Nos. 16-72572, 16-73236 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Parks Foundation, *Petitioner-Appellant*

v.

Commissioner of Internal Revenue, *Respondent-Appellee*

and

Loren E. Parks, *Petitioner-Appellant*

v.

Commissioner of Internal Revenue, *Respondent-Appellee*

Appeals from the United States Tax Court
Nos. 7093-07, 7043-07

BRIEF OF AMICI CURIAE ALLIANCE FOR JUSTICE AND COUNCIL ON FOUNDATIONS IN SUPPORT OF PETITIONERS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Amici are corporations exempt from income tax under 26 U.S.C. § 501(c)(3). Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, Amici neither have parent corporations nor issue stock, so no corporation owns 10% or more of Amici's stock.

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INTERESTS OF AMICI AND CONSENT TO FILE[1]

Amicus Alliance for Justice ("AFJ") is a national association of over 100 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society. AFJ and most of its members are charitable organizations that are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"), and that engage in lobbying activities in furtherance of their tax exempt purposes. Through its Bolder Advocacy project, AFJ conducts workshops and provides other forms of technical assistance to public charities and private foundations throughout the United States to enable them to comply with the IRC's limitations on lobbying. AFJ's publication, *Being a Player*, is a widely used explanation of the 1990 Lobbying Regulations for electing public charities. Another AFJ publication, *Investing in Change: A Funder's Guide to Supporting Advocacy*, aims to encourage grantmaking private foundations to support lobbying activities by charities. AFJ believes that the Tax Court's decision in this case will significantly restrict nonprofit lobbying in a manner that is inconsistent with Congressional intent and

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person other than Amici contributed money intended to fund preparing or submitting the brief.

applicable regulations. AFJ contends that the outcome of this appeal will have implications beyond this particular case, and thus this is an appropriate circumstance in which to consider the arguments contained herein.

Amicus Council on Foundations ("COF") is a nonprofit corporation exempt from federal income tax under IRC section 501(c)(3) with no shareholders or other equity owners. COF is a public charity and association of 800 members consisting of private foundations, public foundations such as community foundations, and other charitable entities. COF members regularly look to COF staff for information and guidance regarding the legal rules applicable to foundation operations and programs, including the rules governing advocacy and lobbying activities by foundations. Accordingly, a consistent definition and test for determining when activity constitutes lobbying as compared to education or advocacy is critical for COF members to ensure legal compliance, proper reporting, and to avoid penalties associated with impermissible activity. COF believes that the Tax Court's decision creates uncertainty in this area because of its overly broad interpretation of the "refer and reflect" test for communications that may or may not be lobbying, and uncertainty often results in a decision to avoid otherwise legitimate and valuable work. Additionally, COF is interested in this case because the Tax Court's overly broad interpretation of the relevant statutory and regulatory

provisions, if upheld, has the potential to impact not only the legitimate activities of private foundations, but also activities of public charities. COF asserts that the outcome of this appeal will have implications beyond this particular case, and thus this is an appropriate circumstance in which to consider the arguments contained herein.

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief.

ARGUMENT

This case raises significant, rarely addressed, issues regarding the application of the Internal Revenue Code's lobbying restrictions to private foundations and charitable organizations. Amici believe the Tax Court's decision below is inconsistent with the relevant statutory and regulatory provisions, thereby improperly restricting foundations' and other charitable organizations' policy-influencing activities.[2] More specifically, the Tax Court's broad interpretation of communications that "refer to" and "reflect a view on" specific legislation will necessarily affect not only the rules governing foundation lobbying but also the rules for many public charities that engage in both direct and grassroots lobbying. In order to help this Court better understand the context and import of the Tax Court's decision, Amici provide the following brief history of the relevant statutes and regulations. Amici then argue that the Tax Court's decision should be reversed on the ground that the Tax Court applied a legally erroneous construction of the applicable IRC provisions.

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[2] Petitioner-Appellants challenge the decision below on constitutional grounds. While generally supporting Petitioner-Appellants, Amici believe the Court should first address the Tax Court's statutory and regulatory analysis, which may allow the Court to avoid reaching the constitutional issues.

I. Congress Has Defined Lobbying In Precise and Limited Terms that Allow Private Foundations and Public Charities to Engage in Discussions About Public Policy.

A. The "No Substantial Part" Test

Since 1934, IRC section 501(c)(3) has provided that corporations and other entities organized and operated exclusively for religious, charitable, scientific, educational and certain other purposes are exempt from federal income taxation only if "no substantial part of [their] activities [consists] of . . . carrying on propaganda, or otherwise attempting, to influence legislation."[3] 26 U.S.C. § 501(c)(3). The legislative history of this provision is sparse,[4] and the regulations implementing this provision, initially issued in 1959, provide little guidance concerning the scope of the restriction on "substantial" lobbying activity. *See* Income Tax Regulations, 24 Fed. Reg. 5,217, 5,217–5,220 (June 26, 1959). These regulations provide only that an organization is not operated exclusively for one or more exempt purposes if it is an "action" organization, defined, *inter alia*, as an organization,

> a substantial part of [whose] activities is attempting to influence

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[3] For a discussion of the pre-statutory regulation of lobbying by charitable organizations, *see* Judith E. Kindell & John Francis Reilly, *Lobbying Issues*, *in* 1997 IRS EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TEXT at 261, 262–264 (hereinafter "1997 CPE Text"), *available at* https://www.irs.gov/pub/irs-tege/eotopicp97.pdf.

[4] For a discussion of the 1934 legislative history, *see id.* at 264–267.

> legislation by propaganda or otherwise. For this purpose, an organization will be regarded as attempting to influence legislation if the organization (a) contacts or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or (b) advocates the adoption or rejection of legislation.

26 C.F.R. § 1.501(c)(3)-1(c)(3)(ii).

Over the years, the Internal Revenue Service ("IRS") has refused to specify a firm percentage to determine whether an organization's activity is "substantial," applying instead a facts and circumstances test which looks to numerous factors in addition to the percentage of expenditures made, including the amount of time spent on the activity, the amount of publicity given to the activity, and the amount of time spent by volunteers. *See* IRS Gen. Couns. Mem. 36,148 (Jan. 28, 1975) (Substantiality is a "problem [that] does not lend itself to ready numerical boundaries . . . . [T]he percentage of the budget dedicated to a given activity is only one type of evidence of substantiality."). Courts too have offered little in the way of clarity to the Code's very general requirement. *See, e.g.*, *Haswell v. United States,* 500 F. 2d 1133, 1142 (Ct. Cl. 1974) ("A percentage test to determine whether the activities are substantial is not appropriate. Such a test obscures the complexity of balancing the organization's activities in relation to its objectives and circumstances in the context of the totality of the organization."); *Christian Echoes Nat'l Ministry v. United States*, 470 F.2d 849, 855 (10th Cir.

1972) ("The political activities of an organization must be balanced in the context of the objectives and circumstances of the organization to determine whether a *substantial* part of its activities was to influence or attempt to influence legislation. A percentage test to determine whether the activities were substantial obscures the complexity of balancing the organization's activities in relation to its objectives and circumstances." (internal citation omitted) (emphasis in original)); *Kuper v. Comm'r*, 332 F.2d 562, 562 (3d Cir. 1964) (holding that a substantial part of the taxpayer's activities consisted of attempting to influence legislation because "[t]he activities in question are an essential part of the general legislative program of the [taxpayer] to promote desirable governmental policies through legislation . . . ."); *cf Seasongood v. Comm'r*, 227 F.2d 907 (6th Cir. 1955) (concluding that less than 5% of time and effort spent on "political activities" was not substantial in relation to all of the taxpayer's other activities).

B. The Excise Tax on Foundation Lobbying - IRC Sections 4945(d)(1) and 4945(e)

In 1969, Congress enacted a comprehensive overhaul of the tax provisions governing private foundations, a subset of 501(c)(3) organizations typically established by individuals or small numbers of donors such as the members of a single family. *See* Tax Reform Act of 1969, Pub. L. No. 91-172, § 101, 83 Stat. 487, 492 (1969). Among these provisions, Congress imposed a two-tiered series

of excise taxes on foundations and their managers that engaged in certain activities, including what are designated in the Code as "taxable expenditures." 26 U.S.C. §§ 4945(d)(1)–4945(d)(5). Taxable expenditures include "any attempt to influence any legislation through an attempt to affect the opinion of the general public or any segment thereof, and . . . any attempt to influence legislation through communication with any member or employee of a legislative body, or with any other government official or employee who may participate in the formulation of the legislation...."[5] 26 U.S.C. §§ 4945(e)(1)–4945(e)(2). In an effort to ensure that the new restriction would not interfere with the educational role often served by foundations, however, section 4945(e) further provides that the excise tax does not apply where a foundation makes available "the results of nonpartisan analysis, study, or research," or where the foundation provides "technical advice or assistance . . . to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be." 26 U.S.C. § 4945(e)(2).

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[5] In addition to lobbying, taxable expenditures include expenditures "for any purpose other than one specified in section 170(c)(2)(B)." 26 U.S.C. § 4945(d)(5). Section 170(c)(2)(B) defines charitable organizations as entities "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals." The Tax Court relied on section 4945(d)(5) as an alternative basis for the tax assessment in this case. Amici address this portion of the Tax Court's decision in Part III of

The Committee Reports for the 1969 private foundation provisions provide little elaboration concerning the restriction on lobbying by foundations except in one important respect. Each of the relevant reports makes clear that the new restriction was not intended to be applied in a manner that would prevent discussion and comment by private foundations on broad issues of policy such as social and economic issues. Thus, the House Report states that section 4945(e) "does not extend to discussions of broad policy problems and issues with such [legislative] members or employees." H.R. REP. NO. 91-413, at 222 (1969). The Senate Report states the provision was not intended to prevent foundation discussions of "policy problems, social or economic issues, and other broad issues where such activities would be considered educational under existing law." S. REP. NO. 91-552, at 455 (1969). And the Conference Report states that the provision "is not intended to prevent the examination of broad social, economic, and similar problems of the type the Government could be expected to deal with ultimately, even though this would not permit lobbying on matters which have been proposed for legislative action." H.R. REP. NO. 91-782, at 648 (1969) (Conf. Rep.).

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the argument.

The limiting language in the Congressional reports was included in the final regulations governing lobbying by private foundations when they were issued in 1972:

> Expenditures for examinations and discussions of broad social, economic, and similar problems are not taxable even if the problems are of the type with which government would be expected to deal ultimately. Thus, the term 'any attempt to influence any legislation' does not include public discussion, or communications with members of legislative bodies or governmental employees, the general subject of which is also the subject of legislation before a legislative body, so long as such discussion does not address itself to the merits of a specific legislative proposal.

See Propaganda Influencing Legislation, 37 Fed. Reg. 23,161, 23,167 (Oct. 31, 1972) (to be codified at 26 C.F.R. § 53.4945-2(d)(4)). Also, as discussed below in Part I Section D, similar limiting language was subsequently added to the regulations governing lobbying by public charities.

C. The Expenditure Test for Public Charities - IRC Sections 501(h) and 4911

While the 1969 amendments addressed the rules pertaining to lobbying activities by private foundations, the lobbying activities of other organizations exempt under IRC section 501(c)(3), so-called public charities,[6] continued to be subject to the vague and subjective "no substantial part" test. In the Tax Reform

[6] Despite their name, "community foundations" - many of whom are members of Amicus Council on Foundations - are classified as public charities because they receive their support from a broad range of donors.

Act of 1976, however, Congress enacted an alternative to the test set out in section 501(c)(3), *see* IRC §§ 501(h) and 4911, in order to reduce the uncertainty caused by the existing rules. The Joint Committee on Taxation, in its General Explanation of the Tax Reform Act of 1976, explains the reasons for the enactment of these new statutes:

> The language of the lobbying provision was first enacted in 1934. Since that time neither Treasury regulations nor court decisions have given enough detailed meaning to the statutory language to permit most charitable organizations to know approximately where the limits are between what is permitted by the statute and what is forbidden by it. This vagueness is, in large part, a function of the uncertainty in the meaning of the terms "substantial part" and "activities." Many believed that the standards as to the permissible level of activities under present law are too vague and thereby tend to encourage subjective and selective enforcement.

JOINT COMM. ON TAXATION, *General Explanation of the Tax Reform Act of 1976*, *in* IRS CUMULATIVE BULLETIN 1976-3, vol. 2, at 419–420 (1976).

Under sections 501(h) and 4911, public charities (other than churches) may elect to have their lobbying activities regulated under an alternative expenditure test that differs from the test set forth in IRC section 501(c)(3) in a number of significant ways aimed at reducing the uncertainty under the prior law.[7] First, the amount of lobbying that may be undertaken by a charity is measured solely by its

[7] Public charities that are ineligible to make the election, such as churches, or that do not do so, remain covered by the "no substantial part" test.

expenditures, unlike under the "no substantial part" test in which activity of volunteers or the amount of time spent by an organization's officials and staff are included in determining whether an organization had engaged in excessive lobbying. Second, the amount of lobbying expenditures that may be made by an electing organization is precisely determined based on a sliding-percentage of the organization's overall expenditures in furtherance of its exempt purposes, rather than by the undefined notion of "substantiality."[8] IRC § 4911(c). Third, in most cases, a charity that exceeds its lobbying limits is subject to an excise tax on its excess lobbying expenditures; except under extreme circumstances, the charity will not lose its tax exempt status[9] - the only sanction available under the "no

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[8] Under the expenditure test, the extent of an organization's non-taxable lobbying activity is measured under the following sliding scale based upon the organization's total expenditures for exempt purposes:

If the exempt purpose expenditures are:	**The lobbying nontaxable amount is:**
≤ $500,000	20% of the exempt purpose expenditures
>$500,00 but ≤ $1,000,000	$100,000 plus 15% of the excess of exempt purpose expenditures over $500,000.
> $1,000,000 but ≤ $1,500,000	$175,000 plus 10% of the excess of exempt purpose expenditures over $1,000,000.
>$1,500,000	$225,000 plus 5% of the exempt purpose expenditures over $1,500,000.

A separate limit on grassroots lobbying is calculated as 25% of the total lobbying non-taxable amount.

[9] Under the expenditure test, an organization may lose its tax-exempt status

substantial part" test. IRC § 501(h)(1).

While the 1976 amendments do not apply directly to private foundations such as the Taxpayer in this case, it is important to recognize that the issues raised here will impact the lobbying activities of electing public charities, because, as explained in the next section, the IRS applies the same definitions of lobbying activity to public charities and private foundations.

D. The 1990 Lobbying Regulations

Although the expenditure test for electing public charities was enacted in 1976, the IRS did not propose implementing regulations until 1986, *see* Lobbying by Public Charities; Lobbying by Private Foundations, Notice of Proposed Rulemaking, 51 Fed. Reg. 40,211 (Nov. 5, 1986) (hereinafter "1986 NPRM"); and, due to numerous objections to the original proposal,[10] it took until 1990 before final regulations were adopted. *See* Lobbying by Public Charities; Lobbying by Private Foundations, 55 Fed. Reg. 35,579 (Aug. 31, 1990). Several

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only if over a four-year period its lobbying expenditures or its grassroots lobbying expenditures exceed its limits by an average of more than 150%. 26 U.S.C. §§ 501(h)(1), (2).

[10] For a detailed discussion of the 1990 regulations written by their principal drafters at the IRS, *see* James J. McGovern, Paul G. Accetura & Jerome P. Walsh Skelly, *The Revised Lobbying Regulations, A Difficult Balance*, 41 TAX NOTES 1426, 1428 (Dec. 26, 1988); James J. McGovern, Paul G. Accetura & Jerome P. Walsh Skelly, *The Final Lobbying Regulations: A Challenge for Both the IRS and Charities*, 48 TAX NOTES 1305, 1306 (Sept. 3, 1990).

of these regulations bear on the issues presented in this case.

First, while the 1976 statutory language defining covered lobbying expenditures continued to be broad, the 1990 regulations provide a more detailed definition by stating that a communication is neither a direct lobbying communication nor a grassroots lobbying communication unless it "refers to" specific legislation and "reflects a view on" that specific legislation. 26 C.F.R. § 56.4911-2(b).

Second, while the proposed regulations treated attempts to influence the outcome of a voter referendum or voter initiative as grassroots lobbying, *see* Lobbying by Public Charities; Lobbying by Private Foundations, Notice of Proposed Rulemaking, 53 Fed. Reg. 51,826, 51,837 (Dec. 23, 1988) (hereinafter "1988 NPRM"), the final regulations provide that attempts to influence referenda and ballot initiatives are considered direct lobbying expenditures, *see* 26 C.F.R. § 56.4911-2(b). As noted by the Tax Court, in making this change, the regulations incorporate into the ballot measure context the regulation's definition of direct lobbying, rather than the definition of grassroots lobbying which requires a call-to-action.[11] *See* ER 50–52. Thus, while under the final regulations attempts to

[11] A call to action, which may take several forms spelled out in the regulations, is a message that generally encourages a member of the public to contact a legislator or other government official in order to influence legislation. *See* 26 C.F.R. § 56.4911-2(b)(2)(iii). The addition of this element to the

influence ballot measures were placed under the more generous limit on direct lobbying, they were at the same time subject to a much broader definition of lobbying than would have been the case if they continued to be treated as grassroots lobbying.

Third, the final 1990 regulations restated the exception for "[e]xaminations and discussions of broad social, economic, and similar problems" that first appeared in the private foundation regulations in 1972. 26 C.F.R. § 56.4911-2(c)(2). Moreover, the regulations continue:

> lobbying communications do not include public discussion, or communications with members of legislative bodies or governmental employees, the general subject of which is also the subject of legislation before a legislative body, so long as such discussion does not address itself to the merits of a specific legislative proposal and so long as such discussion does not directly encourage recipients to take action with respect to legislation.

Id.

Fourth, in order to ensure consistency between the similar schemes for lobbying by electing public charities and private foundations, the final

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definition of grassroots lobbying was made in the 1988 NPRM in response to objections that the definition in the 1986 NPRM would have unduly limited the ability of tax-exempt organizations to participate in public policy. *See* McGovern, Accetura & Walsh Skelly, *The Revised Lobbying Regulations, A Difficult Balance*, *supra* note 10, at 1428. The drafters of the 1988 regulation pointed out that adding the call to action element results in a less restrictive provision than is provided in the statute and is intended to strike a balance between the statutory limitation and the desire of charities to engage in

regulations amended the rules governing the excise tax on private foundation lobbying to incorporate the definitions of direct and grassroots lobbying communications from the public charity regulations as well as other provisions defining exceptions to these definitions. 26 C.F.R. § 53.4945-2(a)(1). As a result of this provision, the broad interpretation given by the Tax Court in this case to terms such as "refer to" and "reflect a view on" will necessarily impact not only the rules governing foundation lobbying but the rules for electing public charities that engage in both direct and grassroots lobbying, including attempts to influence the outcome of ballot measures.

II. The Tax Court's Decision Should be Reversed on the Ground that the Tax Court Applied a Legally Erroneous Construction of the Applicable IRC Provisions.

Under the regulations, the radio messages disseminated by the Parks Foundation constitute a taxable attempt to influence legislation only if they "refer to" and "reflect a view on" specific legislation or, in this case, a ballot measure. In applying this definition, the Tax Court relied on an overly broad interpretation of these terms, which is not supported in the legislative history or regulations.

A. The Tax Court's Test for Determining Whether a Communication "Refers To" Specific Legislation Will Add Uncertainty to the Lobbying Rules for Private Foundations and Public Charities and Will Crimp the Ability of Foundations and Charities to Engage in Discussions of Public Policy.

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policymaking. *Id.*

The Tax Court correctly recognized that "refer to" is not defined in the regulations. Excerpts of Record (hereinafter "ER") at 55. Instead, extrapolating from several examples in the 1990 regulations governing grassroots lobbying by public charities, the Tax Court created its own test for determining whether communications "refer to" a ballot measure: "we hold that a communication 'refers to' a ballot measure within the meaning of the regulations if it either refers to the measure by name or, without naming it, employs terms widely used in connection with the measure or describes the content or effect of the measure." ER 56–57. While the first element of the Tax Court's test - a reference to specific legislation by name - is surely correct, the other elements go well beyond the examples in the regulations and, contrary to Congressional intent, will introduce a high degree of uncertainty into the rules. Moreover, contrary to the regulations themselves, the Tax Court's test will significantly impede the ability of private foundations and public charities to engage in discussions of social and economic policies whenever legislation or a ballot measure is pending that addresses the same topic.

In the view of Amici, a communication which does not refer to specific legislation by its official title, proposition number (e.g. "Prop 12"), or bill number (e.g. "H.R. 2146"), nevertheless may under the regulations be regarded as

referring to legislation if it uses terminology which is commonly used and understood by the public *to identify the legislation in question*. Example 1 in the regulations cited by the Tax Court thus states that a reference to the "President's plan for a drug-free America" refers to legislation proposed by the President to establish a drug control program. ER 55. Other examples of this concept easily come to mind: "the Smith amendment," "the Jones proposal," "the GOP tax bill," and "the climate change initiative" all explicitly identify legislation in a manner that would be understood by recipients of the communication as referring to a specific piece of proposed or introduced legislation or to a specific ballot measure.

The Tax Court's test, however, goes well beyond these examples when it states that a communication refers to specific legislation when it "employs terms widely used in connection with the measure or describes the content or effect of the measure." ER 57. Thus, Example 4 in the regulations, also cited by the Tax Court, holds that the statement "I support a drug-free America" does *not* refer to specific legislation even where there are pending proposals regarding drug issues. The difference between Example 1 (as well as each of our hypothetical descriptions) and Example 4 is that while Example 1 refers explicitly to the President's "plan," Example 4 addresses a policy issue which could be (or is) the subject of legislation without referring to any plan, proposal, amendment, or

legislation at all. Merely using the same "commonly used terms" in talking about an issue or addressing the same general topic as pending legislation, as set forth in the Tax Court's test for determining whether a communication refers to legislation, is not the same as referring to the legislation itself, and would make it virtually impossible for a foundation or charity to know in advance whether its communications on policy issues will later be found to qualify as lobbying. Moreover, the Tax Court's broad test would significantly hamper the ability of private foundations and public charities to engage in policy discussions as intended by Congress and explicitly protected in the regulations.

The Tax Court's analysis of several of the Parks Foundation radio ads demonstrates how far the Court's test deviates from the examples in the regulations and introduces uncertainty into the determination of whether a communication "refers to" specific legislation. For example, relying on the "commonly used terms" element of its test, the Tax Court found that the 1997 radio message concerning the Oregon prisoner work program referred to Measure 49 because "the use of various iterations of the term 'prison inmate work program' in the explanatory statement for Measure 49 demonstrates that those and similar terms had been widely used in connection with Measure 49 at the time the radio message was broadcast." ER 57. In addition, relying on the "content or effect" element of its test, the Court determined, again on the basis of

the explanatory statement, that the radio message "described the general content of Measure 49" and therefore referred to that ballot measure. ER 58. However, referring to the "prison inmate work program" is not the same as referring to the "prison inmate work referendum," as is required under the examples in the regulations; and relying on the fact that the "general content" of the radio ad and the explanatory statement were the same would severely crimp the ability of private foundations and public charities to engage in discussions of social or economic issues in direct contravention of the regulations and Congressional intent, as set out above.

The Tax Court's application of its test to the two radio ads disseminated in 1998, "the subject of which was administrative rules," ER 59, is similarly inconsistent with the applicable regulations. Again, the Tax Court relied solely on the use of the term "administrative rules" in the explanatory statement for Measure 65 to "demonstrate[] that the term had been widely used in connection with Measure 65 at the time the radio messages were broadcast." ER 60. If addressing the general and broad subject of "administrative rules" turns a communication into a taxable lobbying expenditure, then the ability of private foundations and public charities to discuss broad issues of social and economic

policy would be severely hampered.[12]

Finally, the vagueness of the Tax Court's test is demonstrated by its treatment of the two radio ads in 2000 addressing the state's budget. Because the first such ad addressed the rate of growth of state government revenues as compared to the rate of personal income, "coupled with its reference to the fact that Oregonians would 'soon be asked' whether they wanted to slow down the growth of their State government," the Tax Court concluded that the first ad referred to Measure 8, ER 63; but it reached the opposite result concerning the second ad, which did not include the "will soon be asked" language, ER 64–65. In the Tax Court's view, the absence of this sentence "tips the balance" against a finding that the radio message was a lobbying communication, *id.*; rather, the ad "is more accurately characterized as direct criticism of the Oregon State government without a suggestion of a remedy. The message's central thrust is no longer advocacy for Measure 8 but instead an attack on the Oregon State government as wasteful and as retaliatory with respect to its critics," ER 65. The Tax Court did not explain how treating the second ad as advocacy rather than lobbying was consistent with its own test for determining whether an ad "refers

[12] Amici agree with the Tax Court that the June 1999 radio ads meet the "refers to" test because they describe the content and effect of "8 separate amendments" to be reapproved by the voters, even though the specific Measures are not named. ER 29, 61.

to" specific legislation since both ads discussed the same general content using the same "commonly used words." The Tax Court also did not attempt to rationalize this result with its treatment of the other communications discussed above. The absence of such an explanation suggests that the Tax Court itself recognized that its "refer to" test is overbroad and needs to be narrowed in order to conform to the regulations. At the very least, the Tax Court's decision on the second 2000 ad will add to the confusion and uncertainty caused by its treatment of the "refer to" issue in this case.

B. The Tax Court Erroneously Determined that the Parks Foundation Radio Ads "Reflect a View" on Specific Legislation.

Although the applicable regulations also do not contain a definition of when a communication "reflects a view" on specific legislation, the Tax Court did not attempt to create a test of its own for this element of the lobbying definition. Rather, it considered the language of each ad and then concluded, in cursory fashion, that the ad met this requirement. The Tax Court's conclusion that a number of the radio ads did in fact reflect a view on legislation, however, reflects an overly broad and erroneous view of the regulations and regulatory language.

The Tax Court's discussion of when specific ads "reflect a view" on the ballot measures involved in the case is extremely short with regard to each ad. It

determined, for example, that the 1997 radio ad addressing the subject of prisoner work programs reflected a view on Measure 49 solely because of "the radio message's emphatic endorsement of the desirability of prisoner work programs." ER 58. It determined that the two 1998 radio ads that referred to Measure 61 by name reflected a view on that ballot measure "because each posited that mandatory prison sentences for the crimes covered by Measure 61 would result in a reduction in crime in the same manner as had occurred after passage of an earlier measure . . . ." *Id.* And, it concluded that two other ads run in 1998 reflected a view on a series of ballot measures because the ads posed the rhetorical question "Who would be against this?" and suggested that only "The liberals and criminal defense lawyers" would be. ER 61. Finally, the Tax Court concluded that one of the 2000 radio ads addressing the state budget reflected a view on Measure 8 because it contended that State revenues grew at nearly three times the rate of growth of personal income was "a growth rate that any reasonable observer would likely think unsustainable." ER 63-64.[13]

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[13] The Tax Court did not address this issue with respect to the second 2000 radio addressing the budget because it concluded that the second ad amounted to permissible advocacy rather than lobbying. ER 64–65. There is no apparent reason, however, and the Tax Court did not provide one, why the reasoning applicable to the first 2000 ad would not apply equally to the second ad on the same general subject. This again raises the question how the Tax Court meant to distinguish the second 2000 ad from the other ads involved in the case. *See supra* at pp. 21–22.

Given the clear statement in the regulations that private foundations may discuss social and economic issues without restriction, 26 C.F.R. § 53.4945-2(d)(4), a determination that a communication reflects a view on specific legislation should require more than the fact that a message briefly indicates the potential effect of the legislation. It is virtually impossible to discuss the potential social or economic impact of a proposal without providing information that someone might view as positive or negative, depending on their point of view. Yet, this is exactly the kind of discussion that the regulations allow foundations (and public charities) to undertake. *Id.* Thus, the requirement that direct lobbying communications "reflect a view" on legislation must mean something more than briefly describing the potential impact of the measure in a way that could possibly affect the view of the listener. At the very least, in the view of Amici, a communication should not be found to reflect a view on specific legislation unless it plainly endorses passage or defeat of the legislation because of the impact it will have or the results it will produce.

III. The Tax Court Erroneously Concluded that the Parks Foundation Radio Ads are Taxable Expenditures Because They were for a Nonexempt Purpose.

As an alternative basis for the tax assessment, the IRS determined that the Parks Foundation radio ads between 1997 and 2000 were also taxable expenditures under IRC section 4945(d)(5) because they were not incurred for a

charitable purpose as defined in IRC section 170(c)(2)(B). ER 83–87. Exempt purposes described in IRC section 170(c)(2)(B) are religious, charitable, scientific, literary, and educational, as well as fostering amateur sports competition and preventing cruelty to children or animals. 26 U.S.C. § 170(c)(2)(B). In affirming the IRS's determination, the Tax Court applied an erroneous interpretation of IRC section 4945(d)(5) that should be rejected by this Court as a matter of law.

According to the Tax Court, the Parks Foundation claimed that the only exempt purpose served by its radio messages was "educational,"[14] ER 83, and because the Tax Court had previously determined that the radio ads did not

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[14] Assuming that the Tax Court's conclusion in this regard is correct, it should be noted that communications by private foundations may serve other tax exempt purposes directly without qualifying as educational. For example, a private foundation concerned with teenage smoking could sponsor a billboard or radio ad stating that "smoking is dangerous to your health" without any factual support or otherwise having to meet the definition of educational because the billboard or ad promotes health, an exempt purpose under the Code distinct from carrying on an educational program. Similarly, some of the ads in this case may properly be regarded as furthering the exempt purposes of promoting social welfare, lessening neighborhood tensions, eliminating prejudice and discrimination, or combatting community deterioration. *See* 26 C.F.R. § 1.501(c)(3)-1(d)(2) (defining "charitable"). If this Court should conclude, contrary to the Tax Court's position, that the Parks Foundation did not in fact limit its argument under IRC section 4945(d)(5) or that there is a substantial question in this regard, then the Court should remand the case for further proceedings to determine whether the radio ads at issue may have furthered another exempt purpose other than "educational."

satisfy the methodology test for determining whether an activity is educational, the ads necessarily constituted taxable nonexempt purpose expenditures as well.[15] *Id.* The Tax Court's analysis thus incorrectly assumed that in order to serve an educational exempt purpose under IRC section 4945(d)(1), every foundation expenditure must qualify as educational under the methodological test in its own right. This conclusion is inconsistent with the applicable regulations and unnecessarily restricts the ability of private foundations to undertake educational and other exempt activities.

Without qualifying as an educational message in its own right, an expenditure by a private foundation may still further the organization's overall charitable and educational purposes by raising funds to support its program, by encouraging the public to participate in its program, or, as in this case, by otherwise supporting and promoting that program. Consider, for example, the very common example of a radio ad sponsored by a private foundation which states that a particular problem is one of the most important issues facing society and then provides a website address where listeners may "obtain further

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[15] With respect to two of the Parks Foundation ads, the Tax Court had not previously determined whether the ads were educational and it therefore went on to address this question, finding that both ads were not educational. ER 84–87. As with the other ads, the Tax Court erroneously assumed that since the ads did not qualify as educational in their own right, they were automatically taxable expenditures under IRC section 4945(d)(5).

information" about the problem and what they can do about it. Assuming that the information on the website, or other information about the problem disseminated by the foundation, qualifies as charitable or educational, the expenditure for the radio ad itself is not taxable merely because standing alone it does not qualify as charitable or educational. And, the same would be true even if the ad did not explicitly refer listeners to another source of information.

The implementing regulations for IRC section 4945(d)(5) make this point clear when they provide that a foundation's reasonable administrative expenditures are not taxable under IRC section 4945(d)(5). 26 C.F.R. § 53.4945-6(b)(2). Administrative expenses such as for overhead do not further an organization's exempt purposes in their own right, but they nevertheless are not taxable because they indirectly support and promote the foundation's exempt purposes. Similarly, expenses to acquire investments will ordinarily not be treated as taxable expenditures if they are used to obtain income or funds to be used by the foundation to further its exempt purposes. *Id.* § 53.4945-6(b)(1). Under the Tax Court's approach, many communications by private foundations or public charities would not be considered to further tax exempt purposes even though, like administrative and investment expenditures, they support and promote the organization's overall exempt purposes.

CONCLUSION

For the reasons set forth above, the Tax Court's decision should be reversed on the ground that the Tax Court applied a legally erroneous construction of the applicable IRC provisions.

Respectfully submitted,

s/ Joseph W. Steinberg___
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Counsel for Amici Curiae
January 31, 2017

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s/ Joseph W. Steinberg___
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January 31, 2017