranking Member Coons, and distinguished members of the Committee, thank you for the opportunity to testify this afternoon. I am the policy counsel with Common Cause, a nonpartisan, nonprofit organization of 400,000 members nationwide working to restore core values of American democracy and committed to open, honest, and accountable government that serves the public interest. Common Cause is an independent voice for change and a watchdog against corruption and abuse of power. Among other issues, Common Cause works at the federal, state, and local level to advocate for full transparency and disclosure in our elections, and to reduce the undue influence of money in politics.

Let me be clear at the outset: it was wrong for the IRS to subject some “social welfare” nonprofit applications to extra scrutiny based solely on their names and identified interests. The agency should take action to ensure these mistakes are not repeated.

However, it continues to be wrong for the IRS to look the other way as partisan political operatives on the right and the left establish phony social welfare organizations that collectively pump hundreds of millions of dollars from secret sources into our elections. Rather than carry out their election-related spending through tax-exempt organizations in accordance with Section 527, which requires donor disclosure, major political groups are masquerading improperly as

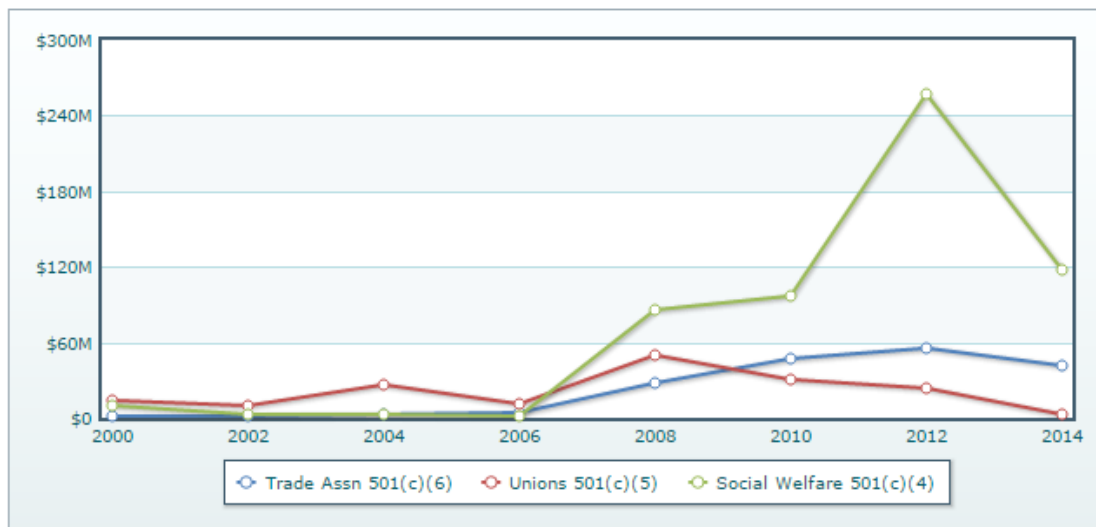
social welfare nonprofits under Section 501(c)(4) – solely to keep political spenders anonymous. This deprives the American people of the information they need about who is trying to influence their votes, and to whom their elected officials may owe a debt of gratitude after Election Day.

This ongoing scandal undermines confidence in our democracy and threatens the integrity of our elections. It stems from a powerful combination of at least four factors: 1) a lack of bright line standards about what constitutes partisan political activity, including how much social welfare organizations can do and how to measure it; 2) the brazen willingness of political consultants to exploit and manipulate the rules governing social welfare organizations by operating them as de facto political committees; 3) an under-resourced agency that has thus far failed to do its job to hold the largest offenders accountable; and 4) champions of gridlock who have blocked Congress from considering comprehensive disclosure legislation in the wake of *Citizens United*.

Up to and including the 2006 election cycle, social welfare groups spent little on partisan political activity. Then, a series of court decisions dramatically changed the status quo. First, the Supreme Court's 2007 decision in *FEC v. Wisconsin Right to Life* lifted prohibitions on corporate spending for election-related communications except for express advocacy and its functional equivalent.¹ That led to a sharp increase in spending on electioneering communications from nonprofit groups that do not disclose their donors. A far larger increase came after the Supreme Court's 2010 decision in *Citizens United* struck down all prohibitions on corporate election-related outside spending.² Combined with the D.C. Circuit's opinion in *SpeechNow.org v. FEC*, these decisions led to an explosion in non-party outside election spending.³ It topped \$1 billion in the 2012 elections³ and over \$500 million in the 2014 midterms.⁴

With this increased spending came increased secrecy about who is financing these political expenditures and, consequently, a less-informed electorate. Approximately one-third of the outside money in the 2012 and 2014 elections came from secret sources, to the tune of \$481 million, of which spending by social welfare nonprofits accounted for approximately \$375 million.⁵ These numbers, though staggering, underestimate the total spent by these organizations to influence campaigns, because they only include the money spent on federal, and not state, elections. The amounts also exclude money that funds communications that fall short of express advocacy outside of the electioneering communications windows but are clearly intended to influence elections.

501(c) Spending, Cycle Totals, by Type



Source: Center for Responsive Politics, http://www.opensecrets.org/outsidespending/nonprof_summ.php (last accessed July 27, 2015).

As election-related spending by social welfare organizations soared after *Citizens United* and *SpeechNow.org*, so did the number of applications from groups seeking 501(c)(4) tax-exempt status. They nearly doubled between 2010 and 2012, from 1,735 in 2010 to 3,357 in 2012.⁶ Although social welfare organizations may self-declare without submitting a formal

application to the IRS, the optional approval process provides them with more certainty that their operations will not jeopardize their tax-exempt status.

Congress never intended for social welfare organizations to exist as conduits for secret political spending. In exchange for their tax exemption, the law requires these nonprofits to engage exclusively in the promotion of social welfare.⁷ The IRS has said social welfare activities do not include political campaign intervention.⁸ IRS regulations muddied the waters with a primary purpose analysis that is inconsistent with the exclusivity requirement of the Internal Revenue Code.⁹

Today, 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. As the IRS has explained, "no precise definition exists in relevant revenue rulings, cases or regulations" to decide if an organization is "'primarily' engaged in social welfare activities."¹⁰ This may "often requir[e] a sophisticated legal and complex factual review to evaluate the application."¹¹ We are left with a vague "facts and circumstances" test that invites inconsistent enforcement of the law. Even when applied properly, some political groups are out of compliance with the existing flawed regulations.

In the wake of *Citizens United*, this discrepancy – coupled with a lack of enforcement – has paved the way for several high-profile partisan political organizations on the right and left to pose as social welfare organizations and spend tens of millions of dollars from undisclosed sources on elections. Ultimately, it is the secrecy that social welfare nonprofits provide to donors that makes them attractive vehicles for political spending, and all the more reason why Americans expect the IRS to do its job and enforce the law. Citing their campaign spending and public reports about their operations, some campaign finance reform advocates have urged the

IRS to investigate groups on the left like Priorities USA and on the right like American Action Network to gauge whether they are in fact organizations that exist primarily to influence candidate election outcomes.¹²

But there is no example of this phenomenon more flagrant than Crossroads GPS, a purported 501(c)(4) social welfare organization founded in 2010 by Karl Rove, which has spent significant amounts of money influencing campaigns. It is the sister organization of American Crossroads, a Super PAC registered with the Federal Election Commission. As such, American Crossroads discloses its donors. Crossroads GPS, however, does not.

During the 2010 election, Crossroads GPS spent approximately \$20.8 million on federal campaign activities, more than half of what it spent in total that cycle. This led the Federal Election Commission General Counsel to conclude that Crossroads GPS' major purpose in 2010 was federal campaign activity, even though a gridlocked FEC ultimately split 3-3 on whether to pursue an enforcement action.¹³

Crossroads GPS then spent at least \$71 million on political expenditures in the 2012 elections, making it the top secret money spender during that cycle.¹⁴ Aside from the presidential race, a significant amount of Crossroads GPS' election-related spending – over \$30 million – targeted Senate candidates in some of the 2012 presidential battleground states, including Virginia, Nevada, Ohio, Wisconsin, and Indiana.¹⁵

Who funded all of its attack ads? Only Crossroads GPS officials, the IRS, the funders themselves, and perhaps the politicians who benefitted from the spending can answer that. In its 2012 Form 990, filed with the IRS, Crossroads GPS reported one single anonymous donation of \$22.5 million; another for \$18 million; another for \$10 million; and many other seven-figure

contributions.¹⁶ Americans deserve to know who was making investments of this magnitude in political races and their eventual outcome.

Mr. Rove himself boasted about how much Crossroads GPS spent boosting President Obama's opponent, Gov. Mitt Romney. In an op-ed published in the *Wall Street Journal* during the 2012 campaign, Mr. Rove said that the Romney campaign had spent less than outside groups, "with \$107.4 million more in ads attacking Mr. Obama's policies or boosting Mr. Romney coming from outside groups (with Crossroads GPS, a group I helped found, providing over half)."¹⁷

Its founders created Crossroads GPS to serve as the secret money corollary to American Crossroads. In post-election remarks at the Annenberg Public Policy Center in 2010, the political director of American Crossroads – Crossroads GPS' sister Super PAC organization – put it bluntly. "[D]isclosure 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. ... Whether they [donors] would have – whether they would have given ultimately or not, I don't know. I know they [donors] were more comfortable giving to a (c)(4). And so we created one."¹⁸

Still, the IRS has done little to hold Crossroads GPS accountable, despite reams of evidence that its overriding purpose appears to be to provide anonymity to donors eager to spend unlimited amounts of money supporting and attacking candidates for public office.¹⁹

This troubling trend shows no sign of stopping in 2016. According to the *New York Times*, supporters of former Secretary of State Hillary Rodham Clinton are considering activating a 501(c)(4) to support her run for the White House.²⁰ On the Republican side, at least eight candidates "have aligned with nonprofit groups to raise hundreds of millions of dollars,"

including at least one that has already planned a \$1 million advertising campaign in support of one of the individuals running for the nomination.²¹

Voters deserve to know who is attempting to influence their votes and who is speaking to them. Disclosure allows them to evaluate the strength, content and agenda of political messages, and is an important tool to hold representatives accountable to their interests instead of those of their representatives' financial backers. That is why courts have repeatedly upheld disclosure requirements.²² Specifically, the Supreme Court ruled 8-1 in *Citizens United* that disclosure by outside spending groups “permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency [in political spending] enables the electorate to make informed decisions and give proper weight to different speakers and messages.”²³ *Citizens United* reaffirmed prior campaign finance cases that upheld disclosure requirements, citing “evidence in the record that independent groups were running election-related advertisements ‘while hiding behind dubious and misleading names.’”²⁴

Consistent with this important First Amendment value – an informed electorate – the law requires Super PACs and other Section 527 organizations to disclose their donors when they spend money to influence elections. Political operatives should not circumvent the constitutionally sound bedrock policy of disclosure by exploiting inconsistent enforcement and vague regulations governing organizations that Congress never anticipated would engage in election-related spending.

There is, of course, legislation that Congress should enact that is in keeping with the Supreme Court's affirmation of the value of disclosure in *Citizens United*. Unfortunately, Congress has thus far failed to pass comprehensive campaign finance disclosure reform that

could have addressed this problem, due in large part to a Republican-led filibuster of the DISCLOSE Act in 2010.

Impartial and consistent enforcement of the law governing nonprofit political spending is squarely within the IRS's mandate and authority. The IRS and Treasury Department took the important step in 2013 of issuing a notice of proposed rulemaking, recognizing that both the public and the government "would benefit from clearer definitions" of campaign-related political activity.²⁵ This action was in keeping with one of the recommendations in the Treasury Inspector General for Tax Administration's report on the IRS' use of inappropriate criteria to select social welfare applications for review.²⁶ The IRS and Treasury Department's notice of proposed rulemaking was a critical first step to solve the problem and protect the integrity of our tax laws. Still, the proposal had significant flaws. Common Cause – along with over 16,000 of our members who have signed our petition – continue to urge the IRS to release a second proposed rule for comment.

It is essential that the next proposed rule establish a low limit on the amount of campaign activity a group can engage in consistent with the statute. New commonsense regulations should allow some modest amount of activity that is unrelated to a 501(c)(4)'s social welfare purpose without jeopardizing the organization's tax-exempt status. Such a rule would permit a small amount of candidate-related political activity, so long as it is not more than an insubstantial part of its activities. An organization could establish a Section 527 organization, which requires disclosure, for all other election-related expenditures.

We recognize that the IRS funding levels have fallen steadily from \$13.4 billion in 2010 to \$10.9 billion in 2015 – a one-fifth reduction in funding, adjusting for inflation.²⁷ This hobbles meaningful action and forces the IRS to rethink its priorities. Senate appropriators proposed

another cut in the FY16 Financial Services appropriations bill last week, reducing the IRS' funding another \$470 million to \$10.4 billion.²⁸ The IRS should not use these budgetary constraints to justify a green light for continued misuse of social welfare organizations.

The use of inappropriate criteria to single out some social welfare applicants for scrutiny does not justify an abrogation of the agency's duty to enforce the law fairly and impartially in the first place. The IRS should hold political groups on the right *and* the left accountable if they misappropriate the privileges of the social welfare organization's structure. The IRS should bring its regulations in line with the Internal Revenue Code, while watchdogging blatant efforts to violate even the flawed rules. Finally, orchestrated gridlock in Congress does not excuse the wholesale abuse of our tax laws by partisan front groups eager to pollute our elections with unlimited amounts of secret money.

Thank you, Mr. Chairman, for the opportunity to testify and I look forward to your questions.

¹ 551 U.S. 449 (2007).

² 558 U.S. 310 (2010).

³ 599 F.3d 686 (2010); Richard L. Hasen, *The Numbers Don't Lie*, SLATE, Mar. 9, 2012, http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_how_it_led_to_an_explosion_of_campaign_spending.html (last accessed July 26, 2015).

⁴ Center for Responsive Politics, Outside Spending by Cycle, <http://www.opensecrets.org/outsidespending/index.php> (last accessed July 26, 2015).

⁵ Center for Responsive Politics, Outside Spending by Disclosure, Excluding Party Committees <http://www.opensecrets.org/outsidespending/disclosure.php> (last accessed July 27, 2015); Center for Responsive Politics, 501(c) Spending, Cycle Totals, by Type http://www.opensecrets.org/outsidespending/nonprof_summ.php (last accessed July 27, 2015).

⁶ TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 3 (2013).

⁷ 26 U.S.C. § 501(c)(4).

⁸ Treas. Reg. § 1.501(c)(4)-(1)(a)(2)(ii).

⁹ Treas. Reg. § 1.501(c)(4)-(1)(a)(2)(i).

¹⁰ IRS, CHARTING A PATH FORWARD AT THE IRS: INITIAL ASSESSMENT AND PLAN OF ACTION 25 (2013).

¹¹ *Id.* at 22.

¹² See Letter from J. Gerald Hebert, Executive Director, Campaign Legal Center and Fred Wertheimer, President, Democracy 21 to the IRS, September 28, 2011, available at http://www.democracy21.org/wp-content/uploads/2014/05/9-28-2011-Letter_to_the_IRS_from_Democracy_21_and_Campaign_Legal_Center.pdf.

¹³ FEDERAL ELECTION COMMISSION, FIRST GENERAL COUNSEL'S REPORT, MUR 6396 (Nov. 13, 2012).

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- ¹⁴ Center for Responsive Politics, Political Nonprofits: Top Election Spenders (2012), http://www.opensecrets.org/outsidespending/nonprof_elec.php?cycle=2012 (last accessed July 27, 2015).
- ¹⁵ Center for Responsive Politics, Crossroads GPS, Outside Spending: Independent Expenditures, Electioneering Communication & Communication Costs by Targeted Candidate, <http://www.opensecrets.org/outsidespending/recips.php?cmte=C90011719&cycle=2012>.
- ¹⁶ Kim Barker, “Crossroads’ Tax Return Shows Big Donors, But Doesn’t Name Them,” PROPUBLICA, Nov. 18, 2013, available at <http://www.propublica.org/article/crossroads-tax-return-shows-big-donors-but-doesnt-name-them>.
- ¹⁷ Karl Rove, “The Obama Ad Bliz Isn’t Working,” WALL ST. J., August 1, 2012, available at <http://www.wsj.com/articles/SB10000872396390443687504577563002812933574>.
- ¹⁸ Carl Forti, Remarks on Panel, Annenberg Public Policy Center of the University of Pennsylvania, “Cash Attack 2010: Political Advertising in a Post-Citizens United World,” Dec. 13, 2010, Washington, DC (transcript by Federal News Service, available at http://www.factcheck.org/UploadedFiles/2011/01/rep_panel.pdf).
- ¹⁹ Democracy 21 and the Campaign Legal Center have sent at least 11 letters to the IRS, thoroughly documenting the extent of Crossroads GPS’ campaign activity and its legal argument for why the IRS should deny Crossroads GPS’ social welfare status and assess penalties for any violations of the law. They sent letters on [May 6, 2014](#); [January 2, 2013](#); [September 27, 2012](#); [July 23, 2012](#); [May 24, 2012](#); [April 17, 2012](#); [March 22, 2012](#); [March 9, 2012](#); [December 14, 2011](#); [September 28, 2011](#); and [October 5, 2010](#) and will provided to the Committee as an appendix.
- ²⁰ Eric Lichtblau, “IRS Expected to Stand Aside as Nonprofits Increase Role in 2-16 Race,” N.Y. TIMES, July 5, 2015, available at <http://www.nytimes.com/2015/07/06/us/politics/irs-expected-to-stand-aside-as-nonprofits-increase-role-in-2016-race.html>.
- ²¹ See *id.*
- ²² See Letter from Fred Wertheimer, President, Democracy 21 & Trevor Potter, President, Campaign Legal Center to Senators, Nov. 14, 2013, available at <http://www.democracy21.org/wp-content/uploads/2013/11/LETTER-TO-HSE-AND-SENATE-ON-COURTS-REJECTING-CHALLENGES-TO-DISCLOSURE-FINAL-11-1-3-13.pdf>.
- ²³ *Citizens United*, 558 U.S. at 371.
- ²⁴ *Id.* at 367.
- ²⁵ Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71535 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1).
- ²⁶ TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 17 (2013).
- ²⁷ Brandon DeBot and Chuck Marr, *Poor IRS Service Reflects Congress’s Deep Funding Cuts* (June 1, 2015), Center for Budget and Policy Priorities, available at <http://www.cbpp.org/sites/default/files/atoms/files/6-1-15tax.pdf>.
- ²⁸ Press release, Senate Committee Agrees to FY2016 Financial Services Appropriations Bill, July 23, 2015, available at <http://www.appropriations.senate.gov/news/senate-committee-agrees-fy2016-financial-services-appropriations-bill>.