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### Cover Page Footnote

J.D., *summa cum laude*, The Catholic University of America, Columbus School of Law, 2019; B.A., Stony Brook University, 2016. I would like to thank Professor Roger Colinvaux for his invaluable expertise and guidance. I would also like to thank Professor Megan La Belle and the staff and editors of the *Catholic University Law Review* for their review of this paper and assistance in readying it for publication. Any errors are my own.

# PREVENTING TAX-EXEMPT PROPAGANDA: THE CASE FOR DEFINING THE SECOND PRONG OF THE METHODOLOGY TEST

*Jordanne Miller*<sup>+</sup>

## I. INTRODUCTION

Americans of all ages, all conditions, all minds constantly unite. Not only do they have commercial and industrial associations in which all take part, but they also have a thousand other kinds: religious, moral, grave, futile . . . Americans use associations to give fêtes, to found seminaries, to build inns, to raise churches, to distribute books . . . in this manner they create hospitals, prisons, schools . . . I often admire the infinite art with which the inhabitants of the United States managed to fix a common goal to the efforts of many men and to get them to advance to it freely.<sup>1</sup>

When people in other bona fide religions follow their doctrines they become better people—Buddhists, Hindus, Christians, Jews. When Muslims follow their doctrine, they become jihadists.<sup>2</sup>

The aforementioned quotes could not be more diametrically opposed: the former describes what charities should strive to achieve while the latter comes from the website of a propaganda organization classified as a hate group.<sup>3</sup> Curiously, under the current test used by the Internal Revenue Service (IRS), this propaganda group currently enjoys the benefits of tax exempt status as an educational organization—such as deductibility of contributions.<sup>4</sup>

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<sup>+</sup> J.D., *summa cum laude*, The Catholic University of America, Columbus School of Law, 2019; B.A., Stony Brook University, 2016. I would like to thank Professor Roger Colinvaux for his invaluable expertise and guidance. I would also like to thank Professor Megan La Belle and the staff and editors of the *Catholic University Law Review* for their review of this paper and assistance in readying it for publication. Any errors are my own.

1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 489 (Harvey C. Mansfield & Delba Winthrop, eds. trans., 2000).

2. *Center for Security Policy*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/center-security-policy> (last visited Jan. 22, 2019).

3. Because there is no legal definition for a hate group, this comment adopts the definition of “hate group” created by The Southern Poverty Law Center, “an organization that—based on its official statements or principles, the statements of its leaders, or its activities—has beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics.” *Frequently Asked Questions About Hate Groups*, S. POVERTY L. CTR., <https://www.splcenter.org/20171004/frequently-asked-questions-about-hate-groups#hategroup> (last visited Nov. 30, 2017).

4. See *Ways to Give*, CTR. FOR SEC. POL’Y (2017), <https://www.centerforsecuritypolicy.org/wp-content/uploads/2017/12/Ways-to-Give.pdf>.

Because the IRS classifies this propaganda group as an educational organization—a type of public charity<sup>5</sup>—it is exempt from paying federal income taxation and is eligible for tax deductible contributions.<sup>6</sup> These benefits are the equivalent of a grant,<sup>7</sup> which means that U.S. taxpayers, through the federal government, subsidize the existence of this hate group, and others like it. How? Why?

The answer lies in the very process designed to separate tax exempt eligible and ineligible organizations: the methodology test.<sup>8</sup> Under Treasury Regulations,

[a]n 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.<sup>9</sup>

Alone, the full and fair exposition standard is unconstitutionally vague. To rectify this, the IRS developed the methodology test to define what a “full and fair exposition of the pertinent facts” is and to inform its application of the full and fair exposition standard.<sup>10</sup> Using the four-prong methodology test, the IRS determines whether the method used by an organization to communicate a particular viewpoint or position provides a factual foundation for that position or viewpoint, enabling the organization to qualify as educational.<sup>11</sup>

Over the past several decades, the IRS has faced challenges to the methodology test. A few key decisions have shaped the test into what it is today;<sup>12</sup> however, the test remains flawed: applying the test does not weed out propaganda groups such as hate groups from genuine educational organizations for purposes of educational tax exempt status.<sup>13</sup> This permits hate groups, such as the one quoted above, to achieve tax exempt status as an educational organization despite failing to fulfill the goals of education: to develop critical thinking skills and to prepare individuals for a job or career.<sup>14</sup>

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5. 26 U.S.C. § 501(c)(3) (2012).

6. I.R.C. §§ 170(a), (c)(2) (2012); ProPublica, *Center for Security Policy, Inc.*, NONPROFIT EXPLORER, <https://projects.propublica.org/nonprofits/organizations/521601976>.

7. *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983) (stating “[a] tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income”).

8. Rev. Proc. 86-43, 1986-2 C.B. 729.

9. Treas. Reg. § 1.501(c)(3)-1 (as amended in 2008) (emphasis added).

10. Rev. Proc. 86-43, 1986-2 C.B. 729.

11. *Id.*

12. See *id.* (noting that *Nat’l All. v. United States*, 710 F.2d 868 (D.C. Cir. 1983) and *Big Mama Rag, Inc. v. United States (Big Mama II)*, 631 F.2d 1030 (D.C. Cir. 1980) were two recent court decisions challenging the constitutionality of section 1.501(c)(3)-1(d)(3) of the regulations).

13. *Big Mama II*, 631 F.2d at 1039–40.

14. Arthur W. Foshay, *The Curriculum Matrix: Transcendence and Mathematics*, 6 J. OF CURRICULUM AND SUPERVISION 277, 277 (1991).

This Comment concludes that the second prong of the methodology test—the facts that purport to support the viewpoints or positions are distorted—permits organizations odious to the purpose of tax exemption to garner the benefits of educational tax exempt status and, therefore, should be redefined. Part I discusses the statutory and regulatory framework that applies to public charities, with a focus on educational organizations, and scrutinizes a series of constitutional challenges to the Department of the Treasury’s regulations for educational organizations. It also discusses the response to these challenges: the methodology test. Part II analyzes the deficiencies of the second prong of the methodology test and proposes a solution which would limit hate groups’ ability to achieve tax exempt status as educational organizations. It concludes by providing an illustrative example.

## II. DEFINING “EDUCATIONAL” FOR 501(C)(3) TAX EXEMPTION

Under the Internal Revenue Code, more than thirty types of organizations are exempt from paying federal income taxes.<sup>15</sup> A variety of types of organizations qualify for tax exempt status;<sup>16</sup> these organizations include, for example, agricultural or horticultural organizations,<sup>17</sup> credit unions,<sup>18</sup> cemetery companies,<sup>19</sup> certain profit-sharing and stock corporations,<sup>20</sup> and religious and apostolic organizations.<sup>21</sup> Perhaps the most prominent type of tax exempt eligible organization, public charities, enjoy an expansive list of benefits—they are eligible to receive tax deductible contributions from individuals and organizations<sup>22</sup> for income,<sup>23</sup> gift,<sup>24</sup> and estate tax purposes.<sup>25</sup> These benefits reduce the cost of contributing to public charities and help public charities organize their funds.<sup>26</sup> By providing a tax exemption for public charities, the government helps those organizations, which would generate little taxable income, to actively generate funds.<sup>27</sup> Without this tax exempt status and the

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15. I.R.C. § 501(a) (2012) (referencing I.R.C. §§ 501(c)–(d), 401(a)).

16. *See generally id.* § 501(c) (describing those organizations which qualify for federal tax exemption).

17. *Id.* § 501(c)(5).

18. *Id.* § 501(c)(14)(A).

19. *Id.* § 501(c)(13).

20. *Id.* § 501(c)(25)(C).

21. *Id.* § 501(d).

22. I.R.C. §§ 170(a), (b)(1) (2012).

23. *Id.* §§ 170(a), (c)(2).

24. I.R.C. § 2522(a)(2) (2012).

25. *Id.* § 2522(a)(2).

26. *See* Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 866 (1993) (noting that tax deductible contributions “reduce the cost of contributing to such organizations and help the organizations raise funds”).

27. Lynn Lu, *Flunking the Methodology Test: A Flawed Tax-Exemption Standard for Education Organizations that “Advocate a Particular Position or Viewpoint”*, 29 N.Y.U. REV. L.

benefits that accompany it, many charities would face large operational difficulties, potentially impacting their continuing existence.<sup>28</sup>

To qualify as a public charity, an organization must comply with four requirements set forth in section 501(c)(3) of the Internal Revenue Code.<sup>29</sup> First, the organization must be “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes.”<sup>30</sup> Second, no part of the organization’s net earnings may “inure[] to the benefit of any private shareholder or individual.”<sup>31</sup> Third, the organization cannot participate in political campaigns.<sup>32</sup> Fourth, the organization cannot devote a substantial portion of their activities to “carrying on propaganda, or otherwise attempting, to influence legislation”<sup>33</sup>—a practice commonly known as “lobbying.”

The Department of the Treasury created regulations pertaining to educational organizations.<sup>34</sup> Within section 501(c)(3), an organization is “educational” if its primary purpose is “[t]he instruction or training of the individual for the purpose of improving or developing . . . capabilities; or [t]he instruction of the public on subjects useful to the individual and beneficial to the community.”<sup>35</sup>

Although the Department of the Treasury has historically construed the educational exemption liberally,<sup>36</sup> its inquiry into organizations “formed to disseminate . . . propaganda” has been much more probing.<sup>37</sup> Beginning with the passage of the Revenue Act of 1918,<sup>38</sup> the Department of the Treasury promulgated a series of regulations withholding the educational exemption from these propaganda organizations.<sup>39</sup> It did so based on a belief that genuine

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& SOC. CHANGE 377, 384–85 (2004) (“Hence, for organizations that would generate little income to tax in any event, section 501(c)(3) status is most valuable . . . as a way actively to generate funds.”).

28. *Id.*

29. I.R.C. § 501(c)(3) (2012).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Treas. Reg. § 1.501(c)(3)-1 (as amended in 2008).

35. Treas. Reg. § 1.501(c)(3)-1(d)(3). Many types of organizations can qualify as “educational”—for example, traditional schools and correspondence courses, “museums, zoos, planetariums, [and] symphony orchestras” all qualify as educational organizations, as do institutions presenting “public discussion groups, forums, panels, [or] lectures.” *Id.*

36. See Alex Reed, *Subsidizing Hate: A Proposal to Reform the Internal Revenue Service’s Methodology Test*, 17 FORDHAM J. CORP. & FIN. L. 823, 828 (2012) (noting that the Department of the Treasury has “demonstrated a willingness to assume the existence of both individual and societal benefits, absent any glaring indications to the contrary.”).

37. See Tommy F. Thompson, *The Availability of the Federal Educational Tax Exemption for Propaganda Organizations*, 18 U.C. DAVIS L. REV. 487, 498 n.26 (1985).

38. Revenue Act of 1918, Pub. L. No. 254, 40 Stat. 1057 (1919).

39. Lu, *supra* note 27, at 391.

education “is directed at and for the benefit of the individual”<sup>40</sup> and “it was Congress’ intention, when providing for the deduction of contributions to educational corporations . . . to foster education in its true and broadest sense, thereby advancing the interest of all, over the objection of none.”<sup>41</sup> Underlying this rationale was the assumption that “the dissemination of propaganda is an inherently selfish endeavor undertaken to further the speaker’s own ends whereas the act of educating is an altruistic enterprise devoted to improving individuals’ overall knowledge and understanding.”<sup>42</sup>

While the IRS’s application of the educational exemption was initially fairly impartial,<sup>43</sup> by the late 1920s, “[o]rganizations advocating minority viewpoints began to face a significantly greater risk of being denied charitable status than their more conventional counterparts.”<sup>44</sup> Although appellate courts reversed the decisions of the lower courts denying minority viewpoint organizations charitable tax exempt status,<sup>45</sup> the same courts upheld decisions denying the same status to lobbying organizations.<sup>46</sup> As the number of cases pertaining to lobbying organizations and tax exempt status grew, public pressure on Congress to prevent taxpayer funded lobbying increased.<sup>47</sup> Congress responded with the Revenue Act of 1934, which made charitable tax exempt status dependent on a finding that “no substantial part of the activities . . . carr[ies] on propaganda, or otherwise attempt[s] to influence legislation.”<sup>48</sup> In response, the Department of the Treasury revised its definition of “educational” to acknowledge that propaganda organizations can qualify for charitable tax exempt status if their “principal purpose and substantially all [their] activities [are] clearly of a

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40. Thompson, *supra* note 37, at 498.

41. S. 1362, 2 C.B. 152, 154 (1920).

42. Alex Reed, *Playing Devil’s Advocate: The Constitutional Implications of Requiring Advocacy Organizations to Present Opposing Viewpoints*, 37 N.Y.U. REV. L. & SOC. CHANGE 591, 595–96 (2013).

43. Thompson, *supra* note 37, at 498.

44. Reed, *supra* note 42, at 596. *See also* Cochran v. Comm’r, 30 B.T.A. 1115, 1119–1121 (1934), *rev’d*, 78 F.2d 176 (4th Cir. 1935) (denying the educational exemption to an organization disseminating “highly controversial” information); Weyl v. Comm’r, 18 B.T.A. 1092, 1094 (1930), *rev’d*, 48 F.2d 811 (2d Cir. 1931); Slee v. Comm’r, 15 B.T.A. 710, 715 (1929), *aff’d*, 42 F.2d 184 (2d Cir. 1930) (finding that organizations “engage[d] in the dissemination of controversial propaganda” should not receive charitable tax exempt status); Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 215 n.76 (1987) (noting that “[t]he controversiality of an organization’s issue or position appears to have played a role in at least some early determinations of eligibility for exempt status”).

45. *See* Cochran v. Comm’r, 30 B.T.A. 1115, 1118–1120 (1934), *rev’d*, 78 F.2d 176, 180 (4th Cir. 1935); Weyl v. Comm’r, 18 B.T.A. 1092, 1094 (1930), *rev’d*, 48 F.2d 811 (2d Cir. 1931).

46. *See, e.g.*, Marshall v. Comm’r, 147 F.2d 75, 77–78 (2d Cir. 1945) (denying tax exempt charitable status to trusts engaging in lobbying).

47. Reed, *supra* note 42, at 596.

48. Revenue Act of 1934, § 101(6), 48 Stat. 680, 700 (1934).

nonpartisan, noncontroversial, and educational nature” and they abstain from substantial legislative activities.<sup>49</sup>

This standard has continued to evolve, and the current standard, discussed *infra*, permits propaganda groups to qualify for educational tax exempt status if they “present[] 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,”<sup>50</sup> regardless of the accuracy of the facts provided. Thus, under the current standard, organizations may qualify for tax exempt charitable status as educational organizations if they can provide factual support for their propositions or arguments even if that factual support is inaccurate or based on faulty methods.

#### A. The Full and Fair Exposition Standard

Promulgated in 1959, the “full and fair exposition” standard “has been extensively litigated.”<sup>51</sup> As discussed, *infra*, from 1979 to 2000, organizations denied tax exempt charity status brought declaratory judgment suits, seeking tax exempt status or, alternatively, to have the full and fair exposition standard declared unconstitutional.<sup>52</sup> Although the D.C. Circuit found the full and fair exposition standard to be unconstitutionally vague,<sup>53</sup> the Department of the Treasury did not revise or reject the standard.<sup>54</sup> Rather, it addressed the constitutional concerns raised by the court by implementing a methodology test to inform its application of the full and fair exposition standard.<sup>55</sup> The Department of the Treasury’s approach seems to have worked—since the implementation of the methodology test, courts have not raised the same constitutionality concerns.<sup>56</sup> However, the standard, although constitutional, does not fulfill its purpose: sorting propaganda groups from organizations which meet the purposes of tax exemption.

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49. Treas. Reg. § 19.101(6)-1 (1940).

50. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (2008).

51. Reed, *supra* note 36, at 829.

52. See *Nat’l All. v. United States*, 710 F.2d 868, 869–71 (D.C. Cir. 1983); *Big Mama Rag, Inc. v. United States (Big Mama II)*, 631 F.2d 1030, 1032 (D.C. Cir. 1980); *Nat’l All. v. United States*, No. 79-1885, 1981 U.S. Dist. LEXIS 12504, at \*7 (D.D.C. May 27, 1981); *Big Mama Rag, Inc. v. United States (Big Mama I)*, 494 F. Supp. 473, 474 (D.D.C. 1979); *Nationalist Found. v. Comm’r*, No. 14871-98X, 2000 Tax Ct. Memo LEXIS 374 (T.C. Oct. 11, 2000); *Nationalist Movement v. Comm’r*, 102 T.C. 558, 559 (1994).

53. *Big Mama II*, 631 F.2d at 1032.

54. Reed, *supra* note 36, at 829–30.

55. *Id.* at 830.

56. *Id.*; see *Nationalist Movement v. Comm’r*, 37 F.3d 216, 218 n.2 (5th Cir. 1994) (stating that, although no federal circuit court had decided the constitutionality of the methodology test, the D.C. Circuit noted, in dicta, that the mythology test was likely constitutional).

### I. Big Mama Rag, Inc. v. United States

In the 1970s, a nonprofit organization known as Big Mama Rag, Inc., (“Big Mama Rag”) published a monthly newspaper “to create a channel of communication for women that would educate and inform them on general issues of concern to them.”<sup>57</sup> Called *The Big Mama Rag*, the newspaper refused to publish any materials that it believed might harm the feminist movement.<sup>58</sup>

As the movement grew, Big Mama Rag sought to increase its revenue from donations and applied for tax exempt status as an educational and charitable organization.<sup>59</sup> Initially, an IRS district director denied *The Big Mama Rag*’s application for tax exempt status, finding that it “was indistinguishable from an ‘ordinary commercial publishing practice.’”<sup>60</sup> Big Mama Rag appealed the denial, and the National Office of the IRS affirmed, noting the presence of political commentary and some sexual orientation commentary.<sup>61</sup> The district director then issued the final determination letter.<sup>62</sup> In it, the director reiterated the denial of Big Mama Rag’s application for tax exempt status because *The Big Mama Rag* was not educational since the preparation of *The Big Mama Rag* “[did] not follow methods educational in nature” and its distribution was “not valuable in achieving an educational purpose.”<sup>63</sup>

With no other administrative remedies available, Big Mama Rag brought its fight to the courts.<sup>64</sup> Using the rights granted to it by a federal statute,<sup>65</sup> Big Mama Rag brought a declaratory judgment suit in the District Court for the District of Columbia,<sup>66</sup> seeking tax exempt status or, in the alternative, to have the full and fair exposition standard declared unconstitutional.<sup>67</sup> The court reached the same conclusion as the IRS—that *The Big Mama Rag* was not educational and, as such, did not qualify for tax exempt status—but reached that

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57. *Big Mama II*, 631 F.2d at 1032.

58. *Big Mama Rag, Inc. v. United States (Big Mama I)*, 494 F. Supp. 473, 475–76 (D.D.C. 1979). The newspaper had the following censorship policy:

We retain the right to censor all copy (including advertisements) submitted to the paper. As feminists in the process of developing a political analysis, we must adopt certain values and reject others. By ‘censorship’ we mean that we will not print any material which, by our judgment, does not affirm our struggle.

*Id.* at 477 (quoting 4 BIG MAMA RAG 4 (1976)).

59. *Big Mama II*, 631 F.2d at 1032 n.2.

60. *Id.* at 1033.

61. *Id.*

62. *Id.*

63. *Id.* at 1033 n. 4.

64. *Id.* at 1033.

65. See 26 U.S.C. § 7428 (2006) (granting the U.S. Tax Court, the U.S. Court of Claims, and the U.S. District Court for the District of Columbia concurrent jurisdiction for cases arising under this section).

66. *Big Mama II*, 631 F.2d at 1032.

67. *Id.*

conclusion on different grounds.<sup>68</sup> According to the court, Big Mama Rag failed the full and fair exposition standard because it advocated “a stance so doctrinaire that it cannot satisfy [the] standard.”<sup>69</sup> Dissatisfied with the court’s ruling, Big Mama Rag appealed. The D.C. Circuit reversed and remanded, finding that the full and fair exposition standard was unconstitutionally vague because it was unclear which organizations were subject to the standard or how those organizations could comply with the standard.<sup>70</sup>

Specifically, the court found that the full and fair exposition standard did not specify in enough detail when an organization is “advocat[ing] a particular position or viewpoint” and, therefore, is subject to the standard.<sup>71</sup> According to the court, since “advocacy” was not defined in the subsection related to educational organizations and it was “difficult to ascertain . . . whether or not the definitions of advocacy groups are the same for both educational and charitable organizations[—]” the standard was unconstitutionally vague.<sup>72</sup> Furthermore, the court also found the standard unconstitutionally vague because the IRS treated “advocacy” and “controversial” as synonyms, making the full and fair exposition standard subjective.<sup>73</sup> Finally, the court rejected the lower court’s attempt to salvage the standard from unconstitutional vagueness by creating a fact/opinion distinction; the appellate court found this distinction could not be applied in an objective manner and thus did not absolve the standard of its vagueness.<sup>74</sup>

Although the court acknowledged that ridding the full and fair exposition standard of vagueness would be difficult, it stressed that “[i]n this area the First Amendment cannot countenance a subjective ‘I know it when I see it’ standard.”<sup>75</sup>

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68. *Id.* at 1033.

69. *Big Mama Rag, Inc. v. United States (Big Mama I)*, 494 F. Supp. 473, 478–79 (D.D.C. 1979).

70. *Big Mama II*, 631 F.2d at 1035–36, 1040.

71. *Id.* at 1036–37 (internal quotes omitted).

72. *Id.* at 1036. Treasury Regulations defined “advocacy” as it applies to charitable organizations as follows:

The fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3) so long as it is not an *action* organization of any one of the types described in paragraph (c)(3) of this section.

Treas. Reg. § 1.501(c)(3)-1 (2008).

73. *See Big Mama II*, 631 F.2d at 1036 (“It gives IRS officials no objective standard by which to judge which applicant organizations are advocacy groups- the evaluation is made solely on the basis of one’s subjective notion of what is ‘controversial.’”).

74. *See id.* at 1038–39 (noting that its view of the fact/opinion distinction was bolstered by the lower court’s failure to apply the fact/opinion distinction it created and stating conclusively that Big Mama Rag did not meet the standard).

75. *Id.* at 1040.

## 2. *The Nationalist Line of Cases*

### a. *National Alliance v. United States*

At the same time that *Big Mama Rag, Inc. v. United States* was pending before the D.C. Circuit, a group called “National Alliance” filed a declaratory judgment suit in the District Court for the District of Columbia<sup>76</sup> seeking tax exempt status or, in the alternative, to have the full and fair exposition standard declared unconstitutional.<sup>77</sup> Like *Big Mama Rag*, National Alliance published what it believed to be educational material,<sup>78</sup> and had applied and been rejected for tax exempt status as an educational organization.<sup>79</sup> According to the IRS, National Alliance’s application was denied because its publications presented “‘unsupported opinion’ rather than a ‘full and fair exposition of the pertinent facts.’”<sup>80</sup>

After the D.C. Circuit ruled on *Big Mama Rag, Inc.*, the IRS offered an additional justification for denying National Alliance’s application for tax exemption as an educational organization.<sup>81</sup> According to this new justification, National Alliance’s application had been denied because its publications did not employ an educational methodology.<sup>82</sup> The methodology approach, as defined by the IRS, “looks to whether the presentation of the ideas, beliefs, etc., is such that it encourages an increased understanding of the subject matter.”<sup>83</sup> Thus, the methodology test was born. Under the methodology test, to determine whether an organization’s methods are educational, IRS agents consider and weigh four factors:

1. Whether or not the presentation of viewpoints unsupported by a relevant factual basis constitutes a significant portion of the organization’s communications.
2. To the extent viewpoints purport to be supported by a factual basis, are the facts distorted.
3. Whether or not the organization makes substantial use of particularly inflammatory and disparaging terms, expressing conclusions based more on strong emotional feelings than objective factual evaluations.

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76. *Nat’l All. v. United States*, No. 79-1885, 1981 U.S. Dist. LEXIS 12504, at \*2 (D.D.C. May 27, 1981). Prior to filing suit in the D.C. District Court, National Alliance exhausted all administrative remedies. *Id.*

77. *Id.* at \*7.

78. *Nat’l All. v. United States*, 710 F.2d 868, 869 (D.C. Cir. 1983). National Alliance published a monthly newsletter and membership bulletins. *Id.*

79. *Nat’l All.*, 1981 U.S. Dist. LEXIS 12504, at \*2.

80. *Id.* at \*4–5.

81. *Id.* at \*4–5 n.2.

82. *Id.* at \*4.

83. *Id.* at \*11.

4. Whether or not the approach to a subject is aimed at developing an understanding on the part of the addresses, by reflecting consideration of the extent to which they have prior background or training.<sup>84</sup>

According to the IRS, when it applied these factors, it concluded National Alliance published “distorted, inflammatory, and unfounded hate material”<sup>85</sup> and, as such, its methodology was not educational.<sup>86</sup>

The district court rejected the methodology test, finding that it “merely reword[ed] the regulation it [was] intended to circumvent, without creating criteria any less vague or more capable of neutral application.”<sup>87</sup> Thus, the court vacated the denial of tax exempt status to National Alliance and remanded the case for further proceedings consistent with the D.C. Circuit’s ruling in *Big Mama Rag, Inc.*<sup>88</sup> The IRS appealed and the D.C. Circuit reversed and remanded, finding denial of tax exempt status was proper because National Alliance’s publications could not be deemed “educational within any reasonable interpretation of the term.”<sup>89</sup> Because it found that National Alliance’s publications could not possibly be educational, the D.C. Circuit did not address whether the methodology test solved the vagueness issue and, therefore, was constitutional.<sup>90</sup> However, in dicta, the court stated:

We observe that . . . application by [the 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 reduced the vagueness found by the *Big Mama* decision.<sup>91</sup>

Thus, it appeared that the D.C. Circuit believed that the methodology test solved the unconstitutional vagueness problem and approved of the test. In light of this, the IRS published the methodology test as Revenue Procedure 86-43.<sup>92</sup>

*b. Nationalist Movement v. United States*

Despite the D.C. Circuit’s seeming approval of the methodology test, groups denied tax exempt status as educational organizations continued to challenge the

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84. *Id.* at \*11–12.

85. *Id.* at \*11. National Alliance’s stated purpose was to “arous[e] in white Americans of European ancestry ‘an understanding of and a pride in their racial and cultural heritage and an awareness of the present dangers to that heritage.’” *Nat’l All. v. United States*, 710 F.2d 868, 869 (D.C. Cir. 1983).

86. *Nat’l All.*, 1981 U.S. Dist. LEXIS 12504, at \*4.

87. *Id.* at \*12.

88. *Id.* at \*13.

89. *Nat’l All.*, 710 F.2d at 875.

90. *Id.* at 875–76.

91. *Id.* at 875.

92. Rev. Proc. 86-43, 1986-2 C.B. 729.

constitutionality of the test. The first challenge was brought by The Nationalist Movement,<sup>93</sup> a group advocating social, political, and economic change to counteract “minority ‘tyranny’” while exalting “freedom as the highest virtue, America as the superlative nation, Christianity as the consummate religion, social justice as the noblest pursuit, English as the premier language, the White race as the supreme civilizer, work as the foremost standard and communism as the paramount foe.”<sup>94</sup> Like Big Mama Rag and National Alliance, The Nationalist Movement published what it believed to be educational material<sup>95</sup> and applied for and was denied tax exempt status as an educational organization.<sup>96</sup> In response to the denial, The Nationalist Movement filed a declaratory judgment suit, seeking tax exempt status or, in the alternative, to have the full and fair exposition standard declared unconstitutional.<sup>97</sup>

Because, unlike in *National Alliance v. United States*, the methodology test had now been published as a Revenue Procedure, the U.S. Tax Court directly “consider[ed] the constitutionality of the [methodology test].”<sup>98</sup> The court agreed with the D.C. Circuit and found that the methodology test was “not unconstitutionally vague or overbroad[.]”<sup>99</sup> According to the court, the methodology test, unlike the full and fair exposition standard, was not phrased in terms of individual sensitivities<sup>100</sup> and clarified that organizations whose unsupported opinions constituted a “significant portion of the organization’s communications” would be denied educational tax exempt status.<sup>101</sup> After approving the methodology test, the court applied it to The Nationalist Movement and found that three of the four factors were present in its newsletter—meaning it failed the methodology test.<sup>102</sup> The court, therefore, found that denial of its application for tax exempt status as an educational

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93. *Nationalist Movement v. Comm’r*, 102 T.C. 558, 558 (1994).

94. *Id.* at 560.

95. *Id.* at 564–69. The Nationalist Movement published a monthly newsletter, litigated First Amendment issues, and provided telephone counseling services. *Id.*

96. *Id.* at 558.

97. *Id.* at 558–59.

98. *Id.* at 583.

99. *Id.* at 588.

100. *Id.* at 586.

101. *Id.* (quoting Rev. Proc. 86-43, 1986-2 C.B. 729, 730). The court held that:

In our view, Rev. Proc. 86-43 . . . is not unconstitutionally vague or overbroad on its face, nor is it unconstitutional as applied. 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. The revenue procedure focuses on the method rather than the content of the presentation . . . . [The Nationalist Movement] has not persuaded us that either the purpose or the effect . . . is to suppress disfavored ideas.

*Id.* at 588–89. The court also noted that, under the methodology test, an organization need not present and rebut opposing views to qualify as an educational organization. *Id.* at 586–87.

102. *Id.* at 591–94.

organization was proper.<sup>103</sup> Despite the court's holding, the methodology test was not free from challenge for long.

c. *Nationalist Foundation v. Commissioner of Internal Revenue*

A mere six years after the court decided *Nationalist Movement v. United States*, the methodology test faced another challenge.<sup>104</sup> The Nationalist Foundation—a group espousing a pro-majority philosophy favoring, “Americans of northern European descent”<sup>105</sup> and focused on publishing materials it believed advanced American freedom, democracy, and nationality<sup>106</sup>—applied for and was denied tax exempt status as an educational organization.<sup>107</sup> In response, The Nationalist Foundation filed a declaratory judgment suit, seeking tax exempt status or, in the alternative, to have the methodology test declared unconstitutional.<sup>108</sup>

Because of the strong similarities between The Nationalist Movement and The Nationalist Foundation and because The National Foundation made arguments “identical to those of the taxpayer in *Nationalist Movement* . . . [the court saw] no reason to change the analysis or the result reached in that opinion.”<sup>109</sup> Thus, the court applied the methodology test, found that The Nationalist Foundation violated the test,<sup>110</sup> and held that denial of tax exempt status was proper.<sup>111</sup> The Nationalist Foundation appealed and the appellate court issued a one-word opinion: “[a]ffirmed.”<sup>112</sup>

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103. *Id.* at 594. Although The Nationalist Movement appealed the court's decision, the appellate court did not consider the constitutionality of the methodology test. *See generally* *Nationalist Movement v. Comm'r*, 37 F.3d 216 (5th Cir. 1994).

104. *See* *Nationalist Found. v. Comm'r*, No. 14871-98X, 2000 Tax Ct. Memo LEXIS 374, at \*1 (T.C. Oct. 11 2000).

105. Reed, *supra* note 36, at 838.

106. *Nationalist Found.*, 2000 Tax Ct. Memo LEXIS 374, at \*2–3. The Nationalist Foundation also presented seminars and litigated First Amendment issues. *Id.*

107. *Id.* at \*1.

108. *Id.* Prior to filing suit in the U.S. Tax Court, The Nationalist Foundation exhausted all of its administrative remedies. *Id.* at \*1–2.

109. *Id.* at \*15–16.

110. *Id.* at \*13–14. Specifically, the court found that The Nationalist Foundation's donation request letters contained “several distortions of fact[,]” thus failing the methodology test. *Id.* at \*5.

111. *Id.* at \*16.

112. *Nationalist Found. v. Comm'r*, 275 F.3d 44, 44 (5th Cir. 2001).

### III. FIXING WHAT'S BROKEN: REDEFINING THE SECOND PRONG OF THE METHODOLOGY TEST

As of 2017, there were 953 active hate groups—a type of propaganda organization<sup>113</sup> in the United States.<sup>114</sup> Of these 953 organizations, more than

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113. Unlike “education,” there is no universally accepted definition of the term “hate group.” See generally BLACK’S LAW DICTIONARY, (10th ed. 2014); OXFORD ENGLISH DICTIONARY, (3rd ed. 2010); MERRIAM-WEBSTER DICTIONARY, (11th ed. 2016). However, different definitions of the term show that “hate group” has a fairly uniform meaning. According to the Federal Bureau of Investigation, a “hate group” is “[a]n organization whose primary purpose is to promote animosity, hostility, and malice against persons of or with a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity which differs from that of the members of the organization, e.g., the Ku Klux Klan, American Nazi Party.” *Hate Crime Data Collection Guidelines and Training Manual*, FBI UNIF. CRIME REPORTING (Feb. 27, 2015), <https://ucr.fbi.gov/hate-crime-data-collection-guidelines-and-training-manual.pdf>. Likewise, according to the Southern Poverty Law Center, a nonprofit civil rights organization “dedicated to fighting hate and bigotry and to seeking justice for the most vulnerable members of . . . society.” *About Us*, S. POVERTY L. CTR., <https://www.splcenter.org/about> (last visited Jan. 22, 2019). A “hate group” is “an organization that—based on its official statements or principles, the statements of its leaders, or its activities—has beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics.” *Frequently Asked Questions*, S. POVERTY L. CTR., [https://www.splcenter.org/20171004/frequently-asked-questions-about-hate-groups#hate group](https://www.splcenter.org/20171004/frequently-asked-questions-about-hate-groups#hate%20group) (last visited Nov. 30, 2017). Finally, according to the Anti-Defamation League, a “nonprofit, nonpartisan . . . civil rights/human relations organization” dedicated to “secur[ing] justice and fair treatment for all”, *Who We Are*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/who-we-are> (last visited Jan. 22, 2019), a “hate group” is “[a]n organization whose goals and activities are primarily or substantially based on a shared antipathy towards people of one or more other different races, religions, ethnicities/nationalities/national origins, genders, and/or sexual identities.” *Hate Group*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/resources/glossary-terms/hate-group> (last visited Nov. 30, 2017). “The mere presence of bigoted members in a group or organization is typically not enough to qualify it as a hate group; the group itself must have some hate-based orientation/purpose.” *Id.* Given these definitions, it is clear that the term “hate group” encompasses those organizations that disparage and malign individuals for certain immutable characteristics.

Both the Southern Poverty Law Center and the Anti-Defamation League name the groups they consider hate groups; the Federal Bureau of Investigation does not but instead publishes yearly hate crime statistics. See *Hate Map*, S. POVERTY L. CTR., <https://www.splcenter.org/hate-map> (last visited Nov. 29, 2017) (listing all active hate groups in the United States); *2016 Hate Crime Statistics*, CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, <https://ucr.fbi.gov/hate-crime/2016> (last visited Nov. 30, 2017). Often, the Southern Poverty Law Center and the Anti-Defamation League agree about what groups constitute hate groups; for instance, both the Southern Poverty Law Center and the Anti-Defamation League agree that the Center for Security Policy is a hate group. See *Hate Map*, *supra* note 113; see, e.g., *Frank Gaffney Jr. and the Center for Security Policy*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/resources/profiles/frank-gaffney-jr-and-the-center-for-security-policy> (last visited Nov. 29, 2017).

114. *Hate Map*, *supra* note 113. Some groups receiving classification as a hate group vigorously dispute this classification. See, e.g., *Oregon Has a Prominent Place on Southern Poverty Law Center’s New List of U.S. Hate Groups*, PAC. NW. NEWS (Feb. 22, 2018, 04:03pm), [https://www.oregonlive.com/pacific-northwest-news/index.ssf/2018/02/oregon\\_plays\\_prominent\\_role\\_in.html](https://www.oregonlive.com/pacific-northwest-news/index.ssf/2018/02/oregon_plays_prominent_role_in.html). This Comment focuses solely on hate groups which are also propaganda organizations; that is, those organizations which advocate hate through the use of propaganda. This Comment makes no claims about those organizations the Southern Poverty Law Center classifies as a hate groups that support their viewpoints without the use of propaganda.

fifty receive tax exempt status as an educational charity under 501(c)(3).<sup>115</sup> Included among these organizations are, for instance, white nationalists, anti-immigrant organizations, and anti-Muslim organizations.<sup>116</sup> Despite strong similarities of those organizations to The National Alliance, The Nationalist Movement, and The Nationalist Foundation<sup>117</sup>—all of whom were denied tax exempt status—<sup>118</sup> many of these groups were granted tax exempt status as educational organizations because the definition of distorted has been muddled over time.<sup>119</sup>

The second prong of the methodology test lacks a clear definition of “distorted” and therefore permits some hate groups to qualify as an educational charity for tax exempt purposes. To prevent this, the second prong needs to be reshaped to weed out propaganda from genuine educational materials for purposes of educational tax exempt status. By introducing a set of factors to analyze the methods used to obtain information, rather than the presence or absence of the information itself, propaganda organizations, such as hate groups, would be prevented from obtaining tax exempt status as educational organizations under 501(c)(3).

#### A. Defining “Distorted”

Imagine an organization that claims the moon is made of cheese. Imagine that this organization provides information supporting and contradicting its position—it provides citations to scientific studies that conclude the moon is made of cheese and it provides citations to contrary studies that conclude the moon is not made of cheese. Now imagine a different organization. Imagine that the second organization claims the sun revolves around the earth. To support their claim that the sun revolves around the earth, the second organization uses information from the 1200s—information that was gathered through then-reliable methods, which have since been disproven. Which organization is supported by facts which are “distorted?” Under the current version of the second prong of the methodology test, the answer is “it depends.” Because the test itself does not define “distorted,” the answer would depend on

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115. Eden Stiffman, *Dozens of ‘Hate Groups’ Have Charity Status, Chronicle Study Finds*, CHRONICLE OF PHILANTHROPY (Dec. 22, 2016), <https://www.philanthropy.com/article/Dozens-of-Hate-Groups-/238748#list>.

116. *Id.* In 2017, there was a 22% increase in the total number of neo-Nazi groups. *Hate Map*, *supra* note 113.

117. For instance, The National Alliance, The Nationalist Movement, The Nationalist Foundation, and organizations such as The Center for Security Policy, The New Century Foundation, and the National Policy Institute, all of which isolate one group of society, claim that group is superior to all others, and support that claim with publications based on opinions, rather than facts. Stiffman, *supra* note 115.

118. See *Nat’l All. v. United States*, 710 F.2d 868, 876 (D.C. Cir. 1983); *Nationalist Found. v. Comm’r*, No. 14871-98X, 2000 Tax Ct. Memo LEXIS 374, at \*16 (TC Oct. 11, 2000); *Nationalist Movement v. Comm’r*, 102 T.C. 558, 596 (1994).

119. Stiffman, *supra* note 115.

the court's interpretation of "distorted." Some courts may find the first organization is not supported by distorted facts because it provides support contrary to its position. In contrast, other courts may ignore this definition completely and find that, even though the second organization does not provide contrary support, it is not supported by distorted facts because the facts used to support the organization's position were gained through reliable methods. Yet, this second group of courts would ignore the current reliability of those methods.

This dilemma is not merely hypothetical: courts have faced this situation, albeit with less absurd factual premises. For instance, in 1999, the IRS approved an organization's application for tax exempt educational status—and therefore found that the organization's position was not supported by distorted facts—specifically because the organization provided facts both supporting and contradicting its position.<sup>120</sup> In essence, the court applied the moon is made of cheese approach.

At the same time, the IRS grants tax exempt educational status to the Center for Security Policy, an organization who does not present facts both supporting and contradicting its position.<sup>121</sup> Rather, as demonstrated below, the Center for Security Policy bases its viewpoints and positions are based on one-sided, discredited information. Essentially, the court applies the sun revolves around the earth approach. Thus, as the IRS's own application of the second prong of the methodology test indicates, the answer to the question "what does it mean for facts to be distorted" is unclear. As such, the second prong of the methodology test should be redefined to provide clear guidance on what makes a fact "distorted."

### *B. Redefining the Second Prong*

To prevent future inconsistencies in the application of the second prong of the methodology test, we must define what it means for a fact to be "distorted." If the purpose of tax exemption is to prevent unity through service and the purpose of education is to encourage and develop critical thinking skills, then distorted should be defined as "inaccurate." That is, non-distorted facts are those that are accurate. After all, an opinion can be educational but lying and disinformation cannot. Without accurate information, there can be no critical thinking—it is impossible to form logical arguments based on false information.

Accepting this definition as true, accurate information would be that information which is gathered through reliable principles or methods.<sup>122</sup> Therefore, the second prong of the methodology test should seek only to weed out those claims ascertained by unreliable principles or methods. This approach

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120. Reed, *supra* note 42, at 603, n.72 (discussing I.R.S. Tech. Adv. Mem. 99-07-021 (Feb. 19, 1999)).

121. *About Us*, *supra* 113.

122. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 584–89 (1993) (discussing how to best obtain reliable knowledge).

leads to a second issue: how do we determine which principles and methods are reliable?

Although done in the context of evidence law, the Supreme Court has already confronted the issue of blocking distorted facts from the court system. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court interpreted Federal Rule of Evidence 702, which, at the time, stated “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”<sup>123</sup> The court focused on two phrases, “assist the trier” and “scientific knowledge;”<sup>124</sup> for our purposes, only the latter phrase is relevant. According to the court, “to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method . . . [and] supported by appropriate validation.”<sup>125</sup> In essence, the court found that “scientific knowledge” is that information that is derived from reliable methods and, therefore, is likely to be truthful. The court’s finding, however, is not limited to “scientific” knowledge; rather, the court found that, to be truthful, *all* information must be based on reliable methods.<sup>126</sup> Although Rule 702 has since been changed,<sup>127</sup> the court’s interpretation of “knowledge” has not been disturbed.

In *Daubert*, the court recognized that determining when knowledge has been gathered by reliable methods would be difficult, so, to help guide the inquiry, the court created a list of factors, commonly referred to as the *Daubert* factors.<sup>128</sup> They include: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subject to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique’s operation; and (5) whether the technique or theory has reached general acceptance within the relevant community.<sup>129</sup> The court also noted that “[t]he inquiry is a flexible one, and its

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123. *Id.* at 588 (quoting a prior version of FED. R. EVID. 702) (internal quotes omitted).

124. *See generally id.*

125. *Id.* at 590.

126. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

127. The current version of Rule 702 states:

Testimony by Expert Witnesses. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

128. *See Daubert*, 509 U.S. at 593–94.

129. *See id.*

focus must be solely on principles and methodology, not on the conclusions that they generate.”<sup>130</sup>

Although the court in *Daubert* dealt with evidence law, the fundamental issue was the same as the second prong of the methodology test: weeding out false information. The *Daubert* court solved this issue by creating the *Daubert* factors and those same factors would both solve the constitutional issue with the second prong of the methodology test and prevent hate groups from achieving tax exempt educational status, thereby preventing groups odious to the purpose of the exemption from enjoying its benefits. As support for this conclusion, we will apply the *Daubert* factors to a publication from a hate group which currently receives tax exempt status as an education organization: The Center for Security Policy.

### 1. *The Center for Security Policy*

The Center for Security Policy’s mission is “[t]o identify challenges and opportunities likely to affect American security, broadly defined, and to act promptly and creatively to ensure that they are the subject of focused national examination and effective action.”<sup>131</sup> Founded in Washington, D.C. in 1988 by Frank Gaffney, Jr.,<sup>132</sup> the Center for Security Policy began as a conservative think-tank dedicated to “rapid preparation and real-time dissemination of information, analyses and policy recommendations . . . [with a] principal audience . . . [of] the U.S. security policy-making community (the executive and legislative branches, the armed forces and appropriate independent agencies).”<sup>133</sup> Following the collapse of the Soviet Union and the end of the Cold War, however, the Center for Security Policy morphed from a conservative think-tank into an organization focused on battling Islam.<sup>134</sup> Today, the Center for Security Policy focuses on publishing books and pamphlets and operating a weekly radio program, arguing that a “Muslim Brotherhood” has infiltrated the American government and the implementation of “Islamic law is imminent.”<sup>135</sup>

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130. *Id.* at 594–95.

131. *Center for Security Policy*, JSTOR, <https://www.jstor.org/publisher/centsecpol> (last visited Jan. 21, 2019).

132. Prior to forming the Center for Security Policy, Frank Gaffney, Jr. served as the Deputy Assistant Secretary of Defense for Nuclear Forces and Arms Control Policy during the Reagan administration. *Frank Gaffney*, CTR. FOR SEC. POL’Y, <https://www.centerforsecuritypolicy.org/about-us/frank-gaffney/> (last visited Nov. 30, 2017).

133. *Mission for the Center for Security Policy*, CTR. FOR SEC. POL’Y, <http://web.archive.org/web/20061207182130/http://www.centerforsecuritypolicy.org/index.jsp?section=static&page=aboutus> (last visited Mar. 26, 2019).

134. *See Center for Security Policy*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/center-security-policy> (last visited Nov. 29, 2017) (describing the change the Center for Security Policy underwent following the end of the Cold War).

135. *See id.*; *Frank Gaffney Jr. and the Center for Security Policy*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/resources/profiles/frank-gaffney-jr-and-the-center-for-security-policy> (last visited Nov. 29, 2017); *see also About Us*, *supra* note 113 (stating the Center

## 2. *Applying the Daubert factors*

Consider, for example, an article written and published by the Center for Security Policy in 2015, entitled “Poll of U.S. Muslims Reveals Ominous Levels Of Support For Islamic Supremacists’ Doctrine of Shariah, Jihad.”<sup>136</sup> This article was based on a poll conducted by the Center for Security Policy<sup>137</sup> and has been cited to as the basis for banning Muslim refugees and visitors from entering the United States.<sup>138</sup> In the article, the Center for Security Policy emphasizes the following information gathered in its poll:

- [A] majority (51%) agreed that ‘Muslims in America should have the choice of being governed according to shariah’
- More than half (51%) of U.S. Muslims polled also believe either that they should have the choice of American or shariah courts, or that they should have their own tribunals to apply shariah.
- [N]early a quarter of the Muslims polled believed that, ‘It is legitimate to use violence to punish those who give offense to Islam by, for example, portraying the prophet Mohammed.’
- Nearly one-fifth of Muslim respondents said that the use of violence in the United States is justified in order to make shariah the law of the land in this country.
- [R]oughly 300,000 Muslims living in the United States who believe that shariah is ‘The Muslim God Allah’s law that Muslims must follow and impose worldwide by Jihad.’<sup>139</sup>

Because both the *Daubert* factors and the methodology test focus “solely on principles and methodology, not on the conclusions that [such principles and methodology] generate[,]”<sup>140</sup> the second prong of the methodology test as modified by the *Daubert* factors should be applied to the poll itself and not the conclusions reached by the Center for Security Policy.

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for Security Policy utilizes multiple mediums of technology to reach greater audiences than ever before).

136. See *Poll of U.S. Muslims Reveals Ominous Levels Of Support For Islamic Supremacists’ Doctrine of Shariah, Jihad*, CTR. FOR SEC. POL’Y, <https://www.centerforsecuritypolicy.org/2015/06/23/nationwide-poll-of-us-muslims-shows-thousands-support-shariah-jihad/> (last visited Nov. 30, 2017).

137. *Id.*

138. Philip Bump, *Donald Trump’s Call To Ban Muslim Immigrants Is Based on a Very Shoddy Poll*, WASH. POST, Dec. 7, 2015, [https://www.washingtonpost.com/news/the-fix/wp/2015/12/07/donald-trumps-call-to-ban-muslims-from-coming-to-the-u-s-has-a-very-bad-poll-at-its-center/?utm\\_term=.e93902f4e6c5](https://www.washingtonpost.com/news/the-fix/wp/2015/12/07/donald-trumps-call-to-ban-muslims-from-coming-to-the-u-s-has-a-very-bad-poll-at-its-center/?utm_term=.e93902f4e6c5) (last visited Nov. 30, 2017).

139. *Poll of U.S. Muslims Reveals Ominous Levels Of Support For Islamic Supremacists’ Doctrine of Shariah, Jihad*, CTR. FOR SEC. POL’Y, <https://www.centerforsecuritypolicy.org/2015/06/23/nationwide-poll-of-us-muslims-shows-thousands-support-shariah-jihad/> (last visited Nov. 30, 2017).

140. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993).

With that in mind, if we apply the *Daubert* factors to the poll, we see that it fails four of the five factors. First, we consider “whether [the theory or technique] can be (and has been) tested.”<sup>141</sup> The poll was conducted as an online, opt-in survey. Numerous sociologists have studied this method,<sup>142</sup> and, therefore, the poll meets the first factor. This is the only factor, however, that the poll meets.

Applying the second factor—“whether the theory or technique has been subjected to peer review and publication”—<sup>143</sup>we begin to see the issues with the poll. Addressing the publication aspect first, we see that the Center for Security Policy published this poll exclusively on its own website;<sup>144</sup> therefore, it was not published in a peer reviewed journal. With respect to the peer review, the scientific community established the principle that online, opt-in surveys contain many flaws,<sup>145</sup> including: the scarcity of the available respondents;<sup>146</sup> becoming “subject to unknown, non-measurable biases;”<sup>147</sup> and failure to provide a sample representative of the population.<sup>148</sup>

Furthermore, the Center for Security Policy’s poll in particular faces additional problems. First, in conducting the poll, the organization itself was biased toward a particular result.<sup>149</sup> The Center for Security Policy has a longstanding history of disparaging Muslims, thereby allowing for a substantial risk of results being biased in favor of its own viewpoint.<sup>150</sup> Second, the poll operated with a severely limited sample size: it only surveyed 600 people.<sup>151</sup> Although the poll claimed to have surveyed 600 American Muslims, no independent verification of the respondents’ citizenship or religion occurred.<sup>152</sup> Thus, not only did the poll survey an extremely limited portion of the population, it also failed to verify the status of the respondents. Third, all questions were

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141. *Id.* at 593.

142. See *AAPOR Report on Online Panels*, AAPOR EXEC. COUNCIL 3 (June 2010), [http://www.aapor.org/aapor\\_main/media/mainsitefiles/aaporonlinepanelstfreportfinalrevised1.pdf](http://www.aapor.org/aapor_main/media/mainsitefiles/aaporonlinepanelstfreportfinalrevised1.pdf); Bump, *supra* note 138; Gary Langer, *Guest Blog: More on Problems with Opt-in Internet Surveys*, Department of Political Psychology, ABC NEWS (Sept. 28, 2009), <https://pprg.stanford.edu/wp-content/uploads/More-on-the-Problems-with-Opt-in-Internet-Surveys-ABC-News.pdf>.

143. *Daubert*, 509 U.S. at 593.

144. *Poll of U.S. Muslims Reveals Ominous Levels Of Support For Islamic Supremacists’ Doctrine of Shariah, Jihad*, CTR. FOR SEC. POL’Y, <https://www.centerforsecuritypolicy.org/2015/06/23/nationwide-poll-of-us-muslims-shows-thousands-support-shariah-jihad/> (last visited Nov. 30, 2017).

145. See *AAPOR Report on Online Panels*, *supra* note 142, at 3; Bump, *supra* note 138; Langer, *supra* note 142.

146. See *AAPOR Report on Online Panels*, *supra* note 142, at 3–4.

147. *Id.* at 82.

148. *Id.*

149. See Bump, *supra* note 138.

150. *Id.*

151. *Id.*

152. *Id.*

asked in an “agree/disagree” fashion,<sup>153</sup> leading to a behavior called “acquiescence” or—“the tendency for survey respondents to agree with statements regardless of their content.”<sup>154</sup> Fourth, even within the agree/disagree questions, the questions were filled with assumptions.<sup>155</sup> For instance, one question asked “Do you believe the Muslim Brotherhood in America accurately represents your views?”<sup>156</sup> Because a respondent can only answer yes or no, no matter what the respondent’s answer is, he or she is forced to acknowledge the existence of a Muslim Brotherhood despite absence of any reliable evidence of its existence. Finally, the poll was offered only in English, yet “[m]any U.S. Muslims are first generation immigrants, who may speak English as a second language.”<sup>157</sup> Experts agree that these flaws are serious and severely undercut the accuracy—the truthfulness—of the poll.<sup>158</sup> Thus, the poll fails the second factor.

Turning to the third factor—“the known or potential rate of error”—<sup>159</sup>again raises problems with the poll. Primarily, “[t]he reporting of a margin of sampling error associated with an opt-in or self-identified sample . . . is misleading.”<sup>160</sup> With a random sample—one in which “every member of the target population has a known probability of being selected”—<sup>161</sup>scientists can use the sample to make “projective, quantitative estimates about the population.”<sup>162</sup> When the sample is based on self-selected volunteers, however, scientists cannot accurately extrapolate trends within the general population because those sampled are not representative of the population as a whole. Without a random sample containing the “known mathematical properties that allow for the computation of sampling error,” any result lacks sufficient guarantees of accuracy and, thus, truthfulness.<sup>163</sup> Consequently, the Center for Security Policy’s poll fails the third factor.

The Center for Security Policy faces additional problems with the fourth factor: “the existence and maintenance of standards controlling the technique’s operation.”<sup>164</sup> Although online, opt-in surveys have become more common,

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153. *Id.*

154. Paul J. Lavrakas, ACQUIESCENCE RESPONSE BIAS, ENCYCLOPEDIA OF SURVEY RES. METHODS (2008), <http://methods.sagepub.com/reference/encyclopedia-of-survey-research-methods/n3.xml> (last visited Nov. 30, 2017).

155. *Id.*

156. *Poll of U.S. Muslims Reveals Ominous Levels Of Support For Islamic Supremacists’ Doctrine of Shariah, Jihad*, *supra* note 136.

157. Bump, *supra* note 138.

158. *AAPOR Report on Online Panels*, *supra* note 142, at 52; Bump, *supra* note 138; Langer, *supra* note 142.

159. *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 594 (1993).

160. *AAPOR Report on Online Panels*, *supra* note 142, at 82.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Daubert*, 509 U.S. at 594.

experts agree that they should be conducted by creating the ability to opt-in on numerous websites of different purposes, so as to reach a sample size more indicative of the population as a whole.<sup>165</sup> In addition, experts agree that the questions should not suggest an answer but, rather, should ask a question and permit the respondent to provide whatever answer he or she wishes.<sup>166</sup> As an agree/disagree, online, opt-in survey available on an extremely limited number of websites, the Center for Security Policy's poll failed to follow these standards and as such, fails the fourth factor.

Finally, the fifth factor: whether the technique or theory has reached "general acceptance" within the community.<sup>167</sup> Although online, opt-in surveys have become more common, many experts still dispute their validity.<sup>168</sup> This method of polling, therefore, has not reached "general acceptance" within its community.<sup>169</sup> The Center for Security Policy's poll fails the fifth factor.

While the poll serves as an illustrative example, it should be noted that an organization's tax-exempt eligibility should not be based on one publication. Although it may be difficult to measure flawed publications in light of other activities done by an organization, the court has already confronted this issue. In *Better Business Bureau v. United States*, the Court held that a substantial nonexempt purpose disqualifies an organization.<sup>170</sup> Thus, an organization that consistently produces propaganda should lose tax exempt status. The Center for Security Policy meets this standard.

Indeed, the Center for Security Policy's poll is emblematic of a larger problem it faces: it consistently bases its viewpoints on information gained through unreliable methods. For instance, in 2010, the Center for Security Policy produced a report titled "Shariah: The Threat to America" and called for, among other things, "government agencies to halt outreach to Muslim communities."<sup>171</sup> The report was compiled using many of the same methods at issue with this poll: the information used in the report did not have independent support;<sup>172</sup> the authors of the report were not impartial as it was co-written by the Center for Security Policy, the United West (a group with an anti-Muslim history), and

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165. See *AAPOR Report on Online Panels*, *supra* note 142, at 4; Bump, *supra* note 138; Langer, *supra* note 142.

166. Lavrakas, *supra* note 154, at 3.

167. *Daubert*, 509 U.S. at 594.

168. See, e.g., *AAPOR Report on Online Panels*, *supra* note 142, at 82; Bump, *supra* note 138; Langer, *supra* note 142.

169. *Daubert*, 509 U.S. at 594.

170. *Better Business Bureau v. United States*, 326 U.S. 279, 283 (1945).

171. See *Center for Security Policy*, *supra* note 134 (describing the report compiled by the Center for Security Policy and noting the conclusion the report came to).

172. See generally *Shariah: The Threat to America*, CTR. FOR SEC. POL'Y (2010), [https://www.centerforsecuritypolicy.org/upload/wysiwyg/article%20pdfs/Shariah%20-%20The%20Threat%20to%20America%20\(Team%20B%20Report\)%20Web%2009292010.pdf](https://www.centerforsecuritypolicy.org/upload/wysiwyg/article%20pdfs/Shariah%20-%20The%20Threat%20to%20America%20(Team%20B%20Report)%20Web%2009292010.pdf) (failing to provide citations to support independent of the report of the organization compiling the report for the claims made in the report).

individuals with anti-Muslim histories;<sup>173</sup> and the report was not peer reviewed, as it was published on the Center for Security Policy's website.<sup>174</sup>

Similarly, in 2011, Gaffney, who runs the Center for Security Policy, wrote an article for the World Net Daily, claiming two members of the "Conservative Political Action Committee (CPAC) were secretly aiding the Muslim Brotherhood."<sup>175</sup> Again, this article faced many of the same issues: the author was not impartial;<sup>176</sup> the conclusions made in the article did not have independent support;<sup>177</sup> and it was not peer reviewed.<sup>178</sup>

On the same note, and also in 2011, the Center for Security policy created a 10-part video course titled "The Muslim Brotherhood in America: The Enemy Within."<sup>179</sup> This video course claims that: "America faces . . . the threat of violent jihad [and] another, even more toxic danger—a stealthy and pre-violent form of warfare aimed at destroying our constitutional form of democratic government and free society."<sup>180</sup> Again, this video course lacks in impartial author,<sup>181</sup> makes conclusions not supported by any independent information,<sup>182</sup> and was not peer reviewed.<sup>183</sup>

These examples illustrate the need to redefine the second prong of the methodology test and give guidance to the term "distorted." By redefining "distorted" to mean "not gathered through reliable methods" and guiding that inquiry with the *Daubert* factors, organizations such as the Center for Security Policy would fail the test at the second prong because their claims are not based on information gathered through reliable methods. The IRS, therefore, would be on a stronger footing to challenge the status of propaganda groups such as the Center for Security Policy and, if the IRS concludes these organizations have

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173. *Id.* at 1. Individual contributors include John Guandolo, Clare Lopez, and David Yerushalmi. *Id.* at 2. John Guandolo is a disgraced former FBI agent who solicited witnesses in corruption cases for money and resigned after investigation by the bureau's Office of Professional Responsibility. *Center for Security Policy, supra* note 134. After leaving the FBI, Guandolo became Vice President of the Strategic Engagement Group—an anti-Muslim group considered by some to qualify as a hate group. *Id.* Clare Lopez and David Yerushalmi work for the Center for Security Policy. *Id.* Lopez is the Vice President for research and analysis and Yerushalmi is the general counsel. *Id.* Both Lopez and Yerushalmi have been involved in other anti-Muslim publications written by the Center for Security Policy. *Id.*

174. *See Shariah: The Threat to America, supra* note 172.

175. *See Center for Security Policy, supra* note 134 (describing the article written by Gaffney which has since been removed from the World Net's website.)

176. *See supra* text accompanying notes 134–169.

177. *See id.*

178. *See id.*

179. *The Muslim Brotherhood in America*, CTR. FOR SEC. POL'Y, <https://www.centerforsecuritypolicy.org/the-muslim-brotherhood-in-america/> (last visited Nov. 30, 2017).

180. *Id.*

181. *See supra* notes 176–178 and accompanying text.

182. *Id.*

183. *Id.*

failed the methodology test, then they would not be eligible for tax exempt status as educational organizations.

#### IV. CONCLUSION

Over the past several decades, the IRS has faced constitutional challenges to its approach to educational organizations. After the full and fair exposition standard was declared unconstitutionally vague, the IRS created the four-prong methodology test to define “full and fair exposition” and to guide its inquiry into an applicant’s potential educational qualities.<sup>184</sup> The current interpretation of the second prong of the methodology test creates an opening in the world of tax exempt educational organizations for propaganda groups. To cure this wrong, the methodology test must be redefined to give guidance to the term “distorted.”

Because the second prong of the methodology test should be understood as excluding organizations which base their positions or viewpoints on inaccurate, unreliable information, introducing the *Daubert* factors to guide the inquiry would prevent propaganda groups from achieving tax exempt status as educational organizations under 501(c)(3), a conclusion which is odious to the purpose of tax exemption: unity through service.

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184. Rev. Proc. 86-43, 1986-2 C.B. 729.

