IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FREEDOM PATH, INC.	)	
Plaintiff,	)	
v.	)	Civil Action No. 3:14-cv-01537-D
INTERNAL REVENUE SERVICE, *et al.*,	)	
Defendants.	)	

UNITED STATES' BRIEF IN OPPOSITION
TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and Statutes:

INTRODUCTION

The claims in this case arise out of Freedom Path's application for tax-exempt status under Internal Revenue Code section 501(c)(4). In its motion for partial summary judgment, Freedom Path addresses only its constitutional challenges to Revenue Ruling 2004-6. Freedom Path is primarily concerned that the Revenue Ruling – like determinations in many areas of the law – calls for the balancing of all "facts and circumstances" in its application. In Count VI, Freedom Path seeks: (1) a declaration that the "facts and circumstances" test in Revenue Ruling 2004-6 is void for vagueness in violation of the due process clause of the Fifth Amendment and (2) an injunction enjoining the IRS from using that test. (Doc. 49-1 ¶¶ 185, 202.) In Count VIII, Plaintiff alleges that the "facts and circumstances" test of Revenue Ruling 2004-6 "is unconstitutionally vague and/or overbroad in violation of the First Amendment." (Doc. 49-1 ¶ 196.) Plaintiff seeks partial summary judgment as to its regulatory challenges in Counts VI and VIII, arguing that Revenue Ruling 2004-6 is unconstitutional on its face.

Contrary to Freedom Path's argument, Revenue Ruling 2004-6 is not constitutionally invalid on its face. An analysis of the Revenue Ruling at issue, in light of the appropriate Supreme Court standards, shows that the Revenue Ruling is neither unconstitutionally vague nor overly broad. As a result, Freedom Path's motion for partial summary judgment should be denied.

SUMMARY OF ARGUMENT

Revenue Ruling 2004-6 does not prohibit any speech; it merely aids in determining whether a tax might be owed for activity that Congress has chosen not to subsidize in Internal Revenue Code section 501(c). Understood in that appropriate context, Revenue Ruling 2004-6 is sufficiently clear in its terms to give fair notice of its requirements, and its objective factors do

not make it readily susceptible to arbitrary or discriminatory application. As a result, Revenue Ruling 2004-6 is not unconstitutionally vague. Revenue Ruling 2004-6 also is not facially overbroad, as it does not substantially burden protected speech, especially as it does not prohibit speech. The main rulings on which Freedom Path relies – which involve prohibitions on speech in the face of criminal penalties – simply do not apply here. Revenue Ruling 2004-6 is constitutional on its face; as a result, Freedom Path's motion for partial summary judgment should be denied.

DISCUSSION

I. Examination of the Revenue Ruling and statutory background at issue.

We must start with the language and provisions of Revenue Ruling 2004-6 to be able to analyze whether it is unconstitutionally vague or overly broad. *See United States v. Williams*, 553 U.S. 285, 293 (2008) (noting in the context of an overbreadth challenge that "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers").[1] Revenue Ruling 2004-6 provides various discrete and objective factors that, when weighed together, are used to determine whether a group that otherwise is exempt from federal income tax under section 501(c) has spent money on an "exempt function,"[2] which may render part of the group's income subject to tax under section 527(f). As described more fully below, section 527(f) carries the possibility of imposing a tax on an otherwise tax-exempt group that engages in political campaign intervention, which activity is inconsistent with the purpose for which Congress has allowed the tax exemption.

[1] For ease of reference, a copy of Revenue Ruling 2004-6 is included in the attached Appendix. It also is available at 2003 WL 23009324.

[2] "Exempt function" is defined in 26 U.S.C. § 527(e)(2). *See infra*.

A. The statutory background in which Revenue Ruling 2004-6 operates.

The Revenue Ruling itself does not impose a tax. Instead, it provides guidance to help determine whether an organization has made expenditures for an exempt function that Congress, in section 527(f), has made subject to tax.

Although the tax under section 527(f) could apply to any type of group that otherwise is exempt from federal income tax described in section 501(c), we will discuss that tax (and its interpretive Revenue Ruling) in relation to section 501(c)(4) social welfare groups, as Plaintiff has applied for tax-exempt status under that particular provision. Unlike charitable organizations described in section 501(c)(3), a social welfare group described in section 501(c)(4) may participate and/or intervene in political campaigns on behalf of or in opposition to any candidate for public office without jeopardizing its tax-exempt status, so long as such political campaign intervention activity (together with any other activity that does not promote social welfare, such as unrelated business or social activity) is not the organization's primary activity.[3] *See* 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i); *see also* Rev. Rul. 67-368, 1967-2 C.B. 194 (1967), *available at* 1967 WL 15093 (determining that an organization whose primary activity was rating candidates for public office did not qualify as tax-exempt under section 501(c)(4)). But even a group that otherwise is tax-exempt under section 501(c)(4) may have a portion of its income subject to tax if it makes certain expenditures specified in the Internal Revenue Code.

[3] Groups exempt from tax under section 501(c)(4) include "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare." 26 U.S.C. § 501(c)(4)(A). Although "promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office," 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii), "[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," *id*. § 1.501(c)(4)-1(a)(2)(i) (emphasis added).

Specifically, if a group that is tax-exempt under section 501(c)(4) expends any amount for an "exempt function" during a taxable year, then the group may be subject to tax under section 527(f) to the extent of its net investment income for the year.[4] *See* 26 U.S.C. § 527(f)(1); Rev. Rul. 81-95, 1981-1 C.B. 332 (1981), *available at* 1981 WL 166125 (holding that an organization that is primarily engaged in activities that support social welfare may be subject to tax under section 527(f) if it engages in political campaign intervention activities).

"Exempt function" refers to the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors. 26 U.S.C. § 527(e)(2). Thus, the term "exempt function" includes political campaign intervention activity. Revenue Ruling 2004-6 provides examples of the facts and circumstances that tend to show whether a particular public advocacy communication constitutes an exempt function, and thus whether a group that enjoys status under section 501(c)(4) may have taxable income as a result of expenditures for such communication. Rev. Rul. 2004-6, 2004-1 C.B. 328 (2003), *available at* 2003 WL 23009324. But a section 501(c)(4) organization that chooses to engage in an exempt function, including political campaign intervention activity, may avoid the section 527(f) tax altogether by establishing and maintaining a separate segregated fund, which is treated as a section 527 political organization,[5] to receive contributions and make expenditures for an exempt function. *See* 26 U.S.C. § 527(f)(3). Section 527(f) creates parity

[4] A group that engages in an exempt function is subject to a tax on the lesser of its net investment income or the aggregate amount expended for the exempt function. *See* 26 U.S.C. § 527(f)(1). As a practical matter, this means that a group with exempt function expenditures will owe no tax under section 527(f) if it has no investment income.

[5] Section 527 political organizations do not owe tax on income that is segregated for use only for exempt function activities. *See* 26 U.S.C.§ 527(c)(1), (3).

between section 501(c) organizations and section 527 political organizations by taxing section 501(c) organizations "to the extent they actually operate as political organizations." *See* S. Rep. No. 93-1357 at 29 (1974), *available at* 1974 WL 11700.

B. The key provisions of Revenue Ruling 2004-6.

Revenue Ruling 2004-6 provides:

> All the facts and circumstances must be considered to determine whether an expenditure for an advocacy communication relating to a public policy issue is for an exempt function under § 527(e)(2). When an advocacy communication explicitly advocates the election or defeat of an individual to public office, the expenditure clearly is for an exempt function under § 527(e)(2). However, when an advocacy communication relating to a public policy issue does not explicitly advocate the election or defeat of a candidate, all the facts and circumstances need to be considered to determine whether the expenditure is for an exempt function under § 527(e)(2).

Although "all facts and circumstances" are to be considered, the Revenue Ruling points to discrete, objective factors to guide the determination. Factors that tend to show that a communication *is* for an exempt function include:

> a) The communication identifies a candidate for public office;
>
> b) The timing of the communication coincides with an electoral campaign;
>
> c) The communication targets voters in a particular election;
>
> d) The communication identifies that candidate's position on the public policy issue that is the subject of the communication;
>
> e) The position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and
>
> f) The communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.

Rev. Rul. 2004-6, 2004-1 C.B. 328 (2003). Factors that tend to show that a communication is *not* for an exempt function include:

> a) The absence of any one or more of the factors listed in a) through f) above;
>
> b) The communication identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence;
>
> c) The timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or other major legislative action (for example, a hearing before a legislative committee on the issue that is the subject of the communication);
>
> d) The communication identifies the candidate solely as a government official who is in a position to act on the public policy issue in connection with the specific event (such as a legislator who is eligible to vote on the legislation); and
>
> e) The communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication.

Rev. Rul. 2004-6, 2004-1 C.B. 328 (2003).

Although geared toward helping to determine whether a tax is owed under section 527(f), the factors identified in Revenue Ruling 2004-6 also may play a part in helping to determine whether an organization has engaged in too much political campaign intervention activity to be entitled to tax-exempt status under section 501(c)(4). As described above, a section 501(c)(4) group may participate and/or intervene in political campaigns without jeopardizing its tax-exempt status, so long as such political campaign intervention activity (together with any other activity that does not promote social welfare) is not the organization's primary activity. While Revenue Ruling 2004-6 does not itself address whether a group has engaged in too much political campaign intervention activity to qualify for section 501(c)(4) status, it describes discrete instances of political campaign intervention activity, which would be considered among all the group's activities that do not promote social welfare in determining whether the group is operated primarily for social welfare purposes.

It also is important to note what Revenue Ruling 2004-6 does *not* do. It does not ban, restrain, or even regulate speech. It merely helps determine whether a group may be subject to tax for expending funds on an activity that Congress has chosen not to subsidize within section 501(c).

C. Revenue Ruling 2004-6 has not been applied to Freedom Path.

In Freedom Path's case, it has been assessed no tax based on the application of Revenue Ruling 2004-6. The IRS cited the Revenue Ruling, amongst other authorities, in a letter proposing the denial of Freedom Path's application for tax-exempt status. (*See* Doc. 84-1 at 6-7.)[6] In the proposed denial letter, the IRS lists the factors in Revenue Ruling 2004-6 and then discusses various television advertisements and mailers that Freedom Path published. For example, the letter notes that five of the six television advertisements that Freedom Path published in 2012 expressed disapproval of a particular candidate or approval of his opponent and were distributed in the months leading up to the nominating convention and the primary election in which those two candidates were competing against each other for the nomination. (Doc. 84-1 at 8.)

After the proposed denial, Freedom Path had the opportunity to file a protest to contest the proposed action (Doc. 84-1 at 10), which Plaintiff did (Doc. 49-1 ¶ 66). The IRS has not issued a final determination as to Freedom Path's application for tax-exempt status, and upon Freedom Path's recent motion, the parties stipulated to an order enjoining the IRS from continuing to process its application during the pendency of this case.[7] (Docs. 74, 78, 78-1, 79.)

[6] Citations to page numbers in record documents refer to the page number in the upper right corner assigned by the ECF system.

[7] Freedom Path contends that *Z Street, Inc. v. Koskinen*, 791 F.3d 24 (D.C. Cir. 2015), entitles it to pre-enforcement review of Revenue Ruling 2004-6. (*See* Doc. 84 at 11.) In addition to the (continued...)

Since Revenue Ruling 2004-6 has yet to be finally applied, Plaintiff raises only a facial challenge to the Revenue Ruling in its motion for partial summary judgment. But contrary to Freedom Path's arguments, Revenue Ruling 2004-6 is not unconstitutionally vague or overly broad.

II. Revenue Ruling 2004-6 is sufficiently clear in its meaning to satisfy constitutional standards and thus is not unconstitutionally vague.

A law is deemed to be void for vagueness "if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) (stating that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law"). The void-for-vagueness doctrine protects two essential values of the due process clause: fair notice and fair enforcement.

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned, 408 U.S. at 108-09.

(…continued)

other arguments distinguishing *Z Street* previously submitted in support of the United States' motion to dismiss (*see* Doc. 59 at 11-12), the United States' position is that the Anti-Injunction Act bars Freedom Path's pre-enforcement challenge to Revenue Ruling 2004-6. *See Florida Bankers Ass'n v. U.S. Dep't of Treasury*, 799 F.3d 1065, 1067 (D.C. Cir. 2015), *cert. denied,* 136 S. Ct. 2429 (2016) (finding that the Anti-Injunction Act barred pre-enforcement challenge to a regulation that imposes a "penalty" on U.S. banks that fail to meet a reporting requirement, when that "penalty" is treated as a tax).

The Supreme Court counsels against rigid application of the doctrine. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). "[M]eticulous specificity" is not required in every statute or regulation. *Grayned*, 408 U.S. at 110. "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Village of Hoffman Estates*, 455 U.S. at 498. Courts weigh multiple factors to determine the level of clarity required of a challenged law. Given all the relevant factors, including the standards given by the Supreme Court and the nature of the regulation at issue, Revenue Ruling 2004-6 is sufficiently clear to pass constitutional muster.

A. The Constitution demands less specificity in civil regulations than in criminal prohibitions.

The Constitution requires a greater level of specificity from criminal statutes than civil statutes because the dangers of their imprecision are greater. "[I]n the civil context, statutes need not be as precise as in the criminal context and are, therefore, less likely to be invalidated under a void-for-vagueness challenge." *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 167 (3d Cir. 2008). A civil statute is unconstitutionally vague only if it is "so vague and indefinite as really to be no rule or standard at all." *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 123 (1967).

Plaintiff wrongly relies on multiple cases that implicate the heightened standard that is appropriate in judging whether criminal laws are written in such broad terms as to be unconstitutionally vague. For example, the statute at issue in *Thomas v. Collins*, 323 U.S. 516, 518-19 (1945), imposed a prior restraint on speech (prohibiting certain speech regarding labor unionization without first obtaining an organizer's card) and carried criminal penalties. The statute involved in *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 456-57

(2007), and *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 321 (2010), involved the prohibition in the Bipartisan Campaign Reform Act of 2002 on the use of corporate funds for "electioneering communications" during a certain period before a federal election, the violation of which incurred criminal penalties. These cases are not analogous to the present action, in which the revenue ruling at issue, and the statute it interprets, impose no prohibition on speech and carry no possibility of criminal liability. The standards applied in those cases cited by Freedom Path are not applicable to its challenge of a revenue ruling that interprets a civil statute to determine whether a taxpayer subsidy will support the speech.

B. Courts are more lenient with economic regulations governing business activities.

Also, courts hold economic regulations governing business activities to a lesser standard because they are often limited in scope, and entities affected by them typically have the opportunity to review relevant regulations before acting and clarify their meaning through inquiry or administrative process. *Village of Hoffman Estates*, 455 U.S. at 498; *United States v. Clinical Leasing Serv., Inc.*, 925 F.2d 120, 122 (5th Cir. 1991) (the Fifth Circuit afforded "considerable deference in the vagueness analysis" to an economic regulation because the complainants had the opportunity to verify its meaning and indeed were warned of its application).

Here, administrative review is available to challenge and seek clarification of any application of Revenue Ruling 2004-6. In the event Revenue Ruling 2004-6 is used to assess a tax under IRC section 527(f), the taxpayer has the opportunity to pay the tax and file an administrative claim for refund with the IRS. The taxpayer has a further opportunity for judicial review in the event the administrative claim is unsuccessful or not acted upon within six months. In the context of an application for tax exemption under section 501(c)(4), an applicant has the opportunity for administrative review of a proposed denial of its application. In fact, and as

already noted, Freedom Path has taken advantage of that opportunity for review of its proposed denial with the IRS Office of Appeals. And, in the event the IRS denies the application or does not act on the application within 270 days, the taxpayer may bring a suit for a declaration of its tax status in the Tax Court, the Court of Federal Claims or the U.S. District Court for the District of Columbia, s*ee* 26 U.S.C. § 7428(a)(1)(E), (b)(2), as described below in part II.E.

C. Because Revenue Ruling 2004-6 does not restrict free speech, it should not be subject to the heightened scrutiny that is used to review laws that impede constitutional rights, but would survive it even if it were.

Even though Revenue Ruling 2004-6 touches on the exercise of political speech, it is not properly understood as requiring application of the more stringent test for vagueness that is used to review laws that threaten to inhibit a constitutionally protected right. "When speech is involved, rigorous adherence to [the fair notice and fair enforcement] requirements is necessary to ensure that ambiguity does not chill protected speech." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). In the case of Revenue Ruling 2004-6, which does not prohibit speech of any kind and carries only a possible tax implication,[8] the objective possibility of chilling speech is markedly less severe than in statutes that operate as a prior restraint on speech and carry criminal penalties.

[8] Even if Revenue Ruling 2004-6 is applied to find that a group has engaged in "exempt function" activity, the group still might owe no tax as a result. As described above in part I, a group that engages in an exempt function is subject to a tax on the lesser of its net investment income or the aggregate amount expended for the exempt function. *See* 26 U.S.C. § 527(f)(1). As a practical matter, this means that a group with exempt function expenditures will owe no tax under section 527(f) if it has no investment income. And in the context of determining tax-exempt status under section 501(c)(4), Revenue Ruling 2004-6 is not alone determinative of whether a group is primarily engaged in promoting social welfare. It merely describes discrete instances of political campaign intervention activity, which would be considered among all the group's activities that do not promote social welfare (within the meaning of section 501(c)(4)) in determining whether the group is operated primarily for social welfare purposes.

But "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism,* 491 U.S. 781, 794 (1989). Even assuming that the challenged provision implicates speech rights and thus qualifies for heightened scrutiny, the Supreme Court has explained that a "statute should not be deemed facially invalid unless . . . its deterrent effect on legitimate expression is both real and substantial." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 216 (1975) (finding that an ordinance that prohibited drive-in movie theatres from projecting films containing nudity on publicly visible screens was facially invalid). Despite Freedom Path's arguments to the contrary, Revenue Ruling 2004-6 does not substantially interfere with a group's First Amendment rights to free speech. Revenue Ruling 2004-6 prohibits no speech. It merely carries a potential tax consequence, and as described in footnote 8, a group still might not actually owe any tax even if the Revenue Ruling is applied to its activities. Because Revenue Ruling 2004-6 does not substantially interfere with anyone's right to free speech, it should not be declared invalid on its face.

D. The discrete, objective factors of Revenue Ruling 2004-6 do not require people of common intelligence to guess at their meaning.

The factors outlined in Revenue Ruling 2004-6 are clear in their meaning. For example, there is little confusion about whether a communication identifies a candidate for public office, whether the communication coincides with an electoral campaign, or whether the communication is aimed at voters in a particular election. All the factors in Revenue Ruling 2004-6 are plainly stated and susceptible of common understanding. Revenue Ruling 2004-6 even provides situational examples to give taxpayers guidance on how the factors are applied together.

The discrete, objective factors of Revenue Ruling 2004-6 are different from the amorphous standards that the D.C. Circuit found objectionable in *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980), a case on which Freedom Path relies. In that case, the

D.C. Circuit found that the definition of "educational" contained in treasury regulations describing educational or charitable organizations under section 501(c)(3) was unconstitutionally vague.[9] In particular, the regulation at issue there provided that a group may qualify as "educational" under section 501(c)(3) even if it advocates a particular position or viewpoint, but only so long as it gives a "full and fair exposition" of facts to allow an individual to form an independent opinion. *Big Mama Rag*, 631 F.2d at 1037. But the regulation did not consider a group to be "educational" if it operated merely to present "unsupported opinion." *Id*. The regulation gave no further guidance about what it meant by a "full and fair exposition" of facts or what would constitute an "unsupported opinion." The regulatory language found to be unconstitutionally vague in *Big Mama Rag* is a far cry from the discrete, objective and understandable factors announced in Revenue Ruling 2004-6.

Cases discussing the "methodology test" that the IRS created in response to the ruling in *Big Mama Rag* further show the inapplicability of *Big Mama Rag* to evaluating Revenue Ruling 2004-6. Following *Big Mama Rag*, the IRS adopted a more objective test, listing discrete factors that would tend or not tend to show that a group was "educational." *See* Rev. Proc. 86-43, 1986-2 C.B. 729 (1986), *available at* 1986 WL 297205. The "methodology test" set forth in that revenue procedure reflected "that the method used by an organization in advocating its position, rather than the position itself, is the standard for determining whether an organization has educational purposes." *Id*. § 2. Like the factors in Revenue Ruling 2004-6, the factors in the methodology test are weighed amongst all the "facts and circumstances." *Id*. § 3.

[9] The plaintiff in *Big Mama Rag* was denied tax-exempt status under section 501(c)(3) and brought suit under Internal Revenue Code section 7428 for judicial review. Freedom Path has the same opportunity for judicial review, as described more fully below in part II.E.

The same court that decided *Big Mama Rag* has commented favorably upon the methodology test prior to its adoption in Revenue Procedure 86-43. *See Nat'l Alliance v. United States*, 710 F.2d 868, 875 (D.C. Cir. 1983). Although that court found it unnecessary to decide whether the methodology test cured the vagueness found in the regulation in *Big Mama Rag*, the court stated:

> We observe that, starting from the breadth of terms in the regulation, application by IRS of the Methodology Test would move in the direction of more specifically requiring, in advocacy material, an intellectually appealing development of the views advocated. The four criteria tend toward ensuring that the educational exemption be restricted to material which substantially helps a reader or listener in a learning process. The test reduces the vagueness found by the *Big Mama* decision.

Id.; *see also Nationalist Movement v. C.I.R.*, 37 F.3d 216, 218 n.2 (5th Cir. 1994) (noting that the D.C. Circuit in *National Alliance* "discussed the [methodology] test with approval"). After the IRS published the methodology test as part of Revenue Procedure 86-43, the Tax Court addressed its constitutionality, stating:

> In our view, Rev. Proc. 86-43 . . . is not unconstitutionally vague or overbroad on its face, nor is it unconstitutional as applied. Its provisions are sufficiently understandable, specific, and objective both to preclude chilling of expression protected under the First Amendment and to minimize arbitrary or discriminatory application by the IRS. The revenue procedure focuses on the method rather than the content of the presentation. In contrast, it was the potential for discriminatory denials of tax exemption based on speech content that Court of Appeals for the District of Columbia Circuit to hold [in *Big Mama Rag*] that the vagueness of the "full and fair exposition" standard violates the first amendment.

Nationalist Movement v. C.I.R., 102 T.C. 558, 588–89, *aff'd on other grounds*, 37 F.3d 216 (5th Cir. 1994).

Also, it is irrelevant that the IRS has proposed a new regulation to provide additional guidance to tax-exempt social welfare organizations on political activities related to candidates that will not be considered to promote social welfare. *See* Proposed Rules [REG-134417-13],

78 Fed. Reg. 71535 (Nov. 29, 2013), *available at* 2013 WL 6207774.[10] Even assuming that a new regulation would provide greater specificity than Revenue Ruling 2004-6, that alone would not render the provisions of Revenue Ruling 2004-6 unconstitutionally vague. The fact that more precise language could have been used does not render a law unconstitutionally vague. *See United States v. Powell*, 423 U.S. 87, 94 (1975).

Finally, Revenue Ruling 2004-6 is not subject to the potential pitfalls of too-vague regulations, such as uncertainty to the regulated party. To the extent that Revenue Ruling 2004-6 entails any minimal vagueness, Congress has given organizations an option to avoid it. As described above in part I, a section 501(c)(4) organization that chooses to make expenditures for an exempt function, including political campaign intervention activity, may avoid the section 527(f) tax altogether by setting up a separate segregated fund, which is treated as a section 527 political organization, to receive contributions and make expenditures for a section 527 exempt function. The expenditures from the segregated fund also are not considered in determining whether the organization is operated primarily for social welfare purposes and

[10] The IRS has announced its intention to issue a new proposed rule after considering the "diversity of views expressed and the volume of substantive input," https://www.irs.gov/uac/newsroom/irs-update-on-the-proposed-new-regulation-on-501-c-4-organizations, but the IRS has not yet published a new proposed rule. In fact, Congress has prohibited the IRS from publishing any regulation "relating to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of section 501(c)(4) of the Internal Revenue Code of 1986 (including the proposed regulations published at 78 Fed. Reg. 71535 (Nov. 29, 2013))." Department of the Treasury Appropriations Act, 2016, § 127 (Title I of Div. E of the Consolidated Appropriations Act of 2016). That original prohibition was made for fiscal year 2016, but was reinstated in Section 104 of the Continuing Appropriations Act, 2017 (effective until Dec. 9, 2016).

thus entitled to tax exemption as an organization described in section 501(c)(4).[11] 26 U.S.C. § 527(f)(3).

E. The discrete, objective factors of Revenue Ruling 2004-6 do not invite arbitrary or discriminatory application.

Freedom Path cites no factual support for its conclusory allegation that the IRS has applied the "facts and circumstances" test of Revenue Ruling 2004-6 in a discriminatory manner "for years." (Doc. 84 at 11.) In fact, the discrete, objective factors set forth in the Revenue Ruling make discriminatory application of the "facts and circumstances" test extremely unlikely.

In a related vein, while Freedom Path alleges that the IRS engaged in viewpoint discrimination by discussing the "facts and circumstances" test of Revenue Ruling 2004-6 in its letter proposing a denial of Freedom Path's application for section 501(c)(4) status (Doc. 84 at 22-23), it provides no support for that claim. Indeed, the balanced and objective discussion in the letter belies Freedom Path's allegation.[12] (*See* Doc. 84-1 at 1-10.) Freedom Path appears to raise its unfounded allegation of discrimination in the proposed application of Revenue Ruling 2004-6 as an extension of its claim in Count IV that the IRS subjected its application for tax exemption to heightened scrutiny and "intrusive" requests for information based on Freedom Path's viewpoints. (Doc. 49-1 ¶¶ 160-61.) The basis for those allegations is the report of the Treasury Inspector General for Tax Administration entitled "Inappropriate Criteria Were Used to

[11] And in this tax context, the creation of a segregated fund is not a substantial burden on the section 501(c)(4) group's exercise of free speech. *See Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 n.9 (1986). As the Supreme Court notes in distinguishing tax situations from the campaign finance law at issue in that case, "there is no right to have speech subsidized by the Government." *Id*.

[12] Plaintiff's discussion of whether, in the proposed denial of its application for tax-exempt status, the IRS reaches the proper proposed conclusions as to how Plaintiff's advertisements would be viewed under Revenue Ruling 2004-6 is irrelevant to the facial challenge that Plaintiff poses here. In the event that Plaintiff later seeks judgment on an as-applied challenge, we will respond appropriately at that time.

Identify Tax-Exempt Applications for Review," dated May 14, 2013 ("TIGTA Report of 2013"). (Doc. 49-1 ¶¶ 21-41.) But contrary to Plaintiff's claim, TIGTA made no finding that the IRS intentionally discriminated against any group, much less Plaintiff in particular. Instead, TIGTA found that the IRS's selection of applications for review based on applicants' names and policy positions "*gives the appearance* that the IRS is not impartial in conducting its mission." (TIGTA Report of 2013 at 6 (emphasis added).) Furthermore, the allegations in Count IV are not the subject of Freedom Path's pending motion for partial summary judgment, and Plaintiff has presented no proof of its allegations that any action the IRS took with respect to its application was politically motivated. Again, Freedom Path's unsupported allegations do not undermine the fact that Revenue Ruling 2004-6 provides discrete, objective and content-neutral standards that are not readily susceptible to discriminatory application.

In addition, the availability of administrative and judicial review substantially insure against abuses of official discretion. In the event the IRS uses Revenue Ruling 2004-6 to support the assessment of a tax under IRC section 527(f), the taxpayer has the opportunity to pay the tax and file an administrative claim for refund with the IRS. In the event the administrative claim is unsuccessful or not acted upon within six months, the taxpayer has the opportunity to sue for a refund in federal court.

In the context of an application for tax exemption under section 501(c)(4), an applicant has the opportunity for administrative review of a proposed denial of its application. As previously discussed, Freedom Path has taken advantage of that opportunity by seeking review of its proposed denial with the IRS Office of Appeals. The review in the Office of Appeals is conducted by people separate from the application review process. And, in the event the IRS finally denies the application or does not act on the application within 270 days, the taxpayer

may bring a suit for a declaration of its tax status in the Tax Court, the Court of Federal Claims or the U.S. District Court for the District of Columbia. *See* 26 U.S.C. § 7428(a)(1)(E), (b)(2).

Applicants under section 501(c)(4) have a range of administrative and judicial review opportunities that will protect against any potential abuses in the application of Revenue Ruling 2004-6. In addition to the objective standards set forth in Revenue Ruling 2004-6, those procedures for both administrative and judicial review help to protect groups against misapplication of the Revenue Ruling in a discriminatory manner.

F. Revenue Ruling 2004-6 is not unconstitutionally vague simply because it calls for the balancing of various factors.

Tax law is no stranger to multi-factor balancing tests. Even courts have developed such tests to aid in determining tax matters.[13] For example, the Fifth Circuit uses a multi-factor test to determine whether a person was responsible for collecting and paying over the employee portion of employment taxes, thus helping to determine whether the person might be personally liable for the taxes. *See Barnett v. IRS*, 988 F.2d 1449, 1455 (5th Cir. 1993). Courts also look to a variety of factors to determine whether a worker is an employee, and thus a subject for employment taxes, or an independent contractor. Like the factors in Revenue Ruling 2004-6, the common law factors for deciding whether a worker is an employee or an independent contractor for employment tax purposes are not exclusive, and no one factor is controlling. *See Bruecher Found. Servs., Inc. v. United States*, 383 F. App'x 381, 389 (5th Cir. 2010). In addition, courts weigh a number of factors to determine whether funds supplied to a business are properly classified as debt or equity for federal income tax purposes. For example, the Fifth Circuit has

[13] Courts have developed balancing tests in a variety of areas. Indeed, as this discussion shows, courts assess whether a law is void for vagueness on a case-by-case basis by examining multiple factors. In that regard, the standard this Court must apply in judging Plaintiff's regulatory challenge is similar to the "facts and circumstances" test that Plaintiff argues is unconstitutional.

"stressed at least thirteen factors which merit consideration in determining this issue." *Estate of Mixon v. United States*, 464 F.2d 394, 402 (5th Cir. 1972).

Freedom Path wrongly contends that cases decided in the context of campaign finance laws compel the conclusion that the multi-factor balancing test of Revenue Ruling 2004-6 is unconstitutionally vague. Freedom Path relies heavily on *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), and *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010). Those cases both involve the prohibition in the Bipartisan Campaign Reform Act of 2002 on the use of corporate funds for "electioneering communications" during a certain period before a federal election. In *Wisconsin Right to Life*, the Court found that BCRA violated the corporation's free speech rights, as applied to certain issue-advocacy advertisements by the corporation. *See Wisconsin Right to Life, Inc.*, 551 U.S. at 456-57. Only two Justices joined the portion of the opinion stating that "the proper standard for an as-applied challenge to BCRA § 203 must be objective," and that "it must eschew 'the open-ended rough-and-tumble of factors.'" *Id.* at 469 (citation omitted). And those Justices did so in the context of determining whether specific language constituted the functional equivalent of "express advocacy" within the meaning of a *criminal* statute. *Id.* In the other case cited by Freedom Path, the Court majority cited that language from *Wisconsin Right to Life* in rejecting a balancing test to determine whether a communication was the functional equivalent of express advocacy, again in the context of a statute with *criminal* penalties. *See Citizens United*, 558 U.S. at 335-36. But whether a multi-factor balancing test is sufficiently precise for a party to determine in advance whether it might engage in speech *that violates a federal criminal statute* is a far different determination from judging whether a balancing test is appropriate in determining civil tax matters.

The Constitution does not require bright-line rules as Plaintiff seems to suggest.[14] In fact, courts have upheld the constitutionality of multi-factor balancing tests since *Citizens United*, even in the context of campaign finance regulation. In *Free Speech v. Fed. Election Comm'n*, 720 F.3d 788, 797–98 (10th Cir. 2013), the plaintiff challenged the FEC's policy of determining political committee statuses on a case-by-case basis. Specifically, the policy provided that the Commission "first considers a group's political activities, such as spending on a particular electoral or issue-advocacy campaign, and then it evaluates an organization's 'major purpose,' as revealed by that group's public statements, fundraising appeals, government filings, and organizational documents." *Id.* at 797. The Tenth Circuit upheld this fact-intensive, comparative approach. Likewise, in *The Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544, 558 (4th Cir. 2012), the Fourth Circuit concluded the FEC's "multi-factor major purpose test" for determining whether an organization qualifies as a political action committee was "sensible" and "consistent with Supreme Court precedent[,]" and did not "unlawfully deter protected speech." The Fourth Circuit also upheld a balancing test used to determine whether a group was required to disclose certain information, specifically distinguishing it from the "censorious nature" of the criminal prohibition on certain speech in which *Citizens United* had declared a multi-factor balancing test unconstitutionally vague. *Id.* at 554.

Finally, the Supreme Court has upheld the weighing of various factors against a vagueness challenge in a setting that contains probably the direst consequences imaginable:

[14] To the extent Plaintiff relies on *NAACP v. Button*, 371 U.S. 415, 466 (1963) (Harlan, J. dissenting), that opinion does not state that the possibility of subjective judgment renders a statute invalid. Rather, it prohibits "language calling for the exercise of subjective judgment, unaided by objective norms." In the circumstances of Revenue Ruling 2004-6, any subjective judgment that IRS employees will have to exercise in weighing the relevant factors is aided by the objective factors found in the Revenue Ruling.

sentencing in death penalty cases. In *Tuilaepa v. California*, 512 U.S. 967 (1994), the defendants objected to various factors that juries were instructed to consider in setting penalties, including such open-ended factors as "the circumstances of the crime" or "the background of the defendant." The Supreme Court held that those open-ended factors are appropriate for a jury to consider in setting a penalty in a capital case:

> Apart from the fact that petitioners' argument ignores the obvious utility of these open-ended factors as part of a neutral sentencing process, it contravenes our precedents. . . . In *Zant,* we found no constitutional difficulty where the jury had been told to consider "'all facts and circumstances presented in extenuation, mitigation, and aggravation of punishment as well as such arguments as have been presented for the State and for the Defense.'" 462 U.S., at 878–880, 889, n. 25, 103 S. Ct., at 2743–2744, 2749, n.25. We also stated that "[n]othing in the United States Constitution prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant's prior criminal record in making its sentencing determination." *Id.,* at 888, 103 S. Ct., at 2748. And in *Gregg,* we rejected a vagueness challenge to that same Georgia sentencing scheme in a case in which the "judge . . . charged the jury that in determining what sentence was appropriate the jury was free to consider the facts and circumstances, if any, presented by the parties in mitigation or aggravation." 428 U.S., at 161, 203–204, 96 S. Ct., at 2919, 2939. In both cases, therefore, the Court found no constitutional problem with a death sentence where the jury instructions directed consideration of the "facts and circumstances" of the case.

Tuilaepa, 512 U.S. at 978. The Supreme Court also rejected the defendants' objection that the list of factors was unconstitutional because it did not instruct the jury on how to weigh the various factors. *Id*. at 979. If sentencing in death penalty cases can tolerate the use of open-ended "facts and circumstances" tests, then so can the determination of whether a group might potentially owe a probably modest tax.

III. Revenue Ruling 2004-6 does not substantially burden protected speech so as to render it overly broad in violation of the First Amendment.

"According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." *Williams*, 553 U.S. at 292. "Invalidation for overbreadth is strong medicine that is not to be casually employed." *Id*. at 293 (internal quotations omitted). The Supreme Court has "vigorously enforced the requirement that a

statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id*. at 292 (emphasis in original).

Revenue Ruling 2004-6 does not substantially burden protected speech. As noted above, Revenue Ruling 2004-6 does not prohibit speech at all; rather, it provides a method of categorizing speech the expenditures for which may be taxable if conducted by a section 501(c) organization or which are tax-exempt if conducted by a section 527 political organization. In this respect, it is akin to civil campaign-finance regulations imposing disclosure requirements. "Disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Free Speech*, 720 F.3d at 792 (quoting *Citizens United*, 558 U.S. at 366). For the same reason, Revenue Ruling 2004-6 also is akin to campaign finance rules for determining when a group is a political action committee, which have survived similar challenges of overbreadth. *See Real Truth About Abortion*, 681 F.3d at 558 (finding that the challenging party "failed to explain why the Commission's test would prevent any party from speaking, especially in view of the fact that the application of the test to find that an organization is a PAC would subject the organization only to 'minimal' reporting and organizational obligations").

Also, Freedom Path wrongly suggests that Revenue Ruling 2004-6 is overbroad because its factors include the timing of communications in relation to an election and other contextual factors. (Doc. 84 at 26-28.) For that proposition, Freedom Path again relies on the portions of *Wisconsin Right to Life* and *Citizens United* that are distinguishable from the circumstances of Revenue Ruling 2004-6. For example, "*Wisconsin Right to Life* simply held that the timing of speech cannot be used as a proxy for a speaker's intent." *Real Truth About Abortion*, 681 F.3d at 554. But, as in *Real Truth About Abortion*, Revenue Ruling 2004-6 does not inquire into the

speaker's subjective intent.[15] As the Fourth Circuit found, the timing of a communication in proximity to an election remains a valid factor for consideration when it is not used merely as a proxy for the speaker's intent. As Revenue Ruling 2004-6 does not concern itself with the speaker's intent, its use of the factors noted here does not encompass considerations that the Supreme Court prohibits.

CONCLUSION

The rulings cited by Freedom Path – that involve prohibitions on speech in the face of criminal penalties – simply do not apply here. Revenue Ruling 2004-6 prohibits no speech; it merely aids in determining whether a tax is owed for activity that Congress has chosen not to subsidize in section 501(c). Understood in that appropriate context, Revenue Ruling 2004-6 is sufficiently clear in its terms to give fair notice of its requirements, and its objective factors do not make it readily susceptible to arbitrary or discriminatory application. As a result, Revenue Ruling 2004-6 is not unconstitutionally vague. And the range of opportunities for both administrative and judicial review provides further insurance against any remote possibility of abuse in the Revenue Ruling's application. Revenue Ruling 2004-6 also is not facially overbroad, as it does not substantially burden protected speech. Freedom Path's motion for partial summary judgment should be denied.

[15] Although Freedom Path contends that the IRS looks at a group's subjective intent in deciding whether a communication is for an exempt function (Doc. 84 at 18-19), an examination of the objective factors in Revenue Ruling 2004-6 shows that the speaker's subjective intent is not a consideration.

DATED: November 2, 2016

Respectfully submitted,

CAROLINE D. CIRAOLO
Principal Deputy Assistant Attorney General
Tax Division

s/ Joseph A. Sergi
JOSEPH A. SERGI (DC 480837)
Senior Litigation Counsel
U.S. Department of Justice, Tax Division
555 4th Street, N.W., JCB 7207
Washington, D.C. 20001
(202) 305-0868; (202) 307-2504 (FAX)
Joseph.A.Sergi@usdoj.gov

LAURA C. BECKERMAN (CA 278490)
LAURA M. CONNER (VA 40388)
JOSEPH R. GANAHL (MD)
JEREMY N. HENDON (OR 982490)
GERALD A. ROLE (IL 6198922)
Trial Attorneys
U.S. Department of Justice, Tax Division
555 4th Street, N.W.
Washington, D.C. 20001
(202) 514-2000

Of Counsel:
JOHN R. PARKER
United States Attorney

ATTORNEYS FOR THE UNITED STATES

CERTIFICATE OF SERVICE

I certify that on November 2, 2016, I electronically filed the United States' Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment, including Appendix, with the Clerk of the Court using the ECF system, which will send notification of such filing to the following counsel for plaintiff: Chris K. Gober, Michael T. Hilgers, Orrin Harrison III and Jason Torchinsky.

s/ Laura M. Conner
LAURA M. CONNER