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

United States Court of Appeals
for the Ninth Circuit

Parks Foundation, *Petitioner-Appellant*

v.

Commissioner of Internal Revenue, *Respondent-Appellee*

and

Loren E. Parks, *Petitioner-Appellant*

v.

Commissioner of Internal Revenue, *Respondent-Appellee*

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

Reply Brief of Appellants

James Bopp, Jr.
jboppjr@aol.com
Lead Counsel for Petitioners-Appellants
Richard E. Coleson
rcoleson@bopplaw.com
Corrine L. Purvis
cpurvis@bopplaw.com
THE BOPP LAW FIRM, PC
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434; 812/235-3685 (fax)
Counsel for Petitioners-Appellants

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Introduction

Two matter-of-law analyses readily resolve this case. (1) IRS's "refers to" examples (Br.20-22) require naming legislation or using a widely recognized name-*substitute*. (Br.18-30.)[1] Amici prove that the tax-court construction creates vagueness, violates congressional intent, and has broad, negative implications for many.[2] CIR refutes neither this plain reading, congressional intent, nor the constitutional reason a narrow interpretation is mandatory, instead alleging "rewrit[ing]" of the examples "pursuant to an inapplicable 'First Amendment Mandate.'" (CIR.Br.43.)

(2) But that Mandate is from the First Amendment and *Big Mama Rag v. U.S.*, 631 F.2d 1039 (D.C. Cir. 1980), and *is* applicable in this case involving the "educational" line-drawing in *BMR* and the test purportedly responsive to *BMR*'s instruction to redefine "educational." (Br.11-18.) *BMR* says, though tax exemptions are not required, IRS must comply with the First-Amendment Mandate in *delineating* lobbying from educational issue-advocacy. (Br.12.) So CIR's subsidies-are-

[1] "[C]ourt[s] should decide . . . case[s] on non-constitutional grounds, if possible." *Bullfrog Films v. Wick*, 847 F.2d 502, 508 (9th Cir. 1988).

[2] Amicus Alliance for Justice represents over a hundred progressive organizations (Am.Br.1; http://www.afj.org/about-afj) and amicus Council on Foundations has eight hundred members (Am.Br.2). Amici say "the tax court's test for determining whether a communication 'refers to' specific legislation will add uncertainty to the lobbying rules for private foundations and public charities and will crimp the ability of foundations and charities to engage in discussions of public policy." (Am.Br.16 (capitalization altered).)

not-required argument errs. Under that argument, there could have been no *BMR*. But there was. Though *BMR* told IRS to redefine "educational" as prescribed, the Methodology Test does what *BMR* forbad, so it is unconstitutional and cannot be applied, 631 F.2d at 1034-35, as are the Refer-Reflect and Ballot-Pamphlet Tests.

Argument

I.

CIR Bears the "Especially Stringent" Burden of "First Amendment Scrutiny," a "Strict Standard" Rejecting "Latitude for Subjectivity."

As established (Br.12-18), *BMR* says "tax exemptions are a matter of legislative grace," 631 F.2d at 1034, but where (as here) IRS tests *delineate* lobbying from educational issue-advocacy, the First Amendment mandates strict clarity, *id.* at 1034-35, especially "where [as here] . . . First Amendment rights may be chilled . . . ." *Id.* at 1035.[3] This "First Amendment scrutiny" is a "strict standard," *id.* at 1035-36, the *government* must justify its tests when constitutionally challenged, *id.* at 1038-40, and it has "the burden involved in reformulating the definition of 'educational' to conform to First Amendment requirements," *id.* at 1040.[4]

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[3] Because *BMR* said (i) vague lines "*chill*" speech, (ii) "discriminatory denial . . . can *infringe* free speech," and (iii) Big Mama Rag was *discriminated* against, *id.* at 1034, 1040 (emphasis added), CIR's claims that "this case is not about" "restricted" or "suppressed" speech and that latitudinous tests don't allow "punish-[ing]" speakers are erroneous. (CIR.Br.35.)

[4] Speech-protective tests are also required because Appellants have no alternative channel since one legal entity can't speak for another. *Citizens United v. FEC*, 558 U.S. 310 (2010). The tax court said "*Citizens United* . . . casts some doubt on (continued...)

CIR nowhere refutes that *BMR* applied this "strict standard" but tries to evade *BMR* by (**1**) pronouncing this a "subsidy" case, (**2**) trying to distinguish *BMR*, and (**3**) assuming that (what CIR calls) "strict scrutiny" doesn't apply. CIR errs on all.

(1) CIR calls this a "subsidy" case, with low scrutiny and vagueness standards and a burden-shift[5] to Appellants. (CIR.Br.4-5, 30, 35-43, 62-65.) CIR says relatively little about *BMR* (CIR.Br.65-66, 69-71), tacitly admitting its tests fail under *BMR*'s analysis. But it is a *given* that government need not subsidize, *BMR*, 631 F.2d at 1034, yet IRS's "educational" test (and others affecting issue-advocacy) must meet the "strict" First-Amendment Mandate, *id.* at 1034-40.

Appellants established that *BMR*'s analysis controls because an influence-attempt/educational-issue-advocacy delineation is at issue, so IRS's "educational" test and issue-advocacy are involved as in *BMR*. (Br.13-14.)[6] *BMR* also gives

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[4] (...continued)
the alternate-channel doctrine." (ER–109.) CIR's cases, where *Citizens United*'s holding was not at issue, cannot refute this. (CIR.Br.37 n.7, 41 n.9.)

[5] CIR says Appellants "bear the '"burden of clearly showing the right to claimed [tax exemption]."'" (CIR.Br.43 (citations omitted.) But Foundation has already met *that* burden by becoming a § 501(c)(3). Now the government must prove its delineation tests meet the First-Amendment Mandate and *BMR*.

[6] The Methodology Test is at issue because it is the successor to the "educational" definition in *BMR* and was used below to find communications not "educational." It is at issue as applied and facially as explained. (Br.2 n.5, 3 n.5.) CIR says a facial challenge is waived. (CIR.Br.62 & n.16.) That errs for reasons already provided, which CIR ignores, e.g., it is undisputed that Appellants made First Amendment challenges to § 4945 and regulations thereunder (ER–123-29, (continued...)

specific content to the First-Amendment Mandate, rejecting terms, factors, and approaches CIR employs. (Br.11-18, 30-40.) *BMR* expressly rejected a *methodology* approach to defining "educational," 631 F.2d at 1037 n.13, but IRS adopted the *Methodology* Test. *BMR* rejected fact/opinion and emotion/mind distinctions, but the Test employs them, (Br.11-18, 30-40). So this is a *BMR*-style case.

(2) CIR tries to distinguish *BMR* with this footnote (CIR.Br.40 n.8[7]):

> [T]he 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.

But that doesn't prove *BMR* inapplicable since *BMR* also held the "educational" definition *itself* vague: "Because we find that the definition of 'educational' . . . is unconstitutionally vague in violation of the First Amendment, we reverse the . . . court below." 631 F.2d at 1032. *BMR* reiterated: "We find that the definition of 'educational,' and in particular its 'full and fair exposition' requirement, is so vague as to violate the First Amendment and to defy our attempts to review its application in this case." *Id.* at 1034-35. Again: "Measured by any standard, and especially the strict standard that must be applied when First Amendment rights are

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[6] (...continued)
134-41, 152) and that the Methodology Test is IRS's application of § 4945. Having made a First Amendment claim against § 4945 and the Methodology Test, Appellees may assert a facial challenge. *Citizens United*, 558 U.S. at 329-31.

[7] CIR makes the same argument elsewhere. (CIR.Br.8, 65-66.)

involved, the definition of 'educational' . . . must fall because of its excessive vagueness." *Id.* at 1035. And the redefinition assignment proves the test is at issue:

> We are not unmindful of the burden involved in reformulating the definition of "educational" to conform to First Amendment requirements. But the difficulty of the task neither lessens its importance nor warrants its avoidance. . . . In this area the First Amendment cannot countenance a subjective "I know it when I see it" standard. And neither can we.

Id. at 1040 (footnote omitted). These holding-statements and assignment flow from the vagueness of "educational," so CIR can't prove *BMR* inapplicable where IRS's "educational" definition and *BMR*'s assignment are at issue.

Now, *BMR also* found unconstitutional vagueness as *to whom* the test applied. IRS had "defined 'advocates a particular position' as synonymous with 'controversial,'" which "[could not] withstand First Amendment scrutiny" as it lacked an "objective standard by which to judge which applicant organizations are advocacy groups" and so subject to the old "educational" standard. *Id.* at 1036-37. *BMR then* held the full-and-fair-exposition test *itself* vague. *Id.* at 1037-39. So CIR's argument that the Methodology Test is "applicable to all advocacy communications" (CIR. Br.9) doesn't make *BMR* inapplicable, and it *exacerbates* the problem because now the vague Methodology Test applies to *all* advocacy groups.[8]

[8] Issue-*advocacy* groups' speech is highly protected by the First Amendment, under *BMR*, requiring speech-protective tests.

CIR's assertion that "discriminatory" enforcement in *BMR* distinguishes this case (CIR.Br.40 n.8) errs because *BMR* says "explicit guidelines" are mandatory "to *avoid* arbitrary and discriminatory enforcement." 631 F.2d at 1035 (emphasis added). The discrimination in *BMR* involved "controversial," 631 F.2d at 1037, but "latitude" allowed it, *id.*: "[T]he latitude for subjectivity afforded by the regulation has seemingly resulted in selective application of the 'full and fair exposition' standard—one of the very evils that the vagueness doctrine is designed to prevent." *BMR* held the "educational" test also had latitude. The Methodology Test incorporate's factors *BMR* held latitudinous. So CIR's distinction fails.

(3) CIR says "strict scrutiny"[9] doesn't apply so (i) vagueness is permissible (CIR.Br.28), (ii) "rules need not be narrowly construed" (CIR.Br.43), and (iii) Appellants have the burden (*id.*). This follows, says CIR, from this being a mere "subsidy" case, so that challenged provisions "do not infringe First Amendment rights" (CIR.Br.28)) and *BMR* is inapplicable. But as already shown, *BMR* and the First-Amendment Mandate apply. So "strict" "First Amendment scrutiny" applies, *BMR*, 631 F.2d at 1035-36, and CIR must prove IRS's tests constitutional and

[9] *BMR* recognized that the First Amendment has its *own* strict anti-vagueness protection. As put in *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976) (citation omitted), "First Amendment freedoms need breathing space to survive . . . [requiring] narrow specificity.'" CIR recites this (CIR.Br.63), but doesn't apply it, citing *due process* vagueness protection (CIR.Br. 63), which *also* applies. So "strict" "First Amendment scrutiny" applies, even though no "restriction" of the sort at issue in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL-II*"), is involved.

compliant with *BMR*'s redefinition assignment, *id.* at 1038-40. CIR nowhere refutes that this is *BMR*'s scrutiny, so it applies here.

Because this is a *BMR*-style case, the First Amendment applies. So cases showing issue-advocacy protection and high-clarity demands are relevant and controlling. (Br.17-18.) CIR errs in claiming irrelevance. (CIR.Br.39-42.)

And the vague terms and factor-formulations that *BMR* rejected provide precise guidance regarding approaches IRS cannot use to define or describe "educational." (Br.15-18.) Yet it does. For example, *BMR* expressly held the following "full and fair exposition" test unconstitutionally vague, 631 F.2d at 1037-40: "An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion," 631 F.3d at 1034 (citation omitted). Yet CIR repeatedly recites and applies this rejected language (CIR.Br.8, 14, 59-61), even though its own Methodology Test also replaced this language *entirely* (Add.–35-37 (§ 3).) *BMR* (and the court below it) held unconstitutionally vague the phrase "instruction to the public on subjects useful to the individual and beneficial to the community," 631 F.2d at 1035-36, yet CIR uses it to describe "educational." (CIR.Br.8.) And *BMR* held unconstitutionally vague and forbidden a fact/opinion distinction, an emotion/mind distinction, and a methodology test (Br.15-16, 30), yet those constitute IRS's

Methodology Test.

Moreover, because this is a First Amendment case, this Court must conduct an independent review of the facts. *See, e.g.*, *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995).

In sum, CIR bears *BMR*'s "especially stringent" burden of "First Amendment scrutiny"—a "strict standard" rejecting "latitude for subjectivity." And it must show it has complied with the First-Amendment Mandate by discontinuing terms and factors rejected by *BMR* and by redefining "educational" as instructed.

II.

Foundation's Messages May Not Be Deemed Influence-Attempts Or Non-Educational, So It Is Not Liable for Assessed Taxes.

A. The Messages May Not Be Deemed "Attempt[s] to Influence Legislation."

Appellants showed they lack tax liability because their messages cannot be deemed "attempt[s] to influence legislation," § 4945(d)(1). (Br.18-30.) Attempt-to-influence language is vague and overbroad, requiring the express-advocacy construction. (Br.18-19.)[10] CIR nowhere refutes that, instead decrying attempts to

[10] CIR's reliance on "'*any attempt* to influence'" to justify the tax-court's vague and overbroad construction of the Refer-Reflect Test (CIR.Br.46 (quoting § 4945(e)(1) (emphasis added)) errs because it retains this vagueness. And "any" does not bear the interpretive weight CIR places on it because it only specifies that any example of what is actually an influence-attempt (subject to the clearly-identified and express-advocacy constructions) is taxable, not that influence-attempt is

(continued...)

"rewrit[e]" provisions "pursuant to an inapplicable 'First Amendment Mandate.'" (CIR.Br.43.) But that Mandate applies. *See* Part I. Instead of the required construction, IRS uses the Refer-Reflect Test. 26 C.F.R. § 56.411–2(b)(ii). That is unconstitutional, so it cannot be applied to deem messages influence-attempts, especially under the tax-court/CIR construction (CIR.Br.45-49), which violates the First-Amendment Mandate (Br.19-30). Under proper constructions of "attempt[] to influence," "refers," and "reflects," no message is an influence-attempt. (*Id.*)

1. The Refer-Reflect Test Is Unconstitutional and May Not Be Applied.

IRS doesn't define "refers to," instead providing "illustrative examples." (ER–55.) The tax court found three "pertinent." (ER–55-56.) Appellants showed six ways "refers to" is unconstitutionally vague and overbroad. (Br.19-24.)

First, "refers to" lacks a *definition*—needed because it is as vague and overbroad as terms rejected by *BMR* and the U.S. Supreme Court and sweeps in educational issue-advocacy. (Br.19-20.)

CIR responds with two inapplicable cases. (CIR.Br.67-68.) CIR says *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1440 (9th Cir. 1996), upheld undefined "educational activities" against a vagueness challenge. But *Newcomb* involved an "educational" exception to a "travel ban" to Cuba under a statute giv-

[10] (...continued)
to be interpreted broadly.

ing the Executive broad authority, with "even broader deference than in the domestic arena," *id.* at 1438, and involving "*international* travel," less protected than "*interstate* movement" in the cases *Newcomb* distinguished, *id.* at 1440 (emphasis in original). In *that* context, this Court upheld "educational activities," especially given an added *definition, id.* at 1440-41. CIR says *United States v. Sandsness*, 988 F2d, 970, 971 (9th Cir. 1993), said examples suffice. (CIR.Br.68.) But *Sandsness* involved a guilty plea to selling drug paraphernalia, with "no protected speech or expression implicated," *id.* at 971 n.1, and in addition to listing "15 different examples," the challenged statute "sets out eight factors to be considered in characterizing items as 'drug paraphernalia.'" So neither case involves highly protected issue-advocacy, for which *BMR* holds that "strict" "First Amendment scrutiny" applies. *BMR*, 631 F.2d at 1035. And *BMR* required IRS to "reformulat[e] the *definition* of 'educational,'" *id.* at 1040 (emphasis added), indicating that in this context lack of a clear *definition* is fatal. And CIR's response doesn't solve all the problems with "refers to" identified in the first point.

Second, Appellants noted that substituting *examples* lacked *BMR*'s required "greater degree of specificity," as evident in erroneous interpretations of the examples, and that these examples were unconstitutionally vague unless narrowly interpreted. (Br.20.) CIR claims examples suffice but that the examples don't mean what they say and what a required narrow reading mandates (discussed next).

Third and fourth, Appellants showed that examples *A*, *B*, and *C* have a plain, narrow meaning, but if read otherwise they take the unconstitutionally vague and overbroad approach rejected in *BMR*, *WRTL-II*, 551 U.S. 449, and *Buckley*, 424 U.S. 1, and are unconstitutional. (Br.20-22.) Under *A*, *B*, and *C*, "refers to" means naming legislation, using a widely recognized *substitute* for legislation's name, or specifically describing its content/effect in a manner that constitutes a widely recognized *substitute* for the legislation's name. (Br.20-22.)

But the tax court interpreted the examples broadly, allowing a mere words/topics-in-common or general-discussion-of-content/effect approach. (ER–56-57.) Instead of distancing itself from this ultra-vires, unconstitutional construction, CIR endorses it and demands deference. (CIR.Br.49.) Deference would doom CIR's interpretation as beyond the authority of its own regulation—just as *BMR* held that "the Treasury regulation does not support such a narrow concept of 'educational' and we cannot approve it," 631 F.2d at 1039—and unconstitutionally vague and overbroad, as *BMR* held "educational" to be. But *BMR* didn't defer, *id.*, and this Court need not. Deference is inappropriate given high "First Amendment scrutiny and the duty to avoid constitutional problems with saving constructions. Anyway, appellate courts don't defer to legal conclusions below.

Amici (representing many varied foundations) provide history and congressional intent[11] showing reversal is required because "the Tax Court applied a legally erroneous construction of the applicable IRC provisions." (Am.Br.4.) The Tax Court's "overly broad interpretation of ['refers to' and 'reflect a view on']" (Am. Br.16) "will add uncertainty to the lobbying rules for private foundations and public charities and will crimp the ability of foundations and charities to engage in discussions of public policy" (*id.* (capitalization altered).) Amici show that "refers to" requires identifying legislation by name, number, or "us[ing] terminology which is commonly used and understood by the public *to identify the legislation in question*." (Am.Br.17-18 (emphasis in original).) The tax court's interpretation "is not the same as referring to the legislation itself, and would make it virtually impossible . . . to know in advance whether . . . communications on policy issues will later be found to qualify as lobbying." (Am.Br.19.) Amici show that the tax court's analysis of "Foundation radio ads demonstrates how far the Court's test deviates from the examples in the regulations and introduces uncertainty . . . ." (*Id.*; *see id.*19-22.) And Amici detail the flaw in the tax court's interpretation of "reflect a view" and why Foundation's ads don't do so under a proper interpretation. (Am.

[11] CIR fails to refute amici's proof of congressional intent. CIR argues that Congress didn't intend to subsidize lobbying, but it doesn't address activities Congress intended to *allow* and the bright, non-vague, speech-protective lines required to protect those long-permitted activities.

Br.22-24.) CIR doesn't respond to most of amici's arguments.

Fifth, Appellants showed that examples A-C are about inapplicable *grass-roots* lobbying, which imposes an *advocacy* requirement consistent with the required express-advocacy construction of the statutory attempt-to-influence language. (Br.22-23.) Requiring that communications expressly advocate *legislation*, not *issues*, is essential to distinguish influence-attempts from educational issue-advocacy and avoid vagueness and overbreadth. (*Id.*) Examples A-C turn on action-advocacy missing from the Refer-Reflect Test. The missing advocacy requirement dooms the Refer-Reflect Test as an interpretation of "attempt[] to influence legislation,"§ 4945, compliant with the First-Amendment Mandate. Attempts to influence *issues* cannot be thus chilled.

CIR says "grass-roots lobbying is not directed at legislators" and so has the action-advocacy requirement. (CIR.Br.45n.10.) That is description, not explanation. It doesn't addresses the required advocacy requirement, given the statute's attempt-to-influence language. And it doesn't make sense, given that grass-roots lobbying, ballot-measure advocacy, and issue-advocacy all address the general public. Whether a communication expressly advocates is the constitutional key, not the audience. CIR says grassroots lobbying examples apply to direct lobbying because both types of lobbying include the "refer to" and "reflect a view" factors. (CIR.Br. 11.) But lack of an *advocacy* requirement dooms the direct-lobbying ex-

amples, making them constitutionally impermissible implementations of the statutory attempt-to-influence language. Examples requiring advocacy don't fix that.

Sixth, Appellants showed that the *tax court's construction* violates examples *A*-*C* and the First-Amendment Mandate as just discussed. Amici elaborated on this. CIR didn't refute these arguments and endorsed the tax-court interpretation.

Appellants also established that the tax court exacerbated its unconstitutionally broad construction with an unconstitutional *Ballot-Pamphlet Test* to show common words/topics and content/effect, and to establish truth/distortion in messages, all without notice. (Br.23-24.) CIR says Appellants had notice from inclusion of ballot pamphlets in the record (CIR.Br.52), but that establishes no notice of the pamphlets' use in disputed refers-to and truth-arbiter analyses, and CIR cites no case where it was done. As this test arose in the court's opinion, this issue could not be waived, as CIR claims. (CIR.Br.52.)[12]

Appellants argued that "*reflects a view*" is similarly unconstitutional to implement the statutory attempt-to-influence language, which requires an express-advocacy construction. (Br.24.) Amici agree that it is vague and overbroad (Am.Br.22-24), and "a communication should not be found to reflect a view on specific legis-

[12] Wherever CIR asserts waiver, Appellants arguments are under the "umbrella" of their First Amendment constitutional challenges to § 4945 and regulations thereunder. *Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir. 1990). *See* Br.2-3 & nn. 4-5 (all issues properly before Court).

lation unless it plainly endorses passage or defeat of the legislation because of the impact it will have or the results it will produce." (Am.Br.24). CIR simply argues that "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.)" (CIR.Br.15. *See also* CIR.Br.53-54 (same), 70-71 (same).) CIR errs because Appellants spoke of *issue*-advocacy: "The substance of the communications shows them to be *issue* advocacy: they focus on an *issue* and take a position." (ER–138 (emphasis added).)[13] So "take a position" did not "reflect[] a view" on a *ballot measure*, Foundation's messages "reflect[] a view" only on issues, and Appellants' constitutional arguments are unrefuted.

The Refer-Reflect Test is "so vague as to violate the First Amendment and . . . defy . . . application," *BMR*, 631 F.2d 1034-35, so Foundation's messages cannot be deemed influence-attempts under it.

2. Under a Proper Construction of the Refer-Reflect Test, No Message Both "Refers to" and "Reflects a View on" a Ballot Measure.

Appellants established that under proper constructions of "attempt[] to influence legislation," the Refer-Reflect Test, and examples A-C, no message is an influence-attempt. (Br.24-30.) CIR merely disputes required constructions and

[13] Similarly, in describing Foundation's purposes (CIR.Br.10), CIR *omits* the relevant one—"promoting education by researching and presenting to the public issues of general interest or concern . . ." (ER–12)— and then says Foundation's messages "did not refer to the [other] educational purposes . . . ." (CIR.Br.11.)

reiterates the tax court's analysis based on erroneous tests. (CIR.Br.50-54.) Because the tests are flawed, CIR's repeated appeals to the fact-finding of the tax court (*see, e.g.*, CIR.Br.53) are unavailing, being based on flawed analysis.

B. No Message May Be Deemed an Influence-Attempt or for a Nonexempt Function on the Ground It Is Non-educational.

Appellants established that Foundation's messages may not be deemed influence-attempts or nonexempt expenditures on the ground they are non-educational because the "educational" test is unconstitutional and the messages are educational. (Br.30-47.) CIR responses are addressed below.

1. The Methodology Test to Determine "Educational" Violates the First-Amendment Mandate and May Not Be Applied to Tax and Penalize.

Appellants proved that the Methodology Test violates *BMR*'s First-Amendment Mandate and "def[ies] . . . application." 631 F.2d at 1034-35. (Br.30-40.) *BMR* held unconstitutional the following as "educational" factors (Br.15-16):

- fact/opinion distinction,
- emotion/mind distinction, and
- methodology.[14]

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[14] In *Bullfrog*, this Court cited *BMR* favorably for the proposition that speakers need not "present all views on a subject, or indeed any view contrary to [their] own." 847 F.2d at 510 (citation omitted). It also held a "balanced and truthful" requirement impermissible as "content-based." *Id.* And it held that requiring filmmakers seeking certification (leading to certain benefits) to not "'attempt generally to influence opinion'" was an unconstitutional condition, *id.* at 511, which is an

(continued...)

Despite rejection of a *methodology* test, 631 F.2d at 1037 n.13, IRS instituted the *Methodology* Test to define "educational" for the "educational" exception to "attempt[ing] to influence legislation,"§ 4945(e),[15] and the exempt "educational" function, *id.* § 501(c)(3). Despite rejection of *fact/opinion* and *emotion/mind* distinctions, 631 F.2d at 1038-39, IRS put them in this Test. (Br.30-40.) CIR never addresses *BMR*'s rejection of these unconstitutional factors. (CIR.Br.69-77.)[16]

Instead, CIR attempts to distinguish *BMR* on flawed grounds (CIR.Br.79), which distinction has already been refuted. *See supra* at 4-6 (*BMR* struck the old "educational" test *both* for application to "controversial" groups/activities *and* for the vagueness of the "educational" test itself). CIR finally admits a "second deficiency" in *BMR* (CIR.Br.71), thus admitting *BMR* can't be distinguished based on "controversial." But CIR ignores *BMR*'s rejection of specific factors to define "educational," instead simply saying the Methodology Test focuses on educational methods, a fact/opinion distinction, and an emotion/mind distinction. (Cir.Br.71.) That doesn't address *BMR*'s *rejection* of those.

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[14] (...continued)
alternative way of looking at *BMR*'s vagueness/chill analysis, i.e., IRS requires speakers to surrender free-speech rights (i.e., "chill") to which they are properly entitled under § 4945 to engage in (now-limited) issue-advocacy under IRS's tests without being taxed/penalized.

[15] The exception for "nonpartisan analysis, study, or research" expressly includes any "educational" activity, (Add.–27 (26 C.F.R. § 56.4911-2(c)(ii)), so "educational" activity satisfies this exception without more.

[16] CIR doesn't refute the error of a greater-justifies-lesser analysis. (Br.14-15.)

Referring to *BMR*, CIR says "[t]he D.C. Circuit has not 'reject[ed]' the Methodology Test as unconstitutionally vague as petitioners contend." (CIR.Br.72 (citing Br.30).) But Appellants *actually* said: "Despite *BMR*'s rejection of a *methodology* test, 631 F.2d at 1037 n.13, IRS instituted the *Methodology* Test . . . ." (Br.30-31 (emphasis in original).) CIR's assertion that "[t]he court did not consider the Methodology Test in *Big Mama Rag*" (CIR.Br.72) is nonsensical (because *BMR* could not have considered the later Methodology Test) and evasive (because *BMR* expressly rejected an educational-methodology test, which CIR never refutes).

CIR cites an opinion that expressly did *not* reach the Methodology Tests's constitutionality (CIR.Br.72-73 (citing *National Alliance v. U.S.*, 710 F.2d 868 (D.C.Cir. 1983)), and a decision that *cursorily* held it non-vague. (CIR.Br.72-73 (citing *Nationalist Movement v. CIR*, 102 T.C. 558 (1994)). Appellants addressed these cases (Br.39-40), to which CIR makes no response. Neither case scrutinized the Methodology Test under the First-Amendment Mandate in light of *BMR*'s rejection of an educational-methodology approach and banned distinctions. And in the latter case, the vagueness challenge was held *unnecessary* to decide, *Nationalist Movement v. CIR*, 37 F.3d 216, 221 n.5 (5th Cir. 1994), so the lower court's no-vagueness finding is in the nature of dictum.

CIR attacks Appellants' "phrase-by-phrase" analysis of the Methodology Test for not considering it "as a whole" and in light of "examples." (CIR.Br.73-75.) But

that doesn't fix the vagueness, and CIR doesn't prove that the Methodology Test does *not* use *BMR*-rejected language and factors. CIR does argue that just *one* phrase, "relevant facts," "gains clarity . . . when understood within the fuller context of the Methodology Test." (CIR.Br.73.) That concedes the vagueness of "relevant facts" standing alone. CIR then just says IRS requires relevant facts so "the listener may be educated . . . ." (CIR.Br.73-74.) That neither clarifies "relevant facts" nor addresses Appellants' argument that "'relevant facts' is like 'pertinent facts,' which *BMR* rejected" for vagueness/latitude. (Br.35 (citing 631 F.2d at 1037 ("Which facts are pertinent?")).) And *BMR* rejected the correlative facts/opinion distinction for vagueness. 631 F.2d at 1038. (Br.15-16, 30-33.) CIR apparently selected "relevant facts" to say it's permissible elsewhere. (CIR.Br.74.) But in this First Amendment context, *BMR* rejected its equivalent.

CIR says the D.C. Circuit, in *National Alliance*, said IRS was not being the "arbiter of truth" by using a methodology test requiring "'reasoned development'—including the presentation of facts without distortion or omission." (CIR.Br.75 (quoting 710 F.2d at 873-74).) But that court did *not* say what CIR says. The court did say that "government must shun being the arbiter of 'truth,'" 710 F.2d at 873-84, which CIR does not dispute. But the court nowhere relied on some government version of "truth," e.g., a ballot-pamphlet equivalent, to establish whether any asserted fact was true. And the court said the newsletter at issue

(*Attack!*) contained "news stories reporting incidents of murder or other violence by black persons, and identifying as Jews persons holding important media or other positions." *Id.* at 871-72. But it didn't decide the truth of facts asserted in those articles. It simply decided there was a "real gap" between National Alliance's "purported facts" and its racist conclusions, *id.* at 873, e.g., that "these perceived dangers can only be averted by the removal of non-whites and Jews from society," which "[may] be violent," *id.* at 872. The court said under *any* "educational" definition, this did not qualify. *Id.* at 871. So CIR errs. But it doesn't dispute that government may *not* be truth-arbiter in this context or that special free-speech protections safeguard issue-advocates. (Br.40-41.)

2. In Applying the Methodology Test, the Tax Court Unconstitutionally Made the Government "the Arbiter of 'Truth.'"

Since government may not be the truth-arbiter and the Methodology and Ballot-Pamphlet Tests allow that, those tests may not be applied to any of Foundation's messages. (CIR.Br.40-44.) Appellants demonstrated the wisdom of the no-truth-arbiter rule using Message 1 as "an example"[17] that showed the tax court operating as truth-arbiter and relying on government pamphlets as truth, resulting in grave error as to found "truth."

[17] Message 1 illustrates the unconstitutionality of IRS's tests, making *factual findings based thereon* immaterial, despite CIR's reliance thereon.

CIR responds to the truth-arbiter problem with the argument about *National Alliance* refuted above. *See supra* at 19-20. And it says that "[s]eeking to portray [Message] 1 as *educational*" Appellants "rely on facts wholly absent from [Message 1]" and that Message 1 doesn't "provide sufficient information to allow a listener to make an independent and informed conclusion regarding the positions taken." (CIR.Br.60 (emphasis added).)[18]

CIR's response here is discussed further below,[19] but in *this* context Appellants established, not that the message is *educational*, but that the tax court erred constitutionally (by being truth-arbiter) and factually (by saying Appellants "falsely" "distort[ed] the facts"). (Br.43 (citing ER–71-72).) As demonstrated and unrefuted, Message 1 accurately illustrated both these errors and that the challenged tests are unconstitutional and may not be applied.

3. Under a Proper Construction, the Messages Are Educational.

Appellants established that Foundation's messages are educational, if "educational" is properly construed, and are thus neither influence-attempts[20] nor non-

[18] Note here CIR's use of language rejected in *BMR*. *See supra* at 7.

[19] Appellants *later* return to Message 1 as also being "educational" (Br.46-47), which is addressed in the following subsection.

[20] Because the messages are educational they *automatically* fit within the influence-attempt exception for making available the results of "nonpartisan study, analysis, and research." (Add.–27 (26 C.F.R. § 56.4911-2(c)(ii).) CIR ignores this and erroneously relies heavily on a purported duty to prove that a "research project" was done. (CIR.Br.55.) But nothing in the regulations requires (i) some sort

(continued...)

exempt activity. (Br.44-47.)[21] *BMR* expressly rejected an "educational" test based on purportedly educational "methods," 631 F.2d at 1037 n.13, and told IRS to re-define "educational" without factors or language *BMR* rejected, *id.* at 1040. CIR makes tangential arguments but ignores that the Test does what *BMR* forbad by employing a "methods" approach and fact/opinion and emotion/mind distinctions (Br.15-17, 30-40).

CIR argues that "Petitioners proffer no reasonable alternative" (CIR.Br.75), but *BMR* expressly assigned the rule redefinition to *IRS*, 631 F.2d at 1040. And though neither Appellants nor this Court[22] must do IRS's neglected redefinition, Appellants did describe forbidden and permissible approaches for IRS's required reformulation. (Br.44-47.)

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[20] (...continued)
of formal research project such as a double-blind scientific test, (ii) proof of such, or (iii) that the exception is *only* available for "research" as CIR implies. Rather, one may do some "study," "analysis," *or* "research," and make that available as desired (26 C.F.R. § 53.4945-2(d)(1)(iv) ("any suitable means")) to the public. Message 1 clearly shows that such study, analysis, and/or research was done and conveyed to the public. The other messages readily reveal that similar background study/analysis/research was done. But as they are *educational*, the messages satisfy the exception without even meeting the study/analysis/research requirement.

[21] CIR's argument that the Clapper Agency produces and schedules "political" ads (CIR.Br.11, 55) fails because IRS can neither dictate how one speaks, *WRTL-II*, 551 U.S. at 477 n.9, nor "foreclose the exercise of constitutional rights by mere labels," *NAACP v. Button*, 371 U.S. 415, 429 (1963). Clapper was skilled at producing and scheduling short radio versions of educational issue-advocacy.

[22] *National Alliance* said "[w]e do not attempt a definition" of what is educational, 710 F.2d at 873.

CIR calls "baseless" Appellants' demonstration that *WRTL-II* held issue-advocacy "educational," 551 U.S. at 470, which at least creates a presumption that issue-advocacy is educational, with ties going to the speaker, *id.* at 474. CIR says "Congress has not chosen to subsidize all issue advocacy." (CIR.Br.76.) But *BMR* clearly considered feminist issue-advocacy educational, so some such issue-advocacy is educational. Congress chose to subsidize "educational," and *WRTL-II* says issue-advocacy is "educational," and *BMR* requires bright, non-vague, speech-protective lines to prevent chilling issue advocacy. So CIR's usual no-subsidy-required argument doesn't address its line-drawing assignment under *BMR*. And since *BMR* expressly held that First Amendment analysis applies to this line-drawing context, "ties" clearly must go to speech, as *WRTL-II* held, 551 U.S. at 474.

CIR argues that there must be "some line" and "we can never expect mathematical certainty from our language." (CIR.Br.76 (citation omitted).) But a "strict standard" of clarity is required here. *See* Part I. And CIR's argument (CIR.Br.76-77) ignores that the Methodology Test draws a "line" that *BMR* forbad.[23] Moreover, one line is the "naked advocacy" line that CIR acknowledges (CIR.Br.58), and none of Foundation's messages are naked advocacy.[24]

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[23] CIR makes no response to Appellants' showings that *how* people speak is protected, variable *methods* can't define "educational," and context-specific "educational" tests should replace a "unified" definition. (Br.44-46.)

[24] Naked advocacy is illustrated by an example (in the analysis/study/research (continued...)

Appellants established that Message 1 is educational (as an analytical example applicable to other messages and illustrating why the IRS's flawed tests cannot be applied). (Br.46-47.) CIR nowhere disputes that Message 1 was factually correct and the tax court wrong, based on the facts presented. Instead, CIR makes three arguments: (i) Message 1 doesn't "provide sufficient information to allow a listener to make an independent and informed conclusion regarding the positions taken"; (ii) Appellants "rely on facts wholly absent from [Message 1]"; and (iii) Message 1 ignores the central issue; and the "conflict" "is not described." (CIR.Br. 60-61.)[25] CIR errs on all.

(i) CIR's reliance on its sufficient-information test is part of the full-and-fair-exposition test, *BMR*, 631 F.2d at 1034 (test stated), which *BMR* held unconstitutional and incapable of application, *id.* at 1034-35, and the replacement Methodology Test lacks that language (*see* Add.–36-37).[26] CIR continues to flout *BMR*.

(ii) Appellants presented facts beyond Message 1 to prove the tax court's errors of making government the truth-arbiter, to show that Message 1 correctly

[24] (...continued)
context) of a bumper sticker saying "STOP ABORTION: Vote NO on Prop. X." (Add.-32 (Example 12).)

[25] CIR says the tax court relied on "objective" ballot-pamphlets, but the government cannot be made the truth-arbiter, *see supra* at 20-21, and Message 1 proves that "objective" government documents don't prove a message untrue.

[26] The old full-and-fair-exposition test is recited as "Background" for the new "educational" test (Add.–35-36), but the replacement Methodology Test nowhere uses the recited language, so CIR errs by continuing to recite what was replaced.

identified the central issue, to show that study/analysis/research underlay results provided to the public, and to show that it was "educational" under any constitutional construction of that term. CIR errs in demanding that all such facts be present in an educational message, let alone a short radio message, and its demand proves the Methodology Test unconstitutional and incapable of application. As *BMR* said, there is no way to know when stated facts are "sufficient," 631 F.2d at 1037, or whether "the facts underlying the conclusions are stated," *id.* at 1038, or whether Big Mama Rag's together-in-the-struggle assertion was sufficiently justified by its plea-agreement description, *id.*—all of which is bound up in *BMR*'s express rejection of a fact/opinion distinction (Br.15-16, 30-39). CIR's assertion that such a high level of factual proof (impossible to know in advance) is required reveals vagueness/ latitude and would exclude *all* brief broadcast messages due to time constraints. But the First Amendment forbids such exclusion because the government cannot dictate how speakers educate. (Br.37-39, 44-45.)

(iii) Message 1 clearly identified the central issue, and the tax court erroneously made ballot-pamphlets the truth-arbiter and erroneously said Message 1's central-issue identification was false. (Br.41-43.) Appellants were not required to detail the full "conflict" in a brief message. Message 1 is educational because it concisely educated the public about the core issues involved. (Br.41-43, 46-47).

In sum, CIR fails its First-Amendment-Mandate burden to prove its test constitutional and capable of application and that Foundation's messages are influence-attempts or non-educational, so Foundation is not liable for taxes.

III.

Parks Is Not Subject to Assessed Taxes.

Appellants established in Part III of the opening brief that Parks is not subject to assessed taxes for three reasons. (Br. 47-53.)

First, as shown in Parts I and II of the opening brief and above, the messages themselves cannot be deemed influence-attempts or non-educational because the tests used to do so are all unconstitutional, so as in *BMR* they may not be applied. Under permissible constructions, the messages are neither influence-attempts nor non-educational. Appellants challenge the phrase "attempt to influence" in both 26 U.S.C. § 4945(d) and (e) as unconstitutionally vague in violation of the First Amendment, unless construed with "clearly identified" and "express advocacy" constructions. (Br.1-3, 18-19, 24-29.) CIR nowhere addresses this challenge except by calling this a subsidy case so the First Amendment doesn't apply. But the First-Amendment *does* apply in cases delineating influence-attempts from educational issue-advocacy. *See supra* Parts I & II. So CIR's argument collapses. Because the Refer-Reflect, Ballot-Pamphlet, and Methodology Tests are unconstitutionally vague under the First-Amendment Mandate, they cannot be applied to find

any message an influence-attempt or non-exempt activity. (Br.47.) So Parks approved nothing taxable and may not be penalized.

Second, Appellants established that Parks would not be liable anyway because his approval was non-knowing and non-willful for the reasonable cause that the cases and arguments cited by Appellants in Parts I and II show (at a minimum) that there are strong arguments (and a consequent reasonable expectation) that the messages are non-taxable—and no stipulation could eliminate that. (Br.47-51.) CIR says a *factual* stipulation controls a *legal* argument (CIR.Br.77-79) but ignores arguments showing why it doesn't (Br.48-50), which stand unrebutted. CIR says Appellants waived this argument. (CIR.Br.79.) But Appellants' whole argument has been that the First Amendment forbids all that CIR has done here, so Parks could not know the messages were taxable (they are not) and a non-knowing, non-willful, reasonable-cause argument inheres in, and is under the umbrella of, both its First Amendment challenge and its advice-of-counsel argument. Anyway, having made a *First Amendment challenge* to § 4945, he is entitled to bring this argument for reasons articulated in *Citizens United*, 558 U.S. at 330-31, which Parks argued (Br.49) and CIR doesn't rebut.

Third, Appellants established that (i) reliance on counsel falls *within* the exception for non-knowing, non-willful, reasonable-cause action and (ii) the safe-harbor provision in IRS's rules is but a *subset* of such reliance (Br.50), which CIR

doesn't dispute. So the extremely narrow safe-harbor provision on which CIR relies does not exhaust the scope of counsel-reliance as making action non-knowing, non-willful, and for reasonable cause. (Br.50.) Limiting counsel-reliance to the narrow safe-harbor provision would unconstitutionally burden educational issue-advocacy. (Br.51-52.) And under a constitutionally permissible scope of counsel-reliance, Parks relied on competent counsel who both advised of the permissible scope of activity and expressly said submitted messages were permissible. (*Id.*)

CIR says this was waived for not being argued below. (CIR.Br.82.) But Appellants argued counsel-reliance below and that Parks was protected by counsel-reliance properly interpreted, so there was no waiver (and anyway arguments here fall under the umbrella of prior arguments and the First Amendment challenge).

CIR says its safe-harbor rule is not vague because courts apply it. (CIR.Br.82-83.) But that doesn't prove non-vagueness because courts also applied the "educational" definition before *BMR* held it unconstitutionally vague.

CIR says the safe-harbor rule is constitutional because it furthers an interest in preventing "abuse" from "baseless advice." (CIR.Br.83.) But there is no evidence of such here, and as Appellants showed, the rule is not properly tailored to such an alleged interest and unconstitutionally burdens free expression (Br.51-52).

CIR says Appellants' demonstrations of other ways there can be reasoned legal advice without expensive, time-consuming, full, legal-opinion letters are irrelevant

because none (e.g., a PowerPoint) is in evidence. (CIR.Br.82 n.18.) But Appellants' argument was to show the lack of tailoring if counsel-reliance protection is restricted to IRS's safe-harbor rule, so no such evidence was required here.

CIR says chronology precludes considering counsel's advice together. (CIR.Br.81-82.) But again this was shown to prove the lack of tailoring of the safe-harbor rule and to show that, under the broader counsel-reliance permitted by the rules, fuller memos provide evidence of the thinking behind counsel advice, regardless of chronology, and prove that even brief communications are the result of actual, reasoned, legal analysis.

CIR says counsel correspondence "fails to address the facts or the substance of the applicable law." (CIR.Br.80.) But the messages *are* the only relevant "facts," and counsel clearly addressed the messages. And the substance of the applicable law was summarized in the stated concept of "endorsing" (ER–294), and the substance of "does not go too far" (*id.*) is revealed both in the word "endorsing" and in the fuller correspondence that clearly proves the legal analysis beyond these brief but fully adequate words.

CIR says counsel didn't say the messages would be "educational" (CIR.Br.80), but counsel approved the messages, indicating that they were also educational, and demonstrating that this was behind approval by saying in another communication that they were "public education" as CIR admits (CIR.Br.81).

CIR disputes whether Parks relied on counsel advice. (CIR.Br.82 n.18.) But after consulting counsel, Parks approved the messages for broadcast, which clearly indicates reliance. Had counsel disapproved, he would not have run them.

Conclusion

Appellants aren't subject to taxes, and challenged provisions are unconstitutional as challenged absent saving constructions described herein.

Respectfully submitted,

s/ James Bopp, Jr.
James Bopp, Jr., jboppjr@aol.com
Lead Counsel for Appellants
Richard E. Coleson, rcoleson@bopplaw.com
Corrine L. Purvis, cpurvis@bopplaw.com
THE BOPP LAW FIRM, PC
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434; 812/235-2685 (fax)
Counsel for Appellants

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Date: May 9, 2017

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Judith Ann Hagley, Esquire, Attorney
Direct: 202-514-8126
[COR LD NTC Government]
DOJ - U.S. DEPARTMENT OF JUSTICE
Tax Division/Appellate Section
P.O. Box 502
Washington, DC 20044

Teresa Ellen McLaughlin, Attorney
Direct: 202-514-4342
[COR NTC Government]
DOJ - U.S. DEPARTMENT OF JUSTICE
Tax Division/Appellate Section
P.O. Box 502
Washington, DC 20044

Gilbert Steven Rothenberg, Esquire, Deputy Assistant Attorney General
Direct: 202-514-3361
[COR NTC Government]
DOJ - U.S. Department of Justice
Room 4326
950 Pennsylvania Ave., N.W.
Washington, DC 20530

William J. Wilkins, Chief Counsel
Direct: 202-622-3300
[COR NTC Government]
INTERNAL REVENUE SERVICE
3300
1111 Constitution Ave., NW
Washington, DC 20224

s/ Richard E. Coleson