TABLE OF CONTENTS

MONEY IN POLITICS:
A HYDRAULIC OR LEGAL ISSUE?

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I. Introduction: 501(c)(4)s in the Tax Code

A. Dating back to a 1913 Senate amendment to the Tariff Act (S. Rep. No. 63-80 (1913), *reprinted in* Comm. Reps. on Act of Oct. 3, 1913; Act of Oct. 22, 1914; and Revenue Acts of 1916 to 1938, inclusive, 1939-1 C.B. 1, 3, 4), Internal Revenue Code section 501(c)(4) provides exempt status to:

> "Civic leagues or organizations not organized for profit but operated *exclusively* for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes." 26 U.S.C. § 501(c)(4)(A) (emphasis added).

B. The 501(c)(4) category has become in many ways a catchall for groups that do not fit elsewhere in the tax code but that seek exempt status for their activities. The American Kennel Club, for example, is one of many animal-related 501(c)(4)s that has landed in this section of the tax code. This (c)(4), which took in more than $60 million in revenue in 2015, describes itself as "a purebred dog registry dedicated to promoting the sport of purebred dogs, responsible dog breeding, canine health and well-being, and the rights of all dog owners." American Kennel Club, Inc., 2015 Form 990: Return of Organization Exempt from Income Tax 1 (filed Nov. 7, 2016). In fact, it was founded in 1884, decades before section 501(c)(4) appeared in the tax code. *History of the American Kennel Club*, American Kennel Club, http://www.akc.org/about/history/ (last visited Nov. 1, 2017). The organization did not find its home in the 501(c)(4) section until 1956. *American Kennel Club, Inc.*, ProPublica Nonprofit Explorer, https://projects.propublica.org/nonprofits/organizations/134923060 (last visited Nov. 1, 2017).

C. In fiscal year 2016, the Internal Revenue Service ("IRS") reported more than 80,000 501(c)(4) groups. Internal Revenue Serv., *Internal Revenue Service Data Book, 2016*, at 57 (2017), https://www.irs.gov/pub/irs-soi/16databk.pdf. Under ten percent of them report any political activity. Jeremy Koulish, Urban Inst., *From Camps to Campaign Funds: The History, Anatomy, and Activities of 501(c)(4) Organizations* 24 (2016), https://www.urban.org/sites/default/files/publication/77226/2000594-From-Camps-to-Campaign-Funds-The-History-Anatomy-and-Activities-of-501(c)(4)-Organizations.pdf.

D. However, in recent years, 501(c)(4)s have become the entity of choice for political donors seeking to spend money on elections without having their names publicly disclosed. Since *Citizens United v. FEC*, 558 U.S. 310 (2010), 501(c)(4)s have reported spending at least $626 million on federal elections, including $7.62 million so far in the 2018 cycle. *Political Nonprofits (Dark Money)*, Ctr. for Responsive Politics, https://www.opensecrets.org/outsidespending/nonprof_summ.php (last visited Nov. 3, 2017). However, these figures only reflect spending that these groups were required to report to the Federal Election Commission ("FEC"); 501(c)(4) spending on many candidate-related ads run more than 30 days before a primary or 60 days before a general election would not be included in the $626 million estimate.

E. The interpretation of "operated exclusively for the promotion of social welfare"

1. Despite the statute establishing c(4)s defining them as operated "exclusively" for social welfare, since 1959 the IRS has interpreted the term as "primarily:" "[a]n organization is operated exclusively for the promotion of social welfare if it is *primarily* engaged in promoting in some way the common good and general welfare of the people of the community." 26 C.F.R. § 1.501(c)(4)– 1(a)(2)(i) (emphasis added).

2. The IRS has held that "[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," 26 C.F.R. § 1.501(c)(4)–1(a)(2)(ii), which effectively means that political activity may not be the "primary" purpose of a 501(c)(4) organization.

3. However, IRS regulations do not answer two questions which are central to today's controversies over political activities by 501(c)(4) organizations: (a) what constitutes political campaign intervention; and (b) how much campaign intervention may a 501(c)(4) engage in before it becomes its "primary" activity.

II. Federal Election Law: Pre-*Citizens United* History

A. The Federal Election Campaign Act ("FECA") and the birth of the Federal Election Commission ("FEC")

1. Introduced in 1971, passed in 1972, Pub. L. 92-225, 86 Stat. 3 (Feb. 7, 1972), and substantially amended in 1974, Pub. L. 93-443, 88 Stat. 1263 (Oct. 15, 1974), FECA serves as the foundation of our modern campaign finance system.

2. In the wake of the Watergate scandal, the 1974 FECA amendments created the FEC as an independent regulatory agency.

a) Charged with administering and enforcing the law, the new agency would receive and publish campaign finance reports, enforce limitations and restrictions on the sources of funding, and administer the presidential public financing system, among other tasks. FECA Amendments of 1974, § 310, Pub. L. 93-443, 88 Stat. 1263, 1281-82 (Oct. 15, 1974) (current version at 52 U.S.C. § 30106(b)(1)).

b) Today, the FEC consists of six commissioners, "no more than 3 . . . affiliated with the same political party." 52 U.S.C. § 30106(a)(1).

3. Congress in 1974 also established limits on contributions to federal candidates, political committees, and political parties, and recodified prohibitions on corporate and labor spending in federal elections. FECA Amendments of 1974, § 101, Pub. L. 93-443, 88 Stat. 1263, 1263-67 (Oct. 15, 1974) (current version at 52 U.S.C. § 30116).

4. Reform opponents challenged FECA in the courts, and, in 1976, the Supreme Court issued its landmark decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). The decision established the constitutional framework for campaign finance law and equated the spending of money with speech, in some circumstances, for First Amendment purposes. *Buckley* created a constitutional distinction between contributions and expenditures; the Court upheld limits on direct contribution to candidates but, reasoning that independent expenditures constituted protected speech, struck down limits on how much individuals could spend independently of candidates. *Buckley* also upheld disclosure laws. The Court also adopted the so-called "express advocacy" standard as a narrowing construction of FECA's statutory terms to avoid vagueness and over-breadth problems:

> "This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 44 n.52.

B. Post-*Buckley*: The Rise of Soft Money

1. After *Buckley*, throughout the 1980s and 1990s, new workarounds to the FECA limits emerged.

2. One was the rise of so-called "soft money"—funds that parties raised outside of federal limits (such as funds raised for state parties that faced no contribution limits under state law) but that nonetheless ended up being used in federal elections, or transferred to federal party committees for allegedly non-federal purposes (which evolved to include advertising mentioning federal candidates).

3. The other was corporate and union spending for "sham issue ads": ads that attacked or supported candidates, but avoided the eight magic words of express advocacy in *Buckley*. As the Supreme Court later noted in its 2003 decision in *McConnell v. FEC*:

> "While the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words. Little difference existed, for example, between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *McConnell v. FEC*, 540 U.S. 93, 126-27 (2003) (internal citations omitted).

4. These phony issue ads peaked in the 1996 elections, when between $135 million and $150 million was spent on so-called issue ads, according to an estimate the University of Pennsylvania's Annenberg Center. Deborah Beck et al., Annenberg Pub. Pol'y Ctr., *Issue Advocacy Advertising During the 1996 Campaign* 3 (1997), https://www.annenbergpublicpolicycenter.org/wp-content/uploads/REP161.pdf. Almost 90 percent of those ads mentioned a public official or a candidate by name. *Id*. at 8. However, because they stopped just short of using *Buckley*'s "magic words," they did not qualify as express advocacy, and therefore could be funded with corporate or labor money.

C. The Bipartisan Campaign Reform Act ("BCRA")

1. Passed in 2002, and also known as the McCain-Feingold Act after its bipartisan Senate sponsors, the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (Mar. 27, 2002), attempted to close the "soft money" and "phony issue ad" loopholes that emerged during the 1980s and 1990s.

2. BCRA banned soft money by, among other things, barring candidates and political parties from soliciting, receiving, directing, or spending any funds that are not subject to FECA's limits, prohibitions, and reporting requirements. BCRA, § 101, Pub. L. 107-155, 116 Stat. 81, 82-86 (Mar. 27, 2002) (current version at 52 U.S.C. § 30125).

3. BCRA also took aim at phony issue ads by creating a new category of ads subject to limits, called "electioneering communications," defined as follows:

> "(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which—
>
> (I) refers to a clearly identified candidate for Federal office;
> (II) is made within—
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate."
>
> BCRA, § 201(a), Pub. L. 107-155, 116 Stat. 81, 88-90 (Mar. 27, 2002) (current version at 52 U.S.C. § 30104(f)(3)).

4. In 2003, the Supreme Court in *McConnell v. FEC* upheld almost all of BCRA's provisions. However, this victory was relatively short-lived; after Justice Sandra Day O'Connor, who had voted with the majority in *McConnell*, retired and was replaced by Justice Samuel Alito in 2006, the Court became more skeptical of campaign finance regulations.

D. Throughout this period (1976-2010), the disclosure debate around nonprofits hinged on three main issues:

1. How to ensure that donors stayed within the $5,000 limit on contributions to committees engaging in federal political activities?

a) Under FECA, an individual can contribute no more than $5,000 to a political committee. 52 U.S.C. § 30116(a)(1)(c).

b) The limit meant that an individual wanting to spend $100,000 had to do so in his or her own name (i.e., on independent expenditures), *or* give to a group that was not a federal political committee (such as a 501(c)(4) or 527 entity) that was willing to spend the money to influence elections, such as through sham issue ads.

c) The FEC uses a "major purpose" test to determine whether a group is actually a political committee. *See* discussion of Crossroads GPS example, *infra*.

2. Which corporations could and could not spend money on public political advertisements?

a) In *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238 (1986) ("*MCFL*") the Supreme Court held that FECA's corporate expenditure ban was unconstitutional as applied to a small non-profit corporation that was, by its nature, political and that was not formed or funded by a business corporation or labor union. At the same time, the Court held that the corporate expenditure ban, in general, was permissible.

(1) "We acknowledge the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 263.

(2) "In particular, MCFL has three features essential to our holding that it may not constitutionally be bound by [FECA's] restriction on independent spending. First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities. This ensures that political resources reflect political support. Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity. Third, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *MCFL*, 479 U.S. at 263-64.

b) In *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), the Supreme Court reviewed the application of BCRA's electioneering communication limits on corporations. Wisconsin Right to Life, Inc. ("WRTL") was a non-profit corporation that accepted for-profit corporate contributions, and was thus prohibited from running "electioneering communications" (i.e., ads run within 30 days or a primary or 60 days of a general election) under BCRA section 203. WRTL filed suit, arguing that section 203, as applied to ads that WRTL sought to run within 30 days of a primary and discussing Senators in connection with the Senate filibuster of judicial candidates, would violate the First Amendment. (*McConnell* had previously rejected a facial challenge to section 203. *McConnell*, 540 U.S. at 207.) The Court held that the law could require that the funding for such advertising be disclosed, but that Congress could not ban corporate or labor funding for electioneering communications unless the ads included express advocacy:

> "This Court has long recognized the governmental interest in preventing corruption and the appearance of corruption in election campaigns.
> . . .
> *McConnell* arguably applied this interest—which this Court had only assumed could justify regulation of express advocacy—to ads that were the 'functional equivalent' of express advocacy. But to justify regulation of WRTL's ads, this interest must be stretched yet another step to ads that are not the functional equivalent of express advocacy. Enough is enough. Issue ads like WRTL's are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them. To equate WRTL's ads with contributions is to ignore their value as political speech." *WRTL*, 551 U.S. at 478-79 (internal marks and citations omitted).

3. How to ensure full disclosure of election spending?

   a) Before 2000, one avenue to avoid disclosure was to give to organizations organized under section 527: "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1).

   b) In 2000, Congress changed the law in the wake of revelations surrounding a particular 527's activity. In the 2000 Republican primary, a 527 called Republicans for Clean Air ran attack ads against presidential candidate John McCain. After McCain's Super Tuesday loss, it was revealed that Texas billionaire brothers Sam and Charles Wyly, one of whom was a major fundraiser for then-candidate George W. Bush, had been behind this group that had previously only been identified with a Virginia P.O. box. After the revelation, Congress proceeded to pass the Full and Fair Campaign Finance Disclosure Act of 2000, requiring 527 groups both to register with and to disclose their contributions and expenditures to the IRS. *Stealth PACs revealed: Interest Groups in the 2000 Election Overview*, Ctr. for Public Integrity (Feb. 9, 2000), https://www.publicintegrity.org/2000/02/09/3311/stealth-pacs-revealed.

   c) Later, contributions to 501(c)(4)s became the preferred avenue for anonymously funding political ads.

III. *Citizens United v. FEC* (2010)

A. The Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), eliminated the prohibition on corporate independent expenditures. Per *Buckley*, the Court held that independent expenditures could not corrupt candidates, that the First Amendment did not distinguish between individuals and corporations, and that, therefore, corporations—as associations of individuals—could not be prohibited from spending on independent expenditures.

B. However, the Court in *Citizens United* upheld federal disclosure laws. In a section of the opinion joined by seven other Justices (with only Justice Clarence Thomas dissenting), Justice Anthony Kennedy emphasized: "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests." *Citizens United*, 558 U.S. at 370 (internal citation omitted).

C. However, even Justice Kennedy has admitted in recent years that the disclosure he envisioned is "not working the way it should." Paul Blumenthal, *Anthony Kennedy's* Citizens United *Disclosure Salve 'Not Working,'* Huffington Post (Nov. 2, 2015), https://www.huffingtonpost.com/entry/citizens-united-anthony-kennedy_us_5637c481e4b0631799134b92.

D. Soon after *Citizens United*, the D.C. Circuit in its *SpeechNow* decision reasoned that, because *Citizens United* found that independent expenditures posed no risk of corruption, the logical corollary was that contributions to committees that only make independent expenditures also cannot corrupt. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). This decision led to the creation of "super PACs"—independent-expenditure only political committees that can raise and spend unlimited amounts from individuals, corporations, and unions, so long as they only use those funds to make independent expenditures, rather than contributions to candidates. As political committees, super PACs file regular reports with the FEC disclosing their contributors and expenditures.

IV. The Political Fight for Disclosure Since 2010

A. The *Citizens United* and *SpeechNow* decisions, collectively, for the first time allowed corporations, including 501(c)(4)s, to make independent expenditures and to donate to super PACs. However, disclosure laws and regulations have not caught up to this new reality.

B. Under BCRA, independent spenders other than political committees must disclose the sources and amounts raised and spent on (1) express advocacy ads and (2) electioneering communications. 52 U.S.C § 30104. However, BCRA's disclosure provisions were drafted for a pre-*WRTL* and pre-*Citizens United* world, where corporations and unions were prohibited from making such expenditures. Accordingly, the FEC has re-interpreted the BCRA disclosure provisions to require only the disclosure of those donors who gave for the "purpose" of funding a particular political ad. *See Center for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012) (per curiam), and more extensive discussion of the *Van Hollen* case, *infra*. As a result, when a 501(c)(4) uses funds from its general treasury to fund an electioneering communication, only those donors who contributed for the purpose of furthering specific electioneering communications must be reported to the FEC and publicly disclosed. Most 501(c)(4)s therefore evade disclosure requirements by claiming that no contributors gave for the purpose of funding specific communications.

C. Regulatory failure: the FEC

1. Basic failures

a) By law, the six-member FEC requires four affirmative votes to take any action: to open a rulemaking, to adopt new regulations, or to open an investigation to determine whether existing rules have been violated.

b) In recent years the FEC has been crippled thanks to a significant rise in 3-3 deadlocks. Before 2013, the FEC had never found itself deadlocked in more than 15 percent of its substantive enforcement votes, but in 2013 that proportion jumped to 25 percent, and it continues to rise. Office of Comm'r Ann Ravel, Federal Election Comm'n, *Deadlock and Dysfunction: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp* 1 (2017), https://www.fec.gov/resources/about-fec/commissioners/ravel/statements/ravelreport_feb2017.pdf. This means that the FEC gives up the investigation with no result, and sends a letter that it is "unable to resolve the matter."

c) The FEC also has seen significant drops in the number of votes taken on enforcement actions. Between 2003 and 2007, the FEC took an average of 727 votes each year on enforcement actions, but since 2008 the average has fallen to only 183. Press Release, Pub. Citizen, Roiled in Partisan Deadlock, Federal Election Commission Is Failing 1 (July 19, 2016), https://www.citizen.org/sites/default/files/fec_deadlock_updated_july_2016.pdf.

d) And even when the FEC does open an investigation, the fines it imposes have been decreasing. In 2016, it imposed only $595,424 in penalties for serious violations, which represented a 90 percent drop from 2006, when it imposed almost $5.6 million. Federal Election Comm'n, *FEC Enforcement Statistics 1977-2017* (last updated Oct. 13, 2017), http://www.fec.gov/press/bkgnd/EnforcementStatistics.shtml. In 2006, the

average FEC civil fine for the most serious enforcement cases was about $179,500; in 2016, it was about $19,850. *Id.* So even though the amount of money spent in federal elections has almost doubled between 2006 and 2016, *see* Ctr. for Responsive Politics, *Cost of Election*, https://www.opensecrets.org/overview/cost.php (last visited Nov. 6, 2017), the total and average amounts of fines dropped by about 90 percent.

e) In the eight years between 2001 and 2008, the FEC assessed $21,310,172 in civil fines for serious violations, or $2.66 million per year; over the following eight years, 2009 to 2016, the FEC issued a total of $4,488,244 million in fines—an average of $561,030 per year. Federal Election Commission, *FEC Enforcement Statistics 1977-2017* (last updated Oct. 13, 2017), http://www.fec.gov/press/bkgnd/EnforcementStatistics.shtml.

2. Example of regulatory failure: *Shays v. FEC*

a) Following passage of BCRA, the FEC promulgated new rules implementing the legislation. BCRA's two sponsors in the House of Representatives, Rep. Christopher Shays (R-CT) and Rep. Marty Meehan (D-MA), sued; as the D.C. Circuit put it, "BCRA's House sponsors (joined by Senate sponsors as amici) claim the FEC has undone their hard work, resurrecting in its regulations practices BCRA eradicated." *Shays v. FEC*, 414 F.3d 76, 79 (D.C. Cir. 2005).

b) The District Court invalidated fifteen separate FEC rules as either failing on *Chevron* step one or as arbitrary and capricious. *See Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004).

c) The FEC appealed with regard to five rules, and lost its appeal on each one. One example that demonstrates the pervasive issue of weak FEC regulations:

(1) A key BCRA objective was to shut down the so-called "soft money" system whereby political parties employed funds outside FECA's controls to finance political activities related to federal elections: "A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act." 52 U.S.C. § 30125(a)(1).

(2) The FEC promulgated a rule that defined "solicit" and "direct" narrowly, essentially excluding instances in which a party subtly (or not so subtly) suggested that someone spend money in a particular way. *See Shays*, 414 F.3d at 103.

(3) The D.C. Circuit Court noted: "The FEC's definitions fly in the face of this purpose because they reopen the very loophole the terms were designed to close. Under the Commission's interpretation, candidates and parties may not spend or receive soft money, but apart from that restriction, they need only avoid explicit direct requests. Instead, they must rely on winks, nods, and circumlocutions to channel money in favored directions—anything that makes their intention clear without overtly 'asking' for money. Simply stating these possibilities demonstrates the absurdity of the FEC's reading. Whereas BCRA aims to shut down the soft money system, the Commission's rules allow parties and politicians to perpetuate it, provided they avoid the most explicit forms of solicitation and direction." *Id.* at 106.

3. Example of regulatory failure: *Van Hollen v. FEC*

a) A BCRA provision requires one of two types of disclosure regarding electioneering communications by individual political committees, including by non-profits and

unions, that total more than $10,000 in a calendar year. The nature of the disclosure depends on how the disbursements to fund electioneering communications are made:

(1) If the disbursements are made from a bank account that is segregated from general funds, donors of $1,000+ to that account must be disclosed. 52 U.S.C. § 30104(f)(2)(E).

(2) If the disbursements are not made from a segregated bank account, *all* donors to the organization of $1,000+ must be disclosed. 52 U.S.C. § 30104(f)(2)(F).

b) In the wake of *Wisconsin Right to Life*, the FEC promulgated a regulation addressing how these disclosure requirements applied to corporations using general treasury funds on electioneering communications. The FEC's new rule stated that disbursements from non-segregated bank accounts required disclosure only of those donations "made for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9). This meant that, when disbursements were made from a non-segregated bank account—such as a nonprofit corporation's general treasury—only those donors who had somehow manifested a purpose of furthering specific electioneering communications would be disclosed. In effect, the FEC's regulation added a "purpose" test not in the statute to determine whether the donation required disclosure.

c) Rep. Chris Van Hollen sued, claiming that the FEC's actions were contrary to law. He prevailed at the District Court level. The District Court for the District of Columbia held that the FEC's actions failed on *Chevron* step 1 (i.e., that Congress spoke directly to the matter at hand and wanted disclosure of *all* donors):

> "The provision plainly requires 'every person' to identify 'all' contributors who contributed over $1,000 during the reporting period, and there are no terms limiting that requirement to call only for the names of those who transmitted funds accompanied by an express statement that the contribution was intended for the purpose of funding electioneering contributions. So, there is no indication that Congress charged the FEC with clarifying anything, either explicitly or implicitly, and the text favors the plaintiff at *Chevron* step one. *See Van Hollen v. FEC*, 851 F. Supp. 2d 69, 80 (D.D.C.), *rev'd sub nom. Center for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012) (per curiam).

d) The D.C. Circuit Court of Appeals reversed and held that the meaning of the statute was far from clear and that the statute could be construed by the FEC to include a purpose test:

> "The statute is anything but clear, especially when viewed in the light of the Supreme Court's decisions in *Citizens United v. FEC* and *FEC v. Wis. Right to Life, Inc*. Furthermore, we do not agree with the District Court that the words 'contributors' and 'contributed' in 2 U.S.C. § 434(f)(2)(F) cannot be construed to include a 'purpose' requirement . . .
> . . .
> The FEC's promulgation of 11 C.F.R. § 104.20(c)(9) reflects an attempt by the agency to provide regulatory guidance under the BCRA following the partial invalidation of the speech prohibition imposed on corporations and labor unions in the context of 'electioneering communications.'" *Center for Individual Freedom v. Van Hollen*, 694 F.3d 108, 110-11 (D.C. Cir. 2012) (per curiam) (internal citations omitted).

D. Early history of 501(c)(4) regulatory failure: *Crossroads GPS*

1. Following *Citizens United* and *SpeechNow*, a group of Republicans announced the creation of American Crossroads as a non-connected independent expenditure only committee (a super PAC), organized under section 527, and stated that its donors would be fully disclosed. *See*

Kenneth P. Vogel, *Secrecy flip-flop fueled Crossroads*, Politico (Oct. 25, 2010), https://www.politico.com/story/2010/10/secrecy-flip-flop-fueled-crossroads-044104.

2. Within months, press reports disclosed that American Crossroads was falling short of its fundraising targets. Upon launch, its leaders had predicted raising $52 million, but it raised less than $5 million in its first few months. *See* Kenneth P. Vogel, *New GOP 527 far short of $52M goal*, Politico (June 21, 2010), https://www.politico.com/story/2010/06/new-gop-527-far-short-of-52m-goal-038825.

3. Thereafter, the same Republicans who created American Crossroads formed the 501(c)(4) organization Crossroads GPS. While Crossroads GPS would have to disclose its major donors to the IRS, those names would not be made public.

4. Crossroads GPS was far more successful at fundraising than American Crossroads. In its first month (June 2010), Crossroads GPS raised $5.1 million, more than the $4.7 million American Crossroads raised in its first three months in existence. *See* Kenneth P. Vogel, *Rove-linked group uses secret donors to fund attacks*, Politico (July 20, 2010), https://www.politico.com/story/2010/07/rove-linked-group-uses-secret-donors-to-fund-attacks-039998. All told, Crossroads GPS raised $43 million in 2010, compared to $28 million for American Crossroads. *See* Dan Eggen & T.W. Garnam, *Pair of conservative groups raised $70 million in midterm campaign*, Wash. Post (Dec. 2, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/02/AR2010120205667.html.

5. Public Citizen and other organizations filed a complaint with the FEC, alleging that Crossroads GPS improperly failed to register as a political committee. Complaint, Federal Election Comm'n, MUR 6396, at 26-27 (Oct. 13, 2013).

6. The key test to determine whether a 501(c)(4) organization is in fact a political committee subject to public disclosure is the so-called "major purpose test":

> "The Supreme Court has held that, to avoid the regulation of activity 'encompassing both issue discussion and advocacy of a political result' only organizations whose major purpose is Federal campaign activity can be considered political committees under the Act. See, e.g., *Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 262. Thus, the major purpose test serves as an additional hurdle to establishing political committee status. Not only must the organization have raised or spent $1,000 in contributions or expenditures, but it must additionally have the major purpose of engaging in Federal campaign activity. The Supreme Court has made it clear that an organization can satisfy the major purpose doctrine through sufficiently extensive spending on Federal campaign activity. See *MCFL*, 479 U.S. at 262 (explaining that a section 501(c)(4) organization could become a political committee required to register with the Commission if its 'independent spending become[s] so extensive that the organization's major purpose may be regarded as campaign activity')." Federal Election Comm'n, Supplemental Explanation and Justification on Political Committee Status, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007).

7. Crossroads GPS claimed that its major purpose was not campaign activity but rather issue advocacy and public education.

8. Crossroads GPS also made an attempt to arbitrage IRS and FEC regulations. It argued that because the IRS's "primary purpose" test for 501(c)(4) organizations was sufficiently similar to the FEC's "major purpose" test, compliance with IRS standards should satisfy the FEC's test.

9. The FEC's general counsel concluded that Crossroads GPS's major purpose was campaign activity and noted that the FEC had never allowed IRS standards to govern FEC major purpose findings:

> "In short, taking into account all of its spending in 2010, Crossroads GPS appears to have spent approximately $20.8 million on the type of communications that the Commission

considers to be federal campaign activity—approximately $15.4 million on express advocacy communications and $5.4 million on non-express advocacy communications that criticize or oppose a clearly identified federal candidate. This total of $20.8 million represents approximately 53 percent of the $39.1 million Crossroads GPS reported spending during 2010. Therefore, Crossroads GPS's spending by itself shows that the group's major purpose during 2010 was federal campaign activity (i.e., the nomination or election of a federal candidate.)" First General Counsel's Report, Federal Election Comm'n, MUR 6396, at 26-27 (Nov. 21, 2013).

10. Nevertheless, the FEC deadlocked 3-3 and was unable to pursue enforcement. *See* Certification of Disposition, Federal Election Comm'n, MUR 6396 (Dec. 5, 2013).

11. Public Citizen filed suit against the FEC over the non-enforcement, and the litigation is ongoing. *Public Citizen et al. v. FEC*, No. 1:14-cv-00148 (D.D.C. filed Jan. 31, 2014).

12. Throughout this process, Crossroads GPS's application for 501(c)(4) status was pending before the IRS, although Crossroads GPS was entitled to register and act as a (c)(4) pending a decision.

13. Many groups, including the Campaign Legal Center, sent letters to the IRS, imploring it to reject the application and explaining why Crossroads GPS did not qualify for 501(c)(4) status. *See, e.g.*, Letter from J. Gerald Hebert, Exec. Dir, Campaign Legal Ctr. & Fred Wertheimer, President, Democracy 21, to John Koskinen, Comm'r, Internal Revenue Serv. (May 6, 2014), http://www.campaignlegalcenter.org/sites/default/files/Letter_to_IRS_from_Democracy_21_and_Campaign_Legal_Center_re_Tax-Status_of_Crossroads_GPS_5-6-14.pdf.

14. Nevertheless, the IRS granted 501(c)(4) status to Crossroads GPS in 2016, five-and-a-half years after it first applied, in what *Politico* called "a move signaling a lack of [IRS] appetite for policing big-money campaign spending." *See* Kenneth P. Vogel, *Karl Rove group wins IRS tax exemption*, Politico (Feb. 9, 2016), https://www.politico.com/story/2016/02/crossroads-gps-irs-tax-exempt-219005.

E. The IRS

1. The IRS uses a "facts and circumstances" test to determine whether a particular expenditure constitutes political campaign intervention:

> "Over the years, the IRS has stated that whether an organization is engaged in political campaign intervention depends upon all of the facts and circumstances of each case. More recently, the IRS released Rev. Rul. 2007–41 (2007–1 CB 1421), providing 21 examples illustrating facts and circumstances to be considered in determining whether a section 501(c)(3) organization's activities (including voter education, voter registration, and get out-the-vote drives; individual activity by organization leaders; candidate appearances; business activities; and Web sites) result in political campaign intervention. The IRS generally applies the same facts and circumstances analysis under section 501(c)(4). . . . Similarly, Rev. Rul. 2004–6 (2004–1 CB 328) provides six examples illustrating facts and circumstances to be considered in determining whether a section 501(c) organization (such as a section 501(c)(4) social welfare organization) that engages in public policy advocacy has expended funds for a section 527 exempt function. The analysis reflected in these revenue rulings for determining whether an organization has engaged in political campaign intervention, or has expended funds for a section 527 exempt function, is fact-intensive." Internal Revenue Serv., Notice of Proposed Rulemaking, Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535, 71,536 (Nov. 29, 2013).

2. In 2013, the so-called Tea Party Scandal arose out of this vague test and the proliferation of (c)(4) applications:

a) In 2013, the IRS was widely criticized for singling out 501(c)(4)s with associated terms like "Tea Party" and "patriot" in an effort to distinguish between true social

welfare organizations and organizations that should be classified as political groups. However, the Treasury Department's Inspector General later determined that the IRS's actions were not limited to groups on the right; in fact, "the I.R.S. was also inappropriately targeting progressive-leaning groups." Alan Rappeport, *In Targeting Political Groups, I.R.S. Crossed Party Lines*, N.Y. Times (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/politics/irs-targeting-tea-party-liberals-democrats.html.

b) Earlier this year, the Justice Department paid millions of dollars to settle a lawsuit filed by Tea Party groups complaining of delayed IRS 501(c)(4) approval and, in a separate lawsuit, acknowledged IRS wrongdoing. Emily Cochrane, *Justice Department Settles with Tea Party Groups After I.R.S. Scrutiny*, N.Y. Times (Oct. 26, 2017), https://www.nytimes.com/2017/10/26/us/politics/irs-tea-party-lawsuit-settlement.html.

3. Also in 2013, the IRS attempted to engage in a rulemaking to clarify two issues:

a) What constitutes political campaign intervention?

> "The Treasury Department and the IRS recognize that more definitive rules with respect to political activities related to candidates—rather than the existing, fact-intensive analysis—would be helpful in applying the rules regarding qualification for tax-exempt status under section 501(c)(4). . . . Accordingly, the Treasury Department and the IRS propose to amend Treas. Reg. § 1.501(c)(4)–1(a)(2) to identify specific political activities that would be considered candidate related political activities that do not promote social welfare." Internal Revenue Serv., Notice of Proposed Rulemaking, Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535, 71,536-37 (Nov. 29, 2013).

b) What proportion of activity must be social welfare-related in order to meet the "primarily" standard?

(1) "Some have questioned the use of the 'primarily' standard in the section 501(c)(4) regulations and suggested that this standard should be changed. The Treasury Department and the IRS are considering whether the current section 501(c)(4) regulations should be modified in this regard and, if the ''primarily'' standard is retained, whether the standard should be defined with more precision or revised to mirror the standard under the section 501(c)(3) regulations. . . . Accordingly, the Treasury Department and the IRS invite comments from the public on what proportion of an organization's activities must promote social welfare for an organization to qualify under section 501(c)(4) and whether additional limits should be imposed on any or all activities that do not further social welfare." *Id*. at 71,537-38.

(2) The Campaign Legal Center and allies supported the IRS opening a rulemaking, and noted that the current regulation is in tension with the underlying statute: "The IRS's current practice of requiring only that § 501(c)(4) organizations be *mostly* devoted to promoting social welfare contradicts the plain meaning of the statutory requirement that an exempt organization promote social welfare *exclusively*." Chris Van Hollen, Pub. Citizen, Inc., Democracy 21 & Campaign Legal Ctr., Comments on REG-134417-13, at 4 (Feb. 27, 2014), http://www.campaignlegalcenter.org/sites/default/files/D21-CLC-PC-Van_Hollen_Comments_on_IRS_rulemaking.pdf.

4. However, the IRS's first round of proposed rules were criticized as both overbroad and underinclusive. In response to those comments, the IRS deliberated whether to rewrite the proposed rules and issue a new Notice of Proposed Rulemaking.

5. However, in 2015, congressional Republicans halted the IRS's attempt to clarify these issues by using the appropriations process to forbid IRS action on the rulemaking:

> "[N]one of the funds made available in this or any other Act may be used by the Department of the Treasury, including the Internal Revenue Service, to issue, revise, or finalize any regulation, revenue ruling, or other guidance not limited to a particular taxpayer relating to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of section 501(c)(4) of the Internal Revenue Code of 1986 (including the proposed regulations published at 78 Fed. Reg. 71535 (November 29, 2013))." Consolidated Appropriations Act, 2016, § 127(1), Pub. L. 114-113, 129 Stat. 2241, 2433 (Dec. 18, 2015).

F. On the left, (c)(4) groups like Patriot Majority USA have spent millions of dollars on political activity, too. *See* Michael Beckel, *The Dark Arts*, Slate (Sept. 3, 2014), http://www.slate.com/articles/news_and_politics/politics/2014/09/democrats_raising_dark_money_liberals_are_using_the_same_campaign_finance.html.

G. The SEC

1. In *Citizens United*, the government put forth "shareholder protection" as one of its compelling interests served by the ban on corporate independent expenditures. In short, the "shareholder protection" argument states that shareholders should not have to subsidize speech they don't like or that isn't in the corporation's best profit-seeking interests.

2. The Court rejected this argument as a justification for banning corporate independent expenditures, but accepted it as a justification for disclosure. Justice Kennedy's opinion emphasized that, "[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests." *Citizens United*, 558 U.S. at 370 (internal citation omitted).

3. However, for the reasons described above, the lack of disclosure in the post-*Citizens United* world means that a publicly-traded corporation's contributions to 501(c)(4) and 501(c)(6) political organizations are never publicly reported, including to shareholders. This means that shareholders are deprived of the information they need to "determine whether their corporation's political speech advances the corporation's interest in making profits." *Id*.

4. The Securities and Exchange Commission ("SEC") has considered adopting rules requiring transparency in political spending for publicly-traded corporations. One example of a petition for rulemaking, from the Committee on Disclosure of Corporate Political Spending, which consists of ten corporate and securities law experts, noted: "a substantial amount of the public-company resources spent on politics are currently not disclosed in any public filing and thus would be hidden even from someone who invested significant effort in trying to put together all the publicly available information about a company's public spending. For example, a substantial amount of corporate spending on politics is conducted through intermediaries not required to disclose the sources of their contributions to the public." Petition for Rulemaking from Comm. on Disclosure of Corp. Political Spending, to Elizabeth M. Murphy, Sec'y, Securities and Exchange Comm'n 8 (Aug. 3, 2011), https://www.sec.gov/rules/petitions/2011/petn4-637.pdf.

5. As was the case with the IRS's proposed rulemaking, Congress in 2015 halted all SEC rulemaking efforts on this issue: "None of the funds made available by any division of this Act shall be used by the Securities and Exchange Commission to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations." Consolidated Appropriations Act, 2016, §707, Pub. L. 114-113, 129 Stat. 2241, 3029 (Dec. 18, 2015).

H. Since *Citizens United*, Congress has repeatedly failed to pass legislation which would clarify the disclosure requirements for political speech—the same disclosure that Justice Kennedy said in *Citizens United* was necessary for democracy.

1. These proposals were included in various versions of the DISCLOSE Act, which among other changes proposed "[r]equir[ing] corporations, labor organizations, tax-exempt charitable organizations, and political organizations other than political committees (covered organizations) to include specified additional information in reports on independent expenditures of at least $10,000, including certain actual or deemed transfers of money to other persons, but excluding amounts paid from separate segregated funds as well as amounts designated for specified campaign-related activities." H.R. 5175, 111th Cong. § 211 (2010). *See also* S. 3295, 111th Cong. (2010); S. 2219, 112th Cong. (2012); S. 3369, 112th Cong. (2012); S. 2516, 113th Cong. (2014); S. 229, 114th Cong. (2015); H.R. 430, 114th Cong. (2015). In July 2017, Senator Sheldon Whitehouse again introduced a version of the bill, which is pending before the Senate Committee on Rules and Administration. S. 1585, 115th Cong. (2017).

2. Similarly, the Shareholder Protection Act has been introduced repeatedly in both houses of Congress since *Citizens United*. If passed, the bill would require corporations to disclose to the SEC their political spending—including by identifying which candidates they supported or opposed—and to alert shareholders and the public to political expenditures over a particular amount, among other reforms. Lisa Rosenberg, *Transparency Provisions in the Shareholder Protection Act Important to Disclose Corporate Political Expenditures*, Sunlight Foundation (June 21, 2011), https://sunlightfoundation.com/2011/06/21/transparency-provisions-in-the-shareholder-protection-act-important-to-disclose-corporate-political-expenditures/. *See also* H.R. 4537, 111th Cong. (2010); H.R. 4790, 111th Cong. (2010); S. 1360, 112th Cong. (2011); H.R. 2517, 112th Cong. (2011); H.R. 1734, 113th Cong. (2013); S. 824, 113th Cong. (2013); S. 214, 114th Cong. (2015); H.R. 446, 114th Cong. (2015); H.R. 376, 115th Cong. (2017); S. 1726, 115th Cong. (2017).

I. Debate over 501(c)(4)s and the gift tax

1. The year following *Citizens United*, the IRS appeared to be starting to enforce gift taxes on contributions to 501(c)(4)s. Stephanie Strom, *I.R.S. Moves to Tax Gifts to Groups Active in Politics*, N.Y. Times (May 12, 2011), http://www.nytimes.com/2011/05/13/business/13gift.html.

2. Republican members of Congress, however, objected to this move. *See, e.g.*, Letter from Senator Orrin G. Hatch et al., to Douglas Shulman, Comm'r, Internal Revenue Serv. (May 18, 2011), https://www.finance.senate.gov/ranking-members-news/senators-to-irs-questions-raised-by-agencys-recent-actions-into-gift-tax-enforcement-concern-about-political-influence.

3. After objections like these, the IRS backed away from its examination of the issue. Stephanie Strom, *I.R.S. Drops Audits of Political Donors*, N.Y. Times (July 7, 2011), http://www.nytimes.com/2011/07/08/business/irs-drops-audits-of-donors-to-political-groups.html

4. In 2015, Congress formally passed a gift tax exemption for contributions to 501(c)(4)s. Consolidated Appropriations Act, 2016, § 408(a), Pub. L. 114-113, 129 Stat. 2241, 3120 (Dec. 18, 2015).

V. <u>Other Avenues for Political Spending not Subject to Donor Disclosure</u>

A. 501(c)(6)s

1. Includes, as laid out in section 501(c)(6), "Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension

fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual." 52 U.S.C. § 501(c)(6)

2. Examples: Chamber of Commerce; Koch Freedom Partners

B. Other 501(c)s

1. Although attention tends to focus on only a small handful of 501(c) subsections, the Internal Revenue Code in fact grants more than 20 categories of groups exempt status.

2. For example, section 501(c)(19) affords exempt status to certain veterans' groups, "at least 75 percent of the members of which are past or present members of the Armed Forces of the United States and substantially all of the other members of which are individuals who are cadets or are spouses, widows, widowers, ancestors, or lineal descendants of past or present members of the Armed Forces of the United States or of cadets." 52 U.S.C. § 501(c)(19)(B).

3. Therefore, in order to be effective, reform measures seeking to require disclosure of the donors of funds used for political spending not only must apply to social welfare nonprofits and trade associations, but they also must apply to all other types of exempt groups that section 501(c) allows (except 501(c)(3)s, which may not conduct campaign activities).

C. LLCs

1. Following *Citizens United*, corporations can now make political contributions to super PACs, which must disclose their donors. However, some donors have sought to avoid disclosure by making a contribution through an LLC.

2. There have been instances in which individuals either (1) set up an LLC for the exclusive purpose of making a political donation or (2) use an existing LLC to make a political donation.

3. The most noteworthy recent case was that of Edward Conard, who created an LLC in order to mask his identity and give $1 million to the Romney super PAC in 2012. *See generally* Dan Eggen, *Mystery pro-Romney donor revealed as a former employee at hedge fund firm*, Wash. Post (Aug. 6, 2011), https://www.washingtonpost.com/politics/mystery-pro-romney-donor-revealed-as-a-former-employee-at-hedge-fund-firm/2011/08/06/gIQArcMlyI_story.html.

4. The Campaign Legal Center filed a complaint with the FEC, alleging violation of FECA's straw donor prohibition in this instance and in several other instances of LLC donations. *See* Complaint, Federal Election Comm'n, MUR 6485 (Aug. 5, 2011).

a) The FEC deadlocked 3-3 on the issue of whether there was sufficient notice following *Citizens United* to bring enforcement actions. The FEC also deadlocked on a prospective standard and whether the law requires intent. *See* Statement of Reasons of Chairman Petersen and Commissioners Hunter and Goodman, Federal Election Comm'n, MURs 6485, 6487, 6488, 6711, 6930 (Apr. 1, 2016); Statement of Reasons of Vice Chairman Walther and Commissioners Ravel and Weintraub, Federal Election Comm'n, MURs 6485, 6487, 6488, 6711, 6930 (Apr. 1, 2016).

b) Notwithstanding the deadlock, the three Commissioners voting against enforcement in these instances nonetheless expressed a willingness to enforce the straw donor ban against LLCs in the future, albeit under a lenient standard:

> "[W]hen enforcing [FECA's straw donor prohibition] in similar future matters, the proper focus will be on whether funds were intentionally funneled through a closely held corporation or corporate LLC for the purpose of making a contribution that evades the Act's reporting requirements." Statement of Reasons of Chairman Petersen and Commissioners Hunter and Goodman, Federal Election Comm'n, MURs 6485, 6487, 6488, 6711, 6930, at 12 (Apr. 1, 2016).

VI. The Significance of Dark Money Spending in the Wake of *Citizens United*

A. Since *Citizens United*, dark money groups like 501(c)(4) and 501(c)(6) groups have spent hundreds of millions of dollars in our elections.

B. However, these figures omit a great deal of political spending that is able to go unreported, including spending on electoral ads that do not qualify as express advocacy or electioneering communications.

C. Dark money can also hide from voters' view donors who may have particular self-interests in the particular outcome of an election, donors engaged in pay-for-play, and even foreign entities seeking influence in our elections.

VII. Making the Problem Worse: Proposals to Allow Political Spending by 501(c)(3) Charities

A. In 1917, Congress first created a tax deduction for charitable contributions. War Revenue Act, § 1201(2), Pub. L. 65-50, 40 Stat. 300, 330 (Oct. 3, 1917). Today, the tax code permits the following organizations to qualify as charities:

> "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does 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." 52 U.S.C. § 501(c)(3).

B. The charitable political activities prohibition

1. Unlike 501(c)(4) or 501(c)(6) entities, a 501(c)(3) charity cannot "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." *Id*. The charitable political activities prohibition is often referred to as the "Johnson Amendment."

2. Enacted in 1954 after then-Senator Lyndon B. Johnson proposed it and President Eisenhower signed it, the Johnson Amendment has been continually recognized as an important restriction on these groups that the tax code subsidizes. Indeed, both Congress and the Courts have strengthened since it was first passed. A D.C. District Court in 1999, for example, upheld the provision and emphasized that "[t]he government has a compelling interest in maintaining the integrity of the tax system and in not subsidizing partisan political activity, and Section 501(c)(3) is the least restrictive means of accomplishing that purpose." *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15, 25–26 (D.D.C. 1999), *aff'd*, 211 F.3d 137 (D.C. Cir. 2000).

3. As the Supreme Court has noted, the tax benefits offered to 501(c)(3)s and their donors operate as a form of subsidy administered through the tax system: "A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983).

4. However, the Trump administration has expressed an interest in rolling back this important prohibition. If the charitable activities prohibition were entirely repealed, not only would it create new avenues for dark money, but it also would make contributions for secretive political spending tax-deductible.

5. In an October 6, 2017 memo circulated to executive departments and agencies, Attorney General Jeff Sessions announced that the IRS "may not enforce the Johnson Amendment-which prohibits 501(c)(3) non-profit organizations from intervening in a political campaign on behalf of a candidate-against a religious non-profit organization under circumstances in which it would not enforce the amendment against a secular non-profit organization." Memorandum from Attorney General Jeff Sessions, *Federal Law Protections for Religious Liberty* 3 (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001891/download.

6. On November 2, 2017, Republican members of Congress announced a partial rollback of the Johnson Amendment as part of their tax bill. If passed, the bill would allow "any homily, sermon, teaching, dialectic, or other presentation made during religious services or gatherings" to include political activity—provided they occur in "the ordinary course of the organization's regular and customary activities" and "incu[r] not more than de minimis incremental expenses" for the organization. H.R. 1, 115th Cong. § 5201(a) (2017), https://waysandmeansforms.house.gov/uploadedfiles/bill_text.pdf. Although not a full repeal of the prohibition on political activity, this change would allow special interests to donate to houses of worship that endorse particular candidates.