

September 27, 2012

Hon. Douglas H. Shulman
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Lois Lerner
Director of the Exempt Organizations Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Crossroads GPS

Dear Commissioner Shulman and Director Lerner:

Democracy 21 and the Campaign Legal Center have written to you on multiple occasions seeking an investigation by the IRS into whether four organizations—Crossroads GPS, Priorities USA, American Action Network and Americans Elect—are improperly claiming status as a “social welfare” organizations under section 501(c)(4) of the tax code.

Our first letter challenging the claim by Crossroads GPS to tax-exempt status as a “social welfare” organization was sent to the IRS nearly two years ago, on October 5, 2010. We have subsequently sent eight letters to you regarding Crossroads GPS and the other organizations. (These letters are dated July 27, 2011, September 28, 2011, December 14, 2011, March 9, 2012, March 22, 2012, April 17, 2012, May 24, 2012 and July 23, 2012.)

We believe the facts we have presented to you in our letters make clear that each of these organizations is, to put it simply, a campaign operation—an organization whose overwhelming focus and purpose has been to elect and/or defeat candidates in the 2012 elections. Because the primary purpose of each of these organizations is to participate or intervene in candidate elections, these organizations are not, and should not be permitted to claim status as, “social welfare” organizations under section 501(c)(4).

There is a serious and continuing harm in the failure of the IRS to enforce the law. If these groups were registered as “political organizations” under section 527 of the tax code, they would be required to disclose their donors of \$200 or more and the public would be able to scrutinize the sources of money they are using to fund their campaign activities. 26 U.S.C. § 527(j). But as purported “social welfare” organizations, these groups are not required to publicly disclose their donors, and can therefore spend millions of dollars on efforts to influence the 2012 elections while hiding their donors from the American people.

In recent letters to the IRS, Senator Carl Levin (D-MI) has raised appropriate concerns about the agency’s lack of enforcement of the rules governing section 501(c)(4) status. As Senator Levin pertinently noted, “I find it unacceptable that the IRS appears to be passively standing by while organizations that hold themselves out to be ‘social welfare’ organizations clearly ignore the tax code with no apparent consequences.”¹

We strongly agree.

The purpose of this letter is to provide additional information to document that Crossroads GPS is an organization with an overriding purpose to influence candidate elections, and is accordingly not entitled to tax-exempt status as a section 501(c)(4) “social welfare” organization. In addition, this letter raises as a second ground for denying tax-exempt status the fact that Crossroads GPS also fails to meet the applicable legal test under the “private benefit” doctrine because it serves private political interests, not public “social welfare” interests.

Crossroads GPS reported in its Form 990s filed with the IRS for 2010 and 2011 that it received 24 separate donations of \$1 million or more in 2010 and 2011—the largest being two single donations of \$10 million. But the organization did not disclose the identity of any of these donors. As one published report stated, “In its first 18 months, Crossroads GPS raised \$67 million of its total \$77 million from as few as 16 rich donors.”² Undoubtedly, Crossroads GPS has received more such contributions this year.

There is little question that these million dollar donors are funding the campaign ads being sponsored by Crossroads GPS, yet the identity of these donors is hidden from the public by the fact that they have funneled their money through a group improperly claiming status under section 501(c)(4). This is an abuse of the tax laws, in service of evading the bedrock principle that money spent to influence federal elections should be subject to public disclosure.

The evidence we have presented to the IRS shows that Crossroads GPS is being operated “for the substantial nonexempt purpose of benefiting the private interests of Republican Party entities and candidates.” *See American Campaign Academy v. Commissioner*, 92 T.C. 1053 (1989). Under these circumstances, Crossroads GPS is not entitled to section 501(c)(4) tax-

¹ Letter of August 31, 2012 from Senator Carl Levin to The Honorable Daniel H. Shulman, Commissioner, Internal Revenue Service.

² S.V. Date, “Rove’s Crossroads GPS Gets Explicit In Anti-Obama Air War,” *NPR* (Sept. 12, 2012).

exempt status under the “private benefit” doctrine because it is an organization created and operated to serve private political interests, not public “social welfare” purposes.

Crossroads GPS and its sister Super PAC organization, American Crossroads, were established in the summer of 2010, and were conceived and founded by Karl Rove and Ed Gillespie. Crossroads GPS was created shortly after American Crossroads in order for donors to be able to provide funds anonymously to influence federal elections.

Karl Rove is the leading Republican Party political operative in the country. Rove was the chief political adviser to President George W. Bush for his eight years in office.

Ed Gillespie was named a counselor to the Romney campaign in April 2012 and serves as a senior adviser for the Romney presidential campaign. Gillespie is a former Chairman of the Republican National Committee and served as a counselor to President George W. Bush in 2007 and 2008. In 2010, Gillespie was named chairman of the Republican State Leadership Committee, which helps elect state attorneys general, lieutenant governors, secretaries of state and house and senate candidates across the country.

The evidence clearly indicates that Crossroads GPS (along with American Crossroads) was founded by Rove and Gillespie to carry out their private political interests in electing Republicans and defeating Democrats, and not to engage in public “social welfare” activities. The organization’s operations have furthered these private political interests.

Karl Rove recently confirmed publicly that Crossroads GPS is a political operation and that its activities are intended to elect Republicans and defeat Democrats. In an op-ed article published in *The Wall Street Journal* (August 1, 2012) (emphasis added), Rove said:

Roughly \$111 million of Mr. Obama’s ad blitz was paid for by his campaign; outside groups chipped in just over \$20 million. The Romney campaign spent only \$42 million over the same period in response, with \$107.4 million more in ads attacking Mr. Obama’s policies or boosting Mr. Romney coming from outside groups (with Crossroads GPS, a group I helped found, providing over half).

Rove thus stated that in response to an “ad blitz” by President Obama’s reelection campaign and supportive Democratic outside groups, Crossroads GPS spent more than \$53 million on ads “attacking Mr. Obama’s policies or boosting Mr. Romney.” This blunt statement by Rove un masks the fact that Crossroads GPS is a campaign operation and makes clear that the ads run by Crossroads GPS about Obama and Romney are campaign ads.

This unambiguously partisan political activity clearly falls within the standard set forth by the IRS in a ruling denying section 501(c)(4) tax-exempt status to an organization that was “not operated primarily to promote social welfare because your activities are conducted primarily for the benefit of a political party and a private group of individuals, rather than the community as a whole.” Final Determination Letter, Number 201128032 (April 4, 2011).

In that matter, the IRS concluded that “an organization which conducts its educational activities to benefit a political party and its candidates serves private interests. And . . . an organization that primarily serves private interests fails to qualify for exemption under section 501(c)(4).” *Id.* at 6 (citing *American Campaign Academy*). The IRS concluded in that matter:

In summary, you are not operated primarily to promote social welfare because your activities are conducted primarily for the benefit of a political party and a private group of individuals, rather than the community as a whole. Accordingly, you do not qualify for exemption as an organization described in section 501(c)(4) of the Code and you must file federal income tax returns.

Id.; see also Determination Letter 201221028 (March 2, 2012) (“Educational activities undertaken to provide a partisan benefit are considered to serve private interests, rather than the common good.”); Determination Letter, Number 201224034 (March 21, 2012) (same).

The information we are submitting here, as well as the information we have submitted in our past letters to the IRS, also shows that the overriding, if not exclusive, purpose of Crossroads GPS is to influence candidate elections and that it is engaged primarily in campaign activities. Under these circumstances, Crossroads GPS does not have a primary purpose of conducting “social welfare” activities and is therefore not entitled to tax-exempt status as a section 501(c)(4) organization.

There can be no doubt that Crossroads GPS is engaging in massive spending on television ads that have the purpose and effect of influencing the 2012 elections, and thereby constitute participation or intervention in the campaign.

The apparent basis for the claim by Crossroads GPS that it is entitled to tax status as a “social welfare” organization is its assertion that its ads are “issue” ads, not campaign ads, because the ads do not contain “express advocacy.”³ As one recent press report stated, “For

³ Ironically, Crossroads GPS did switch to “express advocacy” ads for a short period in order to avoid disclosure of its donors under the campaign finance laws. In a March 2012 ruling, a federal district court invalidated an FEC regulation which limited disclosure of donors to groups that make “electioneering communications” (*i.e.*, ads that are proximate in time to an election but do not contain express advocacy). This ruling required donor disclosure by groups sponsoring electioneering communications, but not for independent expenditures (*i.e.*, ads that do contain express advocacy and are subject to a different FEC disclosure regulation). In order to avoid disclosure once its ads were within the electioneering communications time frame, Crossroads GPS and other section 501(c)(4) groups began adding express advocacy to their ads in early September, so those ads became independent expenditures rather than electioneering communications. K. Doyle, “D.C. Circuit Revives FEC Rule Allowing Political Ad Sponsors to Avoid Disclosure,” *BNA Money and Politics Report* (Sept. 19, 2012) (“One paradoxical result was that groups previously sponsoring ‘issue ads’ began sponsoring messages that explicitly call for votes for or against candidates. The reporting rules for such ‘independent expenditure’ messages were not affected by the Van Hollen litigation and continued to allow ad sponsors to keep donors secret. The groups switching from electioneering communications to independent expenditures include such high-profile, GOP-leaning organizations as U.S. Chamber of Commerce, Americans for Prosperity, and Crossroads GPS. . . .”). The Court of Appeals for the D. C. Circuit reversed the district

months, the tax-exempt Crossroads GPS has argued that its anti-Obama ads were merely issue ads and not political ads.”⁴ The same story stated, “Crossroads GPS spent more than \$50 million on ads attacking President Obama this spring and summer. But its officers do not believe those count as political activity because they did not tell viewers to vote against Obama.” *Id.* (emphasis added).

As noted above, however, Karl Rove has publicly confirmed that more than \$53 million in ads run by Crossroads GPS are campaign ads run in response to President Obama’s “ad blitz.”

Furthermore, it is a flat misstatement of the law to claim that ads are “issue” ads, and not campaign ads, simply because the ads do not contain “express advocacy.” The IRS has made clear in rulings that “express advocacy” is not required for a group’s spending to count as intervention or participation in a campaign for purposes of assessing a group’s eligibility for exempt status under section 501(c)(4). A recent report by the Congressional Research Service summarized the law as it applies to 501(c)(4) organizations:

Clearly, any advertisement that expressly endorses or opposes a candidate is campaign activity. It is also clear that there is no rule that campaign intervention occurs only when an organization expressly advocates for or against a candidate.⁵

Instead, the IRS has set forth in two Revenue Rulings the “facts and circumstances” that the agency takes into consideration in determining whether an ad constitutes intervention or participation in a campaign, even if the ad does not contain “express advocacy.”

Revenue Ruling 2004-6, 2004-1 C.B. 328, explains that, because section 501(c)(4) public policy advocacy “may involve discussion of the positions of public officials who are candidates for public office, a public policy advocacy communication may constitute an exempt function (a political activity) within the meaning of § 527(e)(2).” Rev. Rul. 2004-6 at 1. The Ruling states:

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

court ruling earlier this month. *Center for Individual Freedom v. Van Hollen*, ___ F.3d ___, 2012 WL 4075293 (D.C. Cir. Sept. 18, 2012) reversing *Van Hollen v. FEC*, 851 F.Supp. 2d 69 (D.D.C. 2012).

⁴ S.V. Date, “Rove’s Crossroads GPS Gets Explicit In Anti-Obama Air War,” *NPR* (Sept. 12, 2012).

⁵ E. Lunder, “R42684: Political Ads: Issue Advocacy or Campaign Activity Under the Tax Code,” *Congressional Research Service* (Aug. 29, 2012).

to be considered to determine whether the expenditure is for an exempt function under § 527(e)(2).

Id. (emphasis added)

Rev. Rul. 2004-6 lists six factors that “tend to show” that an advertisement is “exempt function” political campaign activity, and five competing factors that “tend to show” that an advertisement is not. Rev. Rul. 2004-6 at 3-4. These factors are not in themselves dispositive. In the end, the regulations require a determination to be made based on “the facts and circumstances” of each advertisement.

The “factors that tend to show that an advocacy communication on a public policy issue is for an exempt function (political activity) under § 527(e)(2)” include the following:

- 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 at 3.

The “factors that tend to show that an advocacy communication on a public policy issue is not for an exempt function under § 527(e)(2)” include the following:

- 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.

Id.

Similarly, in Rev. Rul. 2007-41, 2007-1 C.B. 1421, the IRS stated that “[w]hether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case.” Rev. Rul. 2007-41 at 2. With regard to campaign ads, the Revenue Ruling states:

Even if a statement does not expressly tell an audience to vote for or against a specific candidate, an organization delivering the statement is at risk of violating the political campaign intervention prohibition if there is any message favoring or opposing a candidate. . . . All the facts and circumstances need to be considered to determine if the advocacy is political campaign intervention.

Id. at 6 (emphasis added). According to the Revenue Ruling, the factors relevant to this determination include:

- Whether the statement identifies one or more candidates for a given public office;
- Whether the statement expresses approval or disapproval for one or more candidates’ positions and/or actions;
- Whether the statement is delivered close in time to the election;
- Whether the statement makes reference to voting or an election;
- Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office;
- Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election; and
- Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.

Id. The Revenue Ruling notes, “A communication is particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election.” *Id.* at 7.

Under established IRS rulings, and with regard to the requirement that the group be primarily engaged in “social welfare activities,” the agency needs to examine the body of ads run by Crossroads GPS this year, to apply the standards laid out in the pertinent IRS Revenue Rulings, and to determine whether the ads run by Crossroads GPS constitute intervention or participation in candidate elections. Once the IRS has determined the extent to which Crossroads GPS has engaged in spending for ads to intervene or participate in candidate elections, the agency can then determine whether such campaign activities constitute its “primary purpose,” in violation of the permissible standard for “social welfare” organizations.

In order to assist the IRS in its task of determining the extent of non-social welfare activities being engaged in by Crossroads GPS, we have enclosed a transcript of each ad that has been aired by Crossroads GPS from January 1, 2012 through September 24, 2012. We believe that a review of these ads, and the circumstances related to where and when they have been run, will demonstrate that under the applicable IRS standards, these ads constitute intervention and participation in candidate elections.

For example, an ad entitled “Suffered,” that was run by Crossroads GPS on July 23, 2012, states:

Narrator: America has suffered three years of crushing unemployment. Remember this: Obama: “We’ll create nearly half a million jobs by investing in clean energy.”
Narrator: What really happened? Billions wasted on failed investments.
Thousands of Americans lost jobs. While stimulus money went to companies that created jobs overseas. Paid for by the \$4 billion Obama has added to our debt every day. Tell President Obama, for real job growth, cut the debt. Support the New Majority Agenda at newmajorityagenda.org.

This ad identifies President Obama and expresses strong disapproval for his positions on jobs and stimulus, two issues that distinguish the candidates in the election. This ad was run in this campaign season and was not related to any identified non-electoral event. Given these facts and circumstances, there is little doubt that this ad would constitute candidate campaign intervention and participation under the standards set forth in the Revenue Rulings discussed above.

The same is true for all of the other ads run by Crossroads GPS this year. For instance, an ad entitled “Basketball,” which began running on May 22, 2012, states:

Woman: “I always loved watching the kids play basketball. I still do, even though things have changed. It’s funny, they can’t find jobs to get their careers started and I can’t afford to retire and now we are all living together again. I supported President Obama because he spoke so beautifully. He promised

change, but things changed for the worse. Obama started spending like our credit cards have no limits. His health care law made health insurance even more expensive. We've had stimulus and bailouts. Obama added over \$16,000 in debts for every American. How will my kids pay that off when they can't even find jobs? Now, Obama wants more spending and taxes. That won't fix things. I had so many hopes. Cutting taxes and debt and creating jobs. That's the change we need. Tell President Obama to cut the job killing debt and support the new majority agenda at newmajorityagenda.org.

This ad, as well, identifies and criticizes President Obama on issues that are central to the presidential election—the health care law, the stimulus and the national debt. There is little doubt that this ad would constitute candidate campaign intervention under applicable IRS standards.

Almost all of the ads run by Crossroads GPS, furthermore, have been run in presidential battleground states and/or states involving contested Senate races. In a number of cases, the Crossroads GPS ads mention both President Obama and a Senate candidate in states that are both a presidential battleground state and a state with a contested Senate race.

Thus, for example, 47 of the 60 ads mention Obama and a Senate candidate, or just the Senate candidate. They include: eight ads that mention Virginia Democratic Senate candidate Tim Kaine, seven ads that mention Montana Democratic Senator Jon Tester, seven ads that mention Nevada Democratic Senate candidate, Representative Shelley Berkley, six ads that mention North Dakota Senate candidate Heidi Heitkamp, six ads that mention Ohio Democratic Senator Sherrod Brown, five ads that mention Missouri Democratic Senator Claire McCaskill, three ads that mention Wisconsin Senate Democratic candidate, Representative Tammy Baldwin, two ads that mentions Indiana Democratic Senate candidate, Joe Donnelly, two ads that mention New Mexico Democratic Senate candidate, Representative Martin Heinrich and one ad that mentions Florida Democratic Senator Bill Nelson.

The Senate races in Montana, Virginia, North Dakota, Nevada, Missouri, Ohio, Wisconsin, New Mexico, Florida and Indiana—the states where the Crossroads GPS ads mentioning Senate candidates have run—are all races that have been considered “in play” during the 2012 elections and have been viewed as key races in determining whether the Republicans can take control of the Senate in 2013.

The transcripts of the ads have been obtained by us from YouTube where Crossroads GPS posts its ads. We do not know how often each of these ads has run, but the IRS can and should obtain that information as part of reviewing the activities of Crossroads GPS to determine whether the group is eligible for section 501(c)(4) tax status.

We urge the IRS to review each of the attached ads, and to apply the agency's standards to determine whether the ads constitute candidate campaign intervention. If you find, as we believe you must, that all, or the overwhelming majority, of these ads are campaign ads, then the inescapable conclusion is that the primary purpose of Crossroads GPS is to participate or intervene in the 2012 elections. As such, its claim to status as a “social welfare” organization

under section 501(c)(4) is not in compliance with the tax laws. Similarly, the IRS should find that the “private benefit” doctrine disqualifies Crossroads GPS for tax-exempt status under section 501(c)(4).

The IRS should act expeditiously in examining these ads, in denying Crossroads GPS tax-exempt status and in imposing appropriate penalties on the organization. The IRS should also act expeditiously in addressing the information we have presented in our prior letters with regard to Priorities USA, American Action Network and Americans Elect, and similarly should deny tax exempt status to those groups and impose appropriate penalties.

Crossroads GPS is engaged in a massive scheme to serve as a black box conduit to mask the sources of tens of millions of dollars flowing into the 2012 elections. We believe that Crossroads GPS is blatantly abusing the non-profit tax laws to do so.

It is the responsibility of the IRS to stop this abuse. We urge you to do so promptly.

Sincerely,

/s/ Gerald Hebert

/s/ Fred Wertheimer

J. Gerald Hebert
Executive Director
Campaign Legal Center

Fred Wertheimer
President
Democracy 21