

1 Chairman Cruz. Thank you.

2 Professor Noble?

ADJUNCT

1 STATEMENT OF LAWRENCE NOBLE, PROFESSOR, GEORGE
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4 Mr. Noble. Thank you. Chairman Cruz, Ranking Member
5 Coons, and Senator Sessions, I appreciate the opportunity to
6 address the Subcommittee on the activities of the Internal
7 Revenue Service and the oversight of political activity of
8 tax-exempt organizations.

9 As Justice Kennedy wrote in Citizens United v. FEC:
10 "The First Amendment protects political speech; and
11 disclosure permits citizens and shareholders to react to the
12 speech of corporate entities in a proper way. This
13 transparency enables the electorate to make informed
14 decisions and give proper weight to different speakers and
15 messages."

16 However, as has been discussed, the IRS' failure to
17 enforce the laws governing political activity by 501(c)(4)
18 organizations, together with the FEC's failure to enforce
19 the campaign finance laws, has resulted in hundreds of
20 millions of tax-exempt dollars being used to elect
21 candidates with little or no transparency as to the sources
22 of these funds.

23 According to the Center for Responsive Politics, groups
24 claiming to be exempt from tax under 501(c)(4) reported
25 spending over \$257 million in the 2012 elections and over

1 \$118 million in the 2014 elections. Very few of these
2 politically active groups publicly disclose any of their
3 donors. So even if they report some of their election-
4 related activity, there is no real transparency. And these
5 figures do not include the spending of organizations who do
6 not report to the IRS or to the FEC.

7 Already in the 2016 election cycle, groups set up by
8 candidates run by people who have worked on behalf of the
9 candidates and financed through the candidates' fundraising
10 are using secret money to support their candidates'
11 elections. As this past Sunday's New York Times reported,
12 it appears that many Presidential hopefuls have been meeting
13 with donors, hiring staff, visiting New Hampshire and Iowa
14 since last year, but have had their travel and other
15 expenses paid for by their super PACs and their 501(c)(4)
16 organizations.

17 Some of these groups are now planning to use the same
18 secret money to finance activity that previously we expected
19 the campaigns to pay for, such as hiring people for
20 grassroots outreach, opposition research, and campaign
21 strategy. And we can also expect to see an increase in the
22 funding of 501(c)(4) organizations that are not directly
23 connected to a specific candidate, but who are supporting
24 specific candidates.

25 There is no question that the goal of these

1 organizations is to affect the outcome of our elections
 2 while hiding the true source of their funds. This means we
 3 have no way of knowing whether the campaign activity of
 4 these groups is being funded by thousands of small donors,
 5 several wealthy individuals, corporations, labor unions, or
 6 even foreign nationals, foreign companies, or foreign
 7 governments.

8 The use of these organizations as conduits for hundreds
 9 of millions of dollars to elect candidates is possible
 10 because of the way the IRS has defined "political activity."
 11 And as has already been discussed, the law requires a
 12 501(c)(4) to be devoted to the promotion of social welfare,
 13 which does not include political activity. The IRS decided
 14 that meant primarily devoted to social welfare, but they did
 15 not describe what that meant. They did not describe what
 16 "primarily" meant ^{o-} ~~and how do they describe~~ what a "political
 17 activity" is beyond a facts and circumstances test. What
 18 that has allowed are these groups and their lawyers to
 19 decide that as long as ^{they} ~~we~~ spend only up to 49 percent ^{on "political"} ~~of~~ ^{activity}
 20 ~~are not primarily~~ ^{they} ~~we~~ are still primarily doing social
 21 activity, and also ~~decide~~ ^{define} very narrowly what is political
 22 activity.

23 Well, 49 percent of a \$100 million group is a lot of
 24 money; 49 percent of a \$10 million group is a lot of money.

25 The problem here is that the IRS now is under a lot of

1 pressure not to do anything. They started a rulemaking, but
2 have been criticized by Members of Congress and the public
3 because of that rulemaking.

4 Now, ^{with} ~~as~~ a public rulemaking, we may agree with part of ✓
5 it, we may disagree with part of it, and that is the whole
6 point of it, to get comments and to come up with the best
7 rules as to what ~~would be--what~~ are the standards for a
8 501(c)(4) organization. But, instead, because of the
9 scandal--and I agree that if they targeted groups for their
10 political ideology, that was wrong, ~~in~~ ~~But because of the~~ ✓
11 ~~scandal~~, they are now under pressure not to do anything. We ✓
12 expect to see less enforcement of the laws, and they are
13 under pressure now not to do new rules.

14 This is wrong. This is not what Congress intended.
15 This defeats transparency, and it ultimately harms our
16 democracy.

17 Thank you.

18 [The prepared statement of Mr. Noble follows:]

1 participating in the investigations for a period of time, we
2 decided and elected on behalf of our clients to no longer
3 participate in those investigations because of the e-mails
4 that came to light where DOJ was involved.

5 Chairman Cruz. Thank you.

6 Senator Coons?

7 Senator Coons. Thank you, Mr. Chairman.

8 If I might just start with Professor Noble, Mr. Sekulow
9 in his testimony stated there has been inappropriate
10 influence by outside groups, and then read an e-mail. I
11 would just give you an opportunity, if I might, to comment
12 on the appropriateness or inappropriateness of the nonprofit
13 you led seeking enforcement of the law. I would be
14 interested in your view on what happened.

15 Mr. Noble: Thank you. I think what I did and what our
16 organization did, what all these organizations do, is
17 totally appropriate. And it is a great example of how e-
18 mails--because ^{with} this one, I know what she was talking about ~~how e-mails~~
19 ~~are being taken out of context and being used~~
20 for purposes that they were not intended. What she was
21 ~~reporting~~ ^{referring to} there is ^{that} my group, myself and others--when she
22 talks about the FEC world, that means the campaign finance
23 world--were ~~out there~~ saying that the IRS should become more
24 active and should look at ways to stop these groups that are
25 using millions of dollars in undisclosed funds for political

1 activity. And one of the ideas that had been talked about--
 2 and it has been talked about ⁱⁿ this hearing--has been the idea
 3 that it is tax fraud, it is lying to the Government. If you
 4 say on a (c) (4) application that you are not going to get
 5 involved in political activity and you do, that is lying to
 6 the Government. If you do get involved in political
 7 activity, again, it is tax fraud. We were talking about
 8 this publicly, and that is what she is reporting on.

9 The other e-mail I ^{also} know something about--~~and Senator~~
 10 ~~Whitehouse is here~~ ^{It refers to} the hearing where Senator Whitehouse
 11 asked DOJ about other activity that could be done, what
 12 DOJ's role was. And the e-mail that they are referring to I
 13 am amused by because I was General Counsel to the Federal
 14 Election Commission for 13 years ^{and} when a Senator at a
 15 hearing ^{asked} asks the agency ^{what could be done} if it can do something about it, and
 16 if the agency went back ~~and did not do anything about it, or~~
 17 ~~if I had gone back~~ and did not do anything about getting an
 18 answer, not necessarily following up and doing what the
 19 Senator may be suggesting, but getting an answer, I would
 20 have been in a lot of trouble.

21 What that e-mail seems to reflect--and I have no
 22 personal knowledge of it other than being at the hearing--
 23 was she was going back and saying ^{the IRS} that DOJ came to us and
 24 said they got this question, ^{and} we need to sit down and talk
 25 about what the response is. It does not say they did

1 anything about it. It does not say that they decided to go
 2 along with anything that was suggested. It was merely a
 3 statement.

4 But in terms of ~~back~~ ^{her reference} to the criticism that ~~we are~~ ^{+ the IRS uses}
 5 taking ⁱⁿ the e-mail ^{where} that Ms. Lerner referred to me, she was
 6 absolutely right. We were pushing her. We had no idea of
 7 what they were doing, and, in fact, I was probably as
 8 surprised as anybody when ^{their activity became public} the whole issue ~~broke~~ because our
 9 understanding ^{was that} ~~is~~ they were not doing anything.

10 Senator Coons. Thank you, Professor.

11 Now, Ms. Aviv, if I might, the inappropriate triage of
 12 501(c)(4) applications for further processing that took
 13 place in Cincinnati some would argue is a predictable
 14 consequence of the real lack of clarity in the rules. The
 15 rules are simply not reasonably administrable in a way that
 16 is consistent, clear, and fair; and, further, due in part to
 17 dozens of congressional hearings just like this one, the
 18 unfortunate result is the IRS has been cowed into barely
 19 enforcing these rules at all.

20 How does the lack of meaningful enforcement in this
 21 area affect your members, which, if I understand correctly,
 22 include thousands of nonprofits?

23 Ms. Aviv. I have hundreds of thousands of nonprofits.
 24 If you had to give out our members' affiliates, we are
 25 talking about hundreds of thousands, and the charitable

1 Senator, one last thing that I just want to make a
2 point about, because we have been asked often about the
3 difference between (c) (3) organizations and (c) (4)
4 organizations, and why do we need (c) (4) organizations if
5 you have got 527s, if people intend to engage in partisan
6 political activity, just go in that direction.

7 But there is a great value in having organizations that
8 can do both. They do not have the benefit of allowing
9 donors to get a charitable deduction, but at the same time,
10 they have at their disposal the full range of activities
11 that are involved in public policy activity all the way up
12 to and including electoral activity. So we think there is
13 still great value in those organizations.

14 Senator Coons. Professor Noble, if I might, just
15 looking at the campaign side of the equation we were just
16 discussing, what is the consequence of allowing
17 organizations that are effectively campaign advocacy
18 organizations to shield themselves under the 501(c) (4)
19 label?

20 Mr. Noble. It has a tremendous effect, and part of the
21 problem is due to the ineffectiveness of the FEC and now the
22 IRS. But what you have is a campaign finance system that is
23 based on disclosure, transparency, which the Supreme Court
24 has said is critical; ^{a system that} ~~it~~ also has contribution limits and
25 prohibitions, ^{which cover} ~~and the prohibitions run~~ anything from

1 corporations or unions giving directly to candidates, to
2 foreign nationals giving in any election.

3 If you allow (c) (4) organizations that do not disclose
4 to get involved in this political activity and they are not
5 held accountable for ^{disclosure} ~~that~~, then you have no way of knowing
6 if the contribution limits are being followed, if there is
7 any coordination going on, if foreign nationals are involved
8 in the process, and you have totally undermined ^{transparency} ~~disclosure~~.
9 We do not know who is supporting the candidates. And the
10 Supreme Court has said over and over again--^{including} ~~again~~, in
11 Citizens United ^{and} ~~in~~ the recent McCutcheon case, ~~the Supreme~~
12 ~~Court said~~ that transparency is critical. And, ~~they assume~~,
13 the Supreme Court's decision ^{that} ~~assumes~~ that what is happening
14 is ^{that} ~~all this information~~, all this money being spent on
15 politics, whether by independent groups or groups affiliated
16 with candidates, is being disclosed. And if you let the
17 (c) (4)s do this without disclosing, whether they are
18 Republican or Democratic, Tea Party groups or liberal
19 groups, you have undermined the campaign finance laws.

20 Senator Coons. Thank you.

21 Thank you, Mr. Chairman.

22 Chairman Cruz. Senator Sessions.

23 Senator Sessions. Ms. Martin, thank you for your
24 testimony and the courage that you have taken to advance the
25 base that you care about. How do you feel about the person