

Nonprofits: Are You at Risk of Losing Your Tax-Exempt Status?

Gina M. Lavarda

ABSTRACT: In 2004, the Internal Revenue Service (“IRS”) studied 110 § 501(c)(3) organizations and found that seventy-five percent of them had violated federal tax law by engaging in political-campaign activities during the 2004 campaign period. The IRS learned that many of these organizations did not understand the broad scope of the political-campaign prohibition and that organizations’ leaders mistakenly spoke on behalf of their organizations rather than in their personal capacities separate from their organizations. Following the study, the IRS stated that any § 501(c)(3) organization that did not comply with federal tax law’s statutory requirements and restrictions risked losing its tax-exempt status.

As the 2008 campaign was in full swing, the IRS promised to step up its enforcement of § 501(c)(3) requirements. As a result, courts likely will face increased litigation related to § 501(c)(3) organization violations. This Note reviews the requirements and restrictions that are placed on § 501(c)(3) organizations, including the political-campaign prohibition. In addition, this Note proposes a test to assist courts, § 501(c)(3) organizations, and leaders of § 501(c)(3) organizations in determining when organizations’ leaders are acting or speaking on behalf of their organizations and when they are speaking in their personal capacities, exercising their First Amendment free-speech rights.

I. INTRODUCTION.....	1475
II. BACKGROUND: BASIC DEFINITION OF A § 501(C)(3) ORGANIZATION ..	1478
III. STATUTORY AND CASE-LAW REQUIREMENTS AND PACI’S FINDINGS	1479
A. STATUTORY REQUIREMENTS PLACED ON § 501(C)(3) ORGANIZATIONS.....	1479
1. Organize and Operate for a Purpose that Qualifies for Tax-Exempt Status	1479
a. Organizational Test	1480
b. Operational Test	1481

2. Status as a Nonprofit Organization.....	1481
3. Participation in Political Campaigns.....	1482
4. Lobbying Activities.....	1485
B. CASE-LAW REQUIREMENTS PLACED ON § 501(C)(3) ORGANIZATIONS.....	1487
C. POLITICAL ACTIVITY COMPLIANCE INITIATIVE.....	1487
IV. THE ABSOLUTE PROHIBITION ON POLITICAL CAMPAIGNING IS CONSTITUTIONAL	1489
V. SANCTIONS FOR ANY STATUTORY OR CASE-LAW REQUIREMENT VIOLATION.....	1491
VI. EXAMPLES OF BLURRING THE LINES BETWEEN INDIVIDUAL AND ORGANIZATIONAL CAMPAIGNING FOR THE PURPOSE OF THE CAMPAIGN PROHIBITION	1491
VII. PROPOSED TEST TO HELP CLARIFY WHEN A LEADER IS ACTING IN THE INDIVIDUAL CAPACITY.....	1492
A. THREE-PRONG TEST	1493
B. FURTHER OBSERVATIONS: POSSIBLE INSULATION FOR ORGANIZATIONS AND THEIR LEADERS.....	1494
C. TEST LIMITATIONS.....	1494
VIII. CONCLUSION	1495

I. INTRODUCTION

Throughout the 2008 presidential election, the media coverage focused on prohibited political-campaign activity by nonprofit organizations.¹ For example, various sources accused the United Church of Christ of engaging in prohibited political-campaign activity that could jeopardize its § 501(c)(3) tax-exempt status.² In one such instance, the church held a national convention in June of 2007 at which then-Senator Barack Obama mentioned his candidacy for President and his platform in front of 10,000 church members and at which volunteers promoted Obama's campaign by staffing campaign tables directly outside the convention complex.³ In other instances, the church's Reverend Jeremiah Wright Jr., Obama's widely publicized former pastor and spiritual mentor, delivered fiery sermons from his church pulpit in which he compared Obama to Jesus Christ and criticized Obama's election opponents.⁴ The IRS determined that, even though the church and its leaders may have appeared to endorse Obama's candidacy through political-advocacy speech, the church did not run afoul of federal tax law and would not lose its § 501(c)(3) tax-exempt status.⁵

Federal tax law strictly prohibits § 501(c)(3) organizations from engaging in political-campaign activity.⁶ Nonprofit organizations risk losing

1. See, e.g., Laurie Goodstein, *Ministers to Defy I.R.S. by Endorsing Candidates*, N.Y. TIMES, Sept. 26, 2008, at A20, available at 2008 WLNR 18286045; Dinesh Ramde, *Protesting Pastors Endorse from Pulpit: Backing Candidates Invites a Legal Fight*, CHI. TRIB., Sept. 29, 2008, at 10, available at 2008 WLNR 18465000; Jacqueline L. Salmon, *IRS Investigating Obama's Church*, WASH. POST, Feb. 26, 2008, available at http://voices.washingtonpost.com/44/2008/02/26/irs_investigating_obamas_churc_2.html; Suzanne Sataline, *Obama Pastors' Sermons May Violate Tax Laws: Famous Parishioner Disavows Himself from Partisan Tilt*, WALL ST. J., Mar. 10, 2008, available at <http://online.wsj.com/article/SB120511457633523621.html>; Paul Vitello, *Pastors' Web Electioneering Attracts U.S. Reviews of Tax Exemptions*, N.Y. TIMES, Sept. 3, 2008, at B1, available at 2008 WLNR 16626212.

2. See Attila Berry, *Taxing Speech*, LEGAL TIMES, Mar. 10, 2008, at 4; Press Release, Americans United for Separation of Church and State, IRS Investigation of United Church of Christ Will Be Closely Watched, Says Americans United (Feb. 27, 2008), available at <http://www.au.org/media/pressreleases/archives/2008/02/irs-investigatio.html>.

3. Letter from Marsha A. Ramirez, Director of Exempt Organizations Examinations, to United Church of Christ (Feb. 20, 2008), available at <http://www.ucc.org/news/pdf/1ettrirs.pdf>.

4. Jeff Goldblatt, *Obama's Spiritual Mentor May Put Church in Hot Water*, FOX NEWS.COM, Mar. 12, 2008, <http://www.foxnews.com/politics/elections/2008/03/12/obamas-controversial-pastor-puts-church-in-hot-water/>.

5. Letter from Marsha A. Ramirez to United Church of Christ, *supra* note 3 ("We have determined that the activity . . . did not constitute an intervention or participation in a political campaign . . . and that the United Church of Christ continues to qualify as an organization described in section 501(c)(3)."); A. Adams, *IRS Drops Investigations of United Church of Christ and First Southern Baptist*, OMB WATCH, May 28, 2008, <http://www.ombwatch.org/node/3698> (explaining the IRS letter).

6. 26 U.S.C. § 501(c)(3) (2006). The statute states:

their tax-exempt status or subjecting themselves to a penalty tax if they campaign in violation of this restriction.⁷ Complicating this issue is the difficulty nonprofit organizations have in attempting to classify political-campaign activity and specifically whether the actions of individual organizational leaders should be attributed to the organization for the purposes of determining whether the organization has violated the political-campaign prohibition.⁸

Complaints of overreaching by § 501(c)(3) organizations are not new. During the 2004 presidential campaign period, for example, numerous watchdog groups wrote letters to the IRS accusing various § 501(c)(3) organizations of participating in political-campaign activity.⁹ In response to these allegations, the IRS organized The Political Activity Compliance Initiative (“PACI”) to investigate allegations of political-campaign activity by § 501(c)(3) organizations.¹⁰ The IRS found that seventy-five percent of the

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.

Id. (emphasis added).

7. See, e.g., *United States v. Christian Echoes Nat’l Ministry, Inc.*, 404 U.S. 561, 561–62 (1972) (per curiam) (stating that the IRS revoked a § 501(c)(3) organization’s tax-exempt status for “interven[ing] in political campaigns on behalf of candidates for public office”); *Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C. Cir. 2000) (concluding that the IRS has statutory authority to revoke a § 501(c)(3) organization’s tax-exempt status for failing to comply with campaign restrictions); *Branch Ministries, Inc. v. Richardson*, 970 F. Supp. 11, 16–17 (D.D.C. 1997) (listing different instances in which the IRS took action against § 501(c)(3) organizations for possibly violating political-campaign prohibitions).

8. See IRS, FINAL REPORT: PROJECT 302, POLITICAL ACTIVITIES COMPLIANCE INITIATIVE 1–2 (2006) [hereinafter PROJECT 302], available at http://www.irs.gov/pub/irs-tege/final_paci_report.pdf (listing political-campaign prohibition challenges).

9. Letter from Citizens for Responsibility and Ethics in Washington to Mark W. Everson, Commissioner, IRS (Nov. 28, 2005) [hereinafter CREW Letter], available at <http://citizensforethics.org/files/DobsonComplaintandattachments.pdf>; Frameshop, http://jeffreyfeldman.typepad.com/frameshop/2007/02/frameshop_donah.html (Feb. 8, 2007, 9:16 EST); see also Stephen H. King, ‘Political Correctness’ for Section 501(c)(3) Organizations, 18 TAX’N OF EXEMPTS 75, 75–76 (2006) (commenting that “[p]olitical campaign intervention was a particularly hot topic during the 2004 presidential election, with accusations from various sources of misuse of charitable organizations for campaign fundraising [and] deliberate targeting of churches for campaign activity”).

10. PROJECT 302, *supra* note 8, at 1.

organizations investigated had been violating the campaign prohibition.¹¹ Interestingly, however, these violations were often innocent. In fact, many of the infringing organizations did not understand that the Internal Revenue Code (“IRC”) defines the political-campaign prohibition broadly and that it includes more than a mere prohibition on expressly endorsing or opposing political candidates.¹²

Through PACI, the IRS learned that it needed to educate § 501(c)(3) organizations on the broad scope of the prohibition against political campaigning.¹³ This Note seeks to assist in educating organizations by clarifying the specific requirements and broad restrictions that federal tax law imposes on § 501(c)(3) organizations. Instead of focusing on the entire range of prohibited conduct however, this Note specifically seeks to define more clearly the political-campaign prohibition and how that prohibition interacts with the actions of organizational leaders. This is because one of the problems that PACI identified was that leaders of nonprofit organizations sometimes spoke on behalf of their organizations rather than as individuals, who are protected when exercising their First Amendment right to free speech.¹⁴ Because of this particular problem, this Note proposes a test to assist courts and organizations in determining whether the leaders of an organization are acting or speaking as individuals or as representatives of their organization, or in other words, whether the organization is violating the restrictions that its tax-exempt status places on its activity by way of its organizational leaders.

Prior to developing this test, however, Part II of this Note provides background information about § 501(c)(3) organizations to help place the ultimate test in context.¹⁵ Part III reviews the statutory and case-law requirements that organizations must satisfy to qualify for tax-exempt status.¹⁶ It also reviews the findings of PACI, which the IRS organized and conducted to address and study political-campaign violations by § 501(c)(3) organizations.¹⁷ Next, Part IV discusses the apposite case law upholding the prohibition on political campaigning as constitutional and clarifies that Congress wrote the provision as an *absolute* prohibition on political campaigning and not as a *substantial* prohibition on political campaigning.¹⁸ Part V discusses the sanctions the IRS or courts may impose against tax-exempt organizations that violate any of the discussed statutory or case-law

11. IRS, 2004 POLITICAL ACTIVITY COMPLIANCE INITIATIVE (PACI): SUMMARY OF RESULTS 1 (2006), available at http://www.irs.gov/pub/irs-tege/one_page_statistics.pdf.

12. PROJECT 302, *supra* note 8, at 16, 21–22.

13. *Id.* at 15, 23, 26.

14. *Id.* at 16–17 (providing examples of ambiguous conduct).

15. *Infra* Part II.

16. *Infra* Parts III.A–B.

17. *See infra* Part III.C.

18. *Infra* Part IV.

requirements or restrictions.¹⁹ Part VI examines the problems that § 501(c)(3) organizational leaders face by highlighting two examples in the media of when an organization's leader violated the political-campaign prohibition.²⁰

In light of the problems highlighted in this Note, Part VII proposes a test to help courts determine whether organizations' leaders are speaking on behalf of their organizations or individually exercising their personal rights to free speech.²¹ Not only will this test allow courts to properly adjudicate whether an organization should have its tax-exempt status revoked, but with proper application of this test, organizations' leaders will be more informed about how to exercise their constitutional rights to free speech without causing their § 501(c)(3) organizations to lose their tax-exempt status. In essence, it will provide organizations with a guideline by which their leaders are able to engage in public life without placing their organizations at risk.

II. BACKGROUND: BASIC DEFINITION OF A § 501(C)(3) ORGANIZATION

In 2006, 1,064,191 organizations classified themselves as § 501(c)(3) organizations.²² Although § 501(c)(3) organizations are often charitable organizations,²³ they may also be educational institutions, churches, or other nonprofit organizations.²⁴ The factor that distinguishes § 501(c)(3) organizations from other organizations is that § 501(c)(3) organizations are organized and operated primarily for a purpose that qualifies for tax-exempt status under § 501(c)(3).²⁵

19. See *infra* Part V.

20. See *infra* Part VI.

21. See *infra* Part VII.

22. See IRS, INTERNAL REVENUE SERVICE DATA BOOK 56 (2006), available at <http://ftp.irs.gov/pub/irs-soi/06databkrevised.pdf> (providing a statistical table listing total number of registered nonprofit organizations). The actual number of nonprofit organizations could be higher. Churches that meet the requirements of § 501(c)(3) are automatically tax-exempt, and the statute does not require them to apply for that status. See IRS, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 3 (2008) [hereinafter TAX GUIDE], available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf> (explaining there are more tax-exempt organizations than only those that have applied to the IRS). Even though it is not necessary to submit an application, many churches apply to assure church leaders, members, and contributors that the IRS recognizes their tax benefits. *Id.*

23. See IRS, Exemption Requirements, <http://www.irs.gov/charities/charitable/article/0,,id=96099,00.html> (last visited May 13, 2009) (noting that § 501(c)(3) organizations are sometimes called charitable organizations).

24. See IRS, Fact Sheet 2004-14 (Oct. 29, 2004), <http://www.irs.gov/newsroom/article/0,,id=130652,00.html> [hereinafter 2004-14 Fact Sheet] (explaining that § 501(c)(3) is not limited only to charities).

25. *Infra* Part III.A.1.

Organizations seek § 501(c)(3) status for two reasons. First, § 501(c)(3) organizations are exempt from federal income taxes.²⁶ Second, pursuant to 26 U.S.C. § 170(a)(1), taxpayer contributions to § 501(c)(3) organizations are tax deductible on the taxpayer's federal income-tax return.²⁷ These advantages result in more revenue-raising opportunities for § 501(c)(3) organizations than would otherwise exist.

III. STATUTORY AND CASE-LAW REQUIREMENTS AND PACI'S FINDINGS

To qualify for tax-exempt status, an organization must satisfy four conditions under § 501(c)(3) and two conditions created by case law.²⁸ In 2004, the IRS studied § 501(c)(3) organizations that had been accused of violating the third statutory condition, the political-campaign prohibition, and learned that many of those organizations underestimated the breadth of that condition.

A. STATUTORY REQUIREMENTS PLACED ON § 501(C)(3) ORGANIZATIONS

1. Organize and Operate for a Purpose that Qualifies for Tax-Exempt Status

First, an organization must organize itself and operate "exclusively" for a tax-exempt purpose that is enumerated in § 501(c)(3) of the IRC.²⁹ Treasury regulations provide that "exclusively" in this statute means "primarily" or "substantially."³⁰ Section 501(c)(3) and the Treasury regulations lay out the purposes that qualify for tax-exempt status, including activities that are "for religious, charitable, scientific, literary, or educational purposes, . . . or for the prevention of cruelty to children or animals."³¹

26. 26 U.S.C. §§ 501(a), (c) (2006); Fund for the Study of Econ. Growth & Tax Reform v. IRS, 161 F.3d 755, 756 n.2 (D.C. Cir. 1998).

27. § 170(a)(1); *Tax Reform*, 161 F.3d at 756 n.2; *Addis v. Comm'r*, 374 F.3d 881, 882 (9th Cir. 2004).

28. *See* *Am. Campaign Acad. v. Comm'r*, 92 T.C. 1053, 1061–62 (1989) (listing criteria that are necessary for an organization to qualify for § 501(c)(3) status). Congress imposed these four criteria for a specific public-policy reason; Congress does not want tax-exempt organizations using "tax-deductible contributions to lobby to promote the private [and political] interests of their members." *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550 (1983). *See also* *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 854 (10th Cir. 1973) (stating that the U.S. "Treasury should be neutral in political affairs and . . . substantial activities directed to attempts to influence legislation or affect a political campaign should not be subsidized" (emphasis omitted)).

29. *Treas. Reg.* § 1.501(c)(3)-1(a) (2008).

30. *See id.* § 1.501(c)(3)-1(c)(1) (explaining that the statute does not use "exclusively" in the same way our society uses it).

31. 26 U.S.C. § 501(c)(3); *Treas. Reg.* § 1.501(c)(3)-1(d)(1)(i) (including "[t]esting for public safety" as a qualifying purpose); *see* BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 85–90 (9th ed. 2007) (listing permissible purposes that qualify for tax-exempt status).

Therefore, to acquire and maintain tax-exempt status, an organization must organize itself and operate at least primarily or substantially for any purpose that qualifies under § 501(c)(3).³²

The Treasury regulations provide an organizational test and an operational test to determine whether an organization organizes itself and operates substantially for a tax-exempt purpose.³³ An organization must satisfy both tests to qualify as tax-exempt.³⁴

a. Organizational Test

The organizational test examines the organization's purpose as stated in the organization's founding document.³⁵ To satisfy the organizational test, the founding document must state: (1) the purposes of the organization that comport with one or more purposes enumerated in § 501(c)(3);³⁶ (2) that the organization will perform activities in furtherance of these purposes, and any activities not in furtherance of these purposes will be to an insubstantial degree;³⁷ and (3) that it will dedicate the organization's assets for tax-exempt uses when the organization terminates.³⁸ The founding document fails the organizational test if the document states that the organization will: (1) lobby, except to an insubstantial degree,³⁹ (2) participate in a political campaign,⁴⁰ or (3) engage in political-campaign activities.⁴¹

32. See *New Dynamics Found. v. United States*, 70 Fed. Cl. 782, 799 (2006) ("It is well-settled that an 'incidental non-exempt purpose will not disqualify an organization, but a single substantial non-exempt purpose or activity will destroy the exemption.'" (quoting *Airlie Found. v. United States*, 826 F. Supp. 537, 549 (D.D.C. 1993))).

33. See *Treas. Reg. §§ 1.501(c)(3)-1(a)(1), -1(b)-(c)* (explaining the organizational and operational tests).

34. *Id.* § 1.501(c)(3)-1(a)(1); *Church of Scientology of Cal. v. Comm'r*, 823 F.2d 1310, 1315 (9th Cir. 1987).

35. *Treas. Reg. § 1.501(c)(3)-1(b)*. The founding documents are the documents that declare the organization's legal existence, such as the organization's articles of incorporation, trust instrument, corporate charter, or articles of association. *Id.* § 1.501(c)(3)-1(b)(2).

36. *Id.* § 1.501(c)(3)-1(b)(1)(ii).

37. *Id.* § 1.501(c)(3)-1(b)(1)(iii).

38. *Id.* § 1.501(c)(3)-1(b)(4).

39. See *Treas. Reg. § 1.501(c)(3)-1(b)(3)* (describing limited circumstances in which the Treasury regulation allows a § 501(c)(3) organization to engage in lobbying); *Am. Campaign Acad. v. Comm'r*, 92 T.C. 1053, 1062 (1989) (stating that § 501(c)(3) does not permit lobbying except to an insubstantial degree).

40. *Treas. Reg. § 1.501(c)(3)-1(b)(3)(ii)*.

41. *Id.* §§ 1.501(c)(3)-1(b), -1(c)(3) (stating that an organization is engaged in political-campaign activities if it attempts to influence legislation, participates directly or indirectly in a political campaign, or if its primary objectives can be obtained only by legislation or the defeat of legislation and it advocates or campaigns for the legislation).

b. *Operational Test*

While the organizational test looks only at the organization's founding document, the operational test examines the actual purposes of the organization, looking at its activities in practice and day-to-day functioning.⁴² An organization satisfies the operational test when it operates primarily or substantially for at least one purpose qualifying under § 501(c)(3), serves a public purpose, and benefits the public.⁴³ An organization will not satisfy the operational test if it "inures" any portion of the organization's net earnings "to the benefit of private shareholders or individuals,"⁴⁴ participates in political campaigns, or spends a substantial part of its resources attempting to influence legislation.⁴⁵ Any organization that operates substantially to benefit a private interest rather than a public interest or that carries on substantial commercial activities unrelated to its exempt purposes will fail the operational test.⁴⁶

2. Status as a Nonprofit Organization

The second criterion an organization must satisfy to qualify for § 501(c)(3) status is that it must be a nonprofit organization.⁴⁷ Whether an organization is for-profit or nonprofit depends on how the organization distributes its profits.⁴⁸ A for-profit organization distributes its profits to the organization's owners or shareholders.⁴⁹ Conversely, a nonprofit organization keeps its profits within the organization to further its activities and to benefit society.⁵⁰ Nonprofit organizations must not pay dividends, pay unreasonably high or excessive compensation to insiders, or transfer property to insiders for less than fair market value.⁵¹ In addition, a § 501(c)(3) organization must not provide a substantial benefit to the private interests of any individual or other organization.⁵²

42. *New Dynamics Found. v. United States*, 70 Fed. Cl. 782, 800 (2006).

43. *Church of Scientology of Cal. v. Comm'r*, 823 F.2d 1310, 1315 (9th Cir. 1987).

44. *See id.* at 1315–16 (internal quotations omitted) ("The sole beneficiary of the church's activities must be the public at large."). Reasonable salaries, but not excessive salaries, are permitted under this element. *Id.*

45. *Id.* at 1315.

46. *See* NICHOLAS P. CAFARDI & JACLYN FABEAN CHERRY, *UNDERSTANDING NONPROFIT AND TAX EXEMPT ORGANIZATIONS* 68–69 (2006) (discussing the operational test in IRS enforcement).

47. *Id.* at 2–3.

48. *See id.* (explaining the principal difference between for-profit and nonprofit organizations).

49. *See id.* at 3 (explaining the inurement doctrine).

50. *Id.*; *see also* HOPKINS, *supra* note 31, at 4–5 (noting that for-profit organizations inure private earnings while nonprofit organizations do not).

51. *See* TAX GUIDE, *supra* note 22, at 5.

52. *Id.*

3. Participation in Political Campaigns

The third criterion prohibits the organization from engaging in electioneering.⁵³ The term electioneering means “participation in a political campaign for elective office.”⁵⁴ Section 501(c)(3) organizations should understand that the IRS broadly defines this political-campaign prohibition.⁵⁵ The IRS has taken steps to inform organizations of this broad scope and put them on notice of its enforcement program by issuing advisories to charities, sending letters to political parties,⁵⁶ and posting on its website resources and other training material.⁵⁷

In every presidential election year since 1992, the IRS has issued news releases reminding § 501(c)(3) organizations that they “are prohibited from directly or indirectly participating or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office.”⁵⁸ Some organizations have misinterpreted this rule to mean only that they were prohibited from expressly endorsing or opposing a candidate, working on behalf of a candidate, or campaigning against a candidate.⁵⁹ In fact, the prohibition means much more. Any indirect or nonverbal endorsement that conveys a clear message for or against a candidate is a form of prohibited campaigning.⁶⁰

For example, the political-campaign prohibition includes, but is not limited to, the following: distributing statements or handouts that favor or disfavor a specific candidate, distributing biased voter guides or candidate

53. H.R. REP. NO. 91-413 (1969), as reprinted in 1969 U.S.C.C.A.N. 1645; see also S. REP. NO. 91-552, at 47 (1969), as reprinted in 1969 U.S.C.C.A.N. 2027 (noting that § 501(c)(3) permits a § 501(c)(3) organization some degree of influencing legislation, but prohibits any degree of support to an individual’s candidacy).

54. See CAFARDI & CHERRY, *supra* note 46, at 74.

55. See *Christian Echoes Nat’l Ministry, Inc., v. United States*, 470 F.2d 849, 856 (10th Cir. 1972) (explaining that campaigning is broader than many churches understand it to be).

56. 2004-14 Fact Sheet, *supra* note 24.

57. See IRS, Political Campaign Intervention by 501(c)(3) Tax-Exempt Organizations—Educating Exempt Organizations, <http://www.irs.gov/charities/charitable/article/0,,id=179750,00.html> (last visited Apr. 21, 2009).

58. I.R.S. News Release IR-2004-79 (June 10, 2004) [hereinafter I.R.S. News Release IR-2004-79], available at <http://www.irs.gov/newsroom/article/0,,id=123922,00.html>; I.R.S. News Release IR-2008-61 (Apr. 17, 2008), available at <http://www.irs.gov/newsroom/article/0,,id=181570,00.html> [hereinafter I.R.S. News Release IR-2008-61]; Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 [hereinafter Rev. Rul. 2007-41], available at <http://www.irs.gov/pub/irs-tege/rr2007-41.pdf>. The IRS issued its latest news release to educate § 501(c)(3) organizations about federal tax law, explain PACI’s objectives, and help those organizations comply with the law. I.R.S. News Release IR-2008-61, *supra*.

59. See PROJECT 302, *supra* note 8, at 21–22 (correcting many organizations’ misunderstanding of the term “campaign”); CAFARDI & CHERRY, *supra* note 46, at 74 (giving examples of electioneering).

60. See PROJECT 302, *supra* note 8, at 21–22 (stating that a clear message without mentioning the candidate’s name is enough to illegally endorse a candidate).

ratings, posting campaign signs on a § 501(c)(3) organization's property, endorsing candidates on a § 501(c)(3) organization's website or through links on that website, fundraising for or making a political contribution or donation to a candidate's campaign, allowing a non-candidate to endorse a candidate during a § 501(c)(3) organization's function, engaging in voter registration and education activities that favor one candidate over another, and allowing a candidate to use a § 501(c)(3) organization's facilities or assets for a political-campaign intervention.⁶¹ A court will consider all the facts and circumstances to determine whether an organization has engaged in prohibited political-campaign activity.⁶²

Under certain circumstances, for example, a political candidate may speak at an organization's event, in an individual capacity, regarding his or her personal experiences.⁶³ For example, after an investigation, the IRS learned that when the United Church of Christ invited then-Senator Barack Obama to speak at its national meeting in June of 2007, it invited him in his individual capacity and not as a candidate.⁶⁴ The church issued its invitation in May of 2006, before Obama had announced his candidacy for president.⁶⁵ Moreover, the church invited him to speak solely on how his personal faith intersected with his public life.⁶⁶ Before Obama spoke, the church clarified to its 10,000 church attendees that Obama was speaking as a member of the church and not as a candidate for office, and therefore it would not allow leaflets or other signs of political support at the meeting.⁶⁷ Finally, the church did not authorize the nearby campaign activity, which occurred on public property and outside the church's control.⁶⁸ The IRS concluded from these findings that the United Church of Christ continues to qualify as a § 501(c)(3) organization, despite the fact that Obama mentioned his candidacy against the church's instructions.⁶⁹

61. 2004-14 Fact Sheet, *supra* note 24.

62. I.R.S. News Release IR-2004-59 (Apr. 28, 2004) [hereinafter I.R.S. News Release IR-2004-59], available at <http://www.irs.gov/newsroom/article/0,,id=122887,00.html>; see also Rev. Rul. 78-248, 1978-1 C.B. 154 (noting that the IRS and courts do not have a bright-line test).

63. Amy R. Murphy, *Political Activity Prohibition: Revisiting Restrictions on Politicking from the Pulpit*, 16 TAX'N OF EXEMPTS 228, 232 (2005), available at 2005 WL 859250. The political candidate must be invited to speak only in a non-candidate capacity, representatives of the organization must not make any mention of the election, and campaign activity must not occur. *Id.*

64. Letter from Marsha A. Ramirez to United Church of Christ, *supra* note 5.

65. *Id.*

66. *Id.*

67. *Id.*; IRS Investigating Obama's United Church of Christ: Says Reason to Believe Speech Violated Restrictions on Political Activity by Non-Profit Groups, WCBSTV.COM, Feb. 26, 2008, available at <http://wcbstv.com/campaign08/barackobama.irs.2.663504.html>.

68. Letter from Marsha A. Ramirez to United Church of Christ, *supra* note 5.

69. *Id.*

The candidate may speak at the event about political-campaign issues, however, if the organization (1) provides equivalent opportunities to other candidates seeking the same office and the event is conducted on a nonpartisan basis; (2) explicitly states in its introduction that it does not support or oppose any candidate; and (3) does not politically fundraise at or for the event.⁷⁰ Similarly, § 501(c)(3) does not permit a candidate to use a tax-exempt organization's office for a phone bank, unless it is done in a nonpartisan manner.⁷¹ Thus, an organization's forum that seeks to educate and inform voters and treats the candidates fairly and impartially would be permissible and its actions would not constitute participation in a political campaign.⁷² The organization must not mention or show evidence of supporting or opposing a candidate, such as asking biased questions to one candidate while favoring another candidate, or reminding only individuals who support a particular political party to vote.⁷³

To protect their organizations from violating § 501(c)(3) and losing their tax-exempt status, leaders of § 501(c)(3) organizations should not expressly endorse or oppose candidates on behalf of their organizations.⁷⁴ However, leaders of a § 501(c)(3) organization may engage in political-campaign activity when they are not acting on behalf of their organization and are acting in their individual capacity.⁷⁵ Although the IRS has not defined "leader," this Note presupposes that a § 501(c)(3) organizational leader is any person representing that organization, including, but not limited to, a president, board member, officer, director, employee, staff member, or volunteer.⁷⁶ Section 501(c)(3) organizational leaders also should refrain from publishing or broadcasting an attack on or a statement

70. IRS, Fact Sheet 2006-17 (Feb. 2006), <http://www.irs.gov/newsroom/article/0,,id=154712,00.html> [hereinafter 2006-17 Fact Sheet].

71. *Id.*

72. Rev. Rul. 2007-41, *supra* note 58.

73. See Harvey et al., *Political Campaign Intervention: IRS Clarifies Rules on What 501(c)(3) Organizations Can Do*, 21 NON-PROFIT TIMES, Oct. 1, 2007, available at 2007 WLNR 20430484 (warning that organizations must be very careful in renting their facilities for political purposes and very careful during events that what they say is nonpartisan to avoid losing their tax-exempt status).

74. See IRS, 2006 POLITICAL ACTIVITIES COMPLIANCE INITIATIVE 4 (2007) [hereinafter PACI Report], available at http://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf (listing examples of prohibited advocacy).

75. Alliance for Justice, Election Activities of Individuals Associated with 501(c)(3) Organizations, [http://www.austincc.edu/npo/resources/docs/Election%20Activities%20of%20Individuals%20Associated%20with%20501\(c\)\(3\).pdf](http://www.austincc.edu/npo/resources/docs/Election%20Activities%20of%20Individuals%20Associated%20with%20501(c)(3).pdf) (last visited May 12, 2009); Margo Rutledge Kissell, *Clergy Wrestle with Free Speech Issue in Light of Nonprofit Rules: Despite IRS Restrictions on Partisan Comments at Official Functions, Some Pastors Took Part in "Pulpit Initiative,"* DAYTON DAILY NEWS, Nov. 2, 2008, at A6, available at 2008 WLNR 21152498 (contrasting an Obama sign in a pastor's yard with an Obama sign in a church's yard).

76. Treas. Reg. § 53.4958-1 defines an "organization manager" as an organization's officer, director, or trustee, or any individual regardless of title having similar powers.

in favor of any specific candidate's political views if someone could interpret the attack or statement as the organization's endorsement of a candidate.⁷⁷ Therefore, a § 501(c)(3) organizational leader may not wear a political button or thank an employee for his or her work in support of a political candidate during an organizational event.⁷⁸

4. Lobbying Activities

The fourth criterion is that a substantial part of the organization's activities must not include lobbying activities.⁷⁹ For the purposes of this criterion, lobbying activity is an activity that attempts to influence legislation.⁸⁰ Legislation in this instance refers to "action by Congress, any state legislature, any local council or similar governing body, or the public by way of referendum, constitutional amendment, or the like. The word action includes the introduction, enactment, defeat, or repeal of legislation."⁸¹ An example of a lobbying activity is contacting or urging the public to contact legislators for the purpose of affecting legislation.⁸²

A court balances an organization's lobbying activity against the organization's overall objectives to determine whether its lobbying activity is a substantial part of its activities.⁸³ If the political activity is an essential part of the organization, or if activity aimed at influencing legislation is more than incidental (i.e., it is substantial and continuous) to the organization's goals, a court would find that the organization participated in substantial political activity.⁸⁴ This finding would cause an organization to lose its tax-exempt status.⁸⁵

77. *Id.*; King, *supra* note 9, at 77; IRS, Influencing Elections and Carrying on Voter Registration Drives, <http://www.irs.gov/charities/foundations/article/0,,id=137391,00.html> (last visited Apr. 8, 2009).

78. Harvey et al., *supra* note 73 ("[I]f an endorsement is made . . . at an organizational meeting, you will find yourself in trouble.").

79. Am. Campaign Acad. v. Comm'r, 92 T.C. 1053, 1062 (1989).

80. See CAFARDI & CHERRY, *supra* note 46, at 2-3 (defining lobbying or political activity).

81. IRS, Influencing Legislation, <http://www.irs.gov/charities/foundations/article/0,,id=137251,00.html> (last visited May 13, 2009) (emphasis omitted). It does not include actions by executive, judicial, or administrative bodies. *Id.*

82. See IRS, PUBLICATION 557, TAX-EXEMPT STATUS FOR YOUR ORGANIZATION 44-45 (2008), available at <http://www.irs.gov/pub/irs-pdf/p557.pdf> (explaining the lobbying rules). The IRS has stated that voter-education meetings, conducted on a nonpartisan basis, are permissible and do not constitute lobbying activities. IRS, Influencing Elections and Carrying on Voter Registration Drives, <http://www.irs.gov/charities/foundations/article/0,,id=137391,00.html> (last visited May 13, 2009).

83. Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 855 (10th Cir. 1972). This is often referred to as the substantial-part test. See IRS, Measuring Lobbying: Substantial Part Test, <http://www.irs.gov/charities/article/0,,id=163393,00.html> (last visited May 13, 2009) (describing how to apply the substantial-part test for this requirement).

84. See *Christian Echoes*, 470 F.2d at 855-57 (providing an example of a substantial-part-test violation); see also *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550 (1983) (holding that a corporation organized and operated solely to advocate its point of view about

Courts apply a broad construction to the limitation on attempts to influence legislation.⁸⁶ In *Christian Echoes National Ministry, Inc. v. United States*, the court agreed with the IRS's finding that Christian Echoes, a religious organization, did not qualify for tax-exempt status under § 501(c)(3).⁸⁷ Christian Echoes argued that a substantial part of its activities did not include lobbying because its only attempt to influence legislation was in its support for a single piece of legislation dedicated to restoring prayers in public schools.⁸⁸ The organization pointed out that it did not attempt to influence legislation through its radio and television broadcasts, publications, campaigns, and meetings, which were motivated by sincere religious convictions, and for the promotion of the community, rather than political reasons.⁸⁹ The court held, however, that a substantial and continuous part of Christian Echoes's activities attempted to influence legislation through appeals to the public to react to certain issues and through an indirect campaign to mold public opinion.⁹⁰ Therefore, an essential part of its organization included promoting desirable governmental policies through legislation, and Christian Echoes did not qualify for tax-exempt status.⁹¹

An organization also does not qualify for tax-exempt status if the IRS classifies it as an "action" organization.⁹² Section 501(h) of the IRC specifies that an organization is an action organization if it must attain its principal objective by passing or defeating proposed legislation and if it advocates or campaigns for that principle objective.⁹³ If a court determines that an organization meets this definition, then the organization may lose its § 501(c)(3) status and tax exemption.⁹⁴

For example, in *Fund for the Study of Economic Growth and Tax Reform v. IRS*, the court found that the fund was an action organization.⁹⁵ The fund

federal taxation in front of the three branches of government was denied tax-exempt status because a substantial part of its activities would consist of attempting to influence legislation).

85. *Christian Echoes*, 470 F.2d at 857.

86. *Id.* at 854–55.

87. *Id.* at 856.

88. *Id.* at 853–55.

89. *Id.*

90. *Christian Echoes*, 470 F.2d at 855–56 (listing that the attempts included encouraging its readers to write to Congress, work in politics, support or oppose legislative amendments, abolish the federal income tax, withdraw from the United Nations, and restore immigration laws).

91. *Id.* at 855–56.

92. 26 U.S.C. § 501(h) (2006); Treas. Reg. § 1.501(c)(3)-1(c)(3) (2008); Rev. Rul. 2007-41, *supra* note 58.

93. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv).

94. *Id.*

95. *Fund for the Study of Econ. Growth & Tax Reform v. IRS*, 161 F.3d 755, 755–56 (D.C. Cir. 1998).

was a charitable trust that had been set up to advocate repealing the tax code and implementing proposed legislation.⁹⁶ The court held that the fund actively engaged in advocating legislation and, therefore, did not qualify for the § 501(c)(3) tax-exemption privilege.⁹⁷

B. CASE-LAW REQUIREMENTS PLACED ON § 501(C)(3) ORGANIZATIONS

In addition to these four statutory requirements specifically listed in § 501(c)(3), courts have held that an organization must satisfy two conditions. First, courts require an organization to disclose all of its records, including its operations and finances, to the public for inspection.⁹⁸ If an individual requests this information and the organization fails to disclose it, courts will infer that the organization does not satisfy the requirements of § 501(c)(3), and the organization will lose its tax-exempt status.⁹⁹ Second, an organization's purposes and activities cannot be illegal or against public policy.¹⁰⁰ If an organization does not meet either of these conditions, the organization will not qualify for or will lose its § 501(c)(3) status.

C. POLITICAL ACTIVITY COMPLIANCE INITIATIVE

Determining whether an organization has met these requirements is difficult. During the 2004 presidential campaign, numerous watchdog groups wrote letters to the IRS accusing § 501(c)(3) organizations of engaging in political-campaign activities.¹⁰¹ These letters reported 166 alleged violations of § 501(c)(3).¹⁰² In response, the IRS organized PACI in 2004 to address these allegations.¹⁰³ The IRS instituted this project to facilitate § 501(c)(3) organizations' understanding of the campaign-prohibition rule.¹⁰⁴ It also hoped that enforcing the campaign prohibition would deter other § 501(c)(3) organizations from illegally campaigning in the future.¹⁰⁵

PACI consisted of 132 cases that were referred to the IRS between July 20, 2004, and November 20, 2004.¹⁰⁶ The IRS closed twenty-two of the 132

96. *Id.* at 756.

97. *Id.* at 759–60.

98. *Nationalist Found. v. Comm'r*, No. 14871-98X, 2000 WL 1507460, at *4 (T.C. Oct. 11, 2000).

99. *Id.*

100. *Bob Jones Univ. v. United States*, 461 U.S. 574, 591–93 (1983) (holding that it was against public policy for a university to be racist and that organizations violating “fundamental public policy” did not qualify for tax-exempt status); TAX GUIDE, *supra* note 22, at 5.

101. *King*, *supra* note 9, at 75 (describing political-campaign intervention as a “hot topic” in 2004).

102. PROJECT 302, *supra* note 8, at 4.

103. *King*, *supra* note 9, at 76–77.

104. *Id.* (explaining the objectives of PACI).

105. *Id.*

106. *Id.* at 77.

cases without examination upon a finding that they did not merit examination.¹⁰⁷ Of the 110 completed examinations, the IRS found that seventy-five percent of the organizations had engaged in some form of prohibited campaign activity.¹⁰⁸ Five of these cases were flagrant enough to warrant revocation of tax-exempt status.¹⁰⁹

The IRS learned from PACI that it needed to enforce the political-campaign prohibition better. To prevent further violations of the political-campaign-prohibition rule, the IRS launched enhanced enforcement efforts for the 2006 presidential campaign period.¹¹⁰ As a result of these efforts, courts likely will see increased litigation concerning § 501(c)(3) organizations violating the statutory political-campaign prohibition.¹¹¹

PACI's report in 2004 recognized at least four challenges to the political-campaign prohibition.¹¹² First, there is no bright-line test for determining what constitutes political campaigning.¹¹³ Instead, courts must balance the facts and circumstances of each case.¹¹⁴ Second, the extent of campaign involvement is not always known or recorded.¹¹⁵ Third, the IRS's list of sanctions is inadequate; it includes assessing de minimis penalties against organizations or revoking organizations' tax-exempt status, which may be contrary to public interest.¹¹⁶ Finally, prohibiting political-campaign activity implicates constitutional rights, including freedom of speech and religious expression.¹¹⁷

107. *Id.*

108. King, *supra* note 9, at 77 (noting that the high percentage of examined organizations that had participated in a prohibited political activity was low when one compares the 110 examined organizations to the more than two million § 501(c)(3) organizations in the United States).

109. *Id.*; IRS, Charities, Churches and Politics, <http://www.irs.gov/newsroom/article/0,,id=161131,00.html> (last visited Apr. 21, 2009). The IRS also issued 69 written advisories and proposed revoking the tax-exempt status for 2 others. *Id.*

110. 2006-17 Fact Sheet, *supra* note 70 ("With the 2006 campaign season approaching, the IRS is launching enhanced education and enforcement efforts, based on the findings and analysis of the 2004 election cycle."). The IRS continued its PACI program in 2006, which is a non-presidential election period, and in 2008, a presidential election period. PACI Report, *supra* note 74, at 1; I.R.S. News Release IR-2008-61 (Apr. 17, 2008), available at <http://www.irs.ustreas.gov/newsroom/article/0,,id=181570,00.html>.

111. King, *supra* note 9, at 79.

112. *Id.* at 76 (listing the project's challenges); PROJECT 302, *supra* note 8, at 1-2 (same).

113. King, *supra* note 9, at 76.

114. *Id.*

115. *Id.*

116. *Id.*; PROJECT 302, *supra* note 8, at 1-2 (discussing the inadequacy of and challenges presented by the list of sanctions available to the IRS).

117. King, *supra* note 9, at 76.

IV. THE ABSOLUTE PROHIBITION ON POLITICAL CAMPAIGNING IS CONSTITUTIONAL

Case law is sparse on the topic of the § 501(c)(3) political-campaign prohibition. Congress did not add the political-campaign-prohibition provision to federal tax law until 1954.¹¹⁸ Until recently, the IRS has only revoked an organization's tax-exempt status when the organization committed a significant or egregious violation.¹¹⁹ It was not until a few days before the 1992 presidential election that the IRS, for the first time, revoked a church's tax-exempt status.¹²⁰ If the IRS launches enhanced enforcement efforts, as it says it will, courts will likely face increased litigation on this topic.¹²¹

Organizations have argued unsuccessfully that the political-campaign prohibition is constitutionally invalid based on the First Amendment (free speech) and the Due Process and Equal Protection Clauses of the Fifth Amendment.¹²² Courts, however, have repeatedly ruled that the political-campaign prohibition is constitutional.¹²³ An unsuccessful constitutional challenge to the campaign prohibition occurred in *Branch Ministries v. Rossotti*.¹²⁴

In *Branch Ministries*, a church lost its tax-exempt status under § 501(c)(3) after it intervened in a political campaign.¹²⁵ Four days before the 1992 presidential election, the church published full-page advertisements in two newspapers.¹²⁶ The newspapers encouraged Christians not to vote for then-governor Bill Clinton because his platform concerning abortion and homosexuality was inconsistent with the Bible.¹²⁷ The advertisements also welcomed contributions by providing the church's name and address and to whom the tax-deductible donations could be

118. HOPKINS, *supra* note 31, at 678. Congress included this federal-tax-law provision in response to Senator Lyndon B. Johnson's concern that a charitable foundation was helping to finance his opponent's campaign in the primary election. *Id.*

119. King, *supra* note 9, at 76.

120. *Id.*

121. *See id.* (suggesting the increased likelihood of future litigation).

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

123. *See, e.g., Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545, 546–47 (1983) (“Congress has not violated [an organization’s] First Amendment rights by declining to subsidize its First Amendment activities.”); *Christian Echoes Nat’l Ministry, Inc. v. United States*, 470 F.2d 849, 855 (10th Cir. 1972) (“The limitations imposed by Congress are constitutionally invalid.”); *Branch Ministries*, 211 F.3d at 139 (arguing that the revocation of the church’s tax-exempt status violated the First and Fifth Amendments and the Religious Freedom Restoration Act).

124. *Id.* at 137.

125. *Id.* at 140–43.

126. *Id.* at 140.

127. *Id.*

made.¹²⁸ As a result, hundreds of contributors from across the country mailed donations to the church.¹²⁹ After the IRS revoked the church's tax-exempt status pursuant to § 501(c)'s political-campaign prohibition, the church sued, claiming that the revocation of its tax-exempt status violated its right to freely exercise its religion under the First Amendment and the Religious Freedom Restoration Act and violated the Equal Protection Clause of the Fifth Amendment.¹³⁰ The court ruled decisively that no constitutional violations occurred because Congress has the prerogative to decline subsidizing First Amendment activities¹³¹ and the plaintiffs failed to make out an equal-protection claim.¹³²

Case law has also clarified that the prohibition on political campaigning is an absolute prohibition. In *Association of the Bar of the City of New York v. Commissioner*, the Second Circuit found that the taxpayer/organization did not qualify for § 501(c)(3) tax-exempt status because the organization rated candidates for appointive and elective judicial office at the municipal, state and federal levels.¹³³ The court held that, even if the organization's political-campaign activities were a minor part of its total activities, the organization violated the campaign-prohibition rule and no longer qualified for tax-exempt status.¹³⁴ This ruling reinforces the statutory rule that, although an organization can lobby if the lobbying is incidental to its goals and objectives, an organization is absolutely barred from campaigning pursuant to the political-campaign prohibition.

128. *Branch Ministries*, 211 F.3d at 140.

129. *Id.*

130. *Id.* at 140–42, 144.

131. *Id.* at 142–44 (“The sole effect of the loss of the tax exemption will be to decrease the amount of money available to the Church for its religious practices . . . [and] such a burden ‘is not constitutionally significant.’” (citing *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391 (1990))); see also *Christian Echoes Nat’l Ministry, Inc. v. United States*, 470 F.2d 849, 856–57 (10th Cir. 1972) (ruling that no constitutional violation occurs when § 501(c)(3) rules are enforced); CAFARDI & CHERRY, *supra* note 46, at 83 (refusing to subsidize a First Amendment activity is not a constitutional violation).

132. *Branch Ministries*, 211 F.3d at 144–46 (“[T]he Church has failed to establish that it was singled out for prosecution from among others who were similarly situated . . .”).

133. *Ass’n of the Bar of New York v. Comm’r*, 858 F.2d 876, 878–79 (2d Cir. 1988) (stating that after it rates a candidate, the association informs, and therefore influences, the voting public through its press releases and regular publications).

134. See *id.* at 881 (finding that the substantial-part test does not apply to electioneering); *United States v. Dykema*, 666 F.2d 1096, 1101 (7th Cir. 1981) (stating that tax-exempt status is lost by participation in any political campaign).

V. SANCTIONS FOR ANY STATUTORY OR CASE-LAW REQUIREMENT VIOLATION

An organization can lose its § 501(c)(3) tax-exempt status if it fails to meet any of the above-mentioned criteria necessary to satisfy § 501(c)(3).¹³⁵ When the IRS removes an organization's tax-exempt status for participating in political-campaign activity, it immediately assesses the organization's income and taxes it based on that income.¹³⁶ In addition to—or in lieu of—removing the organization's tax-exempt status, the IRS may impose a penalty tax against the organization or the organization's officers, or commence an action in federal district court to enjoin the organization from future political expenditures.¹³⁷ If an organization loses its § 501(c)(3) status because it violates the political-campaign prohibition, it could reapply for a determination of its tax-exempt status provided that it does not involve itself in future political campaigns.¹³⁸

VI. EXAMPLES OF BLURRING THE LINES BETWEEN INDIVIDUAL AND ORGANIZATIONAL CAMPAIGNING FOR THE PURPOSE OF THE CAMPAIGN PROHIBITION

As PACI and other institutions have highlighted, one of the problems organizations face is knowing when its leaders are engaging in prohibited or permitted campaigning, or in other words, when these leaders are not acting as leaders but as individuals. Scholar Jeffrey Feldman points out the constitutional right of an organization's leader "to use speech as a tactic for intervening in and attempting to influence a political campaign."¹³⁹ Feldman recognizes this constitutional right as an *individual* right and points out that the leader is not entitled to have his or her tax-exempt organization assist in a political campaign.¹⁴⁰

135. See IRS, ELECTION YEAR ACTIVITIES AND THE PROHIBITION ON POLITICAL CAMPAIGN INTERVENTION FOR SECTION 501(C)(3) ORGANIZATIONS (2006), available at <http://www.irs.gov/newsroom/article/0,,id=154712,00.html> (listing sanctions).

136. STAFF OF THE JOINT COMM. ON TAXATION, OVERVIEW OF PRESENT-LAW RULES AND DESCRIPTION OF CERTAIN PROPOSALS RELATING TO DISCLOSURE OF INFORMATION BY TAX-EXEMPT ORGANIZATIONS WITH RESPECT TO POLITICAL ACTIVITIES: SCHEDULED FOR A HEARING BEFORE THE SUBCOMMITTEE ON OVERSIGHT OF THE HOUSE COMMITTEE ON WAYS AND MEANS (2000).

137. *Id.*

138. *Branch Ministries v. Rossotti*, 211 F.3d 137, 142–43 (D.C. Cir. 2000) (noting that an organization that participated in prohibited political-campaign activity may be able to retain tax-exempt status under § 501(c)(3) if it vows to take steps to avoid campaigning in the future).

139. *Frameshop*, *supra* note 9. Alternatively, an organization that does not qualify under § 501(c)(3) may qualify for tax-exempt status as a § 501(c)(4) organization. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 543 (1983); COMMERCE CLEARING HOUSE, *THE TAX EXEMPT ORGANIZATION: A PRACTICAL GUIDE* 80 (1969). Both a § 501(c)(4) organization and a § 501(c)(3) organization are exempt from federal taxes; however, a § 501(c)(4) organization is permitted to campaign and lobby, and contributions to a § 501(c)(4) organization are not deductible. *Regan*, 461 U.S. at 540.

140. *Frameshop*, *supra* note 9.

Feldman discusses how William Donohue, the President of the Catholic League, attempted to participate in a political campaign against John Edwards.¹⁴¹ The Catholic League is a nonprofit organization with § 501(c)(3) tax-exempt status.¹⁴² Donohue appeared in media broadcasts and published a press release on his organization's website demanding that John Edwards fire two anti-Catholic staff members working on Edwards's campaign.¹⁴³

In another news story, Citizens for Responsibility and Ethics in Washington ("CREW") wrote a seven-page letter to the IRS accusing James Dobson of acting on behalf of his nonprofit organization, Focus on the Family, when endorsing candidates and using his organization's resources to campaign.¹⁴⁴ CREW pointed out that even though Dobson sometimes said he was acting as a private individual, the facts and circumstances suggested that he capitalized on his identification with Focus on the Family.¹⁴⁵ CREW looked to newspapers and journals to support its theory.¹⁴⁶ It argued that because the news articles reported a clear connection between Dobson and his organization, Dobson engaged in prohibited electioneering and Dobson's organization should lose its § 501(c)(3) status.¹⁴⁷ This argument is flawed because a leader violates the political-campaign-prohibition rule only if that leader points out his or her connection to the organization, not if someone else (i.e., a newspaper-article writer) points out the connection.¹⁴⁸ The IRS conducted an audit on the Focus on the Family¹⁴⁹ and ruled that Dobson spoke as an individual and not on behalf of his organization.¹⁵⁰

VII. PROPOSED TEST TO HELP CLARIFY WHEN A LEADER IS ACTING IN THE INDIVIDUAL CAPACITY

Because the Donohue and Dodson situations are not uncommon, the IRS has tried to clarify when a leader's activities may be the activities of his or her organization.¹⁵¹ It has stated that three acts by an organization's

141. *Id.*

142. *Id.*

143. *Id.* (noting that Donohue could have avoided campaigning by employing methods such as "[not demanding] changes in the Edwards campaign staff, [criticizing] the individuals in the Edwards campaign . . . but not link[ing] that criticism to the campaign, and [not using] the resources of The Catholic League").

144. CREW Letter, *supra* note 9.

145. *Id.* at 3.

146. *Id.* at 3–6.

147. *Id.* at 6.

148. *See supra* Part VII.B (discussing how leaders can insulate their organizations from their personal comments).

149. Eric Gorski, *Focus on the Family: Nonprofit Status Upheld Amid Complaints*, PRESS-REG., Sept. 15, 2007, at D2.

150. *Id.*

151. 2006-17 Fact Sheet, *supra* note 70.

officers may be considered to be the activities of the organization: “(1) acts by an organization’s officials under actual or purported authority to act for the organization, (2) acts by agents for the organization within their authority to act, or (3) acts ratified by the organization.”¹⁵² This explanation raised many unanswered questions. For example, to what extent can these organizations’ leaders discuss important issues in campaigns or speak with candidates for public office?

To clarify some of this confusion, the IRS tried to educate organizations’ leaders by providing specific fact situations describing whether a particular statement or activity by an organization’s leader is permissible.¹⁵³ Based on these situations and other information the IRS has released, this Note proposes a three-question test for courts to use to determine whether an organization’s leader made an impermissible political statement on behalf of her organization, or a permissible political statement in an individual capacity.

A. THREE-PRONG TEST

The three-prong test consists of three questions that must be asked in a specific order. An affirmative answer to questions two or three should be enough to establish liability. The first question asks: Did the leader of a § 501(c)(3) organization make one or more partisan comments?¹⁵⁴ If she did not, there is no political-campaign violation. If she did make one or more partisan comments, the court must move on to question two.¹⁵⁵

The second question asks: Did the leader, when endorsing the candidate, specifically say she was speaking on behalf of, or as a representative of, her organization? One way for a leader to speak as a representative is for her to identify or associate herself with the organization when she introduces herself.¹⁵⁶ If she specifically stated that she was speaking on behalf of her organization, her organization is guilty of political-campaign intervention.¹⁵⁷ If she did not, the court must move on to question three.

The third question asks: Did the leader, when endorsing the candidate, *impliedly* speak as a representative for her organization rather than in a

152. IRS, J. ACTIVITIES THAT ARE ILLEGAL OR CONTRARY TO PUBLIC POLICY (1985), *available at* <http://ftp.irs.gov/pub/irs-tege/eotopicj85.pdf>.

153. 2006-17 Fact Sheet, *supra* note 70; Rev. Rul. 2007-41, *supra* note 58.

154. A partisan comment is an endorsement or a remark indicating support for a candidate. *See* ENCARTA WORLD ENGLISH DICTIONARY 1317 (1999) (defining partisan as “showing strong and usually biased support for a cause, especially a political one”).

155. PROJECT 302, *supra* note 8, at 21–22.

156. *Id.*

157. *See id.* (“[P]ublic statements of position (verbal or written) made by or on behalf of an organization in favor of or in opposition to any candidate for public office clearly violate the prohibition on political campaign intervention.”).

personal capacity? One way to speak as a representative impliedly is to endorse the candidate in an official publication,¹⁵⁸ meeting, or function of the organization.¹⁵⁹ If she impliedly spoke as a representative for her organization, her organization is guilty of political-campaign intervention.¹⁶⁰ If she did not, there is no violation.

*B. FURTHER OBSERVATIONS: POSSIBLE INSULATION FOR ORGANIZATIONS
AND THEIR LEADERS*

As the test suggests, organizational leaders may be able to protect themselves by stating that “any reference to their work for the organization is made only for identification purposes.”¹⁶¹ To avoid speaking as a representative, a leader should clearly indicate that his or her comments are personal statements and do not represent the organization’s views. If partisan political activity occurs and it appears to have occurred under the name of the organization, the organization should disavow these actions in writing in a timely manner and take steps to ensure that the activity does not happen again.¹⁶²

C. TEST LIMITATIONS

This Note’s proposed test has two limitations. First, there are limitless sets of fact patterns where leaders mistakenly campaign on behalf of an organization. Therefore, it is unlikely that these three questions provide a bright-line test for every conceivable situation. That being said, this test is a starting point for courts to assess whether a leader has campaigned on behalf of an organization.

Second, this test focuses on a single activity. If an organization performs multiple activities, the interaction among them will have to be considered to determine whether the organization, through its leaders, has engaged in political-campaign intervention.¹⁶³

158. An organization’s official publications could include pamphlets, newsletters, newspaper advertisements or articles, websites, or voter guides. See generally Murphy, *supra* note 63, at 232 (citing TAX GUIDE, *supra* note 22, at 7–10).

159. See Alliance for Justice, *supra* note 75 (“[L]eaders and volunteers may not use the facilities, equipment, personnel, or other resources of the organization to provide support or oppose a candidate or campaign.”).

160. *Id.*

161. Alliance for Justice, *supra* note 75.

162. *Id.*

163. Rev. Rul. 2007-41, *supra* note 58; 2006-17 Fact Sheet, *supra* note 70 (describing the increased difficulty of applying IRS guidelines when an organization is engaged in multiple activities).

VIII. CONCLUSION

The IRS has released numerous revenue rulings, news releases, fact sheets, and publications to help § 501(c)(3) organizations understand and comply with § 501(c)(3) requirements and restrictions.¹⁶⁴ Despite these efforts, many § 501(c)(3) organizations do not understand the broad scope and meaning of the political-campaign prohibition and risk jeopardizing their organizations' tax-exempt status. This Note reviews each § 501(c)(3) requirement and discusses in detail the political-campaign prohibition.

One of the specific areas in which organizations and courts need clarification is in determining whether organizations' leaders are speaking on behalf of their organizations or in their personal capacities, exercising their First Amendment free-speech rights. This Note proposes a test to assist courts and organizations make this determination and to alleviate confusion that results from the current facts-and-circumstances approach.

164. See, e.g., Rev. Rul. 2007-41, *supra* note 58 (providing twenty-one examples illustrating considerations in determining § 501(c)(3) violations); 2006-17 Fact Sheet, *supra* note 70 (reissuing guidance for the 2006 election cycle); 2004-14 Fact Sheet, *supra* note 24 (announcing committee review of alleged violations); I.R.S. News Release IR-2004-79, *supra* note 58 (reissuing guidance for the 2004 election year); I.R.S. News Release IR-2004-59, *supra* note 62 (same).