

A Legacy of Faith, Activism and Revolution: Balancing the First Amendment Rights of Religious Ministries with 501(c)(3) Restrictions on Political Engagement

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America's religious institutions, especially its churches, have helped to foment change throughout its history.

In pre-Revolutionary times, the British often burned the American churches, because that was where the colonists met to plan their resistance to the Crown. Much of the early resistance against Great Britain was led by Christians in general and their ministers in particular, who exerted a strong influence over the society in which they lived. Their sermons were often published and circulated throughout the colonies as broadsides. For example, there was a minister named Samuel West who spoke and wrote revolutionary concepts before the Declaration of Independence was penned. Some argue that language from one of West's printed sermons found its way into the Declaration of Independence.¹

During the Civil Rights era, black churches helped to mobilize and inspire activists by hosting mass meetings, serving as meeting points for rallies and marches, and providing much-needed emotional, physical, moral and spiritual support. In more recent years, especially during the worst of the COVID-19 pandemic, when federal, state and local governments attempted to lockdown communities and limit gatherings, religious institutions found themselves struggling to balance their ministerial mandates with government dictates as to where, how and to what extent they could exercise their right to religious freedom.

The challenge before churches and other religious institutions today is in reconciling a moral calling to speak out on issues of the day, especially as they intersect with contemporary politics, with the need to maintain their tax-exempt nonprofit status, which exempts them from paying taxes and allows them to receive tax-deductible contributions provided that they refrain from political campaigning or substantial lobbying.

Section 501(c)(3) of the Internal Revenue Code of 1986

Since the passage of the Sixteenth Amendment to the United States Constitution, which authorized Congress to impose a federal income tax, Congress has consistently granted churches and religious organizations special exemptions from paying taxes and for receiving tax-deductible contributions.² However, if a church or religious organization wishes to qualify for and maintain this tax-exempt status, it must abide by the restrictions on political and legislative activities established in section 501(c)(3) of the Internal Revenue Code.³ Section 501(c)(3) includes two

* The Rutherford Institute is a national nonprofit civil liberties organization which seeks to protect individuals' constitutional rights and educate the public about threats to their freedoms.

¹ See John W. Whitehead, *An American Dream* (1987), p. 86-99.

² *Walz v. Tax Commission*, 397 U.S. 664, 676 n.4 (1970).

³ All "section" references herein are to the Internal Revenue Code of 1986, as amended (the "Code"), and all "Treas. Reg. §" references are to the regulations under the Code ("Regulations"), unless otherwise noted.

A Legacy of Faith, Activism and Revolution: Balancing the First Amendment Rights of Religious Ministries with 501(c)(3) Restrictions on Political Engagement

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Page 2

stipulations on political involvement: *first*, no substantial part of the organization's activities may consist of carrying on propaganda or otherwise attempting to influence legislation;⁴ and *second*, the organization may not participate in political campaigning in opposition to, or on behalf of, any candidate for public office.⁵

In light of how the Internal Revenue Service (IRS) and some courts have interpreted section 501(c)(3) [see discussion below], churches and religious organizations may well consider this law as yet another example of the government's subordination of the rights of religious persons to "matters of national public policy" or to other rights.⁶ Understanding section 501(c)(3), however, is necessary for any church that wishes to positively impact the moral and social fabric of our culture. A church must decide whether it can be a viable and influential force in society within the constraints of section 501(c)(3) *or* whether it should forego the benefits of tax-exemption in order to participate unreservedly in the legislative and political process.

Legislative Activities

Defining a "Substantial Part." Section 501(c)(3) states that a church or religious organization which engages in "substantial" legislative activities jeopardizes its tax-exempt status. The IRS interprets "legislative activities" as attempts to influence legislation by participation in lobbying for the purpose of proposing, supporting, or opposing federal, state, or local legislation; or advocating the adoption or rejection of legislation.⁷

The IRS states that its determination of whether an organization's legislative activities constitute a "substantial" part of its overall activities depends on "all the pertinent facts and circumstances in each case."⁸ It gives "[c]onsideration . . . to a variety of factors including the time devoted by the organization to the activity (by both compensated and volunteer workers), assets devoted to the activity (such as office space, machinery, etc.), as well as expenditures."⁹

To make this determination more precise, one federal court proposed a rule of thumb that an expenditure of less than five percent of a tax-exempt organization's time and effort in attempting to influence legislation does not constitute "substantial legislative activities."¹⁰ Some

⁴ Except as otherwise provided in IRC § 501(h), which does not apply to churches, a convention or association of churches, or an integrated auxiliary of them.

⁵ IRC § 501(c)(3).

⁶ See e.g., *Bob Jones University v. United States*, 461 U.S. 574 (1983) (religion rights inferior to issues concerning public policy); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 26-27 (1989) (Blackmun, J., concurring) (accusing other Justices of preferring one First Amendment value over another).

⁷ Treas. Reg. § 1.501(c)(3)-1(c)(3). Additionally, the Regulations regard an organization as *not* being operated for an exempt purpose if it is an "action" organization; that is, if its main or primary objective is the enactment or defeat of proposed legislation, and it advocates or campaigns for such an objective.

⁸ Internal Revenue Service, *Tax Guide for Churches and Other Religious Organizations* (1994).

⁹ *Id.*

¹⁰ *Seasongood v. Commissioner*, 227 F.2d 907, 912 (6th Cir. 1955).

A Legacy of Faith, Activism and Revolution: Balancing the First Amendment Rights of Religious Ministries with 501(c)(3) Restrictions on Political Engagement

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Page 3

tax-exempt organizations regarded the five percent rule as a benchmark of permissible legislative activity.¹¹ Later, however, the IRS administrative manual noted:

[The five percent rule] provides but limited guidance because the court's view as to what sort of activities were to be measured is no longer supported by the weight of precedent. Moreover, it is not clear how the court arrived at the five percent figure. Most cases . . . have tended to avoid any attempt at percentage measurement of activities. . . . The central problem is more often one of characterizing the various activities as attempts to influence legislation. Once this determination is made, substantiality is frequently self-evident.¹²

Therefore, the IRS' approach is to conduct a case-by-case review with no precise standards. Consistent with this approach, another federal court rejected the five percent rule while ruling in favor of the IRS' revocation of a Christian organization's tax exempt status.¹³ The court reached its decision by broadly interpreting "substantial" legislative activities to include all indirect attempts to influence legislation through "a campaign to mold public opinion."¹⁴

In contrast, several court decisions have specifically held that churches and religious organizations do not violate the restriction on legislative activities when they are motivated by the religious purposes of the organization.¹⁵ These cases, however, interpreted the law as it existed prior to the enactment of the limitation on legislative activities by Congress.¹⁶

At one time, the Supreme Court also appeared supportive of legislative involvement by churches and religious organizations when it noted:

Adherents of particular faiths and individual churches frequently take strong positions on public issues . . . vigorous advocacy of legal or constitutional

¹¹ Hammar, *Pastor, Church & Law* 744 (2d ed. 1991).

¹² Internal Revenue Manual §§ 392-94 (1989).

¹³ *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973). The Tenth Circuit Court of Appeals rejected the five percent rule, reasoning that a "percentage test to determine whether the activities were substantial obscures the complexity of balancing the organization's activities in relation to its objectives and circumstances." *Id.* at 855. It should be noted that this decision is only binding within the Tenth Circuit; i.e., federal courts in Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming.

¹⁴ *Id.* The court rejected the notion that to violate section 501(c)(3), it was necessary for a religious organization to attempt to influence *specific* legislation before Congress. *Id.*

¹⁵ See e.g., *International Reform Federation v. District Unemployment Compensation Board*, 131 F.2d 337 (D.C. Cir. 1942) (church organization was exempt despite proposing 36 legislative bills because its activity was consistent with its religious purposes); *Girard Trust Co. v. Commissioner*, 122 F.2d 108 (3d Cir. 1941) (Methodist Episcopal Church was exempt because lobbying activities carried on by its Board of Temperance, Prohibition and Public Morals were motivated by religious beliefs); *Lord's Day Alliance v. United States*, 65 F.Supp. 62 (E.D. Pa. 1946) (religious organization established to promote observance of the Sabbath was exempt since its legislative efforts were incidental to its religious purposes).

¹⁶ Hammar, *supra*, note 10, at 744.

A Legacy of Faith, Activism and Revolution: Balancing the First Amendment Rights of Religious Ministries with 501(c)(3) Restrictions on Political Engagement

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Page 4

positions. Of course, churches as much as secular bodies and private citizens have that right.¹⁷

But later, the Court reasoned that since tax exemptions are "'a matter of grace that Congress can, of course, disallow as it chooses' . . . Congress is not required by the First Amendment to subsidize lobbying."¹⁸

In short, the IRS refuses to abide by any precise standards, such as a percentage rule, to measure when "substantial" legislative activities have occurred. Hence, a church or religious organization seeking to acquire or maintain a tax-exempt status must be aware that there is always *some* risk that its attempt to influence legislation will prompt the IRS to pursue an audit and perhaps even revoke its tax-exempt status.

While there are no fail-safe ways to guarantee that a church or religious organization can be both involved in the legislative process and remain tax-exempt, one risk adverse approach might be for a church to *report* pending legislation to church members, without *proposing, supporting or opposing* any legislation. Of course, nothing prohibits the IRS from scrutinizing even such activity. The Supreme Court has suggested another option: section 501(c)(3) organizations could engage in substantial legislative activities if they establish a separate non-profit entity under section 501(c)(4) which could promote "social welfare" and be exempt from federal income tax, but would not qualify for tax-deductible contributions.¹⁹ Beyond that, as noted, a church may well assess that it must speak out without inhibition on pending legislation in order to remain culturally relevant, and therefore, willingly forego its tax-exempt status altogether.

Political Activities

Defining "Political Campaign" Participation. Unlike the quantitative limitation on influencing legislation, section 501(c)(3) provides an absolute and unconditional prohibition on the involvement of tax-exempt churches and religious organizations in political campaign activities on behalf of—or in opposition to—any candidate for public office, which means that no

¹⁷ *Walz v. Tax Commission*, 397 U.S. at 670.

¹⁸ *Regan v. Taxation with Representation*, 461 U.S. 540, 546, 549 (1983) (quoting *Commissioner v. Sullivan*, 356 U.S. 27, 28 (1958)). In *Regan*, the Court also suggested that section 501(c)(3) organizations could engage in substantial legislative activities by establishing a 501(c)(4) organization (a "civic league" promoting "social welfare"), which can engage in such activities but not receive tax-deductible contributions. *Id.* at 544.

¹⁹ *Id.* In addition, section 501(h) of the Internal Revenue Code permits an organization to make an election to participate in lobbying activities. As set forth in section 4911(c), a sliding scale of permissible lobbying nontaxable amounts is established based on the organization expenditures for exempt purposes. Churches and their integrated auxiliaries, however, are not eligible for this election. IRC § 501(h)(3).

A Legacy of Faith, Activism and Revolution: Balancing the First Amendment Rights of Religious Ministries with 501(c)(3) Restrictions on Political Engagement

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Page 5

quantitative or qualitative analysis is necessary to determine whether "substantial" activity has occurred since no such campaign activity is allowed at all.²⁰

According to the IRS, this prohibition means that a church or religious organization may lose its tax-exempt status if it actively *participates or intervenes* in a political campaign by making oral statements or publishing or distributing written statements on behalf of or in opposition to a particular candidate.²¹ Furthermore, a church or religious organization does not qualify for an exemption if *its charter empowers it* to "directly or indirectly 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."²²

Challenges to Exempt Status. At least a few religious organizations have lost their tax-exempt status due to political involvement, though some reports indicate that numerous violations have occurred.²³ However, two attorneys who successfully defended the Catholic church in a lawsuit brought by abortion operators and clergymen asserted that given the high cost of litigation, the mere threat of such a challenge may still have a potential chilling effect on a church's statements and activities.²⁴

Some public interest organizations have sought to generate such a chilling effect. For example, in early 1996, Americans United for Separation of Church and State ("Americans United"), announced that it was engaging in a concerted effort with its members and state chapters to monitor and report to the IRS any involvement in political campaigning by churches and religious organizations during the election year, with particular attention being paid to involvement with conservative political candidacies.²⁵ Although Americans United is not a government entity, its focus on this issue can only heighten the IRS's interest in the types of activities engaged in by churches and religious organizations. As a recent example, in May 2022, Americans United wrote the IRS to report that a pastor had told his congregation that "you cannot be a Christian and vote Democrat," and "if you vote Democrat, I don't even want you

²⁰ Furthermore, section 504(a)(2)(B) of the Code states that if an organization loses its 501(c)(3) exemption for engaging in political campaign activities, it may not seek to reclassify itself as a "civic league" promoting "social welfare" under section 504(c)(4). IRC § 504(c)(4) (1996).

²¹ Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).

²² *Id.* A "candidate for public office" refers to an "individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, state, or local." *Id.*

²³ Hammar, *supra*, note 10, at 750; *Political Activities By Churches*, 6 Church Law & Tax Rep. 3 (Sept./Oct. 1992). For instance, revocation was averted in *Abortion Rights Mobilization v. Regan*, 544 F.Supp. 471 (S.D.N.Y. 1982), a case in which several operators of abortion facilities and certain clergymen challenged the tax-exempt status of the United States Catholic Conference ("USCC") and the National Conference of Catholic Bishops ("NCCB"). The plaintiffs alleged that the Catholic Church had intervened in political campaigns as part of its efforts to oppose abortion. The court dismissed USCC and NCCB as parties on the grounds that the plaintiff had insufficient standing to file suit. *Id.*

²⁴ Caron & Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 U. Va. J. Law & Pol. 169, 180 (1984).

²⁵ Americans United for Separation of Church and State, "Americans United for Separation of Church and State Announces National Project to Expose Illegal Politicking By Churches," News Release (March 19, 1996).

A Legacy of Faith, Activism and Revolution: Balancing the First Amendment Rights of Religious Ministries with 501(c)(3) Restrictions on Political Engagement

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Page 6

around this church.”²⁶ Americans United also provided a link for the IRS to view the sermon online, and asked the IRS to investigate the matter as a political campaign violation by a 501(c)(3) organization.²⁷

The following sections provide illustrations of political activities which the IRS tends to scrutinize:

Campaign Involvement. According to the IRS, an organization engages in political activity in violation of section 501(c)(3) when it directly or indirectly participates in the nomination and promotion of candidates for public office. For example, the IRS revoked the tax-exempt status of an organization because it had encouraged "through its advocacy in its publications, [its members] to build a cadre of precinct committeemen in order to further its ultimate objective: the nomination and election of candidates who shared [its] beliefs."²⁸ The IRS observed that "[i]ntervention at this early stage in the elective process is, we believe, sufficient to constitute intervention in a political campaign."²⁹

Based on this illustration, it would appear that this prohibition does not mean that churches and religious organizations cannot generally encourage their individual members to be responsible citizens who vote and take an interest in the political process, or that individual members cannot run for public office or support candidates for public office on their own initiative. The risk of IRS scrutiny increases, however, when these incidents coincide with a church or religious organization's expression of support for a particular political candidate or agenda.³⁰

Speaking about Candidates. Most clearly, churches cannot tell or encourage people how to vote, whom to vote for or against, or what specific issues should ultimately determine their vote. Likewise, churches cannot endorse or oppose political candidates or parties, nor can churches engage in activities targeted toward assisting people based on an indication of how they will vote (such as by registering or providing transportation to the polls of only those voters who express an intent to vote a certain type of way).³¹ The IRS states that churches “are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of

²⁶ Americans United letter to IRS regarding Global Vision Bible Church, May 16, 2022, available at <https://www.au.org/wp-content/uploads/2022/05/AU-Letter-to-IRS-on-Pastor-Greg-Locke-Johnson-Amendment-Violation-5.16.22.pdf>.

²⁷ *Id.*

²⁸ IRS Gen. Couns. Mem. 39811 (June 30, 1989). The IRS also revoked the organization's tax-exempt status because of the voters' surveys it published (see *infra* in *Distribution of Voting Records and Candidate Surveys*).

²⁹ *Id.*

³⁰ Tax-exempt churches and religious organizations should also be on guard against the unsolicited distribution or display of political campaign literature by its individual members or others at their services or meetings. For example, Americans United accused a church of endorsing a particular candidate when the candidate, without prior approval, placed campaign literature on a book table in the church building.

³¹ *Tax Guide for Churches & Religious Organizations*, IRS Publication 1828 (Rev. 8-2015) (hereafter as “IRS Pub. 1828”) at pages 15-16, Example 4, <https://www.irs.gov/pub/irs-pdf/p1828.pdf>.

A Legacy of Faith, Activism and Revolution: Balancing the First Amendment Rights of Religious Ministries with 501(c)(3) Restrictions on Political Engagement

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Page 7

(or in opposition to) any candidate for elective public office,” such as by contributing to political campaign funds or making public statements for or against a candidate for public office.³²

However, with some limitations, the IRS indicates that churches can publicly recognize the fact that members are running for office, such as an announcement in a church newsletter which includes updates about members’ activities, as long as the church does not endorse the member or encourage others to vote for the member.³³ The IRS also indicates that churches can acknowledge the presence and current title or position of public officials in attendance as long as the church does so equally and in an unbiased manner for all public officials who attend, and does not mention their candidacy or an upcoming election.³⁴

Additionally, the IRS says churches can have candidates speak in a non-candidate capacity, such as by giving a sermon or leading a Sunday school class, as long as the speaker does not use any part of that opportunity to ask for votes or support, no campaign activity occurs in connection with the candidate’s attendance, and the church does not mention the speaker’s candidacy or election.³⁵ There is also lower risk if the individual is chosen to speak solely for reasons other than his or her candidacy for public office.³⁶

Candidate Endorsements. Likewise, the IRS views an organization's formal endorsement of a political candidate as impermissible. In 1992, the IRS publicized a settlement with Jimmy Swaggart Ministries (JSM), in which JSM acknowledged that it had endorsed Pat Robertson's 1988 presidential candidacy. JSM agreed that it had endorsed Mr. Robertson through statements by Jimmy Swaggart from the pulpit of his church and in the JSM monthly magazine, and agreed to refrain from further political activities. In conjunction with the settlement, the IRS released a statement clarifying its policy on the political involvement of ministers:

[W]hen a minister of a religious organization endorses a candidate for public office at an official function of the organization, or when an official publication of a religious organization contains an endorsement of a candidate for public office by the organization's minister, the endorsement will be considered an endorsement by the organization since the acts and statements of a religious organizations' ministers at official functions of the organization and in its official publications are the principal means by which a religious organization communicates its official views to its members and supporters.³⁷

In the same statement, however, the IRS clarified that pastors and other church leaders are free to become personally involved in political campaigns, "so long as those ministers or

³² Id. at page 7.

³³ Id. at page 14, Example 3.

³⁴ Id. at page 14, Examples 1, 3 and 4.

³⁵ Id. at page 13, Example 3, and pages 13-14.

³⁶ Id. at page 13.

³⁷ As reported in *Political Activities By Churches*, 6 Church Law & Tax Rep. 8 (Sept./Oct. 1992).

A Legacy of Faith, Activism and Revolution: Balancing the First Amendment Rights of Religious Ministries with 501(c)(3) Restrictions on Political Engagement

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Page 8

officials do not in any way utilize the organization's financial resources, facilities, or personnel, and clearly and unambiguously indicate that the actions taken or statements made are from those individuals and not of the organization."³⁸

Criticism of Political Candidates. Churches and religious organizations concerned about their tax-exempt status should be mindful of the timing and extent to which they could appear to indirectly criticize a political candidate during an election year.

In one case, a federal court ruled that the Christian Echoes organization had intervened in political campaigns by using its publications and broadcasts to attack candidates and incumbents who were considered too liberal.³⁹ Specifically, the court stated that in 1961, the organization had criticized President Kennedy and urged its followers to elect conservatives such as Senator Thurmond; several years later, the ministry also urged its followers to defeat Senator Fulbright, criticized President Johnson and Senator Humphrey, and at its annual convention, endorsed Senator Goldwater as a presidential candidate.⁴⁰

Relying on similar reasoning, the IRS revoked the tax-exempt status of Branch Ministries (a religious organization doing business as "The Church at Pierce Creek") because the organization had placed a partisan political advertisement in USA Today and The Washington Times opposing the presidential candidacy of Bill Clinton four days prior to the 1992 presidential election.⁴¹

³⁸ *Id.*

³⁹ *Christian Echoes*, 470 F.2d at 856.

⁴⁰ *Id.* The *Church Law & Tax Report* criticizes this decision by pointing out that Christian Echoes' attacks on President Kennedy actually preceded the next presidential election by three years. Consequently, the Report noted, this decision implies that all office holders are candidates under 501(c)(3) and effectively stifles churches and other exempt organizations from ever criticizing an office holder. *Political Activities By Churches*, 6 Church & Tax Rep. 3-4 (Sept./Oct. 1992). The Report also argues that a subsequent ruling of the United States Supreme Court, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), undercuts the Tenth Circuit's rationale. In *Bellotti*, the Court held that business corporations have a constitutional right to address public issues, and it was impermissible for a state to penalize them for doing so. *Id.* at 785. In the process, the Court also asserted that it was improper under the First Amendment for a government to wield its power in a way which would channel the expression of views of business, as well as religious, charitable and civic, corporations. Although one could also take this statement to mean that the entire prohibition against political activities is unconstitutional, the Court has never issued such a conclusion. In fact, in *Regan v. Taxation with Representation* (discussed *supra*), the Court held that the companion limitation on legislative activities is constitutional and that "Congress is not required by the First Amendment to subsidize lobbying." 416 U.S. at 546.

⁴¹ *Branch Ministries, Inc. v. Rossotti*, 40 F.Supp.2d 15 (D.D.C. 1999). This revocation of the church's tax exemption was challenged and upheld by the U. S. Court of Appeals for the District of Columbia Circuit in *Branch Ministries, Inc. v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000). The church had asserted that the IRS action violated its Free Speech and Free Exercise rights, but the court found that the revocation posed no burden on religious exercise and that the IRS had not unlawfully discriminated on the basis of the church's viewpoint. It also noted that the church had alternative means to advance its objectives through the formation of a 501(c)(4) social action organization which, itself, could then create a political action committee (PAC) to participate in political campaigns.

A Legacy of Faith, Activism and Revolution: Balancing the First Amendment Rights of Religious Ministries with 501(c)(3) Restrictions on Political Engagement

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Page 9

Distribution of Voting Records and Candidate Surveys. A church or religious organization may publish legislative voting records of public officials so long as it remains nonpartisan and does not indicate a preference towards any particular candidate in an election. In 1980, for instance, the IRS upheld the tax-exempt status of a charitable and educational organization which monitored and reported on judicial and legislative activities and developments in a monthly newsletter distributed to approximately 2,000 persons nationwide.⁴² The organization published a summary of the voting records of each member of Congress on selected legislative issues important to it, along with an expression of the organization's position on those issues. The IRS reasoned that since the newsletter was issued on a monthly basis to a small number of readers, the organization was not targeting a particular geographic area or seeking for the date of publication to coincide with an election campaign. Furthermore, the newsletter did not identify which members of Congress were up for re-election, issue any comment on an individual's overall qualifications for office, or expressly endorse or reject any candidate for office.⁴³

In contrast, the IRS revoked the tax-exempt status of a religious organization in part because of the organization's "voter survey."⁴⁴ Despite containing a disclaimer of any endorsement, the survey clearly identified Christian candidates by their positions, which served the organization's objective of publicizing such candidates. The organization also advocated that Christians dominate the political parties so that more Christian candidates would be nominated and elected to political office.⁴⁵

Providing a Public Forum. A 1974 IRS ruling concerning a broadcasting station held that a tax-exempt organization could provide air time to qualified candidates for public office, so long as it made such time equally available to all candidates.⁴⁶ The station had expressed that the candidates' views were not necessarily those of the station, and that the presentation was a public service to educate its viewers. By way of analogy, a church or religious organization might be able to provide a public forum to all political candidates, as long as it carefully avoids any implication of an endorsement.⁴⁷

Speaking about Issues. Churches can speak about issues of public concern as long as it is not done in a way which indirectly supports a political candidate. The IRS explains that churches "must avoid any issue advocacy that functions as political campaign intervention. Even if a

⁴² IRS Ruling 80-282 (1980).

⁴³ *Id.*

⁴⁴ IRS Gen. Couns. Mem. 39811 (June 30, 1989). In addition to the federal Code, some states may have state election laws which require groups that distribute voter guides to register as political committees and to make disclosures concerning their financial supporters. Organizations should contact a local attorney to inquire if any such laws exist in their state.

⁴⁵ *Id.* See also *Association of the Bar of New York of the City of New York v. Commissioner*, 858 F.2d 876 (2d Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989) (a non-religious organization which published its ratings of candidates for elective judicial office as a very small portion of its total activities failed to qualify for tax-exempt status under section 501(c)(3)).

⁴⁶ IRS Ruling 74-574 (1974).

⁴⁷ IRS Pub. 1828 at pages 11-13.

A Legacy of Faith, Activism and Revolution: Balancing the First Amendment Rights of Religious Ministries with 501(c)(3) Restrictions on Political Engagement

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Page 10

statement does not expressly tell an audience to vote for or against a specific candidate, an organization delivering the statement is at risk of violating the political campaign intervention prohibition if there is any message favoring or opposing a candidate,” such as an indirect or implied message.⁴⁸ Therefore, churches can be at risk if they make a statement on an issue which divides candidates for an upcoming election, even if they do not specifically mention any of the candidates at all.⁴⁹

Churches are at higher risk of being perceived as indirectly supporting or opposing a candidate if they discuss a prominent issue which candidates differ on close in time to an election, especially if the church does not regularly discuss that issue.⁵⁰ Thus, churches appear to face less risk if they regularly discuss an issue (such as the sanctity of life or God’s design of human gender) without any reference to voting or an election, especially during a time when no candidates are officially running for office.

Despite these limitations, the IRS indicates that there are circumstances in which churches can still encourage people to contact political representatives to ask the representative to support or oppose pending legislation which is scheduled for a vote shortly before an election. However, this must be done without reference to an upcoming election or candidacy by the incumbent, and without distinguishing the position of the candidates on the issue (but this can involve higher risk if the candidates have themselves expressed different positions and made the issue prominent in their campaigns).⁵¹

So, while churches must remain non-partisan as to candidates, they can still teach what the Bible says and take stances on certain issues of public concern. However, as discussed above, churches can risk losing their 501(c)(3) status if a “substantial part” of their activities involves lobbying or attempting to influence legislation. The IRS explains that a “church or religious organization will be regarded as attempting to influence legislation if it contacts, or urges the public to contact, members or employees of a legislative body for the purpose of proposing, supporting or opposing legislation, or if the organization advocates the adoption or rejection of legislation.”⁵² But the IRS acknowledges that a “501(c)(3) organization may engage in some lobbying.”⁵³ Whether that lobbying constitutes a “substantial part of the activities” of a church depends on a “variety of factors, including the time . . . and the expenditures devoted by the organization to the activity,” but there is not a clear standard for how to measure this.

Also, many neutral political activities are not considered lobbying. The IRS notes that “[c]hurches and religious organizations may, however, involve themselves in issues of public policy without the activity being considered as lobbying. For example, churches may conduct

⁴⁸ Id. at page 9.

⁴⁹ Id. at pages 9-10.

⁵⁰ Id. at pages 9-10.

⁵¹ Id. at page 10, contrast Example 1 with Examples 2 and 3.

⁵² Id. at page 6.

⁵³ Id.

A Legacy of Faith, Activism and Revolution: Balancing the First Amendment Rights of Religious Ministries with 501(c)(3) Restrictions on Political Engagement

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Page 11

educational meetings, prepare and distribute educational materials, or otherwise consider public policy issues in an educational manner without jeopardizing their tax-exempt status.”⁵⁴ However, those activities (such as hosting public forums for candidates, publishing voter education guides, and holding voter registration drives) must still be done in a neutral, non-biased, and non-partisan manner so as not to be indirectly participating or intervening in “any political campaign on behalf of (or in opposition to) any candidate for public office” because “voter education or registration activities conducted in a biased manner that favors (or opposes) one or more candidates is prohibited.”⁵⁵

Speaking as Individuals. While churches are limited on the political activity they can engage in, church leaders are still individuals who have First Amendment rights which are not diminished in their personal lives outside of church as a result of their role in the church. Thus, church leaders can endorse candidates; however, it must be clear that church leaders are not speaking on behalf of the church, but are rather speaking or acting in their personal capacities and not using the platform or resources of their churches to do so. As the IRS itself explains,

The political campaign activity prohibition isn’t 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. However, for their organizations to remain tax exempt under IRC Section 501(c)(3), religious leaders can’t make partisan comments in official organization publications or at official church functions. To avoid potential attribution of their comments outside of church functions and publications, religious leaders who speak or write in their individual capacity are encouraged to clearly indicate that their comments are personal and not intended to represent the views of the organization.⁵⁶

Therefore, a church leader can publicly endorse a candidate in his personal capacity, but he cannot do so through a church newsletter, sermon, website, or social media account.⁵⁷ It would thus decrease risk to the church if a leader’s personal political statements on social media are made from a separate personal account rather than from the official account for the church. “If an organization posts something on its website that favors or opposes a candidate for public office, the organization will be treated the same as if it distributed printed material, oral statements or broadcasts that favored or opposed a candidate,” and this can include posting links to other websites which do so, even though the content of those sites is not under control of the church and can change without notice.⁵⁸

⁵⁴ Id.

⁵⁵ Id. at pages 7, 14-15; 26 U.S.C. § 501(c)(3).

⁵⁶ Id. at page 8.

⁵⁷ Id. at page 8, contrast Examples 1 and 2 with Examples 3 and 4.

⁵⁸ Id. at pages 17-18.

A Legacy of Faith, Activism and Revolution: Balancing the First Amendment Rights of Religious Ministries with 501(c)(3) Restrictions on Political Engagement

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Page 12

These restrictions are not just for pastors, but also apply to other leaders such as elders and staff of the church. So, an elder who speaks at a church function and tells people to vote in favor of a prominent issue which candidates in an upcoming election are divided upon, can violate the prohibition against political campaign interventions for the church.⁵⁹

IRS Penalties for Engaging in Political Campaign Activities. Some of the penalties which a church or religious organization may be subject to for engaging in political campaign activities include and may not be limited to excise taxes,⁶⁰ an injunction,⁶¹ and the revocation of its tax-exemption.⁶²

Concern of IRS Bias

In May 2021, the IRS denied an application for tax exemption by an organization called Christians Engaged.⁶³ Part of the stated mission of Christians Engaged was to motivate Christians to pray for the nation and vote by educating them in a non-partisan manner on national issues which are central to their belief in the Bible, such as the “sanctity of life, the definition of marriage, biblical justice, freedom of speech, defense, borders and immigration, [and] U.S. and Israel relations.”⁶⁴ The IRS Director of Exempt Organizations concluded that the Christians Engaged organization “engage[s] in prohibited political campaign intervention” because the “bible teachings are typically affiliated with the Republican party and candidates.” The director therefore reasoned that Christians Engaged is “serving the private interests of the Republican party more than incidentally” which disqualifies it from tax exemption.⁶⁵

The decision of the IRS was contrary to its own policies, inconsistent with its grants of tax exemption to other groups which likewise sought to educate voters and increase turnout to advance their interests, and likely in violation of the First Amendment which prohibits the government from “respecting an establishment of religion, or prohibiting the free exercise thereof or abridging the freedom of speech.” Christians Engaged appealed the denial of its tax exemption to the IRS. Several U.S. Senators and Representatives also sent a letter to the Commissioner of the IRS, noting that the issues identified by the IRS “have always been at the core of Christian belief and classifying them as inherently political is patently absurd,” characterizing the IRS’s reasoning as “flawed and politically motivated,” and warning that “if the IRS applied this interpretation broadly, it would jeopardize the tax-exempt status of thousands of

⁵⁹ Id. at page 10, Example 3.

⁶⁰ See IRS Pub. 1828 at page 18; IRC §§ 4955, 6852.

⁶¹ See IRC § 7409.

⁶² See IRC § 7611.

⁶³ IRS Exemption Denial Letter to Christians Engaged, May 18, 2021; available at <https://taxprof.typepad.com/files/christians-engaged-irs-determination-letter-051821.pdf>.

⁶⁴ Id. at pages 2, 4.

⁶⁵ Id. at page 4.

A Legacy of Faith, Activism and Revolution: Balancing the First Amendment Rights of Religious Ministries with 501(c)(3) Restrictions on Political Engagement

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Page 13

Christian churches across the country.”⁶⁶ Another letter to the Commissioner by members of the House Committee on Ways and Means explained that “concluding that biblical teachings are ‘affiliated’ with a political party simply because a party may take a position that in some way overlaps with a particular teaching in the Bible would lead to . . . absurd results.”⁶⁷ Less than a month after the appeal, the same IRS Director of Exempt Organizations reversed his earlier decision (without giving any explanation for the change) and approved Christians Engaged’s request for exemption from federal income tax under section 501(c)(3).⁶⁸

Conclusion

Tax exemptions for churches and religious organizations are a privilege and not a constitutional right. In fact, to acquire and maintain this privilege, churches and religious organizations may forsake protected constitutional rights under the First Amendment. However, this does not mean that religious individuals and, in some instances religious institutions, must completely forego their rights to free speech.

The cases discussed above demonstrate that a church or religious organization which desires to acquire or maintain a tax-exempt status must always remain vigilant. Therefore, it could decide to avoid any involvement in legislative or political activities. Alternately, it could take a risk-adverse approach, such as reporting pending legislation and information about political candidates in an objective, non-partisan manner *only* while issuing disclaimers that it does not endorse or oppose any legislation or candidate. No matter what the approach, however, there is no guarantee that the IRS will not conduct an audit or investigation. Tax-exempt churches and religious organizations, therefore, should maintain meticulous records of their activities and expenditures in the event of an audit.⁶⁹

Should a church or religious organization decide to become actively involved in legislative or political activities, such a church or religious organization could possibly consider establishing a *separate* entity under section 501(c)(4) of the Code, which could promote "social welfare" and be exempt from federal tax but would not qualify for tax-deductible contributions. The most direct approach, of course, would be to simply forego efforts to maintain a tax-exempt status, and invest unreservedly in engaging every facet of our society, including the political realm.

⁶⁶ Letter from Members of Congress to IRS Commissioner, June 25, 2021, available at <https://www.lee.senate.gov/public/cache/files/06957322-4e7e-450b-97c6-92ffca031833/sent-bicameral-roy-letter-to-irs-christians-engaged-6.25.21-14-.pdf>.

⁶⁷ Letter from Members of House Committee on Ways and Means to IRS Commissioner, June 29, 2021, available at <https://gop-waysandmeans.house.gov/wp-content/uploads/2021/06/2021.06.29-TEGE-Targeting.pdf>.

⁶⁸ IRS Exemption Approval Letter to Christians Engaged, July 7, 2021, available at <https://taxprof.typepad.com/files/irs-exemption-letter.pdf>.

⁶⁹ See IRS Pub. 1828 at pages 25-26.

A Legacy of Faith, Activism and Revolution: Balancing the First Amendment Rights of Religious Ministries with 501(c)(3) Restrictions on Political Engagement

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Page 14

Churches which already have a 501(c)(3) status are probably not likely to be as scrutinized by the IRS as new religious-based organizations which have a primary political purpose. There are some statutory limitations on how and when the IRS may conduct civil tax inquiries on churches.⁷⁰ And if the IRS ultimately revokes a church's tax-exemption after the church has exhausted all administrative remedies and appeals available to it within the IRS, then the church may file a lawsuit with an appropriate court for review.⁷¹ Though again, there is no guarantee that the IRS or the courts will follow or apply the IRS policies and the law as they should.

For further details and examples on these topics, and for information about other political activities (such as inviting candidates to speak as candidates, hosting a public forum for candidates, providing voter education guides, holding voter registration and get-out-the-vote drives, leasing or renting building space to candidates, etc.) see IRS Publication 1828, "Tax Guide for Churches & Religious Organizations."⁷²

While this publication of The Rutherford Institute contains information for churches to be aware of, consider, and look into further, it is not comprehensive and is not legal advice. There could be additional information which churches should consider, including but not limited to state laws and regulations. Also, laws, rules, and policies can change, and there is no guarantee that the IRS, the government, or a court will follow or correctly apply the law. Therefore, it cannot be predicted or guaranteed that relying on any of this information will avoid liability or consequences in any particular situation. Churches should consult with an attorney if there are any questions about the permissibility or appropriateness of any act or speech, or about responding to inquiries by the IRS or other government agencies.

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⁷⁰ Id. at pages 31-32; 26 U.S.C. § 7611.

⁷¹ 26 U.S.C. § 7428.

⁷² *Tax Guide for Churches & Religious Organizations*, IRS Publication 1828 (Rev. 8-2015), <https://www.irs.gov/pub/irs-pdf/p1828.pdf>



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