

United States Senate
WASHINGTON, DC 20510

February 3, 2021

The Honorable Janet Yellen
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Dear Secretary Yellen,

Congratulations on your swift confirmation. We write today to follow up on the conversation at your Senate Finance Committee hearing regarding Treasury's role in overseeing the political activity of social welfare organizations organized under section 501(c)(4) of the Tax Code. As was discussed at the hearing and we outline below, the IRS's regulation and enforcement related to 501(c)(4) organizations has been woefully inadequate in the post-*Citizens United* era. We urge you to undertake a careful review of what the IRS has done, reform its approach, and rein in abuse by "dark money" organizations.

Citizens United and Donor Disclosure

In *Citizens United*, the Supreme Court struck down provisions of the Bipartisan Campaign Reform Act ("BCRA")¹ and allowed unlimited spending in elections. That decision presumed that BCRA's disclosure requirements, which remained intact, would create a regime of "effective disclosure" that would "provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."² That presumption utterly failed: following *Citizens United*, "effective disclosure" collapsed. This collapse among non-profit groups took place largely because of ambiguous and permissive Treasury regulation of political spending.

Corporate special interests, and their sophisticated political operatives, lawyers, and contributors, identified and exploited the IRS's weak and outdated regulations. They funneled money into organizations under section 501(c)(4) of the Internal Revenue Code precisely because these

¹ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

² *Id.* at 370. The justices upheld BCRA's disclosure requirements by an 8-1 margin. *Id.* at 372.

organizations do not have to publicly disclose their contributors,³ and then turned those organizations to political work.

Once *Citizens United* allowed unlimited political spending in elections, the value of hiding donors' identities exploded, and political activity by 501(c)(4) groups exploded in parallel. Since 2010, 501(c)(4) organizations have spent over \$900 million on political expenditures, compared to \$103 million in the previous decade.⁴ In one representative case, the American Action Network raised \$41.9 million in one year, \$24.6 million of which came from a single anonymous donor.⁵ According to an analysis of the 2020 election, 70% of outside spending came from groups that do not fully disclose their donors, meaning they have dark money or shell company donors.⁶

Citizens United wrought a seismic shift in the political ecosystem. These figures, while staggering, show only a facet of the massive, sophisticated political operation of these big influencers. For example, these figures do not include money spent on “issue ads” (often thinly veiled political attack ads), nor on official lobbying expenditures, nor on conventions and retreats in exotic locations designed to “educate” policy makers, nor on impact litigation and amicus briefs that these organizations have turned into a burgeoning legal influence industry, nor do they contemplate the value of private threats and promises that the prospect of unlimited spending enables.

While the amount of spending is immense, the number of outside groups doing the bulk of the spending is not. In 2016 alone, just ninety-five 501(c)(4) and 501(c)(6) trade associations made independent expenditures of \$50,000 or more, which totaled more than \$185 million.⁷ The ten largest of those spenders were responsible for 77% of this total, and the top three spenders were responsible for nearly half.⁸ Our most powerful political forces now hide from open debate and public accountability by virtue of having interposed a one-way mirror between themselves and the public sphere. The result has been widely described as a “tsunami of slime.”⁹

³ See, e.g., Trevor Potter & B. B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the Dark Money Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383, 463-64 (2013) (discussing the formation of Crossroads GPS, a 501(c)(4) spin-off of super PAC American Crossroads, formed to protect donors from disclosure).

⁴ *Outside Spending*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/index.php?type=A&filter=N> (last visited Jan 26, 2021).

⁵ Scott Bland, *Ryan-linked group Raised \$24.6M From an Anonymous Donor*, POLITICO (May 18, 2018), <https://www.politico.com/story/2018/05/18/american-action-network-24-6-million-anonymous-donor-554680>.

⁶ *2020 Election To Cost \$14 Billion, Blowing Away Spending Records*, OPENSECRETS.ORG (Oct. 28, 2020), <https://www.opensecrets.org/news/2020/10/cost-of-2020-election-14billion-update/>.

⁷ *Political Nonprofits: Top Election Spenders*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/nonprof_elec.php?cycle=2016 (last visited Dec. 3, 2019).

⁸ *Id.*

⁹ Joe Hagan, *The Coming Tsunami of Slime*, N.Y. MAG. (Jan 22, 2012) <https://nymag.com/news/features/negative-campaigning-2012-1/>.

The IRS Has Wrongly Given Up the Fight Regulating Non-Profit Political Activity

The impotence of the IRS's existing 501(c)(4) regulations has been thoroughly discussed.¹⁰ By law, 501(c)(4) groups must be set up “*exclusively*... for the promotion of social welfare,”¹¹ which, according to the IRS's own regulations, “*does not* include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.”¹² Nevertheless, Treasury regulations allow 501(c)(4) social welfare organizations to engage in campaign activity so long as the “primary” activity of the organizations is social welfare.¹³

The IRS permits 501(c)(4)s to engage in express political activity as long as it is less than half of the organization's spending. The remainder of that spending can be on “issue ads” or transfers to other organizations that then spend the money on political ads.¹⁴ In some cases, 501(c)(4) organizations have operated in a manner indistinguishable from Political Action Committees,¹⁵ and some operatives and contributors have created intricate webs of organizations to further thwart disclosure and shield contributors from scrutiny.¹⁶

These groups have an obvious imperative for ambiguous and unenforced regulation, so they and their political allies have spent the last decade deriding and threatening the IRS to keep it from cleaning up these murky waters. In 2013, the Treasury Inspector General of the Tax Administration (TIGTA) found that the IRS had singled out certain conservative groups for increased scrutiny.¹⁷ Notably, the 2013 report did not look into whether other political groups were similarly targeted.¹⁸ Nevertheless, big special interests used the finding to batter the IRS. Powerful special interest groups and their political allies slashed the IRS budget, threatened to

¹⁰ See, e.g., Letter from Senators to Department of Treasury and IRS (Feb. 27, 2014), <https://www.whitehouse.senate.gov/imo/media/doc/2014-02-27%20501c4%20Rules%20Comments%20Signed%20FINAL.pdf>.

¹¹ 26 U.S.C. § 501(c)(4)-1(a)(1)(ii) (emphasis added).

¹² Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (emphasis added).

¹³ Treas. Reg. § 1.501(c)(4)-1(a)(2)(i).

¹⁴ See, e.g., Kim Barker, *New Tax Return Shows Karl Rove's Group Spent Even More on Politics than it Said*, PROPUBLICA (Nov. 25, 2013), <https://www.propublica.org/article/new-tax-return-shows-karl-roves-group-spent-more-on-politics-than-it-said>.

¹⁵ See, e.g., Tom Hamburger and Matea Gold, *Crossroads GPS Probably Broke Election Law, FEC Lawyers Concluded*, WASHINGTON POST, (Jan. 15, 2014), https://www.washingtonpost.com/politics/crossroads-gps-likely-broke-election-law-fec-staff-reports-concluded/2014/01/15/15af18b6-7d73-11e3-93c1-0e888170b723_story.html; Federal Election Commission, First General Counsel's Report, MUR: 6396 (Crossroads Grassroots Policy Strategies), Nov. 21, 2012.

¹⁶ See, e.g., Matea Gold, *Koch-Backed Political Coalition, Designed to Shield Donors, Raised \$400 million in 2012*, WASHINGTON POST (Jan. 5, 2014), https://www.washingtonpost.com/politics/koch-backed-political-network-built-to-shield-donors-raised-400-million-in-2012-elections/2014/01/05/9e7cfd9a-719b-11e3-9389-09ef9944065e_story.html (Describing the Koch-backed coalition: “Tracing the flow of the money is particularly challenging because many of the advocacy groups swapped funds back and forth. The tactic not only provides multiple layers of protection for the original donors but also allows the groups to claim they are spending the money on “social welfare” activities to qualify for 501(c)(4) tax-exempt status.”).

¹⁷ Treasury Inspector Gen. For Tax Admin., *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013) <https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>.

¹⁸ Treasury Inspector Gen. For Tax Admin., *Review of Selected Criteria Used to Identify Tax-Exempt Applications for Review* (September 28, 2017) <https://www.treasury.gov/tigta/auditreports/2017reports/201710054fr.pdf>.

impeach the then-Commissioner, and even passed legislation prohibiting the IRS from issuing clarifying rules regarding 501(c)(4) political activity.

Their argument was not true: a more comprehensive 2017 audit of the IRS's treatment of potential political groups found that left-leaning groups had also been flagged for closer scrutiny.¹⁹ The new audit found that instead of ideologically targeting certain groups, the IRS under both Republican and Democratic administrations had looked into groups across the political spectrum to enforce the rule against "direct or indirect participation or intervention in political campaigns."

However, the damage had been done. The IRS was cowed from regulating or even investigating a small, powerful cadre of savvy political operatives who formed and funded a flotilla of non-profit front groups, through which anonymous money flows into elections, in contravention of a clear statute and the IRS's own rules. Enforcement has become so weak that abuses have become open and notorious.²⁰ According to one ProPublica study, from 2015-2019, the IRS failed to strip any non-profit of its tax-exempt status, despite receiving thousands of complaints of abuse from watchdog groups and concerned taxpayers.²¹ Flagrant discrepancies between sworn statements made to the IRS and sworn statements made by the same group to election regulators have been turned a blind eye.²²

The dark money problem was exacerbated under the Trump administration, which promulgated a rule in 2020 that allows 501(c)(4)s to withhold their donor information from the IRS on their annual Form 990 reports.²³ Dark money got darker.

Next Steps

Treasury and the IRS are not alone to blame for the dark money problem infecting our body politic. Republican appropriations riders have tied Treasury's and the IRS's hands, preventing promulgation of new regulations regarding 501(c)(4) political activity. We are heartened that the Senate and House are poised to take up and pass the For the People Act (H.R.1/S.1), which would shine more light on dark money. However, absent a legislative fix, Treasury and the IRS should shift to a more robust 501(c)(4) enforcement regime, and thoroughly investigate the situation so those appropriations riders can be reviewed.

¹⁹ Treasury Inspector Gen. For Tax Admin., Review of Selected Criteria Used to Identity Tax-Exempt Applications for Review (September 28, 2017) <https://www.treasury.gov/tigta/auditreports/2017reports/201710054fr.pdf>.

²⁰ *Infra*, note 22.

²¹ Maya Miller, *How the IRS Gave Up Fighting Political Dark Money Groups*, PROPUBLICA (April 18, 2019), <https://www.propublica.org/article/irs-political-dark-money-groups-501c4-tax-regulation>.

²² In 2012, ProPublica investigated 501(c)(4) filings from 104 organizations that had reported electioneering activity to the Federal Election Commission or state equivalents, saying "here is what we spent on elections." ProPublica cross-checked those claims with what the organizations had reported to the IRS. Thirty-two groups had told the IRS they spent no money to influence elections, either directly or indirectly. Both statements cannot be true. See Kim Baker, *How Nonprofits Spend Millions on Elections and Call it Public Welfare*, PROPUBLICA (Aug. 18, 2012), <https://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare>; see also, Hearing: "Current Issues in Campaign Finance Law Enforcement," U.S. Senate Committee on the Judiciary, Subcommittee on Crime and Terrorism, Apr. 9, 2013.

²³ 85 FR 31959.

Most immediately, Treasury should work with the Department of Justice and other law enforcement agencies investigating the attack on the United States Capitol on January 6, 2021. According to reports, a number of dark money organizations helped organize and fund the rally that eventually led to the armed attack on the Capitol.²⁴ Treasury and the IRS should provide any assistance necessary to help law enforcement in its investigations into the groups behind this tragic assault on our democracy, and should review whether organizers of the assault should keep their tax-exempt status.

Treasury should also work with the Department of Justice in its response to the *Americans for Prosperity Foundation v. Becerra* case for which the Supreme Court recently granted *certiorari*. The case involves a challenge, brought by the non-profit counterpart of the hyper-political, Koch-backed Americans for Prosperity, to a California regulation that requires non-profits to report the same donor information confidentially to the State of California that the groups report to the IRS. Americans for Prosperity, and an armada of dark money-funded *amici*, are seeking constitutional protection for the dark money scheme. We have already seen dark money groups assert such a constitutional right in response to Congressional inquiries. Such a ruling would imperil federal disclosure rules upon which the IRS relies to enforce its own regulations.

Under the Trump administration, the United States weighed in on the side of the dark money groups in *Becerra*. We urge Treasury and the IRS to work with the Department of Justice to reverse this position in the litigation and argue for the values of transparency.

On the enforcement side, we urge Treasury and the IRS to enforce existing 501(c)(4) regulations, including investigating open and notorious inconsistent statements that predicate investigation as to whether they are criminal false statements. Specifically, the IRS should investigate dark money groups that report to the IRS that they do not engage in political activity while at the same time reporting to election commissions that they do indeed make political expenditures, in some cases in the millions of dollars.²⁵ We urge Treasury to work with election regulators and the Department of Justice on these cases.

More generally, we encourage Treasury and the IRS to bear in mind that the corrosive effect of dark money on American elections is amplified by dark money's dark shadow: threats and promises. What dark money can do, dark money can also threaten (or promise) to do. These threats and promises can have a powerful political effect, and unlike the actual spending, threats and promises never appear in the form of a visible advertisement.²⁶ This element of the dark money threat has been repeatedly overlooked, but it should be overlooked no longer.

Anonymous money bears particularly on Congress's inability to tackle the climate crisis. Perhaps no industry has more utilized dark money than the fossil fuel industry, which unleashed

²⁴ See Brian Schwartz, *Pro-Trump Dark Money Groups Organized the Rally that Led to the Deadly Capitol Hill Riot*, CNBC.COM (Jan. 9, 2021), <https://www.cnbc.com/2021/01/09/pro-trump-dark-money-groups-organized-the-rally-that-led-to-deadly-capitol-hill-riot.html>.

²⁵ *Supra*, note 22.

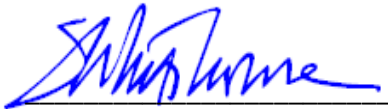
²⁶ See *American Tradition Partnership v. Bullock*, 132 S. Ct. 2490, Cert. Brief of *Amici Sens.* Sheldon Whitehouse and John McCain in Support of Respondents.

an army of dark money groups to propagate fake science and which enforced its power against Republicans who dared to support climate legislation.²⁷ Prior to *Citizens United*, bipartisan climate bills abounded; following *Citizens United*, there have been exactly zero meaningful bipartisan climate bills, despite the mounting threat. Reining in dark money is essential to integrity in government and to a government responsive to the people, not special interests.


We seek no infringement on First Amendment speech rights. Basic, commonsense disclosure requirements restrict no one's right to speak, nor to spend money to influence elections. As Justice Brandeis said, "Sunlight is the best disinfectant"; as Justice Scalia said, "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."²⁸ Disclosure is what permits citizens to do the work of citizenship in a republic, knowing the identity of political actors contesting for power.

As members of the Senate both before and after *Citizens United*, we can personally attest to the corrosive influence of dark money. We hope that under your leadership Treasury will reexamine how it regulates dark money groups and restore transparency to our political landscape. We look forward to working with you on this supremely important issue.

Sincerely,



Sheldon Whitehouse
United States Senator



Elizabeth Warren
United States Senator

²⁷ E.g., Albert R. Hunt, *Flood of Money in U.S. Elections Is a Scandal Waiting to Happen*, N.Y. Times (April 26, 2015) (discussing the primary defeat of Rep. Bob Inglis after fossil fuel-backed groups abandoned him over his efforts to address climate change).

²⁸ *Doe v. Reed*, 130 S. Ct. 2811, 2837 (U.S. 2010) (Scalia, J., concurring).