Section 501(c)(4) Advocacy Organizations: Political Candidate-Related and Other Partisan Activities in Furtherance of the Social Welfare

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I. INTRODUCTION

In the wake of the 2012 presidential election, tax and political law lawyers are left with a number of unanswered questions concerning the political activities of tax-exempt organizations. Under what circumstances may a tax-exempt advocacy organization conduct activities in support of candidates for political office and in furtherance of other partisan interests, such as political parties? How much activity of this type—if any—should be permissible? Should there be restrictions on the types of political activities an advocacy organization may undertake? For example, how directly may such an organization support partisan interests? Must partisan activities clearly be in furtherance of the organization's tax-exempt purposes? May partisan goals be a constitutive purpose of a tax-exempt advocacy organization? May a Super PAC—a political action committee that is independent of candidates, candidate committees, and political parties but is formed for the express purpose of promoting candidates for political office—form or coordinate with a tax-exempt advocacy organization?

Despite the importance of these questions, there are striking gaps in the authority of federal tax law governing the conduct of political candidate- and other partisan-related activities by tax-exempt organizations. Organizations exempt from taxation under Section 501(c) of the Internal Revenue Code of 1986, as amended (the Code), do not have a clear definition of those political activities that generally are prohibited in the case of Section 501(c)(3) organizations[1] and are limited and regulated in the

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1. I say "generally" because the prohibition does not apply to candidates for appointive office. Further, the IRS has concluded that in limited circumstances a Section 501(c)(3) organization may

case of Section 501(c)(4) organizations.[2] Section 501(c)(4) organizations—known as social welfare organizations—do not have clear guidance regarding how much of this activity is permissible and whether there are limitations on the types of these activities that are consistent with Section 501(c)(4).

Further, notwithstanding the holding of one of the most cited and decades old Supreme Court cases involving taxation, *Moline Properties*—which as a basic matter requires that federal tax law respect the independent tax status of corporations formed for valid business reasons, that are not a sham, and that do not act merely as an agent or instrumentality of a third party[3]—organizations that conduct political activities do so, to some extent, at their own risk of attribution of those activities among their related Section 501(c) corporations, including a Section 501(c)(3) corporation that is not permitted to engage in those activities.[4]

This lack of guidance may be related to institutional discomfort within the Internal Revenue Service (IRS) and the Treasury Department with taking and defending solid stands in interpreting congressional statutes that restrict the political speech of organizations that are not operated for profit—a considerable deviation from their traditional tax collection role. Further, the statutory framework in this area is not a model of clarity. The IRS authority addressing the restrictions on Section 501(c) tax-exempt organizations' activities in the political arena primarily in the context of Section 501(c)(3)—the subsection of the Code defining charitable and educational organizations—strictly regulates the political can-

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engage in activities related to candidates for public office. *See, e.g.*, Rev. Rul. 72-512, 1972-2 C.B. 246 (stating that it is not inconsistent with Section 501(c)(3) for a school to require that students of a political science course participate in a political campaign of their choosing); Rev. Rul. 72-513, 1972-2 C.B. 246 (stating that it is not inconsistent with Section 501(c)(3) for a school to provide facilities and faculty advisors to a newspaper published by students that includes editorials in which the students endorse candidates); Rev. Rul. 78-248, 1978-1 C.B. 154 (discussing situations where a Section 501(c)(3) organization may compile and distribute candidates' positions or voting records); Rev. Rul. 80-282, 1980-2 C.B. 178 (discussing the timing and distribution of voter education materials by Section 501(c)(3) organization). Further, partisan activities that are not candidate-related are not prohibited but must be insubstantial and incidental to an organizational activity in furtherance of the organization's exempt purpose.

2. *See* discussion *infra* Part III.

3. *See* Moline Properties, Inc. v. Comm'r, 319 U.S. 436, 439–40 (1943).

4. This is true notwithstanding the United States Supreme Court having supported the extension of *Moline*-type principles in the context of organizations that operate through related Section 501(c) nonprofit organizations. The United States Tax Court has acknowledged the applicability of the principles of *Moline Properties* not only to taxable but also to tax-exempt organizations. *See* C.H. Smith v. Comm'r, 51 T.C.M. (CCH) 1114 (1986). The Supreme Court first extended *Moline*-type principles to related tax-exempt organizations, without citing *Moline Properties*, in a concurring opinion addressing the constitutionality of the statutory lobbying restrictions applicable to Section 501(c)(3) organizations. *See generally* Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983); *see also* discussion *infra* Part V.A.

didate-related activities of organizations exempt under this subsection. Because most of this guidance addresses what is prohibited, it is not easily translatable into guidance addressing the quantity and quality of political activities that may be undertaken by those exempt organizations, including social welfare organizations exempt under Section 501(c)(4), which may engage in some political activities, including activities related to political candidates.

This gap has led to instances of opportunistic behavior: an "anything goes" approach to these activities by Section 501(c)(4) organizations.[5] Based on the understanding that exempt activities must constitute the organization's "primary" activities and that political candidate- and party-related activities are not exempt activities, they take the position that as long as expenditures on these activities do not exceed fifty percent of the organization's expenditures—i.e., are less than primary—anything goes; the organization can engage in these activities regardless of the nature of the political activities and whether they are in furtherance of the organization's social welfare purposes.

The lack of clarity in this area has become more problematic as a result of recent changes in federal, and in some cases state, campaign finance law, which regulates communications and spending relating to candidates for federal and state elective office by for-profit and nonprofit entities. Prior to January 2010, federal election law generally prohibited corporations from using their general treasury funds to make contributions to and coordinate their communications with federal candidates, candidate committees, and political parties.[6] Corporations also were generally prohibited from using their general treasury funds to pay for communications expressing support for or opposition to federal candidates—"express advocacy"—that are made independently of federal candidates, candidate committees, and political parties,[7] and from funding certain broadcast advertisements aired close to elections that identify a federal

5. *See, e.g.*, Larry Ottinger, *Nonprofits Must Take a Stand on Partisan Groups Masquerading as Charities*, CHRON. PHILANTHROPY, July 26, 2012, at 31, *available at* http://philanthropy.texterity.com/philanthropy/20120726?pg=31#pg31; Kim Barker, *How Nonprofits Spend Millions on Elections and Call it Public Welfare*, PROPUBLICA (Aug. 18, 2012), http://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare; David van den Berg, *CREW, Former Illinois House Candidate Sue IRS Over 501(c)(4) Regulation*, TAX NOTES TODAY (Feb. 20, 2013) (quoting Gregory Colvin as saying that the "IRS 'has tacitly fostered the impression' that 'less than primary' is a standard that can be met by a group spending up to 49 percent of its budget on political intervention in a fiscal year").

6. 2 U.S.C. §§ 441a–441b (2002); *see* discussion *infra* Part IV.

7. 11 C.F.R. § 114.2(b)(2)(ii) (2007). These are known as "independent expenditures."

candidate that neither expressly support nor oppose a federal candidate but are considered to be the functional equivalent of express advocacy.[8]

In January 2010, however, in *Citizens United v. Federal Election Commission*, the Supreme Court invalidated the federal election law prohibiting corporations from using their general treasury funds to make independent expenditures and functionally equivalent electioneering communications and, by implication, any similar state campaign finance law restrictions, thus allowing corporations to make unlimited expenditures for communications supporting and opposing candidates.[9] Because most tax-exempt organizations are organized as corporations, as a matter of campaign finance law, *Citizens United* greatly expanded the ability of tax-exempt organizations to engage in federal and state candidate-related work. This has resulted in a significantly increased interest in the extent that these organizations may engage in these activities consistent with their federal tax-exempt status.[10]

The extent that 501(c)(4) social welfare organizations can undertake political candidate-related activities is of particular interest. This exemption category encompasses organizations that conduct activities that "promote social welfare," including unlimited lobbying work, and has historically included the majority of the constituency-based, tax-

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8. These are known as "electioneering communications." *See* Bipartisan Campaign Reform Act of 2002, § 203, 2 U.S.C. § 441b (2010). An electioneering communication is considered the functional equivalent of express advocacy if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 466 (2007).

9. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). Post-*Citizens United*, corporations still are prohibited from making contributions to federal candidates, candidate committees, and political parties and from coordinating their communications with such persons unless they do so using funds collected and disbursed out of a separate segregated fund. *See* discussion *infra* Part IV.

10. *See, e.g.*, Fred Stokeld, *IRS Will Consider Changes to Regs on Social Welfare Groups and Politics*, 70 EXEMPT ORG. TAX REV. 2, 121 (2012) (describing July 17 letter from Lois Lerner, Director of the Exempt Organizations Division of the IRS, to two campaign watchdog groups, Democracy 21 and the Campaign Legal Center, in which Ms. Lerner indicates that the IRS will consider recommending amendments to the Treasury regulations promulgated under Section 501(c)(4) to address political activities). Contributors of $5,000 or more annually to Section 501(c)(4) organizations are required to be reported to the IRS, but the identities of these contributors are not required to be disclosed to the general public. When these Section 501(c)(4) organizations contribute funds to Super PACs, the Super PAC must disclose the Section 501(c)(4) as a contributor, but currently there is no look-through rule requiring disclosure of contributors to the Section 501(c)(4) whose funds are passed on to the Super PAC. Following *Citizens United*, legislation has been introduced in Congress that would require disclosure of the identity of contributors to these Section 501(c)(4) organizations. *See* Democracy Is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175, 111th Cong. (2010) (introduced by Rep. Van Hollen, D-Md.). *See also* van den Berg, *supra* note 5 (describing lawsuit challenging the IRS for failing to regulate political activities of Section 501(c)(4) organizations).

exempt advocacy organizations in the United States: organizations that engage in work on broad social and political issues.[11]

Following *Citizens United*, a number of organizations that have obtained or are seeking tax-exemption status have been formed in order to work closely with political candidate organizations, including those political committees known as "Super PACs."[12] Super PACs are federally registered political action committees that are set up and presumably operate independently of a federal candidate or party but whose purpose is making independent expenditures and functionally equivalent electioneering communications to support a specific federal candidate.[13] These organizations' activities have generated significant controversy and press interest;[14] both members of Congress and watchdog groups have questioned whether these activities are consistent with Section 501(c)(4) status, and there have been calls to regulate or at least enhance the disclosure relating to these activities.

In this Article, I refer to two categories of political activities: those related to candidates for public office and those related to non-candidate partisan interests, such as political parties. I bifurcate political activities into these two categories following the tax law framework applicable to Section 501(c)(3) and Section 501(c)(4) organizations that engage in partisan activities. Section 501(c)(3) organizations are statutorily prohibited from engaging in, and Section 501(c)(4) organizations are subject to Treasury regulations that limit their ability to engage in, activities considered to directly or indirectly support or oppose candidates for public

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11. Section 501(c)(3) organizations also may engage in advocacy but these organizations are subject to limitations on their lobbying activities and are very constrained in their political candidate- and political party-related activities. *See supra* note 1; *see also* discussion *infra* Part III.

12. For example, a great deal of attention has been paid to American Crossroads, a Super PAC established by Republican political operative Karl Rove, and Crossroads GPS, a closely-affiliated Section 501(c)(4) organization. *See, e.g.*, Karen Tumulty, *Karl Rove and His Super PAC Vow to Press On*, WASH. POST (Nov. 10, 2012), http://articles.washingtonpost.com/2012-11-10/politics/35506918_1_american-crossroads-crossroads-gps-pacs. On the other end of the political spectrum during the 2012 election, Priorities USA Action is a Super PAC established to support the reelection of Barack Obama that is closely affiliated with Priorities USA, a Section 501(c)(4) organization. *See* Jonathan D. Salant, *IRS Denial of Tax Exemption to U.S. Political Group Spurs Alarms*, BLOOMBERG (June 7, 2012), http://www.bloomberg.com/news/2012-06-08/irs-denial-of-tax-exemption-to-u-s-political-group-spurs-alarms.html; *see also* PRIORITIES USA ACTION, www.prioritiesusaaction.org (last visited Feb. 2, 2013). Bill Burton, former aide to President Obama, is a senior strategist for both. *Arena Profile: Bill Burton*, POLITICO (Feb. 8, 2013), http://www.politico.com/arena/bio/bill_burton.html.

13. *See* discussion *infra* Part IV for a description of the post-*Citizens United* caselaw and the FEC Advisory Opinions that are the legal basis for the creation and use of the political organization known as the Super PAC.

14. *See* sources cited *supra* notes 5 and 10.

elective office.[15] By contrast, activities that benefit partisan political interests not related to specific candidates for public elective office are not subject to a blanket prohibition but are regulated as activities that benefit "private" interests. The IRS has taken the position that the permissibility of these activities by both Section 501(c)(3) organizations and Section 501(c)(4) organizations should be determined through application of the "private benefit" doctrine.[16]

Conceptually, when it comes to determining whether an organization's purposes and activities are consistent with tax-exempt status, the basis for this bifurcation is not as solid in the Section 501(c)(4) context as it is in the Section 501(c)(3) context. Because there is no statutory prohibition regarding candidate-related activities applicable to Section 501(c)(4) organizations, the bifurcation of Section 501(c)(4) political activities into these two categories is unnecessary as a statutory matter for purposes of determining whether political activities are consistent with Section 501(c)(4) tax-exempt status.[17] Further, because political candidate-related activities generally are prohibited under Section 501(c)(3), the Section 501(c)(3) authority does not shed any light on the quantity of these activities that are permissible in the Section 501(c)(4) context. It also does not shed light on whether there are qualitative limits on these activities—types of political candidate-related activities that are and are not permissible for a specific Section 501(c)(4) organization based on the nexus of those activities with the organization's mission. Finally, the private benefit doctrine used by the IRS to consider the permissibility of Section 501(c)(3) non-candidate, partisan political activities—and applied by the IRS to Section 501(c)(4) organizations that engage in these activities—is a doctrine grounded in the Treasury regulations under Section 501(c)(3), regulations inapplicable to Section 501(c)(4) organizations.

In this Article, I argue that it may be preferable to consider the permissibility of partisan political activities by Section 501(c)(4) organizations—both candidate and non-candidate—through a different lens

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15. Section 501(c)(4) organizations also are subject to tax payment and reporting obligations when they engage in these activities under 26 U.S.C. § 527 (2003) and 26 U.S.C. § 6033(e) (2010).

16. *See generally* Am. Campaign Acad. v. Comm'r, 92 T.C. 1053 (1989) (applying private benefit doctrine to partisan political activities); I.R.S. Priv. Ltr. Ruls. 201128032 (July 15, 2011), 201128034 (July 15, 2011), 201128035 (July 15, 2011), 201221025 (May 25, 2012), 201221026 (May 25, 2012), 201221027 (May 25, 2012), 201221028 (May 25, 2012) & 201221029 (May 25, 2012) (applying *American Campaign Academy* to Section 501(c)(4) organization).

17. While this bifurcation may not be necessary in the Section 501(c)(4) context in terms of determining the acceptable amounts and kinds of partisan political activity that is consistent with Section 501(c)(4) tax-exempt status, it is a necessary distinction to the extent that 26 U.S.C. § 527(f) (2003) may impose tax on expenditures of Section 501(c)(4) organizations related to work directly or indirectly supporting or opposing candidates.

than the lens applicable to Section 501(c)(3) organizations. What might be such a lens? There is a great deal of focus in the historical authority under Section 501(c)(4)—authority that is not even focused on partisan political activities—on whether organizations seeking Section 501(c)(4) tax-exempt status are serving a "community" versus a "private" interest. Assuming activities in furtherance of partisan interests are activities that support private interests, I consider what this authority may tell us about the permissibility of Section 501(c)(4) organizations engaging in partisan political activities and having as a constitutive purpose a partisan political goal, and I consider whether the authority supports quantitative limits (limits on the amount of such activities a Section 501(c)(4) may undertake) and qualitative limits (limits on the nature and kinds of partisan political activities a Section 501(c)(4) organization may undertake or partisan political purposes that a Section 501(c)(4) organization may have). I suggest that this authority may support the existence of some limits to these activities.

In Part II, I describe the statutory and regulatory framework of Section 501(c)(4), particularly the requirement that exempt organizations operate exclusively for the promotion of social welfare.[18] Further, I address the IRS and judicial authority that have defined what it means for an organization to be operated for the promotion of social welfare and focused on the distinction between benefiting community versus private interests.

In Part III, I look at the Treasury regulation and IRS authority that restrict Section 501(c)(4) organizations from engaging in political candidate- and party-related work. This authority is derived from the authority addressing the permissibility of partisan, political activities in the Section 501(c)(3) context. I argue that the application of Section 501(c)(3) principles in this context falls short and suggest that the historic Section 501(c)(4) authority defining social welfare organization status may be sufficient to begin to address what may be the qualitative and quantitative limits on Section 501(c)(4) organizations' political candidate- and party-related work.

In Part IV, I consider the conclusions drawn in Part III as applicable to the establishment of a Section 501(c)(4) organization in order to support or coordinate activities with a Super PAC that has been formed to

18. Alternatively, an organization may be exempt under Section 501(c)(4) if it is a "local association[] 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) (2010). Since this Article focuses on political activities by Section 501(c)(4) organizations, it does not explore the contours of the exemption category for local associations of employees.

support one or more specific candidates for elective office, concluding that this arrangement may be in conflict with numerous aspects of the law governing Section 501(c)(4) social-welfare status.

Finally, in Part V, I briefly address why, from a normative perspective, it may matter whether a Section 501(c)(4) organization should be able to engage in political candidate-related work and whether that work can and should be restricted qualitatively or quantitatively. I note the historical use of the tax-exempt Section 501(c)(4) organization as a vehicle through which individuals, who have a commonality of political, cultural, or social interests, can associate with one another in order to promote those interests. While I caution against prohibiting Section 501(c)(4) organizations from engaging in any partisan political activities in furtherance of their mission, I question whether permitting these organizations to engage in these activities unfettered will fundamentally change the historical character of these organizations, rendering them no different than (and subject to the same regulation and public scrutiny as) political organizations, such as Super PACs.

II. FEDERAL TAX EXEMPTION UNDER SECTION 501(C)(4): THE STATUTORY, REGULATORY, IRS, AND JUDICIAL AUTHORITY

Determining whether an organization is eligible for federal tax-exempt status is not always straightforward. Neither the Internal Revenue Code nor the Treasury regulations promulgated thereunder provide clear, bright-line rules establishing when an organization is eligible for this status. Rather, the determination involves carefully parsing the statutory and regulatory language in numerous exemption categories and reviewing the body of IRS and judicial authority that has interpreted the statutory and regulatory language. In this Part, I review in detail the Section 501(c)(4) statutory and regulatory language and the interpretive authority.

A. Social Welfare Organizations: The Statutory and Regulatory Framework

1. The Statute

Under Section 501(a) of the Code, an organization may be exempt from federal tax on its income by coming within one of the twenty-nine exemption categories set forth in Section 501(c). Section 501(c)(4) organizations are described as:

> (A) 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 em-

> ployees 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.
>
> (B) Subparagraph (A) shall not apply to an entity unless no part of the net earnings of such entity inures to the benefit of any private shareholder or individual.[19]

In other words, an organization seeking exemption under Section 501(c)(4), (1) must not be organized for profit; (2) must be a "[c]ivic league[] or organization[]"; (3) must be operated exclusively for the promotion of social welfare; and (4) must be an organization no part of whose net earnings inures to the benefit of a private shareholder or individual.[20] While the last clause of Section 501(c)(4)(A) includes the qualification that the "net earnings of [the organization must be] devoted exclusively to charitable, educational, or recreational purposes," courts generally have agreed that this clause modifies only organizations seeking Section 501(c)(4) status as a local association of employees.[21]

These four statutory requirements can be described as follows.

a. Not Organized For Profit

In order for an organization seeking exemption under Section 501(c)(4) to be considered not organized for profit, it must be subject to a prohibition on the distribution of its profits to shareholders or other beneficial interest holders—this is known as a "nondistribution constraint."[22] Organizations incorporated under state nonprofit corporate statutes typically will meet this requirement, although this requirement also may be formalized through an organization's constitutive documents.

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19. 26 U.S.C. § 501(c)(4) (2010). The predecessor to Section 501(c)(4), which was first enacted as part of the Internal Revenue Code of 1954, was Section 101(8). *See* Law of Aug. 16, 1954, ch. 736, 68A Stat. 163. The statutory language was no different, providing for an exemption for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare." The authority addressing social welfare organizations does not distinguish between the treatment of those organizations under the 1939, 1954, and 1986 Internal Revenue Codes, and this Article assumes the authority addressing Section 101(8) to be interpretive authority in the Section 501(c)(4) context.

20. 26 U.S.C. § 501(c)(4) (2010); Treas. Reg. § 1.501(c)(4)-1(a) (as amended in 1990). As noted above, this Article does not focus on Section 501(c)(4) organizations that are local associations of employees.

21. *See* People's Educ. Camp Soc'y, Inc. v. Comm'r, 331 F.2d 923, 929 n.7 (2d Cir. 1964); United States v. Pickwick Elec. Membership Corp., 158 F.2d 272, 276 (6th Cir. 1946); Hanover Imp. Soc., Inc. v. Gagne, 92 F.2d 888, 891 (1st Cir. 1937).

22. *See* Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 504 (1981).

b. Civic League or Organization

Courts have disagreed over whether the adjective "civic" modifies only "league" or instead modifies both "league" and "organization."[23] This distinction may be insignificant because courts taking the position that "civic" also modifies "organization" have concluded that "civic" is a broad term that is not limited to government- or entire community-sponsored organizations; rather the focus generally is on whether the organization's purposes promote the social welfare.[24] This topic is discussed more fully below.

c. Operated Exclusively for the Promotion of Social Welfare

While Section 501(c)(4) states that social welfare organizations must be operated "*exclusively* for the promotion of social welfare,"[25] the IRS and courts instead interpret "exclusively" to mean "*primarily*."[26] The Treasury regulations under Section 501(c)(4) described in Part II.A.2 also make this interpretation clear.[27] Section 501(c)(4) is not unique in this regard. For purposes of many of the Section 501(c) exempt organization categories, including Section 501(c)(3), the statutory requirement that the organization be exclusively devoted to exempt activities has been interpreted to mean that the organization must be devoted to those activities to an extent that is less than exclusive.[28] What this means in the Sec-

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23. *Compare* Erie Endowment v. United States, 316 F.2d 151, 156 (3d Cir. 1963) ("civic" modifies organization), *with Gagne*, 92 F.2d at 891 ("civic" does not modify organization).

24. *See, e.g.*, *Pickwick*, 158 F.2d at 276 ("'Civic' is defined as pertaining to a city or a citizen; relating to the community. A civic league or organization embodies the idea of citizens of a community cooperating to promote the common good and general welfare of people of the community."); *see also People's Educ. Camp Soc'y*, 331 F.2d at 929 n.7 (stating that the emphasis should be on whether the organization promotes social welfare); Consumer-Farmer Milk Coop. v. Comm'r, 186 F.2d 68, 70 (2d Cir. 1950) (same).

25. 26 U.S.C. § 501(c)(4) (2010) (emphasis added).

26. *See, e.g.*, Vision Service Plan, Inc. v. United States, 265 Fed. App'x. 650, 651, 2008 WL 268075 (9th Cir. 2008) (non-precedential), *cert. denied*, 555 U.S. 1097 (2009); *People's Educ. Camp Soc'y*, 331 F.2d at 929; Democratic Leadership Council, Inc. v. United States, 542 F. Supp. 2d 63, 69 (D.D.C. 2008); Los Angeles Cnty. Remount Ass'n v. Comm'r, 27 T.C.M. (CCH) 1035 (1968); Comm'r v. Lake Forest, Inc., 36 T.C. 510, 536 (1961); BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS § 4.4 (J. Wiley ed., 10th ed. 2011); JOHN FRANCIS REILLY, CARTER C. HULL & BARBARA A. BRAIG ALLEN, IRS 501(C)(4) ORGANIZATIONS (2003), *available at* http://www.irs.gov/pub/irs-tege/eotopici03.pdf (test looks to "primary" activities).

27. *See* Treas. Reg. § 1.501(c)(4)-1(a)(2) (as amended in 1990) ("An 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.") (emphasis added).

28. *See, e.g.*, Orange Cnty. Agric. Soc'y v. Comm'r, 55 T.C.M. (CCH) 1602 (1988), *aff'd*, 893 F.2d 647 (2d Cir. 1990). The very fact that Section 501(c)(3) organizations may be taxed on their unrelated business income—income derived from profit-making activities unrelated to their exempt purposes—demonstrates Congress's acknowledgement of the permissibility of engaging in these activities and the fact that "exclusively" must mean "less than exclusively."

tion 501(c)(4) context—how one determines, including quantifies, whether an organization is operated primarily for the promotion of social welfare—is discussed in more detail in Part II.B, below.

d. Private Inurement

This additional constraint on Section 501(c)(4) exempt status was added to the statute in order to make clear, somewhat as a backstop to the requirement that the organization not be organized for profit, that the organization's income or assets may not flow through the organization and wind up in the hands of its insiders—those individuals, such as founders, directors, officers, key employees, the family members of these persons, and entities controlled by these persons.[29] The most common type of private inurement involves the payment of excessive compensation by an organization to an insider.[30]

2. The Regulations

a. What Is Social Welfare?

While the Code does not provide a definition of what it means to be operated for the promotion of social welfare, Treasury regulations promulgated under Section 501(c)(4) further elaborate on the requirements of this exemption category, stating that an 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."[31] This regulation illustrates that an organization's activities need not exclusively be in furtherance of the organization's tax-exempt purposes and instead only must be primarily in furtherance of those purposes. This specific regulatory language does not say that a Section 501(c)(4)'s organization can have a purpose that is not a tax-exempt purpose; instead, it says that the organization may be exempt under this subsection if it is primarily engaged in promoting the social welfare, possibly implying that the "primarily" test, at least as expressed in this regulatory language, is an activities test, not a purposes test.

However, the description of what it means to promote "in some way the common good and general welfare of the people of the commu-

29. HOPKINS, *supra* note 26, at §§ 20.1, 20.3.

30. Other examples of private inurement are when an organization purchases or rents assets from an insider at more than fair market value or sells or rents to insiders at less than fair market value and when an organization loans money to or borrows money from an insider on terms not favorable to the organization, or participates in a business transaction with an insider on terms not favorable to the organization. *Id.* at § 20.4.

31. Treas. Reg. § 1.501(c)(4)-1(a)(2) (as amended in 1990).

nity" for purposes of Section 501(c)(4) is not exactly clear and not further elaborated. As noted by the Fourth Circuit, "Unfortunately, the regulation itself is of limited value since it merely substitutes one amorphous term ('community') for another ('social welfare')."[32]

The regulations also state that an organization is "embraced within" Section 501(c)(4) if it is "operated primarily for the purpose of bringing about civic betterments and social improvements."[33] This language also is not very helpful because it does not describe what constitutes civic betterment or social improvement for purposes of Section 501(c)(4). This language also seems to make clear that the organization's activities need only be primarily in furtherance of the organization's exempt purposes, whatever those purposes may be, but it does not make clear whether the organization may have a non-exempt purpose.

In Part II.B.1, I outline purposes that have been identified in the Section 501(c)(4) caselaw and IRS authority as tax-exempt social welfare purposes. I also outline in this section the distinction between serving community versus private interests, which is at the heart of the determination of whether an organization's purposes are tax-exempt social welfare purposes. I also outline in Part II.B.2 caselaw that addresses whether a Section 501(c)(4) organization need only a valid exempt primary purpose and, if so, is otherwise unconstrained in its ability to have a non-exempt purpose or, alternatively, whether a significant non-exempt purpose is inconsistent with Section 501(c)(4) tax-exempt status. Before turning to these issues, however, I point out two additional, important regulatory constraints applicable to organizations exempt under Section 501(c)(4).

b. Additional Regulatory Constraints.

Treasury regulations describe two important limitations applicable to an organization seeking exemption under Section 501(c)(4).[34] First, the regulations provide that an organization whose primary activity is "carrying on a business with the general public in a manner similar to organizations which are operated for profit" is not an organization "operated primarily for the promotion of social welfare."[35] The ability of Section 501(c)(4) organizations to conduct business activities—either to

32. Flat Top Lake Ass'n, Inc. v. United States, 868 F.2d 108, 110 (4th Cir. 1989).

33. Treas. Reg. § 1.501(c)(4)-1(a)(2) (as amended in 1990).

34. Treasury regulations also describe requirements applicable to local associations of employees seeking exemption under Section 501(c)(4). Treas. Reg. § 1.501(c)(4)-1(b) (as amended in 1990). Additionally, they state that an organization whose primary activity is operating "a social club for the benefit, pleasure, or recreation of its members" is not operated primarily for the promotion of social welfare. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (as amended in 1990).

35. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (as amended in 1990).

raise funds to be used in furtherance of social welfare purposes or as an activity that is itself in furtherance of social welfare—has been a significant area of interpretation by the IRS and courts for a number of decades. This is discussed in Part II.B.1.

Second, the regulations state 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."[36] This restriction—the only direct statutory or regulatory statement regarding the permissibility of political candidate-related activities by Section 501(c)(4) organizations—remains unclear. Does it impose a prohibition on the conduct of activities that are considered direct or indirect intervention? Because Section 501(c)(4) requires organizations to be primarily operated for the promotion of social welfare, are these activities prohibited only if they constitute an organization's primary activities? Or should this regulatory language be interpreted to mean that activities supporting or opposing candidates do not promote social welfare, so these activities may be engaged in only to the extent that they are incidental to an activity that is in furtherance of social welfare? Further, because the regulation addresses only political candidate-related work, what constraints are Section 501(c)(4) organizations subject to regarding their non-candidate, but partisan political, work?

Before turning to an in-depth discussion of Section 501(c)(4) organizations and political activities, I discuss in the remainder of this Part the ways that the Section 501(c)(4) exemption category has been historically defined.

B. Interpreting the Statute and the Regulations: The Courts and the IRS

A significant body of caselaw and IRS authority, developed over roughly seventy-five years, addresses the statutory and regulatory framework of Section 501(c)(4) social welfare organization tax-exempt status. While there is significant variation within this body of law and it certainly does not seem possible to discern from the authority clear rules applicable in all cases establishing when an organization's activities or purposes will or will not be consistent with Section 501(c)(4), some basic themes emerge that are useful in considering, as I do in Part III, whether and to what extent partisan political activity is consistent with Section 501(c)(4) tax-exempt status. In this section, I outline the themes throughout the authority that define what purposes and activities are considered to promote social welfare for purposes of Section 501(c)(4). I then consider whether and to what extent an organization that is operated for the

36. *Id.*

promotion of social welfare may undertake an activity, or even have an organizational purpose, that is not considered to promote social welfare and still be eligible for Section 501(c)(4) tax-exempt status.

1. What Does it Mean to Be Operated for the Promotion of Social Welfare?

As described above, Treasury regulations under Section 501(c)(4) interpret the statutory language "operated . . . for the promotion of social welfare" to mean "engaged in promoting in some way the common good and general welfare of the people of the community," and the regulations state that an organization that falls within Section 501(c)(4) when it is operated "primarily for the purpose of bringing about civic betterments and social improvements."[37] Beyond this, the regulations are silent as to what kinds of purposes and activities promote social welfare. Other attempts to define these purposes and activities are similarly broad and open to wide interpretation. For example, the Fourth Circuit has explained that social welfare activities further the "national interest by expanding potential, by opening opportunities to all citizens who may someday find themselves within the bounds of [the] particular community [being served by the organization]."[38]

The following describes in more detail some of the primary lenses through which the IRS and courts have considered the purposes of and activities conducted by organizations in determining whether the organizations may be tax-exempt under Section 501(c)(4).

a. Social Welfare Organizations: Benefiting Community Interests

Under caselaw and IRS authority defining the exemption under Section 501(c)(4) in the context of specific factual circumstances, the concept of community is paramount. As described by the Third Circuit, to be exempt under Section 501(c)(4), "the organization must be a community movement designed to accomplish community ends."[39] What, then, is a "community"? It, too, has no specific definition. As the IRS has stated, "an exact delineation of the boundaries of a 'community' contemplated by section 501(c)(4) is not possible,"[40] but community tends to imply a grouping that is open or potentially open to all members of the general public or at the very least a broad, non-exclusive region. A "geographical unit bearing a reasonably recognizable relationship to an area ordinarily identified as a governmental subdivision or a unit or district

37. *Id.*
38. Flat Top Lake Ass'n, Inc. v. United States, 868 F.2d 108, 112 (4th Cir. 1989).
39. Erie Endowment v. United States, 316 F.2d 151, 156 (3d Cir. 1963).
40. Rev. Rul. 74-99, 1974-1 C.B. 131.

thereof" is a traditional form of community recognized as a community for purposes of Section 501(c)(4).[41] But a region need not be a governmental subdivision or unit in order to constitute a community.[42] In fact, there is no minimum or maximum number of residents and no minimum or maximum size of a geographic area required for a region to constitute a community; rather, all facts and circumstances must be considered.[43] As the Fourth Circuit stated in 1986, the concept of "'community' functions within a broader national fabric," and is an "active part of society" as opposed to "a private refuge."[44]

Under this framework, Section 501(c)(4) organizations may be organized to engage in a wide range of activities that are in furtherance of community interests. For example, youth, amateur sports, and recreation organizations, which literally bring people together for purposes designed to enhance the welfare of the community without a profit-making motive, have been determined by the IRS to be exempt under Section 501(c)(4).[45] Organizations promoting community art and community customs by sponsoring community gatherings also are exempt under Section 501(c)(4).[46] These organizations are considered to promote social improvement and the welfare of the community by encouraging "wholesome activity and entertainment."[47] Similarly, organizations that educate

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41. *Id.*

42. *See* Rancho Santa Fe Ass'n v. United States, 589 F. Supp. 54 (S.D. Cal. 1984); Columbia Park & Recreation Ass'n, Inc. v. Comm'r, 88 T.C. 1 (1987); Rev. Rul. 80-63, 1981-1 C.B. 116 (clarifying Rev. Rul. 74-99, 1974-1 C.B. 131).

43. Rev. Rul. 74-99, 1974-1 C.B. 131.

44. Flat Top Lake Ass'n, Inc. v. United States, 868 F.2d 108, 111–13 (4th Cir. 1989).

45. *See, e.g.*, Rev. Rul. 65-195, 1965-2 C.B. 164 (stating that a junior chamber of commerce that, among other things, conducts youth programs; sponsors a Boy Scouts troop; sponsors health, safety, and conservation projects; offers public speaking training; and arranges entertainment activities for hospital patients and veterans homes is exempt under Section 501(c)(4)); Rev. Rul. 66-179, 1966-1 C.B. 139 (stating that a garden club engaged in promoting and educating regarding horticultural activities and practices is exempt under Section 501(c)(4)); Rev. Rul. 68-118, 1968-1 C.B. 261 (stating that an organization promoting youth interest in sports is exempt under Section 501(c)(4)); Rev. Rul. 69-384, 1969-2 C.B. 122 (stating that an organization operating an amateur sports league is exempt under Section 501(c)(4)); Rev. Rul. 67-190, 1967-1 C.B. 310 (stating that an organization operating a roller skating rink open to the community is exempt under Section 501(c)(4)); Rev. Rul. 70-4, 1970-1 C.B. 126 (stating that an organization engaged in promoting, training, and developing rules and regulations relating to a particular sport is exempt under Section 501(c)(4)); I.R.S. Tech. Adv. Mem. 9220010 (May 15, 1992) (stating that an organization conducting bridge tournaments and educational programming regarding bridge for the general public is exempt under Section 501(c)(4)).

46. *See, e.g.*, Rev. Rul. 78-131, 1978-1 C.B. 156 (stating that an organization sponsoring an annual community art show of members of the community, including high school students, is exempt under Section 501(c)(4)); Rev. Rul. 68-224, 1968-1 C.B. 262 (stating that an organization sponsoring an annual festival around regional, Western customs and traditions, including a rodeo and a community banquet, is exempt under Section 501(c)(4)).

47. Rev. Rul. 70-4, 1970-1 C.B. 126.

the community regarding public safety,[48] provide free parking in a congested downtown area to all members of the general public,[49] or serve to increase the underground water table in a community[50] also benefit the community, supporting its functioning and health.

Organizations providing to a community a necessary or basic service not otherwise available may also be eligible for tax-exempt status under Section 501(c)(4), particularly where the service is provided for free. For example, an organization that re-transmitted television reception to a community that had no access to television reception, making the reception available to all members of the community without charge, was eligible under Section 501(c)(4).[51] Similarly, an organization that provided a rush-hour bus service to bring members of a suburban community without adequate public transportation to municipal areas was also eligible.[52]

Organizations that consider, educate the community regarding, and advocate positions with respect to broad social issues, even where these issues may be of interest only to a subset of the community, are considered to promote the social welfare. These organizations often are referred to as "advocacy organizations."[53] For example, an organization that promotes simplicity and dignity in funeral and memorial services and seeks to educate the community and advocate for these practices may be exempt from tax under Section 501(c)(4).[54]

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48. *See, e.g.*, Rev. Rul. 66-273, 1966-2 C.B. 222 (stating that an organization operating rifle and pistol target range open to the general public in order to provide a supervised facility for firearm shooting and which instructs the public regarding marksmanship and the safe handling and proper care of guns is an activity that promotes the common good and general welfare of the community); Rev. Rul. 65-195, 1965-2 C.B. 164 (stating that a junior chamber of commerce that among other things sponsors health and safety projects is promoting the common good and general welfare of the people of the community).

49. Rev. Rul. 81-116, 1981-1 C.B. 333.

50. Rev. Rul. 66-148, 1966-1 C.B. 143.

51. Rev. Rul. 62-167, 1962-2 C.B. 142.

52. Rev. Rul. 78-69, 1978-1 C.B. 156.

53. There is considerable overlap among the advocacy-related purposes that qualify for tax-exempt status under both Section 501(c)(4) and Section 501(c)(3). Section 501(c)(3) charitable purposes include the "promotion of the social welfare" and defending "human and civil rights." *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 2008). In fact, it often is the case that an advocacy organization that otherwise would qualify as tax-exempt under Section 501(c)(3), but cannot by virtue of the fact that it engages in substantial lobbying or in political candidate-related work (an "action organization"), both of which preclude exemption under Section 501(c)(3), will instead qualify as exempt under Section 501(c)(4). Section 501(c)(4) organizations are not subject to limitations on their lobbying activities and, as noted above, may engage in some candidate-related work. *See* Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (as amended in 1990) ("A social welfare organization that is not . . . exempt from taxation as an organization described in section 501(c)(3) may qualify under section 501(c)(4) even though it is an action organization described in § 1.501(c)(3)-1(c)(3)(ii) or (iv), if it otherwise qualifies under this section.").

54. Rev. Rul. 64-313, 1964-2 C.B. 146.

Similarly, organizations that advocate for a vulnerable group, such as tenants, the elderly, or animals,[55] may be found to be exempt under Section 501(c)(4), as may organizations that advocate before, or encourage members of the public to advocate before, governmental bodies regarding zoning, traffic, parking, sanitation, and lighting matters in order to preserve the "traditions, architecture, and appearance of a community."[56]

Organizations that encourage greater participation in governmental and political affairs or promote a political ideology also fall within the Section 501(c)(4) exemption category.[57] The fact that an organization advocates on behalf of a controversial issue will not preclude exemption under Section 501(c)(4).[58] Further, advocacy organizations may undertake a wide range of activities in furtherance of those purposes, including engaging in legislative and administrative advocacy, encouraging the public to undertake this advocacy, disseminating materials in order to educate the public concerning its social welfare agenda, and encouraging social protest.[59]

While the concerns of advocacy organizations may not be the concerns of everyone in a community—in fact, advocacy organizations often are formed by members of a community holding views that are in the minority within that community—their purposes are community-based in that their efforts are directed toward impacting and improving the community at large by educating the community regarding their issues, advo-

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55. Rev. Rul. 80-206, 1980-2 C.B. 185 (stating that an organization formed to promote the legal rights of all tenants in a community is exempt under Section 501(c)(4)); Rev. Rul. 67-293, 1967-2 C.B. 185 (stating that an organization promoting animal welfare is exempt under Section 501(c)(4)); Rev. Rul. 57-297, 1957-2 C.B. 307 (stating that an organization combating discrimination toward the elderly is exempt under Section 501(c)(4)).

56. Rev. Rul. 67-6, 1967-1 C.B. 135.

57. Debs Mem'l Radio Fund v. Comm'r, 148 F.2d 948 (2d Cir. 1945) (organization operating radio station committed to progressive ideals); Rev. Rul. 60-193, 1960-1 C.B. 195 (stating that an organization created to encourage greater participation in governmental and political affairs by holding nonpartisan seminars and workshops on college and university campuses relating to the American political system is exempt under Section 501(c)(4)).

58. Rev. Rul. 76-81, 1976-1 C.B. 156 (stating that an anti-abortion rights organization is exempt under Section 501(c)(4)); Rev. Rul. 68-656, 1968-2 C.B. 216 (stating that an organization seeking to legalize an illegal activity is exempt under Section 501(c)(4)).

59. Rev. Rul. 68-656, 1968-2 C.B. 216 (stating that an organization formed to educate the public regarding an activity or practice that is not presently legal and that seeks changes in the law to legalize this activity is exempt under Section 501(c)(4)); Rev. Rul. 67-293, 1967-2 C.B. 185 (stating that an organization substantially engaged in promoting legislation is exempt under Section 501(c)(4)); Rev. Rul. 67-6, 1967-1 C.B. 135 (stating that an organization primarily engaged in nonlegislative governmental advocacy is exempt under Section 501(c)(4)); Rev. Rul. 67-6, 1967-1 C.B. 135 (stating that an organization primarily engaged in grassroots advocacy is exempt under Section 501(c)(4)). However, the promotion of illegal activities in furtherance of an organization's goals, such as unlawful civil disobedience, is not a permissible activity for a Section 501(c)(4) organization. *See* Rev. Rul. 75-384, 1975-2 C.B. 204.

cating for community change, or protecting a specific community interest. Further, they are a collective means by which like-minded individuals may share ideas, speak collectively to the public, and use their collective influence to advocate for policy change, activities that are considered to be a social good as demonstrated by the strong protection afforded them under the First and Fourteenth Amendments to the U.S. Constitution.[60]

b. Social Welfare Organizations: Benefiting Community v. Private Interests: Some Themes

Under the authority interpreting Section 501(c)(4), the concept of serving a community interest as a basis for exemption may be contrasted with the concept of serving a private interest. As a general matter, an organization formed to serve a private, and not a community, interest will not be eligible for exemption under Section 501(c)(4). This, however, does not mean that Section 501(c)(4) organizations may not benefit private interests as they do their work on behalf of the community.

The analysis of the benefits that an organization provides to the community, as opposed to private persons, in considering whether an organization is eligible for exemption under Section 501(c)(4) is not an application of the private benefit doctrine applicable in the Section 501(c)(3) context. This doctrine, which is described in more detail in Part III.A.1, requires that a Section 501(c)(3) organization's activities that provide benefits to private interests be incidental to the organization's exempt activities and insubstantial in amount. As I discuss in Part III.A.2, the IRS has applied the private benefit doctrine to Section 501(c)(4) organizations, including in the context of partisan political activities. Regardless of whether that doctrine applies in the Section 501(c)(4) context, in a great deal of the authority addressing whether an organization's purposes and activities are consistent with Section 501(c)(4), courts and the IRS have considered whether the organization serves a community, as opposed to a private interest—a "private interest," as opposed to a private benefit, doctrine, as it were.

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60. U.S. CONST. amend. I (freedom of speech); U.S. CONST. amend. XIV (freedom of association). *See, e.g.*, *In re* Primus, 436 U.S. 412, 422–32 (1978) (stating that a South Carolina law prohibiting nonprofit organization lawyer from soliciting plaintiffs violates the First and Fourteenth Amendments because these litigation activities are a form of political expression and association and a means for informing the public); Nat'l Ass'n for Advancement of Colored People v. Alabama, 357 U.S. 449, 466 (1958) (noting Alabama law requiring disclosure of nonprofit organization's membership list may impede "the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment").

Two general themes emerge from this authority. First, in determining whether an organization is serving community interests, as opposed to one or more private interests, courts and the IRS will more carefully scrutinize organizations providing benefits to a narrow range of persons within a community, such as an organization's members or those in control of the organization's operations, than organizations providing benefits to everyone in that community. Second, the IRS and courts often will focus on whether the benefits an organization is providing to a community on the one hand or to private interests on the other are direct or indirect, and in particular whether benefits being provided to private interests are incidental to the activities that benefit the community.

i. Benefits to Members, Founders, and Those in Control

Because Section 501(c)(4) organizations provide benefits to members of the community, the IRS and courts often closely scrutinize an organization that limits the benefits it provides to a specific group within the community, such as the organization's members, particularly when the nature of the organization's members are such that only a specific group within the community with common private interests, such as the individuals in a specific industry, can become a member of the organization. For example, in *Consumer-Farmer Milk Cooperative*, the Second Circuit held that a cooperative organization of milk producers and milk purchasers that paid a periodic dividend to the milk producers when funds were available was ineligible for exemption from tax under the predecessor to Section 501(c)(4) because the organization's dominant and controlling purpose was to benefit its members economically.[61] Similarly, in 1970, the tax court held that a trust established by the New York State Association of Real Estate Boards in order to provide group life insurance for individual and employer members of the associations was ineligible for exemption under Section 501(c)(4) because the trust "was organized for the benefit of its members only," a "small group interested in obtaining group insurance."[62]

In several rulings, the IRS has held that an activity carried on by an organization for the sole benefit of its members precluded exemption under Section 501(c)(4), even where that activity, if provided to the community at large, would be one that was in furtherance of the social

61. Consumer-Farmer Milk Coop. v. Comm'r, 186 F.2d 68, 71 (2d Cir. 1950).

62. N.Y. Ass'n of Real Estate Bds. Grp. Ins. Fund v. Comm'r, 54 T.C. 1325, 1333 (1970); *see also* Rev. Rul. 81-58, 1981-1 C.B. 331 (stating that an association of policy officers primarily engaged in providing retirement benefits to members and death benefits to members' beneficiaries is ineligible for exemption under Section 501(c)(4) because its primary benefits are limited to organization's members).

welfare. For example, an organization providing bus service for the convenience of its members, which were limited to employees of a specific corporation, was found to be ineligible for exemption under Section 501(c)(4) because the bus service was "operated primarily for the benefit of the members."[63] By contrast, the IRS concluded that an organization operating a rush-hour bus transportation service between a suburban community underserved by public transportation and nearby municipal areas was eligible for exemption under Section 501(c)(4) because it provided this service to anyone in the community.[64] Similarly, an organization furnishing television reception to its members on a cooperative basis was found to be ineligible for exemption by virtue of its being operated "for the benefit of its members rather than for the promotion of the welfare of mankind."[65] By contrast, an organization re-transmitting television reception to all members of a community that did not otherwise have reception was found to be eligible for exemption under Section 501(c)(4) even though the organization's membership, which was open to anyone in the community, also benefited from the transmission.[66] In another example, the IRS has stated that an organization formed by merchants in a community that operated a parking facility providing free parking to patrons of those merchants was ineligible for exemption.[67] By contrast, an organization formed by local merchants, businesspeople, churches, civic organizations and other interested individuals and organizations in a congested downtown area that provided a free parking facility for anyone visiting the downtown area was found to be eligible for exemption under Section 501(c)(4) even though the members also could use the parking and members who were local merchants could see increased business traffic.[68]

Finally, while the IRS ruled that an organization formed to advocate on behalf of its members, tenants of a housing complex, in negotiations and other matters involving their landlord was ineligible for exemption under Section 501(c)(4),[69] the membership class being by its nature a group of individuals with private interests more narrow than the interests of the community as a whole, it later ruled that an organization

63. Rev. Rul. 55-311, 1955-1 C.B. 72.

64. Rev. Rul. 78-69, 1978-1 C.B. 156.

65. Rev. Rul. 54-394, 1954-2 C.B. 131.

66. Rev. Rul. 62-167, 1962-2 C.B. 142.

67. Rev. Rul. 78-86, 1978-1 C.B. 151 (stating that the IRS will not follow the Ninth Circuit's decision in *Monterey Pub. Parking Corp. v. United States*, 481 F.2d 175 (9th Cir. 1973)).

68. Rev. Rul. 81-116, 1981-1 C.B. 333.

69. Rev. Rul. 73-306, 1973-2 C.B. 179.

formed to advocate on behalf of all tenants in a community was eligible for exemption under Section 501(c)(4).[70]

While in much of the authority finding organizations ineligible for exemption under Section 501(c)(4), the organization was engaging in an activity that was akin to a cooperative business enterprise,[71] the provision of benefits to members has resulted in ineligibility for the exemption even where the activity conducted by the organization was not a business enterprise.[72] But in all of these rulings, the organization was providing something of tangible benefit, and the limitation of those benefits to a class of individuals narrower than a full community resulted, at least in part, in the organization being ineligible for exemption.[73]

The IRS and courts may determine that an organization is ineligible for exemption under Section 501(c)(4), even if the organization does not limit its benefits to a class of members that is by its nature narrower than the full community,[74] when it is controlled by a private interest, such as

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70. Rev. Rul. 80-206, 1980-2 C.B. 185.

71. *See, e.g.*, N.Y. Ass'n of Real Estate Bds. Grp. Ins. Fund v. Comm'r, 54 T.C. 1325 (1970) (stating that an organization cooperatively purchasing life insurance on behalf of its members is ineligible for exemption under Section 501(c)(4)); Rev. Rul. 86-98, 1986-2 C.B. 74 (stating that an association that arranges for the delivery of health services through written agreements negotiated with health maintenance organizations on behalf of licensed physician members and provides billing and collection services for members is ineligible for exemption under Section 501(c)(4) because it "operates in a manner similar to organizations carried on for profit"); Rev. Rul. 75-199, 1975-1 C.B. 160 (stating that an organization providing sick benefits to its members and death benefits to its members' beneficiaries is ineligible for exemption under Section 501(c)(4) where membership is limited to members of an ethnic group of good moral character and health in a particular region).

72. *See, e.g.*, Rev. Rul. 78-132, 1978-1 C.B. 157 (stating that a community cooperative organization formed to facilitate the exchange of personal services among its members, such as home maintenance, repairs and transportation is ineligible for exemption as a private cooperative enterprise for the economic benefit of its members); Rev. Rul. 73-306, 1973-2 C.B. 179 (stating that an organization formed to advocate on behalf of its members, tenants of a housing complex, in negotiations and other matters involving their landlord ineligible for exemption under Section 501(c)(4)).

73. Even an organization operating a recreational facility may be found ineligible for exemption by virtue of it limiting the benefits it provides to its members. *See* Internal Revenue Serv. Private Letter Ruling No. 200531025 (Aug. 5, 2005) (stating that an organization operating, improving, and maintaining golf course for members and permitting members of the general public to use the course upon payment of green fee is ineligible for exemption under Section 501(c)(4)).

74. In all of these rulings, presumably the organization in question was a state law membership corporation whose members had some, albeit likely limited, right to participate in the organization's governance, such as by having the right to vote for the organization's directors. The fact that an organization provides benefits only to its members who have some governance rights with respect to the corporation may be a factor in considering whether the organization serves a private interest since the members have some sort of control over the organization. At the same time, it may be irrelevant whether the benefits an organization provides are provided only to its state law members as opposed to some other defined group of individuals. One would suspect that if any of the organizations found ineligible for exemption by virtue of providing benefits only to members were not state law membership corporations but nonetheless limited the provision of their benefits to the same defined group of persons within a community, for example, all individuals that pay the organization

the organization's founder or a person otherwise controlling the organization. In *The Erie Endowment v. United States,* the Third Circuit held that an organization, which became ineligible for tax-exempt status under Section 501(c)(3) because it retained earnings in excess of permissible amounts under the then-applicable tax law, was ineligible for exemption under Section 501(c)(4) because it was created and funded by a single individual who exerted influence over the organization's policies in a manner inconsistent with Section 501(c)(4).[75] Further, a trust formed to provide insurance benefits to employees of religious schools that were members of a tax-exempt association was found to be ineligible for exemption under Section 501(c)(4).[76]

More recently, the IRS considered an organization formed to "promote solutions to [a state's] challenging problems through grassroots advocacy and publicity," with a focus on a broad range of public issues, including the marine environment, inappropriate law enforcement raids, educational reform, governmental cost-cutting, entrepreneurial development, and ambulance response rates.[77] Despite the fact that this organization's activities would appear to be in furtherance of community interests, consistent with Section 501(c)(4), the IRS rejected the organization's application for Section 501(c)(4) status, reasoning that the organization was controlled by its founder, who was its only member and officer and primary funder; did not seek input from the community; and was not subject to oversight with no community members on its board.[78]

When it comes to benefiting a limited group of persons within a community, the IRS may be more conservative than courts. In *Eden Hall Farm,* the Western District of Pennsylvania held that an organization formed and funded by a former executive of the H.J. Heinz Company, whose management and control were vested in employees of Heinz and that ran a private vacation retreat for working women (and their guests) who were either employed by Heinz or by other employers selected by the organization's board, qualified as exempt under Section 501(c)(4) because the organization served thousands of working women in a re-

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a nominal fee, the organizations similarly would have been ineligible for exemption under Section 501(c)(4).

75. Erie Endowment v. United States, 316 F.2d 151, 156 (3d Cir. 1963). The organization also made loans to the founder's daughter. *Id.*

76. Am. Ass'n of Christian Schs. Voluntary Emps. Beneficiary Ass'n Welfare Plan Trust v. United States, 850 F.2d 1510, 1515–16 (11th Cir. 1988).

77. I.R.S. Priv. Ltr. Rul. 201224034 (June 15, 2012).

78. *Id.*; *see* discussion *infra* Part III.A.2.h (the founder was a politician and the issues the organization focused on were aligned with the founder's political agenda).

gion.[79] The court noted that there was no evidence of domination, control, or management of the organization by Heinz.[80]

The IRS, however, disagreed, issuing Revenue Ruling 80-205, in which it held that it would not follow the court's decision because the organization did not provide a benefit to the community as a whole, but instead primarily benefited a private group—the employees of the Heinz company and their guests.[81]

ii. Benefit to Community Must Not Be Remote or Incidental; Benefit to Private Interests Must Not Be Direct and Substantial

Section 501(c)(4) organizations often provide benefits to private interests. A free community bus service, which takes community members to a downtown area, provides a benefit to the individual members of that community who use the bus.[82] On numerous occasions, the IRS and courts have addressed the balance between the community interest on the one hand and private interests on the other that are served by a Section 501(c)(4) organization. In some of this authority, Section 501(c)(4) status is not available on the grounds that an organization only incidentally or remotely benefits the community. Additionally, the IRS and courts often will look at whether the organization's activity benefiting private interests is the same as or different than the activity benefiting the community, finding that conducting a different activity that benefits private interests is permissible only when it is remote or incidental to the activity benefiting the community. By contrast, when the same activity conducted by the organization benefits both the community and private interests, the focus in the authority may be on how direct or substantial the benefit is that is provided to the private interest.

ii(a). Community Benefit Must Not Be Remote, Incidental

An organization's activity that provides benefits to private interests will not be found to be exempt under Section 501(c)(4) if the benefit it provides to the community at large is remote or incidental. For example, the Sixth Circuit considered the fact that the original impetus behind an

79. Eden Hall Farm v. United States, 389 F. Supp. 858, 866 (W.D. Pa. 1975). The organization also made its grounds available to churches and civic groups. *Id.* at 864.

80. *Id.* at 863.

81. Rev. Rul. 80-205, 1980-2 C.B. 184.

82. *See* Rev. Rul. 78-69, 1978-1 C.B. 156. In the Section 501(c)(3) context, the permissibility of providing such a benefit may hinge on whether the users of the bus service are a charitable class. *See, e.g.*, Rev. Rul. 77-246, 1977-2 C.B. 190 (stating that an organization providing bus service to elderly and disabled individuals is eligible for exemption under Section 501(c)(3) because organization serves charitable classes). But Section 501(c)(4) organizations are not so constrained in their provision of benefits as long as those benefits serve a community interest.

organization being formed to purchase and subdivide land and finance the sale of plots to individuals was to induce industry to come to the community in which the land was located in order to relieve unemployment to be too remote a community benefit for the organization to qualify for exemption under Section 501(c)(4).[83] Similarly, a business industry group facilitating the vocational advancement of its members, which is not a social welfare activity, did not qualify for exemption under Section 501(c)(4) notwithstanding the fact business promotion may reduce the need for the unemployment benefits the organization provided (assuming that the provision of unemployment benefits constitute a Section 501(c)(4) activity), because these benefits are "remote" and "too tenuous to satisfy the requirements of the statute."[84]

ii(b). Benefit to Private Interests that Differs from the Benefit to the Community Must Not Be Direct and Substantial

The activity an organization undertakes that provides a direct and substantial benefit to the community may also benefit a private interest. This is not necessarily inconsistent with Section 501(c)(4) status. Even a direct benefit to private interests may not be inconsistent with Section 501(c)(4) status depending on the benefit provided to the community as a whole.[85] However, as demonstrated in the paragraphs below, an organi-

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83. Lake Petersburg Ass'n v. Comm'r, 33 T.C.M (CCH) 259 (1974) (stating that the fact that the original impetus behind an organization being formed to purchase, develop, and re-sell land surrounding a lake was to stimulate the economy of the city in which the land was located was too indirect and remote a community benefit for the organization to qualify for exemption under Section 501(c)(4)); *see also* Consumer-Farmer Milk Coop. v. Comm'r, 186 F.2d 68, 72 (2d Cir. 1950) (stating that an organization whose activities result in financial gain to its members does not qualify as a social welfare organization despite the fact that its activities benefit an industry and the organization incidentally devotes its efforts to charitable purposes); Comm'r v. Lake Forest, Inc., 305 F.2d 814, 818 (4th Cir. 1962) (corporation organized to purchase government housing project in order to convert the housing into nonprofit cooperatively-owned housing for its members may be a "public-spirited" endeavor but does not fall within Section 501(c)(4) because it only "incidentally redounds to society").

84. *See* Am. Women's Buyers Club, Inc. v. United States, 338 F.2d 526, 529 (2d Cir. 1964); *see also* Mut. Aid Ass'n of the Church of the Brethren v. United States, 578 F. Supp. 1451, 1457 (D. Kan. 1983), *aff'd on other grounds*, 759 F.2d 792 (10th Cir. 1985) (stating that organization's sale of property insurance to mutual aid church is not a "'necessary incident[]' of the religious philosophy of mutual aid 'to all people regardless of religious conviction'"); Rev. Rul. 81-58, 1981-1 C.B. 331 (stating that a nonprofit police officer association providing lump-sum payment to members or death benefits to their beneficiaries is not exempt under Section 501(c)(4) notwithstanding the fact that "the class of employees benefited by the organization consist of police officers engaged in the performance of essential and hazardous public services and there is an incidental benefit provided by the organization to the larger community, . . . [since] the primary benefits from the organization are limited to its members").

85. *See* Rev. Rul. 66-148, 1966-1 C.B. 143 (stating that a nonprofit that established and maintained a water storage and distribution system for members who pay assessment based on water

zation may be denied Section 501(c)(4) tax-exempt status if the benefit provided to the private interest is either too direct or substantial, particularly if the benefit is substantial as compared to the benefit being provided to the community.

For example, as noted above, the provision of a free bus service to all members of a community without access to public transportation benefits both the community and individual members of the community each time they ride the bus, and an organization providing such a service may be eligible for Section 501(c)(4) tax-exempt status.[86] This kind of benefit to a private interest does not seem controversial even where the community is not one that is economically disadvantaged; individual members of the community that take the bus benefit as members of the community in the same way all other members of the community benefit. Further, an organization that conducts an activity that benefits the community may also undertake an additional activity that does not benefit the whole community but rather benefits only its members and still be eligible for Section 501(c)(4) tax-exempt status if the activity that benefits private interests is incidental to and in furtherance of the organization's social welfare purposes.[87]

An organization also may provide a benefit to a community, and the same activity it undertakes in order to provide that benefit may simultaneously benefit a subset of the community that is a private interest. While the organization may be eligible for exemption under Section 501(c)(4), it may be ineligible if the benefit to the private interest is too direct and substantial. For example, the Ninth Circuit concluded that an organization formed by local business owners that constructed a parking facility in a congested downtown area for use by the general public qualified as exempt from tax under Section 501(c)(4).[88] Any local business—not only the businesses that formed the organization—could arrange with the organization a system whereby it would validate the parking tickets

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pumped from their well results in increase in overall water table, benefitting all residents of the community, is exempt under Section 501(c)(4)).

86. Rev. Rul. 78-69, 1978-1 C.B. 156.

87. *See* Rev. Rul. 64-313, 1964-2 C.B. 146 (stating that a memorial association promoting simplicity and dignity in funeral and memorial services that undertakes research and educational activities in furtherance of those purposes is exempt under Section 501(c)(4) notwithstanding the fact that it also supplies information to members as to funeral directors furnishing low-cost funerals because those referrals are "incidental to and in furtherance of the organization's primary social welfare functions").

88. Monterey Pub. Parking Corp. v. United States, 481 F.2d 175, 177 (9th Cir. 1973). The court also held that the organization qualified as exempt under Section 501(c)(3). *Cf.* Rev. Rul. 81-116, 1981-1 C.B. 333 (stating that an organization providing free public parking to anyone visiting a downtown area provides a direct benefit to the city and its residents and qualifies as exempt under Section 501(c)(4)).

of individuals who visited their businesses, paying the parking garage a lower rate than members of the public without validated tickets would pay.[89] While the activity the organization undertook benefitted the whole community through providing free parking, the same activity also benefited private business owners by encouraging parkers to patronize those businesses. Upholding the lower court, the Ninth Circuit held that this organization qualified as an exempt social welfare organization under Section 501(c)(4) because the city in which the garage was located was "the primary beneficiary" of the organization's purposes and while the local business owners who created the organization "were also undeniably benefited . . . this benefit is indistinguishable from that which inhered to the community as a whole."[90]

In other words, because the activity benefiting private interests—providing a parking garage to the community—was the very activity that benefited the community, the Ninth Circuit was able to conclude that the organization qualified for exemption under Section 501(c)(4).[91]

Further, in Revenue Ruling 81-116, the IRS held that an organization whose members included local merchants, businessmen, churches, and civic organizations, and that provided and maintained free public parking to anyone who visited a downtown area, served the community as a whole by relieving congested parking conditions.[92] The fact that these same activities undertaken to reduce congestion also benefited the merchants and businessmen that were among the organization's members was not a concern for the IRS.[93]

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89. *Monterey Public*, 481 F.2d at 177 (citing Monterey Pub. Parking Corp. v. United States, 321 F. Supp. 972, 975–76 (N.D. Cal. 1970)).

90. *Id.*

91. *But see* Rev. Rul. 78-131, 1978-1 C.B. 156 (focusing on the parking validation system that encourages parkers to visit the stores of the merchants that formed the organization, the IRS concluded that it will not follow the holding in *Monterey Public*).

92. Rev. Rul 81-116, 1981-1 C.B. 333.

93. Consistent with Revenue Ruling 78-69, the IRS did not even address the fact that visitors to the downtown area were able to park for free. Additionally, in 1979, the IRS considered whether a nonprofit organization whose purpose was to aid in the prevention, containment and cleanup of liquid, particularly oil, spills in a port area qualified as tax-exempt under Section 501(c)(4). Rev. Rul. 79-316, 1979-2 C.B. 228. It charged dues to its members based on the quantity of spillable liquid each member stored or shipped and charged members and nonmembers for cleaning up spills only at cost. *Id.* The IRS ruled that this organization qualified as exempt notwithstanding its provision of benefits to private interests because it served to prevent deterioration of a port community that did not otherwise have a means for containing, cleaning up, and preventing spills, including spills "that endanger marine life and foul recreational beaches and shorefront property." *Id.* While its activities also served to prevent damage to its members' facilities, aid them in complying with polluting laws, and help lower their insurance rates, the IRS ruled that these "benefits to members can properly be characterized as incidental to the primary activity of the organization." *Id.* In coming to this conclusion, the IRS noted that the benefits to the companies were benefits provided to any companies storing or shipping liquids in this port, not only companies that were members of the organi-

However, at some point, the benefit being provided to the private interest may be too direct or substantial to be consistent with the exemption. For example, in *Contracting Plumbers Cooperative Restoration Corp.*, the Second Circuit denied exemption under Section 501(c)(4) to an organization formed to repair sidewalk cuts created by plumbers in New York City.[94] Prior to formation of the organization, the city completed this work in a less efficient manner, increasing the time sidewalks remained open, the potential harm to members of community, and the potential liability of the plumbers who made the cuts. While the court acknowledged that the organization benefited the community, it held that the organization was not exempt under Section 501(c)(4) because the benefits it provided to its plumber members were both "substantial and different" from the benefits provided to the community at large.[95] Further, the court noted that the plumbers enjoyed an economic benefit "precisely to the extent that [the member] . . . uses, and pays for, its restoration services."[96] In other words, even though the activity benefiting the private interest was the same activity benefiting the community, the court expressed concern about how this different benefit that was provided to private interests was both substantial and direct.

What constitutes substantial benefit to a private interest is not clear, but it would appear to involve an analysis of the actual private benefit provided compared to the benefit provided to the community as a whole. In *Contracting Plumbers*, because the organization provided a substantial, direct, and different benefit to private interests than the benefit it provided to the community at large, the court concluded "that we therefore cannot say that it is 'primarily' devoted to the common good."[97]

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zation, and both members and nonmembers were charged the same costs for cleanups. *Id.* ("The organization's cleanup services are equally available to members and nonmembers and both members and nonmembers, if identifiable, are charged for the cost of labor, supplies, and equipment used in the cleanup of their spills.").

94. Contracting Plumbers Coop. Restoration Corp. v. United States, 488 F.2d 684, 687 (2d Cir. 1973).

95. *Id.*

96. *Id.* This decision may be squared with the Ninth Circuit's decision in *Monterey*: while a merchant who was a member of the organization considered in that case could financially benefit from the ticket validation system because it encouraged shoppers to visit his/her store, s/he did not benefit precisely to the extent s/he supported the organization in that supporting the organization did not guarantee any additional customers would frequent his/her business. *See supra* text accompanying notes 88–90; *see also* Vision Service Plan v. United States, No. CIVS041993LKKJFM, 2005 WL 3406321, *8 (E.D. Cal. Dec. 12, 2005) (non-precedential) (organization providing professional vision care service to subscribers who pay into a fund used to defray the cost of such services is not exempt under Section 501(c)(4) because the members enjoy the benefit of the services "precisely to the extent that members use and pay for services").

97. *Id.* The Second Circuit also could have come to the same outcome in *Contracting Plumbers* on the grounds that the organization benefitted its members and membership was limited to a group narrower than the community that had a common, private interest. The IRS's ruling addressing the

iii. Business Activities and Governmental Collaborations and Initiatives

Two additional themes emerge from the Section 501(c)(4) authority that are less directly related to the question of what private partisan activities and purposes are consistent with Section 501(c)(4), but are related to whether an organization is operated in furtherance of the social welfare.

The first theme is that the more an organization operates like a typical business enterprise, the less likely it will be found to be exempt under Section 501(c)(4). While an organization that achieves its social welfare purposes through the conduct of activities that are in some ways business-like may be exempt from tax under Section 501(c)(4)—such as operating an employment service for the elderly unemployed,[98] making loans to businesses in order to induce them to come into a community suffering from high unemployment,[99] operating a roller skating rink,[100] and operating an amateur art show in which art made by members of the community could be purchased[101]—at some point, a social welfare organization's activities operating a business-like enterprise can cross a line and be seen not as benefiting the community but rather as benefiting private interests to an extent that is inconsistent with the exemption.[102] Industry-specific housing development activities undertaken in order to lessen unemployment have been found to be ineligible for exemption on these grounds.[103] Organizations that operate as business cooperatives also

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organization that cleaned up spillage in a port area, Rev. Rul. 79-316, 1979-2 C.B. 228, is a bit difficult to square with *Contracting Plumbers*, in that both organizations directly benefited private interests. However, certain things distinguish the two organizations. First, unlike in *Contracting Plumbers*, the clean-up service the organization provided was available to members and nonmembers alike. Additionally, unlike in *Contracting Plumbers*, there was no other means in the community for cleaning up and preventing spills. In other words, the benefit to the community was substantial, including as weighed against the benefit provided to the private companies. In *Contracting Plumbers*, the benefit to the private interests seems to have been more substantial when compared to the benefit provided by that organization to the community.

98. Rev. Rul. 57-297, 1957-2 C.B. 307.

99. Rev. Rul. 67-294, 1967-2 C.B. 193.

100. Rev. Rul. 67-109, 1967-1 C.B. 136 (noting that the organization charged a low admission to skaters).

101. Rev. Rul. 78-131, 1978-1 C.B. 156 (noting that the organization encouraged the display of art by high school students).

102. As noted in Part II.A.2.b, Treasury regulations under Section 501(c)(4) state that if an organization's primary activity "is carrying on a business with the general public *in a manner similar to organizations which are operated for profit*," the organization will not be seen as operated primarily for the promotion of social welfare. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (as amended in 1990) (emphasis added) (but this concern is developed in authority that precedes the promulgation of this regulation).

103. Indus. Addition Ass'n v. Comm'r, 149 F.2d 294 (6th Cir. 1945) (stating that an organization seeking to attract businesses to a region suffering from unemployment that purchased land on which it built housing it rented to a milling company it induced to establish operations in that region for use by the milling company's employees was ineligible for exemption under the predecessor to

have been found to be ineligible for exemption under Section 501(c)(4).[104] Even if an organization conducts activities that are classic social welfare activities, such as recreational activities, the organization may be found ineligible for exemption under Section 501(c)(4) if those activities are conducted in a manner that is like a for-profit business.[105]

The second theme is that to the extent an organization's purposes and activities are in furtherance of an express governmental priority or are done in coordination with a governmental authority, the more likely the IRS and courts will conclude that the activities are in furtherance of the social welfare.

For example, while the Fourth Circuit in *Lake Forest, Inc.* held that a cooperative housing organization did not qualify as exempt under Section 501(c)(4), several decades earlier the Seventh Circuit held, in *Garden Homes Co. v. Commissioner*, that a corporation formed by a special act of the Wisconsin legislature and conceived, initiated, and controlled by the city and county governments of Milwaukee to create housing during a housing shortage was eligible for exemption under the predecessor to Section 501(c)(4).[106]

Additionally, while courts and the IRS have held that cooperative associations, such as police benevolent associations, formed in order to purchase insurance or other benefits on behalf of their members, are not eligible for exemption under Section 501(c)(4),[107] the IRS held otherwise in the case of a nonprofit firefighters' association formed pursuant to an act of the state legislature and funded and controlled by a local government that provided retirement benefits to firefighters ineligible to receive benefits under a civil service retirement program because they were em-

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Section 501(c)(4) because the organization "entered into a competitive field" and engaged in a "business of a kind ordinarily carried on privately for profit").

104. Consumer-Farmer Milk Coop. v. Comm'r, 186 F.2d 68, 71 (2d Cir. 1950) (stating that a milk producer and milk purchaser cooperative was organized for a profit-making purpose—the payment of a periodic dividend to the milk producers to the extent there were funds available to do so—and therefore the organization could not be found to be exempt from tax under the predecessor to Section 501(c)(4)).

105. Rev. Rul. 55-516, 1955-2 C.B. 260 (stating that a semiprofessional baseball club which provided 95% of the net gate receipts to players is ineligible for exemption under Section 501(c)(4)); *cf.* Rev. Rul. 69-384, 1969-2 C.B. 122 (stating that an amateur baseball club is exempt under Section 501(c)(4)).

106. Garden Homes Co. v. Comm'r, 64 F.2d 593, 599 (7th Cir. 1933), *distinguished by* Comm'r v. Lake Forest, Inc., 305 F.2d 814, 819 (4th Cir. 1962); *see also* Scofield v. Rio Farms, Inc., 205 F.2d 68, 70 (5th Cir. 1953) (stating that a farm corporation that is controlled by the Farm Security Administration "to meet the social problems and assist low-income farm families and individuals . . . in obtaining agricultural benefits, marketing and otherwise, and in improving their economic position" qualifies as exempt from tax under the predecessor to Section 501(c)(4)).

107. *See, e.g.*, Police Benevolent Ass'n of Richmond, Virginia v. United States, 661 F. Supp. 765, 772–73 (E.D. Va. 1987); Rev. Rul. 81-58, 1981-1 C.B. 331.

ployed by a local government prior to the effective date of the program.[108] The IRS distinguished the facts before them from prior precedent because the organization was established, maintained, and controlled by the local government.[109] Moreover, the organization's benefits were funded by the government and automatically granted to firefighters ineligible to receive civil service benefits; thus, the benefit was "of a type and in an amount that the local government has decided is sufficiently in the public interest to be recognized as a legitimate function of government."[110] These facts demonstrated that the association was "serving the common good and general welfare of the people of the community."[111]

iv. Case Example: Homeowners' and Neighborhood Beautification Associations

Because the Section 501(c)(4) exemption category is broad, the appropriate balancing of the tension between the community and the private interests an organization may support consistent with the exemption primarily must be discerned from caselaw addressing a wide variety of organizational activities. However, there is one line of authority—the authority addressing homeowners' associations and neighborhood beautification organizations under Section 501(c)(4)—that is particularly well developed. While homeowners' associations and advocacy organizations that engage in partisan political activities are about as far apart as possible on the broad spectrum of Section 501(c)(4) organizations, it is worth taking some time to consider the authority in this area because it focuses in particular on the question of what is a community versus a private interest and the scope of permissible Section 501(c)(4) activities that benefits private interests, and it does so in the context of an organization that is formed by and for, or is controlled by, a limited group of private actors.[112]

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108. Rev. Rul. 87-126, 1987-2 C.B. 150.

109. *Id.*

110. *Id.*

111. *Id.* (citing Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (as amended in 1990)). *Compare* Consumer-Farmer Milk Coop. v. Comm'r, 186 F.2d 68, 69–72 (2d Cir. 1950) (stating that the payment of dividends to its milk producer members was the primary reason the Second Circuit held that a milk cooperate was ineligible for exemption under Section 501(c)(4)), *with* United States v. Pickwick Elec. Membership Corp., 158 F.2d 272 (6th Cir. 1946) (stating that a public utility cooperative membership corporation formed by an act of the Tennessee legislature in order to assist in bringing electricity to rural communities that provided electricity to members and nonmembers and distributed to members excess earnings in the form of patronage refunds or rate reductions qualified as an organization exempt from tax under the predecessor to Section 501(c)(4)).

112. Note that many homeowners' associations are recognized as exempt from tax not under Section 501(c)(4), but under 26. U.S.C. § 528 (1997), which Congress enacted in light of the difficulty many homeowners' associations faced in qualifying as exempt under Section 501(c)(4). *See* 26 U.S.C. § 528 (1997); INTERNAL REVENUE SERV., HOMEOWNERS ASSOCIATIONS UNDER IRC

In 1975, the IRS considered an organization formed to preserve and beautify a city block.[113] The organization paid the city to plant trees, conducted litter drives, encouraged members to plant shrubbery, and paid its expenses using voluntary contributions and amounts raised by holding block parties.[114] The organization's members were limited to residents and property owners of, and business owners operating within, that block. The IRS recognized that the organization's activities benefited the members of the organization.[115] They enhanced the quality of the block, which could have a positive impact on the businesses run by the business operator members and enhanced the value of property owned by members.

While the organization provided benefits to its members, membership was not limited to property owners whose property values may be enhanced by the organization's activities, nor was it limited to business owners, some of whose businesses would be of a type that would be improved by the organization's activities. Residents of the block—who may not have been property owners or business operators—were also eligible to be members, thus making the group controlling the organization more like a community and the organization more answerable to community interests. Ultimately, the IRS determined that because the organization's activities "beautify and preserve public property in cooperation with the local government" and "the community as a whole benefits" from these activities, the organization was organized for the promotion of social welfare.[116] Additionally, the IRS noted that the organization collaborated with a local government, which was a factor that favored treating it as a social welfare organization.[117]

It is interesting to consider this ruling against the authority presented earlier in this section discussing benefiting members, founders, and

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501(C)(4), 501(C)(7) AND 528 (1982) (citing H.R. REP. NO. 94-658 (1975)), *reproduced in* 1979-3, Vol.1, C.B. 373, *available at* http://www.irs.gov/pub/irs-tege/eotopicr82.pdf. Organizations meeting the requirements of 26 U.S.C. § 528 (1997), which include limits on the percentage of gross income derived from sources other than dues, fees, and assessments and on the percentage of expenditures unrelated to the acquisition, construction, management, maintenance, and care of the association's property, are exempt from tax on income derived from dues, fees, and assessments. *See* 26 U.S.C. § 528 (1997).

113. Rev. Rul. 75-286, 1975-2 C.B. 210; *see also* Rev. Rul. 67-6, 1967-1 C.B. 135 (stating that an organization devoted to preserving traditions, architecture, and appearance of a community primarily by advocating before governmental bodies regarding zoning, parking, traffic, sanitation, and lighting regulations and activities, and also by participating in crime prevention and anti-litter campaigns, qualifies as exempt under Section 501(c)(4) but does not qualify as exempt under Section 501(c)(3) because its activities are on behalf of a community and not the general public).

114. Rev. Rul. 75-286, 1975-2 C.B. 210.

115. *Id.*

116. *Id.*

117. *Id.*

other private persons controlling the organization and discussing the balance of the benefits provided by Section 501(c)(4) organizations to community and private interests. Because the block improved by this organization was a public city block, all members of the community as a whole—members and nonmembers alike—could enjoy the benefit of the improvements to the city block in the same way that residents of the block could enjoy those improvements. The business operator- and property owner-members stood to receive a different, additional benefit than did resident-members and the community at large, but that benefit was an indirect result of the visual improvements to the block and not guaranteed, and the organization did not undertake any additional activities specifically benefiting these members.

Homeowners' associations, which are organizations whose members are the property owners in a specific housing development (the association often is formed as part of a developer's plan) and are organized to improve or maintain the public areas in the development, will be carefully scrutinized by the IRS and courts in order to determine whether the organization sufficiently benefits the interests of a community, as opposed to the private interests of the association's members, within the meaning of Section 501(c)(4). This may be due in large part to the fact that the members that control, and in many cases founded, a homeowners' association are the private property owners whose property values may be enhanced by the organization's activities or the developers that formed the development the organization serves.

The IRS has indicated that "the *prima facie* presumption" is that homeowners' associations are "formed and operated for the individual business or personal benefit of their members, and, as such, do not qualify for exemption under section 501(c)(4)."[118] Homeowners' associations can overcome this presumption by demonstrating that the homeowners' association covers a geographic area that is itself a community. For example, a geographic region is a community where it is has "reference to a geographical unit bearing a reasonably recognizable relationship to an area ordinarily identified as a governmental subdivision or a unit thereof"[119] or where the geographic region functions similarly to a community, such as by being of significant size, having its own post office and zip code, or not being a private enclave within another municipality.[120] In

118. Rev. Rul. 74-99, 1974-1 C.B. 131, *modifying* Rev. Rul. 72-102, 1972-1 C.B. 149.

119. *Id.*

120. *See, e.g.*, Rancho Santa Fe Ass'n v. United States, 589 F. Supp. 54, 57–59 (S.D. Cal. 1984) (stating that a homeowners' association covering 6,100 acres of land, including parkland, open space, playgrounds, athletic fields, tennis courts, hiking trails, a community clubhouse, an inn, and a parking lot, and has its own post office and zip code constitutes a community for purposes of Section 501(c)(4)); *see also* Columbia Park & Recreation Ass'n, Inc. v. Comm'r, 88 T.C. 1 (1987) (stating

these cases, the IRS has noted that while the organization may have been established by a developer, aid in the selling of homes, and "serve to preserve and protect property values in the community," such private, non-community benefits "are . . . incidental to the goal to which the organization's activities are directed, the common good of the community."[121]

Because the property owners *are* a community, the benefit provided to the community is identical to the benefit provided to the homeowners and therefore permissible, notwithstanding the fact that the community members (homeowners) benefit in a private capacity by virtue of the activities of the homeowners' association—both in terms of enhanced property values and ability to use the benefits provided by the association. The former benefit is not directly related to the homeowners' association's activities. However, the latter benefit is. It may be for this reason that homeowners' associations that serve a community are limited in the activities they may undertake and qualify as tax-exempt under Section 501(c)(4). According to the IRS, in order for a homeowners' association that serves a community to qualify as exempt under Section 501(c)(4), that organization must limit its activities to owning and maintaining areas and facilities that are traditionally recognized and accepted as being of direct governmental concern in the exercise of the powers and duties entrusted to governments, such as roadways, parklands, sidewalks, and street lights, all of which are open to members of the general public.[122] In other words, the organization must function more closely to the city block association considered by the IRS in Revenue Ruling 75-286.

If a homeowners' association does not serve a region that constitutes a community for purposes of Section 501(c)(4), that does not mean that it cannot qualify for exemption under Section 501(c)(4).[123] However, the IRS will perform an even more careful analysis of the benefits that accrue to the homeowners controlling the organization because they not only may benefit from the organization's activities but are themselves a private, rather than a community, interest.[124] The IRS considers such an organization to be promoting the social welfare if its activities benefit the larger community within which the association is located, such as by making available to the general public its recreational facilities (e.g.,

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that a homeowners' association of more than 100,000 residents of planned community that maintains paths, parks, pools, community centers, tennis courts, a golf course, a zoo, an ice skating rink, a boat dock, and athletic clubs is eligible for exemption under Section 501(c)(4)).

121. Rev. Rul. 72-102, 1972-1 C.B. 149, *modified by* Rev. Rul. 74-99, 1974-1 C.B. 131.

122. Rev. Rul. 74-99, 1974-1 C.B. 131. Further, such an organization may not include activities devoted to exterior maintenance of private residences. *Id.*

123. Rev. Rul. 80-63, 1980-1 C.B. 116, *clarifying* Rev. Rul. 74-99, 1974-1 C.B. 131.

124. *Id.*

swimming pools, tennis courts, and picnic areas).[125] If it does not do so, then the organization does not confer "a universal benefit" or is not an "active part of society," and instead the IRS may consider it "a private refuge for those who would live apart."[126] The fact that this organization exercises powers and duties entrusted to governments on behalf of its residents—such as water, sanitation services, snow removal, security, road, and equipment maintenance—will not necessarily qualify the organization as exempt under Section 501(c)(4) because these activities are for the benefit of a private group of individuals.[127]

While courts and the IRS have recognized that homeowners' associations may operate in furtherance of social welfare by benefiting community interests even though they also enhance property values and serve the private interests of the residents of the community they encompass, there are circumstances where these organizations provide direct benefits to residents—such as maintenance of the exterior walls and roofs of homes—such that the organizations' activities are inconsistent with § 501(c)(4),[128] thereby precluding exemption. And this is the case even where the organization serves a geographic region that constitutes a community,[129] because this type of maintenance and repair work provides a too direct and substantial benefit to the members of the association. Similarly, the IRS has held that a homeowners' association formed by condominium unit holders to manage, maintain, and care for common areas cannot be tax exempt under § 501(c)(4).[130] The IRS noted that "condominium ownership necessarily involves ownership in common by all condominium unit owners of a great many so-called common areas, the maintenance and care of which necessarily constitutes the provision of private benefits for the unit owners."[131] The fact that improvements to the common areas directly benefit property owned by the members confers too direct a benefit to a private interest to be consistent with Section 501(c)(4).

The authority in this area demonstrates that while an organization's activities may benefit private interests—such as home and business own-

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125. *Id.*

126. Flat Top Lake Ass'n, Inc. v. United States, 868 F.2d 108, 112–13 (4th Cir. 1989).

127. *But see id.* at 113–14 (Widener, J., dissenting) (objecting to public use being the "*sine qua non* of a § 501(c)(4) exemption").

128. Rev. Rul. 69-280, 1969-1 C.B. 152.

129. Rev. Rul. 74-99, 1974-1 C.B. 132 ("[T]he exterior maintenance activities reinforce the *prima facie* presumption that the organization is operated essentially for private benefit.").

130. Rev. Rul. 74-17, 1974-1 C.B. 130.

131. *Id.*; *see also* Rev. Rul. 73-306, 1973-2 C.B. 179 (stating that a nonprofit organization formed to represent member-tenants of an apartment complex is operated for the private benefit of its members and therefore is not engaged in activities for the common good and general welfare of the people of the community for purposes of Section 501(c)(4)).

ers in the community served by the organization and real estate developers—the organization may be exempt from tax under § 501(c)(4). To be exempt, the activities the association undertakes that benefit private interests—the homeowners—must be the same activities that benefit the community as a whole, which may be achieved if the homeowners are in fact themselves a group that is based broadly enough to constitute a community. However, even in this situation, the organization may not directly benefit homeowners, such as by completing actual repair work on their homes. If, by contrast, the homeowners do not constitute a community, the association can benefit the community as a whole only if the benefits provided to the homeowners—such as a parkland or a swimming pool—are identical to the benefits made available to the community at large.

2. Non-exempt Purposes and Activities

Can an organization with a valid social welfare purpose that benefits community (as opposed to private) interests conduct activities that are not in furtherance of its exempt social welfare purpose? And if there are quantitative limits to these activities—the amount of these activities the organization can engage in—are there also qualitative limits? In other words, are there limits to the kinds of non-exempt activities the organization may engage in?

Importantly, while an organization's stated purposes are of interest in determining whether an organization is exempt under § 501(c)(4), courts will look beyond stated purposes to consider the organization's purposes based on its actual operations.[132] As the IRS recently stated, whether an organization is "primarily engaged" in promoting social welfare requires an analysis of all relevant facts and circumstances, including "the manner in which the organization's activities are conducted; resources used in conducting such activities, such as buildings and equipment; the time devoted to activities (by volunteers as well as em-

132. *See, e.g.*, Contracting Plumbers Coop. Restoration Corp. v. United States, 488 F.2d 684, 687 (2d Cir. 1973); United States v. Pickwick Elec. Membership Corp., 158 F.2d 272, 276 (6th Cir. 1946) ("The actual purpose is not controlled by the corporate form or by the commercial aspect of the business transacted, but may be shown by extrinsic evidence, including the by-laws and the method of operation."). Debs Mem'l Radio Fund v. Comm'r, 148 F.2d 948, 951 (2d Cir. 1945) (stating how the failure to include social welfare purposes in constitutive documents does not result in failure to qualify as exempt under Section 501(c)(4)); Roche's Beach v. Comm'r, 96 F.2d 776, 778–79 (2d Cir. 1938) (discussing how the incorporation under business corporation law does not result in failure to qualify as tax exempt if extrinsic evidence regarding actual purposes demonstrative qualification for the exemption); Mut. Aid Ass'n of the Church of the Brethren v. United States, 578 F. Supp. 1451, 1457 (D. Kan. 1983) (stating how the organization's statement of a social welfare purpose is not conclusive).

ployees); the purposes furthered by various activities; and the amount of funds received from and devoted to particular activities."[133]

As stated above, while Section 501(c)(4) itself states that to qualify for exemption an organization must be operated "exclusively" for social welfare, the term "exclusively" has been interpreted to mean something less than exclusive—the interpretation often used is that the organization must be "primarily" operated for social welfare.[134] The Treasury regulations under Section 501(c)(4) specifically state that an organization (1) is exclusively operated 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, and (2) is embraced within Section 501(c)(4) if it is operated "primarily for the purpose of bringing about civic betterments and social improvements."[135] The first clause, referring to what the organization must be "engaged in," may be an activities-based test. If the organization is engaged in these activities, it will meet the social welfare purposes requirement of Section 501(c)(4).

The second clause may be an activities test (what activities does the organization undertake as part of its operations?) or a purposes test (what are its operational purposes?). The regulations seem to establish that as long as the organization's primary activities directly further the organization's exempt social welfare purposes, other activities that do not are permissible. But if other activities are permissible, it is unclear whether the organization's non-primary activities that do not directly promote social welfare can constitute *any* activities at all, or instead must be restricted to activities that do not directly promote social welfare but nevertheless further the organization's goals.

For example, while activities engaged in solely for profit are not social welfare activities, social welfare organizations may engage in profit-making activities in order to raise funds to support their social welfare activities. In fact, the permissibility of a Section 501(c)(4) organization engaging in profit-making activities is of long provenance. It is based on the "ultimate destination" of income test articulated by the U.S. Supreme Court in 1924 in *Trinidad v. Sagrada Orden de Predicadores*.[136] Under this test, a tax-exempt organization may conduct a commercial operation as long as the ultimate destination of the profits of that operation was in furtherance of the organization's exempt purpos-

133. I.R.S. Priv. Ltr. Rul. 201224034 (June 15, 2012).

134. *See supra* Part II.A.1.c.

135. Treas. Reg. § 1.501(c)(4)-1(a)(2) (as amended in 1990).

136. Trinidad v. Sagrada Orden de Predicadores, 263 U.S. 578, 581 (1924) (applying the test in the context of an organization exempt under the predecessor to Section 501(c)(3)).

es.[137] In other words, while these profit-making activities are not themselves directly in furtherance of social welfare, there is a nexus between these activities and the organization's social welfare goals (and importantly, they are not undertaken for any additional non-social welfare purpose of the organization).[138]

However, at some point, an organization's profit-making activities will cause it to be ineligible for tax-exempt status under Section 501(c)(4). For example, in *People's Educational Camp Society v. Commissioner*, the Second Circuit held that an organization that was formed to promote Socialist principals and educate the public about the labor movement was ineligible for exemption under Section 501(c)(4).[139] Although the organization originally formed a camp to serve as a place to develop its programs and for people to study its principles, the camp eventually evolved into a resort open to paying members of the public, which competed with other resorts in its region and was used only to a minimal extent to conduct social welfare activities for the community. The profits generated from this operation did not inure to the benefit of any private party, nor were they used in furtherance of an organizational purpose that was inconsistent with Section 501(c)(4) status. Instead, they primarily were used to expand the camp facilities and the organization's reserve.

However, the Second Circuit stated that the ultimate destination test "ought not to be used to permit an entity to escape taxation where, as here, so much of its revenues is devoted to expanding its commercial facilities and increasing its surpluses, and so little of its revenues are actually spent for social welfare activities."[140] The extent of these activities precluded a conclusion that the activities were being conducted in support of social welfare purposes. Instead, the court stated that these activities were extensive enough that as a factual matter "the primary purpose of the organization [was] not really the promotion of social welfare but

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137. *See* Hanover Imp. Soc., Inc. v. Gagne, 92 F.2d 888, 891 (1st Cir. 1937) (applying the ultimate destination test in context of the predecessor to Section 501(c)(4)); *Roche's Beach*, 96 F.2d 776; *Debs Memorial Radio Fund*, 148 F.2d 948.

138. The application of the unrelated business income tax regime to profit-making activities of Section 501(c)(4) organizations demonstrates Congress's approval of Section 501(c)(4) organizations engaging in these activities. *See* 26 U.S.C. § 511 (1988).

139. People's Educ. Camp Soc'y, Inc. v. Comm'r, 331 F.2d 923, 939 (2d Cir. 1964). The tax years in question preceded promulgation of the Department of Treasury regulation under Section 501(c)(4) that limits business activities.

140. *Id.* at 933. This case was decided prior to promulgation of Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (as amended in 1990), which states that an organization is not operated primarily for the promotion of social welfare and, therefore, may not be exempt under Section 501(c)(4) "if its primary activity . . . is carrying on a business with the general public in a manner similar to organizations which are operated for profit."

the running of a commercial operation."[141] Once the activities become the organization's primary activities, they become in some ways constitutive of the organization's purpose, thereby precluding exemption. Other courts similarly have held that profit-making activities that form a significant portion of an organization's activities may be a non-exempt purpose precluding exemption.[142]

In another example, the operation of a recreational facility is not a social welfare activity.[143] However, some social welfare organizations, such as veterans' organizations and volunteer fire companies, may in fact operate a recreational activity in connection with or in support of their social welfare activities. For example, according to IRS Revenue Rulings, a garden club and a volunteer fire company may provide recreational facilities and conduct recreational activities on behalf of their members.[144] In a 1974 Revenue Ruling, the IRS noted that a volunteer fire company's provision of a recreational facility to its volunteers, whether on or off duty, "fosters a camaraderie and spirit of cooperation that is important to the operation of an effective firefighting unit."[145] In other words, while the regulations state that providing a recreational facility, like earning income, is not directly in furtherance of social wel-

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141. *Id.*

142. *See* Veterans Found. v. United States, 281 F.2d 912, 914 (10th Cir. 1960) (holding that an organization operating two stores selling merchandise, the profits of which were paid to an organization serving disabled veterans, was ineligible for exemption under Section 501(c)(4)); Consumer-Farmer Milk Coop. v. Comm'r, 186 F.2d 68, 71 (2d Cir. 1950); Club Gaona, Inc. v. United States, 167 F. Supp. 741, 746–47 (S.D. Cal. 1958) (stating that an organization formed to promote education and support the development of Mexican youth and which, among other things, held meetings, celebrated Mexican holidays, promoted a baseball team, and provided gifts to service members eventually came to conduct as its chief activity the promotion of regular social dances open to the public for a fee, and thereby became ineligible for exemption under Section 501(c)(4)); Los Angeles Cnty. Remount Ass'n v. Comm'r, 27 T.C.M. (CCH) 1035 (1968) (holding that an organization operating a commercial facility for use by horse owners was ineligible for exemption under Section 501(c)(4) notwithstanding the fact that the facility also was made available for use by a small regiment of mounted Los Angeles police officers).

143. An organization may not be exempt from tax under Section 501(c)(4) by virtue of its operation of a social club. However, under Section 501(c)(7), an organization may be tax exempt as a "[c]lub[] organized for pleasure, recreation, and other nonprofitable purposes, substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder."

144. *See* Rev. Rul. 66-179, 1966-1 C.B. 139 (stating that a garden club permissibly conducting recreational activities for its members is exempt under Section 501(c)(4)); Rev. Rul. 74-361, 1974-2 C.B. 159 (addressing that a volunteer fire company providing recreational facilities to its members qualifies for exemption).

145. Rev. Rul. 74-361, 1974-2 C.B. 159. This ruling addressed whether the organization's activities were consistent with both Sections 501(c)(4) and 501(c)(3), finding that the organization qualified as exempt under both provisions. By contrast, the authority does not support a volunteer fire company that undertakes firefighting activities as its primary purposes using its resources to operate a social club out of the garage of one of its members that is not open to volunteer fire fighters, but instead is open to members of a certain ethnic group.

fare, an organization may undertake this activity—as long as it is not the organization's primary activity and it nonetheless is supportive of, or indirectly in furtherance of, the organization's social welfare purposes.

By contrast, there is no apparent authority that supports a Section 501(c)(4) organization conducting non-exempt activities that are not even supportive of the organization's social welfare purposes and are instead in furtherance of some other non-social welfare goal. It is possible that these activities are inconsistent with Section 501(c)(4) tax-exempt status.

A Second Circuit case provides some support for this proposition. In *American Women Buyer's Club, Inc.*, the court considered a membership corporation of women who were in the ready-to-wear apparel and accessory business.[146] The organization paid for sickness and unemployment benefits on behalf of its members and also incurred significant expenses in conducting its board, committee, and membership meetings at which lectures and discussions regarding trade issues were conducted and refreshments or dinner were served.[147] It argued that its non-exempt recreational and vocational activities were ancillary to the organization's basic social welfare purpose of providing sickness and unemployment benefits.[148] The Second Circuit assumed for purposes of its decision that the provision of sickness and unemployment benefits were in furtherance of social welfare, but found that the social and vocational activities the organization conducted were not.[149] While the court noted that these activities "may indeed help to keep the organization alive," it concluded that the activities did not sufficiently support the organization's presumed social welfare purposes in order to be consistent with Section 501(c)(4).[150] In fact, the organization appeared to be serving as a business trade group, which is not consistent with Section 501(c)(4) tax-exempt status.

Under this reading of the authority, an organization may not be tax-exempt under Section 501(c)(4) if two criteria exist: (1) its primary activities are not in furtherance of social welfare, and (2) its activities that are not in furtherance of social welfare have no nexus with the organization's social welfare activities—these activities are not somehow indi-

146. *See generally* Am. Women's Buyers Club, Inc. v. United States, 338 F.2d 526 (2d Cir. 1964).

147. *Id.* at 527.

148. *Id.*

149. *Id.* at 528.

150. *Id.* at 529; *see also* Vision Service Plan, Inc. v. United States, No. CIVS041993LKKJFM, 2005 WL 3406321, *8 (E.D. Cal. Dec. 12, 2005) (non-precedential) (organization conducting substantial non-exempt, private activity that is not in furtherance of its activities benefiting the community is not exempt under Section 501(c)(4)).

rectly in furtherance of social welfare but rather are conducted for some other purpose.

There is additional support in the Section 501(c)(4) authority for the notion that a Section 501(c)(4) organization may not have a purpose—or at least not a substantial one—that is inconsistent with Section 501(c)(4). The U.S. Supreme Court first addressed this question in the context of an organization exempt from tax under the precursor to Section 501(c)(3). In *Better Business Bureau of Washington, D.C. v. United States*, the Court held that an organization may not have any substantial purpose that does not qualify as a Section 501(c)(3) purpose:

> [I]n order to fall within the claimed exemption, an organization must be devoted to educational purposes exclusively. This plainly means that the presence of a single non-educational purpose, if substantial in nature, will destroy the exemption, regardless of the number or importance of truly educational purposes.[151]

While *Better Business Bureau* was not a Section 501(c)(4) case, the Court's holding has been applied on numerous occasions to organizations seeking to obtain or maintain their exemption from tax under Section 501(c)(4), including by the Second, Fourth and Eleventh Circuits, several federal district courts, and the IRS.[152] At this point, it may be seen as a judicial gloss on the language in 26 U.S.C. § 501(c)(4) requiring an organization be operated exclusively for exempt purposes and the Section 501(c)(4) Treasury regulations that require an organization be "primarily engaged in" or operated "primarily for the purpose" of Section 501(c)(4) exempt purposes.[153]

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151. Better Bus. Bureau of Wash., D.C. v. United States, 326 U.S. 279, 283 (1945).

152. *See, e.g.*, Contracting Plumbers Coop. Restoration Corp. v. United States, 488 F.2d 684, 686 (2d Cir. 1973); Am. Women's Buyers Club, Inc. v. United States, 338 F.2d 526, 528 (2d Cir. 1964); People's Educ. Camp Soc'y, Inc. v. Comm'r, 331 F.2d 923, 931 (2d Cir. 1964); Comm'r v. Lake Forest, Inc., 305 F.2d 814, 820 (4th Cir. 1962); Consumer-Farmer Milk Coop. v. Comm'r, 186 F.2d 68, 72 (2d Cir. 1950); Am. Ass'n of Christian Schs. Voluntary Emps. Beneficiary Ass'n Welfare Plan Trust v. United States, 850 F.2d 1510, 1513 (11th Cir. 1988); Vision Serv. Plan, Inc. v. United States, 2005 WL 3406321, *4 (E.D. Cal. 2005), *aff'd on other grounds*, 265 Fed. App'x. 650, 2008 WL 268075 (9th Cir.), *cert. denied*, 555 U.S. 1097 (2009); Mut. Aid Ass'n of the Church of the Brethren v. United States, 578 F. Supp. 1451, 1457 (D. Kan. 1983), *aff'd on other grounds*, 759 F.2d 792 (10th Cir. 1985); Club Gaona, Inc. v. United States, 167 F. Supp. 741, 743 (S.D. Cal. 1958); I.R.S. Priv. Ltr. Rul. 20122404.

153. As Ezra Reese of Perkins Coie has pointed out, the first time the standard was applied in the Section 501(c)(4) context, in *People's Education Camp Society*, the court appears to have been conflating the "substantial purpose" standard of *Better Business Bureau* with the "primary purpose" standard in Section 501(c)(4), and therefore the applicability of the United States, *Better Business Bureau* standard in the Section 501(c)(4) context may have originated as a judicial mistake. *See Election Year Issues for Exempt Organizations*, 70 EXEMPT ORG. TAX REV. 622, 631–32 (2012) (transcribing the ABA tax section's exempt organization committee meeting). That being said, the

While the courts applying *Better Business Bureau* to Section 501(c)(4) organizations do not define when a non-exempt purpose is considered substantial and therefore inconsistent with Section 501(c)(4) tax-exempt status,[154] they certainly seem to impose a more rigorous standard than the "primary purpose" test. The applicability of this standard to Section 501(c)(4) organizations is of considerable significance as a limitation on qualification for exemption under this subsection of the Code. If this standard applies, then because an organization's activities may be constitutive of its purposes, it would further support the argument that activities not directly in furtherance of social welfare purposes must be not only non-primary and indirectly in furtherance of the organization's social welfare purposes, but also, if they are in furtherance of an additional organizational purpose that is not a social welfare purpose, they must be insubstantial.

III. SECTION 501(C)(4) ORGANIZATIONS AND POLITICAL CANDIDATE- AND PARTY-RELATED ACTIVITIES

The rules addressing whether Section 501(c)(4) organizations may engage in political candidate-related and other partisan activities are heavily drawn from the rules addressing these activities by Section 501(c)(3) organizations. As noted above, Section 501(c)(4) is silent regarding whether an organization engaging in political candidate and other partisan activities is consistent with tax-exempt status under that subsection of the Code.[155] Because Section 501(c)(3) includes an express statement prohibiting nonprofits exempt under Section 501(c)(3) from participating or intervening in "any political campaign on behalf of (or in opposition to) any candidate for public office,"[156] which I refer to as "political campaign intervention" activities, the implication is that nonprofits exempt under subsections of the Code other than Section 501(c)(3), including Section 501(c)(4), that do not include this language are not per se subject to a blanket prohibition on such activities. Further, as a matter of tax law, there is a logic to the special treatment of Section 501(c)(3) organizations when it comes to political campaign intervention activities: since 1993, Section 162(e) of the Code has denied a deduction for amounts paid or incurred for "participation in, or intervention in, any

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standard has been applied by numerous courts and by the IRS to organizations exempt from tax under Section 501(c)(4).

154. In the Section 501(c)(3) context, the Tax Court determined that where an organization's activities constituted less than ten percent of its total activities, the activity was insubstantial. *See* World Family Corp. v. Comm'r, 81 T.C. 958, 967 (1983).

155. *See supra* Part II.A.

156. 26 U.S.C. § 501(c)(3) (2010).

political campaign on behalf of (or in opposition to) any candidate for public office," language nearly identical to the language establishing the Section 501(c)(3) prohibition.[157] Because contributions to Section 501(c)(3) organizations are deductible, the engagement in political campaign intervention activities by a Section 501(c)(3) organization would frustrate the Section 162(e) deduction denial for such activities.[158] By contrast, because contributions to Section 501(c)(4) organizations generally are not deductible, a blanket prohibition may not be appropriate. And while some contributions to a Section 501(c)(4) may be deductible as membership dues, Section 6033(e) of the Code requires that most Section 501(c)(4) organizations provide notice to their members regarding the portion of their membership dues that are nondeductible in light of the dues being used to conduct political campaign intervention activities or else itself pay a proxy tax in order to make the Treasury whole.[159]

While Section 501(c)(4) does not expressly speak to the permissibility of Section 501(c)(4)s engaging in political candidate-related activities, as noted in Part II, Treasury regulations promulgated under Section 501(c)(4) use language similar to the language setting forth the Section 501(c)(3) prohibitions, stating 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."[160] Of course, that does not necessarily mean that organizations exempt under this subsection of the Code are prohibited from engaging in political campaign intervention activities, and the IRS has acknowl-

157. 26 U.S.C. § 162(e)(1)(B) (2011). While the language in Section 162(e) describing the political candidate-related activities for which a deduction is denied is not identical to the language in Section 501(c)(3) prohibiting political campaign intervention activities, the IRS generally interprets these Code provisions to cover the same activities.

158. Note that there are other theories explaining and justifying the Section 501(c)(3) political campaign intervention prohibition, for instance that it was included during the enactment of the 1954 Code by then-Senator Lyndon Johnson in response to the involvement of tax-exempt groups in opposition to his reelection to the Senate. *See* Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733, 739 (2001). Additionally, some commentators argue that political campaign intervention activities are inconsistent with the purposes behind the exemption from tax under Section 501(c)(3). *See* GREGORY L. COLVIN, POLITICAL TAX LAW AFTER CITIZENS UNITED: A TIME FOR REFORM (2010) ("I prefer to view the [S]ection 501(c)(3) tax exemption as a government declaration that the organization is dedicated to serving the broad interests of the public as a whole, does not serve any significant element of private interest (including the partisan interests of political parties and candidates seeking election), and therefore the badge of 501(c)(3) status may be relied upon by the donating public as a guarantee of political nonpartisanship and independent integrity.").

159. 26 U.S.C. § 6033(e) (2010) also requires notice to members of the portion of dues used to lobby, or alternately requires the payment of a proxy tax. Interestingly, Section 6033(e) does not apply to veterans' organizations exempt under Section 501(c)(19).

160. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (as amended in 1990).

edged that such activities are permissible when undertaken by Section 501(c)(4) organizations.[161]

What is not clear under either the Code or the regulations is the extent of the political campaign intervention activities that a Section 501(c)(4) exempt organization may undertake. It also is unclear whether there are any limitations on the types of political campaign intervention activities that these organizations may permissibly undertake, including (1) whether a Section 501(c)(4) organization may undertake these activities only if they are in furtherance of or in support of its social welfare purposes; (2) whether the support of a candidate or other partisan interest may be among a Section 501(c)(4) organization's exempt purposes; and (3) whether a Section 501(c)(4) organization's partisan activities may directly support candidates and their campaigns or partisan organizations formed for the express purpose of supporting the election of one or more candidates. Both the statute and the regulations are completely silent regarding whether Section 501(c)(4) organizations may undertake activities that benefit non-candidate partisan interests, such as political parties or partisan organizations formed for the express purpose of promoting a political party.

In this Part, I describe the IRS authority addressing political candidate- and political party-related activities and purposes. I first briefly describe this authority in the Section 501(c)(3) context and then provide a description of the Section 501(c)(4) authority that serves as the background in which this Section 501(c)(4) authority addresses these activities and purposes. I argue that the Section 501(c)(3) framework is insufficient for understanding these activities and purposes in the Section 501(c)(4) context. I then describe an alternative framework for addressing political candidate- and political party-related activities when conducted by Section 501(c)(4) organizations that is more grounded in the authority addressing what purposes and activities constitute Section 501(c)(4) social welfare purposes and activities.

A. The IRS Authority

1. Section 501(c)(3): The Background

Most of the IRS authority defining political activities that are consistent with tax-exempt status has been defined in the context of Section 501(c)(3) tax-exempt status. The IRS has extensively addressed impermissible intervention in the campaigns of candidates for public office for

161. *See, e.g.*, Rev. Rul. 67-368, 1967-2 C.B. 194; Rev. Rul. 81-95, 1981-1 C.B. 332; Rev. Rul. 2004-6, 2004-1 C.B. 328; I.R.S. NSAR 20044008E, 2003 WL 23811660 (Dec. 2, 2003); I.R.S. Priv. Ltr. Ruls. 201127013 (July 8, 2011) & 201214035 (Apr. 6, 2012).

purposes of Section 501(c)(3), including issuing precedential and non-precedential guidance,[162] publishing detailed internal manuals,[163] establishing projects for identifying and addressing instances of violations,[164] and undertaking educational activities.[165]

Despite these activities, the guidance in this area is far from clear.[166] There are no bright lines or safe harbors. Instead, a broad-based facts and circumstances test applies in determining whether a Section 501(c)(3) organization's activities may be seen as directly or indirectly expressing support for or opposition to a candidate for political office, including in situations where the organization did not intend to do so.[167] The IRS's inability or unwillingness to issue clear guidance to Section 501(c)(3) organizations regarding what does and does not constitute intervention in campaigns of candidates for political office is a great failure of the IRS as a regulatory body. This is particularly so considering the consequences of having been found to have engaged in these activities—loss of Section 501(c)(3) status, conversion to for-profit status, and the possible imposition of excise taxes on the organization and its managers.[168] Additionally, the combination of the lack of clear rules and the impact of having been found to have violated these rules may have a chilling effect on Section 501(c)(3) organizational speech.

However, one thing that is clear is that once an activity is considered intervention in the campaign of a candidate for public office, a Section 501(c)(3) organization is flatly prohibited as a statutory matter from engaging in that activity. Because of this blanket prohibition, the Section 501(c)(3) authority does not address what Section 501(c)(4) organizations need to know, which is what if any qualitative and quantitative lim-

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162. *See, e.g.*, Rev. Rul. 2007-41, 2007-1 C.B. 1421; Rev. Rul. 86-95, 1986-2 C.B. 73; Rev. Rul. 80-282, 1980-2 C.B. 178; Rev. Rul. 78-248, 1978-1 C.B. 154; Rev. Rul. 74-574, 1974-2 C.B. 160; Rev. Rul. 66-256, 1966-2 C.B. 210; I.R.S. Tech. Adv. Mem. 200908050 (Feb. 20, 2009).

163. *See, e.g.*, JUDITH E. KINDELL & JOHN FRANCIS REILLY, ELECTION YEAR ISSUES (2002), *available at* www.irs.gov/pub/irs-tege/eotopici02.pdf.

164. In 2004, the IRS launched the Political Activity Compliance Initiative, through which the IRS could conduct limited scope direct examinations of Section 501(c)(3) organizations suspected of having violated the political campaign intervention prohibition. *See* The Exempt. Org. Tax Rev. 144 (2008). The initiative was quietly suspended in 2009.

165. *See, e.g.*, *Life Cycle of a Public Charity/Private Foundation*, IRS, http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Life-Cycle-of-a-Public-Charity-Private-Foundation (last visited Feb. 10, 2013).

166. *See, e.g.*, Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1144–49 (2009); *see generally* Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV. 55 (2004).

167. *See, e.g.*, Rev. Rul. 2007-41, 2007-1 C.B. 1421; *see also* 26 U.S.C. § 501(c)(3) (2010); Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 2008).

168. *See* 26 U.S.C. § 501(c)(3) (2010); 26 U.S.C. § 504 (1987), 26 U.S.C. § 4955 (1996).

its are imposed on these activities when conducted by Section 501(c)(4) organizations.

Similarly, while Section 501(c)(4) organizations frequently confer benefits on private interests,[169] Section 501(c)(3) organizations are extremely limited in their ability to conduct an activity that benefits a private partisan interest, such as a political party, under the Section 501(c)(3) private benefit doctrine. This doctrine derives from Treasury regulations promulgated under Section 501(c)(3), which state **"**[a]n organization is not organized or operated exclusively for [Section 501(c)(3) exempt] purposes . . . unless it serves a public rather than a private interest.**"**[170] A private interest under this doctrine includes not only an interest provided to an organizational insider, but also includes unrelated private interests.[171] In the Section 501(c)(3) context, the private benefit doctrine operates to prohibit exempt organizations from undertaking activities that benefit private interests unless they are quantitatively insubstantial in relation to the tax-exempt benefit conferred by the activity and, qualitatively, the **"**private benefit must be a necessary concomitant of the exempt activity, in that the exempt objectives cannot be achieved without necessarily benefiting certain individuals privately.**"**[172]

American Campaign Academy is the only case addressing the Section 501(c)(3) private benefit doctrine in the context of political party-related activities.[173] In that case, the Tax Court considered an organization formed to operate a school that would train individuals for careers as political campaign professionals. The IRS considered the school's purposes, its leadership, its student body, and the placement of its students in political campaigns following graduation. The court determined that the organization did not qualify for exemption under Section 501(c)(3) because the organization conferred a secondary private benefit on the Republican Party.[174] In coming to this determination, the court recog-

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169. For example, the neighborhood block association that was determined by the IRS to qualify as exempt under Section 501(c)(4) was determined to be ineligible for Section 501(c)(3) status on the grounds that it benefited private interests. *See* Rev. Rul. 75-286, 1975-2 C.B. 210.

170. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 2008). As described by a leading commentator, "[T]he concept of private benefit is a derivative of the operational test; . . . as one court put the matter, the private benefit proscription 'inheres in the requirement that [a charitable] organization operate exclusively for exempt purposes.'" *See* HOPKINS, *supra* note 26, at § 20.11 (citing Redlands Surgical Servs. v. Comm'r, 113 T.C. 47, 74 (1999), *aff'd*, 242 F.3d 904 (9th Cir. 2001)).

171. *Id.*; *see* Am. Campaign Acad. v. Comm'r, 92 T.C. 1053 (1989).

172. HOPKINS, *supra* note 26, at §§ 20.11(a) (citing Ginsburg v. Comm'r, 46 T.C. 47 (1966)); Rev. Rul. 75-286, 1975-2 C.B. 210; Rev. Rul. 68-14, 1968-1 C.B. 243; Rev. Rul. 70-186, 1970-1 C.B. 129.

173. *See Am. Campaign Acad.*, 92 T.C. at 1069.

174. *Id.* at 1079.

nized that the organization did not require that its graduates work for Republican organizations and candidates,[175] but it found that the facts and circumstances demonstrated that the organization "was formed with a substantial purpose to train campaign professionals for service in Republican entities." Moreover, while benefiting Republican entities may have been only a "secondary benefit"—the primary beneficiary of the organization's activities being its students—this secondary benefit was a private one, "which advance[s] a substantial purpose [that] cannot be construed as incidental to the organization's exempt educational purpose."[176]

In other words, while the private benefit doctrine requires that any private benefit conferred by a Section 501(c)(3) organization activity be quantitatively insubstantial as compared to the tax-exempt benefit of such activity and qualitatively incidental to that activity, *American Campaign Activity* additionally tells us that no private benefit can be incidental if it is in furtherance of a substantial purpose of the organization. This is consistent with *Better Business Bureau v. United States,* described above, in which the U.S. Supreme Court held that the presence of a single substantial nonexempt purpose disqualifies an organization for exemption under Section 501(c)(3).[177]

Of course, if partisan political interests are private interests, then the interests of candidates themselves also must be private. In fact, because benefiting a candidate—a single individual—or his or her committee, is benefiting a much more narrow private interest than benefiting a political party, a Section 501(c)(3) organization's provision benefiting a candidate or candidate committee would seem to be even more problematic under the private benefit doctrine.[178] It is not necessary to analyze a Section 501(c)(3) organization's provision of benefits to candidates under the private doctrine, however, in light of the statutory prohibition imposed on Section 501(c)(3) organizations with respect to political candidate-related activities, but conceptually, it would seem that candidate-related activities are in fact a subset—a statutorily impermissible subset—of the activities that confer a private benefit.

2. Section 501(c)(4) and Partisan Activities

There is not a great deal of authority addressing political candidate- and political-party related activities in the context of the Section

175. *Id.* at 1078.

176. *Id.*

177. Better Bus. Bureau of Wash., D.C. v. United States, 326 U.S. 279, 283 (1945).

178. *Am. Campaign Acad.*, 92 T.C. at 1077 (addressing how the size of the "class" on which a benefit is conferred is "one factor to be considered" in determining whether the benefit is an impermissible private benefit).

501(c)(4) tax exemption. The IRS has issued a handful of Revenue Rulings, which are IRS interpretations of the law to which the IRS considers itself bound and which taxpayers may rely on; however, they are not necessarily binding on a court.[179] Additionally, the IRS has issued private letter rulings, which are responsive to specific requests made by persons regarding the applicability of the law to their individual factual circumstances, and rulings responding to requests for exemption under Section 501(c)(4). These may not be relied upon as precedent because their analysis and conclusions are limited solely to the individual factual circumstances described in the guidance and solely to the person to which they were issued.[180]

The IRS does interpret the Code and regulations to permit the conduct of some political candidate and other partisan activities by Section 501(c)(4) organizations.[181] Additionally, in interpreting the regulatory language that states that 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," the IRS defines direct or indirect participation or intervention to mean those political candidate-related activities that Section 501(c)(3) organizations are prohibited from engaging in. And while those activities are limited to activities related to candidates for public office, the IRS takes the position that, like organizations exempt from tax under Section 501(c)(3), organizations exempt under Section 501(c)(4) also are restricted in their partisan political activities that are not related to candidates for public office—for example, activities that support a political party—under the Section 501(c)(3) private benefit doctrine.[182]

The following subsections describe the Revenue Rulings and some of the non-precedential IRS guidance addressing Section 501(c)(4) or-

179. For an excellent summary of the materials issued by the IRS and their level of authority, see Kingsley & Pomeranz, *supra* note 166, at 62.

180. *Id.* at 63; *see also* 26 U.S.C. § 6110(k)(3) (2007).

181. *See* Rev. Rul. 67-368, 1967-2 C.B. 194; Rev. Rul. 67-293, 1967-2 C.B. 185; Rev. Rul. 81-95, 1981-1 C.B. 332; Rev. Rul. 2004-6, 2004-1 C.B. 328; I.R.S. Priv. Ltr. Rul. 201214035 (June 2012).

182. As described below, the IRS takes the position that Section 501(c)(4) organizations may engage in more of these activities than a Section 501(c)(3) organization. *See* I.R.S. Priv. Ltr. Ruls. 201128032 (July 15, 2011), 201128034 (July 15, 2011), 201128035 (July 15, 2011), 201221025 (May 25, 2012), 201221026 (May 25, 2012), 201221027 (May 25, 2012), 201221028 (May 25, 2012) & 201221029 (May 25, 2012); *see also* AM. BAR ASS'N, COMMENTS OF THE INDIVIDUAL MEMBERS OF THE EXEMPT ORGANIZATIONS COMMITTEE'S TASK FORCE ON SECTION 501 (C)(4) AND POLITICS (2004) (citing Letter from Edward K. Karcher, Chief of Exempt Organizations Technical Branch 3, to Empower America (Feb. 21, 1997)).

ganizations and political candidate- and political-party related activities.[183]

a. Revenue Ruling 67-368

In Revenue Ruling 67-368, the IRS held that an organization that was formed for the purpose of promoting an enlightened electorate and whose primary activities in furtherance of those purposes was rating candidates for public office on a nonpartisan basis as "average, good, or excellent," based on objective factors such as the candidates' education and experience, and disseminating the result of such rating, did not qualify as exempt from tax under Section 501(c)(4).[184] The IRS appears to have accepted the fact that promoting an enlightened electorate was a valid social welfare purpose. However, it noted that because the organization's rating activity constituted "participation or intervention on behalf of those candidates favorably rated and in opposition to those less favorably rated," and under the Treasury regulations promulgated under Section 501(c)(4) this activity does not fall within the definition of social welfare, the fact that it was the organization's exclusive activity led the IRS to determine that the organization was "not operated exclusively for the promotion of social welfare."[185]

b. Revenue Ruling 81-95

In Revenue Ruling 81-95, the IRS again addressed the permissibility of political campaign intervention activities by Section 501(c)(4) organizations.[186] The IRS acknowledged that the tax-exempt status of a Section 501(c)(4) organization that was primarily engaged in activities promoting social welfare would not be adversely affected by its conduct-

183. While this section describes the Revenue Rulings issued by the IRS addressing Section 501(c)(4) organizations, political campaign intervention, and other partisan activities, and while Revenue Rulings may be relied on by taxpayers, it does not describe all the IRS guidance addressing these activities. For example, there are IRS responses to applications for Section 501(c)(4) status by organizations that engage in political activities, and the IRS has described the permissibility of these activities in a training manual prepared by IRS personnel for use by auditors. *See* JOHN FRANCIS REILLY, CARTER C. HULL & BARBARA A. BRAIG ALLEN, IRS 501(C)(4) ORGANIZATIONS (2003), *available at* http://www.irs.gov/pub/irs-tege/eotopicj03.pdf; *see also* JOHN FRANCIS REILLY & BARBARA A. BRAIG ALLEN, POLITICAL CAMPAIGN AND LOBBYING ACTIVITIES OF IRS 501(C)(4), (C)(5), AND (C)(6) ORGANIZATIONS (2003), *available at* http://www.irs.gov/pub/irs-tege/eotopicl03.pdf. This section is meant to touch on the key aspects of the IRS's approach to these issues.

184. Rev. Rul. 67-368, 1967-2 C.B. 194.

185. *Id.*

186. Rev. Rul. 81-95, 1981-1 C.B. 332.

ing political campaign intervention activities on behalf of or in opposition to candidates for nomination or election to public office.[187]

The IRS did not describe in the ruling the social welfare purposes the organization was engaged in or how its political campaign intervention activities related to those social welfare purposes. Instead, the IRS merely stated that the organization's primary activities promoted social welfare and that "[i]n addition, it carries on certain activities" that constituted political campaign intervention.[188] There is no indication that the IRS based its decision that these political campaign intervention activities were permissible on a finding that the activities were undertaken in furtherance of or in support of the organization's social welfare purposes.[189]

Also of interest is that the IRS stated in this ruling that the political campaign intervention activities carried on by this social welfare organization "take the form of both financial assistance and in-kind services."[190] Those who are acquainted with federal campaign finance law will be quite familiar with the significant distinction between using funds to make or support statements concerning candidates that are independent of those candidates on the one hand and contributing resources to candidates or making statements that are coordinated with candidates on the other.[191] And those familiar with the federal tax law principles relating to tax-exempt organizations providing benefits to private parties may be surprised that the IRS would find direct cash and in-kind contributions to candidates (and presumably also to political parties) to be consistent with Section 501(c)(4) tax exempt status.

c. Revenue Ruling 2004-6

In 2004, the IRS issued another Revenue Ruling addressing political candidate-related intervention activities in the Section 501(c)(4) context.[192] This ruling focuses on the tax treatment of expenditures by Sec-

187. *Id.* In Revenue Ruling 81-95, the IRS also noted that the organization would be required to pay tax imposed by 26 U.S.C. § 527(f) (2003) with respect to its political activities, as defined in 26 U.S.C. § 527(e)(2) (2003).

188. *Id.*

189. It is almost as if this social welfare organization could have been operating a volunteer fire company as its primary activity in a community of the United States primarily populated by individuals whose forebears emigrated from a specific country and then also carried on political campaign intervention activities on behalf of candidates for office in that country of origin based on reasons having nothing to do with volunteer fire company concerns.

190. *Id.*

191. The provision of resources to candidates, campaigns, and political parties may be prohibited under federal, state, or local campaign finance rules. *See, e.g.*, 2 U.S.C. § 441a (2002).

192. Rev. Rul. 2004-6, 2004-1 C.B. 328. The ruling also addresses 26 U.S.C. §§ 501(c)(5), 501(c)(6) (2010) organizations.

tion 501(c)(4) organizations on political campaign intervention activities under Section 527 of the Code.[193] This ruling defines the approach Section 501(c)(4) organizations may take in determining whether certain activities constitute political campaign intervention—an approach quite similar to the approach taken to similar activities when engaged in by Section 501(c)(3) organizations. However, it does not address the extent or permissibility of political candidate-related activities, taking as a given that the level and type of activities the organization undertook were consistent with Section 501(c)(4) status, nor does it address whether those activities are subject to any additional constraints, such as having to be consistent with, incidental to or in furtherance of the Section 501(c)(4) organization's tax-exempt purposes.

d. NSAR 20044008E

In 2004, the IRS issued a Non Docketed Service Advice Review (NSAR), responding to an application for Section 501(c)(4) tax-exempt status from an organization whose goal was increasing the involvement of women from a particular political party in elective and appointive public office.[194] To achieve its goal, the organization selected women who were sponsored by, and members of, the particular party to participate in a nonpartisan leadership-training program that focused "on government structure, the role of government, and the tools required to seek and achieve a successful position in government, including elective office," which included mentoring from current public office holders.[195] The organization did not support the election or defeat of candidates, make political contributions, or even "inquire of any applicant whether she will seek elective office."[196] Its primary source of financial support was direct public contributions from the corporate community and individuals.

The IRS ruled that the organization could not be exempt under Section 501(c)(4) because its activities "benefit the private interests" of the Republican Party "rather than promote the social welfare of the commu-

193. Rev. Rul. 2004-6, 2004-1 C.B. 328. Under 26 U.S.C. § 527(f) (2003), a Section 501(c) organization must report to the IRS its expenditures relating to its activities "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors." 26 U.S.C. §§ 527(e), 527(f) (2003). Further, it must pay a tax on the lesser of these expenditures and its net investment income. 26 U.S.C. § 527(f) (2003). Activities that constitute political campaign intervention for purposes of Section 501(c)(4) are considered by the IRS to be activities covered by 26 U.S.C. § 527(f) (2003).

194. I.R.S. NSAR 20044008E, 2003 WL 23811660 (Dec. 2, 2003).

195. *Id.*

196. *Id.* The organization also did not support "public issue[s]" or spend funds on advocacy issues.

nity as a whole."[197] In coming to this conclusion, the IRS did not cite the Section 501(c)(4) authority addressing community versus private interests, but rather cited the Tax Court's decision in *American Campaign Academy*.[198] The IRS concluded in the NSAR that the private benefit doctrine "also applies to organizations seeking exemption under Section 501(c)(4)," [199] the sole difference in the application of the standard to the two categories of exemption lying in the weight accorded to the private benefit (namely, the amount of private benefit), not the standard.

e. Private Letter Ruling 201127013

In 2011, the IRS responded to a request for guidance from a Section 501(c)(3) healthcare organization that conducted some advocacy activities related to healthcare policy.[200] The organization wanted to set up a controlled Section 501(c)(4) organization through which it would conduct its advocacy activities and have the Section 501(c)(4) set up a Section 527 organization in order to engage in political candidate related activities. The organization sought guidance regarding whether the establishment of the Section 527 organization would constitute impermissible political campaign intervention by the Section 501(c)(3).[201] The IRS ruled that it would not.[202] Noting that a Section 501(c)(4) organization may engage in some political campaign intervention activities, the IRS held that prior authority required it to respect the separate corporate form of the Section 501(c)(3) and Section 501(c)(4) organizations. Additionally, it could not attribute the Section 501(c)(4)'s activity establishing the Section 527 organization to the Section 501(c)(3) organization as long as each organization operates independently of the other and administers its own affairs separately.[203] The IRS did not, however, define the quantitative limits on the conduct of political campaign intervention activities by Section 501(c)(4) organizations. It merely "[a]ssum[ed] that [the Section 501(c)(4)] Organization qualifies as a social welfare organization under § 501(c)(4) because its establishment of [the Section 527 organization] will

197. *Id.*

198. Am. Campaign Acad. v. Comm'r, 92 T.C. 1053 (1989). The IRS does cite in the NSAR some of the authority discussed in Part II that requires that social welfare organizations promote the social welfare of the community as a whole and not private interests, but it fails to tie the analysis set forth in the authority to the facts before them regarding the organization seeking exemption under Section 501(c)(4).

199. I.R.S. NSAR 20044008E, 2003 WL 23811660 (Dec. 2, 2003).

200. I.R.S. Priv. Ltr. Rul. 201127013 (July 8, 2011).

201. Section 527 organizations also are discussed briefly in Part V. The organization also wanted to set up a voluntary payroll deduction plan so that it and its subsidiaries' employees could contribute to 26 U.S.C. § 527 (2003) organizations.

202. I.R.S. Priv. Ltr. Rul. 201127013 (July 8, 2011).

203. *Id.* The IRS cited *Moline Properties* and *Regan* as the prior authority guiding its decision.

be less than its primary activity," without defining what primary means.[204] Nor did it at all address whether there are any qualitative limits to these activities.

f. Private Letter Ruling 20121403

In a recent private letter ruling, the IRS considered an application for Section 501(c)(4) tax-exempt status submitted by an organization whose constitutive documents included purposes that, as stated, appeared to be in furtherance of social welfare. It was formed to "disseminate information regarding national elections [to non-U.S. citizens from a specific non-U.S. country] . . . residing in the United States"; "to promote, foster, and advance their voting rights" in their home country "by providing access to information concerning political topics of interest" to them; "to research economic and social policies" that may affect them; to study "their opinions on issues relevant to [their] community" in the United States; "to provide information on all matters of political concern" to them; "to provide information regarding the availability of . . . governmental and social services in the U.S." for citizens of that country; and "to provide an avenue of information" between them and their homeland.[205]

The organization indicated that it believed that increasing the interest and voting rates of citizens of this country who reside in the United States would lead to the development of the "rights, interests, and pride for their mother land" among these individuals.[206] The organization also determined that a specific individual, the former chairperson of a political party, was the most reliable and suitable politician to increase this interest and voting rates. It therefore determined that its primary activity would be forming a public opinion favorable to this individual and helping elect this individual as president of the country.[207] It indicated it would devote 80% of its time to supporting this individual's political interests and would do so by supporting the individual's policies, disseminating information and materials about the individual and his policies, and advising the individual about the concerns of citizens of this country living in the United States.[208] On voting day, the organization would provide rides to voting centers, but it would remain neutral regarding its support for candidates or political parties while doing so.

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204. I.R.S. Priv. Ltr. Rul. 201127013 (July 8, 2011).
205. I.R.S. Priv. Ltr. Rul. 201214035 (Apr. 6, 2012).
206. *Id.*
207. *Id.*
208. *Id.*

The organization obviously took pains to make clear that it had a valid social welfare purpose unrelated to the election of any candidate for public office. Its purpose—supporting the community of individuals from a non-U.S. country living in the United States—was not the election of this individual; rather, it made the determination that the best way to further its social welfare purpose would be for its primary activity to constitute supporting this candidate. The IRS was not convinced. Citing the authority referred to in this section that considers political campaign intervention in the context of Section 501(c)(4), it concluded that the organization would be primarily engaged in activities that constitute "influencing or attempting to influence the selection, election, or appointment of [this individual in this country's] . . . upcoming presidential election."[209]

The IRS indicated that the organization's "stated primary *activity*, promoting an individual's political campaign is not a qualifying tax-exempt *purpose*."[210] In other words, it equated the organization's activity with its purpose. This is consistent with the traditional authority under Section 501(c)(4) discussed in Part II, which establishes that an organization's activities can be constitutive of its purpose. The IRS also noted in this ruling that the *American Campaign Academy* private benefit analysis applicable to Section 501(c)(3) organizations that undertake partisan activities applies to Section 501(c)(4) organizations.[211]

g. Emerge America

In 2011 and 2012, the IRS denied tax-exempt status under Section 501(c)(4) to a number of groups that have been identified in press reports as affiliates of Emerge America, an organization that assists women in obtaining elective public office on the Democratic ticket.[212] In all of these rulings, the IRS relied on *American Campaign Academy*, taking the position, without providing any rationale, that the Section 501(c)(3) private benefit doctrine, as applied in that case to partisan political work benefiting a political party, applies to Section 501(c)(4) organizations

209. *Id.*

210. *Id.* (emphasis added).

211. *Id.*

212. *See* I.R.S. Priv. Ltr. Ruls. 201128032 (July 15, 2011), 201128034 (July 15, 2011), 201128035 (July 15, 2011), 201221025 (Mar. 25, 2012), 201221026 (Mar. 25, 2012), 201221027 (Mar. 25, 2012), 201221028 (Mar. 25, 2012) & 201221029 (Mar. 25, 2012); *see also* Patrick Temple-West, *IRS Denials a Worry for Political Tax-Exempt Groups: Attorneys*, REUTERS (July 13, 2012), http://www.reuters.com/article/2012/07/13/us-usa-tax-fundraising-idUSBRE86C1AC20120713; Jonathan D. Salant, *IRS Denial of Tax Exemption to U.S. Political Group Spurs Alarms*, BLOOMBERG (June 8, 2012), http://www.bloomberg.com/news/2012-06-08/irs-denial-of-tax-exemption-to-u-s-political-group-spurs-alarms.html.

engaging in similar activities. The IRS stated that the Section 501(c)(4) organizations engaging in these activities are "not operated primarily to promote social welfare because [their] activities are conducted primarily for the benefit of a political party and a private group of individuals, rather than the community as a whole,"[213] essentially conflating the Section 501(c)(3) public versus private benefit doctrine and the Section 501(c)(4) community versus private interest doctrine.

h. Private Letter Ruling 201224034

Finally, in a recent ruling, the IRS denied exemption to an organization whose founder was a political figure.[214] As described in Part II, in PLR 201224034 the IRS considered an organization formed to "promot[e] solutions to [a] state's challenging problems through grassroots advocacy and publicity," with a focus on a broad range of public issues, including the marine environment, inappropriate law enforcement raids, educational reform, governmental cost-cutting, entrepreneurial development, and ambulance response rates.[215] The founder of the organization was a political figure, and the issues the organization focused on were aligned with the founder's political agenda. The organization's website linked to the founder's campaign website and included material written by the founder, which was critical of his political opponents, including before an election. The organization stated that it had never and would not "spend money attempting to influence the selection, nomination, election, or appointment of individuals to public office or office in a political organization."[216]

This ruling is interesting in that it grounds its analysis in Section 501(c)(4) authority. Citing both *Contracting Plumbers* and *Erie Endowment*, the IRS concluded that the organization was not eligible for exemption under Section 501(c)(4) because its activities primarily served to benefit its founder.[217] It therefore failed the *Contracting Plumbers* test, which requires that the organization not be operated primarily to benefit a private group (even if it provides some benefit to the community). It also failed to meet the *Erie Endowment* requirement that a Section 501(c)(4) organization be a community movement designed to accom-

213. *See* I.R.S. Priv. Ltr. Ruls. 201128032 (July 15, 2011), 201128034 (July 15, 2011), 201128035 (July 15, 2011), 201221025 (Mar. 25, 2012), 201221026 (Mar. 25, 2012), 201221027 (Mar. 25, 2012), 201221028 (Mar. 25, 2012) & 201221029 (Mar. 25, 2012).

214. I.R.S. Priv. Ltr. Rul. 201224034 (June 15, 2012).

215. *Id.*

216. *Id.*

217. *Id.*

plish community ends.[218] As noted in Part II, an organization that promotes its founders or those persons controlling the organization will more likely be found to benefit a private, as opposed to a community, interest.

Additionally, the IRS considered whether the organization was engaged in political campaign intervention, citing Revenue Ruling 81-95 for the principle that a Section 501(c)(4) organization may engage in lawful political activities as long as its primary activity promotes social welfare.[219] While the IRS did not determine that the organization's primary activities constituted political campaign intervention, it noted that the organization had "not established that [its] primary activity is not to engage in direct or indirect political intervention."[220]

B. Critique of the Current Framework and a Proposed Alternative

1. Critique of the Current Framework

The current dual Section 501(c)(3) framework that informs the analysis of the permissibility of engaging in partisan political activities under Section 501(c)(4)—the blanket prohibition on intervention in campaigns of candidates for political office and the private benefit doctrine in the case of political parties—is an insufficient legal framework for analyzing the permissibility of political activities in the Section 501(c)(4) context. Regarding political candidate-related activities, as noted above, the IRS generally applies the same definition of political candidate-related activities to Section 501(c)(3) and Section 501(c)(4) organizations. This seems to be a practical approach, particularly given the fact that so many nonprofit enterprises operate through related Section 501(c)(3) and Section 501(c)(4) organizations.[221]

However, because Section 501(c)(3) organizations are subject to a blanket prohibition with respect to their engagement in these activities, the Section 501(c)(3) authority in this area does not address the quantitative and qualitative limitations on political candidate-related activities by organizations exempt under Section 501(c)(4). This may be the reason that the authority addressing political candidate-related activities in the Section 501(c)(4) context fails to address qualitative limitations. Further, the quantitative limitations on these activities are addressed in the author-

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218. *Id.* (citing Contracting Plumbers Coop. Restoration Corp. v. United States, 488 F.2d 684, 687 (2d Cir. 1973), and Erie Endowment v. United States, 316 F.2d 151, 156 (3d Cir. 1963)).

219. *Id.*

220. *Id.*

221. While this would be the most practical approach even if there were clear bright line rules or safe harbors defining these activities, the fact that there are no bright-line rules lends even stronger support to the position that this is the most practical approach.

ity by simply concluding that political candidate-related activities may not be a Section 501(c)(4) organization's primary activities.[222] If one uses the Section 501(c)(3) authority as the sole lens through which political candidate-related activities are analyzed for purposes of Section 501(c)(4), it does not seem entirely illogical to conclude that as long as a Section 501(c)(4) has a social welfare purpose and engages slightly more than 50% of its activities in furtherance of those purposes, it is unconstrained with respect to the rest of its activities and the purposes in furtherance of which it engages in those activities, including activities in furtherance of an organizational purpose of electing an individual to public office.

Regarding non-candidate partisan activities and the IRS's application of the private benefit doctrine to Section 501(c)(4) organizations, the IRS has stated that the sole difference in the application of this Section 501(c)(3) doctrine to Section 501(c)(4) organizations—such as in applying the analysis of *American Campaign Academy*—lies in "the weight accorded the private benefits (i.e., the amount of private benefit), not the standard."[223]

This does not provide a sufficient explanation of the permissibility within Section 501(c)(4) for providing benefits to private, partisan interests. First, the regulatory basis supporting the application of the private benefit doctrine to Section 501(c)(3) organizations—the language that states that these organizations must serve "a public rather than a private interest"—is inapplicable as a statutory or a regulatory matter to organizations exempt under Section 501(c)(4).[224] In *American Campaign Academy*, the Tax Court determined that benefiting the Republican Party was inconsistent with Section 501(c)(3) status because this party did not constitute a charitable class, and if providing this benefit is an organizational purpose, it could never pass muster under the private benefit doctrine.[225] But as discussed in Part II, Section 501(c)(4) organizations are not required to limit their benefits to private persons that constitute a charitable class, and, at least in the several decades of IRS authority addressing when and how Section 501(c)(4) organizations may benefit private interests, their activities benefiting private interests have not been considered through the lens of the Section 501(c)(3) private benefit doctrine.[226]

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222. *See, e.g.*, Rev. Rul. 81-95, 1981-1 C.B. 332.

223. *See* I.R.S. NSAR 20044008E, 2003 WL 23811660 (Dec. 2, 2003).

224. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 2008). No such language appears in the Treasury regulations promulgated under Section 501(c)(4). *See* Treas. Reg. § 1.501(c)(4)-1 (as amended in 1990).

225. Am. Campaign Acad. v. Comm'r, 92 T.C. 1053, 1079 (1989).

226. In fact, in determining whether the interests of partisan political organizations were private as opposed to public interests, the Tax Court in *American Campaign Academy* focused on the

Additionally, it may be that the bifurcation approach—considering political campaign intervention under one set of rules and private partisan non-candidate related benefit under another set of rules—is unnecessary in the Section 501(c)(4) context. Unlike Section 501(c)(3), Section 501(c)(4) does not include a statutory prohibition on political campaign intervention activities. And unlike contributions to Section 501(c)(3) organizations, contributions to Section 501(c)(4) organizations are not deductible. Therefore, contributions by individuals in furtherance of political campaign intervention activities are not treated any differently than if those individuals were to make these expenditures directly. And if partisan activities are activities that benefit private, as opposed to community, interests, there does not seem to be any philosophical reason to draw the line between candidate and other partisan activities.[227]

2. An Alternative Framework

Rather than viewing Section 501(c)(4)-permissible political activities through the lens of the authority addressing these activities when undertaken by Section 501(c)(3) organizations, what if the principles established in the authority addressing Section 501(c)(4) social welfare organization status (described in Part II) were applicable? While this authority does not provide any explicit guidance addressing the extent to which social welfare organizations may engage in partisan political activities, it may provide the Treasury Department and the IRS with some direction, particularly if we consider partisan political activities to be activities that benefit private interests.

This section considers Section 501(c)(4) social welfare principles as applied to political activities conducted by advocacy organizations exempt under Section 501(c)(4). Section 501(c)(4) itself says nothing about whether it is consistent with tax-exempt social welfare status to conduct partisan political or candidate-related activities. Further, the Section 501(c)(4) caselaw is silent on this subject. It is the Treasury regulations

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fact that Republican political entities and candidates do not comprise a *charitable* class notwithstanding the large size of this class of persons. *Id.* at 1077 ("Size alone [does not] . . . transform a benefited class into a charitable class."). In fact, in determining that this class does not constitute a charitable class, the Tax Court cited *Columbia Park and Recreation Association, Inc. v. Commissioner*, 88 T.C. 1 (1987). In *Columbia Park*, the Tax Court concluded that an organization that was formed to provide recreational and other benefits to its membership, which comprised over 100,000 homeowners and tenants of a real estate development, did not qualify as exempt under Section 501(c)(3), despite the size of the benefited class, but, as discussed above, the organization in question *could* qualify as exempt from tax under Section 501(c)(4). *Id.* at 19 ("Mere size does not transform an otherwise noncharitable, private organization to a 'charitable' one.").

227. In fact, in some ways the bifurcation in the Section 501(c)(3) context also may not make sense—and it may be better to view all partisan political activities by Section 501(c)(3) organizations through the Section 501(c)(3) private benefit doctrine.

under Section 501(c)(4) that indicate the promotion of social welfare "does not include" direct or indirect political campaign intervention activities. These regulations are silent regarding the permissibility of conducting partisan, non-candidate-related activities such as undertaking an activity that supports a political party indirectly, primarily, or incidentally. If the Treasury regulations were completely silent on this issue and didn't even address partisan political activities, how might we approach these activities using the social welfare principles that emerge from the Section 501(c)(4) authority discussed in Part II?

As a basic matter, efforts in support of a particular candidate's attempt to achieve public elective office, including opposing that candidate's rivals, can be considered supportive of the private interests of that candidate. For one thing, the candidate is seeking something of significant personal interest: public office. Additionally, a campaign for elective office is a complex economic enterprise that is significantly impacted by the amount of funds and in-kind support the candidate has; any attempt to assist that candidate or his or her campaign directly benefits that candidate economically.[228] Further, while public officials may work on broad policy matters that support communities, it also is true that public officials often work in furtherance of private constituencies, and aiding a candidate in getting elected thereby may benefit a private constituency. The IRS has concluded that candidate interests are private interests for purposes of Section 501(c)(4).[229]

A similar analysis may be applied to partisan political-party-related support. Political parties are not institutions that necessarily solely have community-based goals—they frequently have as part of their platforms goals in furtherance of private interests.[230] Further, they too win or lose based on the amount of money they are able to attract to support their candidates' platforms. At least in the Section 501(c)(3) context, the Tax Court has determined that the provision of support to a partisan interest, such as a political party, serves a private interest.[231] The IRS has come to a similar conclusion in the Section 501(c)(4) context.[232]

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228. That being said, the fact that Congress determined that candidate committees and political parties should be exempt from tax on some of their revenue under 26 U.S.C § 527 (2003) may argue against the idea that political activities benefit private interests, although it also is true that the exemption from tax they enjoy is more limited than the tax exemption enjoyed by organizations described in Section 501(c)(4).

229. I.R.S. Priv. Ltr. Rul. 201214035 (Apr. 6, 2012).

230. It is conceivable that a political party could be organized solely in furtherance of community-based goals.

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

232. *See* I.R.S. NSAR 20044008E, 2003 WL 23811660 (Dec. 2, 2003); *see also* discussion *supra* Part III.A.1.g.

Further, Congress's decision to (1) require that Section 501(c) organizations pay tax on the lesser of their net investment income or their political expenditures on behalf of candidates,[233] and (2) deny a deduction for dues paid to certain Section 501(c) organizations to the extent those dues are used by the organization to make political expenditures on behalf of candidates[234] implies that Congress considers these activities to be activities that are not in furtherance of Section 501(c)(4) social welfare purposes, at least not in and of themselves.

It does not seem controversial to conclude, as the IRS has—nor would it be controversial for Treasury regulations to provide—that activities that benefit candidates and non-candidate partisan interests benefit private, non-community interests within the meaning of Section 501(c)(4). In fact, I have suggested that there is not any reason as a tax matter to treat differently activities by Section 501(c)(4) organizations that benefit candidate interests on the one hand and those that benefit non-candidate partisan interests on the other.[235]

If benefiting candidates and political parties benefits private interests, it would appear to benefit private interests regardless of whether a social welfare organization provides those benefits directly to a candidate or a political party or provides those benefits to a political organization that is formed or operates to support a candidate or a political party. While under federal campaign finance law there is a significant distinction between a corporation that directly supports or coordinates with candidates or partisan political organizations and one that engages in candidate-, campaign-, and party-related work without directly supporting or coordinating, this is a result of the constitutional jurisprudence under campaign finance law that addresses permissible limits on the ability of corporations to support candidates for public office.[236] Yet, this

233. 26 U.S.C. § 527(f) (2003).

234. 26 U.S.C. §§ 162(e) (2011), 6033(e) (2010).

235. Of course, the Section 501(c)(3) political campaign intervention rules may be of use to Section 501(c)(4) organizations: to the extent an activity does not constitute political campaign intervention under Section 501(c)(3) because it is a charitable and educational activity, a Section 501(c)(4) may take comfort that this activity is permissible for a Section 501(c)(4) organization.

236. While it has been long settled law that statutory limitations on direct corporation support of candidates withstands First Amendment scrutiny because of the government's legitimate interest in reducing the fact or appearance of quid pro quo corruption, see Buckley v. Valeo, 424 U.S. 1 (1976), and under federal law corporations that coordinate their political activities with federal candidates are treated as supporting those candidates, 11 C.F.R. § 109.21 (2010), the U.S. Supreme Court recently held that statutory limits on corporate activities supporting or opposing candidates for office that are conducted independent of candidates do not withstand First Amendment scrutiny because those activities do not involve the fact or appearance of corruption. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (upholding Michigan law prohibiting corporate independent expenditures on ground that the government has an interest in reducing the corrosive impact on elections of vast aggregations of corporate wealth).

campaign finance law distinction between direct and independent expenditures does not seem to have any bearing on the question of whether a social welfare organization's activities benefit private interests when the social welfare organization supports groups that engage in direct expenditures on the one hand or groups that make only independent expenditures on the other. Further, there is no reason as a matter of federal tax law to treat differently Section 501(c)(4) organizations that operate in corporate form and those that operate as unincorporated associations. In all cases, the Section 501(c)(4) organization is supporting a private interest. If providing this kind of support is a substantial purpose of the Section 501(c)(4) organization, it may be ineligible for exemption under Section 501(c)(4).

If it is correct to assume that activities in furtherance of partisan or candidate interests are in furtherance of a private interest for purposes of Section 501(c)(4), then what does the authority under Section 501(c)(4) tell us about what might be the qualitative and quantitative limits on these activities?

First, *Erie Endowment* stands for the principle that a social welfare organization may not limit its provision of benefits to individuals controlling, or who founded, the organization; as such, limitation is inconsistent with the organization serving a community as opposed to a private interest.[237] If partisan activities are activities that benefit private interests, this might mean that the interaction between an organization, candidates, political organizations, or the individuals serving as their leaders could be relevant to whether the organization is eligible for exemption under Section 501(c)(4). Similarly, if an organization's membership is limited to members of a single political party, a class of members that is narrower than the community and is a group with a common, private interest, it may be ineligible for exemption under Section 501(c)(4). The IRS and courts might consider whether the presence of these relationships evidence control on the part of the political interests. If so, to the extent the organization itself engaged in partisan political activity, that activity might be seen as serving those partisan political interests in a manner that may be inconsistent with Section 501(c)(4).

The IRS has broad statutory authority to seek information in order to carry out the "internal revenue laws."[238] The IRS could use this au-

237. *See supra* Part II.B.1.b.i.

238. 26 U.S.C. § 6033(a) (2010). While there may be some limitations on the IRS's ability to collect information from tax-exempt organizations, collecting information relevant to determining whether the organization continues to be eligible for tax-exempt status appears to be fair game. *See, e.g.*, Marcus S. Owens, *Charities and Governance: Is the IRS Subject to Challenge?*, TAX ANALYSTS (2008), *available at* http://www.capdale.com/files/Publication/C3941121-3CE4-412A-

thority to ask organizations exempt from tax under Section 501(c)(4) that engage in partisan political activities to provide information concerning the organization's direct and indirect expenditures on these activities; whether there are any private partisan organizations they support or coordinate with; whether those private partisan organizations' founders, significant donors, staff, or lay leaders are founders of, significant donors to, leaders of, or individuals who form an exclusive group of members of the Section 501(c)(4) organization, the Section 501(c)(4) organization; and whether the Section 501(c)(4) organization shares office space or other resources with a partisan political organization.[239] While the answers to these questions would not necessarily be determinative of whether the Section 501(c)(4) organization's activities or purpose are consistent with Section 501(c)(4), they would provide useful information to the IRS and to the general public regarding whether the organization conducts substantial non-exempt activities or otherwise has a substantial non-exempt purpose. Further, the IRS could establish some safe harbors.

Second, under *Contracting Plumbers*, where a social welfare organization's activity in furtherance of a community interest also provides a different benefit to a private interest, then that private benefit must not be direct and substantial. What might this mean in the advocacy organization context? When a Section 501(c)(4) advocacy organization issues a statement outlining the positions taken by candidates in an election on an issue of importance to the organization, that statement serves a community interest by educating the community regarding the issue and regarding the candidates' positions on the issue. This same activity also provides a different benefit to the candidates favored in the communication, in that they are supported in their campaign activities. Under *Contracting Plumbers*, the benefit to the candidates may not be direct and substantial. While a statement that describes why a candidate's positions are or are not most closely aligned with the organization's positions may not be substantial enough, it may be that an express endorsement would be too substantial. Coordination with a candidate or political organization in connection with the communication also might be too direct a benefit.[240] Transfers of resources to a candidate or political organization also might be too direct a benefit. The principle expressed in the homeowners' asso-

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239. I am not suggesting that the identity of donors to Section 501(c)(4) organizations be made public. Section 501(c)(4) organizations are already required to report to the IRS the identity of, and the contributions made by, donors of $5,000 or more annually. The identity of these donors is redacted from the version of the organization's IRS Form 990 that is made available to the public. *See* 26 U.S.C. § 6103 (2010).

240. *See supra* Part II.B.1.b.ii(b).

ciation rulings that these types of organizations may not pay for repairs to houses also may support a rule prohibiting direct transfers of resources to candidates and political organizations.[241] Further, the transfer of resources and coordination may be considered an activity that is different than the activity the organization engages in in furtherance of its social welfare purposes and therefore may be impermissible, under *Contracting Plumbers,* on the grounds that it is too direct and not insubstantial.

One thing that would have an impact on the analysis of Section 501(c)(4) political activities is whether the principle set forth by the Supreme Court in *Better Business Bureau*—a single substantial non-exempt purpose is inconsistent with exempt status—applies in the Section 501(c)(4), as well as the Section 501(c)(3), context.[242] Three federal Circuit Courts, several district courts and the IRS have taken the position that it does.[243] If it does, and if partisan activities are considered to serve private interests, then no Section 501(c)(4) organization could have as one of its substantial purposes partisan activities. What might this mean? Because an organization's activities may be considered constitutive of its purposes, it certainly would serve as a limit to the extent of partisan activities a Section 501(c)(4) organization may undertake and could cause rigorous scrutiny of the partisan activities undertaken by Section 501(c)(4) organizations in order to determine whether those activities truly are in furtherance of the organization's social welfare goals. Some types of activities, such as direct transfers of resources to, and coordination with, candidates and partisan organizations and direct endorsements might be seen as particularly suspect, depending on the level of these activities and the context in which they are carried out.

Finally, even if a "primary" test were to apply to partisan political activities (i.e., these activities may not be the organization's primary activites), since these activities do not promote social welfare, perhaps they cannot be conducted unless they in some way further the organization's overall exempt purposes and goals. Recall the ruling discussing a volunteer fire company that operated a recreational clubhouse for its members—operating such a clubhouse is not a Section 501(c)(4) activi-

241. However, it is true that in the case of those types of organizations, one additional factor is that the homeowners control the organization. Note that a rule prohibiting transfers of resources would require revoking in part Rev. Rul. 81-95, 1981-1 C.B. 332, which seems to permit these transfers.

242. The Treasury Department could simply incorporate into the regulations promulgated under Section 501(c)(4) language similar to that already in the regulations promulgated under Section 501(c)(3): "An organization will not be so regarded [as exempt under Section 501(c)(4)] if more than an insubstantial part of its activities is not in furtherance of an exempt purpose." *See* Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 2008).

243. *See supra* Part II.B.2.

ty—the IRS determined that this non-social welfare activity did not preclude exempt status under Section 501(c)(4) because it fostered camaraderie among the firemen who were members of the company, thereby making them more effective. In other words, the non-social welfare activity was permissible because it aided in furthering the social welfare organization's goals.[244] Further, while investing assets for profit may not further social welfare, that activity also has been found to be permissible since it is undertaken to raise funds to conduct social welfare activities; i.e., it aids in furthering the organization's goals. It is not clear whether an activity may be undertaken if the organization cannot point to a nexus with fulfilling its mission.

On the other hand, the social welfare organization authority also may support an organization conducting some partisan activities without any limitation—i.e., activities that do not have to be less than "primary." The IRS has ruled in numerous instances that an organization may be exempt from tax under Section 501(c)(4) even if its basic activities support a private interest, as long as the activities supporting that private interest are the same activities supporting the community (subject to the *Contracting Plumbers* caveat that they not be too direct and substantial). The IRS has so ruled with respect to an organization that provided a water storage and distribution facility to its members as an incident to assisting in improving the water table in a community;[245] provided retirement benefits to firefighters as an incident to satisfying a municipality's obligations to these individuals;[246] cleaned up liquid spills made by private parties in a port and charging them only cost as an incident to protecting marine life and recreational areas;[247] encouraged persons to frequent businesses run by an organization's founders by providing free parking, as an incident to relieving parking congestion in a municipal area;[248] and improved property values for homeowners as an incident to improving the appearance of, providing recreational facilities to, or de-

244. Rev. Rul. 74-361, 1974-2 C.B. 159. This is not wholly different from the ultimate destination tests, which establish that operating a profit-making enterprise—as long as it is not substantial—is not inconsistent with Section 501(c)(4) status if undertaken to raise money to support the organization's Section 501(c)(4) goals.

245. Rev. Rul. 66-148, 1966-1 C.B. 143.

246. Rev. Rul. 87-126, 1987-2 C.B. 150.

247. Rev. Rul. 79-316, 1972-2 C.B. 228.

248. Rev. Rul. 81-116, 1981-1 C.B. 333. In fact, courts may be even more lenient than the IRS in assessing the permissibility of these activities, even allowing for benefits to accrue to private interests when an organization provides free parking only to persons whose tickets are validated by the business owners who are members of the organization. *But see* Rev. Rul. 78-86, 1978-1 C.B. 151 (stating that the IRS will not follow the holding in *Monterey Public*). *See generally* Monterey Pub. Parking Corp. v. United States, 481 F.2d 175 (9th Cir. 1973).

livering government-like services to, all members of a community.[249] Under this authority, an organization that conducts as its primary activity an activity that benefits a private, partisan interest may be eligible for exemption under Section 501(c)(4) if the activity is directly in furtherance of its social welfare purposes, the organization is not controlled by and the activity is not coordinated with a candidate or other private, partisan interest, the activity does not involve a transfer of resources to a candidate or partisan organization and the organization's membership is broadly open to all members of the community.

Under this reasoning, the organization described in Revenue Ruling 67-368, discussed in Part III.A.2.a, above, whose primary activity in furtherance of promoting an enlightened electorate was ranking candidates for an office on a nonpartisan basis, based on objective factors such as education and expertise, would have been eligible for Section 501(c)(4) status contrary to the IRS's conclusion. This organization might not be able to be controlled by or coordinate with partisan interests, could not have as its goal a specific partisan electoral outcome, might not be able to provide resources to or perhaps even directly endorse candidates that obtain an "excellent" rating, but could perform the analysis as even its primary or its sole activity.[250]

IV. SECTION 501(C)(4) ORGANIZATIONS AND SUPER PACS IN A POST-*CITIZENS UNITED* WORLD

While *Citizens United* and its progeny address the constitutionality of provisions of campaign finance law, and not federal tax law, this caselaw has had a significant impact on political activities by tax-exempt organizations. In *Citizens United*, the Supreme Court invalidated certain provisions of the federal campaign finance law that regulated the activities of corporations regarding candidates in federal elections.[251] Federal election law generally prohibits corporations from making contributions to and coordinating their communications with federal candidates, candi-

249. *See supra* Part II.B.2.b.

250. This result may be more clearly squared with the D.C. Circuit decision in *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000), which incorporates Justice Blackmun's concurrence in *Regan* into the partisan political activity context, stating that the ban on political campaign intervention activities in the Section 501(c)(3) context survives First Amendment scrutiny in part because a Section 501(c)(3) organization may establish and conduct these activities through a Section 501(c)(4) organization. It seems inconsistent with this reasoning for that Section 501(c)(4) organization to be required to undertake all sorts of other nonpartisan activities merely to meet a primary purpose test. It would be far better if the Section 501(c)(4) organization were able to conduct these activities on an unlimited basis, as long as they were in furtherance of the community interest in a manner consistent with Section 501(c)(4).

251. *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

date committees, and political parties.[252] Prior to the Court's decision, corporations generally also were prohibited from using their general treasury funds to make expenditures to express support for or opposition to federal candidates as candidates (express advocacy) even where those communications were not coordinated with federal candidates, candidate committees, and political parties (independent expenditures).[253] Further, they were prohibited from funding certain broadcast advertisements aired close to elections that identify a federal candidate (electioneering communications) and that neither were coordinated with candidates, candidate committees, or party committees, nor constituted express advocacy, but that were considered to be the functional equivalent of express advocacy because they were "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[254]

Corporations were permitted to make expenditures on express advocacy communications if those communications were solely to its "restricted class," including shareholders and administrative and executive personnel and their families.[255] Further, corporations could make contributions to, and coordinated communications with, candidates, candidate committees and political parties, could make independent expenditures, and could make electioneering communications if they paid for those expenditures using a separate segregated fund. However, they could solicit contributions to this fund only from their shareholders, executive and administrative personnel, employees and their families, and in the case of nonprofit corporations, from their members, and they were limited in the extent to which they could conduct these fundraising activities.[256] Certain nonprofit corporations were subject to more permissive rules. In considering a challenge by a corporation exempt under Section 501(c)(4) to the law prohibiting it from making independent expenditures, the Supreme Court created an exception from the independent expenditure prohibition generally applicable to corporations (1) formed for the express purpose of promoting political ideas that do not engage in business activities; (2) that have no shareholders or other persons with a

252. 2 U.S.C. §§ 441a, 441b (2002).

253. 11 C.F.R. § 114.2(b)(2)(ii).

254. Section 203 of the Bipartisan Campaign Reform Act as originally enacted by Congress prohibited all electioneering communications, including those that merely identified a federal candidate, in an attempt to prohibit advertisements known as "sham issue ads" that purported to focus on an issue but were in fact the functional equivalent of express advocacy. However, in an as-applied challenge to Section 203, the United States Supreme Court held that the application of Section 203 to an electioneering communication was permissible only if it was susceptible of no reasonable interpretation other than as an appeal to vote a certain way. Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 469–70 (2007).

255. 11 C.F.R. § 114.1(j).

256. 2 U.S.C. §§ 441b(b)(2), 441b(b)(3) (2002).

claim on the corporation's assets or earnings; and (3) that were not established by a business corporation or labor union and have a policy of not accepting contributions from these entities.[257]

In *Citizens United*, the Court considered a challenge to the law prohibiting corporations from making electioneering communications that were the functional equivalent of express advocacy.[258] It invalidated the prohibition and also the law prohibiting corporations from making independent expenditures.[259] Because the Court determined that these prohibitions were inconsistent with the First Amendment, its holding invalidated any similar state statutes.[260] Corporations still, however, may be restricted under federal campaign finance law—and the laws of several states as well—in their ability to make contributions to candidates, candidate committees, or political parties, or to coordinate their communications with candidates, candidate committees, or political parties.[261]

Several months after the Court issued its decision in *Citizens United*, the District of Columbia Court of Appeals, in *SpeechNOW.org v. FEC*, invalidated provisions of federal campaign finance law that imposed limits on the amounts SpeechNOW.org, a nonprofit organization, could accept as contributions from individuals for the exclusive purpose of making independent expenditures (i.e., the organization would not contribute to candidates, candidate committees, or political parties or make coordinated communications).[262] Subsequent FEC advisory opinions have made clear that Section 501(c)(4) corporations need not set up a separate segregated fund to make independent expenditures using their general treasury funds and instead may fund these expenditures directly.[263] Additionally, political action committees that solely make independent expenditures and do not fund, or make coordinated communica-

257. Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263–64 (1986). The FEC promulgated regulations establishing that organizations meeting these requirements also could make electioneering communications. 11 C.F.R. § 114.10(d).

258. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 901–13 (2010).

259. *Id.*

260. If there was any doubt about this, it recently was made clear in *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012), in which case the Supreme Court, *per curium*, overturned a 2012 decision of the Montana Supreme Court upholding a restriction on independent expenditures by corporations, reversing 2011 MT 328, Mont. 220, 271 P.3d 1 (2012).

261. Decades earlier, the United States Supreme Court held that these restrictions could withstand constitutional scrutiny in light of the government's legitimate interests in reducing the fact or appearance of quid pro quo corruption. Buckley v. Valeo, 424 U.S. 1, 26–27 (1976). *Citizens United* did not overturn *Buckley*. Under federal campaign finance law, corporations may make contributions to and coordinate their communications with federal candidates using separate segregated funds.

262. SpeechNOW.org v. Fed. Election Comm'n, 599 F.3d 686, 689 (D.C. Cir. 2010). The court upheld requirements that the organization register with the FEC as a political committee. *Id.*

263. FEC Adv. Op. 2010-09 (Club for Growth).

tions with, federal candidates, may receive unlimited contributions from individuals, corporations, and unions.[264]

As a result of these legal developments, a number of political action committees have been established by individuals closely related to candidates, candidate committees, and political parties that have as their goal supporting the election of one or more specific candidates for federal political office, but which do not contribute funds to or coordinate their communications with candidates, candidates committees, or political parties and instead solely make independent expenditures expressly advocating for or against federal candidates. These committees, called "Super PACs" reportedly have amassed significant funds of money to be used for these purposes—many are pouring significant funds into running "attack ads"—and come close to but do not cross the line into coordinating their activities with candidates and their campaigns.

While Super PACs are unlimited in the funds they can raise—including from any single donor—and expend to make partisan communications,[265] they are required to disclose the donors funding these expenditures. Presumably because there are donors who would like to donate to a Super PAC but also would like their contributions to remain anonymous, some individuals who have set up Super PACs also have set up a Section 501(c)(4) organization to which these donors instead contribute, and the Section 501(c)(4) organization donates these contributions to the Super PAC. These Section 501(c)(4) organizations often share the same office space, staff, and other resources as the Super PAC. Because donors to Section 501(c)(4) organizations are not publicly disclosed—donors of $5,000 or more are disclosed to the IRS, but on a section of the form that the IRS will only make public, and will only require the Section 501(c)(4) organization to make public, after redacting the names of donors—a donor that wishes to fund "attack ads" anonymously can donate to the Section 501(c)(4) that is aligned with the Super PAC, and the Section 501(c)(4) can contribute those funds to the Super PAC; the Super PAC only discloses the Section 501(c)(4) as its donor—not the identity of the donor to the Section 501(c)(4). Since the contribution no doubt would be considered political campaign intervention under the current tax law applicable to Section 501(c)(4) organizations, the related Section 501(c)(4) organization makes sure that its contributions to the Super PAC constitute less than 50% of its expenditures. It engages in legislative advocacy or educational outreach regarding "conservative" or "progressive" issues related in some manner to the platform of the candi-

264. FEC Adv. Op. 2010-11 (Commonsense Ten).

265. Federal law does, however, regulate the use of non-U.S. funds for these purposes. 2 U.S.C. § 441e (2002).

dates the Super PAC was formed to promote, claiming that this work is its primary activity and is in furtherance of the social welfare. It therefore takes the position that its primary activities do not constitute political campaign intervention.

A. Section 501(c)(4) Social Welfare Status?

Presumably, the individuals that have set up social welfare organizations supporting Super PACs take the position that the Section 501(c)(4) statutory and regulatory framework merely requires that a Section 501(c)(4) be primarily engaged in social welfare. While political campaign intervention activity does not constitute the promotion of social welfare, as long as more than 50% of the organization's activities does not constitute political campaign intervention activity—for example, it is advocacy on a matter relevant to the community—the organization claims that it qualifies as exempt under Section 501(c)(4).

This analysis is flawed. First, the very fact that these organizations were set up and are controlled by individuals directly involved in the same political activities as the Super PACs calls into question whether these organizations are eligible for Section 501(c)(4) tax-exempt status. As the Section 501(c)(4) authority described earlier demonstrates, it is not consistent with Section 501(c)(4) for an organization to be set up and controlled by a private interest. Additionally, these organizations may be ineligible for exemption in that they were formed for the purpose of funding a Super PAC—a partisan political organization. *Better Business Bureau*, if it is in fact applicable to Section 501(c)(4) organizations, tells us that a single non-exempt purpose, if substantial, precludes exemption. It shouldn't matter whether these organizations do not acknowledge, for example in their governing documents, that supporting the Super PAC is one of its purposes; as described in Part II.B.3, courts have considered the totality of the facts and circumstances in determining what an organization's purposes are, including an analysis of the organization's structure and activities. If a Section 501(c)(4) organization is formed, funded, and controlled by the same individuals who formed a Super PAC, coordinates with the Super PAC, and shares office space and other resources with the Super PAC, then it would be difficult to conclude that the organization does not have a substantial non-exempt purpose of benefiting a private interest—the Super PAC.

Additionally, these Section 501(c)(4) organizations often make contributions to the Super PACs with which they are associated in the form of direct transfers of resources. And these organizations' communications regarding candidates are almost by definition coordinated with the Super PAC, and so these communications may be seen as a contribution

of support to the Super PAC. The authority under Section 501(c)(4) calls in to question whether a Section 501(c)(4) organization may make direct transfers of resources to support a private interest. While this transfer may indirectly support the social welfare purposes of the Section 501(c)(4) organization, it directly supports a private interest and therefore may be impermissible under the Section 501(c)(4) authority. As noted in Part II, direct financial support of members of homeowners' associations and plumbing cooperatives is inconsistent with Section 501(c)(4) tax-exempt status. At the very least, this non-exempt activity might need to be insubstantial. While a Section 501(c)(4)s transfer of funds to and coordination with a political organization such as a Super PAC may be indistinguishable from an FEC perspective with a Section 501(c)(4)'s transfer of funds to or establishment of its own political organization, that does not mean that these two activities are the same from a federal tax perspective.

V. WHY IMPOSE ANY LIMITS ON SECTION 501(C)(4) ORGANIZATION'S POLITICAL CANDIDATE-RELATED ACTIVITIES?

As noted above, Section 501(c)(4) is silent as to whether organizations may be exempt under this subsection of the Code and engage in political candidate and other partisan activities. I have suggested that these activities, if they are considered to be activities that benefit private interests, should be considered through the lens of the IRS and judicial authority that addresses social welfare organizations and benefits to private interests.

Of course, Congress could amend Section 501(c)(4) either to completely prohibit organizations exempt under this subsection of Section 501(c) from engaging in these activities altogether or to allow these activities, even as part of the constitutive purpose of the organization, including without any restrictions as to amount or kind. In this Part, I briefly address these two options.

A. Prohibiting Partisan Activities

As noted above, Section 501(c)(4) is the subsection of the Code under which many advocacy organizations are eligible for exemption from tax. These organizations play an important role in American society. They have been involved in most of the progressive and conservative social movements in the United States since the enactment of the precursor to Section 501(c)(4) in the early part of the twentieth century. Organizations as diverse as the NAACP and the National Rifle Association have been exempt from tax under Section 501(c)(4). Further, these advocacy organizations often are organized under state law as membership

organizations. While many nonprofit organizations, such as museums and schools, are organized with a single level of lay leadership—their board of directors—membership organizations have a dual level of lay leadership: a board of directors responsible for most of the oversight of the organization and a membership, generally individuals, who often pay dues and on whose behalf the organization operates.[266] The board of directors may ultimately be responsible to the membership in that members often have some powers with respect to the organization's governance, such as by nominating and electing directors or calling for meetings.

Further, the Supreme Court has recognized that advocacy organizations serve a role in allowing individuals to speak as one voice in expressing their political views on social issues. The activities of these organizations have been held to be First Amendment expressive activity and a means through which individuals effectuate their Fourteenth Amendment right of association, and, accordingly, the Court has recognized that there are limits to applying to these organizations laws that impose too great a restriction on their ability to engage in expressive and associational activities. For example, the Supreme Court determined that it was inconsistent to apply, under the First and Fourteenth Amendment protections afforded to advocacy organizations, South Carolina lawyer anti-solicitation laws to an ACLU lawyer who approached an individual and offered to provide pro bono representation in a challenge to a South Carolina law that conditioned the receipt of certain government benefits on undergoing sterilization.[267] Similarly, the Court determined that under the Fourteenth Amendment, Alabama could not require that the NAACP disclose a copy of its membership list as a condition of qualifying to do business in Alabama.[268]

The Supreme Court also has recognized that campaign finance restrictions on independent political advocacy must be considered differently in the advocacy organization context. In 1986, prior to *Citizens United*, and thus at a time when campaign finance law prohibited corporations from using their general treasury funds to make independent expenditures supporting or opposing candidates for political office, a Sec-

266. In some ways, membership organizations are similar to for-profit corporations in that for-profit corporations are answerable to their shareholders.

267. *See, e.g.*, *In re* Primus, 436 U.S. 412, 422–32 (1978) (stating that South Carolina law prohibiting nonprofit organization lawyer from soliciting plaintiffs violates the First and Fourteenth Amendments because these litigation activities are a form of political expression and association and a means for informing the public).

268. *See, e.g.*, Nat'l Ass'n for Advancement of Colored People v. Alabama, 357 U.S. 449, 466 (1958) (holding that an Alabama law requiring disclosure of nonprofit organization's membership list may impede "the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment").

tion 501(c)(4) organization, Massachusetts Citizens for Life (MCFL), successfully challenged the application of this prohibition to its activities.[269] The Court's primary reason for distinguishing the application of the campaign finance law prohibition to MCFL was that neither of the two reasons the government offered in justification of the prohibition—its interest in preventing the "corrosive influence of concentrated corporate wealth" on elections and in preventing shareholder money from being used in elections without having the authorization of the shareholder—were applicable in the advocacy organization context.[270] However, the Court also acknowledged that individuals who contribute to political organizations specifically do so in furtherance of their own political will and often express such will through advocacy organizations "as a more effective means of advocacy than spending the money under their own personal direction."[271]

Additionally, the Court has suggested that even tax law restrictions on speech by tax-exempt advocacy organizations raise constitutional concerns. In 1983, the Supreme Court considered a challenge on First Amendment grounds to the lobbying limits applicable to Section 501(c)(3) organizations.[272] In upholding these limits, the Court reasoned that because Section 501(c)(3) organizations may receive tax-deductible contributions, a form of subsidy, it was within Congress's discretion to limit the lobbying undertaken by organizations availing themselves of the benefits of this subsidy.[273] In a concurring opinion, Justice Blackmun, joined by two other justices, noted that this restriction on the organization's ability to speak about legislative matters withstood congressional scrutiny because Section 501(c)(3) organizations may establish Section 501(c)(4) affiliates through which they may engage in unlimited lobbying activities as long as the Section 501(c)(3) organization does not subsidize the Section 501(c)(4) organization's activities.[274] In two subse-

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269. *See generally* Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986). The Court created an exception to the application of the prohibition for corporations (1) formed for the express purpose of promoting political ideas that do not engage in business activities; (2) that have no shareholders or other persons with a claim on the corporation's assets or earnings; and (3) that were not established by a business corporation or labor union and have a policy of not accepting contributions from these entities. *Id.* at 264.

270. *Id.* at 257, 260.

271. *Id.* at 261.

272. *Regan*, 461 U.S. 540. The taxpayer also unsuccessfully challenged the limitations on equal protection grounds, arguing that Section 501(c)(3) organizations should be treated no differently than veterans' organizations exempt from tax under Section 501(c)(19), which are subject to no lobbying restrictions and may receive tax-deductible contribution. *Id.* at 550–51.

273. *Id.* at 550 ("Congress—not [the Section 501(c)(3) organization] or this Court—has the authority to determine whether the advantage the public would receive from additional lobbying by charities is worth the money the public would pay to subsidize that lobbying . . . .").

274. *Id.* at 552 (Blackmun, J., concurring).

quent cases, a majority of the Court adopted Justice Blackmun's reasoning.[275] While *Regan* addressed lobbying restrictions, the District of Columbia Circuit has applied the same reasoning to the Section 501(c)(3) prohibition on political campaign activities, including noting that Section 501(c)(3) organizations can establish Section 501(c)(4) organizations through which they may conduct these activities.[276]

Given this background, what would it mean to amend Section 501(c)(4) to include a complete prohibition on partisan political activities, including setting up a political action organization exempt from tax under Section 527?[277] It is unclear whether this prohibition could withstand constitutional scrutiny. The reasoning in *Regan*—that the Congressional restriction on lobbying speech by Section 501(c)(3) organizations is constitutionally permissible in light of the fact that Section 501(c)(3) organizations receive tax deductible funds and thus elect to benefit from this subsidy in exchange for the restriction on speech—which the D.C. Circuit extended to the political campaign intervention context, would not apply, because contributions to Section 501(c)(4) organizations do not give rise to a tax deduction.[278]

Individuals associated with the Section 501(c)(4) could, of course, set up a political organization through which they could engage in these activities. This organization would be exempt from tax under Section 527, but Section 527 organizations are more limited in the relief from taxation they enjoy than are Section 501(c)(4) organizations. Importantly, they are not exempt from tax on their investment earnings, as the exemption under Section 527 is available to organizations that raise and expend funds in elections, and thus generally have a shorter life than

275. *See* Fed. Commc'n Comm'n v. League of Women Voters of Cal., 468 U.S. 364, 399–400 (1984); *see also* Rust v. Sullivan, 500 U.S. 173, 197–98 (1991).

276. Branch Ministries v. Rossotti, 211 F.3d 137, 143–44 (D.C. Cir. 2000).

277. Either the statute could be amended to include language similar to the language in Section 501(c)(3) that prohibits candidate-related activities or it could be amended to more broadly prohibit candidate and other partisan political activity. Presumably this statutory prohibition would be interpreted to mean that the organization also could not set up a political action organization. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 201127013 (July 8, 2011) (stating that a Section 501(c)(3) organization may not set up a political action committee exempt from tax under Section 527).

278. They are not deductible as charitable contributions under 26 U.S.C. § 170 (2010) and, further, in light of the application of 26 U.S.C. § 6033(e) (2010), Section 501(c)(4) organizations generally must report to their members the portion of their dues that the organization used to undertake political campaign intervention activities, which portion is not deductible under 26 U.S.C. § 162(e) (2011) or else pay a proxy tax with respect to such amounts. Further, Section 501(c)(4) organizations must pay a tax under 26 U.S.C. § 527(f) (2003) with respect to its political campaign intervention expenditures (although the proxy tax and the tax under 26 U.S.C. § 527(f) (2003) is not paid with respect to the same expenditures). Of course a statutory prohibition on Section 501(c)(4) partisan political activity would thwart the Section 501(c)(3) and Section 501(c)(4) frameworks.

Section 501(c)(4) organizations.[279] Further, these individuals likely would have to undertake these Section 527 activities solely in their personal capacities to avoid attribution of those activities to the Section 501(c)(4), thereby depriving the Section 501(c)(4) organization of the ability to act on behalf of its constituency by undertaking electoral activities in furtherance of its mission. This also would deprive the Section 527 organization of the ability to use the expertise and resources of the Section 501(c)(4) organization, including, importantly, the use of the Section 501(c)(4) organization's brand, which may embody and represent the historical and institutional importance of the Section 501(c)(4) organization in representing its constituency.

Additionally, as Professor Hansmann has articulated, one policy justification for the nonprofit exemption from tax is that it compensates for the fact that these organizations may have greater difficulty than their for-profit counterparts in raising funds for capital investment—the exemption from tax assists these organizations in achieving a permanence in society.[280] Of course, in order to have funds available for capital investments, the nonprofit must retain revenues in excess of its expenditures. The taxation of the earnings on these revenues creates a disincentive to retain such earnings to achieve permanence and results in it taking longer for the organization's investment assets to grow, particularly when considering the impact of inflation on the organization's purchasing power. I believe there may be an argument grounded in tax policy that supports the tax treatment of nonprofit advocacy organizations—associations through which individuals may express their collective will on important social issues, including on partisan political issues that are in furtherance of their mission—differently than the tax treatment of Section 527 organizations, particularly in the case of the taxation of investment earnings. The Section 527 organization set up by individuals associated with a Section 501(c)(4) organization but which is neither funded nor controlled by that organization and cannot in any official capacity benefit from that organization's expertise or branding—including, for some organizations, the historical import of that organization—may not be an effective mechanism for ensuring that individuals associated with a Section 501(c)(4) organization can express their political will on relevant matters.

279. 26 U.S.C. § 527(b) (2003).

280. Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 75 (1981).

B. Broadly Permitting Partisan Activities

At the other end of the spectrum, what if Congress were to amend Section 501(c)(4) either to permit unlimited partisan political activities, or alternatively to impose some limit (for example, a 49% expenditure test), but within that permissive range allow the organization to undertake any activities whatsoever, regardless of whether they are in furtherance of or in support of the organization's social welfare purposes?

On the one hand, there is something quite simple about this solution. Of course, once a Section 501(c)(4) organization's partisan political activities become so extensive that the organization itself is treated as a Section 527 organization, it would be subject to the tax and disclosure rules applicable to these organizations under Section 527 and the federal and state campaign finance law disclosure rules applicable to political organizations.[281]

However, what might be lost if Section 501(c)(4) organizations no longer have to have the promotion of social welfare—serving community as opposed to private interests—as their purpose or if they can promote private, partisan interests as a significant purpose? I argue that something will be lost in the manner in which advocacy organizations have been treated as a distinct and relevant form of association for individuals to promote social change, including promoting controversial social issues. In fact, the use of social welfare organizations to engage in partisan political work already has had an impact on the reputation of these organizations, with calls for broad disclosure of donors to these organizations and regulation as if they were political organizations formed for the purpose of engaging in candidate-related work. The Supreme Court has repeatedly recognized that legislatures have broad authority to enact disclosure and disclaimer laws with respect to partisan expenditures, and legislatures may enact laws of broad sweep.[282] In other words, to the extent so-

281. For example, an organization will be considered a political committee for federal law purposes and therefore subject to disclosure and disclaimer requirements under the Federal Election Campaign Act (FECA) if it meets a threshold test regarding its expenditures or contributions received for purposes of influencing federal elections and its "major purpose" is federal campaign activity. 2 U.S.C. § 431(4); Political Committee Status, 72 Fed. Reg. 5,595-02 (Feb. 7, 2007); Buckley v. Valeo, 424 U.S. 1, 79 (1976) (reading "major purpose" requirement into the Federal Election Campaign Act). Section 527 provides that an organization is a "political organization" if it is organized and operated "primarily for the purpose of" activities relating to influencing federal, state, or local elections. 26 U.S.C. § 527 (2003). Under Section 527, political organizations pay tax on their net investment income, *id.* § 527(b) (2003), and are subject to reporting requirements if they are not otherwise required to report as a political committee under FECA and are not a state or local political committee. *Id.* § 527(i).

282. The constitutional permissibility of broad disclosure in the campaign finance area has as its genesis *Buckley v. Valeo*, in which the Supreme Court upheld compelled disclosure of political contributions as not inconsistent with the First Amendment, but noted that exceptions to disclosure

cial welfare organizations may broadly engage in partisan political activities and have partisan political goals as part of their constitutive purposes, they may become subject to disclosure laws similar to the laws applicable to political organizations, including laws requiring disclosure of donors whose funds supporting partisan activities that are in furtherance of and incidental to the organization's social welfare purposes, or, even worse, laws requiring disclosure of all donors. This quite possibly could have an adverse effect on these organizations' ability to attract new members.

VI. CONCLUSION: FINAL THOUGHTS

What do homeowners' associations, plumbers' organizations, and parking facilities tell us about the permissible restrictions on the ability of organizations exempt from tax under Section 501(c)(4) to engage in political activities? The historic IRS and judicial authority provide little guidance regarding the permissibility of these activities and whether there ought to be qualitative and quantitative limits on these activities. Given the lack of direct guidance, it is not surprising that the IRS has primarily turned to the authority developed in the Section 501(c)(3) context. Because Section 501(c)(3) organizations are prohibited from engaging in political campaign intervention, there is a pool of guidance on what does and does not constitute political campaign intervention activities: a murky and confusing pool, but a pool nonetheless.

Instead of turning to this authority, I have looked back at the historic authority under Section 501(c)(4) to determine what guidance it offers regarding quantitative and qualitative limits on Section 501(c)(4) organizations' partisan political activities. In addressing Section 501(c)(4) organizations, both the courts and the IRS have evinced a concern that the-

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may be necessary in the case of minor parties that can show a "reasonable probability that compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties. Buckley v. Valeo, 424 U.S. 1, 74 (1976); *see also* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982) (determining that disclosure of campaign contributors and recipients cannot be constitutionally applied to the Socialist Workers Party, which historically has been subjected to harassment by government officials and private parties). While the primary holding in *Citizens United* regarding the permissibility of corporate independent expenditures and electioneering communications was sharply divided along partisan lines, in an 8–1 section of the opinion, the Court upheld federal campaign finance disclosure requirements applicable to electioneering communications. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 913–16 (2010). Additionally, the Court has upheld laws requiring disclosure of paid direct lobbying activity regarding federal legislation, *United States v. Harriss*, 347 U.S. 612 (1954), and the names of individuals supporting a petition to include a controversial referendum on a state ballot. Doe v. Reed, 561 U.S. 2 (2010) (but leaving open whether the First Amendment might prohibit disclosure if it can be shown that disclosure could expose the signer to harm).

se organizations be organized to benefit community interests and only benefit private interests incidentally or indirectly.

Because of the work that advocacy organizations do, including broadly educating the community or advocating in the community or legislatures for social change, advocacy organizations are not as likely as other kinds of social welfare organizations—such as homeowners' associations—to benefit private interests. But when advocacy organizations engage in candidate or other partisan work, which may be seen as work that benefits private interests, the historic Section 501(c)(4) authority analyzing social welfare as supporting of community versus private interests becomes relevant.

While I have touched upon some of the consequences of strictly prohibiting or broadly permitting partisan political activities by Section 501(c)(4), ultimately, I am agnostic. I have instead tried to explain what the authority under Section 501(c)(4) tells us about these activities and touch upon some of the consequences of moving the law in this area to either extreme. I do think that establishing a sharp deviation from this authority—prohibiting all activities or permitting it unfettered—should be accomplished not by the Treasury Department, but rather by Congress.