



# MEMORANDUM

**FROM:** CeCe Heil, Senior Counsel, Jordan Sekulow, Executive Director

**RE:** Pastor's Permitted "Political" Speech

**DATE:** 1/23/2012

## INTRODUCTION

### I. CHURCHES MAY SPEAK OUT ON THE MORAL ISSUES OF THE DAY.

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**B. The First Amendment Protects Churches' Right To Speak Out On Moral Issues Of The Day**

**C. Under Current Tax Law, Churches May Not Speak Out On The Moral Qualifications of Candidates For Public Office.**

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### II. INDIVIDUAL ACTIVITY BY RELIGIOUS LEADERS

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## INTRODUCTION

501(c)(3) Language:

(c) List of exempt [from taxation] organizations. The following organizations are referred to in subsection (a):

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no *substantial* part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which *does not* participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

The First Amendment clearly protects Churches' right to speak on moral issues of the day and, to develop and disseminate information on public policy matters. In recent years, however, some have attempted to intimidate pastors and their churches from getting involved in political matters during elections. The chief tool of intimidation has been the threat of loss of a church's tax-exempt status under § 501(c)(3) of the Internal Revenue Code. Liberal advocacy groups and some government officials selectively target churches with a conservative viewpoint who speak out on political and social matters. They invoke provisions of the Internal Revenue Code restricting political speech by churches, and attempt to revoke a church's tax exempt status. As a result of these efforts to chill churches' exercise of Amendment rights, churches are confused and intimidated. To clear up confusion, the American Center for Law and Justice provides this information letter on what the IRS regulations and guidelines provide, and what the First Amendment rights of churches are under constitutional law.

## **I. CHURCHES MAY SPEAK OUT ON THE MORAL ISSUES OF THE DAY.**

### **A. A Primary Purpose Of The Church Is To Influence The Culture Through Advocacy Of Moral Issues.**

Because every major religion promulgates a moral code, churches often speak out on the social and political issues of the day. As one commentator declared: "Religion and politics have been intertwined since the birth of our nation. In a democracy created to reflect the social fabric of its citizens, religious groups have always advocated moral positions to further or impede political causes and political campaigns." Judy Ann Rosenblum, Note, Religion and Political Campaigns: A Proposal to Revise Section 501(c)(3) of the Internal Revenue Code, 49 Fordham L. Rev. 536 (1981) (citations omitted). Churches are unique in this respect among other 501(c)(3) organizations.

Government policy necessarily involves moral issues – naming some things as wrong or unlawful, and others as right or commendable. Many churches include among their purposes the goal of influencing government policy in accordance with their moral principles. As the Third Circuit Court of Appeals observed:

Religion includes a way of life as well as beliefs upon the nature of the world and the admonitions to be "Doers of the word and not hearers only" (James 1:22) and "Go ye therefore, and teach all nations, . . ." (Matthew 28:19) are as old as the Christian Church. The step from acceptance by the believer to his seeking to influence others in the same direction is a perfectly natural one, and is found in countless religious groups.

Girard Trust Co. v. Comm'r, 122 F.2d 108, 110 (3d Cir. 1941) (omission in original). The United States Catholic Conference agrees:

It is the Church's role as a community of faith to call attention to the moral and religious dimension of secular issues, to keep alive the values of the Gospel as a norm for social and political life, and to point out the demands of the Christian faith for a just transformation of society.

Wilfred R. Caron and Deirdre Dessingue, I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions, 2 J. L. & Pol. 169, 183 (1985) (quoting Political Responsibility: Choices for the 1980s, A Statement of the Administrative Board of the United States Catholic Conference 2 (rev. ed. Mar. 22, 1984)). Thus, free speech is of paramount

importance to churches because a church's mission can only be fully achieved through unfettered religious expression.

**B. The First Amendment Protects Churches' Right To Speak Out On Moral Issues Of The Day.**

If "a page of history is worth a volume of logic," *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 777 n.33 (1973), then the history of this country, the history of the First Amendment, and perhaps most importantly, the history of the Tax Code show that churches have always taken stands on moral issues of the day. Clearly, government attempts to chill or censor this religious expression is unconstitutional. As stated in *Walz v. Tax Comm'n*, 397 U.S. 664 (1969), a case upholding tax exemptions for churches:

Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several amici, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right.

*Id.* at 670 (emphasis added).

Rather than being a First Amendment orphan as some would have it, religious speech is at the apex of protected speech under the First Amendment. See *Lovell v. City of Griffin*, 303 U.S. 444 (1938). As the Supreme Court stated in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 761 (1995), "[I]n Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." See also *Police Dep't v. Mosely*, 408 U.S. 92 (1972) (content-based restrictions on speech violate the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.) Consequently, the government may not censor churches' speech on moral issues of the day without running afoul of the First and Fourteenth Amendments to the United States Constitution. The Internal Revenue Code, however, has circumscribed the rights of 501(c)(3) organizations to engage in political campaign speech. Thus, the First Amendment notwithstanding, churches who desire to retain their status as tax-exempt organizations under I.R.C. 501 (c)(3) must adhere to IRS restrictions on political campaign speech.

**C. Under Current Tax Law, Churches May Not Speak Out On The Moral Qualifications of Candidates For Public Office.**

The Internal Revenue Code does not restrict churches' right to speak out on the moral and political issues of the day, but it does prohibit churches from speaking out on the qualifications of candidates for public office.(1) In exchange for receipt of tax-exempt status, I.R.C. § 501(c)(3) absolutely prohibits churches and other tax-exempt organizations from campaigning for or against a candidate for public office:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), *and which does not participate in, or intervene in (including the publishing or distributing of*

*statements), any political campaign on behalf of (or in opposition to) any candidate for public office.*

I.R.C. § 501(c)(3) (emphasis added).

An IRS regulation explains that "an organization is not operated exclusively for one or more exempt purposes if it is an 'action' organization." Regulation § 1.501(c)(3)-1(c)(3)(i). An "action" organization is:

[one that] participates or interferes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office. . . . Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.

Regulation § 1.501(c)(3)-1(c)(3)(iii). Hence, churches can violate the campaigning ban through the written or spoken word.

Moreover, an organization's motive for engaging in campaign activity is irrelevant in determining whether the campaigning ban has been violated. The IRS has stated that the campaigning ban "does not refer only to participation or intervention with a partisan motive, but to any participation or intervention which affects voter acceptance or rejection of a candidate." Revenue Ruling 78-160, 1978-1 C.B. 154 (emphasis added).

Additionally, unlike IRS restrictions on lobbying activities by § 501(c)(3) organizations, see Section III *infra*, the prohibition on political candidate campaigning is absolute. § 501(c)(3) allows no degree of participation or intervention. See *Association of the Bar of the City of New York v. Comm'r*, 858 F.2d 876 (2d Cir. 1988) (court upheld the denial of exempt status to an organization that rated elected judicial candidates, affirming the principle that the campaigning ban is absolute).

Neither the I.R.C. nor IRS regulations define the term "candidate." In *Fulani v. League of Women Voters Education Fund*, 882 F.2d 621 (2d Cir. 1989), however, the court did imply that the prohibition on political campaign activity applies only to campaigns for political office.

While the ACLJ believes that this campaigning ban impermissibly infringes on the First Amendment rights of churches, it is nevertheless the current law. Consequently, churches desiring to keep their tax-exempt status must stringently adhere to it. A recent Court of Appeals decision has made it clear, however, that a church may form a separate organization which, in turn, may form a political "arm" to conduct the very political activities that are impermissible for a church.

**D. Churches May Form Separately Incorporated 501 (c) (4) Organizations Which May, In Turn, Form Political Action Committees That Are Free To Participate in Political Campaigns.**

Though a church is forbidden from certain political conduct, the Internal Revenue Code provides an "alternate means by which [a church could] communicate its sentiments about candidates for political office." See *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000). Just as a lobbying group could "use its . . . § 501(c)(3) organization for its nonlobbying activities and may create a § 501(c)(4) affiliate to pursue its charitable goals through lobbying," *id.* (quoting Regan

v. Taxation With Representation, 461 U.S. 540, 552 (1983) (Blackmun, J., concurring)), a church "has such an avenue available to it." *Rossotti*, 211 F.3d at 143. A related organization under section 501(c)(4) may then form political action committees to engage in political campaigns and lobbying. *Id.*

Churches that wish to create a 501(c)(4) organization must proceed carefully. The 501(c)(4) organization must be separately incorporated from the church. *Id.* It is important to note that such a related organization, like a 501(c)(4) organization, "is also subject to the ban on intervening in political campaigns." *Id.*; see also 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii) (1999). The 501(c)(4) organization is exempt from taxation, but contributions to such organizations, unlike contributions to 501(c)(3) organizations, *are not deductible*. *Branch Ministries*, 211 F.3d at 143.

The church-created 501(c)(4) organization, not the church itself, may then form a political action committee ("PAC") "that would be free to participate in political campaigns." *Id.*; see also 26 C.F.R. § 1.527-6(f), (g) (1999). Note that it is the PAC of the 501(c)(4) organization that may engage in political activities, not the 501(c)(4) organization. See *id.* In fact, the 501(c)(4) organization "must maintain records that will demonstrate that tax-deductible contributions to the [c]hurch have not been used to support the political activities conducted by the 501(c)(4) organization's political action arm." *Id.* See also 26 U.S.C. § 527(f)(3); 26 C.F.R. § 1.527-6(e), (f). Churches, therefore, still maintain a means to indirectly support or oppose political campaigns or legislation.

## II. INDIVIDUAL ACTIVITY BY RELIGIOUS LEADERS.

The previously mentioned limits on political campaign activity are "not intended to restrict free expression on political matters by leaders of churches or religious organizations speaking for themselves, as *individuals*. Nor are leaders prohibited from speaking about important issues of public policy."<sup>1</sup> However, there are several guidelines for church leaders to follow to protect their organization's 501(c)(3) status. Political leaders cannot "make partisan comments in official organization publications or at official church functions."<sup>2</sup> However, in their individual capacity as a citizen, religious leaders can state their opinions provided that those statements "clearly indicate that their comments are personal and not intended to represent the views of the organization."<sup>3</sup> The following examples were taken from the Tax Guide for Churches and Religious Organizations prepared by the IRS to give church leaders and members an idea of whether particular actions are considered endorsement.

*Example 1:* Minister A is the minister of Church J and is well known in the community. With their permission, Candidate T publishes a full-page ad in the local newspaper listing five prominent ministers who have personally endorsed Candidate T, including Minister A. Minister A is identified in the ad as the minister of Church J. The ad states, "Titles and affiliations of each individual are provided for identification purposes only." The ad is paid for by Candidate T's campaign committee. Since the ad was not paid for by Church J, the ad is not otherwise in an official publication of Church J, and the endorsement is made by

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<sup>1</sup> Internal Revenue Service, Tax Guide for Churches and Religious Organizations (2006), <http://www.irs.gov/pub/irs-pdf/p1828.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

Minister A in a personal capacity, the ad does not constitute campaign intervention by Church J.

*Example 2:* Minister B is the minister of Church K. Church K publishes a monthly church newsletter that is distributed to all church members. In each issue, Minister B has a column titled “My Views.” The month before the election, Minister B states in the “My Views” column, “It is my personal opinion that Candidate U should be reelected.” For that one issue, Minister B pays from his personal funds the portion of the cost of the newsletter attributable to the “My Views” column. Even though he paid part of the cost of the newsletter, the newsletter is an official publication of the church. Since the endorsement appeared in an official publication of Church K, it constitutes campaign intervention attributable to Church K.

*Example 3:* Minister C is the minister of Church L and is well known in the community. Three weeks before the election, he attends a press conference at Candidate V’s campaign headquarters and states that Candidate V should be reelected. Minister C does not say he is speaking on behalf of his church. His endorsement is reported on the front page of the local newspaper and he is identified in the article as the minister of Church L. Since Minister C did not make the endorsement at an official church function, in an official church publication or otherwise use the church’s assets, and did not state that he was speaking as a representative of Church L, his actions did not constitute campaign intervention attributable to Church L.

*Example 4:* Minister D is the minister of Church M. During regular services of Church M shortly before the election, Minister D preached on a number of issues, including the importance of voting in the upcoming election, and concludes by stating, “It is important that you all do your duty in the election and vote for Candidate W.” Since Minister D’s remarks indicating support for Candidate W were made during an official church service, they constitute political campaign intervention attributable to Church M.<sup>4</sup>

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<sup>4</sup> *Id.*