Nonprofits Face Uncertainty Over Political Activity Rules

By **Allison Tuck, Allen Dickerson and Alexander Reid** (December 12, 2025)

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The law concerning federal limits on political advocacy by nonprofit organizations continues to evolve. For 501(c)(4) social welfare organizations, two federal court decisions, issued nearly a year apart, have unsettled both the constitutional footing and practical rules governing their activities.

These decisions suggest that the Internal Revenue Service's rules for political activity may be too vague to survive constitutional scrutiny, even as courts redefine "social welfare" in narrower terms.

The resulting tension could force significant changes in how these organizations engage in lobbying, advocacy and political activity. Until it is resolved, 501(c)(4) organizations operate in a narrowing corridor, caught between constitutional limits on the government's ability to regulate political speech and tax limits on exempt status.

Internal Revenue Code Section 501(c)(4) is silent about the political activity of social welfare organizations. It simply provides that such organizations must operate "exclusively for the promotion of social welfare" and without inurement of net earnings to "any private shareholder or individual."

The U.S. Department of the Treasury regulations interpreting the statute, however, stipulate that the "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."[1]

Perhaps the reason such obvious censorship has survived in administrative interpretations of the statute for so long is that the Treasury regulations also interpret the word "exclusively" to mean "primarily." As a result, a social welfare organization may engage in noncompliant activity, including political campaign intervention, provided that it continues to engage primarily in social welfare activity.

The IRS currently determines whether a 501(c)(4) organization is primarily engaged in promoting social welfare through a facts-and-circumstances analysis of the organization's activities rather than through a fixed formula.

Neither the Internal Revenue Code nor the Treasury regulations impose a numeric or percentage limit on political activity, but IRS guidance and historical practice suggest that such activity should not exceed 40% of the organization's total expenditures in a given year.

On Sept. 30, in Freedom Path Inc. v. IRS, the U.S. District Court of the District of Columbia held that this facts-and-circumstances framework for judging permissible political activity, which the IRS used to deny Freedom Path's application for exemption under Section 501(c)(4), was unconstitutionally vague as applied to that organization.

While the court's decision did not strike down the IRS' existing framework in general, similar as-applied challenges could follow until the IRS or Congress provides a clearer rule explaining where the line lies.

By contrast, in 2024, in Memorial Hermann Accountable Care Organization v. IRS, the U.S. Court of Appeals for the Fifth Circuit addressed the scope of the social welfare exemption itself. In that case, the U.S. Court of Appeals for the Fifth Circuit held that an organization did not qualify for exemption under Section 501(c)(4) because its activities primarily benefited health care providers and insurers rather than the public.

In reaching this conclusion, the court applied the substantial nonexempt purpose doctrine from Better Business Bureau v. U.S., a 1945 U.S. Supreme Court case holding that an organization can be denied exemption if it engages in even one significant nonexempt activity.

That approach departs from the more flexible primary purpose test found in the Treasury regulations, under which an organization may still qualify for exemption so long as its social welfare mission predominates.

By adopting the stricter standard, the court effectively aligned the rules governing 501(c)(4) organizations with those governing 501(c)(3) charities and expanded the IRS' authority to deny exemption.

These decisions deepen uncertainty in the law of tax-exempt advocacy. Freedom Path calls the IRS' standards for evaluating political activity into question, while Memorial Hermann tightens the substantive limit on nonexempt activities. This tension is compounded by current IRS practice.

Although 501(c)(4) organizations have, since 2016, only needed to notify the IRS of their formation rather than seek formal recognition, many still pursue determination letters to reduce future risk. In reviewing those submissions, the IRS continues to rely on the same facts-and-circumstances approach that Freedom Path criticized. With no updated regulations or safe harbors, these determinations remain highly fact-specific and potentially inconsistent.

These rulings may also force the IRS to reckon with how it defines and enforces standards for exemption under Section 501(c)(4). If the agency revises its regulations to cure the constitutional vagueness identified in Freedom Path, it may also need to reconcile them with the Fifth Circuit's stricter reading of the permissible threshold for nonexempt activity in Memorial Hermann.

Meanwhile, this regulatory complexity for Section 501(c)(4) social welfare organizations occurs against a changing legal landscape for the First Amendment rights of 501(c)(3) charitable organizations.

In Buckeye Institute v. IRS, the U.S. Court of Appeals for the Sixth Circuit is considering whether the First Amendment freedom of association protects the donors to 501(c)(3) charities from public disclosure.

The IRS' contrary position relies upon the notion that if a tax rule provides an economic subsidy, then the First Amendment does not protect the recipient of that subsidy.

The IRS' position raises serious constitutional questions, including which subsidies negate First Amendment protection, how much subsidy is too much, and how much power should the IRS have to limit political speech and associational activity by donors and tax-exempt organizations.

More lawsuits around these issues are inevitable.

At the same time, the U.S. Department of Justice has expressed openness to permitting candidate endorsements by churches and other religious charities. In November, the IRS agreed to settlement terms in National Religious Broadcasters v. Werfel that would permit at least some religious organizations to discuss "electoral politics … through the lens of religious faith" during religious services.

Time will tell whether the IRS' strict interpretation of the Johnson Amendment as prohibiting all political intervention by 501(c)(3) organizations including churches, or the DOJ's more lenient interpretation will prevail.[2] Regardless of the outcome in that case, the government's shifting position is part of the larger trend toward reconsideration of the settled law governing political activity by nonprofit groups.

Taken together, these developments point toward a compliance environment that is both unpredictable and demanding for all tax-exempts, including 501(c)(4) organizations. The near-term priority for all nonprofits is risk mitigation.

Boards should revisit their governing documents, purpose statements and program budgets to confirm that public benefit, not private advantage or political activity, remains their primary objective.

Political activity and lobbying efforts should be clearly separated from operational programs and supported by contemporaneous documentation linking them to the organization's public welfare mission.

Counsel representing 501(c)(4) organizations should monitor where IRS determinations arise, as courts in different jurisdictions may interpret Freedom Path and Memorial Hermann differently until higher courts clarify the standard.

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