

SUBMISSION TO THE  
INTERNAL REVENUE SERVICE  
UNDER THE TAX WHISTLEBLOWER ACT,  
26 U.S.C. § 7623(b)

REGARDING IMPERMISSABLE ELECTORAL ACTIVITY  
OF THE  
AMERICAN LEGISLATIVE EXCHANGE COUNCIL  
IN CONTRAVENTION OF 26 U.S.C. § 501(c)(3)  
TAX-EXEMPT CHARITABLE STATUS

July 20, 2021

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## Introduction

The Center for Media & Democracy (CMD) submits this Form 211 exposing the American Legislative Exchange Council's (ALEC) severe and repeated violations of the prohibition on political campaign intervention by a tax-exempt nonprofit organization, under 26 U.S.C. § 501(c)(3). As reflected in prior submissions to the IRS, ALEC has abused its non-profit status for many years. Common Cause has filed a separate Form 211 submission to the IRS in collaboration with CMD, detailing ALEC's extensive lobbying activity and its actions for the private inurement of its corporate sponsors in violation of its 501(c)(3) status.<sup>1</sup> Moreover, a 2015 ruling by Minnesota's Campaign Finance and Public Disclosure Board found that "ALEC's primary purpose is the passage of state legislation in the various states and that all of its wide-ranging activities are in support of this primary purpose."<sup>2</sup>

ALEC is highly selective in the candidates it assists and the lobbying it performs. The organization is dedicated exclusively to advancing the agenda of its corporate members and the Republican Party and helping to el

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to its legislative members since at least 2016 in continuing violation of its 501(c)(3) status. By ALEC's own admission, and other evidence provided below, these unreported in-kind campaign contributions to ALEC's 2,000-plus members, almost all of whom are Republicans, have a total value of more than \$6 million per election cycle.

As a registered tax-exempt organization under 26 U.S.C. § 501(c)(3), ALEC is forbidden from engaging in partisan political campaign activities. This prohibition is absolute: even *de minimis* interventions in political campaigns are prohibited under penalty of fines, sanctions, and revocation of nonprofit status. Yet since at least 2016, ALEC has provided valuable campaign assistance to its legislative members in the form of free, sophisticated voter management software and voter data, constituting an illegal and unreported in-kind campaign contribution.

The information in this submission is based upon two primary sources. First, CMD has conducted its own exhaustive investigation of ALEC's activities, resulting in extensive evidence that demonstrates ALEC's repeated violations of the tax laws. Second, as stated above, CMD has received confidential assistance from a current legislative member of ALEC ("Legislator"), a classic "insider" who wishes to remain anonymous. This unprecedented look inside ALEC's highly secretive operations provides irrefutable evidence of ALEC's longstanding unlawful electoral assistance provided to the overwhelmingly Republican legislative members of ALEC.

Pursuant to 26 U.S.C. § 7623 *et seq.* (the "Tax Whistleblower Act"), this Memorandum and accompanying Form 211 comprise CMD's submission to the Internal Revenue Service detailing ALEC's violations. CMD is also filing campaign finance complaints with the appropriate oversight agencies in 15 states.

## **I. Factual Summary**

Legislator is a state legislator, candidate for public office, and dues-paying member of ALEC. As a “membership benefit,” Legislator has been provided by ALEC with an expensive and

voter identification numbers;<sup>6</sup> and numerous other data points exceedingly helpful for a re-election campaign but largely irrelevant to “constituent service.”<sup>7</sup>

ALEC has been providing services that benefit the political campaigns and fortunes of its legislative members since at least 2016, when it began testing the CARE software platform.<sup>10</sup>

An ALEC internal promotional document from that election year touts CARE as a “game-changing tool for legislators” to “gather and store information for targeted, insightful, and immediate reporting on constituent attitudes and policy positions.”<sup>11</sup> It also noted that a full rollout would follow in 2017, with CARE being “offered to all ALEC member legislators as a member benefit.” Moreover, ALEC’s partisan assistance is multi-layered. In addition to providing its legislative members with electioneering software, it has used the CARE platform to contribute in-kind voter data and information directly to the Republican National Committee.<sup>12</sup>

ALEC claims that the CARE platform is intended for “constituent management.”<sup>13</sup> Yet CMD’s analysis reveals that CARE has, from its inception, been (1) conceived, (2) built, (3) promoted, and (4) distributed for an entirely different purpose: benefitting the political campaigns of ALEC’s 2,000-plus legislative members and using their input of private voter information to augment the RNC’s voter file.

1. *The roots of ALEC CARE: software developed from the outset by Ned Ryun and VoterGravity to facilitate electioneering for conservative Republican candidates.*

The proprietary software behind ALEC CARE, called VoterGravity, was designed as a highly partisan tool from the beginning. It was conceived by Ned Ryun, conservative political operative, activist, and founder of the “campaign operative training group” American Majority,<sup>14</sup> with the explicit goal of creating a political campaign technology to “outmaneuver the left

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<sup>10</sup> See Exhibit 6, ALEC promotional flyer,

philosophically and politically . . . leverag[ing] all of our data technology for the center Right.”<sup>15</sup>

The software, rebranded by ALEC as “CARE,” was originally intended to be distributed in conjunction with American Majority—Ned Ryun’s conservative political operative and activist training group. Before the VoterGravity company and software took shape in 2012, it was called just “Gravity,” developed by a company called Political Gravity (formerly at [www.politicalgravity.com](http://www.politicalgravity.com)).<sup>16</sup> According to an article in *The Hill* from April 2012, the Ryun brothers were directly involved in the software’s original development: “[Drew] Ryun is working with his brother Ned, founder and president of American Majority, an affiliated educational organization. . . . American Majority Action developed the software in partnership with Political Gravity, a technology firm.”<sup>17</sup> At the time, the software was targeted at empowering Tea Party activists:

American Majority Action, a rising force among the conservative grass roots, has made a nearly \$1 million investment in technology to put Tea Party activists on even footing with President Obama’s election campaign. . . . The leadership at American Majority Action wants conservative candidates to do a better job of reaching independent voters likely to support them. . . . Its solution is **Gravity**, campaign management software that allows field directors to organize volunteers in real time through smartphones.

“**Gravity** will rocket conservatives past the high-tech approaches of the DNC and other progressive political groups,” said Drew Ryun, president of American Majority Action. “This is the fusion of old-school grassroots tactics with the state-of-the-art technology. In recent years, conservatives have been out-gunned by their more liberal counterparts in utilizing technology as a means of promoting their message and mobilizing voters” (emphasis added).<sup>18</sup>

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<sup>15</sup> See Press Release by Ned Ryun, *Voter Gravity Announces Integration with the RNC Database*, VOTER GRAVITY NEWS/BLOG (Aug. 25, 2015), <https://votergravity.com/integration-with-rnc-database>.

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According to *The Hill*, “Their [the Ryun brothers’] plan [was] to distribute the software for free to local Tea Party groups, which often have plenty of motivation but little funding.”

In fact, the partnership with American Majority Action was originally thought to be critical to Gravity’s widespread adoption and success. According to a joint press release between the two organizations from July 2011, “The American Majority Action partnership adds **national distribution and a training vehicle** to get this technology in the hands of the people who can impact elections” (emphasis added).<sup>19</sup> In order to facilitate Gravity’s dissemination, and echoing the software’s later evolution into CARE, Political Gravity’s then CEO William Hogsett noted that, “We have also built a version of our toolbox that is **available at no cost to conservative grassroots groups**” (emphasis added).<sup>20</sup>

This partnership for development and distribution eventually precipitated a wholesale change in ownership. In December 2012, just after the 2012 elections, Hogsett sold Political Gravity to Ned Ryun, who re-branded the company to VoterGravity as its new “Founder and CEO.”<sup>21</sup> From this point on, VoterGravity has described itself as “the first integrated database platform on the center-right”; a “Voter Canvassing [tool] for Republican Operatives”; and, following a 2014 state senate race in Indiana, an indispensable program for unseating incumbent Democrats in “large, or small, size campaigns.”<sup>22</sup>

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<sup>19</sup> See Press Release by Political Gravity and American Majority Action, *Political Gravity and American Majority Action Form Powerful Partnership to Effect Political Change* (July 26, 2011), republished on Scribd by TEA\_Party\_Rockwall at <https://www.scribd.com/document/61051661/American-Majority-and-Political-Gravity-Partnership-Announcement>, at 1.

<sup>20</sup> *Id.*

<sup>21</sup> See Exhibit 8, LinkedIn page of Ned Ryun (screen print), available at <https://www.linkedin.com/in/nedryun> (taken July 14, 2021), at 1 (indicating that Ryun started as “Founder and CEO” of Voter Gravity in November 2012, with no mention of Political Gravity); see also William Hogsett LinkedIn, *supra* note 16, at 2 (indicating that “Political Gravity (Now VoterGravity.com)” was sold on December 21, 2012).

<sup>22</sup> See Exhibit 9, Screenshots of Voter Gravity website, available generally at <https://votergravity.com> (taken July 14, 2021), at 1-3.



After founding the new corporation, Ryun quickly began making good on VoterGravity's grand ambitions. Within a few years, he closed a \$2 million round in new capital funding,<sup>23</sup> added to its board senior Republican leader Matt Schlapp,<sup>24</sup> and launched a "2.0" version of its software for a "bigger, faster, and more targeted voter contact effort."<sup>25</sup>

In 2015, Ryun hosted several sessions at the Conservative Political Action Conference (CPAC), an annual meeting of officials, activists, legislators, and political operatives.<sup>26</sup> Among Ryun's presentations was a session entitled "Back to the Future: Catching up on Political Technology," for attendees of the conference's "Operatives in Training—Candidate, Campaign Manager & Campaign Operative Track."<sup>27</sup> According to a subsequent profile in Breitbart News Network, Ryun warned during this session that "the center right is woefully behind the curve in campaign technology, and if things don't change, it will seriously hamper the electoral future of conservatives and Republicans both."<sup>28</sup> Ryun then proceeded to introduce VoterGravity as his "new campaign data system," which Breitbart noted at the time was "devised with the backing of the Koch brothers."

But Ryun's biggest win, by far, was securing a colossal distributional partner in ALEC. Previously, Gravity's top institutional clients had been American Majority Action, FreedomWorks, the Republican Governor's Association, and the (now-defunct) Scott Walker

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<sup>23</sup> See Byron Tau, *GOP data firm adds big name*, POLITICO (Dec. 4, 2013), <https://www.politico.com/story/2013/12/voter-gravity-matt-schlapp-100644> ("A new Republican technology firm has raised \$2 million in new capital and is adding a veteran political hand to its board").

<sup>24</sup> See *id.* Politico describes Schlapp as "the former White House political director under President George W. Bush[.]. . . Schlapp was previously involved in fundraising for the Republican National Committee's abandoned Data Trust project — which sought to outsource the committee's voter file to a private company . . . [and] previously worked as vice president of federal affairs at Koch Industries."

<sup>25</sup> See Allen Fuller, *Voter Gravity 2.0 arms campaigns with the power to turn data into votes*, VOTER GRAVITY NEWS/BLOG (June 26, 2013), <https://votergravity.com/voter-gravity-2-0-arms-campaigns-with-the-power-to-turn-data-into-votes>.

<sup>26</sup> See

Defense Fund;<sup>29</sup> ALEC, meanwhile, boasted higher annual revenues than these organizations *combined*.<sup>30</sup> Sometime around his noted 2015 CPAC “Operatives in Training” presentation, Ryun struck an agreement with ALEC to distribute VoterGravity’s voter management software across its entire 2,000-plus member Republican legislator base, and ALEC CARE was born.

That same year, VoterGravity announced another major win for the company: direct data integration into the Republican National Committee voter database. “We’re excited about these API integrations [connecting two otherwise separate databases via software],” Ryun said in a press release, which “will allow any candidate . . . to put data back in real time into the RNC.”<sup>31</sup> API is the acronym for Application Programming Interface, which is a software intermediary that allows two applications to talk to each other. Ryun’s head of operations Chris Littleton added candidly, “We believe that this is going to help more Republican candidates win in 2016.”

Throughout this period, Ryun continued to pursue a grand vision and aspirations for VoterGravity as a “campaign technology” company. “Our ultimate goal,” Ryun explained, “is to outmaneuver the left philosophically and politically. And the best way to accomplish this is to fully leverage all of our data technology for the center Right, while always keeping true to our strongly held beliefs.”<sup>32</sup> At the time of its integration with the RNC, VoterGravity already offered an impressive suite of politicaln.ida TD8-1.. f17.295 0 TD0.0wis.

touchstone surveys, Esri-based mapping, and walk-list cutting<sup>33</sup>—with more features promised.<sup>34</sup>

Today, the software’s additional features include voter-level information preloaded directly from the RNC voter file;<sup>35</sup> donor, voter, and volunteer management functionality; door knocking and mobile canvassing tools; and a “Campaign Intelligence Dashboard” to “Track and manage your campaign.”<sup>36</sup>

2. *Despite efforts to conceal the connection, ALEC simply rebranded the VoterGravity software as CARE for its own dissemination and use.*

ALEC credits the CARE software as being “developed by VoterGravity,”<sup>37</sup> but the true relationship between CARE and VoterGravity is actually more simple: ALEC CARE *is* VoterGravity, simply re-branded or “white labeled” as a separate (ostensibly non-electoral) product.

According to the “About Us” page of an archived, now-defunct version of VoterGravity’s website from 2017, “Gravity CRM and ALEC CARE” are *jointly* a “Solution for ALEC Members”; the two are listed side-by-side as being the *same tool*, “[o]ffered as an ALEC membership benefit.”<sup>38</sup> On Gravity CRM’s erstwhile homepage, meanwhile, the “Sign-Up” and “About Us” buttons under “ALEC CARE” and “Gravity CRM” contain the exact same links<sup>39</sup>—

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<sup>33</sup> Esri is a widely used supplier of geographic information system (GIS) software for location-based analysis. *See generally* Esri, <https://www.esri.com/en-us/home>. A walk list is a (sometimes computer generated) sequence of potential voters to door-to-door in an efficient manner as part of political campaign efforts. *See, e.g.*, Dan Gookin, *How to Create Voter Lists for Your Political Campaign*, D

with the Sign-Up button leading to a description of how CARE is an ALEC benefit “powered by Gravity CRM.”<sup>40</sup>

Apparently realizing its tax law exposure, ALEC tried to erase these connections with VoterGravity. Sometime between 2017 and 2020, archived versions of Gravity CRM’s website cease to function, indicating that the above cited content was removed.<sup>41</sup> On ALEC’s own website, however, there are still traces of the former branding. One page describes an “ALEC CARE Training,” urging “ALEC Legislators [to] . . . Come see how ALEC CARE can benefit you.”<sup>42</sup> Underneath that description is a link to “sign up today at [www.gravitycrm.org](http://www.gravitycrm.org).”

Meanwhile, in 2018, the VoterGravity Client Relations Specialist responsible for servicing ALEC left VoterGravity to join ALEC directly. Aaron Gillham, previously the “Campaign Hacks” author for VoterGravity’s blog,<sup>43</sup> started at ALEC as a “C.A.R.E. Associate” in March 2018 according to that month’s ALEC State Chair Call Minutes.<sup>44</sup> Gillham’s LinkedIn page describes his role at ALEC as “Spearheading the full implementation of the [CARE] platform as a member benefit within ALEC,” among others tasks, and his job at VoterGravity as “providing the onboarding for all new clients” and “turn[ing] data into votes” at “the premier platform for Center-Right, voter contact tools.”<sup>45</sup>

3. *The features of ALEC CARE are largely irrelevant to “constituent management” but highly effective as electioneering tools.*

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<sup>40</sup> *Id.* at 6 (archived June 4, 2017).

<sup>41</sup> The websites and web archives display, as is still the case today with “gravitycrm.org,” pages which are active (that is, the domain can be accessed) but which show a permanent “loading” screen. *Id.* at 7 (taken July 13, 2021); see also Later archived versions at <https://web.archive.org>, *supra* note 38.

<sup>42</sup> See Exhibit 13, Screenshot of ALEC website, *ALEC CARE Training*, available at <https://www.alec.org/meeting-session/alec-care-training> (advertising an event on May 4, 2017).

<sup>43</sup> See, e.g., Aaron Gillham, *Campaign Hack: Creating a Better Target Audience*, VOTER GRAVITY BLOG (Jan. 6,

As discussed above, the Republican-leaning, campaign-focused nature of ALEC CARE has been sanitized and is no longer prominently advertised: there is little mention of ALEC on VoterGravity’s current website, nor much the other way. Indeed, ALEC is careful to brand CARE today as a “Constituent Relationship Management (CRM)” tool, as opposed to a political campaign platform.<sup>46</sup> But the partisan and political nature of CARE is still manifest in the software’s interface, features, functionality, and design.

As discussed above, the graphical user interface of ALEC CARE is exactly the same as that of VoterGravity, besides the “VoterGravity” banner topping the web page.<sup>47</sup> Comparing in-depth screenshots of Legislator’s CARE account to VoterGravity’s public website and promotional materials, CMD notes that the boxes, dials, buttons, and visual elements are identical between the two—including the red-and-white color scheme.<sup>48</sup> (ALEC’s typical colors resemble a cobalt blue,<sup>49</sup> but this aspect of the software was apparently not re-branded.) On VoterGravity’s website, next to “technology will completely change politics over the next few elections” and “[w]e place powerful data . . . into the hands of political campaigns . . . on the center-right,” are images of “Support Goal” (check mark), “Surveys Goal” (doc icon); “Doors Knocked Goal” (house icon); and “Phones Called Goal” (handset icon).

VoterGravity—the very metrics and data fields CARE is built to track suggest a partisan and political use. Screenshots of CARE provided by Legislator show various examples of individual-level “Voter Profiles.”<sup>52</sup> Another ALEC legislator who attended a live CARE training session reported that according to the trainer, these “voter information and history” pages for a given legislator’s constituents are pre-populated directly from the RNC’s voter file, confirming claims made by VoterGravity.<sup>53</sup> Not surprisingly, many of the fields are thus highly electoral and partisan in nature, including:

- Political Ideology and Party Status with a partisan slant, including “Inferred Republican” and “Tea Party Supporter”
- Income and Donor Status
- “Election Details” (voting history), by election, down to primary vs. general elections
- Interest in partisan conservative issues, including “Tax Issues,” “Second Amendment Supporter,” etc.
- Turnout Score, Aristotle ID, and RNC ID
- Other election-related parameters, such as “Persuadable Voter”<sup>54</sup>

ALEC CARE also allows for filtering of constituents by RNC ID and Aristotle ID,<sup>55</sup> although the software does not provide any equivalent filtering functionality for Democratic or third-party attributes as far as Legislator and CMD can tell. In fact, while CARE even contains built-in API integrations for RNC Access (with an “Access Token”) and Anedot<sup>56</sup>—the noted favorite electronic donation platform of Never-Trump Republicans like the Lincoln Project<sup>57</sup>—

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<sup>52</sup> See Screenshots of ALEC CARE, *supra* note 7, at 1-4 & 10-12.

<sup>53</sup> See, e.g., Ryun press release, *supra* note 15.

<sup>54</sup> See Screenshots of ALEC CARE, *supra* note 7, at 1-4 & 10-12.

<sup>55</sup> See *id.* at 5.

<sup>56</sup> See *id.* at 6.

<sup>57</sup> See, e.g., Michael Graham, *In Fundraising Fight, Anti-Trump Republicans Embrace Anedot Software*, INSIDE SOURCES (May 29, 2020), <https://insidesources.com/in-fundraising-fight-anti-trump-republicans-embrace-anedot-software>.

there are no known integrations to any Democratic or third-party platforms or software as of this submission.

Despite ALEC's re-branding of CARE as a constituent relationship platform, its purpose and provenance are clear. CARE started as, and still is, VoterGravity: a conservative-focused

. . . Part of a long-term transition of ALEC; **not only a model policy creating org, but “trusted convenor”** (emphasis added).<sup>59</sup>

ALEC’s pivot from legislative idea exchange, as claimed on its Form 990, to “trusted convenor” for partisan political gain, violates its status as a 501(c)(3) nonprofit.

Since CARE’s rollout in 2017, ALEC has provided multiple training sessions for the “member benefit” at each of its annual meetings.<sup>60</sup> Although the CARE login page forbids use for “campaign related purpose[s]”<sup>61</sup> and CARE’s promotion has reframed its electoral and campaign elements as “constituent management,”<sup>62</sup> this is mere window dressing belied by the facts.

In addition to the previously described links to VoterGravity, CARE’s dissemination has also featured more direct references to electioneering. For example, in the introductory video on ALEC’s YouTube page from September 2020, the narrator introduces the CARE platform while Aaron Gillham’s email address appears; soon, viSee, e.g.82 Tw[2a32dde3.32i3,4o “tvity,6t.



list progress as it happens.

How do you do this? Simply create a target list of voters, assign the targeted voters to volunteers by precinct and make sure they select who has voted on their Voter Gravity app as lists of voters become available at each polling location.

As your campaign strikes voters off the list of those who should be voting, add those who still need to vote to phone and contact lists and give them friendly reminders.

**Don't waste your hard work. Give your campaign the best chance to make sure every identified supporter and target voter makes it to the polls. (emphasis added)**<sup>64</sup>

If ALEC were genuinely aiming to ensure that CARE would not be used for “any campaign related purpose,” then there would be no reason for distinctly election-minded features like Turnout Score and “Strikelists” to be promoted through the platform.<sup>65</sup>

5. A \$3,000 campaign contribution, from ALEC to its member candidates.

ALEC's provision of the CARE software suite free of charge to its legislative members cements its violation of the political campaign prohibition, and its approach to distributing CARE to its overwhelmingly Republican members is as brazenly partisan as the software's design.

ALEC openly touts to its members that CARE is a highly valuable benefit provided free of charge. In internal emails obtained by CMD, ALEC's Member Engagement Manager Will Davies and Legislative Outreach Coordinator Hunter Hamberlin share the following three facts:

- ALEC CARE is developed by VoterGravity<sup>66</sup>
- The CARE “software would cost \$3,000 if bought by a member”<sup>67</sup>

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<sup>64</sup> See Ned Ryun, *Maximizing GOTV*, VOTER GRAVITY BLOG (Oct. 29, 2014), <https://votergravity.com/maximizing-gotv>.

<sup>65</sup> While

- It is provided completely free of charge to

VoterGravity is, and was always intended to be,

Integration” feature—which users access by entering an “RNC Access Token”—as featured in the paid VoterGravity suite.<sup>76</sup>

In fact, this two-way production of voter data is not a bug but rather a sought-after feature of VoterGravity, which was conceived from the start to prevent campaign “data loss.” As *The Hill* reports:

The drawback to [the] old-school hard-copy model, according to Drew Ryun, is that campaigns lose data. The Gravity program is designed to better capture voter data that gets lost. . . . [T]he stacks of hard-copy data [volunteers] return to headquarters do not get entered properly into campaign databases. American Majority Action hopes **conservative candidates can avoid this data loss by using the Gravity smartphone technology, which immediately updates voter profiles with the answers to survey questions**” (emphasis added).<sup>77</sup>

The big win for Ned Ryun was elevating his data-sharing operation from the individual campaign-level, to the national party-level, through his much-touted RNC integration—but for ALEC, a tax-exempt nonprofit, to participate in Ryun’s enterprise via CARE represents yet another instance of prohibited partisan electoral activity.

ALEC’s real-time delivery of voter data to the RNC constitutes an independent violation of the § 501(c)(3) prohibition on political campaign intervention. For VoterGravity, the data inputted by ALEC’s legislative members may serve as an attractive reason to “give away” its valuable software suite for free. But for ALEC, not only does the production of data for voter management purposes during ostensible “constituent service” interactions raise privacy and ethics

## **II. Law**

The Internal Revenue Code § 501(c)(3) absolutely forbids the participation of tax-exempt, tax-deductible organizations in any partisan political campaign activities. The relevant provisions of the Internal Revenue Code, 26 U.S.C. § 501, include the following: Section 501(a) provides that certain organizations are exempt from federal income taxation, § 501(b) specifies that these organizations are still subject to taxation to the extent of their “unrelated business income and

to) any candidate for elective public office.”<sup>79</sup> This includes funding, contributions, support, oral or written statements of position made on behalf of the organization, etc.—all of which violate the prohibition and destroy the organization’s exempt status.<sup>80</sup> As numerous scholars have pointed out, the (v) prohibition on political campaign intervention is an absolute standard, wherein “even a *de minimis* amount of involvement in political campaign activities by [501(c)(3)] charities” will lead to their being re-classified as 501(c)(4) “action organization[s].”<sup>81</sup>

Under this unequivocal bar, it is forbidden for a 501(c)(3) organization to make “cash [] or ‘in kind’ contributions of services or use of facilities to particular candidates or political parties.”<sup>82</sup> Any contribution of this sort is absolutely prohibited by the Code and Treasury Regulations, as they violate the prohibition on political campaign intervention.

Critically, this prohibition bars contribution of services to facilitate political campaigns *even if such services are provided on a non-partisan basis*. The only question is whether the contribution constitutes electioneering on a candidate’s behalf. A 501(c)(3) organization cannot

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<sup>79</sup> See IRS, *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, <https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations> (last updated July 1, 2021). This is the Service’s main landing page on the political campaign prohibition, cited as authority in *Citizens Union of City of N.Y.*

avoid the prohibition by making in-kind electioneering contributions to candidates of both parties. Unlike, say, voter education or turnout efforts, campaign contributions are equally impermissible even if given to both Republicans and Democrats.

Here, it is beyond dispute that the very purpose of the CARE software is to facilitate campaigning. This purpose is confirmed by explicit statements made by its creators and users, by the fact that its features and tools make sense only if used for electioneering, and by the express rationale for the tool's creation in the first instance. Without more, such in-kind contributions violate ALEC's 501(c)(3) tax-exempt status.

Alternatively, while ALEC's persistent partisan bias is not necessary to finding that ALEC has violated the law, such partisan bias provides an independent basis for holding ALEC's in-kind contributions to be unlawful. For a tax-exempt, tax-deductible organization, even when a given activity or contribution would *otherwise* be permissible, if that activity or contribution is conducted in a *biased manner* or has a *partisan effect*, then the activity or contribution will still be deemed unlawful. In other words, an act or contribution by a nonprofit organization necessarily constitutes unlawful political campaign intervention when that act or contribution demonstrates partisan bias for a candidate or candidates for public office.

This partisan bias rule has been the subject of increasing guidance and enforcement by the Service over time:

In 2004, the IRS initiated a process, although still informal, to address in real time allegations of partisanship by 501(c)(3) organizations during the time period around national elections, through targeted examinations, rather than just through the process of auditing returns . . . now known as the Political Activity Compliance Initiative . . . . Also after a long hiatus, the IRS has issued precedential "revenue rulings" in recent years addressing the contours of what constitutes partisan election

intervention. More may be forthcoming.<sup>83</sup>

The rule was most recently detailed in a 2007 IRS Revenue Ruling entitled “Exempt organizations; political campaigns.”<sup>84</sup> The Ruling states that whether political campaign intervention has occurred turns primarily on whether an action or activity “shows a bias or preference . . . with respect to the views of a particular candidate . . . [or] for or against a particular candidate.” In order to evaluate the existence of bias (and therefore unlawful campaign intervention), the Rule further states that such a determination “depends upon all of the facts and circumstances of each case.” It gives note of the specific “facts and circumstances” which prove dispositive in twenty-one potentially ambiguous hypothetical fact patterns. Scholars conclude, based on this Ruling and others, that “the Service approaches these issues on a case-by-case basis under a highly factual inquiry and looks to see if the organization is supporting a candidate or remaining neutral.”<sup>85</sup>

In terms of the relevant “facts and circumstances,” the 2007 Ruling explains that bias or preference can be reflected in “content,” “structure,” “timing,” “distribution,” “procedure,” or any other such dimensions of a given act or contribution.<sup>86</sup> It can even be implicated in “coded” language, “such as ‘conservative,’ ‘liberal,’ ‘pro-life,’ ‘pro-choice,’ ‘anti-choice’ . . . etc.” which,

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<sup>83</sup> Rosemary E. Fei, Laurence E. Gold & David A. Levitt, *The Rules of the Game: A Guide to Election-Related Activities for 501(c)(3) Organizations*, ALLIANCE FOR JUSTICE ADVOCACY RESOURCE (2d. ed. 2010), at 9. Several publications by the Alliance for Justice are cited with favor in *Citizens Union*, *supra* note 79, *e.g.*, nn. 2, 6, & 8.

<sup>84</sup> Rev. Rul. 2007-41, *supra* note 80, at 1421. This official Revenue Ruling, published in the Internal Revenue



when referencing a candidate or election, can constitute a violation.<sup>87</sup> The issue, according to commentators, is one of intent: the Service’s factual inquiry seeks to determine whether the organization *intended* to bias or favor a specific candidate or slate of candidates. If it did, then the non-profit has violated its tax-exempt status.<sup>88</sup>

When the specific campaign intervention at issue is a cash or in-kind contribution, the relevant “facts and circumstances” typically include: the nature of the item contributed, the parties to whom it was provided, and what level of fees (if any) was charged, among others. As explained in the 2007 Ruling,

In the context of a business activity of the organization . . . some of the factors to be considered in determining whether the organization has engaged in political campaign intervention include the following:

- Whether the good, service or facility is available to candidates in the same election on an equal basis,
- Whether the good, service, or facility is available only to candidates and not to the general public,
- Whether the fees charged to candidates are at the organization’s customary and usual rates, and
- Whether the activity is an ongoing activity of the organization or whether it is conducted only for a particular candidate.<sup>89</sup>

Each of these factors is independently sufficient to constitute bias or preference: If the contribution was offered to one candidate but not another candidate or the general public, if the prices charged to one candidate were different from those charged to another candidate or the general public, or if the contribution otherwise reflected inconsistent availability or treatment for a given candidate

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<sup>87</sup> See Boatwright, *supra* note 85, at 14 (citing Judith E. Kindell & John Francis Reilly, *Election Year Issues*, IRS 2002 EO CPE TEXT, 345 (2002)).

<sup>88</sup> *Id.* at 14-15.

<sup>89</sup> Rev. Rul. 2007-41, *supra* note 80, at 1425. See also Cong. Research Serv., *Tax-Exempt Organizations: Political Activity Restrictions and Disclosure Requirements*, RL33377 (Sept. 24, 2010), at 10 (“According to the IRS, factors that tend to indicate the activity is not biased towards any candidate or party include . . .”) (citing Rev. Rul. 2007-41, *supra* note 80; Kindell & Reilly, *supra* note 87, at 383-84).

or set of candidates, then a prohibited campaign activity has occurred.

Here, ALEC's in-kind contributions violate each of the four factors set forth in the 2007 Revenue Ruling. The CARE tool is not available to all candidates "on an equal basis"; the tool is not available "to the general public"; the tool is provided free of charge and worth many times the dues paid by ALEC's legislative members; and the tool is available only to "particular candidates," *i.e.*, conservatives and Republicans who are members of ALEC. This bias provides an independent basis upon which to find ALEC in violation of its tax-exempt status.

In 1983, the Supreme Court held in *Regan v. Taxation Without Representation of Wash.*, 461 U.S. 540, 544 (1983) that the classifications of various tax-exempt and tax-deductible organizations, such as 501(c)(3) nonprofit organizations and 501(c)(4) action organizations, reflected Congress's desire to subsidize some nonprofit activities more than others, and that the proscriptions placed upon 501(c)(3) organizations' political activities were to prevent "public funds [from] be[ing] spent on an activity Congress chose not to subsidize." This belief that tax-exempt, tax-deductible organizations should refrain from certain political activities—so as not to misuse taxpayers' subsidies—remains at the core of what it means to be a 501(c)(3) charity today.

ALEC has long pursued a non-charitable set of activities: it has brazenly helped to conceive, design, promote, and distribute partisan political campaign software under the guise of constituent service. It has also supplied the voter data from this software directly to the Republican National Committee on an ongoing basis. CMD thus submits to the Service that ALEC has intervened in countless political campaigns, on behalf of its overwhelmingly Republican membership, in stark violation of its duties under 26 U.S.C. § 501(c)(3).