

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
DR. DAVID GILL, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil No. 13-00213 (RLW)
)	
U.S. DEPARTMENT OF THE)	
TREASURY, INTERNAL REVENUE)	
SERVICE)	
)	
Defendant.)	
_____)	

PLAINTIFFS’ OPPOSITION TO DEFENDANT’S MOTION TO DISMISS

INTRODUCTION

The 2012 election cycle revealed one of the legacies of the Supreme Court’s decision in *Citizens United v. Fed. Election Comm’n*¹ – a massive increase in anonymous political spending by organizations claiming tax-exempt status under section 501(c)(4) of the U.S. Tax Code, 26 U.S.C. § 501(c)(4). According to the Center for Responsive Politics, spending in 2012 by § 501(c)(4) organizations, as reported to the Federal Election Commission (FEC), totaled a staggering \$254,279,733,² up from the \$92.2 million reported to be spent by these groups in the 2010 election cycle.³ This spending was made possible in large part by an enormous loophole a

¹ 558 U.S. 310 (2010).

² Open Secrets, 2012 Outside Spending Summary, available at <http://www.opensecrets.org/outsidespending/index.php> (all Open Secret websites last visited May 16, 2013).

³ Open Secrets, Outside Spending by Group, available at <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=A>.

regulation of the Internal Revenue Service (IRS) created, which has allowed § 501(c)(4) organizations to be exploited as conduits for large political contributions from wealthy individuals and entities seeking to conceal their role in electoral politics and advance a particular political agenda.

This lawsuit challenges that regulation under the Administrative Procedure Act (APA) as contrary to law, specifically the Tax Code's requirement, set forth in unmistakable terms, that § 501(c)(4) groups be operated exclusively for the promotion of social welfare in order to function as tax-exempt organizations with no requirement to disclose their donors. By defining the word "exclusively" to mean "primarily," the IRS regulation plainly and unlawfully departs from the Tax Code. Plaintiffs include an unsuccessful 2012 nominee for the U.S. House of Representatives who was targeted for defeat by a § 501(c)(4) organization, his campaign committee, and CREW,⁴ an ethics watchdog group with an established interest in campaign finance reform. Through this lawsuit they seek to have the IRS regulation declared invalid on its face and as applied to the plaintiffs.

The IRS has now moved to dismiss the complaint, arguing no plaintiff has standing to sue. The government's motion rests on a fundamental misconstruction of this lawsuit, the types of injuries the plaintiffs have suffered, and the requested relief. This case does not present a challenge to the tax-exempt status of a particular organization, but rather to an IRS regulation that has "shape[d] the environment in which Plaintiffs must operate." *Shays v. Fed. Election*

⁴ CREW is the acronym for Citizens for Responsibility and Ethics in Washington, misidentified by the IRS as the Center for Ethics and Responsibility in Washington. *See* Points and Authorities in Support of the United States' Motion to Dismiss (D's Mem.) at 1 (Dkt. 11-1). In its memorandum the IRS also mislabeled the defendant here as the United States, rather than the U.S. Department of the Treasury, the properly named agency defendant in an APA lawsuit.

Comm'n, 414 F.3d 76, 82 (D.C. Cir. 2005) (*Shays I*). As a direct result of that environment, plaintiffs have suffered injuries. Thus, contrary to the arguments of the IRS, plaintiffs are not claiming injury at the hands of some third party not before this Court. In addition, plaintiffs have suffered informational injuries from the IRS regulation on which many § 501(c)(4) organizations rely to withhold the identities of their donors.

It also follows that where, as here, the regulation plaintiffs challenge authorized the conduct that injured the plaintiffs, the causation requirement of standing is met. Further, the relief plaintiffs seek will redress the injuries they have suffered. Dr. Gill and his campaign committee seek an electoral process untainted by the actions of organizations that have relied on the challenged IRS regulation to circumvent the Tax Code's requirement that in order to maintain their tax-exempt status and ability to keep secret their donors, they be operated exclusively for the promotion of social welfare. As the D.C. Circuit recognized under similar circumstances, "where an agency rule causes the injury . . . the redressability requirement may be satisfied by vacating the challenged rule." *Shays I*, 414 F.3d at 94 (citation omitted).

The IRS's prudential standing argument suffers from similar flaws. Plaintiffs are not seeking an end-run around the enforcement scheme of the IRS and decisions the IRS has made about the tax status of a particular organization. Rather, plaintiffs challenge an IRS regulation that applies equally to plaintiffs and all other candidates and participants in the electoral process. A victory for plaintiffs here will not result in the reversal of any particular decision to grant § 501(c)(4) status to any particular organization, but rather will eliminate a regulation that bars implementation of the Tax Code as Congress intended. In sum, under well established Supreme Court and Circuit precedent, plaintiffs satisfy the Article III and prudential requirements for

standing.

STATUTORY BACKGROUND

The issues this case raises fall within the intersection of two statutory schemes: the Tax Code and campaign finance laws. The meaning and relevance of the Tax Code provisions at issue can only be understood within the parallel context of campaign finance laws, which impose a separate set of requirements on candidates for federal office and provide the rationale for the disclosure provisions the Tax Code incorporates. Both are discussed below.

The Tax Code and Implementing Regulations

In 1913, Congress for the first time provided a tax exemption for “any civic league or organization not organized for profit, but operated exclusively for the promotion of social welfare.” Revenue Act of 1913, ch. 16, § II(G)(a), 39 Stat. 172. In the repeated recodifications of this provision over the years, Congress consistently limited the tax exemption to organizations “operated exclusively” for the promotion of social welfare. The current version of the Code provides a tax exemption for:

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 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)(A) (emphasis added). Organizations subject to this provision are known as “§ 501(c)(4) organizations.”

Treasury and IRS regulations promulgated initially to implement the statute limited the tax exemption for § 501(c)(4) organizations to those “operated exclusively for purposes

beneficial to the community as a whole.” *See, e.g.*, Treas. Reg. 65, Art. 519, T.D. 3640, 26 Treas. Dec. Int. Rev. 745, 897 (1924); Treas. Reg. 111, § 29.101(8)-1 (1943); Treas. Reg. § 39.101(8)-1 (1954). Congress recodified the statute in 1954, Internal Revenue Act of 1954, Pub. L. No. 83-591, ch. 736, 68A Stat. 163. Five years later, in 1959, the IRS promulgated new regulations identical in substance to the current regulation, under which a “civic league or organization may be exempt as an organization described in § 501(c)(4) if – (i) It is not organized for profit; and (ii) It is operated exclusively for the promotion of social welfare.” Treas. Reg. § 1.501(c)(4)-1(a)(1). But while this part of the regulation mirrors the statutory language, the regulation defining the phrase “promotion of social welfare” departs radically from the statute. Specifically, under the IRS regulation,

[a]n 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. An organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements.

Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (emphasis added). In essence, this regulation substitutes the word “primarily” for the statutory term “exclusively.” At the same time, Treasury regulations exclude from the definition of the “promotion of social welfare” “direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.” Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).

IRS policy directives implementing these provisions provide that an organization may carry on lawful political activities and still be entitled to tax-exempt status under § 501(c)(4) as long as the organization is primarily engaged in activities that promote social welfare. Rev. Rul. 81-95, 1981-1 C.B. 332. The IRS has not further defined the “primary activity” standard its

regulations establish. Instead, in a Revenue Ruling, the IRS stated only that all facts and circumstances are taken into account in determining the “primary activity” of a § 501(c)(4) organization. Rev. Rul. 68-45, 1968-1 C.B. 259.

Groups seeking or claiming § 501(c)(4) status have interpreted the “primary activity” requirement to mean they can spend up to 49 percent of their total expenditures in a tax year on political campaign activities without such campaign activities constituting the “primary activity” of the organization.⁵ Significantly, such groups – like all groups organized under § 501(c)(4) – are not required to disclose publicly the names of their donors. 26 U.S.C. §§ 6104(b), (d)(3). By contrast, groups that qualify as political organizations under § 527 of the Tax Code are required to report publicly their expenditures and contributions. 26 U.S.C. § 527(j).

Beyond the tax exempt social welfare organizations recognized by § 501(c)(4), other organizations are exempted from the requirement to pay federal income tax by section 501(c) of the Tax Code. These include charitable organizations (§ 501(c)(3)), labor unions (§ 501(c)(5)),

⁵ See, e.g., ABA Section on Taxation, Comments of the Individual Members of the Exempt Organizations Committee’s Task Force on Section 501(c)(4) and Politics, 37 (2004), available at <http://www.abanet.org/tax/pubpolicy/2004/040525exo.pdf> (“Many practitioners believe that ‘less than primary’ means less than 50% of an organization’s expenditures in a year.”); Miriam Galston, When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?, 132 U. Pa. J. Const. L. 867, 930 n.29 (2011) (“At least one official of the IRS has stated that a social welfare organization may be entitled to exemption even if 49% of its activities are not devoted to social welfare.”) (citing Judy Kindell on § 501(c)(4)-(6) Organizations and § 527, 11 Paul Streckfus EO Tax J. 42, 45 (2006)). See also Steven Rattner, Behind The I.R.S. Mess: A Campaign-Finance Scandal, *New York Times*, May 16, 2013 (noting “[s]ome groups have interpreted the [IRS] regulations as permitting them to spend as much as 49 percent of their funds directly advocating for or attacking the election of candidates, maintaining all the while the secrecy of their donors’ names.”), available at <http://opinionator.blogs.nytimes.com/2013/05/16/behind-the-i-r-s-mess-a-campaign-finance-scandal/?hp>.

and trade associations (§ 501(c)(6)). In addition, § 527 provides a tax exemption for political organizations, defined as an organization “operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.” 26

U.S.C. § 527(e)(1). “Exempt function,” in turn, is defined as:

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, whether or not such individual or electors are selected, nominated, elected, or appointed.

Id. at § 527(e)(2).

Significantly, unlike § 501(c)(4) organizations, § 527 organizations must disclose their contributions and expenditures. *Id.* at §§ 527(a), (j)(2). Congress added this requirement to the Tax Code in 2000, in response to the failure of the Federal Election Campaign Act (FECA) to impose reporting and disclosure requirements on these groups. This failure resulted in an increase in the number of so-called “stealth PACs,” *i.e.*, groups operating as political organizations under § 527 in order to spend anonymous money on elections. As a Congressional Research Service report explains, the lack of reporting requirements for these political organizations may have stemmed from Congress’ mistaken belief they were regulated by the FECA and required to report to the FEC.⁶ In response, Congress amended § 527 in 2000 “to generally require that most organizations that do not report to the FEC report to the IRS and that

⁶ Erika Lunder, Cong. Research Serv., RL33377, [Tax-Exempt Organizations: Political Activity Restrictions and Disclosure Requirements](http://assets.opencrs.com/rpts/RL33377_20070911.pdf) 17 (2007), *available at* http://assets.opencrs.com/rpts/RL33377_20070911.pdf (CRS Report). *See also* 146 Cong. Rec. S6055 (2000) (statement of Sen. Levin).

the information be available to the public.” *Id.* at 18.⁷

The Federal Election Campaign Act

The Federal Election Campaign Act imposes a series of disclosure and reporting requirements that govern federal elections. Those requirements include the directive to disclose the identities of contributors whose donations are used to expressly advocate for the election or defeat of candidates for federal office.

For candidates, such disclosures are made through their principal campaign committees, required to be registered with the FEC,⁸ which must file periodic reports with the FEC disclosing the names and addresses of those who contributed a total of more than \$200 to the campaign and the amount contributed.⁹ All other political committees, including political parties, traditional political action committees (PACs), and independent expenditure-only PACs (so-called super PACs), also must register with the FEC and file periodic reports disclosing the names, addresses, and amount of contributions totaling more than \$200.¹⁰

The legislative history of the FECA and its interpretation by courts highlight three

⁷ When Congress first enacted § 527 in 1975, the FECA imposed disclosure requirements on political committees and others making expenditures for the purpose of influencing a federal election. The Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), narrowed the FECA’s disclosure requirements and limited those groups regulated by the statute. This ruling allowed many § 527 groups to engage in political activity without disclosing their donors. Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 *Geo. Wash. L. Rev.* 949, 955-59 (2005). The resulting activities of these “stealth PACs” led Congress to close this loophole in 2000. *Id.*

⁸ 2 U.S.C. §§ 432(e)(1), 433(a).

⁹ *Id.* at §§ 431(13), 434(a)(3), 434(b)(3).

¹⁰ *Id.* at §§ 431(4), 431(13), 433(a), 434(a)(4), 434(b)(3). *See also SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686, 696-98 (D.C. Cir. 2010) (super PACs required to disclose contributors).

categories of governmental interests the FECA's disclosure requirements serve:

First, disclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return. And, as we recognized in *Burroughs v. United States*, 290 U.S. at 548, Congress could reasonably conclude that full disclosure during an election campaign tends 'to prevent the corrupt use of money to affect elections.' In enacting these requirements it may have been mindful of Mr. Justice Brandeis' advice: 'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.'

Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

Buckley v. Valeo, 424 U.S. 1, 66-68 (1976) (citations and footnotes omitted).

The Supreme Court reiterated the importance of disclosure requirements in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), which involved the electioneering communications disclosure provision of the Bipartisan Campaign Reform Act (BCRA). As in *Buckley*, the Court concluded BCRA's disclosure provisions served the important interests of "providing the

electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions.” *Id.* at 196. More recently, in *Citizens United*, the Court recognized “prompt disclosure of expenditures” by corporations “can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.” 558 U.S. at 370. The resulting transparency “enables the electorate to make informed decisions and give proper weight to different speakers and messages.” *Id.* at 371.

Given that the Tax Code exempts § 501(c)(4) groups from the requirement to disclose their donors, the public is deprived of these benefits with respect to the activities these groups fund. As a necessary consequence, when § 501(c)(4) organizations fund political activities in support of or opposition to any particular candidate for office, the public is deprived of information that “allows voters to place each candidate in the political spectrum more precisely,” and “alert[s] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.” *Buckley*, 424 U.S. at 66. Nor is there a deterrent to “discourage those who would use money for improper purposes either before or after the election.” *Id.* at 67.

FACTUAL BACKGROUND

Plaintiff Dr. David Gill was the 2012 Democratic candidate for Congress for the 13th Congressional District of Illinois who lost his election bid to the Republican candidate, Rodney Davis. Declaration of Dr. David Gill, ¶ 1 (Gill Decl.) (attached as Exhibit A). Throughout Dr. Gill’s race, nearly every reputable poll showed Dr. Gill leading Mr. Davis by margins ranging

from one to nine percent. *Id.* at ¶ 2.¹¹ Nevertheless, Dr. Gill lost by 1002 votes, or 3/10th of one percent of the votes cast. Gill Decl., ¶ 3.¹² This was the third closest House race in the nation in 2012, and the narrowest loss by a Democratic candidate. Gill Decl., ¶ 3.¹³

Dr. Gill's loss correlates to a large influx of money spent by the American Action Network (AAN), an IRS-recognized § 501(c)(4) group that reported expenditures to the FEC of nearly \$1.5 million in opposition to Dr. Gill.¹⁴ This was the single largest expenditure by a third-party against Dr. Gill.¹⁵ In the final weeks of the campaign, AAN spent more than \$1 million on political advertisements broadcast in the Champaign, Illinois and St. Louis, Missouri media markets. Gill Decl., ¶ 4; Declaration of Sherry Greenberg, ¶ 3 (Greenberg Decl.) (attached as Exhibit B). The electioneering broadcast advertisements paid for by AAN contained false statements about Dr. Gill, including the statement he would eliminate Medicare, disingenuously

¹¹ See, e.g., *Huffington Post*, [Poll Chart, 2012 Illinois House: 13th District](http://elections.huffingtonpost.com/pollster/2012-illinois-house-13th-district), available at <http://elections.huffingtonpost.com/pollster/2012-illinois-house-13th-district>.

¹² See also Illinois Board of Elections, November 6, 2012 General Election, at 32, available at <http://www.elections.il.gov/Downloads/ElectionInformation/VoteTotals/2012GEOfficialVote.pdf>.

¹³ See also Gregory Giroux, [Ten Closest House Races of 2012 – Starting With 654 Votes](http://go.bloomberg.com/political-capital/2013-01-15/ten-closest-house-races-of-2012-starting-with-654-votes/), *Bloomberg*, Jan. 15, 2013, available at <http://go.bloomberg.com/political-capital/2013-01-15/ten-closest-house-races-of-2012-starting-with-654-votes/>.

¹⁴ American Action Network, Inc., [FEC Form 5, 2012 October Quarterly Report, Amended](http://images.nictusa.com/pdf/264/13940039264/13940039264.pdf), Jan. 15, 2013, available at <http://images.nictusa.com/pdf/264/13940039264/13940039264.pdf>.

¹⁵ Open Secrets, [2012 Race: Illinois District 13, Outside Spending](http://www.opensecrets.org/races/index.php?cycle=2012&id=IL13), available at <http://www.opensecrets.org/races/index.php?cycle=2012&id=IL13>.

citing in support his 2004 campaign website. Gill Decl., ¶ 5.¹⁶

AAN first sought IRS recognition as a § 501(c)(4) group in an application it filed with the IRS on February 20, 2010 (AAN Form 1024).¹⁷ In its application, AAN indicated it was applying for tax-exempt status as a social welfare organization, but also answered “yes” to the question of whether it had spent, or planned to spend, any money attempting to influence the selection, nomination, election, or appointment of any person to any federal, state, or local public office or to an office in a political organization. *Id.* at 4. In a statement accompanying its application, AAN declared that while its primary focus would be on lobbying and educational efforts designed to promote social welfare, it also would engage in political campaign intervention on an ongoing basis. *Id.*, Exhibit A at 4. Further, AAN specified its anticipated political activities included, *inter alia*, running advertisements on behalf of candidates who support AAN’s key priorities. *Id.*, Exhibit A at 4, 5. In support, AAN cited § 1.501(c)(4)-1(a)(2) of the Treasury regulations. *Id.*, Exhibit A at 6. The IRS granted AAN’s application for § 501(c)(4) status on April 3, 2010.¹⁸

In addition to establishing itself as a § 501(c)(4) organization, AAN also affiliated with a § 501(c)(3) organization, the American Action Forum, Inc. AAN Form 1024, Exhibit A at 5. The two organizations share two board members – Fred Malek and Norm Coleman – who initially served as Chairman and CEO respectively for both organizations. *Id.*

¹⁶ *See also* http://www.youtube.com/watch?v=wc9whvRfmb8&list=PLVOeJbQR9B3IWCre78K0gD3_94Bi0JnyY&index=5.

¹⁷ That application is attached as Exhibit C.

¹⁸ The IRS letter indicating it had approved AAN’s tax-exempt status under § 501(c)(4) is attached as Exhibit D.

AAN also is associated with a § 527 political action committee, the Congressional Leadership Fund (CLF), which describes itself as supporting “candidates who promote the values of the center right majority in the House of Representatives.”¹⁹ As with AAN, Sen. Coleman chairs the CLF, its president is Brian Walsh, current president of AAN, and the same individuals sit on the boards of both the CLF and AAN.²⁰ Moreover, AAN donated \$257,813 to CLF in the 2012 cycle as in-kind contributions for shared payroll, office space, and fundraising consulting,²¹ and the two entities have the same address.²² Further, in its recently filed IRS Form 990, AAN identified the CLF as a “Related Tax-Exempt Organization[.]” that AAN directly controls.²³ By branching out into three separate groups – “the 501c(3), which solicits money for policy research . . . [t]he advocacy arm [AAN] . . . to generate citizen activism around issues . . . [and] the Congressional Leadership Fund . . . a political action committee dedicated to supporting candidates” – AAN is able to “raise and spend unlimited amounts of money” on political activities.²⁴

AAN’s promise to engage in partisan political activities was borne out with respect to Dr.

¹⁹ <http://www.congressionalleadershipfund.org/about/>.

²⁰ *Id.*; <http://americanactionnetwork.org/about>.

²¹ *See* Congressional Leadership Fund, FEC Form 3X, 2011-2012 Reports (relevant portions attached as Exhibit E).

²² *Id.*; American Action Network, Inc., FEC Form 5, 2012 October Quarterly Report, Amended, Jan. 15, 2013.

²³ Relevant pages of AAN’s Form 990, filed on May 15, 2013, are attached as Exhibit F.

²⁴ Luke Rosiak, GOP Group To Raise Unlimited Cash To Keep House Majority, *The Washington Times*, Oct. 13, 2011, available at <http://www.washingtontimes.com/news/2011/oct/13/gop-group-to-raise-unlimited-cash-to-keep-house-ma/?page=all>.

Gill's 2012 campaign. AAN's large infusion of money to fund electioneering ads and political robo calls calling for the defeat of Dr. Gill was a key factor in Dr. Gill's loss. On election night Sen. Coleman claimed victory in a press release touting AAN's independent expenditures as resulting in electoral victories in races across the country, including Dr. Gill's, as well as its role in advocating for the candidates' "center-right records."²⁵

The impact of these expenditures on Dr. Gill and his campaign committee, Friends of David Gill, was direct and harmful. Dr. Gill suffered economic harm when he was forced to spend campaign funds in an effort to counter the false and misleading advertisements AAN funded. Gill Decl., ¶ 9. Dr. Gill also had to spend campaign funds on attorneys' fees incurred in preparing and sending cease and desist letters to broadcast stations in an attempt to stop the stations from airing advertisements funded by AAN that contained false statements. *Id.* Further, Dr. Gill lost wages, as he was required to substantially reduce his hospital work hours to spend time refuting the allegations made in those political advertisements, and to make fundraising appearances and calls to generate additional resources to counter the money AAN spent to defeat his candidacy. *Id.*

Dr. Gill, an emergency room and family practice physician, also suffered ongoing harm to his reputation from the political advertisements funded by AAN, which were designed specifically to harm Dr. Gill's public image and reputation as a physician. Gill Decl., ¶ 7. As an

²⁵ American Action Network, [AAN Congratulates First Wave of Victorious Center-Right Candidates](http://americanactionnetwork.org/topic/aan-congratulates-first-wave-victorious-center-right-candidates), Nov. 7, 2012, *available at* <http://americanactionnetwork.org/topic/aan-congratulates-first-wave-victorious-center-right-candidates>.

example, one television advertisement AAN financed paints Dr. Gill as a “mad scientist,”²⁶ a false image entirely at odds with a reputable physician and candidate for public office. This harm, in turn, has impacted Dr. Gill’s ability to participate effectively in the political process. Gill Decl., ¶ 8. Although he lost his race in 2012, and at this time is sitting out the 2014 election, Dr. Gill contemplates a future run. *Id.* Indeed, Dr. Gill ran for a congressional seat in 2004 and 2006, sat out the 2008 election, and then ran again in 2010 and 2012. *Id.*

Friends of David Gill also sustained direct and concrete harms from the political activities of AAN. Like Dr. Gill, the campaign committee had to spend campaign funds in an effort to counter the false and misleading advertisements AAN funded, as well as on attorneys’ fees incurred in sending cease and desist letters to broadcast stations to stop further airing of the advertisements. Gill Decl., ¶ 9. Friends of David Gill also incurred economic harm from the additional staff and consultants it had to pay to respond to AAN’s political advertisements, including time spent strategizing, drafting media statements, talking with reporters, preparing materials for counsel, and answering calls and inquiries from potential voters and supporters about the veracity of the advertisements. *Id.* To respond to AAN’s attack on Dr. Gill as a physician, Friends of David Gill had to develop, produce, and air its own advertisements, using time and funds that otherwise would have been spent on advertisements addressing the true issues in the campaign. *Id.*, ¶ 10.

Given this demonstrated commitment to public service and longstanding participation in the political process, Dr. Gill suffers real and ongoing harm from AAN’s political activities.

²⁶ *See* http://www.youtube.com/watch?v=azyE1YJwbQs&list=PLVOeJbQR9B3lWCRc78K0gD3_94Bi0JnyY&index=21.

Further, in light of his intention to run again, Dr. Gill and his political campaign will again be directly affected by the opportunities the challenged IRS regulation creates for contributors and supporters of his opponents to expend large amounts of anonymous money to defeat his candidacy. Once again, Dr. Gill and his campaign committee will be forced to raise money, campaign, and attempt to discharge important public responsibilities in a system significantly corrupted by the influence of special-interest, dark money. *Id.*, ¶¶ 12, 13. Once again, Dr. Gill will be open to attack at critical periods of his candidacy by broadcast advertising campaigns anonymously funded by individuals and entities seeking to evade disclosure requirements in order to conceal their role in electoral politics. Gill Decl., ¶ 13. There is a nearly inevitable risk future opponents of Dr. Gill will taint the elections by raising and spending large sums of dark money in a manner banned by the Tax Code, but permitted by IRS regulations. *Id.*

Moreover, the experiences of Dr. Gill and his campaign committee were replicated throughout the nation during the 2012 election cycle. Spending by § 501(c)(4) groups in the 2012 election cycle, as reported to the FEC, totaled more than \$254 million,²⁷ and the four biggest groups that dominated that spending were pursuing agendas similar to that of AAN. Those groups included Crossroads GPS, founded by Karl Rove; Americans for Prosperity, founded by the Koch brothers; Americans for Tax Reform, founded by Grover Norquist; and the American Future Fund, founded by Nick Ryan, a longtime political advisor to former Republican Iowa Congressman Jim Nussle.²⁸

²⁷ Open Secrets, 2012 Outside Spending Summary, available at <http://www.opensecrets.org/outsidespending/index.php>.

²⁸ See Paul Blumenthal, Dark Money In 2012 Election Tops \$400 million, 10 Candidates Outspent By Groups With Undisclosed Donors, *Huffington Post*, Nov. 2, 2012, available at

According to the Center for Responsive Politics, in the 2012 election cycle, Crossroads GPS spent \$70,968,744 in independent expenditures;²⁹ Americans for Prosperity spent \$33,542,051 in independent expenditures;³⁰ American Future Fund spent \$24,499,533 in independent expenditures;³¹ and Americans for Tax Reform spent \$15,794,552 in independent expenditures.³² Together with the U.S. Chamber of Commerce, a § 501(c)(6) organization, these groups spent \$295 million on political activities since the beginning of 2011.³³

Beyond Dr. Gill's race, § 501(c)(4) organizations had a huge impact on a number of Senate and House races in the 2012 election cycle. For example, in the Virginia Senate race, § 501(c)(4) organizations spent a total of \$15,057,020, which represented 28.73 percent of all outside spending.³⁴ Crossroads GPS led the pack in this race, spending \$10,559,237, followed

http://www.huffingtonpost.com/2012/11/02/dark-money-2012-election-400-million_n_2065689.html .

²⁹ Open Secrets, Outside Spending, American Crossroads/Crossroads GPS, available at <http://www.opensecrets.org/outsidespending/detail.php?cmte=American+Crossroads%2FCrossroads+GPS&cycle=2012>.

³⁰ Open Secrets, Outside Spending, Americans for Prosperity, available at <http://www.opensecrets.org/outsidespending/detail.php?cmte=Americans+for+Prosperity&cycle=2012>.

³¹ Open Secrets, Outside Spending, American Future Fund, available at <http://www.opensecrets.org/outsidespending/detail.php?cmte=American+Future+Fund&cycle=2012>.

³² Open Secrets, Outside Spending, Americans for Tax Reform, available at <http://www.opensecrets.org/outsidespending/detail.php?cmte=C90011289&cycle=2012>.

³³ Blumenthal, *Huffington Post*, Nov. 2, 2012.

³⁴ Open Secrets, 2012 Race: Virginia Senate, Outside Spending, available at <http://www.opensecrets.org/races/index.php?cycle=2012&id=VAS1>. The percentage of outside spending for this and other races cited was derived by determining which groups are § 501(c)(4) organizations and dividing the amount they spent by the total amount of outside

by the League of Conservation Voters at \$2,027,693. *Id.* Similarly, in the 2012 Nevada Senate race, § 501(c)(4) organizations spent a total of \$12,126,911, which represented 43.26 percent of all outside spending.³⁵ Again, Crossroads GPS led the pack, spending a total of \$6,654,542, followed by the Patriot Majority USA at \$3,464,537, and the American Future Fund at \$1,299,599. *Id.*

Further, in the 2012 Wisconsin senatorial race, § 501(c)(4) organizations spent a total of \$9,337,355, which represented 20.19 percent of all outside spending.³⁶ Crossroads GPS spent the most, at \$4,717,099, followed by Americans for Prosperity at \$1,473,349. *Id.* Likewise, in the 2012 Ohio Senate race, spending by § 501(c)(4) organizations totaled \$9,203,995, which represented 23.66 percent of all outside spending.³⁷ As in the other races, Crossroads GPS spent the most at \$6,363,705. *Id.*

House races also saw significant spending by § 501(c)(4) organizations. For example, in the Ohio 6th Congressional District race, § 501(c)(4) organizations spent a total of \$3,160,601, or 43.90 percent of all outside spending.³⁸ Americans for Tax Reform led the way, spending a total of \$3,125,327. *Id.* In the Pennsylvania 12th Congressional District race, § 501(c)(4)

spending for and against all candidates, as compiled by the Center for Responsive Politics.

³⁵ Open Secrets, [2012 Race: Nevada Senate, Outside Spending](http://www.opensecrets.org/races/index.php?cycle=2012&id=NVS1), available at <http://www.opensecrets.org/races/index.php?cycle=2012&id=NVS1>.

³⁶ Open Secrets, [2012 Race: Wisconsin Senate, Outside Spending](http://www.opensecrets.org/races/index.php?cycle=2012&id=WIS1), available at <http://www.opensecrets.org/races/index.php?cycle=2012&id=WIS1>.

³⁷ Open Secrets, [2012 Race: Ohio Senate, Outside Spending](http://www.opensecrets.org/races/index.php?cycle=2012&id=OHS1), available at <http://www.opensecrets.org/races/index.php?cycle=2012&id=OHS1>.

³⁸ Open Secrets, [2012 Race: Ohio District 06, Outside Spending](http://www.opensecrets.org/races/index.php?cycle=2012&id=OH06), available at <http://www.opensecrets.org/races/index.php?cycle=2012&id=OH06>.

organizations spent \$2,999,409, or 29.79 percent of all outside spending.³⁹ Again, Americans for Tax Reform spent the most at \$2,517,329. *Id.* In the Colorado 3rd Congressional District race, spending by § 501(c)(4) organizations totaled \$1,616,541, a whopping 68.98 percent of all outside spending.⁴⁰ Americans for Tax Reform led the spending at \$1,575,152. *Id.* Further, in the New York 25th Congressional District race, § 501(c)(4) organizations spent \$1,245,115, or 50.43 percent of all outside spending.⁴¹ The leader was Crossroads GPS, which spent \$1,227,057. *Id.*

Spending by AAN also had a significant impact on the 2012 10th Congressional District race in California, where Democratic candidate Jose Hernandez was running against Republican incumbent Jeff Denham. Political spending by § 501(c)(4) organizations in that race totaled \$2,647,698, or 30.68 percent of all outside spending.⁴² The top spender was AAN at \$2,525,694. *Id.* Collectively AAN and the U.S. Chamber of Commerce spent \$3.1 million during the election cycle to help Rep. Denham defeat Mr. Hernandez. *Id.* This far exceeded the \$1.7 million Mr. Hernandez was able to raise.⁴³ When questioned about the negative ads financed by § 501(c)(4)

³⁹ Open Secrets, 2012 Race: Pennsylvania District 12, Outside Spending, available at <http://www.opensecrets.org/races/index.php?cycle=2012&id=PA12>.

⁴⁰ Open Secrets, 2012 Race: Colorado District 03, Outside Spending, available at <http://www.opensecrets.org/races/index.php?cycle=2012&id=CO03>.

⁴¹ Open Secrets, 2012 Race: New York District 25, Outside Spending, available at <http://www.opensecrets.org/races/index.php?cycle=2012&id=NY25>.

⁴² Open Secrets, 2012 Race: California District 10, Outside Spending, available at <http://www.opensecrets.org/races/index.php?cycle=2012&id=CA10>.

⁴³ Jose Hernandez for Congress, FEC Form 3, 2012 Post-General Election Report, December 5, 2012, available at <http://images.nictusa.com/pdf/174/12962938174/12962938174.pdf>.

organizations, Mr. Hernandez's campaign manager stated, "It really makes it somewhat unfair where there's no disclosure, because you don't know who's saying what they're saying and why they're saying it."⁴⁴

ARGUMENT

I. STANDARD OF REVIEW.

In responding to a motion brought under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a plaintiff bears the burden of establishing the court's jurisdiction. *See, e.g., A.N.S.W.E.R. Coalition v. Salazar*, 2013 U.S. Dist. LEXIS 5066, *12 (D.D.C. Jan. 14, 2013), and cases cited therein. This burden at the pleading stage "is not onerous." *Id.*, quoting *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011). A plaintiff need only allege "general factual allegations of injury resulting from the defendant's conduct." *A.N.S.W.E.R.*, at *12 (quotation omitted).

The reviewing court must accept all factual allegations in the complaint as true, giving the plaintiff "the benefit of all favorable inferences that can be drawn from the alleged facts." *CREW v. Cheney*, 593 F. Supp. 2d 194, 209-10 (D.D.C. 2009), citing *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). Further, in resolving a motion to dismiss for lack of subject matter jurisdiction, a court may properly consider "the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coalition for*

⁴⁴ Will Evans, [Money From Secret Donors Flows To Congressional Races](http://californiawatch.org/dailyreport/money-secret-donors-flows-congressional-races-18549), *California Watch*, Oct. 26, 2012, available at <http://californiawatch.org/dailyreport/money-secret-donors-flows-congressional-races-18549>.

Underground Expansion v. Mineta, 333 F.3d 193, 198 (D.C. Cir. 2003) (quotation omitted).

II. PLAINTIFFS HAVE STANDING TO MAINTAIN THIS SUIT.

To invoke the Court’s jurisdiction under Article III of the Constitution, a plaintiff must demonstrate, as an “irreducible constitutional minimum,” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), an injury in fact “fairly traceable” to the challenged act and “likely to be redressed by the requested relief.” *Allen v. Wright*, 468 U.S. 737, 751 (1984). Here the IRS alleges no plaintiff satisfies any of these requirements, an argument grounded in a fundamental misconception of the nature of plaintiffs’ claims and the harm they have suffered.

A. Plaintiffs Have Suffered Concrete, Particularized Harms That Satisfy The Injury In Fact Requirement.

The injury in fact element of Article III standing “requires ‘an invasion of a concrete and particularized legally protected interest.’” *Shays I*, 414 F.3d at 83, quoting *McConnell*, 540 U.S. at 227. The D.C. Circuit has recognized this element is present where, as here, plaintiffs have suffered injuries to statutorily protected interests caused by their participation in electoral contests tainted by practices agency regulations permit, but the statute those regulations implement bars. *Shays I*, 414 F.3d at 85. Referred to as the “illegal structuring of a competitive environment,” courts routinely hold in a variety of analogous contexts the injuries it produces support standing to sue. *Id.*, citing *Elec. Power Supply Ass’n v. FERC*, 391 F.3d 1255, 1262 (D.C. Cir. 2004); *Lujan*, 504 U.S. at 572-73 & nn. 7-8; *Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc). *See also Laroque v. Holder*, 650 F.3d 777, 787 (D.C. Cir. 2011) (reaffirming theory of standing established by *Shays I*).

The plaintiffs in *Shays I* were two members of Congress who brought a facial challenge to FEC regulations that permitted practices concerning the use of so-called soft money and issue

ads BCRA prohibited. As a result of these unlawful regulations, plaintiffs alleged they were injured by being “forc[ed] to seek reelection in illegally constituted electoral contests.” *Shays I*, 414 F.3d at 79. The D.C. Circuit found this injury satisfied Article III requirements because the challenged regulations “fundamentally alter[ed] the environment” in which they had to compete for reelection. *Id.* at 86. “[A]t the very least,” the plaintiffs were “harmed by having to anticipate other actors taking advantage of the regulations to engage in activities that otherwise would be barred.” *Id.* at 87 (quotation omitted).

Here, too, Dr. Gill and his campaign committee faced “*intensified* competition” and had to “anticipate and respond to a broader range of competitive tactics,” *Shays I*, 414 F.3d at 86 (emphasis in original), as a direct result of the challenged IRS regulation. Under the statute, § 501(c)(4) organizations must be “operated exclusively” for the promotion of social welfare, meaning groups like AAN cannot lawfully engage in the level of political activity it directed against Dr. Gill. The IRS regulation, by substituting the word “primarily” for the statutory term “exclusively,” has allowed AAN and other § 501(c)(4) organizations to engage in political activities without disclosing their donors. As a result, candidates have been subjected to an “illegally structured campaign environment.” *Shays I*, 414 F.3d at 86.

In the case of the 2012 election, this illegally structured campaign environment resulted in huge amounts of anonymous money pouring into elections from § 501(c)(4) groups as a direct result of the IRS regulation. That regulation, by substituting the word “primarily” for the statutory term “exclusively,” upset plaintiffs’ interest, protected by § 527 of the Tax Code, in knowing who was funding political activities directed against them by tax-exempt organizations. Dr. Gill and other candidates had, and continue to have, every reason to believe they would not

face this influx of anonymous dark money by § 501(c)(4) organizations, given the statutory requirement that such groups be organized exclusively to promote social welfare. To be sure, candidates certainly could anticipate significant campaign spending against them by groups organized under § 527 of the Tax Code, as those groups have a statutorily recognized purpose of influencing elections. In contrast to § 501(c)(4) groups, however, groups organized pursuant to § 527 of the Tax Code must disclose their donors. The net effect of the IRS § 501(c)(4) regulation has been to expose plaintiffs, and all other candidates, to campaign practices the Tax Code proscribes, and infringe on interests the Tax Code guarantees.

Plaintiffs' expectation in being protected from Tax Code-banned practices is reinforced by the history of the disclosure provisions of § 527 that Congress added precisely because groups engaged in political activities were taking advantage of the gaps in FECA's coverage to create "stealth PACs." CRS Report at 18. The "expansion of these groups pose[d] a real and significant threat to the integrity and the fairness of our election system"; requiring disclosure was viewed as "simple fairness, basic facts, respecting the public's right to know." 146 Cong. Rec. S4660 (2000) (statement of Sen. Lieberman). By effectively negating those disclosure provisions, the IRS regulation at issue created an illegally structured competitive environment for seeking office that resulted in direct harm to the plaintiffs, a harm the Tax Code protects against and that supports their standing to sue here.

Neither Dr. Gill nor any other candidate can level the playing field by establishing a § 501(c)(4) organization to make independent expenditures on behalf of the candidate without disclosing its donors. As a candidate, Dr. Gill was permitted to make campaign expenditures through his campaign committee, Friends of David Gill, but was required to make regular

disclosures to the FEC of individuals donating more than \$200 to his campaign. 2 U.S.C. §§ 432(e), 434(a)(2), (b)(3). Any other spending by a group run by Dr. Gill would constitute a coordinated expenditure with, and contribution to, his campaign committee. Because campaign committees may only accept \$5,000 from each donor, 2 U.S.C. § 441a(a)(f), any spending by such a group in excess of \$5,000 would be an illegal excessive contribution. 2 U.S.C. § 441a(a)(f). Thus, no candidate can compete with the massive political spending of § 501(c)(4) organizations that has become the norm by establishing his or her own § 501(c)(4) organization.

Not only is this case on all fours with *Shays I*, but the plaintiffs' showing of harm here is even stronger than that presented in that case, where the plaintiffs had not yet faced the effect of the challenged regulations. There, the D.C. Circuit found the *Shays I* plaintiffs had standing based on the “‘hard lessons of circumvention’ evident in ‘the entire history of campaign finance regulation.’” 414 F.3d at 90, quoting *McConnell*, 540 U.S. at 165. Here, however, the Court need not consider the lessons of history to adduce the likely impact of the challenged regulation; Dr. Gill and his campaign committee already have felt the impact of the loophole created by the IRS regulation allowing § 501(c)(4) groups to engage in significant amounts of political activity without disclosing who is funding that activity. Further, having faced these tactics in the past, Dr. Gill and his campaign committee, like all other congressional candidates, “will ‘almost surely’” face harm in the future from § 501(c)(4) groups exploiting the same loophole unless the regulation is struck down. *Shays I*, 414 F.3d at 90 (citation and quotation omitted).

Plaintiffs also have suffered an “information injury” recognized by the Supreme Court in *Fed. Election Comm’n v. Akins*, 524 U.S. 11 (1998), as sufficient to support their standing to sue. Here, as in *Akins*, plaintiffs have been deprived of information the law requires be disclosed,

specifically who funded the \$254,279,733 spent on political activities by § 501(c)(4) groups in the 2012 election cycle, including activities by AAN directed against Dr. Gill's candidacy. As explained above, under the express language of the Tax Code, § 501(c)(4) groups must be operated exclusively for social welfare purposes, while § 527 groups, which engage in political activities, must disclose their donors. Accordingly, because these § 501(c)(4) groups, including AAN, engaged in a level of political activities permissible only by tax-exempt § 527 groups, plaintiffs (and the public) were entitled to information about who funded their political activities during the 2012 election cycle. The application of the challenged IRS regulation, by enabling those groups to engage in significant political activities with no requirement to disclose their donors, deprived the plaintiffs of the information the Tax Code requires be disclosed.

Without question the identities of the donors would be useful to all plaintiffs, as it would help them “evaluate candidates for public office . . . , and to evaluate the role that [outside groups'] financial assistance might play in a specific election.” *Shays v. Fed. Election Comm'n*, 528 F.2d 914, 923 (D.C. Cir. 2008) (*Shays II*), quoting *Akins*, 524 U.S. at 21. As Dr. Gill has explained, “if the IRS regulations do not faithfully implement the Tax Code provisions requiring disclosure of those who fund political activities, I will be deprived of information to which I am entitled under the Tax Code.” Gill Decl., ¶ 12. This is enough under *Akins* to establish plaintiffs' information standing, which requires only that plaintiffs allege the requested information “would help them.” *Akins*, 524 U.S. at 21; *see also Shays II*, 528 F.3d at 923; *Kean for Congress Comm. v. Fed. Election Comm'n*, 398 F. Supp. 2d 26, 34-37 (D.D.C. 2005) (informational injury recognized in *Akins* extends to candidate challenging failure of entity funding ads against the candidate to report required disclosures).

Plaintiffs Dr. Gill and his campaign committee also have suffered discrete and particularized economic harm. As a result of the political activities by AAN in opposition to his candidacy, Dr. Gill spent campaign funds in an effort to counter the false and misleading advertisements AAN produced with contributions from anonymous donors, and to stop stations from airing those false advertisements. Gill Decl., ¶ 9. Dr. Gill also lost wages as AAN's political activities required him to divert his time and attention from his emergency room work to refute the false allegations and generate additional resources to counter the money AAN spent to defeat his candidacy. *Id.* Similarly, Friends of David Gill sustained direct and concrete harms from the political activities of AAN, when it had to spend campaign funds in an effort to counter the AAN-funded false and misleading advertisements, and pay additional staff and consultants to respond to those political advertisements. *Id.*

Dr. Gill suffered additional harm to his reputation from the political advertisements AAN funded with anonymous money, which painted him as a “mad scientist” and falsely represented his position on Medicare. *Id.*, ¶ 7. Not only did this harm likely play a key role in his losing the election,⁴⁵ but its harm is ongoing, as it continues to impact his ability to participate fully and

⁴⁵ In this regard, plaintiffs need not establish “with any certainty” Dr. Gill would have won the election but for the operation of the challenged IRS regulation. *Shays I*, 414 F.3d at 91, citing *Lujan*, 504 U.S. at 572 n.7. As the court explained, “given the multiplicity of factors bearing on elections and the extreme political sensitivity of judgments about what caused particular candidates to win” cases such as this one do not require the plaintiffs “to establish that but for certain . . . rules they could have won an election.” *Id.* at 91-92. *See also Clapper v. Amnesty Internat’l*, 133 S. Ct. 1138, 1150 n.5 (2013) (“Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about.”). In any event, as the former campaign manager for Friends of David Gill attests, in the two media markets in which AAN spent heavily on ad buys opposing Dr. Gill’s candidacy, he either lost (St. Louis media market) or faced heavily depressed voting (Champaign media market). Greenberg Decl., ¶ 7.

effectively in public discourse and the political process, Gill Decl., ¶ 8, all harms recognized as sufficient to establish Article III standing.

The IRS does not really dispute plaintiffs suffered these harms, but argues only that they occurred in the past and therefore cannot sustain plaintiffs' suit for prospective relief. D's Mem. at 9-10. This argument stems from a fundamental misconception of the nature of this lawsuit and the cause of plaintiffs' harm. Plaintiffs are not complaining about the actions of AAN, but rather the actions of the IRS in promulgating a regulation that permits activities banned by the Tax Code. Because that regulation remains in effect, "that AAN is [not] currently causing [plaintiffs] injury," D's Mem. at 9, has no bearing on plaintiffs' standing.

The case the IRS cites in support of its position, *Entergy Services. v. FERC*, 391 F.3d 1240 (D.C. Cir. 2004), is not to the contrary. That case involved a challenge to agency orders and their impact on contracts of ten or more years duration, a more than adequate time for judicial review. *Id.* at 1246. Here, by contrast, plaintiffs are challenging a regulation and its impact on a specific candidate during the much shorter election cycle that, like the gestational cycle, does not present an opportunity for full judicial review. *See Johnson v. Fed. Election Comm'n*, 829 F.2d 157, 159 n.7 (D.C. Cir. 1987); *La Botz v. Fed. Election Comm'n*, 889 F. Supp. 2d 51, 59 (D.D.C. 2012) ("Electoral disputes are . . . 'paradigmatic' examples of cases that cannot be fully litigated before the particular controversy expires.") (citation omitted).

Moreover, to accept the argument of the IRS would mean pre-election conduct could never form the basis for a challenge to the IRS regulation, something the courts have soundly rejected. "Whether cast as a mootness or standing argument, the logical result of the [IRS'] reasoning would be to render [the challenged IRS regulation] meaningless and to permit harms

capable of repetition to evade review.” *Natural Law Party v. Fed. Election Comm’n*, 111 F. Supp. 2d 33, 43 (D.D.C. 2000). It is precisely for these reasons the courts have recognized “[p]ast exposure to illegal conduct satisfies the injury in fact requirement where it is accompanied by continuing adverse effects.” *Id.*, citing *Akins*. That the injury claimed here is ongoing cannot seriously be disputed; the illegally structured environment the IRS regulation creates controls all future elections, presenting a classic problem “capable of repetition, yet evading review.” *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969), quoting *So. Pacific Terminal Co. v. Interstate Commerce Comm’n*, 219 U.S. 498, 515 (1911).

The key here is that as long as the challenged IRS regulation is in effect, plaintiffs – and all other candidates – will continue to face an illegally structured electoral environment that will continue to require them to adjust their campaign strategies, and will continue to leave them vulnerable to political attacks from § 501(c)(4) groups funded by dark money. This is not idle speculation; Dr. Gill and Friends of David Gill already have faced these harms, and the numbers paint a picture of increasing political spending by § 501(c)(4) groups that fail to hew to the requirement they be operated exclusively to promote social welfare. As outlined *supra*, in the 2012 election cycle, spending by such groups had a huge impact on the outcome of a number of House and Senate races, and the overall level of such spending increased 275 percent from the 2010 election cycle. At a minimum, this establishes a “substantial risk” the harm will continue to occur, which is all Article III requires. *Clapper*, 133 S. Ct. at 1150 (citation omitted).

B. Plaintiffs’ Injuries Are Directly Traceable To The Challenged IRS Regulation.

The causation requirement of Article III requires a plaintiff to demonstrate its injury is “fairly traceable” to the challenged conduct. *Allen v. Wright*, 468 U.S. at 751. The IRS claims

plaintiffs do not meet this requirement here based on the government's fatally flawed theory that the injuries plaintiffs suffered were caused by AAN and voters, all third parties not before the Court. D's Mem. at 11.

Here, as in *Shays I*, plaintiffs' harm is anchored to its claim that but for the challenged IRS regulation, plaintiffs would not face an illegally structured electoral environment. Accordingly, this is not a case where the plaintiffs' "actual injury depends on action by non-governmental third parties." 414 F.3d at 93. Indeed, as *Shays I* recognized, this presents "an entirely conventional administrative law claim, i.e., a facial challenge to allegedly invalid regulations," that satisfies the causation requirement because "the challenged rule permitted the activity" that injured the plaintiffs, "when that activity would allegedly have been illegal otherwise." *Id.* (quotation omitted). *See also Shays II*, 528 F.3d at 923 (informational injury deemed "fairly traceable" to the defendant agency because it was "caused by the [agency]'s rule").

In arguing to the contrary, the IRS places heavy reliance on *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976), *see* D's Mem. at 11-12, where the Court deemed it speculative that the alleged harm – denial of access to hospital services – resulted from the Revenue Ruling the plaintiffs were challenging. The harm in that case, however, cannot be equated with the harm alleged here – either in its cause or its effect.

The plaintiffs in *Simon* alleged they were denied hospital services that otherwise would have been available to them as indigents but for the challenged Revenue Ruling, which the plaintiffs characterized as "encouraging" hospitals to deny them services by extending tax benefits to hospitals even if they refused to fully serve the indigent population. 426 U.S. at 33.

The Supreme Court held it was “purely speculative” whether the denial of services resulted from this “encouragement,” or instead resulted from decisions the hospitals made “without regard to the tax implications.” *Id.* at 42-43. As the Court pointed out, “it is just as plausible” the hospitals would have “elect[ed] to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services.” *Id.* at 43. To otherwise conclude the harm was caused directly by the challenged Revenue Ruling required the Court to “infer[] that these hospitals or some of them, are so financially dependent upon the favorable tax treatment afforded charitable organizations” that they would have agreed to treat the plaintiffs if that were a condition of receiving that favorable tax treatment, a speculation the Court declined to make. *Id.*

Simon has no applicability here, where the plaintiffs are complaining of injuries flowing directly from the challenged IRS regulation, which contravenes the Tax Code provision it purports to implement. As a result of that regulation, Dr. Gill was forced to compete in an illegally structured campaign environment. Properly viewed, the causation element of standing is met here in what, essentially, is “an entirely conventional administrative law claim,” involving a facial challenge to a regulation that adversely affects the plaintiffs’ interests. *Shays I*, 414 F.3d at 93. Tellingly, the D.C. Circuit in *Shays I*, while clearly aware of the *Simon* decision (*see* 414 F.3d at 93), saw no reason to address it or explain why it did not apply, reinforcing its inapplicability here.⁴⁶

⁴⁶ Moreover, the nature of the institutions at issue in *Simon* – hospitals – differs radically from § 501(c)(4) groups. Unlike groups formed specifically to promote social welfare, many hospitals operate for profit. Indeed, the evidence before the *Simon* Court was that for private hospitals, “private philanthropy account[ed] for only 4%” of their revenues. 426 U.S. at 43. Thus, the IRS’s reliance on *Simon* to argue plaintiffs here have no standing is a classic “apples to

Moreover, unlike *Simon*, there is no plausible alternative AAN would have pursued but for the challenged IRS regulation. AAN affirmatively elected the tax-exempt treatment afforded by § 501(c)(4), as reflected in its Certificate of Incorporation and Form 1024, and the IRS expressly approved that status notwithstanding AAN's representation that as a § 501(c)(4) organization, it would engage in political campaign intervention on an ongoing basis, including, *inter alia*, running advertisements on behalf of candidates who support AAN's key priorities. AAN Form 1024 at Exhibit A, pp. 4, 5. At the same time, AAN affiliated with a § 501(c)(3) organization, the American Action Forum, Inc., and a § 527 political action committee, the CLF, over which AAN has direct control. Clearly AAN understood the different tax-exempt options the Tax Code provides and their different disclosure requirements. Just as clearly, AAN used the loophole created by the IRS regulation to funnel anonymous money through its § 501(c)(4) organization to finance political activities, rather than through the CLF, which would have required it to disclose all donors contributing more than \$200. *See* 26 U.S.C. § 527(j).

This conclusion is reinforced by the little information to be gleaned about at least a fraction of AAN's funding. Aetna and the Pharmaceutical Research and Manufacturers of America (PhRMA), two corporate entities seeking to hide from their shareholders and the public their participation in electoral politics, contributed significant funds to AAN.⁴⁷

oranges" comparison that offers this Court no basis to conclude standing is lacking.

⁴⁷ According to a political activity report Aetna, Inc. and Aetna PAC filed in 2012, and inadvertently revealed to the public, Aetna contributed more than \$3.3 million to AAN in 2011. *See* CREW, [Aetna Hides \\$7 Million in Political Spending](http://www.citizensforethics.org/press/entry/aetna-political-spending-american-action-network-chamber-of-commerce), available at <http://www.citizensforethics.org/press/entry/aetna-political-spending-american-action-network-chamber-of-commerce>. PhRMA reported a grant of \$4.5 million to AAN on its 2010 tax return. PhRMA 2010 Form 990, Schedule I, Part II, available at <http://www2.guidestar.org/FinDocuments/2010/530/241/2010-530241211-07d129f7-9O.pdf>.

Recent disclosures about the reportedly uneven scrutiny the IRS has given to political spending by § 501(c)(4) groups highlight that it is well known donors are exploiting § 501(c)(4) organizations to cloak their political activities. The anonymity § 501(c)(4) affords such groups – by operation of the IRS regulation challenged here – makes such groups “the preferred vehicle for large, publicly traded corporations that seek to influence elections without identifying themselves.”⁴⁸ By now it also is well recognized, post *Citizens United*, that “[t]he only reason to have [super PACs and 501(c)(4)s] is if you wanted to have one that allows people and entities to avoid disclosure.”⁴⁹ Here, AAN’s clearly purposeful decision to use a § 501(c)(4) to anonymously fund political activities supplies the necessary “but for” causal link to support the plaintiffs’ standing.

C. Plaintiffs’ Injuries Are Redressable Through The Relief They Seek.

It is nearly self-evident that the redressability prong of standing is satisfied here, where the injury is caused by the statute plaintiffs ask this Court to invalidate as contrary to law.

See Shays II, 528 F.3d at 923; *Shays I*, 414 F.3d at 95 (“where an agency rule causes the injury, as here, the redressability requirement may be satisfied by vacating the challenged rule”) (citation omitted). Nevertheless, the IRS argues plaintiffs’ injuries would not be redressed by a favorable ruling because of a claimed “temporal disconnect between Plaintiffs’ past injuries and

⁴⁸ Nicholas Confessore, Uneven I.R.S. Scrutiny Seen In Political Spending By Big Tax-Exempt Groups, *New York Times*, May 13, 2013, available at http://www.nytimes.com/2013/05/14/us/politics/irs-ignored-complaints-on-political-spending-by-big-tax-exempt-groups-watchdog-groups-say.html?pagewanted=1&_r=1&hp.

⁴⁹ Ezra Klein, The IRS Was Wrong To Target The Tea Party. They Should’ve Gone After All 501(c)(4)s., *Washington Post*, May 10, 2013 (quoting election-law expert Rick Hasen), available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/10/the-irs-was-wrong-to-target-the-tea-party-they-shouldve-gone-after-all-501c4s/>.

the prospective relief they seek,” and the Court’s inability to compel AAN to either stop its political activities or disclose its donors. D’s Mem. at 13.

As discussed, however, plaintiffs’ injuries stem directly from the challenged IRS regulation and are ongoing. Dr. Gill, as well as all other candidates for congressional seats, will face an illegally structured campaign environment unless the regulation is struck down. Further, plaintiffs are not asking this Court to compel AAN to do anything; the source of, and solution to the problem is the IRS and its regulation that creates a loophole allowing § 501(c)(4) organizations to engage in significant levels of political activity without disclosing their donors. If that regulation is invalidated, plaintiffs’ injuries will be redressed. Article III requires nothing more.

III. PLAINTIFFS SATISFY THE PRUDENTIAL REQUIREMENTS FOR STANDING.

Finally, the IRS makes the completely misguided argument that plaintiffs lack prudential standing because Congress has vested exclusive enforcement authority of the Tax Code with the Secretary of the Treasury. D’s Mem. at 14-15. This case, however, is not an attempt to usurp the enforcement power of the IRS, and plaintiffs are not challenging the failure of the IRS to enforce the tax laws against any specific individual or group.

Rather, plaintiffs seek to invalidate an IRS regulation across the board and as applied to all groups seeking tax exempt status under § 501(c)(4). At bottom, this is a bread and butter administrative law suit, brought under the Administrative Procedure Act, raising an issue that is “purely one of statutory interpretation.” *Shays I*, 414 F.3d at 95, quoting *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 479 (2001). The issues this case raises clearly are fit for judicial review. *Id.* Moreover, withholding court consideration will cause plaintiffs and all other

candidates considerable harm, as they will be forced to campaign in an illegally structured environment with no possibility of relief, including through an IRS enforcement action. *Id.* Under these circumstances, plaintiffs satisfy the prudential requirements for standing.⁵⁰

CONCLUSION

Although the IRS has known for decades about the problems with its regulation implementing § 501(c)(4) of the Tax Code,⁵¹ to date it has done nothing. As a result, individuals and entities seeking to influence our elections have discovered the great utility of the IRS regulation, which allows them to make anonymous donations to § 501(c)(4) organizations, thus concealing their roles. This influence of “dark” money on our electoral politics has been exacerbated by the Supreme Court’s decision in *Citizens United* and the complete failure of the FEC to enforce campaign finance laws.

This lawsuit seeks to remedy at least part of the problem created by the huge discrepancy between how the Tax Code defines § 501(c)(4) groups and how IRS regulations defines them.

⁵⁰ Because Dr. Gill and his campaign committee have standing to sue, the Court need not separately consider the standing of CREW. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (“the presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement”); *Americans for Safe Access v. DEA*, 706 F.3d 438, 443 (D.C. Cir. 2013) (“to proceed on the merits of their claims, we need only find one party with standing”).

⁵¹ For example, a 1978 internal IRS memorandum attached to a General Counsel Memorandum (GCM) refers to the § 501(c)(4) regulations as “an unduly broad interpretation of the statute,” and notes a 1962 GCM “questioned whether the Regulations were a valid interpretation of the statutory requirements and suggested that there should be a policy decision whether the language of the statute or that of the Regulations controls.” G.C.M. 38215, 1979 G.C.M. LEXIS 269, at *20, 21. More recently, in response to rulemaking petitions filed in 2011 and 2013, the IRS has stated only it is “aware of the current public interest in this issue.” Letter from David L. Fish, Manager Exempt Organizations, IRS, to Anne L. Weismann, Chief Counsel, CREW, April 20, 3013 (attached as Exhibit G).

Left untouched, these groups will have an even greater impact on future elections, directly contrary to the role Congress envisioned. Plaintiffs, who have been injured by the illegally structured campaign environment the IRS regulation has created, satisfy all the requirements of standing. It is therefore time for this Court to require the IRS to face the problem its unlawful regulation has created. Accordingly, plaintiffs respectfully request that defendant's motion to dismiss be denied.

Respectfully submitted,

/s/

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