Nos. 16-72572 & 16-73236

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PARKS FOUNDATION,

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

LOREN E. PARKS,

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

ON APPEALS FROM THE DECISIONS OF
THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

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GLOSSARY

Am. Br.	Brief filed in support of petitioners by amici Alliance for Justice and Council on Foundations
Code	Internal Revenue Code (26 U.S.C.)
ER	Excerpts of Record
Foundation	Petitioner Parks Foundation
IRS	Internal Revenue Service
Parks	Petitioner Loren E. Parks
Add.	Statutory and regulatory addendum attached to petitioners' opening brief
Br.	Opening brief filed by petitioners

STATEMENT OF THE ISSUES

1. Whether the Tax Court correctly determined that § 4945[1] and the related regulations, which impose viewpoint-neutral excise taxes on expenditures by private foundations that do not further exempt purposes, do not infringe First Amendment rights, with the result that the strict-scrutiny standard of review does not apply.

2. Whether the Tax Court correctly determined that the Parks Foundation is liable for the tax imposed by § 4945(a)(1) because its funding of certain advertisements constituted taxable expenditures under § 4945(d) and the related regulations.

3. Whether the Tax Court correctly determined that Loren E. Parks, the Foundation's manager, is liable for the tax imposed by § 4945(a)(2) because he failed to establish that in authorizing the expenditures, he relied on qualifying advice of counsel under Treasury Regulation § 53.4945-1(a)(2)(vi).

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[1] All "§" references are to the Internal Revenue Code (26 U.S.C.), as in effect during the years at issue.

STATEMENT OF THE CASE

A. Procedural overview

This case involves a constitutional challenge to excise taxes imposed by § 4945 and related Treasury regulations on the making of taxable expenditures by private foundations, a subset of organizations that are exempt from tax under § 501(c)(3) and donations to which are deductible by donors under § 170(c)(2)(B). *See* § 509(a). These excise taxes are designed to ensure that private foundations use their funds for exempt purposes, not for lobbying or other nonexempt purposes. Petitioners Parks Foundation (the Foundation), a private foundation, and its manager, Loren E. Parks (Parks), filed petitions in the Tax Court after the IRS determined that expenditures made by the Foundation (and authorized by Parks) for radio advertisements regarding certain Oregon ballot measures are taxable expenditures under § 4945. The court determined that all but one of the expenditures (*i.e.*, that for Advertisement 9)[2] are taxable, and upheld the Commissioner's deficiency determinations respecting those

[2] Like petitioners (Br. 5-8), we refer to the advertisements by number, starting with the earliest.

expenditures.[3] The court further determined that petitioners' constitutional arguments were misconceived because the challenged provisions do not prohibit speech, but only tax subsidies for that speech. Petitioners now appeal.

B. Background

This case concerns whether the Foundation and Parks are liable for excise taxes under § 4945 for amounts spent to produce and broadcast radio advertisements regarding various Oregon ballot measures. That question depends in turn on whether this activity was educational or, instead, constituted lobbying or other nonexempt activity. A brief overview of the law follows below.

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[3] The Commissioner does not dispute the Tax Court's finding that the expenditure for Advertisement 9 was not taxable, while petitioners have not challenged the court's determination that they failed to prove how much (if any) of its expenditures was allocable to that advertisement. (ER4-6.) Accordingly, except where the context requires, we generally confine our discussion to Advertisements 1-8 and 10, which remain in dispute.

The Tax Court also determined that petitioners owed second-tier excise taxes under § 4945(b)(1) and (2) because they had not corrected the taxable expenditures. (ER96-98.) Petitioners have not challenged the court's decision in this regard.

1. Organizations exempt from tax under § 501(c)(3)

Certain organizations are exempt from tax, and contributions to them are deductible by donors. §§ 170(c)(2)(B), 501(c)(3). To qualify for these benefits, the organization must (among other things) be organized and operated "exclusively" for certain delineated charitable purposes. *Id*. If an organization is organized or operated for other, nonexempt purposes, or engages in "substantial lobbying" or other restricted activities, it does not qualify for exemption, and contributions to it are not deductible. *Id*.

Section 501(c)(3) does not prohibit lobbying. Rather, like other provisions in the Internal Revenue Code that deny tax benefits for lobbying activities, that statute implements Congress's policy choice not to subsidize lobbying through tax benefits. *See* §§ 162(e), 501(c)(3), 4945(d)(1). The "restrictions on lobbying activities by charities reflect Congressional policies that the U.S. Treasury should be neutral in political affairs, and that substantial activities directed to attempts to influence legislation should not be subsidized through the tax benefits accorded to charitable organizations and their contributors." H.R. Rep. No. 100-391, at 1625 (1987).

It is fundamental that Congress's refusal to subsidize lobbying through tax benefits does not infringe the First Amendment to the Constitution. *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) (rejecting First Amendment challenge to § 501(c)(3)'s restriction on lobbying); *Cammarano v. United States*, 358 U.S. 498 (1959) (rejecting First Amendment challenge to Treasury regulations prohibiting deductions for lobbying expenses).

2. Regulation of private foundations

There are two types of § 501(c)(3) organizations — public charities, which (as the name suggests) are supported by the public, and private foundations, which are supported by a limited number of donors, frequently a single donor or family of donors. *See* § 509(a). This case concerns a private foundation and its sole donor.

"Because private foundations receive support from, and typically are controlled by, a small number of supporters, private foundations are subject to a number of anti-abuse rules and excise taxes not applicable to public charities," including § 4945 (described below). Joint Committee on Taxation, *Technical Explanation of H.R. 4*, JCX-38-06 at 352 (2006). The opportunity for abuse arises because donors can direct

their private foundations' funds for personal gain and tax avoidance without the "public scrutiny" faced by public charities. *Cockerline Memorial Fund v. Commissioner*, 86 T.C. 53, 65 (1986). For example, Congress prohibits taxpayers from deducting lobbying expenditures. § 162(e), 262. But if a taxpayer makes tax-deductible contributions to his private foundation, and then directs the foundation to spend those contributions on lobbying, he will have gained indirectly a tax benefit Congress sought to deny. Section 4945 is designed to eliminate this and similar abuses.

Congress enacted § 4945 in 1969 as part of an extensive and comprehensive effort "to curb widespread abuses by private foundations of their tax exempt status." *John Q. Shunk Ass'n, Inc. v. United States*, 626 F. Supp. 564, 567 (S.D. Ohio 1985). *See* Tax Reform Act of 1969, Pub. L. No. 91-172, § 101(b), 83 Stat. 487, 498-515 (codified at §§ 4940-4945). Section 4945 was designed to supplement the restrictions of § 501(c)(3) by requiring private foundations to pay excise taxes on any expenditure not serving an exempt purpose, including expenditures for lobbying or political activity. H.R. Rep. No. 91-413, at 33 (1969); S. Rep. No. 91-552, at 48 (1969).

Section 4945 imposes excise taxes on any amount expended by a foundation for an impermissible purpose, referred to as a "taxable expenditure." § 4945(a). As relevant here, § 4945 defines "taxable expenditure" to include amounts spent (i) "to carry on propaganda, or otherwise to attempt to influence legislation" ("lobbying"), or (ii) "for any purpose other than one specified in section 170(c)(2)(B)"[4] (a "nonexempt purpose"). § 4945(d)(1), (5). If a foundation makes a taxable expenditure, a "first-tier" tax equal to 10 percent of the expenditure is imposed on the foundation. § 4945(a)(1). If the foundation fails to correct the expenditure within the correction period, an additional, "second-tier" tax is imposed on it. § 4945(b)(1). If the foundation's manager knowingly made the taxable expenditure, then a first-tier tax of 2.5 percent of the expenditure (but capped at $5,000) is imposed on the manager. § 4945(a)(2). If the manager fails to correct the expenditure, then a second-tier tax is imposed. § 4945(b)(2).

[4] Section 170(c)(2)(B) lists the various purposes (*e.g.*, charitable, educational, and religious) that benefit the community and qualify organizations for exemption under § 501(c)(3) and receipt of tax-deductible contributions under § 170.

3. The meaning of "educational"

Among the organizations chosen by Congress to benefit from the tax subsidies described above are those organized and operated for "educational" purposes. §§ 170(c)(2)(B), 501(c)(3). The Code does not define "educational," leaving it to Treasury to define the term, consistent with Congressional intent that § 501(c)(3) organizations benefit the community. Treasury regulations define "educational" generally as relating to "instruction or training" on subjects useful and beneficial to the community. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (26 C.F.R.). Advocacy of a particular viewpoint, however, is deemed educational only if "it presents a sufficiently full and fair exposition of the pertinent facts." *Id.*

In 1980, however, the D.C. Circuit determined that the regulation's "full and fair exposition" standard was unconstitutionally vague. In the court's view, the standard lacked substantive criteria to clearly identify advocacy, creating "latitude for subjectivity" that had "seemingly resulted in selective application" of the standard to only "controversial" communications. *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1036-1037 (D.C. Cir. 1980).

In response, the IRS issued formal guidance, applicable to all advocacy communications, providing substantive criteria to identify communications that, due to the manner of presentation, cannot be considered "educational." Rev. Proc. 86-43, 1986-2 C.B. 729 (the "Methodology Test") (Add. 35-37). The Methodology Test lists the following four indicia that an organization's method of advocating its position is not educational (Add. 37):

- the presentation of the position is "unsupported by facts,"
- the facts that purport to support the position are "distorted,"
- the presentation makes "substantial use of inflammatory and disparaging terms" and expresses conclusions based more on "strong emotional feelings" than "objective evaluations," or
- the presentation is "not aimed at developing an understanding on the part of the intended audience."

Because the Methodology Test applies to all advocacy communications, not just controversial ones, and provides substantive criteria for determining which advocacy communications qualify as "educational," it has been held to be constitutionally sound. *See*

Nationalist Movement v. Commissioner, 102 T.C. 558, 588-589 (holding that the Methodology Test is "not unconstitutionally vague" on "its face" or "as applied"), *aff'd on other grounds*, 37 F.3d 216 (5th Cir. 1994); *cf. Nat'l Alliance v. United States*, 710 F.2d 868, 875 (D.C. Cir. 1983) (holding that an organization's activities were not "educational" without regard to the "Methodology Test," while noting approvingly that the "test reduces the vagueness found by the *Big Mama* decision").

C. The Foundation and its political advertisements

The Foundation was incorporated in 1977 by Parks and has been recognized by the IRS as a tax-exempt organization described in § 501(c)(3) since 1979. (ER12.) As a § 501(c)(3) organization, the Foundation is exempt from federal income tax and is eligible to receive tax-deductible contributions. §§ 170(c)(2)(B), 501(c)(3). Its sole contributor since its inception has been Parks. (ER12, 160.) According to its bylaws, the Foundation's primary purpose is promoting fishing, hunting, and alternative educational programs. (ER12-13.) During the years at issue (1997-2000), however, the Foundation's activities focused on the political initiative process in Oregon. (ER301.) Under that process, Oregon citizens have the right to propose statutes or

constitutional amendments by ballot measures and to enact or reject the measures in elections. (ER14.)

During 1997-2000, the Foundation (with Parks' approval) used over $600,000 of its funds to purchase ten advertisements that were broadcast on commercial radio stations in Oregon. (ER13, 161-162, 183.) The advertisements were brief, lasting 30 to 60 seconds each, and were created by the Clapper Agency, a company that produces and arranges for the broadcast of political advertisements. (ER13-14, 162.) The advertisements did not refer to the educational purposes for which the Foundation was formed. (ER18-38.) Instead, they referred to certain state-wide ballot measures that were being presented to Oregon voters. (ER57-65.) The advertisements were broadcast shortly before elections in which Oregonians were to vote on the measures. (ER14.) *See* ER162-183 (setting out the text of the advertisements and the official explanatory statements provided in the Voters Guides for the ballot measures).[5]

[5] The Oregon Secretary of State was required to prepare Voters Guides that contained an explanatory statement regarding each ballot measure in a given election. (ER14-15.) These statements were prepared through a process designed to ensure that they were impartial

During this same time period, the State of Oregon began to investigate the Foundation's political activities, including whether its purchase of the advertisements constituted taxable expenditures for Oregon state tax purposes. (ER287-288, 299-300.) Oregon's Attorney General was concerned because, as petitioners were advised by their tax counsel, some of the Foundation's expenditures "have clearly been outside the permitted limits" and were "not for a charitable purpose." (ER299.) In 2000, after an audit, the Oregon Justice Department sued the Foundation, claiming that its advertising expenditures were taxable under § 4945 and therefore violated Oregon law. (ER183.)

The IRS reached a similar conclusion. After an audit, it determined that the Foundation's expenditures for the advertisements were taxable expenditures under § 4945. (ER39-40.) Although the Foundation maintained that the expenditures were made for "educational purposes," the IRS determined that they were in fact made for other purposes and were either lobbying expenditures under § 4945(d)(1) or expenditures for nonexempt purposes under § 4945(d)(5).

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and understandable. (ER16-18.) The parties stipulated to, and relied on, these official descriptions of the ballot measures. (ER162-183.)

(ER284.) After Parks refused to make the requested corrections, he and the Foundation filed petitions in the Tax Court, challenging the deficiency notices, alleging that the expenditures are not taxable under § 4945. (ER318-321.) They later filed an amended petition that raised a constitutional challenge, alleging that § 4945 is unconstitutional "as applied" to the advertisements. (ER152.)

D. The Tax Court proceedings

The parties submitted these consolidated cases for decision without trial under Tax Court Rule 122 based on stipulated facts and exhibits. (ER11.) It was disputed whether the advertisements constituted lobbying under § 4945(d)(1) or served a nonexempt purpose under § 4945(d)(5), thereby incurring excise taxes on the sums paid for them.

Section 4945(d)(1) applies to two different types of lobbying: (i) attempts to influence legislation by communicating directly with legislators ("direct lobbying"), and (ii) attempts to influence legislation by communicating with the general public ("grass-roots lobbying"). § 4945(e); Treas. Reg. § 53.4945-2(a)(1) (incorporating Treas. Reg. § 56.4911-2). "Legislation" includes action "by the public" in a

"referendum" or "ballot initiative." Treas. Reg. § 56.4911-2(d)(1)(i). Where, as here, a ballot measure is concerned, "members of the general public" are treated as "legislators," and communications with them about such measures are treated as "direct," not "grass-roots," lobbying. Treas. Reg. § 56.4911-2(b)(1)(iii).

"Direct lobbying" is defined as a communication that "[r]efers to specific legislation" and "[r]eflects a view on such legislation," Treas. Reg. § 56.4911-2(b)(1)(ii)(A), (B), unless it "constitutes engaging in nonpartisan analysis, study or research and making available . . . the results of such work," Treas. Reg. § 53.4945-2(d)(1)(i). "Nonpartisan analysis" includes "any activity that is 'educational' within the meaning of § 1.501(c)(3)-1(d)(3)" and thus "may advocate a particular position or viewpoint so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public . . . to form an independent opinion. . . . [T]he mere presentation of unsupported opinion does not qualify as 'nonpartisan analysis, study or research." Treas. Reg. § 53.4945-2(d)(1)(ii). In determining whether a communication is nonpartisan (and educational) or partisan (and taxable), what matters is the method

used to communicate the viewpoint, rather than the viewpoint itself, as set out in the Methodology Test, described above (p. 9).

Petitioners did not deny that the advertisements reflected a view on any given ballot measure, and they acknowledged that each advertisement "take[s] a position." (ER138.) Nor did they dispute that the ballot measures were "specific legislation" under the regulations. (ER53 n.41.) Petitioners nevertheless argued that the Foundation is not liable for the § 4945(a)(1) excise tax for two factual reasons and one overarching constitutional reason. First, they argued that most of the advertisements could not be considered lobbying under § 4945(d)(1) because (except for Advertisements 2 and 3) they do not "refer to" specific legislation "by name." (ER54.) Second, they argued that all of the advertisements are "educational" so as to qualify for the nonpartisan-analysis exception to lobbying under § 4945(d)(1) or as furthering an exempt purpose under § 4945(d)(5). (ER67.) They contended that the advertisements satisfied the Methodology Test because they "do not contain any of the four items that would indicate they are not educational in nature." (ER140.) Finally, petitioners argued that § 4945 is subject to strict scrutiny and violates their First

Amendment rights unless narrowly construed as inapplicable to the advertisements. They also argued that the "statute and regulations defining 'refers to'" are "unconstitutionally vague as applied." (ER126.)

In response, the Commissioner argued that a lobbying communication can "refer to" specific legislation without identifying it by name. (ER54-55.) He further argued that the advertisements (i) are taxable expenditures under § 4945(d)(1) because they constitute direct lobbying rather than nonpartisan analysis, and (ii) are taxable expenditures under § 4945(d)(5) because none are educational, the only exempt purpose asserted by petitioners. Finally, the Commissioner argued that no First Amendment rights had been infringed, but Congress has merely refused to subsidize lobbying by private foundations.

1. The Foundation's liability under § 4945(a)(1)

a. Overview

The Tax Court determined that the expenditures for all the advertisements at issue on appeal are taxable. (ER87.) The Tax Court first addressed whether the advertisements are direct lobbying expenditures under § 4945(d)(1). The court agreed with the Commissioner that an advertisement could refer to specific legislation

without identifying it by name, so long as it employs terms widely used in connection with the legislation or describes its content or effect. (ER55-57.) The court found that Advertisements 1-7 refer to, and reflect a view on, specific legislation. (ER57-65.) The court rejected petitioners' argument that those advertisements qualify as "nonpartisan analysis" because (i) petitioners failed to submit any evidence that they engaged in, or were producing the results of, nonpartisan analysis (ER66), and, alternatively, (ii) the advertisements are not "educational" under the Methodology Test (ER70-82).

The Tax Court next addressed the Commissioner's alternative determination that all of the advertisements in issue on appeal are taxable expenditures under § 4945(d)(5) because they did not serve an exempt purpose. It rejected petitioners' argument that they were educational. (ER83.) The court accordingly determined that the Foundation was liable for excise tax deficiencies under § 4945(a)(1).

b. The court's findings regarding specific advertisements

Advertisement 1 (direct lobbying & non-educational). In 1997, the Foundation purchased one advertisement that was broadcast shortly before the public voted on Measure 49. (ER19.) The official

Voters Guide provided that Measure 49 modified the requirements for state-prison work programs that voters had enacted by constitutional amendment in 1994. (ER18-19.) According to that Guide, the Department of Corrections had shut down those work programs "[d]ue to a conflict between Oregon constitutional provisions and federal law." (ER19.) Measure 49 was to modify the State constitution to eliminate the conflict and allow the State to operate prison work programs that complied "with federal law." (ER19.) Advertisement 1 asserts that Oregon voters told politicians in 1994 that prisoners should be working 40 hours per week, but that the Oregon Governor and Attorney General had disregarded the voters by shutting down prison work programs. (ER19-20.)

The Tax Court determined that Advertisement 1 resulted in a taxable expenditure under § 4945(d)(1) and (5). It found that Advertisement 1 "refers to" Measure 49, although that measure is not specifically named, because it employs terms widely used in connection with, and describes the content of, that measure, and petitioners offered no evidence to support a contrary conclusion. (ER57-58.) The court further found that Advertisement 1 "reflects a view on" Measure 49,

because the measure would reinstate prison work programs, which the advertisement favors. (ER58.) Finally, the court rejected petitioners' argument that the advertisement qualifies for the nonpartisan-analysis exception (i) because the information contained in the advertisement was not the result of any analysis, study, or research (ER66), and, alternatively, (ii) because it failed the Methodology Test, in that it omitted and distorted the facts that led to the shutdown of Oregon's prison work programs and lacked any objective evaluation, relying instead on inflammatory and disparaging language. (ER71-72.)

Advertisements 2 and 3 (direct lobbying & non-educational). In 1998, the Foundation purchased two advertisements that were broadcast shortly before the vote on Measure 61. (ER20.) Measure 61 was to set minimum sentences for major crimes, and (according to the official Voters Guide) would cost $470 million for prison construction, plus additional amounts for operating costs and debt service. (ER21.) Both advertisements expressly refer to "Measure 61" and state that it would not "cost billions." (ER22-23.)

The Tax Court determined that Advertisements 2 and 3 resulted in taxable expenditures under § 4945(d)(1) and (5). The court found

that both advertisements "refer to" Measure 61 because they cite the measure by name. (ER59.) The court further found that these advertisements "reflect a view on" Measure 61 because they posit that mandatory prison sentences would reduce crime. (ER59.) Finally, the court found that Advertisements 2 and 3 do not qualify for the nonpartisan-analysis exception because (i) the information contained in the advertisements was not the result of any analysis, study, or research (ER66), and, alternatively, (ii) the advertisements failed the Methodology Test, because they distort the facts by suggesting that certain mandatory and additional prison sentences could be implemented without significant costs and omitting official estimates of the costs (ER72-75).

Advertisements 4 and 5 (direct lobbying & non-educational). In 1998, the Foundation also purchased two advertisements that were broadcast shortly before the vote on Measure 65. (ER24.) According to the official Voters Guide, Measure 65 was to amend the Oregon constitution to require state administrative rules to be reviewed and approved by the state legislature. (ER24.) Advertisements 4 and 5 each refers to "administrative rules," describes

(using one example) the negative impact such rules could have, and promises that "you're gonna hear a lot more about 'em in the weeks to come." (ER25-27.)

The Tax Court determined that Advertisements 4 and 5 resulted in taxable expenditures under § 4945(d)(1) and (5). It determined that both advertisements "refer to" Measure 65 because they use a term — "administrative rules" — that was widely used in connection with the measure at the time the advertisements were broadcast, and petitioners offered no evidence to the contrary. (ER60.) The court further found that Advertisements 4 and 5 "reflect a view" on Measure 65 because each posits an example where an administrative rule conflicted with legislative intent, strongly suggesting the desirability of greater legislative oversight under Measure 65. (ER60.) Finally, the court found that Advertisements 4 and 5 do not qualify for the nonpartisan-analysis exception because (i) the information contained in the advertisements was not the result of any analysis, study, or research (ER66), and, alternatively, (ii) the advertisements failed the Methodology Test because they present positions unsupported by facts and do not identify or meaningfully describe the administrative rules

being criticized, relying instead on disparaging terms to support their position (ER75-76).

Advertisements 6 and 7 (direct lobbying & non-educational). In 1999, the Foundation purchased two advertisements that were broadcast shortly before the vote on Measures 69-75. (ER28.) Three years earlier, Oregon voters had approved Measure 40, which granted crime victims certain constitutional rights regarding the prosecution of criminal defendants. Measure 40 was later voided by the Oregon Supreme Court because it contained several distinct constitutional amendments, and the State's constitution requires a separate vote on each amendment. In response, the distinct elements of Measure 40 were recast as Measures 69-75 for voter reapproval. (ER27-28.) Advertisements 6 and 7 cite Measure 40 by name, note that it had been invalidated and reconstituted into "separate amendments to be reapproved by the voters," and ask "[w]ho would be against this" measure that allows "victims to be treated at least as well as the criminals." (ER29.)

The Tax Court determined that Advertisements 6 and 7 resulted in taxable expenditures under § 4945(d)(1) and (5). The court found

that both advertisements "refer to" Measures 69-75 because they describe the content and effect of the legislation. (ER61.) The court further found that Advertisements 6 and 7 "reflect a view" on Measures 69-75 by asking "who would be against this" effort to help crime victims. (ER61.) Finally, the court found that Advertisements 6 and 7 do not qualify for the nonpartisan-analysis exception because (i) the information contained in the advertisements was not the result of any analysis, study, or research (ER66), and, alternatively, (ii) the advertisements failed the Methodology Test because they offer "no facts" in support of the position that Measures 69-75 should be approved, but instead express "conclusions based more on strong feelings than on objective evaluations" (ER76-77).

Advertisement 8 (Non-educational). In 1999, the Foundation also purchased an advertisement that cited a previously approved measure (Measure 11), which enacted a statute setting mandatory minimum sentences for certain crimes. (ER30.) During 1999, the Oregon legislature was considering bills that would amend the Measure 11 statute. (ER30.) Advertisement 8 first describes a man recently arrested for "gruesome serial murders" who had spent "2 years in jail"

for numerous crimes before Measure 11 was approved, but would still be imprisoned under Measure 11. (ER30.) It goes on to note that the legislature "just voted to allow some violent Measure 11 convicts a 15% reduction in prison time" and then asks, "who would do that?" (ER30.)

The Tax Court determined that Advertisement 8 resulted in a taxable expenditure under § 4945(d)(5),[6] rejecting petitioners' argument that it served an educational purpose. The court found that Advertisement 8 failed the Methodology Test because it provides no information concerning the circumstances under which sentence reductions would apply and thus "omits critical facts." (ER85.) The court explained that, without those facts, a listener could not evaluate whether the reductions were justified or the impact it would have on the serial murderer described in the advertisement. In addition, the court found that Advertisement 8 supports its position on the "basis of strong emotional feelings" rather than "objective evaluations." (ER85.)

Advertisement 10 (non-educational). In 2000, the Foundation purchased Advertisements 9 and 10, which were broadcast shortly

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[6] The Commissioner did not contend that Advertisement 8 constituted lobbying under § 4945(d)(1). (ER84.)

before the vote on Measure 8. (ER33.) Measure 8 would amend the Oregon constitution to link the rate of growth of state-government spending to the rate of growth of personal income in the state, and limit state spending to no more than 15% of total personal income of Oregonians in the two prior years. (ER33.) The official Voters Guide provided recent figures for comparison and the estimated impact of Measure 8 on the 2001-2003 state budget. (ER34.)

Advertisement 9 questions the growth of Oregon state government during the prior decade and provides supporting facts from those years, including some statistics from research conducted by Oregon Tax Research. (ER34, 66 n.47.) The Tax Court found that this expenditure was not taxable. The court found that Advertisement 9 qualifies for the nonpartisan-analysis exception to lobbying under § 4945(d)(1) by (i) making available the results of statistics obtained from Oregon Tax Research (ER66 n.47) and (ii) satisfying the Methodology Test (ER79-82). The court further determined that, because Advertisement 9 was educational under the Methodology Test, it served an exempt purpose and was not taxable under § 4945(d)(5). (ER84.)

Around the same time that Advertisement 9 was broadcast, the Oregon Justice Department sued the Foundation, alleging that it had made taxable expenditures from 1993-2000. (ER37.) The lawsuit followed an audit by the Oregon Attorney General that had been ongoing since at least March 1998. (ER37.)

Like Advertisement 9, Advertisement 10 posits that the state budget had grown much faster than personal income and should be reined in by mandatory limits. But unlike Advertisement 9, it provides no factual support for that viewpoint. (ER38.) Advertisement 10 also accuses the Oregon Justice Department of trying to intimidate the Foundation from "revealing this kind of information," asserting that the State government "didn't like what we said" in Advertisement 9 and "filed a lawsuit against us." (ER38.) Advertisement 10 does not mention that the lawsuit relates to the Foundation's taxable expenditures and follows an audit that had been ongoing for years. (ER38.)

The Tax Court determined that Advertisement 10 resulted in a taxable expenditure. It found that this advertisement was not lobbying under § 4945(d)(1) because it is directed to criticizing the Oregon

Justice Department, not advocating for Measure 8. (ER65.) The court found, however, that the expenditure was taxable under § 4945(d)(5) because the advertisement did not satisfy the Methodology Test and therefore is not educational. (ER86-87.) The court reasoned that Advertisement 10 omits material facts of substantial relevance to the claim of retaliation, rendering the assertion concerning the retaliatory nature of the lawsuit a factual distortion, and uses inflammatory and disparaging terms. (ER86-87.)

2. Parks' liability under § 4945(a)(2)

The parties stipulated that, if the Foundation is liable under § 4945(a)(1), then Parks is liable under § 4945(a)(2) unless he establishes that he agreed to the expenditures based on advice of counsel as described in Treasury Regulation § 53.4945-1(a)(2)(vi). (ER88-89.) To rely on the advice-of-counsel defense, a taxpayer must obtain a "reasoned written legal opinion" (as defined in the regulation) that addresses a particular taxable "expenditure." Treas. Reg. § 53.4945-1(a)(2)(vi). Parks submitted only two documents that addressed specific expenditures, and the court determined that neither satisfied the regulation's requirements. (ER90-92.) Parks also

submitted a letter from his attorney that provided general advice regarding § 4945. But the court concluded that Parks did not in fact rely on that letter when he made the one taxable expenditure that occurred after he received it. (ER94-95.) The court accordingly determined that Parks was liable for excise tax deficiencies under § 4945(a)(2). (ER96.)

Finally, the Tax Court rejected petitioners' constitutional arguments. Relying chiefly on the Supreme Court's decision in *Taxation With Representation*, the court held that § 4945 and the related regulations do not infringe First Amendment rights and therefore are not subject to a strict-scrutiny standard of review. (ER102-103.) The court also rejected petitioners' argument that the regulatory definition of lobbying is unconstitutionally vague with regard to "refers to," holding that, under the standard applied by the Supreme Court to Government subsidies in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), any imprecision in the phrase "does not raise constitutional vagueness problems." (ER113.)

SUMMARY OF ARGUMENT

Private foundations are exempt from income tax under § 501(c)(3), and contributions to them are tax-deductible under § 170(c)(2)(B). But these tax benefits come with a price. Private foundations and their managers (like petitioners here) are subject to the provisions of § 4945, an anti-abuse rule designed to discourage foundations from spending funds for nonexempt purposes. If they spend monies devoted to exempt purposes in a manner inconsistent with the tax exemption, § 4945 effectively requires them to disgorge the associated tax subsidies by taxing those expenditures.

In this case, petitioners used the Foundation's funds to purchase political advertisements. In a lengthy, fact-intensive opinion, the Tax Court determined that all nine of the advertisements remaining in issue on appeal resulted in taxable expenditures because they did not serve an exempt purpose and that seven of them resulted in taxable expenditures for the additional reason that the advertisements constituted lobbying. On appeal, petitioners for the most part ignore the Tax Court's factual analysis, as well as concessions and arguments that they made in the court below, and challenge instead the tax-

expenditure rules under the First Amendment. That challenge lacks merit, as does their critique of the court's analysis.

1. The Supreme Court has long held that denying tax benefits for lobbying activity does not "infringe" First Amendment rights. *Taxation With Representation*, 461 U.S. at 549-550; *Cammarano*, 358 U.S. at 513. The cases cited by petitioners — which do not address Government subsidies — are not to the contrary. Because the Government is not restricting speech, but merely declining to subsidize speech through the tax code, the strict-scrutiny standard of review pressed by petitioners is inappropriate, as is their attempt to rewrite the rules related to tax expenditures. Although the First Amendment gives petitioners broad latitude to advocate for or against legislation, and to engage in issue advocacy, it does not require the Federal Government to assist them in that endeavor by subsidizing their purchase of political advertisements.

2. The Tax Court correctly applied the tax-expenditure rules in finding that all nine advertisements still in issue are taxable under § 4945. Seven of the advertisements are taxable under § 4945(d)(1) as lobbying expenditures because they refer to, and reflect a view on,

specific legislation. Petitioners' contention that only advertisements that refer to legislation by name can qualify as lobbying conflicts with the plain language of § 4945, its history, the related regulations, and the Treasury's interpretation of its regulations.

In addition, all of the advertisements in issue are taxable under § 4945(d)(5) because petitioners have failed to demonstrate that they served an exempt purpose. Although petitioners contend that the advertisements are educational, the Tax Court correctly rejected that claim, finding that none still at issue was "educational" within the meaning of the term as defined in the Methodology Test contained in Revenue Procedure 86-43.

Unable to impugn the Tax Court's factual analysis of their political advertisements, petitioners instead challenge the IRS's definitions of "lobbying" and "educational" under the void-for-vagueness doctrine. That challenge lacks merit. Both definitions provide objective, identifiable standards for determining activity within their scope and therefore are not unconstitutionally vague.

3. Finally, the Tax Court correctly determined that Parks is liable for the tax imposed by § 4945(a)(2). Parks stipulated in the Tax

Court that he would be liable for that tax unless he establishes that he agreed to the expenditures based on advice of counsel as described in Treasury Regulation § 53.4945-1(a)(2)(vi). The court's findings that Parks failed to establish that he received such advice are not clearly erroneous. Two conclusory memoranda he offered did not provide the reasoned opinion the regulation requires. Nor could they be propped up by a third memorandum obtained later on.

ARGUMENT

I

The Tax Court correctly determined that the Foundation made expenditures for lobbying and other nonexempt purposes that are subject to the excise tax imposed by § 4945

Standard of review

The Tax Court's determination that § 4945 and the related regulations do not violate the First Amendment, as well as its interpretation of Treasury regulations, are legal questions reviewed *de novo*. The court's findings, on a stipulated record, that advertisements purchased by petitioners constitute taxable expenditures cannot be disturbed unless clearly erroneous. *See Church By Mail, Inc. v. Commissioner*, 765 F.2d 1387, 1390 (9th Cir. 1985).

A. Introduction

This case concerns whether petitioners owe taxes on the Foundation's expenditures for advertisements created by Parks' political consultant. The advertisements were purchased by the Foundation, a tax-exempt private foundation that receives tax-deductible contributions from Parks and that is required to use those contributions (and any other assets) for exempt purposes. §§ 170(a), 501(c)(3). If the Foundation instead uses its assets for lobbying or any other nonexempt purpose, it must pay a tax on those expenditures. § 4945(d)(1)-(5).

Section 4945 was enacted for the specific purpose of preventing foundations and their donors (like petitioners here) from abusing tax-exempt status — and the attendant deductibility of contributions — by recouping those tax benefits from the persons abusing those rules. *Mannheimer Charitable Trust v. Commissioner*, 93 T.C. 35, 41 (1989). As Congress explained when enacting § 4945, "organizations should not receive substantial and continuing tax benefits in exchange for the promise of their contributions to society, and then avoid the carrying out of these responsibilities." H.R. Rep. No. 91-413, at 39.

In a lengthy, fact-intensive opinion, the Tax Court determined that petitioners violated the restrictions on the use of the Foundation's tax-subsidized funding and were required to effectively repay the tax benefits that they had received respecting the expenditures for Advertisements 1-8 and 10. On appeal, petitioners ignore, for the most part, the court's analysis of their advertisements under the relevant law, as well as the concessions and arguments that they made below. Instead, they contend that the First Amendment allows them to rewrite the pertinent rules. Citing what they describe as "the First-Amendment Mandate," petitioners contend (Br. 11-20) that strict-scrutiny review applies here because First Amendment rights have been infringed, and that, under that standard of review, (i) the Government — rather than petitioners — bears the burden of proof, (ii) all applicable laws must be narrowly construed pursuant to petitioners' purported "saving constructions," and (iii) an "even greater degree of specificity is required" when evaluating the laws under the void-for-vagueness doctrine.

Petitioners' First Amendment argument is baseless. Nevertheless, we address it first because it colors, and provides the

predicate for, all of their arguments. As demonstrated below, the tax-expenditure rules do not infringe First Amendment rights and therefore strict scrutiny — and petitioners' attendant rewriting of the rules — does not apply. *See*, below, § I.B. Applying the rules as Congress and Treasury have written them, the Tax Court correctly found that petitioners' expenditures do not qualify for a tax subsidy. *See*, below, § I.C. And petitioners' void-for-vagueness challenge to those longstanding rules lacks all merit. *See*, below, § I.D.

Before turning to these arguments, however, we first emphasize what this case is not about, because petitioners have obscured the issue. Petitioners are not being "punish[ed]" for "issue advocacy" (Br. 44), nor is their speech being "suppressed" (Br. 47) or "restrict[ed]" (Br. 14). Instead, the case is about who should bear the cost of petitioners' speech. Section 4945 and the related regulations do not prohibit any speech. They simply require petitioners "to pay for [their lobbying and advocacy] activities entirely out of their own pockets, as everyone else engaged in similar activities is required to do." *Cammarano*, 358 U.S. at 500, 513.

B. The Tax Court correctly followed controlling Supreme Court precedent in concluding that the restrictions imposed by § 4945 on the use of tax-subsidized funds do not infringe First Amendment rights

It is fundamental that Congress is not required to subsidize the exercise of constitutional rights — including First Amendment rights — through the allowance of tax benefits. *Taxation With Representation*, 461 U.S. 540; *Cammarano*, 358 U.S. 498. In *Taxation With Representation*, the Supreme Court held that denying tax-exempt status under § 501(c)(3) to a charitable organization because it engaged in substantial lobbying did not infringe the organization's First Amendment rights. The Court began its analysis with the observation that tax deductions and exemptions "are a form of subsidy that is administered through the tax system." 461 U.S. at 544. The Court then rejected the contention that the preclusion of tax-exempt status under § 501(c)(3) to a charitable organization that engages in substantial lobbying violates its First Amendment rights. It reasoned that "Congress is not required by the First Amendment to subsidize lobbying" (*id.* at 546), but has "merely refused to pay for the lobbying out of public moneys" (*id.* at 545), referring to the use of donated, deductible funds for such a purpose.

The Supreme Court further held that Congress's refusal to subsidize lobbying in § 501(c)(3) was not subject to the "strict scrutiny" standard of review rather than the rational-basis standard. It observed that, in the case before it, there was "no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." *Taxation With Representation*, 461 U.S. at 548. As the Court explained, "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id*. at 549. The Court then upheld the statute on rational-basis review.[7] *Id*. at 550-551. *Accord Cammarano*, 358 U.S. at

[7] The Supreme Court observed that an organization that wishes to engage in substantial lobbying and yet retain its § 501(c)(3) status could lobby through an affiliated § 501(c)(4) organization, an option referred to as the alternative-channel doctrine. *Taxation With Representation*, 461 U.S. at 544. Accordingly, if petitioners wish to avoid the risk that the Foundation would lose its § 501(c)(3) exemption because of its lobbying activity, they could create an affiliate organization that qualifies for exemption under § 501(c)(4). In other words, they would conduct their nonlobbying activities with tax-deductible contributions through the § 501(c)(3) organization and conduct their lobbying activities without tax-deductible contributions through the § 501(c)(4) organization. As the Tax Court observed (ER107), this arrangement also would avoid the § 4945 excise tax, which applies only to expenditures by § 501(c)(3) foundations.

500, 513 (rejecting First Amendment challenge to a Treasury regulation denying a deduction for lobbying expenses).

As the Tax Court correctly held (ER99), the reasoning and decisions of the Supreme Court in *Taxation With Representation* and *Cammarano* apply with equal force here. As in those cases, the tax rules here apply to all lobbying and other activities outside the scope of § 501(c)(3), no matter what the viewpoint, § 4945(d)(1), (5), and thus are "[n]ondiscriminatory" laws that do not infringe First Amendment interests, *Cammarano*, 358 U.S. at 513. Indeed, as the Tax Court observed (and petitioners do not deny), "petitioners do not contend that sec. 4945 and the implementing regulations employ any suspect classifications or seek to suppress any particular idea or ideology such that heightened scrutiny would be triggered on that basis." (ER106 n.62.)

The issue here, as in *Taxation With Representation* and *Cammarano*, is not whether petitioners "must be permitted to lobby, but whether Congress is required to provide it with public money with which to lobby." *Taxation With Representation*, 461 U.S. at 551. The answer, as the Supreme Court long ago made clear, is no. *Id.* If

petitioners use the Foundation's funds to lobby or engage in other nonexempt activity — funds for which petitioners previously have enjoyed tax benefits — Congress is entitled to recoup those tax benefits through the § 4945(a) excise tax. *See Am. Society of Ass'n Executives v. United States*, 195 F.3d 47, 51-52 (D.C. Cir. 1999). Indeed, petitioners do not challenge (Br. 10) "using excise taxes to enforce" the limitations of § 501(c)(3) and thereby to recoup tax benefits.

The cases cited by petitioners do not compel a different conclusion. Petitioners' reliance on a trio of campaign-finance decisions is misplaced. *See* Br. 13-20 (citing *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010), *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007), and *Buckley v. Valeo*, 424 U.S. 1 (1976)). None of these cases addresses a law declining to subsidize political speech. In *Citizens United*, the Court held that "an outright ban [on political speech], backed by criminal sanctions," violates the First Amendment. 130 S. Ct. at 897. Similarly, in *Wisconsin Right to Life*, the law held to be unconstitutional made it a "federal crime" for corporations to engage in certain political speech. 551 U.S. at 455-456. And in *Buckley*, the Court scrutinized and narrowed under the void-for-

vagueness doctrine a "criminal" law requiring disclosure of electioneering expenditures. 424 U.S. at 77. Unlike the laws at issue in these cases, § 4945 and the related regulations do not criminalize or "suppress" political speech "altogether." *Citizens United*, 130 S. Ct. at 886. They merely remove the tax subsidy on a viewpoint-neutral basis.[8] The latter does not raise First Amendment concerns.

Indeed, the Supreme Court has relied on this distinction when distinguishing *Taxation With Representation*. In *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), the Court held that a federal election law that prohibited election-related communications violated the First Amendment. The Court distinguished *Taxation With Representation* as involving a law that "infringe[d] no protected activity, for there is no right to have speech subsidized by the Government." *Id*. at 256 n.9. So too here, § 4945 and the related regulations do not infringe protected activity. They merely

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[8] In sharp contrast, the law at issue in *Big Mama Rag* (cited by petitioners (Br. 12-18)) denied tax subsidies on a "discriminatory" basis, depending on whether an organization's activities were "controversial," and, in that situation, the court scrutinized the law at issue. 631 F.2d at 1034 n.7, 1036.

recoup tax subsidies of monies used for lobbying and other nonexempt purposes.

Petitioners have not cited (and our research has not uncovered) any case holding that *Taxation With Representation* and *Cammarano* have been overruled or "vitiated" (Br. 14) in any way by *Citizens United* or *Wisconsin Right to Life*.[9] To the contrary, courts continue to recognize the distinction between the two lines of authority. For example, in *Agency for International Development*, 133 S. Ct. at 2328, the Supreme Court relied on *Taxation With Representation* to "illustrate" permissible "conditions that define the limits of [a] government spending program — those that specify the activities Congress wants to subsidize." 133 S. Ct. at 2328. In holding up *Taxation With Representation* as an example of conditions that do not violate the First Amendment — as an instance in which Congress had

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[9] Those decisions do not address, let alone "vitiate[ ]," the alternative-channel doctrine cited in *Taxation With Representation* (*see*, above, n.7), as petitioners contend (Br. 14). Indeed, subsequent decisions have described the continued relevance of that decision's alternative-channel analysis for § 501(c)(3) organizations wishing to lobby through a § 501(c)(4) affiliate without losing the ability to receive tax-deductible contributions themselves. *E.g., Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328-2329 (2013).

"merely 'chose[n] not to subsidize lobbying'" — the Court in no way suggested that *Taxation With Representation* had been overruled by *Citizens United* or *Wisconsin Right to Life*. *Id.* at 2329 (quoting *Taxation With Representation*, 461 U.S. at 544) (alteration in original); *see also Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2080 (2012) (quoting *Taxation With Representation* for the fundamental principle that "'[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes'"); *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 648 (7th Cir. 2013) (distinguishing *Citizens United* from *Taxation With Representation* because *Citizens United* applies to "statutes that prohibit or burden speech," whereas *Taxation With Representation* "controls on government subsidies of speech").

Petitioners' constitutional arguments are fatally flawed. They ignore the clear distinction between a law that "restrict[s] political speech" and one that "declines to promote that speech" on a nondiscriminatory basis. *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1096-1098 (2009). Only the former implicates First Amendment

concerns so as to be subject to "'strict scrutiny.'" *Id.* (quoting *Taxation With Representation*, 461 U.S. at 549).

Because strict scrutiny does not apply, the tax-expenditure rules need not be narrowly construed in petitioners' favor, as they argue throughout their brief in support of their purported "saving constructions" of the rules. To the contrary, petitioners bear the "'burden of clearly showing the right to claimed [tax exemption].'" *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 84 (1992) (citation omitted). The Tax Court correctly applied the rules as drafted by Congress and the Treasury — not as rewritten by petitioners pursuant to an inapplicable "First-Amendment Mandate" — and determined that petitioners' advertisements are outside the scope of what Congress has chosen to subsidize.

C. The Tax Court correctly determined that petitioners' advertisements resulted in taxable expenditures under § 4945

Section 4945(a) imposes an excise tax on a private foundation's use of its funds for certain activities, including (as relevant here) any attempt to influence legislation (*i.e.*, lobbying) (§ 4945(d)(1)), or any nonexempt purpose (§ 4945(d)(5)). As demonstrated below, the Tax

Court correctly found that Advertisements 1-7 are taxable expenditures under § 4945(d)(1) because they refer to, and reflect a view on, specific legislation and do not disclose the results of nonpartisan analysis. The court further correctly found that Advertisements 1-7, as well as Advertisements 8 and 10, are taxable expenditures under § 4945(d)(5) because they are not educational communications (as petitioners allege), but are merely the unsupported opinion of Parks and his political consultant.

1. The Tax Court correctly determined that Advertisements 1-7 are direct lobbying expenditures taxable under § 4945(d)(1)

Section 4945 taxes any expenditure paid by a tax-exempt foundation "to influence legislation" (other than through "making available the results of nonpartisan analysis, study or research," § 4945(e) — an exception discussed below). § 4945(d)(1). Where (as here) the legislation at issue is a ballot measure, communications with the public about that legislation is treated as "direct lobbying," not grass-roots lobbying. Treas. Reg. § 56.4911-2(b)(1)(iii). To constitute direct lobbying, the communication must "refer[ ] to specific legislation"

and "reflect[ ] a view on such legislation."[10] Treas. Reg. § 56.4911-2(b)(1)(ii)(A), (B). Advertisements 1-7 refer to and express a view on legislation without qualifying for the nonpartisan-analysis exception.

a. The Tax Court correctly endorsed the IRS's interpretation of its regulatory definition of lobbying

The regulations do not separately define "refers to" or "reflects a view," but instead provide numerous examples to "illustrate" the meaning of both terms. 55 Fed. Reg. 35579-01, 35581 (1990). Citing these examples, the Tax Court agreed with the Commissioner's interpretation that a communication "refers to" specific legislation (such as 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." (ER56-57.)

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[10] As with direct lobbying, grass-roots lobbying requires that a communication refer to, and reflect a view on, specific legislation. Treas. Reg. § 56.4911-2(b)(2)(ii)(A), (B). But because grass-roots lobbying is not directed at legislators, it has the additional requirement that the communication must encourage the recipient to "take action" by contacting a legislator, among other things. Treas. Reg. § 56.4911-2(b)(2)(ii)(C).

The Tax Court's interpretation of "refers to" is supported by the plain language of § 4945, its history, and the related regulations. Section 4945 broadly includes within the scope of lobbying expenditures taxable under § 4945(d)(1) "*any attempt* to influence legislation through communication with" a legislator. § 4945(e)(i) (emphasis added). Nothing in the statute limits its scope to communications that actually name the legislation, as petitioners contend (Br. 21). Rather, the statute covers "any" attempt, which would include attempts to refer to specific legislation by means other than by name.

The Tax Court's interpretation is also "supported by the broad congressional purpose" underlying § 4945. *Zemurray Foundation v. United States*, 687 F.2d 97, 101 (5th Cir. 1982). Section 4945 was part of a "Reform Act [that] was passed to ensure that private foundations promptly and properly use their funds for charitable purposes." *Id.* Its legislative history makes clear that § 4945 was designed to be a remedial measure that would place "more effective limitations . . . on the extent to which tax-deductible and tax-exempt funds can be dispensed by private persons" and halt the use of those funds for "political and legislative activities" rather than charitable purposes. S.

Rep. No. 91-552, at 47-48; H.R. Rep. No. 91-413, at 32-34. As a "remedial" measure, § 4945 "should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

Finally, the Tax Court's interpretation is supported by reasonable Treasury regulations and the long-held administrative interpretation of those regulations. As relevant here, the regulations define "[i]nfluencing legislation" as any communication that "[r]efers to specific legislation" and "[r]eflects a view on such legislation" without any limitation regarding how the reference could be made. Treas. Reg. § 56.4911-2(b)(1)(ii)(A), (B). Moreover, the regulation's illustrative examples demonstrate that any type of reference to specific legislation is within the scope of the regulation, including the use of "terms [that] have been widely used in connection with specific legislation," Treas. Reg. § 56.4911-2(b)(4)(ii)(B), Ex. 1 (Add. 21), or descriptions of the content or effect of the legislation, Treas. Reg. § 56.4911-2(d)(1)(iii), Ex. 1 (Add. 34).[11] Widely used terms and content descriptions "refer to"

[11] Petitioners' contention (Br. 22) that the examples in the regulation cited by the Tax Court are "inapplicable" because they address grass-roots lobbying rather than direct lobbying ignores the fact that both types of lobbying require the communication to "refer to" and

specific legislation because they provide "sufficient information to permit [the] audience to identify one or more specific [legislative proposals] as the subject of the communication." *Political Law & Lobbying Guide for Tax Exempt Organizations*, SJ039 ALI-ABA 215, 267 (2003). And, as Congress has recognized — without any suggestion of disapproval — the IRS has long interpreted "refers to" as including both formal and functional references. Joint Committee on Taxation, *Overview of Present-Law Rules*, JCX-59-00 at 33 n.85 (2000) (observing that specific legislation "may be identified by its formal name, by a widely used term in connection with the legislation, or even by its content or effect") (citing Kindell & Reilly, *Lobbying Issues, in Continuing Professional Education Exempt Organizations Technical Instruction Program for FY 1997* 296 (1996)).

The IRS's long-held interpretation of its own regulations "must be given 'controlling weight'" because it is not "'plainly erroneous or inconsistent with the regulation.'" *Stinson v. United States*, 508 U.S. 36, 45 (1993) (citation omitted); *see Auer v. Robbins*, 519 U.S. 452, 461-

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"reflect a view" on specific legislation. As the Tax Court explained (ER55 & n.43), that commonality renders the cited examples pertinent.

462 (1997) (holding that an agency's reasonable interpretation of its own regulation is entitled to controlling weight even where its interpretation is "in the form of a legal brief"). By treating both formal and functional references to specific legislation as lobbying, the regulations have adopted a practical, effective approach that implements Congressional intent to stop abuse by taxing "any attempt" to lobby by a tax-exempt private foundation.

Petitioners and amici have failed to identify any error in the Tax Court's interpretation.[12] Their unsupported suggestion (Br. 21; Am. Br. 16) that § 4945 and the implementing regulations require certain "magic words" before a communication qualifies as lobbying conflicts with the statute, its history, and the regulations, and disregards the deference due the IRS's interpretation of its own regulations. This cramped interpretation of an anti-abuse rule was properly rejected by the Tax Court because it would allow foundations to easily evade the tax-expenditure rules and engage in the very conduct that § 4945 was designed to eliminate.

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[12] Petitioners' primary argument — that the regulation's "refers to" test is unconstitutionally vague — is refuted below in § I.D.

b. The Tax Court correctly found that Advertisements 1-7 each "refers to" specific legislation

The Tax Court found that Advertisements 1-7 each "refers to" specific legislation. *See*, above, pp. 18-23. Those detailed findings are fully supported by the record. (ER162-183.) For four of the advertisements, there is no real dispute that they "refer to" specific legislation. The Tax Court found (and petitioners do not dispute) that Advertisements 2 and 3 refer to Measure 61 "by name." (ER59.) Moreover, petitioners admitted in their petition that Advertisements 4 and 5 "addressed" Measure 65. (ER154.) Indeed, the scripts for Advertisements 4 and 5 were entitled "M65-1" and "M65-2" (ER290-291), and petitioners' advisors referred to them as "two ads for Ballot Measure 65" (ER308).

The remaining three advertisements also refer to specific legislation. Advertisements 1, 6 and 7 describe the content and effect of specific ballot measures and utilize terms that have been widely used in connection with those measures, as evidenced by the Tax Court's comparison of each of those advertisements to the related official Voters Guide and other stipulated facts. (ER57-61, 162-165, 174-177.)

Moreover, Advertisements 6 and 7 expressly refer to previously approved "Measure 40 [which has now been split] into 8 amendments to be reapproved by the voters." (ER29, 176-177.) The reference to "8 amendments" up for voter approval cannot reasonably be interpreted as anything other than specific ballot measures for the voters to approve. Indeed, amici acknowledge (Am. Br. 21 n.12) that they "agree" that Advertisements 6 and 7 "meet the 'refers to' test."

Petitioners fail to identify any error in the Tax Court's factual analysis of the advertisements. They argue instead (Br. 25-30) that the advertisements cannot satisfy their purported "saving construction" of the regulation. Petitioners' attempt to rewrite the rules, however, is inappropriate because the strict-scrutiny standard of review does not apply here. *See*, above, § I.B. Although petitioners complain (Br. 23) that the court relied on the official Voters Guides to evaluate whether the advertisements utilized terms that were widely used in connection with the measures or described the measures' content or effect, petitioners have not — and cannot — deny the accuracy of the court's comparison of the language in the Voters Guides and the language in the advertisements.

There is no basis for petitioners' objection (Br. 23) to the Tax Court's reliance on the official Voters Guides as an objective benchmark for evaluating the advertisements (what petitioners refer to as "the Ballot-Pamphlet Test"). First, petitioners admittedly did not raise this claim in the Tax Court (Br. 41), and they have therefore waived it on appeal.[13] Their suggestion (Br. 41) that they failed to raise this claim because they had "no notice" is unfounded. The Commissioner relied on the "official Voters Guide" in his opening brief below to demonstrate that the advertisements were taxable expenditures. *See* Doc. 15 at 14-17, 22-23, 34-35, 75. Moreover, the parties stipulated to the language of those Voters Guides (ER163-165, 167-170, 172-174, 181-183) without either party challenging the relevance of the Guides. Indeed, petitioners themselves relied on that stipulated language in their Tax Court briefing. *See* Doc. 14 at 8 (citing Stipulation ¶24, ER163-164). At no point in the proceeding did petitioners object to the relevance of the Voters Guides or the Commissioner's reliance on them. Petitioners'

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[13] *See Lopez v. Pac. Mar. Ass'n*, 657 F.3d 762, 767 (9th Cir. 2011) (holding that "a litigant must argue clearly all of his theories of relief, both in the district court and in his opening brief, to preserve those theories on appeal").

after-the-fact challenge on appeal is untimely and should be deemed waived.

c. The Tax Court correctly found, as petitioners did not dispute below, that Advertisements 1-7 each "reflects a view" on specific legislation

Similarly well supported are the Tax Court's findings that Advertisements 1-7 each "reflects a view" on specific legislation. *See*, above, pp. 18-23; ER162-183. Indeed, petitioners did not argue in the Tax Court that any of the advertisements failed to "reflect a view" on specific legislation. They contended only that some of the advertisements did not "refer to" specific legislation. (ER123-129, 135.) Moreover, petitioners conceded below that their advertisements took a "position or viewpoint." (ER154; *see also* ER138.) Consequently, there is no question that each advertisement "reflects a view" on the advertisement's subject matter. Amici's complaint that the court's analysis of this issue is "cursory" (Am. Br. 22) ignores petitioners' litigation strategy in the Tax Court.

Again, petitioners have failed to identify any error in the Tax Court's factual analysis of the advertisements, arguing instead (Br. 25-30) that the advertisements cannot satisfy their purported "saving

construction" of the regulation. Petitioners' attempt to rewrite the rules is inappropriate, however, because the strict-scrutiny standard of review does not apply here. *See*, above, § I.B.

d. Advertisements 1-7 are not eligible for the exception to lobbying under § 4945(e) for the results of nonpartisan analysis, research, or study because, as the Tax Court found and petitioners do not dispute, they did not make such results available

Section 4945 does not tax a foundation's attempt to influence legislation "through making available the results of nonpartisan analysis, study, or research." § 4945(e). In creating this exception to the scope of taxable lobbying expenditures, Congress intended only "to permit making available the results of nonpartisan analysis or research." H.R. Rep. No. 91-413, at 33; S. Rep. No. 91-552, at 49.

Nonpartisan analysis, study, or research is defined in the Treasury Regulations as "an independent and objective exposition of a particular subject matter, including any activity that is 'educational' within the meaning of § 1.501(c)(3)-1(d)(3)" and the Methodology Test. Treas. Reg. § 53.4945-2(d)(1)(ii). To qualify for this exception, a foundation must first demonstrate that it (or another source) actually "engag[ed] in nonpartisan analysis, study, or research" and then made

"available" to the legislator at issue "the results of such work." Treas. Reg. § 53.4945-2(d)(1)(i). The regulation's examples that illustrate the scope of this limited exception stress the importance of there being an actual "research project to collect information" that would form the basis for any communication qualifying for the exception. *Compare* Ex. 2 *with* Ex. 12 in Treas. Reg. § 53.4945-2(d)(vii).

The Tax Court found that none of the advertisements still in issue is eligible for the nonpartisan-analysis exception because petitioners failed to submit the requisite evidence demonstrating that the information in the advertisements were the result of any analysis, study, or research it conducted or collected from others. (ER66.) The court determined that the absence of such evidence gave rise to the presumption that the Foundation did not conduct or collect any such nonpartisan work. (ER66.) The court's determination is further supported by the parties' stipulation that the messages were crafted by the Clapper Agency, a producer of "political advertisements" (ER66, 162), not a nonpartisan researcher.

Petitioners on appeal ignore, but have not challenged, the Tax Court's determination. Therefore, whether or not Advertisements 1-7

are educational within the meaning of the Methodology Test (which, as shown below, they are not), those advertisements cannot qualify for the exception for nonpartisan analysis, study, or research and are therefore taxable expenditures under § 4945(d)(1).

2. The Tax Court correctly determined that the advertisements still in issue did not serve an exempt purpose and therefore are taxable expenditures under § 4945(d)(5)

Section 4945(d)(5) taxes expenditures paid by a tax-exempt foundation "for any purpose other than one specified in section 170(c)(2)(B)," which identifies purposes that qualify an organization for exemption under § 501(c)(3). In the Tax Court, the only exempt purpose offered by petitioners for their advertising expenditures was that they were "educational." (ER83.) According to petitioners, the advertisements were educational because they satisfied the Methodology Test of Revenue Procedure 86-43.[14] (ER140.)

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[14] The Tax Court did not inappropriately narrow the exempt purposes allowed by § 4945(d)(5) to "educational," as amici incorrectly assume. (Am. Br. 25 n.14.) Rather, as the court observed (ER83), petitioners narrowed the necessary analysis under § 4945(d)(5) as a matter of litigation strategy by "offer[ing] 'educational' as the only exempt purpose of the expenditures." An expenditure is not taxable under § 4945(d)(5) if it serves any exempt purpose identified in

Communications that advocate a particular viewpoint — like the advertisements created by Parks' political consultant (Clapper) — can qualify as educational, and therefore do not result in a taxable expenditure, if they satisfy the Methodology Test. Rev. Proc. 86-43, Add. 35. Pursuant to that test, the "method used by the organization will not be considered educational if it fails to provide a factual foundation for the viewpoint or position being advocated, or if it fails to provide a development from the relevant facts that would materially aid a listener or reader in a learning process." *Id*. at Add. 37.

Applying the Methodology Test, the Tax Court carefully analyzed each of petitioners' advertisements and found that none still in issue followed an educational method. (ER71-87.) It found that Advertisements 1-8 and 10 are not educational, and therefore do not (i) qualify as "nonpartisan analysis, study, or research" under § 4945(d)(1) and (e), or (ii) serve an exempt purpose under § 4945(d)(5).

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§ 170(c)(2)(B) or is an administrative expense of the foundation. *See* Treas. Reg. § 53.4945-6. The hypotheticals posited by amici (Am. Br. 26) — which likely would serve an exempt purpose (even if not educational) or fall within the scope of Treasury Regulation § 53.4945-6 — are therefore inapt.

Petitioners have failed to identify any error — let alone clear error — in the court's findings, which are summarized above in the Statement of the Case (pp. 18-27).

The Tax Court found that all four disqualifying indicia outlined in the Methodology Test — in varying combinations for each advertisement — were present in petitioners' advertisements. Most critically, the court found that each advertisement presented a position that was unsupported by facts. This failing is dispositive because being "educational' . . . require[s] more than mere assertion" to qualify for public subsidy. *Nat'l Alliance*, 710 F.2d at 873. As the D.C. Circuit has explained, "in order to be deemed 'educational' and enjoy tax exemption[,] some degree of intellectually appealing development of or foundation for the views advocated would be required." *Id.* Without supporting facts, there can be "no reasoned development of the conclusions[,] which removes [a communication] from any definition of 'educational' conceivably intended by Congress." *Id.* "[I]ntellectual exposition" rather than mere expression of "emotions" must be present. *Id.* Naked advocacy — the method utilized in petitioners' advertisements — is not enough.

In evaluating whether petitioners' advertisements omit or distort the relevant facts regarding the positions advocated, the Tax Court relied on objective, verifiable facts, including the nonpartisan Voters Guides. For example, the court analyzed Advertisements 2 and 3, which both refer to Measure 61's proposal for mandatory prison terms. Comparing the advertisements with the information provided in the Voters Guides, the court found that the advertisements distorted the facts by suggesting that certain mandatory prison terms could be implemented without significant cost and by omitting public estimates of the costs provided in the Voters Guides. (ER72-75.) Without those facts, a listener could not form an independent conclusion regarding the merits of the initiative. In other words, the listener would not be "educated" on the topic. Likewise, the court properly found that the other advertisements suffered from similar distortions and omissions of "critical facts," "offer[ed] no facts in support of the position," or lacked "basic information," as detailed above (pp. 18-27). *See* ER71-72 (Advertisement 1); ER75-76 (Advertisements 4 and 5); ER76-77 (Advertisements 6 and 7); ER85 (Advertisement 8); ER86-87 (Advertisement 10).

Petitioners fail to identify any error in the Tax Court's application of the Methodology Test to their political advertisements.[15] Indeed, petitioners defend only Advertisement 1 (Br. 41-43, 46), and make no attempt to explain how the other advertisements provide sufficient information to allow a listener to make an independent and informed conclusion regarding the positions taken. Seeking to portray Advertisement 1 as educational, petitioners describe in detail (Br. 41-42) the issue addressed by the advertisement. But, in doing so, they rely on facts wholly absent from the advertisement. For example, petitioners describe how, under Measure 49, the ballot measure referred to in Advertisement 1, money earned by prisoners would be used to reimburse the State for the costs of their incarceration, to compensate victims, and to pay court fees. But none of those factual details is present in Advertisement 1 itself. (ER19-20.) Although petitioners complain that the Tax Court "ignored the central issues about how prisoners are paid" (Br. 43), Advertisement 1 does as well, omitting the facts required to educate the public with regard to those

[15] Petitioners' primary argument — that the Methodology Test is unconstitutionally vague — is refuted below in § I.D.

issues. Similarly, petitioners detail the "conflict" with federal law that led to the shutdown of the prison work program that petitioners advocate should be reinstated. (Br. 42.) But that conflict, too, is not described in Advertisement 1, which suggests instead that policy preferences of political players led to the shutdown. (ER19.) Without these critical details, the public could not reach an informed decision regarding the merits of how prisoners are paid or the behavior of political actors.

Finally, the Tax Court's application of the Methodology Test does not "allow[ ] subjective attacking of the facts themselves," as petitioners contend. (Br. 35.) Rather, the court largely relied on the absence of factual support in petitioners' advertisements. (ER71-86.) And where the court concluded that petitioners' advertisements distort the facts, it measured the advertisements against "objective," verifiable yardsticks, such as the official nonpartisan Voters Guides, which illuminate the factual distortions in Advertisements 1-3 (ER71-74), and the stipulated evidence that petitioners had been under audit by the Oregon Justice Department for years before the Department brought the purported retaliatory lawsuit discussed in Advertisement 10 (ER86, ER286-288).

Petitioners are free to lobby and advocate their views regarding the personal motivations of public officials and other public issues. But they are not entitled to have the Treasury subsidize that advocacy under the guise of nonpartisan educational expenditures. As Congress explained when it enacted § 4945, "private foundations are stewards of public trusts and their assets are no longer in the same status as the assets of individuals who may dispose of their own money in any lawful way they see fit." S. Rep. No. 91-552, at 48.

D. Petitioners' void-for-vagueness challenge to the rules applied by the Tax Court lacks merit

Unable to demonstrate any flaws in the Tax Court's application of the tax-expenditure rules to their advertisements, petitioners seek to avoid the rules altogether by challenging — as unconstitutionally vague — (i) the regulatory definition of direct lobbying (Br. 19-24), and (ii) the Methodology Test (Br. 30-40). The latter argument, however, was not raised in the Tax Court and is therefore waived on appeal.[16] *See Lopez*, 657 F.3d at 767. In any event, neither argument has merit.

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[16] In the Tax Court, petitioners argued that their advertisements are not taxable expenditures under § 4945(d)(5) because they satisfy the Methodology Test's criteria for "educational" communications. (ER139-

The void-for-vagueness doctrine protects two essential due process values: "fair notice and fair enforcement." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982). Language, by its nature, can be imprecise, and the "degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." *Id.* The Constitution requires a greater level of specificity from "criminal" enactments than from "civil" ones because the consequences of their imprecision are greater. *Id.* at 499. In addition, "where the guarantees of the First Amendment are at stake the Court applies its vagueness analysis strictly." *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1988). But in cases (as here) where the Government does not infringe First Amendment rights, but merely declines to "subsidi[ze]" them, *see*, above, § I.B, the vagueness analysis should not be applied strictly. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 572-573, 589-590 (1998) (rejecting a void-for-vagueness challenge to a statute requiring consideration of "decency and respect for the diverse beliefs and values of the American public" in granting federal arts funding). In

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140.) As the Tax Court observed, however (ER68 n.49), they did not challenge the test "as unconstitutionally vague."

that situation, "opaque" rules allocating government "subsidies" are acceptable, even though they would "raise substantial vagueness concerns" if found in a "criminal statute or regulatory scheme." *Id.* at 588-589. As the Supreme Court explained, "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." *Id.* at 589. So long as the rule at issue allocates subsidies in a neutral fashion, and does not raise "concern about the suppression of disfavored viewpoints," the specificity of the rule should be evaluated under a deferential standard. *Id.* at 587.

This principle is illustrated by this Court's decision in *Bullfrog Films*. There, the Court addressed an agency's certification procedure that applied to films that were "educational, scientific and cultural" and held that regulations defining those terms were unconstitutionally vague. 847 F.2d at 512-514. In so ruling, the Court distinguished *Taxation With Representation* as "fundamentally different" because the challenged regulations in *Bullfrog* "discriminate based on content" and involved "no Treasury Department funds," whereas in *Taxation With Representation*, "the lobbying restriction was neutral as to content,"

even though it "distinguished lobbying from informational and charitable activities," and involved the withholding of tax subsidies. *Id.* at 509. As in *Taxation With Representation*, and unlike the situation in *Bullfrog*, the tax-expenditure rules are neutral as to viewpoint and permissibly determine the proper allocation of Treasury funds by way of tax subsidies.

The Tax Court correctly held that the more lenient vagueness standard applied in *Finley* should be followed here. (ER113-114.) As demonstrated above in § I.B, First Amendment interests are not implicated in this case. As a result, a "greater degree of specificity" is not required when evaluating § 4945 and the related rules under the void-for-vagueness doctrine, as petitioners contend. (Br. 11-12.) Neither the definition of direct lobbying nor the Methodology Test prohibits speech. Rather, using viewpoint-neutral tests, they both determine whether speech will be subsidized through the tax code.

Despite petitioners' reliance, *Big Mama Rag* is not to the contrary. There, the D.C. Circuit scrutinized the definition of "educational" set forth in the Treasury regulations because it admittedly had been applied only to communications deemed "controversial," a

"discriminatory" viewpoint-based distinction that infringed First Amendment interests. 631 F.2d at 1034 n.7, 1036. Indeed, the court in *Big Mama Rag* distinguished *Cammarano* on this basis, observing that Treasury regulations disallowing a deduction for lobbying expenses were "nondiscriminatory" because they disallow tax benefits for all lobbying, whereas the regulations at issue in *Big Mama Rag* disallowed tax benefits only for "controversial" activities. *Id*. at 1034 n.7. To read *Big Mama Rag* to apply strict scrutiny to nondiscriminatory limitations on tax benefits would cause the decision to conflict with *Cammarano* and *Taxation With Representation* as well as *Finley*.

In civil tax cases such as this one, in which constitutional rights are not infringed, the void-for-vagueness "question is whether the scheme that subjects [petitioners to] taxes is 'so vague and indefinite as really to be no rule or standard at all,' or whether a person of ordinary intelligence could understand that the scheme requires payment of [the relevant] taxes." *Fang Lin Ai v. United States*, 809 F.3d 503, 514 (9th Cir. 2015) (citation omitted). The definition of direct lobbying and the Methodology Test easily satisfy this standard.

1. The regulatory definition of direct lobbying is not unconstitutionally vague

Petitioners have not — and cannot — demonstrate that the IRS's definition of direct lobbying is unconstitutionally vague under the applicable deferential standard of review. Treasury Regulation § 56.4911-2 provides examples of what is meant by "refers to" and spells out that a communication can refer to specific legislation, even if it does not use the legislation's actual "name," if it uses "terms [that] have been widely used in connection with specific legislation," Add. 21, or describes the content or effect of specific legislation, Add. 34. That objective standard provides both notice to taxpayers as to what is taxable and guidance for the IRS so as to prevent arbitrary determinations.

The fact that the regulation does not formally define "refers to" and uses examples to illustrate its meaning does not make it unconstitutionally vague, as petitioners contend. (Br. 19-20.) There is no requirement that a statutory or regulatory term have a specific definition to avoid being deemed unconstitutionally vague. For example, in *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1440 (9th Cir. 1996), this Court held that a regulation that restricted

licenses for travel to Cuba to "educational activities" was "not unconstitutionally vague," even though "educational activities" was "undefined." Moreover, courts frequently have relied on the presence of "examples" to uphold a law against a void-for-vagueness challenge, *United States v. Sandsness*, 988 F.2d 970, 971 (9th Cir. 1993), and petitioners have cited no case to the contrary.

Petitioners' contention (Br. 23-24) that they had "no notice" that an advertisement could be deemed to "refer to" legislation based on "words/topics in common without IRS being required to show that messages used widely recognized *substitutes* for measures' names" is unfounded. First of all, it is well settled that foundations — not the IRS — bear the "burden" of showing that they did not incur a taxable expenditure under § 4945. *Mannheimer*, 93 T.C. at 50. The Tax Court found — and petitioners do not dispute — that petitioners "have offered no evidence to support a contrary conclusion" regarding whether the disputed advertisements refer to specific legislation. (ER57-58, 60.)

Moreover, petitioners can scarcely deny being on notice of the scope of the law. Section 4945(e) provides that § 4945(d)(1) broadly applies to "any" attempt to influence legislation Moreover, Treasury

Regulation § 56.4911-2 (i) expressly states that a communication "refers to" specific legislation where it uses "'terms [that] have been widely used in connection with specific legislation'" (ER55-56 (quoting the regulation)) and (ii) does not limit such terms to those that were "widely recognized *substitutes* for measures' names" (Br. 24). Moreover, the regulations make it clear that public communications about ballot initiatives are "direct," not grass-roots, lobbying, 55 Fed. Reg. at 35583, and that, in that situation, an "explicit appeal to the action of voting" is not required, as petitioners contend (Br. 22). Indeed, petitioners' attorneys specifically advised Parks of that fact, explaining that when "communicating with voters about an initiative issue," the "requirement for urging a particular vote or to contact a legislator is not required." (ER301.) Accordingly, under any standard of specificity, the definition of direct lobbying is not unconstitutionally vague.

2. The Methodology Test is not unconstitutionally vague

The Methodology Test of Revenue Procedure 86-43 is likewise constitutionally sound. As noted above, Revenue Procedure 86-43 was specifically designed to respond to the concerns expressed by the D.C. Circuit in *Big Mama Rag*. There, the court held that the "full and fair

exposition" definition of "educational" set out in Treasury Regulation § 1.501(c)(3)-1(d)(3) was unconstitutionally vague because the standard lacked substantive criteria, creating "latitude for subjectivity" that had "seemingly resulted in selective application" of the standard to only "controversial" communications. *Big Mama Rag*, 631 F.2d at 1036-1037. At the same time, however, the court recognized that the IRS was required by law to distinguish activity that qualifies as educational from activity that does not, emphasizing that tax-exempt status need not "be accorded to every organization claiming an educational mantle." *Id*. at 1040.

In response to the decision in *Big Mama Rag*, the IRS formally adopted the Methodology Test in Revenue Procedure 86-43. Unlike the approach rejected in *Big Mama Rag*, the Methodology Test is not limited to "controversial" communications. It applies to all communications that take a "position," Add. 35, whether or not the position is controversial. By doing so, the Methodology Test replaced a subjective viewpoint-based standard ("controversial") with an objective viewpoint-neutral standard (advocates a "position"). Having conceded

that their advertisements "take a position" (ER138), petitioners have not — and cannot — contend that this part of the test is too vague.

The Methodology Test also corrects the second deficiency in the educational definition identified by *Big Mama Rag* by providing substantive requirements for "full and fair exposition." In this regard, the Methodology Test first instructs that "the method used by the organization will not be considered educational if it fails to provide a factual foundation for the viewpoint or position being advocated, or if it fails to provide a development from the relevant facts that would materially aid a listener or reader in a learning process." Rev. Proc. 86-43, Add. 37. It then outlines four specific indicia (quoted above (p. 9)) that a method of presentation is not educational, including that the position advocated is "unsupported by facts."[17] *Id.* By focusing on the method of presentation, rather than on the viewpoint advanced, these objective, substantive requirements "minimize" the "risk of being

[17] The Methodology Test's use of "negative terms" to define educational is not problematic under the void-for-vagueness doctrine. *Nat'l Ass'n of Indep. Tel. Producers v. FCC*, 516 F.2d 526, 539 (2d Cir. 1975). As the courts have properly recognized, some categories are "probably better defined by what such a [category] is not." *Id.*

applied to favor or disfavor certain types of speech." *Nationalist Movement*, 102 T.C. at 588.

The D.C. Circuit has not "reject[ed]" the Methodology Test as unconstitutionally vague, as petitioners contend. (Br. 30.) The court did not consider the Methodology Test in *Big Mama Rag*, and in a subsequent case, the court spoke approvingly of the test. *See Nat'l Alliance v. United States*, 710 F.2d 868, 875 (D.C. Cir. 1983). Although the court in *National Alliance* found it unnecessary to decide whether the Methodology Test is constitutional, the court favorably observed (*id.*):

> [S]tarting 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.

The only court to have addressed the constitutionality of the Methodology Test concluded that it "is not unconstitutionally vague." *Nationalist Movement*, 102 T.C. at 588. As the Tax Court there explained, 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." *Id.* at 589.

In their positive assessments of the Methodology Test, the D.C. Circuit and the Tax Court correctly analyzed the test as a whole and in the context of the statutory directive that the "educational exemption be restricted to material which substantially helps a reader or listener in a learning process." *Nat'l Alliance*, 710 F.2d at 875. As the courts recognized, in evaluating whether a law is void for vagueness, courts must analyze the law "as a whole," rather than isolating individual phrases from their "context." *Grayned v. City of Rockford*, 408 U.S. 104, 110-112 (1972). In sharp contrast, petitioners' phrase-by-phrase critique of the Methodology Test (Br. 31-39) inappropriately evaluates individual words divorced from their context and the fuller explanation set out in Revenue Procedure 86-43. For example, petitioners complain (Br. 35) that the term "relevant facts" is inappropriately vague. That phrase gains clarity, however, when understood within the fuller context of the Methodology Test, which seeks to ensure that the facts upon which a conclusion is based are provided so that the listener may

be educated and thereby make an informed, independent decision as to whether to endorse the position being advocated. Indeed, "relevant facts" is a common requirement in legal rules, and the scope of the phrase is governed by the specific rule's purpose. *E.g.*, § 6662(d)(2)(B)(ii) (providing that substantial-understatement penalty does not apply where "relevant facts" are adequately disclosed on return); *United States v. Kapp*, 564 F.3d 1103, 1113 (9th Cir. 2009) (rejecting reasonable-cause defense to tax-preparer penalty where defendant failed to demonstrate that his advisor was "aware of all the relevant facts").

Moreover, petitioners' phrase-by-phrase critique ignores that Treasury regulations provide numerous examples illustrating both the general definition of "educational," as well as the meaning of "educational" for purposes of the exception to lobbying for nonpartisan analysis, study, or research. *See* Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii), Exs. 1-4; Treas. Reg. § 53.4945-2(d)(vii), Exs. 1-12. Such "concrete examples" alleviate vagueness concerns under any standard of specificity. *Retired Teachers Legal Defense Fund, Inc. v. Commissioner*, 78 T.C. 280, 285 (1982) (rejecting void-for-vagueness challenge to

general definition of educational in Treasury Regulation § 1.501(c)(3)-1(d)(3) but not addressing the Methodology Test); *e.g., Murphy v. Matheson*, 742 F.2d 564, 570-572 (10th Cir. 1984) (holding, in a case involving a "strict test of specificity," that a non-exhaustive "list of examples" provided "sufficient definiteness to avoid vagueness problems").

The fact that the Methodology Test requires a determination as to whether facts have been omitted or distorted does not make the IRS a "truth-arbiter," as petitioners contend. (Br. 35.) As the D.C. Circuit explained, the IRS is not acting as an "arbiter of 'truth'" by "test[ing] the method by which the advocate proceeds from the premises he furnishes to the conclusion he advocates rather than the truth or accuracy or general acceptance of the conclusion." *Nat'l Alliance*, 710 F.2d at 873-874. Without "reasoned development" — including the presentation of facts without distortion or omission — a communication is not "educational" for purposes of qualifying for a tax subsidy. *Id.* at 873.

Petitioners proffer no reasonable alternative for devising the administrative guidelines necessary to determine entitlement to a tax

subsidy that is limited to "educational" materials. Their suggestion (Br. 45) that the term "educational" should be broadened to include all "issue advocacy" is baseless. Congress has not chosen to subsidize all issue advocacy — only advocacy that is "educational." § 170(c)(2)(B). The First Amendment does not require — as petitioners suggest — "a construction of the term 'educational' which embraces every continuing dissemination of views." *Nat'l Alliance*, 710 F.2d at 875.

Similarly misconceived is petitioners' suggestion (Br. 46) that "ties" in the analysis regarding the educational nature of their advertisements must go to exempting their expenditures from taxation. The opposite is true. "Grants of tax exemptions are narrowly construed against the assertions of the taxpayers and in favor of the taxing power." *Moorhead v. United States*, 774 F.2d 936, 941 (9th Cir. 1985).

To be sure, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110. But the fact that Congress limited the scope of exempt activity, as relevant here, to that which is "educational," means that some line must be drawn to separate educational from non-educational expression. The Methodology Test, supervised by the courts, attempts

to draw that line and set a carefully charted course that avoids extremes. As the Tax Court held in *Nationalist Movement*, and the D.C. Circuit intimated in *National Alliance*, the Methodology Test does so in a constitutionally acceptable fashion. For the necessary purpose of administering the tax-exemption provisions of the Code, the Methodology Test leads to the minimum of official inquiry into, and hence potential censorship of, the content of expression, because it focuses on the method of presentation, rather than the ideas presented. The Methodology Test is therefore as concrete and neutral as the concept of "educational" permits.

II

The Tax Court correctly determined that Parks is liable for the tax on foundation managers under § 4945(a)(2)

Standard of review

The Tax Court's finding that Parks did not reasonably rely on advice of counsel is "reviewed for clear error." *DJB Holding Corp. v. Commissioner*, 803 F.3d 1014, 1022 (9th Cir. 2015).

A. Introduction

The parties stipulated that, to the extent that the Foundation is found liable for the tax under § 4945(a)(1), Parks "shall be deemed

liable" under § 4945(a)(2) "unless [he] establishes that he agreed to the expenditures based on advice of counsel as described in Treas. Reg. § 53.4945-1(a)(2)(vi)." (ER89, 184.) On appeal, Parks attempts to avoid the impact of the stipulation, contending that he is not liable for the tax, without regard to whether he relied on advice that satisfies the strictures of that regulation. His attempt to dodge the stipulation is unavailing.

Tax Court Rule 91(e) provides that a "stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation unless otherwise permitted by the Court or agreed upon by those parties." Parties can therefore waive "an issue or argument," and that "waive[r] will generally be treated as binding and conclusive." *Leuhsler v. Commissioner*, 963 F.2d 907, 911 (6th Cir. 1992). This treatment is enforced because "narrowing disputes to the essential disputed issues is the primary function of stipulations" in the Tax Court. *Estate of Quirk v. Commissioner*, 928 F.2d 751, 758-759 (6th Cir. 1991). Accordingly, as he stipulated below, Parks is liable for the tax unless he is able to establish that he received legal advice that satisfied

the requirements of Treasury Regulation § 53.4945-1(a)(2)(vi). There is no basis for relieving him of his stipulation.

Even without the stipulation, Parks is precluded from arguing that he can avoid the tax imposed by § 4945(a)(2) for any reason other than the advice-of-counsel defense outlined in the regulation because that is the only argument that he made below. Indeed, in the Tax Court, he claimed this sole defense as to only four of the advertisements — Advertisements 2-5. (ER141-142.) Any other argument on appeal has been waived. *See Lopez*, 657 F.3d at 767.

B. The Tax Court correctly found that Parks failed to establish that he agreed to the expenditures based on the requisite advice of counsel

Treasury Regulation § 53.4945-1(a)(2)(vi) provides that a foundation manager will not be taxed under § 4945(a)(2) if he provides "full disclosure of the factual situation to legal counsel" and "relies on the advice of such counsel expressed in a reasoned written legal opinion that an expenditure is not a taxable expenditure under section 4945." Add. 9. Petitioners are mistaken (Br. 50-51) that "reasoned written legal opinion" is "undefined." The regulation expressly defines "reasoned" as meaning that the written legal opinion does not merely

"recite the facts and express a conclusion," but "addresses itself to the facts and applicable law." *Id.*

Applying this standard to the evidence, the Tax Court found that Parks failed to establish that he relied on advice that satisfies the regulation's requirements. (ER91-92.) Parks provided only two written responses from his attorney addressing whether specific advertisements would result in a taxable expenditure. (ER90.) As the court correctly found, neither response was adequate.

The first written response from Parks' attorney addresses Advertisement 2, which refers to Measure 61. (ER293-294.) It consists of one paragraph, concluding that Advertisement 2 is "close" to endorsing Measure 61, but does not go "too far." (ER294.) As the Tax Court correctly found (ER91), this conclusory memorandum does not qualify as a "reasoned written legal opinion" under the regulation because it fails to address the advertisement's facts or the substance of the applicable law. Moreover, even if the memorandum is sufficient regarding whether Advertisement 2 qualifies as lobbying for purposes of § 4945(d)(1), it fails to address how it would qualify as educational for

purposes of § 4945(d)(5). For both of these reasons, the advice cannot excuse Parks from liability.

The second written response from Parks' attorney addresses Advertisements 4 and 5, which refer to Measure 65. (ER292.) This response is even briefer than the first memorandum, stating only that "We have reviewed the texts of spots labeled M65-1 and M65-2. They appear to comply with the 'public education' purpose of the Parks Foundation. If you have further questions, please contact us." (*Id.*) As the Tax Court correctly found, this memorandum "'does nothing more'" than "'express a conclusion'" and therefore is not a "'reasoned written legal opinion.'" (ER92, quoting Treas. Reg. § 53.4945-1(a)(2)(vi).) Accordingly, the advice cannot excuse Parks from liability.

Petitioners do not contest the Tax Court's findings that the two memoranda are conclusory and lack any reasoned analysis. Instead, they rely upon a 1999 legal opinion from Parks' attorney that provides general "guidelines" for Parks to follow, but does not address any specific advertisement. (ER296-301.) They argue (Br. 51-53) that the "shorter" memoranda described above should be "considered together" with this longer opinion, and that there was accordingly no need for the

shorter memoranda to "restate" the law set out in the longer opinion. This argument is belied by the chronology of the documents. The shorter memoranda analyzing Advertisements 2, 4 and 5 were drafted in 1998 (ER292, 294), more than a year *before* the detailed opinion cited by Parks (ER296) was drafted. The shorter memoranda clearly cannot be propped up by a legal opinion that did not then exist.[18]

Unable to demonstrate that Parks received a qualified legal opinion for any (let alone all) of the Foundation's taxable expenditures, petitioners instead contend, for the first time on appeal (Br. 52), that Treasury Regulation § 53.4945-1(a)(2)(vi) "violate[s] the First Amendment." That contention has not only been waived, but it also lacks merit. The regulation by no means restricts petitioners' speech. Rather, it sets out the requirements for a reliance-on-counsel defense. Moreover, these viewpoint-neutral requirements are not too "subjective"

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[18] Petitioners also assert (Br. 53), without evidentiary support, that Parks "reasonably relied on the advice" when authorizing the Foundation's taxable expenditures. But because petitioners provided no testimony from Parks or his attorney, the court could not find that Parks actually relied on the advice. Likewise, petitioners' suggestion (Br. 51) that "affidavits" or "a Power-Point presentation" could properly substitute for a "written" legal opinion is irrelevant because no such evidence was provided here.

or "vague" (Br. 51), as evidenced by the numerous courts that have applied "analogous" requirements (Br. 52) in other tax cases. *E.g., Blum v. Commissioner*, 737 F.3d 1303, 1318-1319 (10th Cir. 2013) (rejecting reliance-on-counsel defense where written advice failed to satisfy requirements imposed by Treas. Reg. § 1.6664-4(c)(1)); *Kerman v. Commissioner*, 713 F.3d 849, 870 (6th Cir. 2013) (same); *Crispin v. Commissioner*, 708 F.3d 507, 519 (3d Cir. 2013) (same). Although petitioners struggle to avoid them, the requirements for an advice-of-counsel defense have been strictly enforced by the courts because they are designed to counter "a substantial risk of abuse by taxpayers" who would "secure baseless advice as protection against" the rules imposed by the Code. *Estate of Liftin v. United States*, 754 F.3d 975, 980 (Fed. Cir. 2014).

CONCLUSION

The Tax Court's decisions should be affirmed.

Respectfully submitted,

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MARCH 2017

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the Commissioner respectfully inform the Court that they are not aware of any cases related to the instant appeal that are pending in this Court.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-72572 & 16-7

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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Signature of Attorney or Unrepresented Litigant: /s/ Judith A. Hagley

Date: Mar 27, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Judith A. Hagley
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