Both section 501(c)(3) public charities and section 501(c)(4) social welfare organizations face distinct constitutional tensions between the IRS’s regulation of their tax-exempt limitations and the U.S. Supreme Court’s interpretation of their First Amendment rights. This tension is perhaps most evident for “issue advocacy,” which is the term coined for nonprofits’ educational communications on public policy matters related to their tax-exempt goals.

The U.S. Supreme Court’s decisions on politically related speech should provide a critical safeguard against the IRS’s current overreaching. As the Court observed in its 1986 Massachusetts Right to Life decision, “Freedom of speech plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech ‘is the matrix, the indispensable condition, of nearly every form of freedom.’” As the Court further instructed, “[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on the speech that does not pose the danger that has prompted regulations.” More recently, as recognized by the Court in the landmark Citizens United case, the First Amendment prohibits the government from unduly interfering in the “marketplace of ideas,” particularly since “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”

The Supreme Court’s ruling in Federal Election Commission v. Wisconsin Right to Life, Inc. is particularly instructive in light of the IRS’s currently proposed regulations to restrict politically related activities of Section 501(c)(4) organizations. In that decision, the Court addressed the issue of whether a Section 501(c)(4) organization exceeded its legal limits by using corporate funds for an ad that encouraged listeners to contact their senators and oppose a filibuster. The ads aired within 30 days of a primary election, in violation of the Bipartisan Campaign Reform Act of 2002, which makes such violations punishable as a federal crime. The Court framed the issue as whether such communication was the “functional equivalent” of express advocacy, and therefore could be regulated. Rejecting such conclusion, the Court determined instead that governmental interests justifying regulation of political campaign speech, including its “functional equivalent,” did not apply to issue advocacy.

As the Court instructed, “Where the First Amendment is implicated, the tie goes to the speaker, not the censor.” Any test regarding politically oriented speech thus should “reflect[] our profound national commitment to the principle that debate on public issues
should be uninhibited, robust, and wide-open.” On this basis, the Court applied the high-level “strict scrutiny” constitutional test, requiring the government to show that regulation of speech in this case furthered a “compelling governmental interest” and was “narrowly tailored to achieve that interest.” In doing so, the Court specifically rejected any “intent-based,” subjective test based on factors such as timing and relevance of the issues to the election at hand. As the Court warned, “[f]ar from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad . . . , on the theory that the speaker actually intended to affect an election.”

Instead, the Court imposed an objective test that affirmed broad freedom of expression: “[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” Accordingly, the Court instructed that the focus should be on the substance of the communication at issue, not “amorphous considerations of intent and effect.” In doing so, the Court specifically rejected “the open-ended rough-and-tumble of factors that could invite complex arguments.” Furthermore, the Court held that any information about the speech’s context is constitutionally irrelevant, such as its timing in relation to any election or the speech’s relevance to election issues.

Applying these considerations, the Court concluded the speech was not “express advocacy” that would be subject to regulation, but rather constitutionally protected “issue advocacy.” First, the content was consistent with genuine issue advocacy, focusing on a legislative issue, taking a position, exhorting the public to adopt such position, and urging the public to contact public officials about it. Second, the content lacked any indicia of express advocacy: there was neither any mention of any election, candidacy, political party, or challenger, nor any position expressed about a candidate’s character, qualifications, or fitness for office. The Court noted that an appeal to contact one’s elected representative does not amount to the functional equivalent of express advocacy. As the Court further instructed, “Issue advocacy conveys information and educates. An issue ad’s impact on an election, if it exists at all, will come only after the voters hear the information and choose – uninvited by the ad – to factor it into their voting decision.”

The Court concluded by holding that no “compelling government interest” existed that was sufficient to pass constitutional muster to disqualify issue advocacy speech. In doing so, the Court specifically rejected the applicability of any bright-line test as being constitutionally appropriate under the requisite strict scrutiny test: “[T]he desire for a bright-line rule . . . hardly constitutes the compelling state interest necessary to justify any infringement on First Amendment freedom.”

Judging from its recently proposed regulations, the IRS appears to be tone-deaf to the sound of Supreme Court’s instructions as supreme arbiter of constitutional protections. Despite its ostensible interest in “clarity,” the IRS’s approach clashes instead with Section 501(c)(4) organizations’ constitutionally recognized First Amendment rights and, indeed, the rule of law. Rather than applying Supreme Court’s “tie goes to the
speaker, not the censor” approach, the IRS continues to use a content-based “facts and circumstances” test that allows for too much discretion – and therefore abuse. Taken together with the IRS’s limited resources that keep it from effectively and appropriately parsing through speech-related issues of constitutional dimension, the IRS’s approach is highly problematic.

Given the specter of losing (or not getting) tax-exempt status as a result of IRS scrutiny, the inevitable logical result is that nonprofit organizations will err on the side of not engaging in potentially controversial activities. The upshot is that speech is chilled, applications are delayed, and – as our country recently learned all too clearly - the IRS is allowed to abuse its discretion. If the IRS is truly interested in a bright-line test and clarity as it claims, then it should comply with the U.S. Supreme Court’s directive to let the proverbial tie go to the speaker, not the censor. In the meantime, nonprofit organizations should minimize restricted activities, like political campaign activity and lobbying, while continuing to appeal to broader interests and considerations such as moral, spiritual, and philosophical dimensions and non-political solutions.