

Government Regulation of Political Speech by Religious and Other 501(c)(3) Organizations



Why the Status Quo Is Untenable *and* **Proposed Solutions**

*A report to Senator Charles Grassley with recommendations
for Congress and the Treasury Department*



COMMISSION ON ACCOUNTABILITY AND
POLICY FOR RELIGIOUS ORGANIZATIONS

2013

The term “Grassley Staff Report” as used in the accompanying Report refers to the 61-page memorandum dated January 6, 2011 to Senator Charles E. Grassley from members of his staff. The memorandum is available at ReligiousPolicyCommission.org/GrassleyStaffReport.

An excerpt of the portion of the Grassley Staff Report which is relevant to this Report is included herein as Appendix A, beginning on page 41.

All references to the Internal Revenue Code are to the Internal Revenue Code of 1986, as amended, unless otherwise noted.

ISBN: 978-1-936233-16-8

A Message from the Chairman



No freedoms are more central to the American experience than the freedom of speech and the freedom to exercise religion. To ensure that we are all reminded of those most fundamental freedoms, the American people enshrined them at the top of the Bill of Rights—the First Amendment to the Constitution of the United States of America.

In light of our knowledge of and rights to such freedoms, it is both disturbing and chilling that the federal government regulates the speech of religious organizations and other organizations dedicated to improving the lives of people. As Americans, we know this instinctively. Yet, since 1954, federal tax law has included a provision that, as currently interpreted and applied, does exactly that. The prohibition against participation or intervention in a political campaign included in Section 501(c)(3) of the Internal Revenue Code prohibits communications that involve support of or opposition to candidates for political office by religious and other 501(c)(3) organizations. It is the only law of its type on the books . . . the only law that allows the Internal Revenue Service to evaluate the content of a sermon delivered by a member of the clergy . . . the only law that could cause a church to lose its federal tax exemption based on the words spoken by its leaders in a worship service. Federal government officials also know instinctively that the law, as currently interpreted and applied, is problematic—which is why the law is largely unenforced in some respects and inconsistently enforced in others.

The law prohibiting political campaign participation and intervention by 501(c)(3) organizations as currently applied and administered lacks clarity, integrity, respect, and consistency. Guidance from the Internal Revenue Service states that all the “facts and circumstances” must be taken into consideration in determining whether an organization’s activities constitute prohibited conduct. Consequently, religious and nonprofit leaders are never quite sure where the lines of demarcation are, and the practical effect of such vagueness is to chill free speech—often in the context of exercising religion. Many 501(c)(3) organizations engage regularly in communications that the IRS says are prohibited, and there are no consequences. Yet, the IRS does enforce the law on occasion, in a variety of ways, giving rise to understandable claims of selective or inconsistent application of the law. The controversy that became public in May of 2013 surrounding the IRS’s admittedly improper handling of certain nonprofit

organizations based on their political views serves only to fuel perceptions of selective and inconsistent enforcement.

Given the untenable mix of vagueness in the law, violations without consequences, limited and inconsistent enforcement, and the lack of respect for the law and its administration that inevitably results, something needs to change. Acknowledging the issues and challenges associated with the prohibition, Senator Charles Grassley asked ECFA to lead an effort to provide input from the religious and broader nonprofit sector in this important area of the law. ECFA, in turn, formed the Commission on Accountability and Policy for Religious Organizations, an unprecedented effort that involves the robust engagement of leaders from a diverse cross-section of the religious and broader nonprofit sector. The Commission previously issued a separate report in response to Senator Grassley's request on topics related to enhancing financial accountability in the religious and broader nonprofit sector.

The Commission's Panel of Religious Sector Representatives includes leaders from every major faith group in America. The Panel of Legal Experts includes top attorneys experienced in the areas of exempt organization law and constitutional law, with a specific concentration in the arena of religious freedom. The Panel of Nonprofit Sector Representatives includes leaders from some of the most respected organizations providing thought leadership and guidance to the U.S. nonprofit sector. And the Commission itself is composed of some of the most respected religious and nonprofit leaders in the country—leaders known for their experience, wisdom, and integrity.

When the leaders comprising the Commission and its Panels were first assembled, we had no idea what degree of consensus or discord might result from the process. After a highly transparent process that involved meetings of the Commission and Panels, a meeting with the leadership of the IRS Exempt Organizations Division, a special meeting with leaders from a number of African-American churches, media communications, public input, position papers, presentations at national conferences, and a virtual town hall meeting, the Commission has developed the accompanying recommendations with a very high degree of agreement among those participating. Along the way, many of us have developed new friendships across faith lines and in sectors other than our own.

A key principle on which there is much accord among the members of the Commission and its Panels is the idea that a member of the clergy should be permitted to say whatever he or she believes is appropriate in the context of a religious worship service without fear of government reprisal, even when such communications include content related to political candidates. Similarly, there is a high level of agreement that if

religious organizations are afforded such latitude, comparable latitude should exist for secular nonprofit organizations. At the same time, there is a high level of agreement among Commission and Panel members that permitting the disbursement of funds by tax-exempt religious and other 501(c)(3) organizations for political campaign activities could have a deleterious impact on the effectiveness of the nonprofit sector.

Opinions will vary significantly from one organization to another as to whether it is appropriate to engage in certain political communications. Such determinations should be made by each organization, taking into consideration the unique factors that apply to the organization and its constituencies. Having the freedom to do something does not, of course, create an obligation to do it. Further, an organization's views about whether to engage in certain types of communication may change over time as both the organization and our culture continue to change.

The Commission believes that the accompanying recommendations represent a rational and feasible approach to addressing the problems associated with the existing law and its administration. The Commission's recommendations strike a necessary balance of permitting religious and other nonprofit organizations to engage in communications that are relevant to their exempt purposes while ensuring that such organizations expend their funds in a manner consistent with their tax-exempt charitable, religious, educational, and similar purposes. The recommendations also take into consideration the realities that exist in our current culture and represent an approach that permits consistent and even-handed administration of the law—a sorely needed attribute that will vastly improve compliance with and respect for the law.

It is our sincere hope that those who read this report will apply intellectual integrity in considering its recommendations and our basis for them. We believe that a fair assessment of the current state of the law and its administration together with honest consideration of the options for improvement will reveal the wisdom in these recommendations developed by a diverse group of leaders from across the religious and broader nonprofit sector.



Michael E. Batts
Commission Chairman

Introduction and Background



In a report dated January 6, 2011 to Senator Charles Grassley (hereinafter referred to as the “Grassley Staff Report”¹), members of the Senator’s staff identified a variety of tax policy issues and questions related to religious and other nonprofit organizations. Senator Grassley asked ECFA to lead an effort to obtain input on the issues and questions from the religious and broader nonprofit sector. ECFA, in turn, formed the Commission on Accountability and Policy for Religious Organizations (“the Commission”). Extensive information about Senator Grassley’s request and the work of the Commission is available on the Commission’s website at www.ReligiousPolicyCommission.org. All but one of the topics addressed in the Grassley Staff Report relate in some way to financial accountability and were addressed by the Commission in a report issued in December 2012.² That report is also available on the Commission’s website. The remaining topic addressed in the Grassley Staff Report is described in the following paragraphs.

Federal law states that a tax-exempt organization described in Section 501(c)(3)³ of the Internal Revenue Code may 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.”⁴ As commonly understood, this prohibition is absolute, meaning that even a single violation is a basis for preclusion or loss of exempt status as a 501(c)(3) organization. The IRS, however, has taken the position at times that loss of exempt status may occur in “extreme” cases, implying that in other cases it may not revoke a violating organization’s 501(c)(3) exempt status.⁵ The prohibition encompasses activities that include speech (including “the publishing or distributing of statements”), whether or not engaging in such speech involves an expenditure of an organization’s funds.

¹ See reference to the Grassley Staff Report in the opening pages of this Report.

² See COMMISSION ON ACCOUNTABILITY AND POLICY FOR RELIGIOUS ORGANIZATIONS, ENHANCING ACCOUNTABILITY FOR THE RELIGIOUS AND BROADER NONPROFIT SECTOR (2012).

³ References in this Report to 501(c)(3) organizations and nonprofit organizations are provided in the context of 501(c)(3) public charities such as churches, educational institutions, hospitals, and other publicly-supported 501(c)(3) organizations. While the prohibition against campaign participation and intervention applies to 501(c)(3) private foundations, additional restrictions apply uniquely to 501(c)(3) private foundations, and such restrictions are not included in the scope of this Report.

⁴ I.R.C. § 501(c)(3).

⁵ See, e.g., I.R.S. News Release IR-2007-190 (Nov. 19, 2007).

Federal law also imposes a penalty excise tax on a 501(c)(3) organization (and potentially its managers) that makes a “political expenditure.”⁶ A political expenditure is defined as “any amount paid or incurred by a section 501(c)(3) organization in any participation in, or intervention in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”⁷ The tax is assessed in two tiers with respect to both the organization and its managers.

As to the organization, an “initial” tax of 10 percent applies to the amount of the political expenditure.⁸ If the political expenditure is not “corrected” in a timely manner, an “additional” tax of 100 percent applies to the amount of the political expenditure.⁹ “Correction” is defined as “recovering part or all of the expenditure to the extent recovery is possible, establishment of safeguards to prevent future political expenditures, and where full recovery is not possible, such additional corrective action as is prescribed by the Secretary by regulations.”¹⁰ The related Treasury Regulations provide that “additional corrective action” which may be required in the event full recovery is not possible is to be prescribed by the Commissioner of the Internal Revenue Service.¹¹ As to “organization managers,” an initial tax of 2½ percent of the political expenditure applies to organization managers who knowingly agree to the making of a political expenditure, unless such agreement “is not willful and is due to reasonable cause.”¹² In the event an “additional tax” is assessed on the organization, if an organization manager refuses to agree to all or part of the correction, an “additional tax” of 50 percent of the amount of the political expenditure applies to the organization managers.¹³

Related Treasury Regulations provide additional guidance regarding the applicability of the excise taxes under Section 4955, including limitations on the tax and provisions for abatement in certain circumstances.¹⁴ The excise taxes that apply pursuant to Section 4955 may be imposed in addition to and without regard to denial or revocation of an

⁶ I.R.C. § 4955.

⁷ *Id.* § 4955(d)(1).

⁸ *Id.* § 4955(a)(1).

⁹ *Id.* § 4955(b)(1).

¹⁰ *Id.* § 4955(f)(3).

¹¹ Treas. Reg. § 53.4955-1(e)(1).

¹² I.R.C. § 4955(a)(2).

¹³ *Id.* § 4955(b)(2).

¹⁴ Treas. Reg. § 53.4955-1.

organization's exempt status as a 501(c)(3) organization.¹⁵ A dearth of cases or rulings referencing assessment of the Section 4955 excise taxes suggests that the IRS has rarely assessed them.

Additionally, federal law permits the IRS to immediately impose and assess excise taxes pursuant to Section 4955 in the case of "a flagrant violation of the prohibition against making political expenditures."¹⁶ Section 6852 provides, in the event of a flagrant violation,

the Secretary shall immediately make a determination of any income tax payable by such organization for the current or immediately preceding taxable year, or both, and shall immediately make a determination of any tax payable under section 4955 by such organization or any manager thereof with respect to political expenditures during the current or preceding taxable year, or both. Notwithstanding any other provision of law, any such tax shall become immediately due and payable. The Secretary shall immediately assess the amount of tax so determined (together with all interest, additional amounts, and additions to the tax provided by law) for the current year or the preceding taxable year, or both, and shall cause notice of such determination and assessment to be given to the organization or any manager thereof, as the case may be, together with a demand for immediate payment of such tax.¹⁷

Further, federal law provides that the U.S. government may obtain a court injunction prohibiting a 501(c)(3) organization from making further political expenditures if the organization has flagrantly violated the campaign intervention prohibition in Section 501(c)(3) and other specified criteria are met.¹⁸ A lack of evidence to the contrary suggests that the IRS has never asserted the authority to obtain a court injunction to stop future campaign intervention by a 501(c)(3) organization.¹⁹

Nonprofit organizations described in Section 501(c)(3) (other than private foundations) are generally permitted to engage in lobbying activities (attempting to influence legislation), so long as such activities are not a "substantial part" of their overall activities.²⁰ The term

¹⁵ *Review of Internal Revenue Code Section 501(c)(3) Requirements for Religious Organizations: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means, 107th Cong. 6 (2002)* (statement of Steven T. Miller, Director, Exempt Organizations, Internal Revenue Service) ("Like any other section 501(c)(3) organization, a church not only jeopardizes its tax-exempt status for participating in a political campaign, it also becomes subject to excise tax under section 4955 on its political expenditures. This excise tax may be imposed in addition to or in lieu of revocation.").

¹⁶ I.R.C. § 6852.

¹⁷ *Id.* § 6852(a)(1)(B).

¹⁸ I.R.C. § 7409.

¹⁹ Ellen P. Aprill, *Why the IRS Should Want to Develop Rules Regarding Charities and Politics*, 62 CASE W. RES. L. REV. 643, 652 n.50 (2012).

²⁰ I.R.C. § 501(c)(3).

“substantial” for this purpose is not defined in the Internal Revenue Code or Treasury Regulations. A federal court ruled in one case that “something less than 5 [percent] of [an organization’s] time and effort” was not substantial.²¹ In another case, the court held that an organization whose expenditures for lobbying were in the range of approximately 16 to 20 percent of its total expenditures was “no longer [operated in] accord with conceptions traditionally associated with a common-law charity.”²² That same court also noted, “A percentage test to determine whether the activities are substantial is not appropriate. Such a test obscures the complexity of balancing the organization’s activities in relation to its objectives and circumstances in the context of the totality of the organization.”²³

Organizations other than churches and certain church-affiliated organizations may elect to have the provisions of Section 501(h) and Section 4911 apply with respect to their lobbying activities.²⁴ For an organization that makes the election, the vagueness of the no “substantial part” limitation is replaced with a scheme that measures lobbying activity exclusively in terms of monetary expenditures. Activities that do not involve expenditures (e.g., volunteer activities) are not considered.²⁵ Collectively, Sections 501(h) and 4911 permit an electing organization to make lobbying expenditures within defined limits. If an organization’s lobbying expenditures exceed the prescribed limits (the “lobbying nontaxable amount”), an excise tax applies.²⁶ In the event lobbying expenditures exceed larger prescribed limits (the “lobbying ceiling amount”), an organization’s exempt status as a 501(c)(3) organization ceases.²⁷

As further described in this Report, numerous challenges exist with respect to the application and administration of the law prohibiting participation or intervention in political campaigns by 501(c)(3) organizations. The definition of participation or intervention in a political campaign is not clear in many instances. The IRS itself finds the prohibition difficult to administer.²⁸ Some churches that view the prohibition as unconstitutional intentionally engage in activities that the IRS has stated are prohibited²⁹

²¹ *Seasongood v. Comm’r*, 227 F.2d 907, 912 (6th Cir. 1955).

²² *Haswell v. United States*, 500 F.2d 1133, 1146–47 (Ct. Cl. 1974).

²³ *Id.* at 1142.

²⁴ I.R.C. § 501(h).

²⁵ I.R.C. § 4911(d)(2).

²⁶ *Id.* § 4911(a)(1).

²⁷ I.R.C. § 501(h)(1)(A).

²⁸ *See Hearing, supra* note 15, at 7–8.

²⁹ A distinction is made here between positions of the IRS and the law itself. For example, the IRS has stated in its official publications (e.g., Revenue Ruling 2007-41 and IRS Publication 1828) that endorsement of a candidate by a 501(c)(3) organizational leader at an official function of the organization or in an official publication of the organization is a prohibited activity. The law itself is not so specific, and a point of controversy may exist as to whether the IRS’s position is valid because its positions in this area are more specific than the law itself.

in the hope that the IRS will initiate an examination that can result in litigation of the matter.³⁰ Some churches engage in campaign-related communications because such activities are inextricably steeped in their culture.³¹ Allegations and perceptions of selective or inconsistent enforcement abound, and federal litigation has been initiated seeking a court order for the IRS to bolster its enforcement in this area of the law.³² Senator Grassley's staff has made the following recommendation:

The electioneering prohibition on section 501(c)(3) organizations should be repealed or circumscribed with respect to churches and other section 501(c)(3) organizations (other than private foundations) because the game is not worth the candle. The IRS is required to draw on its limited resources to police a provision that has no express purpose that can be deduced from the legislative history, is harsher than what is necessary to address legitimate policy concerns, is vague (and therefore difficult for charities to comply with and for the IRS to enforce), and rarely results in any punishment being imposed on non-complying organizations or excise tax revenues being collected for the U.S. Treasury. Several legal scholars have questioned the constitutionality of the prohibition. The only sure effect of the prohibition has been to cause headaches for the IRS, especially when a church is accused of overstepping the prohibition's tenuous borders.³³

Several bills have been introduced in Congress over the years which would have modified the 501(c)(3) prohibition against participating or intervening in a political campaign. Most of the legislative proposals have centered on modifications for churches and other religious organizations, particularly in the context of worship services.³⁴

The Commission has considered the relevant issues and has evaluated them within the framework of the following questions:

1. Should the provision in Section 501(c)(3) that prohibits participating or intervening in political campaigns be repealed or modified, and if so, how?

³⁰ Erik W. Stanley, *LBJ, the IRS, and Churches: The Unconstitutionality of the Johnson Amendment in Light of Recent Supreme Court Precedent*, 24 REGENT U. L. REV. 237, 238–39 (2012) (describing the background and purpose of the Alliance Defending Freedom's Pulpit Freedom Sunday initiative).

³¹ See generally Vaughn E. James, *The African-American Church, Political Activity, and Tax Exemption*, 37 SETON HALL L. REV. 371 (2007).

³² *Freedom from Religion Foundation, Inc. v. Comm'r*, No. 12-CV-818 (W.D. Wis. filed Nov. 14, 2012); News Release, Freedom from Religion Foundation, FFRF Sues IRS to Enforce Church Electioneering Ban (Nov. 14, 2012), <http://ffrf.org/news/news-releases/item/16091-ffrf-sues-irs-to-enforce-church-electioneering-ban>.

³³ GRASSLEY STAFF REPORT 54–55 (2011) (footnotes omitted).

³⁴ See ERIKA K. LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV., RL 34447, CHURCHES AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FINANCE LAWS 9–10 (2012); ERIKA LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV., RL 32973, CAMPAIGN ACTIVITY BY CHURCHES: LEGAL ANALYSIS OF HOUSES OF WORSHIP FREE SPEECH RESTORATION ACT 4–8 (2005); Keith S. Blair, *Praying for a Tax Break: Churches, Political Speech, and the Loss of Section 501(c)(3) Tax Exempt Status*, 86 DENV. U. L. REV. 405, 432–35 (2009).

2. Should the provisions of Section 4955 related to excise taxes on political expenditures by 501(c)(3) organizations be repealed or modified, and if so, how?
3. Should the provisions of Section 6582 and 7409 related to immediate assessment of the Section 4955 excise taxes and injunctions against further political expenditures be repealed or modified, and if so, how?
4. Should the manner in which the applicable laws are applied and administered be modified, and if so, how?

History of the 501(c)(3) Political Campaign Prohibition



From before the founding of the United States until 1934, churches and charities in America were free to use their respected platforms to address legislative issues and to inform citizens about religious and moral considerations in choosing candidates for public office. In 1934, Congress added a provision to the Internal Revenue Code stipulating that “no substantial part” of such an organization’s activities could consist of “carrying on propaganda, or otherwise attempting, to influence legislation. . . .”³⁵ This restriction on attempting to influence legislation is commonly referred to as the “lobbying limitation.” At the time Congress adopted the lobbying limitation in 1934, it also considered but did not adopt a limitation on “participation in partisan politics.”³⁶

The ban on political campaign participation or intervention was adopted as a result of a floor amendment by then-Senator Lyndon B. Johnson to the Revenue Act of 1954. The Congressional Record reveals the following exchange which took place on the Senate floor:

The Presiding Officer: The Senator from Texas [Mr. Johnson] has been recognized.

Mr. Johnson of Texas: Mr. President, I have an amendment at the desk, which I would like to have stated.

The Presiding Officer: The Secretary will state the amendment.

The Chief Clerk: On page 117 of the House Bill, in section 501(c)(3), it is proposed to strike out “individuals, and” and insert “individual,” and strike out “influence legislation.” and insert “influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.”

Mr. Johnson of Texas: Mr. President, this amendment seeks to extend the provisions of section 501 of the House bill, denying tax-exempt status to not only those people who influence legislation but also to those who intervene in any political campaign on behalf of any candidate for any public office. I have discussed the matter with the chairman of the committee, the minority ranking member of the committee, and several other members of the committee, and I understand that the amendment is acceptable to them. I hope the chairman will take it to conference, and that it will be included in the final bill which Congress passes.

³⁵ I.R.C. § 501(c)(3).

³⁶ See 78 CONG. REC. 7,831 (1934) (statement of Rep. Samuel B. Hill); H.R. REP. NO. 73-1385, at 3–4 (1934) (Conf. Rep.).

Mr. Millikin: Mr. President, I am willing to take the amendment to conference. I understand from the minority leader that the distinguished Senator from Georgia [Mr. George] feels the same way about it.

The Presiding Officer: The question is on agreeing to the amendment of the Senator from Texas [Mr. Johnson].

The amendment was agreed to.³⁷

Without discussion or debate, the so-called “Johnson Amendment” was quickly passed on a voice vote. With the exception of Johnson’s statements from the Senate floor, there is minimal legislative history surrounding the campaign prohibition.³⁸ Consequently, there is no express public policy purpose in the dearth of legislative history surrounding the 1954 Johnson Amendment.³⁹ Additionally, Johnson’s statements did not accurately reflect the facts. Johnson referred to the lobbying limitation implying that it was a ban and indicated that the campaign participation and intervention amendment would be comparable to the existing provision in the law related to lobbying.⁴⁰ It was not and is not.

With the passage of the Revenue Act of 1954, Congress effectively barred all 501(c)(3) organizations, including churches, from participating or intervening in political campaigns by adding language to the Internal Revenue Code that disqualifies them from exemption if they “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.”⁴¹ In 1987, Congress amended Section 501(c)(3) to clarify that the prohibition on political campaign intervention encompasses activities “in opposition to,” as well as on behalf of, any candidate for public office.⁴²

³⁷ 100 CONG. REC. 9,604 (1954).

³⁸ GRASSLEY STAFF REPORT, *supra* note 33, at 55–56 (“No hearings were held on the subject, and there is no discussion of the Johnson amendment in the Act’s legislative history . . .”); *see also* Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 23–24 (2003) (“[T]he legislative history here is minimal. No committee proposal was made; no Treasury proposal was made; no committee hearings were held. There was no discussion of the amendment on the floor of either chamber.”).

³⁹ *See, e.g.*, GRASSLEY STAFF REPORT, *supra* note 33, at 54–56; Johnny Rex Buckles, *Not Even a Peep? The Regulation of Political Campaign Activity by Charities Through Federal Tax Law*, 75 U. CIN. L. REV. 1071, 1078–79 (2007); Nicholas P. Cafardi, *Saving the Preachers: The Tax Code’s Prohibition on Church Electioneering*, 50 DUQ. L. REV. 503, 504–05 (2012); Benjamin S. De Leon, *Rendering a Taxing New Tide on I.R.C. § 501(c)(3): The Constitutional Implications of H.R. 2357 and Alternatives for Increased Political Freedom in Houses of Worship*, 23 REV. LITIG. 691, 695–96 (2004); Houck, *supra* note 38, at 23–29; Stanley, *supra* note 30, at 243–48; Mark Totten, *The Politics of Faith: Rethinking the Prohibition on Political Campaign Intervention*, 18 STAN. L. & POL’Y REV. 298, 304 (2007).

⁴⁰ 100 CONG. REC. 9,604 (1954); Judith E. Kindell & John Francis Reilly, *Election Year Issues*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 2002, at 337 (2002), *available at* <http://www.irs.gov/pub/irs-tege/eotopici02.pdf>.

⁴¹ I.R.C. § 501(c)(3).

⁴² The language “in opposition to” was added by the Revenue Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987).

Why the Status Quo Is Untenable



The current state of affairs with respect to the 501(c)(3) political campaign prohibition is untenable for the following reasons:

- 1. The vagueness in official guidance related to the law chills permissible speech, causes confusion among nonprofit organization leaders, and makes the law difficult for the IRS to administer.**
- 2. The Internal Revenue Service does not address the fact that some churches deliberately engage in activities that violate the prohibition as described in official IRS documents.**
- 3. For some faith communities, engagement in political communications is inextricably steeped in their history and culture. That will not change. The IRS will not (and should not) enforce the prohibition in such faith communities en masse.**
- 4. Some IRS enforcement actions involving 501(c)(3) organizations have resulted in controversial outcomes and have generated allegations and popular perceptions of inconsistent or selective enforcement.**
- 5. It is not fair, appropriate, or reasonable to expect religious and other 501(c)(3) organizations to comply with a law that is regularly violated by significant segments of the sector with impunity. The fact that the government does have such an expectation results in a lack of respect for the law and its administration.**

Analysis

- 1. The vagueness in official guidance related to the law chills permissible speech, causes confusion among nonprofit organization leaders, and makes the law difficult for the IRS to administer.**

The vagueness of current guidance creates an environment in which nonprofit organizations that engage in communications about the moral and social issues of the day can never quite know for certain whether the IRS will deem their communications to constitute prohibited political campaign participation or

intervention. The following excerpts from IRS Revenue Ruling 2007-41 (the most recent authoritative guidance issued by the IRS on the topic) clearly illustrate why this is the case:

Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case.

Section 501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office. However, section 501(c)(3) organizations must avoid any issue advocacy that functions as political campaign intervention. Even if a 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. A statement can identify a candidate not only by stating the candidate's name but also by other means such as showing a picture of the candidate, referring to political party affiliations, or other distinctive features of a candidate's platform or biography. All the facts and circumstances need to be considered to determine if the advocacy is political campaign intervention. Key factors in determining whether a communication results in political campaign intervention include the following:

- Whether the statement identifies one or more candidates for a given public office;
- Whether the statement expresses approval or disapproval for one or more candidates' positions and/or actions;
- Whether the statement is delivered close in time to the election;
- Whether the statement makes reference to voting or an election;
- Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office;
- Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election; and
- Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.⁴³

⁴³ Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1424.

It is not an exaggeration to state that guidance like that cited above from Revenue Ruling 2007-41 does little to help leaders of 501(c)(3) organizations know where the lines of safety are when publicly discussing important current social and moral issues.

One practical impact of this vagueness is to chill permissible speech—a deplorable result given the fact that many 501(c)(3) organizations have as their core purposes making a difference in major social and moral conditions. Rather than risk the possibility that the IRS could deem their communications about moral issues of the day to be impermissible political campaign activity (a determination that could jeopardize an organization’s tax-exempt status), many nonprofit leaders steer widely away from that possibility and avoid permissible communications that they would otherwise make.⁴⁴ The U.S. Conference of Catholic Bishops put it this way:

[E]very sermon on a controversial issue in which the candidates are on opposite sides, and every report in the religious press on the views of candidates running for office raises a potential question of the appropriate application of the political campaign activity restriction. The current broad IRS interpretation of the restriction has a substantial chilling effect on the role of churches and religious organizations in discussing not only particular candidates’ views on issues of importance to members of the faith, but also in discussing the issues themselves.⁴⁵

Additionally, this lack of clarity results in difficulty for the IRS itself in administering the law—a fact that IRS officials have clearly admitted.⁴⁶

⁴⁴ See, e.g., Erik J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 541, 553 (1999); Stephanie A. Bruch, Comment, *Politicking from the Pulpit: An Analysis of the IRS’s Current Section 501(c)(3) Enforcement Efforts and How It Is Costing America*, 53 ST. LOUIS U. L.J. 1253, 1277 (2009); Kay Guinane, *Wanted: A Bright-Line Test Defining Prohibited Intervention in Elections by 501(c)(3) Organizations*, 6 FIRST AMENDMENT L. REV. 142, 170 (2007); James, *supra* note 31, at 371; Jeffrey Mikell Johnson, Comment, *The 501(c)(3) Campaign Prohibition as Applied to Churches: A Consideration of the Prohibition’s Rationale, Constitutionality, and Possible Alternatives*, 2 LIBERTY U. L. REV. 557, 558–59 (2008); Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 169 (2006); Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMENDMENT L. REV. 1, 31–33 (2007); 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, 543–44 & n.41 (1981); Jennifer M. Smith, *Morse Code, Da Vinci Code, Tax Code and . . . Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches*, 23 J.L. & POL. 41, 61 (2007); Stanley, *supra* note 30, at 282; Totten, *supra* note 39, at 320.

⁴⁵ *Lobbying and Political Activities of Tax-Exempt Organizations: Hearings Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 100th Cong. 426 (1987) (statement of United States Catholic Conference).

⁴⁶ See *Hearing*, *supra* note 15, at 12 (statement of Steven T. Miller) (“The IRS takes all these considerations into account when it enforces or educates, but taken together they do make the area more challenging to regulate.”).

2. The Internal Revenue Service does not address the fact that some churches deliberately engage in activities that violate the prohibition as described in official IRS documents.

Alliance Defending Freedom (“ADF”) is a 501(c)(3) organization that leads an initiative known as Pulpit Freedom Sunday in which churches engage in activities that violate the political campaign prohibition as described in official IRS documents. ADF and its participating churches have constitutional concerns about the 501(c)(3) political campaign prohibition as applied by the IRS, and they seek to litigate the matter. Following is an adapted excerpt of a treatise by Erik W. Stanley, senior legal counsel for ADF, published in the Regent University Law Review:

On September 28, 2008, more than thirty pastors from across the country stood in their pulpits and preached sermons that evaluated candidates running for political office in light of Scripture. They made specific recommendations to their congregations, based on that scriptural evaluation, as to how the congregation ought to vote—either supporting or opposing candidates from their pulpits. The pastors were part of “Pulpit Freedom Sunday,” a project of the Alliance Defense Fund [now Alliance Defending Freedom] (“ADF”) intended to present a direct constitutional challenge to the 1954 “Johnson Amendment” to Section 501(c)(3) of the Internal Revenue Code. The pastors who participated in Pulpit Freedom Sunday sent recordings of their sermons to the Internal Revenue Service and awaited enforcement action that might spark a constitutional challenge to the law.

Only one pastor who participated in Pulpit Freedom Sunday that year was investigated; however, the IRS dropped the investigation shortly after it was initiated, and there was no punishment or enforcement action taken against the church for the pastor’s sermon. None of the other participants were investigated or in any way punished by the IRS, despite the fact that Americans United for Separation of Church and State sent letters to the IRS asking it to audit the participating churches. The IRS itself was well aware of the actions of the thirty-three pastors. Their sermons received widespread media coverage, and “[a] spokesman for the IRS said that the agency was aware of Pulpit Freedom Sunday and ‘[would] monitor the situation and take action as appropriate.’” Yet, no action was taken.

In 2009, the number of Pulpit Freedom Sunday churches grew to eighty-three. In 2010, the number grew again, this time to one hundred. Finally, the number of participating churches in Pulpit Freedom Sunday exploded in 2011 to 539 churches. None of the churches that have participated in Pulpit Freedom Sunday, save the one in 2008, have been investigated, censored, or punished

for their sermons, even though they explicitly crossed the line into what the IRS deems prohibited by the Johnson Amendment.

ADF has announced that it will continue to host Pulpit Freedom Sunday in the years to come. The sole goal of the program is to have the Johnson Amendment declared unconstitutional as it applies to pastors' sermons from the pulpit.⁴⁷

More than 1,600 pastors participated in Pulpit Freedom Sunday in 2012.⁴⁸

As described in Mr. Stanley's commentary above, the IRS has not (with one negligible exception) pursued enforcement actions with respect to this large effort to challenge the law, despite the fact that the Pulpit Freedom Sunday initiative's challenge to the law is a rather "in your face" approach. The Commission confirmed with Mr. Stanley prior to the issuance of this Report that these facts remain unchanged. It is reasonable to infer from these facts that the IRS refuses to enforce the law with respect to churches participating in Pulpit Freedom Sunday—an initiative that has grown exponentially since its inception in 2008.

Dean Zerbe, former senior counsel to the Senate Finance Committee, has observed that auditing churches in connection with political activities is "an extremely hellish area for the IRS to deal with."⁴⁹ "Most senators blanch at the idea of having an IRS agent in the pews listening to what's going on from the pulpit. . . . I think the IRS in some ways reflects that similar discomfort," said Zerbe.⁵⁰

One obstacle facing the IRS in initiating examinations of churches exists due to a procedural issue. The Church Audit Procedures Act ("CAPA") codified into Section 7611 of the Internal Revenue Code permits the IRS to initiate a church inquiry or examination so long as certain criteria are met. The criteria for a church tax inquiry include a requirement that a "high-level Treasury official" must determine, based on written evidence, that the church is not exempt, that it has a liability for unrelated business income tax, or that it has otherwise engaged in taxable activities.⁵¹ Subsequent to a relatively recent national restructuring of its operations, the IRS internally designated a particular official as the "high-level Treasury official" with authority to make the required determination. However, in litigation decided in 2009, a federal court ruled that the official designated by the

⁴⁷ Stanley, *supra* note 30, at 238–39 (footnotes omitted).

⁴⁸ ALLIANCE DEF. FREEDOM, PULPIT FREEDOM SUNDAY 2012 PARTICIPATING CHURCHES 1–42 (2012), available at http://www.speakupmovement.org/Church/Content/pdf/PFS_2012_Churches_Final_list.pdf (listing the 1,620 churches participating in the 2012 Pulpit Freedom Sunday).

⁴⁹ Rachel Zoll, *IRS Not Enforcing Rules on Churches and Politics*, AP (Nov. 3, 2012, 12:51 PM), <http://bigstory.ap.org/article/irs-not-enforcing-rules-churches-and-politics>.

⁵⁰ *Id.*

⁵¹ I.R.C. § 7611(a)(2).

IRS did not meet the statutory definition of a high-level Treasury official.⁵² As of the date of this Report, the Treasury Department has not yet developed Regulations to satisfactorily address the issue, and reports suggest that the IRS has ceased inquiries and examinations of churches until the matter is resolved.⁵³ In this Commission's first report, entitled "Enhancing Accountability for the Religious and Broader Nonprofit Sector," we recommended that the Treasury Department rectify this issue as soon as possible.⁵⁴ Notwithstanding the lack of revised Treasury Regulations that would resolve the matter, there is no reason to believe that the IRS cannot initiate a church tax inquiry by obtaining the approval of a Treasury official with a rank sufficiently high to ensure compliance with CAPA.⁵⁵ The IRS has not chosen to do so with respect to the Pulpit Freedom Sunday initiative.

3. For some faith communities, engagement in political communications is inextricably steeped in their history and culture. That will not change. The IRS will not (and should not) enforce the prohibition in such faith communities en masse.

It is commonly known and well-documented that many African-American churches have historically engaged heavily in the American political process. Doing so is an integral part of the culture of many African-American churches and communities.⁵⁶ According to a study conducted by the Pew Research Center in late 2012, black Protestant churchgoers are eight times as likely to hear about political candidates at church as their white mainline counterparts.⁵⁷ The Pew study further reveals that 45% of black Protestant churchgoers indicated that the messages they hear at church favor a particular candidate.⁵⁸

The Commission's leadership convened a meeting on April 3, 2013 to which a number of African-American church leaders were invited for the purpose of sharing information about political activities within African-American churches and communities. We are deeply grateful for the participation of the leaders who attended and for the candid information and insights they shared. In that meeting, African-American church leaders shared relevant literature with us, engaged in robust discussions, and confirmed our understanding that:

⁵² *United States v. Living Word Christian Center*, No. 08-mc-37, slip op. at 7 (D. Minn. Jan. 30, 2009) (concluding the Director of Exempt Organizations, Examination is not "an appropriate high-level Treasury official" within the meaning of Code Section 7611).

⁵³ See *Church Tax Audits Not Moving for Lack of Final Rules*, BLOOMBERG BNA (Oct. 22, 2012), <http://www.bna.com/church-tax-audits-n17179870390/>; Zoll, *supra* note 49.

⁵⁴ COMMISSION ON ACCOUNTABILITY AND POLICY FOR RELIGIOUS ORGANIZATIONS, *supra* note 2, at 31.

⁵⁵ Zoll, *supra* note 49 (reporting that the IRS officially denies holding church audits in abeyance and that "the IRS continues to run a balanced program that follows up on potential noncompliance").

⁵⁶ See generally James, *supra* note 31.

⁵⁷ PEW RESEARCH CTR., IN DEADLOCKED RACE, NEITHER SIDE HAS GROUND GAME ADVANTAGE 6 (2012), available at <http://www.people-press.org/files/legacy-pdf/10-31-12%20Campaign%20Outreach%20Release.pdf>.

⁵⁸ *Id.* at 7.

- Communications about political campaigns occur with frequency in African-American churches,
- Such communications are an integral part of the culture and community of African-American churches,
- Such communications have a long history in the African-American church, and
- Engagement by African-American churches in the political arena is not likely to cease.

The following excerpts are from the seminal work on the topic, *The Black Church in the African American Experience*, by C. Eric Lincoln and Lawrence H. Mamiya:

Politics in black churches involves more than the exercise of power on behalf of a constituency; it also includes the community building and empowering activities in which many black churches, clergy, and lay members participate daily.⁵⁹

As the primary social and cultural institution, the Black Church tradition is deeply embedded in black culture in general so that the sphere of politics in the African American community cannot be easily separated from it.⁶⁰

In an article written for the *Marquette Law Review* entitled *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, author Anne Berrill Carroll observed, “[A]n assault on the political role of black churches may be seen as nothing less than an assault on black enfranchisement itself, which was nurtured within the churches during a time when no other forum for the black political voice existed.”⁶¹

The African-American church has been a source of significant social change in the United States. Some of the most well-known leaders of the Civil Rights Movement in America (e.g., Dr. Martin Luther King, Jr.) were clergy from African-American churches.

Given the nature, origin, and history of political activity in the African-American church, the Commission believes that it is not in the best interests of American public policy for the federal government to attempt to change that attribute of the African-American church, nor does the Commission believe that any attempts to do so would or should be successful.

⁵⁹ C. ERIC LINCOLN & LAWRENCE H. MAMIYA, *THE BLACK CHURCH IN THE AFRICAN AMERICAN EXPERIENCE* 199 (1990).

⁶⁰ *Id.* at 234.

⁶¹ Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 *MARQ. L. REV.* 217, 226 (1992).

There is no evidence to suggest that the IRS has ever attempted in any significant way to enforce the political campaign intervention prohibition generally among African-American churches, and there is no evidence to suggest it has any intention of doing so in the future.

The Commission's recommendations provided elsewhere in this Report present solutions that would appropriately recognize the role of political communications in and by African-American churches. The recommended solutions should largely eliminate the ongoing dissonance among a law prohibiting political campaign communications by churches, the reality that such communications occur with frequency in African-American churches, and the fact that the federal government agency charged with enforcing the law has no interest in doing so with respect to a significant portion of the religious sector.

4. Some IRS enforcement actions involving 501(c)(3) organizations have resulted in controversial outcomes and have generated allegations and popular perceptions of inconsistent or selective enforcement.

Despite the fact that the IRS has elected not to pursue enforcement action in many well-documented and high-profile instances of violation of the political campaign prohibition by significant segments of the religious sector as described above, in relatively recent years, the IRS has initiated enforcement actions with respect to some 501(c)(3) organizations, both religious and secular. The fact that the IRS seemingly ignores violations by large swaths of the religious and nonprofit sector, but occasionally initiates enforcement action against some organizations, has fueled an understandably popular perception that the IRS's enforcement actions in the arena of political campaign intervention are inconsistent at best or possibly biased.

Following are examples of the rare and controversial cases in which the IRS has initiated enforcement action:

Branch Ministries

Branch Ministries, which operated the Church at Pierce Creek, placed full-page advertisements in national newspapers immediately prior to the 1992 presidential election. The advertisements bore a headline, "Christians Beware" and asserted that then-candidate Bill Clinton's positions concerning certain moral issues violated scriptural standards. The IRS notified the church on November 20, 1992 that it had authorized a church tax inquiry. After two meetings that were deemed "unproductive," the IRS revoked the church's tax-exempt status in 1995.⁶²

⁶² Branch Ministries v. Comm'r, 211 F.3d 137, 140 (D.C. Cir. 2000).

The church filed suit to challenge the revocation. The IRS was granted summary judgment in favor of upholding the revocation. The church appealed the lower court decision and lost on appeal.⁶³

Some legal observers believe that the IRS's action in the Branch Ministries case represented "selective prosecution and unbridled discretion."⁶⁴ In the trial, counsel for Branch Ministries introduced "several hundred pages of newspaper excerpts" citing examples of campaign intervention by other churches and pastors, arguing that the IRS had singled out Branch Ministries in an act of selective enforcement.⁶⁵ The court noted, "These include reports of explicit endorsements of Democratic candidates by clergymen as well as many instances in which favored candidates have been invited to address congregations from the pulpit."⁶⁶ The church complained, "[D]espite this widespread and widely reported involvement by other churches in political campaigns, [we are] the only one to have ever had its tax-exempt status revoked for engaging in political activity."⁶⁷ The church attributed the alleged discrimination to the IRS's political bias.⁶⁸ Legal counsel for the IRS conceded, "[I]f some of the church-sponsored political activities cited by [Branch Ministries] were accurately reported, they were in violation of section 501(c)(3) and could have resulted in the revocation of those churches' tax-exempt status."⁶⁹ However, the court stated that it would not entertain the selective enforcement claim since none of the examples cited by Branch Ministries "involved the placement of advertisements in newspapers with nationwide circulations opposing a candidate and soliciting tax deductible contributions to defray their cost."⁷⁰

Catholic Answers

Catholic Answers is a 501(c)(3) public charity. In 2004, Catholic Answers president Karl Keating posted two e-letters questioning whether presidential candidate John Kerry, also a Catholic, should present himself for Holy

⁶³ *Id.* at 140–41, 145.

⁶⁴ See, e.g., Deirdre Dessingue Halloran & Kevin M. Kearney, *Federal Tax Code Restrictions on Church Political Activity*, 38 CATH. LAW. 105, 122 (1998).

⁶⁵ *Branch Ministries*, 211 F.3d at 144.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

Communion because of his support for abortion.⁷¹ The organization also created a voter's guide entitled "Voter's Guide for Serious Catholics."⁷²

On January 3, 2005, the IRS notified Catholic Answers that it was opening an examination to determine whether Catholic Answers violated the prohibition on political intervention.⁷³ The IRS investigated and found that the organization's voter's guides did not constitute political intervention. The IRS imposed Section 4955 excise taxes of \$101.93 relating to the expenditures by Catholic Answers for the two e-letters posted on the organization's website, and required Keating to reimburse Catholic Answers \$831.41, representing the cost of the expenditures by Catholic Answers related to the e-letters.⁷⁴ Catholic Answers paid the excise taxes assessed.

Subsequently, the IRS decided to reverse its assessment of the excise taxes and refund them to Catholic Answers, together with interest, because the alleged political activity "was not willful and flagrant."⁷⁵ Offended by the assessment of the excise taxes and believing they were improperly assessed, Catholic Answers sued the IRS in 2009. The court dismissed the lawsuit as moot after the refund was issued.⁷⁶ After an appeals court affirmed the district court's dismissal, Catholic Answers appealed to the United States Supreme Court seeking to reinstate the case, but the Supreme Court declined to hear the case.⁷⁷

All Saints Church

Two days before the 2004 election, the former pastor of All Saints Church in Pasadena, California gave a sermon discussing presidential candidates George W. Bush and John Kerry by name. The pastor made certain derogatory comments about Mr. Bush and positive comments about his challenger, Mr. Kerry. Included in the remarks were criticisms of the war in Iraq. The pastor further made comments intimating that Jesus would have been critical of Mr. Bush.⁷⁸

⁷¹ Catholic Answers, Inc. v. United States, No. 09-CV-670, at 1–2 (Oct. 14, 2009) (order granting defendant's motion to dismiss plaintiffs' first amended complaint).

⁷² *Id.* at 2 & n.2.

⁷³ *Id.* at 2.

⁷⁴ *Id.* at 2–3.

⁷⁵ *Id.* at 3–4.

⁷⁶ *Id.* at 17.

⁷⁷ Catholic Answers, Inc. v. United States, 438 Fed. App'x 640, 640–42 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1143 (2012).

⁷⁸ See Blair, *supra* note 34, at 429–30; Johnson, *supra* note 44, at 557; Patricia Ward Biederman & Jason Felch, *Antiwar Sermon Brings IRS Warning*, LA TIMES (Nov. 7, 2005), <http://articles.latimes.com/2005/nov/07/local/me-all Saints7>.

In 2005, the IRS initiated a church tax inquiry based on press coverage of the sermon. In 2007, the IRS closed the matter, but indicated in its closing letter that the IRS still believed that the sermon was illegal.⁷⁹

NAACP

The NAACP is a 501(c)(3) public charity. At its convention in Philadelphia in 2004, then-chairman of the NAACP, Julian Bond, made a speech that included negative commentary about President George W. Bush and Vice President Dick Cheney.⁸⁰ Written copies of the speech were provided to attendees.⁸¹ Later that year, the IRS initiated an examination of the NAACP's political activity, having been made aware of "statements in opposition of George W. Bush for the office of presidency" and noting that Mr. Bond had "condemned the administration policies of George W. Bush in education, the economy and the war in Iraq."⁸²

The IRS's examination was not welcomed by the NAACP. Mr. Bond was quoted as saying, "This is an attempt to silence the NAACP on the very eve of a presidential election." He further stated, "We are best known for registering and turning out large numbers of African-American voters. Clearly, someone in the IRS doesn't want that to happen."⁸³ Legal counsel for the NAACP stated, "It appears that political pressure, rather than any sound legal authority, motivated the Service to open the audit."⁸⁴

As a protective measure, and without admitting liability, the NAACP paid a tax in the amount of \$17.65, representing its calculation of the Section 4955 excise tax on political expenditures.⁸⁵ The NAACP then filed a claim for a refund of the tax in order to put itself in position to sue the IRS if it failed to provide the refund.⁸⁶ NAACP president Bruce S. Gordon stated, "The NAACP strongly believes that this case implicates fundamental First Amendment

⁷⁹ Blair, *supra* note 34, at 430–32; Johnson, *supra* note 44, at 557–58; Rebecca Trounson, *IRS Ends Church Probe but Stirs New Questions*, LA TIMES (Sept. 24, 2007), <http://articles.latimes.com/2007/sep/24/local/me-allsaints24>.

⁸⁰ Michael Janofsky, *Citing July Speech, I.R.S. Decides to Review N.A.A.C.P.*, NY TIMES (Oct. 29, 2004), <http://www.nytimes.com/2004/10/29/politics/29probe.html>.

⁸¹ Lisa Getter, *IRS Investigating NAACP for Criticism of President*, LA TIMES (Oct. 29, 2004), <http://articles.latimes.com/2004/oct/29/nation/na-naacp29>.

⁸² Janofsky, *supra* note 80.

⁸³ *Id.*

⁸⁴ Jim Drinkard, *NAACP Calls IRS Probe 'Political,' Refuses to Comply*, USA TODAY (Jan. 30, 2005, 10:40 PM), http://usatoday30.usatoday.com/news/washington/2005-01-30-naacp-irs-probe_x.htm?csp=34.

⁸⁵ Press Release, Nat'l Ass'n for the Advancement of Colored People, *NAACP Will Challenge the IRS Threat in Federal Court* (Mar. 30, 2006).

⁸⁶ *Id.*

principles, and we have always been committed to challenging the IRS's actions in court if necessary."⁸⁷

On August 31, 2006, the NAACP released a letter from the IRS stating that the IRS had closed its examination and confirmed that the NAACP continued to be recognized as a 501(c)(3) organization.⁸⁸ The IRS also refunded the excise taxes paid by the NAACP.⁸⁹ The *Washington Post* reported that NAACP chairman Bond "reiterated his belief that the investigation was politically motivated."⁹⁰

It is not difficult to surmise, based on the examples cited above, why there is a serious credibility problem with respect to the consistency of the IRS's enforcement actions in the arena of political campaign activities by religious and other 501(c)(3) organizations. In cases where information is available about the nature of the IRS's enforcement, questions abound regarding why the IRS would take positions that seem to differ from case to case and why the IRS would initiate some enforcement actions only to abandon them when challenged by the subject organization. Such inconsistencies and aberrations fuel allegations of bias on the part of the IRS in its administration of the law.

5. It is not fair, appropriate, or reasonable to expect religious and other 501(c)(3) organizations to comply with a law that is regularly violated by significant segments of the sector with impunity. The fact that the government does have such an expectation results in a lack of respect for the law and its administration.

Given the overwhelming and genuinely insurmountable challenges described above related to administration of the law as currently interpreted and applied, the status quo is fundamentally and abjectly dysfunctional. Having a law for which the guidance is impracticably vague, that is violated or ignored by large swaths of the nonprofit sector without consequence, and that is occasionally enforced in ways that raise significant questions and controversies, is simply untenable. These conditions make a mockery of the law and its administration and do nothing to justify faith in the authorities that administer the law. The religious and nonprofit organizations of America deserve better . . . much better.

⁸⁷ *Id.*

⁸⁸ Darryl Fears, *IRS Ends 2-Year Probe Of NAACP's Tax Status*, WASH. POST (Sept. 1, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/31/AR2006083100737.html>; Letter from Marsha A. Ramirez, Dir., EO Examinations, Internal Revenue Serv., to NAACP (Aug. 9, 2006).

⁸⁹ Letter from Marsha A. Ramirez, *supra* note 88.

⁹⁰ Fears, *supra* note 88.

Proposed Solutions



The Commission recommends a multifaceted approach to addressing the untenable state of affairs related to the 501(c)(3) political campaign prohibition. Should the recommendations contained herein be codified into law and/or Treasury Regulations, organizations that engage in campaign-related communications as described herein should, under the advice of counsel, ensure that such communications comply with applicable election laws and other laws in applicable jurisdictions.

1. The law prohibiting political campaign participation and intervention by 501(c)(3) organizations should not be repealed.

The Commission believes that a public policy purpose is served by prohibiting 501(c)(3) tax-exempt organizations from expending funds for political campaign-related activities. There is broad agreement among the Commission and Panel members that it is not in the public interest to permit tax-deductible funds to be used for political campaign purposes. The basis for that position has three primary elements:

- a. Given the fact that taxpayers who make contributions to 501(c)(3) organizations are permitted to deduct the contributions for income tax purposes, we believe it is in the public interest not to permit tax-deductible funds to be used for political campaign purposes—especially since contributions made to political campaigns are not tax-deductible.
- b. The groups who find the current prohibition to be troubling, limiting, frustrating, and even potentially unconstitutional, do not generally seek the ability to take tax-deductible contributions made by donors and relay them to political campaigns. Rather, they generally seek freedom of expression in the context of their ordinary tax-exempt activities.
- c. There is a high level of agreement among Commission and Panel members that permitting the disbursement of funds by religious and other 501(c)(3) organizations for political campaign activities would likely have a deleterious impact on the effectiveness and credibility of the nonprofit sector.

Repeal of the prohibition would permit 501(c)(3) organizations to make direct political campaign expenditures to the extent such activity is not prohibited by other laws. For example, if the prohibition were repealed, 501(c)(3) organizations

would be permitted under the laws of a number of states to make direct political campaign contributions. 501(c)(3) entities not organized as corporations might be permitted to make political campaign contributions to candidates for federal office.

In arriving at this recommendation, the Commission considered the possibility of recommending that political campaign activities of 501(c)(3) organizations be subject to the same rules that exist currently for lobbying by 501(c)(3) public charities—that such activities would be permissible so long as they do not constitute a “substantial part” of an organization’s activities. (See the Introduction and Background section of this Report for additional information about the lobbying limitation for 501(c)(3) organizations.) The Commission does not believe such an approach would be the ideal solution, primarily because permitting all types of political activity by 501(c)(3) organizations within limits would permit them to make direct political campaign contributions and other political expenditures with tax-deductible funds.

2. Definitional guidance should be added to the law to clarify that certain communications that are made in the ordinary course of a 501(c)(3) organization’s regular and customary exempt-purpose activities and that do not involve an expenditure of funds do not constitute participation or intervention in a political campaign.

As stated in the Message from the Chairman at the beginning of this Report, a key principle on which there is much accord among the members of the Commission and its Panels is the belief that a member of the clergy should be permitted to say whatever he or she believes is appropriate in the context of a religious worship service without fear of government reprisal, even when such communications include content related to political candidates. Similarly, there is a high level of agreement that if religious organizations have such latitude, comparable latitude should exist for secular nonprofit organizations.

The Commission believes that a communication related to one or more political candidates or campaigns that is made in the ordinary course of a 501(c)(3) organization’s regular and customary religious, charitable, educational, scientific, or other exempt-purpose activities should not constitute a prohibited activity under Section 501(c)(3), so long as the organization does not incur more than *de minimis* incremental costs with respect to the communication (that is, the organization’s costs would not have been different by any significant amount had the communication not occurred). This exception could possibly be referred to as the exception for “no-cost political communications.” The exception should expressly include sermons and other communications delivered as part of a religious organization’s regular and customary worship services, provided that no more than *de minimis* incremental costs are incurred for communications directly related to one or more political candidates or campaigns. The Commission recommends that Congress adopt legislation making such a clarification in connection with Section 501(c)(3), and that conforming changes be made to other relevant provisions of the law,

such as Sections 170, 527, 2055, 2106, 2522, 4955, 6852, and (possibly) 7409 (see further reference to Section 7409 below).

We recommend that Congress direct the Treasury Secretary to make conforming changes to the Treasury Regulations and to adopt Regulations that apply reasonable guidelines for determining whether (i) a communication is made in the ordinary course of an organization's regular and customary religious, charitable, educational, scientific, or other exempt-purpose activities; and (ii) the incremental costs for such communication are *de minimis*. Such Regulations should expressly provide that sermons and other communications that are delivered as part of a religious organization's regular and customary worship services constitute communications made in the ordinary course of a religious organization's regular and customary exempt-purpose activities.

The basic purpose and principle of this recommendation is to acknowledge the sacred and protected value of freedom of expression with respect to all persons and organizations and to permit such expression within the context of otherwise exempt-purpose activities, so long as such communications do not involve the disbursement of tax-deductible funds.

The Commission strongly believes that adoption of this recommendation will eliminate most of the challenges associated with administration of the existing law based on the following observations:

- a. Many of the challenges surrounding administration of the existing prohibition relate to statements made by religious and other nonprofit leaders during worship services or other exempt-purpose functions or in exempt-purpose publications or media. Implementation of the recommendation described herein will largely eliminate the challenges associated with applying the law in connection with such activities and will represent deference to the First Amendment freedoms that are so precious to Americans.
- b. This recommendation appropriately respects the reality of many African-American and other churches where communications and expressions about socially relevant topics, including candidates and campaigns, are central to their culture and character. Implementation of this recommendation will substantially eliminate the IRS's dilemma with respect to addressing such realities in the context of worship services or similar activities.
- c. Implementation of this recommendation will eliminate the challenges posed to the IRS by churches (such as those participating in "Pulpit Freedom Sunday" sponsored by Alliance Defending Freedom) that deliberately engage in political communications in the context of worship services in the hope that the IRS will initiate an examination and permit them to litigate the issue.

- d. This recommendation should permit the IRS to demonstrate an even-handed approach to administering the law by eliminating many of the bases for allegations of selective or inconsistent enforcement of the prohibition.
- e. This recommendation will eliminate the obligation of the IRS to evaluate the speech of nonprofit leaders *vis-à-vis* vague “facts and circumstances” guidelines to discern whether or not such speech is political—a challenge that is particularly troublesome when the organization is a religious institution.

Due to the dramatic simplification that will result from adoption of this recommendation, substantial time and cost resources of the IRS that could arguably be spent in more important areas of tax administration may be redirected.

At the same time, this recommendation preserves the economic policy purpose of not permitting the use of tax-deductible funds for political purposes. Analogously, in *Regan v. Taxation With Representation*, the United States Supreme Court held that the lobbying limitation that applies to 501(c)(3) organizations is constitutional.⁹¹ In so doing, the Court noted:

The Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for lobbying out of public monies. . . . Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR’s lobbying.⁹²

One may reasonably infer from the Supreme Court’s comments regarding lobbying activity that the key public policy issue at question is the use of tax-deductible funds . . . not the speech or communication itself. The Commission believes the recommendation described herein strikes the right balance between respecting the proper use of tax-deductible contributions and respecting the First Amendment rights of free exercise of religion and free speech. The Commission’s recommendation does not require Congress to “pay for” an organization’s incidental political communications. The Commission also recognizes that most 501(c)(3) public charities receive a portion of their support from donors who do not itemize deductions or who otherwise do not receive a tax benefit associated with their charitable giving. That fact supports the position that this recommendation does not involve the use of tax-deductible funds to support political communications, notwithstanding that *de minimis* expenditures would be permitted.

Another advantage of the approach afforded by this recommendation is purely logistical. By clarifying the definition of participation or intervention in a campaign

⁹¹ 461 U.S. 540, 551 (1983).

⁹² *Id.* at 545–46.

in the manner recommended, as opposed to amending Section 501(c)(3) itself, no changes are required in the fundamental aspects of qualifying for tax exemption. Organizations applying for exemption for recognition under Section 501(c)(3) will not be required to include new or different provisions in their governing documents, and existing 501(c)(3) organizations will not be required to amend their governing documents in order to avail themselves of the modified definition (unless their governing documents contain self-imposed provisions not required under existing law for 501(c)(3) organizations).

The Commission respectfully acknowledges that participants constituting a minority of its Panel members do not concur with the recommendations described herein that would modify the definitions in the law so as to permit churches and other 501(c)(3) organizations to engage in communications advocating the election or defeat of specific candidates provided that such communications do not involve additional or incremental expenditures.

The Commission also acknowledges that opinions differ widely among religious and other 501(c)(3) organizations as to whether it is appropriate to engage in certain political communications. Such determinations should be made by each organization, taking into consideration the organization's culture and constituencies. Many organizations will choose as a matter of their own policy not to take positions or engage in communications that relate to political candidates or campaigns. Given the fact that relatively few 501(c)(3) organizations choose to engage in lobbying activities even though they have been permitted to do so within limits under existing law, it is reasonable to expect that relatively few 501(c)(3) organizations will choose to engage in political campaign-related communications. An organization's views about whether to engage in certain types of political communication may change over time as both the organization and our culture continue to change.

- 3. For activities or communications that are not “no-cost political communications” as described in Recommendation 2 above, Congress should adopt clarifying provisions in the law establishing that only the following actions constitute prohibited political campaign participation or intervention:**
 - a. A communication that involves an expenditure of funds, and**
 - i. Clearly identifies one or more political candidates for public office or one or more political parties or political organizations described in Section 527 of the Internal Revenue Code by name, title, party affiliation, audio or visual likeness, or other distinctive characteristics; and**

ii. Contains express words of advocacy to:

- (a) elect or defeat one or more such candidates, or**
- (b) make contributions to one or more clearly identified candidates, political parties, or political organizations described in Section 527 of the Internal Revenue Code;**

or

- b. A contribution of money, goods, services, or use of facilities to one or more political candidates, political parties, or political organizations described in Section 527 of the Internal Revenue Code.**

As is more fully described in the section of this Report entitled “Why the Status Quo is Untenable,” the vagueness of current guidance creates an environment in which nonprofit organizations that engage in communications about the moral and social issues of the day can never quite know for certain whether the IRS will deem their communications to constitute prohibited political campaign participation or intervention. Such uncertainty serves to chill permissible speech and make administration of the law a virtually impossible task. The recommendation set forth herein establishes much-needed clarity with respect to what constitutes participation or intervention in a political campaign. The Commission believes that “brighter lines” in this area will be advantageous to exempt organizations and the Internal Revenue Service alike. With clearer, brighter lines of definition, 501(c)(3) organizations (especially those engaged in addressing the social and moral issues of the day) will be able to carry out their exempt purposes with a greater degree of confidence.

- 4. Congress should clarify in the law its intent that the Section 4955 excise taxes on political expenditures by 501(c)(3) organizations serve as intermediate sanctions and are to be applied as the exclusive sanction in cases where political expenditures are made by a 501(c)(3) organization that are inadvertent or are not substantial or frequent in relation to the organization’s activities as a whole. Section 4955 excise taxes should be imposed only on:**

- a. A communication that involves an expenditure of funds, and**
 - i. Clearly identifies one or more political candidates for public office or one or more political parties or political organizations described in Section 527 of the Internal Revenue Code by name, title, party affiliation, audio or visual likeness, or other distinctive characteristics; and**

ii. Contains express words of advocacy to:

- (a) elect or defeat one or more such candidates, or**
- (b) make contributions to one or more clearly identified candidates, political parties, or political organizations described in Section 527 of the Internal Revenue Code;**

or

- b. A contribution of money, goods, services, or use of facilities to one or more political candidates, political parties, or political organizations described in Section 527 of the Internal Revenue Code.**

Congress should further clarify in the law its intent that the sanction of revocation of exempt status should be applied only in cases where Section 4955 taxes apply and where the prohibited campaign participation or intervention is willful and substantial or frequent in relation to an organization’s activities as a whole. Congress should direct the Secretary of the Treasury to adopt conforming Regulations. We recommend that the Treasury Secretary, in adopting conforming Regulations, apply the principles in Treasury Regulations § 1.501(c)(3)-1(f)(ii)-(iii) (related to determination of whether revocation of tax-exempt status is appropriate when Section 4958 excise taxes for excess benefit transactions also apply.)

As is mentioned in the Grassley Staff Report, under current law, a single violation of the political campaign prohibition by a 501(c)(3) organization is a basis for revocation of the organization’s exempt status by the Internal Revenue Service.⁹³ Evidence of the IRS’s position in this regard is found in the following excerpt from Revenue Ruling 2007-41:

However, for their organizations to remain tax exempt under section 501(c)(3), leaders cannot make partisan comments in official organization publications or at official functions of the organization.⁹⁴

No other provision of federal tax law has the potential to invoke the “nuclear” penalty of loss of exempt status for what one organization’s leader may say in one or a few instances. Imposing so harsh a penalty in such cases is not only unfair, it is unpalatable—which is why the IRS rarely invokes it under existing law. But the IRS should not even have such authority in the case of insubstantial violations. The recommendation described herein will largely eliminate the unnecessary and harsh threat of revocation in cases where violations are insubstantial or infrequent in relation to an organization’s activities as a whole.

⁹³ GRASSLEY STAFF REPORT, *supra* note 33, at 56–57.

⁹⁴ Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1422.

An analogous area of federal tax law exists with respect to excess benefit transactions and the related excise taxes under Section 4958. Excess benefit transactions are generally a form of private inurement. Private inurement is prohibited for 501(c)(3) and certain other organizations, and can be the basis for denial of exempt status by the IRS. In establishing “intermediate sanctions” (the excise taxes on excess benefit transactions under Section 4958), Congress expressed its intent that the excise taxes would be assessed as the sole sanction in the case of violations that are not substantial or egregious.⁹⁵ The Treasury Department subsequently adopted Regulations that provide guidance as to whether revocation of tax-exempt status is appropriate when Section 4958 excise taxes for excess benefit transactions also apply.⁹⁶ The Commission believes that comparable guidance can and should be provided with respect to violations of the political campaign prohibition by 501(c)(3) organizations once Congress makes the statutory changes recommended herein.

5. Section 7409 of the Internal Revenue Code (permitting the IRS to obtain a court injunction prohibiting a 501(c)(3) organization from making further political expenditures) should be repealed.

As described in the Introduction and Background section of this Report, federal law provides that the U.S. government may obtain a court injunction prohibiting a 501(c)(3) organization from making further political expenditures in the event the organization has flagrantly violated the campaign intervention prohibition in Section 501(c)(3) and other specified criteria are met. A lack of evidence to the contrary suggests that the IRS has never asserted the authority to obtain a court injunction to stop future campaign intervention by a 501(c)(3) organization.

It is not clear what public policy purpose is served by Section 7409. If a 501(c)(3) organization has flagrantly violated the political campaign prohibition in Section 501(c)(3), the IRS is permitted to revoke the organization’s tax-exempt status. The recommendations contained herein would continue to permit revocation of exempt status when an organization violates the prohibition in a manner that is substantial or frequent in relation to an organization’s activities as a whole. Revocation may be made effective as of the date the organization engaged in the substantial violation. If an organization’s 501(c)(3) status has been revoked, it is no longer a tax-exempt organization. It is difficult to comprehend a valid public policy purpose that would permit the federal government to prohibit an organization from engaging in political activities if it is no longer tax-exempt. To do so would seem to present substantial constitutional concerns. Given these observations and the fact that the IRS has apparently never asserted its authority under Section 7409,⁹⁷ the Commission recommends that Section 7409 be repealed.

⁹⁵ H.R. REP. NO. 104-506, at 53, 59 n.15 (1996).

⁹⁶ Treas. Reg. § 1.501(c)(3)-1(f)(1)(ii)–(iii).

⁹⁷ See Aprill, *supra* note 19, at 652 n.50.

Examples

- A. Oak Lane Church (OLC) is a 501(c)(3) public charity and is a church. OLC conducts regular weekly worship services that include prayer, scripture reading, singing, and other worship activities. During a regular worship service, OLC's officiating minister makes statements in support of a particular candidate for public office and encourages the congregation to vote for that candidate. OLC's media ministry makes audio and video recordings of all sermons available to anyone upon request and posts recordings of all sermons on its website in the ordinary course of its regular and customary exempt-purpose activities. No additional or incremental costs are incurred by OLC in connection with the minister's statements during the worship service or in the dissemination of the content of the minister's sermon containing those statements. The minister's communications related to the candidate would be considered no-cost political communications, and would not constitute prohibited participation or intervention in a political campaign.
- B. Oak Lane Church (OLC) is a 501(c)(3) public charity and is a church. OLC conducts regular weekly worship services that include prayer, scripture reading, singing, and other worship activities. During a regular worship service, OLC invites Candidate R, a candidate for the U.S. Senate from OLC's state, to deliver a message to the congregation. Candidate R delivers an inspirational message that includes references to her campaign and the improvements Candidate R believes she can bring to the Senate. After Candidate R's message, OLC's presiding minister makes statements in support of Candidate R and encourages members of the congregation to vote for Candidate R. OLC's media ministry makes audio and video recordings of all worship services available to anyone upon request and posts recordings of all worship services on its website in the ordinary course of its regular and customary exempt-purpose activities. No additional or incremental costs are incurred by OLC in connection with Candidate R's message or the communications by the presiding minister during the worship service or in connection with the dissemination of the content of the worship service. The communications related to Candidate R's candidacy would be considered no-cost political communications, and would not constitute prohibited participation or intervention in a political campaign.
- C. Oak Lane Church (OLC) is a 501(c)(3) public charity and is a church. OLC conducts regular weekly worship services that include prayer, scripture reading, singing, and other worship activities. OLC holds a special political campaign rally for selected candidates for public office. The rally is separate

and distinct from OLC's regular worship services and its other regular and customary exempt-purpose activities. Communications made during and related to the rally clearly identify candidates for public office and encourage people to vote for the candidates and to support them financially. OLC incurs costs to conduct the rally, and the costs are not *de minimis*. OLC's activity of conducting a special campaign rally is not a no-cost political communication, but rather would constitute prohibited political campaign participation or intervention. The expenditures for conducting the rally would constitute political expenditures subject to the excise taxes under Section 4955 of the Internal Revenue Code.

- D. Oak Lane Church (OLC) is a 501(c)(3) public charity and is a church. The leadership of OLC favors a particular candidate for an upcoming election. OLC makes monetary contributions to the political campaign of the candidate favored by OLC's leadership. The act of making the campaign contributions would constitute prohibited participation or intervention in a political campaign and the related expenditures would constitute political expenditures subject to the excise taxes under Section 4955 of the Internal Revenue Code.
- E. Oak Lane Church (OLC) is a 501(c)(3) public charity and is a church. OLC conducts regular weekly worship services that include prayer, scripture reading, singing, and other worship activities. OLC receives printed voter guides in connection with an upcoming election from an unrelated organization at no cost to OLC. The voter guides address candidates' positions with respect to various issues of importance to OLC and its constituents. The voter guides do not contain language expressly advocating the election or defeat of any specifically-identified candidates. OLC volunteers distribute copies of the voter guides to OLC's congregation during regular worship services. No additional or incremental costs are incurred by OLC in connection with obtaining or distributing the voter guides. Distribution of the voter guides would not constitute prohibited participation or intervention in a political campaign.
- F. Oak Lane Church (OLC) is a 501(c)(3) public charity and is a church. OLC conducts regular weekly worship services that include prayer, scripture reading, singing, and other worship activities. OLC receives printed voter guides in connection with an upcoming election from an unrelated organization at no cost to OLC. The voter guides address candidates' positions with respect to various issues of importance to OLC and its constituents. The voter guides do contain language expressly advocating the election or defeat of certain specifically-identified candidates. OLC

volunteers distribute copies of the voter guides to OLC's congregation during regular worship services. No additional or incremental costs are incurred by OLC in connection with obtaining or distributing the voter guides. Distribution of the voter guides would be considered no-cost political communications, and would not constitute prohibited participation or intervention in a political campaign.

- G. Oak Lane Church (OLC) is a 501(c)(3) public charity and is a church. OLC conducts regular weekly worship services that include prayer, scripture reading, singing, and other worship activities. OLC receives printed voter guides in connection with an upcoming election from an unrelated organization at a cost that is more than *de minimis* to OLC. The voter guides address candidates' positions with respect to various issues of importance to OLC and its constituents. The voter guides do contain language expressly advocating the election or defeat of certain specifically-identified candidates. OLC volunteers distribute copies of the voter guides to OLC's congregation during regular worship services. Since OLC incurs additional or incremental costs that were more than *de minimis* in connection with obtaining the voter guides, OLC's action of distributing the voter guides would not be considered no-cost political communications. Rather, the related expenditures would constitute political expenditures subject to the excise taxes under Section 4955 of the Internal Revenue Code.
- H. Oak Lane Church (OLC) is a 501(c)(3) public charity and is a church. OLC conducts regular weekly worship services that include prayer, scripture reading, singing, and other worship activities. Utilizing its own staff and resources, OLC creates printed voter guides in connection with an upcoming election. The staff and resources utilized by OLC in creating the voter guides are employed and utilized by OLC in the ordinary course of OLC's regular and customary exempt-purpose activities without regard to the creation of the voter guides. OLC's costs would have been the same regardless of whether the voter guides were created, with *de minimis* exceptions, such as costs for minor office supplies. The voter guides address candidates' positions with respect to various issues of importance to OLC and its constituents. The voter guides do not contain language expressly advocating the election or defeat of specifically-identified candidates. OLC volunteers distribute copies of the voter guides to OLC's congregation during regular worship services. Distribution of the voter guides would not constitute prohibited participation or intervention in a political campaign.

- I. Trees Forever (TF) is a 501(c)(3) public charity dedicated to protecting and preserving the environment. TF regularly produces and issues a newsletter several times a year for its donors and other interested parties. The newsletter contains information about TF's programs and activities as well as a solicitation for contributions. The newsletter is ordinarily distributed by mail, email, and by posting in a blog on TF's website. Each newsletter ordinarily includes an editorial article—typically authored by TF's president. An editorial in one of the regular newsletters includes statements by the president of TF in favor of specific candidates for public office as well as statements in favor of candidates of a particular party. The president urges readers to vote for those candidates. No additional or incremental costs are incurred by TF in connection with the president's statements or the distribution of the newsletter. The communications related to the candidates would be considered no-cost political communications, and would not constitute prohibited participation or intervention in a political campaign.
- J. Trees Forever (TF) is a 501(c)(3) public charity dedicated to protecting and preserving the environment. TF regularly produces and issues a newsletter several times a year for its donors and other interested parties. The newsletter contains information about TF's programs and activities as well as a solicitation for contributions. The newsletter is ordinarily distributed by mail, email, and by posting in a blog on TF's website. TF decides to produce a separate special edition of its newsletter, the content of which is dedicated entirely to supporting a particular group of clearly identified candidates for public office. TF produces the newsletter and distributes it in the same manner it normally uses for distribution of its regular newsletter. Production of the special edition of the newsletter is not a communication made in the ordinary course of TF's regular and customary exempt-purpose activities, and TF incurs incremental costs associated with the production and distribution of the special edition of the newsletter. TF's activity of producing and distributing the special edition of the newsletter is not a no-cost political communication, but rather would constitute prohibited participation or intervention in a political campaign. The expenditures for producing and distributing the special edition of the newsletter would constitute political expenditures subject to the excise taxes under Section 4955 of the Internal Revenue Code.
- K. Brighter Times (BT) is a 501(c)(3) public charity whose primary activities consist of providing educational information to the public regarding civil rights issues. BT maintains a robust, multi-dimensional website containing hundreds of pages as the primary means by which its educational information is disseminated. One page of its website contains a statement by BT's

president in opposition to a particular candidate for public office. No additional or incremental costs are incurred by BT in connection with inclusion of the president's statement on the website. The communication related to the candidate would be considered a no-cost political communication, and would not constitute prohibited participation or intervention in a political campaign.

- L. Brighter Times (BT) is a 501(c)(3) public charity whose primary activities consist of providing educational information to the public regarding civil rights issues. BT maintains a robust, multi-dimensional website containing hundreds of pages as the primary means by which its educational information is disseminated. BT creates a sizable, special multiple-page section of its website that contains statements in opposition to certain candidates for public office. BT incurs incremental costs to design and post the special section. Such costs are not *de minimis*. BT's activity of designing and posting the special section of its website is not a no-cost political communication, but rather would constitute prohibited participation or intervention in a political campaign. The expenditures for producing the special section would constitute political expenditures subject to the excise taxes under Section 4955 of the Internal Revenue Code.
- M. Cures for Disease (CD) is a 501(c)(3) public charity that seeks cures for particular diseases. CD's activities consist of disease research and holding forums for sharing educational information about disease research. CD does not regularly or customarily run advertisements in newspapers. CD creates and runs ads in newspapers of general circulation the content of which relates exclusively to its endorsement of clearly and specifically identified candidates for public office. CD incurs costs to create and run the ads, and the costs are not *de minimis*. CD's activity of creating and running the ads is not a no-cost political communication, but rather would constitute prohibited participation or intervention in a political campaign. The expenditures for creating and running the ads would constitute political expenditures subject to the excise taxes under Section 4955 of the Internal Revenue Code.
- N. Cures for Disease (CD) is a 501(c)(3) public charity that seeks cures for particular diseases. CD's activities consist of disease research and holding forums for sharing educational information about disease research. CD regularly and customarily runs advertisements monthly in a few major magazines. The ads typically contain up-to-date descriptions of CD's work and appeals for funds. Senator T is a candidate for election to the office of President of the United States who has been supportive of CD's mission and work. In one of its regular monthly ads, CD dedicates a small portion of

the ad to thanking Senator T for his support of CD's mission and expressing support for Senator T in his upcoming election. CD incurs no incremental costs associated with including the expression of gratitude to Senator T in the ad. The inclusion of the communication related to Senator T in the ad would be considered a no-cost political communication and would not constitute prohibited participation or intervention in a political campaign.

Appendix A – Excerpt of the Grassley Staff Report



The following is an excerpt of the portion of the Grassley Staff Report entitled “Eliminate or Circumscribe Electioneering Prohibition” (Appendix E).

Present law

(1) Tax Law

(a) Electioneering Prohibition

An organization cannot be exempt from federal income tax as an organization described in section 501(c)(3) unless it “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 regulations provide that activities that constitute participation or intervention in a political campaign 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, a candidate for public office.¹ A determination whether an organization has participated or intervened is based upon all the relevant facts and circumstances. This prohibition on political campaign intervention by section 501(c)(3) organizations is referred to as the “electioneering prohibition” for short.

Under section 4955, an amount paid or incurred by a section 501(c)(3) organization to participate in, or intervene in, a political campaign for public office is considered a “political expenditure.”² Section 4955(a) imposes an initial tax on each political expenditure by a section 501(c)(3) organization equal to 10 percent of the amount of the expenditure. In addition, an initial tax equal to 2½ percent of the organization’s political expenditures is imposed on any organization manager who agrees to the making of any expenditure, knowing it to be a political expenditure. If the expenditure is not promptly corrected, section 4955(b) imposes an additional tax equal to 100 percent of the political expenditure upon the organization, and an additional tax equal to 50% of the expenditure upon any manager who refuses to agree to the correction.

Section 6852 authorizes the IRS to immediately determine the amount of income tax and section 4955 tax due from an organization that flagrantly violates the electioneering prohibition, which taxes shall be immediately due and payable.

[Footnote numbering adapted to start at 1 for purposes of this publication.]

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

² I.R.C. § 4955(d)(1).

Section 7409 authorizes the IRS to seek an injunction from a federal district court prohibiting any further political expenditures by an organization that “has flagrantly participated in, or intervened in . . . any political campaign” and that has not ceased the expenditures upon being notified that the Service intends to seek an injunction.

(b) Lobbying Restriction

An organization is exempt under section 501(c)(3) only if “no substantial part of [its] activities is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in [section 501](h)).”

Thus, section 501(c)(3) allows organizations exempt under that section to lobby so long as they do not devote a substantial part of their activities to attempting to influence legislation. The IRS has not adopted a percentage test for determining whether a substantial part of an organization’s activities consist of lobbying; rather, a facts and circumstances test is used. But in one court case, the court held that an organization’s attempts to influence legislation that constituted less than five percent of the organization’s total activities were not substantial.³ In another case, the court noted that an organization’s expenditures for lobbying activities ranged from 16.6 to 20.5 percent of total expenditures during a four-year period, and concluded that “for an organization “to devote so much of its total resources to legislative activities, it fairly can be concluded that its purposes no longer accord with conceptions traditionally associated with common-law charity.”⁴

Section 501(h) of the Code, enacted in 1976, allows section 501(c)(3) public charities to elect to have their lobbying activities governed by expenditure tests in lieu of being subject to the “substantial part” test (churches and private foundations and not allowed to make the election). A public charity that makes the election may make lobbying expenditures within specified dollar limits determined under section 4911. If an electing public charity’s lobbying expenditures are within the dollar limits determined under section 4911(c), the electing public charity will not owe tax under section 4911, nor will it lose its tax-exempt status. If, however, the electing public charity’s lobbying expenditures exceed its section 4911 lobbying limit, the organization is subject to an excise tax on the excess lobbying expenditures. Further, if an electing public charity’s lobbying expenditures normally are more than 150 percent of its section 4911 lobbying limit, the organization’s tax-exempt status as a section 501(c)(3) organization will be revoked.

A public charity that elects the expenditure test may nevertheless lose its tax exempt status if it is an action organization, i.e., its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and it advocates, or campaigns for, the attainment of such main

³ Seasongood v. Comm’r, 227 F.2d 907, 912 (6th Cir. 1955).

⁴ Haswell v. United States, 205 Ct. Cl. 421, 443-44 (1974).

or primary objective or objectives as distinguished from engaging in nonpartisan analysis, study, or research and making the results thereof available to the public.⁵

In Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983), the Supreme Court ruled that the section 501(c)(3) lobbying restriction is constitutional. TWR, a section 501(c)(3) organization, argued that the lobbying limitation violated its right to freedom of speech under the First Amendment.

In holding that the lobbying restriction does not violate the First Amendment, the Court posited that—

Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. 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. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions. The system Congress has enacted provides this kind of subsidy to ... those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that non-profit organizations undertake to promote the public welfare....⁶

Relying on Cammarano v. United States, 358 U.S. 498 (1959) – in which the Court upheld a Treasury regulation that denied business expense deductions for lobbying activities, holding that Congress is not required by the First Amendment to subsidize lobbying – the Court in TWR said—

The Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TRW any independent benefit on account of its intention to lobby. Congress has merely refused to pay for lobbying out of public monies.... Congress has not infringed any first Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying.⁷

(2) Campaign Finance Law

In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court considered the constitutionality of the Federal Election Campaign Act of 1971 (FECA), as amended in 1974. The Court upheld the constitutionality of certain statutory provisions, including contribution limitations to candidates for federal office and disclosure and recordkeeping provisions. But the Court found other provisions unconstitutional, including a \$1,000 limitation on

⁵ Treas. Reg. 1.501(c)(3)-1(c)(3).

⁶ Regan v. Taxation With Representation of Washington, 461 U.S. 540, 544 (1983).

⁷ *Id.* at 545-46.

independent expenditures. Former 18 U.S.C. § 608(e)(1), which the appellants contended is unconstitutionally vague, provides that “no person may make any expenditure ... relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds \$1,000.” Noting that “vague laws may not only ‘trap the innocent by not providing fair warning’ or foster arbitrary and discriminatory application’ but also operate to inhibit protected expression by inducing ‘citizens to steer far wider from the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked,’”⁸ the Court observed that “although ‘expenditure,’ ‘clearly identified,’ and ‘candidate’ are defined in the Act, there is no definition clarifying what expenditures are ‘relative to’ a candidate. The use of so indefinite a phrase as ‘relative to’ a candidate fails to clearly mark the boundary between permissible and impermissible speech”⁹ The Court said that, although the context of section 608(e)(1) “clearly permits, if indeed it does not require, the phrase ‘relative to’ a candidate to be read to mean ‘advocating the election or defeat of’ a candidate [it is a mistake to think] that this construction eliminates the problem of unconstitutional vagueness altogether.”¹⁰

[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest. In an analogous context, this Court in Thomas v. Collins, 323 U.S. 516 ... (1945), observed:

[W]hether words intended and designed to fall short of invitation would miss the mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstance wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.¹¹

⁸ Buckley v. Valeo, 424 U.S. 1, 41 n.48 (1976).

⁹ *Id.* at 41.

¹⁰ *Id.* at 42.

¹¹ *Id.* at 42-43.

The Court then concluded that:

The constitutional deficiencies described in “Thomas v. Collins” can be avoided only by reading s 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate, much as the definition of “clearly identified” in s 608(e)(2) requires that an explicit unambiguous reference to the candidate appear as part of the communication.... We agree that in order to preserve the provision against invalidation on vagueness grounds, s 608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.¹²

The Court said that “[t]his construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”¹³

The Bipartisan Campaign Reform Act of 2002 (BCRA), P.L. 107-155 (H.R. 2356, 107th Cong.) significantly amended the FECA. Section 203 of the BCRA prohibits corporations and labor unions from using their general treasury funds (and any person from using funds donated by a corporation or labor union) to finance electioneering communications. Instead, the statute requires that such ads be paid for with corporate or labor union political action committee (PAC) regulated hard money.

Section 201 of the BCRA defines “electioneering communication” as any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office, is made within 60 days of a general election or 30 days of a primary election or political party caucus, and, in the case of a communication that refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.¹⁴ But if such definition is “held to be constitutionally insufficient by final judicial decision,” Section 201 provides, alternatively, that the term “electioneering communication” means “any broadcast, cable, or satellite communication which promotes or supports a candidate for [Federal] office, or attacks or opposes ad candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.”

In McConnell v. FEC, 540 U.S. 93 (2003), the Supreme Court held that neither the First Amendment nor Buckley prohibits BCRA’s regulation of “electioneering communications,”

¹² *Id.* at 43-44.

¹³ *Id.* at 44 n.52.

¹⁴ 2 U.S.C. 434(f)(3)(A)(i).

even though such communications do not contain express advocacy. The Court found that the speech regulated by section 203 of the BCRA was the “functional equivalent” of express advocacy. The Court said that the distinction made by Buckley between express and issue advocacy was a matter of statutory interpretation, not constitutional command, and that Buckley’s narrow reading of the FECA provisions to avoid problems of vagueness and overbreadth “did not suggest that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.”¹⁵ While section 203 prohibits corporations and labor unions from using their general treasury funds for electioneering communications, the Court observed that they are still free to use separate segregated funds (PACs) to run such ads. Therefore, the Court concluded that it is erroneous to view this provision of BCRA as a “complete ban” on expression rather than simply a regulation.¹⁶

In Fed. Election Comm’n v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007), the Supreme Court held that section 203 of the BCRA was unconstitutional as applied to ads broadcast by WRTL. Those ads accused a group of Senators of filibustering to delay and block federal judicial nominees, and told voters to contact Wisconsin Senators Feingold and Kohl to urge them to oppose the filibuster. Recognizing that the ads would be illegal “electioneering communications” under section 203 of the BCRA if run within 30 days of the Wisconsin primary, but believing it had a First Amendment right to broadcast them, WRTL filed suit against the FEC seeking declaratory and injunctive relief and alleging that section 203’s prohibition was unconstitutional as applied to those ads. The Court said that because section 203 burdens political speech, it is subject to strict scrutiny under which the government must prove that applying BCRA to WRTL’s ads furthers a compelling governmental interest and is narrowly tailored to achieve that interest. While recognizing that McConnell had ruled that the BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent, the Court said that McConnell did not establish an intent-and-effect test for determining if a particular ad is the functional equivalent of express advocacy, and did not purport to overrule Buckley, which rejected an intent-an-effect test for distinguishing between discussions of issues and candidates. The Court found that, because the ads may reasonably be interpreted as something other than an appeal to vote for or against a specific candidate, they are not the functional equivalent of express advocacy and therefore fall outside McConnell’s scope. To safeguard freedom of speech on public issues, a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate.¹⁷ The Court held that because WRTL’s ads were not express advocacy or its functional equivalent, and because the FEC identified no interest sufficiently compelling

¹⁵ McConnell, 540 U.S. at 192.

¹⁶ *Id.* at 204.

¹⁷ WRTL, 127 S. Ct. at 2667.

to justify burdening WRTL's speech, section 203 of the BCRA was unconstitutional as applied to the ads.

In Citizen's United v. Fed. Election Comm'n, 530 F. Supp. 2d 274 (D.D.C. 2008), the District Court rejected the plaintiff's claim that section 203 of the BCRA violated the First Amendment on its face. The Supreme Court, however, agreed that BCRA did in fact violate free speech rights.¹⁸

Past Legislative Proposals to Amend the Electioneering Prohibition

Legislation has been introduced in the past several Congresses that would have allowed churches to participate in at least some campaign activity without jeopardizing their tax-exempt status.¹⁹

In the 107th Congress, the Houses of Worship Political Speech Protection Act (H.R. 2357) would allow churches to engage in campaign activity so long as such activity was "no substantial part" of the church's activities. The "no substantial part" test is a flexible test, and would require the IRS to judge each church on a case-by-case basis.²⁰ And the Bright-Line Act of 2001 (H.R. 2931) would allow a church to engage in campaign activity as long as it did not normally make expenditures for campaign activity in excess of 5 percent of its gross revenues and as long as it did not normally spend more than 20 percent of its gross revenues on campaign and lobbying activities combined. The bill did not define "normally."

In the 108th Congress, a provision in the American Jobs Creation Act of 2004, H.R. 4520, as originally introduced, would add a new subsection to section 501, entitled "Safe Harbor for Churches," which would provide that:

- A church would not be treated as having engaged in electioneering because of a statement by one of its religious leaders which is clearly identified as a statement made as a private citizen and not made on behalf of the church.
- A church would not lose its tax-exempt status unless its leaders unintentionally engage in electioneering on more than three separate occasions during any calendar year or intentionally engage in electioneering.

H.R. 4520 would also add a new section to the Code imposing a tax on churches for "impermissible activities," i.e., electioneering. If a church unintentionally engages in

¹⁸ Citizens United v. FEC, 130 S. Ct. 876 (U.S. 2010)

¹⁹ Erika K. Lunder & L. Paige Whitaker, Churches and Campaign Activity: Analysis of the Houses of Worship Free Speech Restoration Act and Similar Legislation, Congressional Research Service, at 1 (2009)

²⁰ *Id.* at 6.

electioneering on three occasions during a calendar year, it would be subject to a tax equal to the highest corporate tax rate multiplied by the organization's gross income for the calendar year. The amount would be reduced by 1/52 if there is only one violation in the year or by 1/2 if there are only two violations during the year. Any tax imposed under this new section would be reduced by the amount of any tax imposed under section 4955.²¹

The Houses of Worship Free Speech Restoration Act (H.R. 235) was introduced in both the 108th and 109th Congresses. It would add a new subsection to section 501 providing that a church would not lose its tax-exempt status or be deemed to have engaged in electioneering "because of the content, preparation, or presentation of any homily, sermon, teaching, dialectic, or other presentation made during religious services or gatherings."

In the 110th Congress, H.R. 2275 would repeal the political campaign prohibition entirely, in which case a church's political campaign activity would be limited only by the general section 501(c)(3) requirement that the church be organized and operated exclusively for exempt purposes. Churches and other section 501(c)(3) organizations would still be subject to the section 4955 tax on political expenditures.²²

Discussion

The electioneering prohibition on section 501(c)(3) organizations should be repealed or circumscribed with respect to churches and other section 501(c)(3) organizations (other than private foundations) because "the game is not worth the candle." The IRS is required to draw on its limited resources to police a provision that has no express purpose that can be deduced from the legislative history,²³ is harsher than what is necessary to address legitimate policy concerns, is vague (and therefore difficult for charities to comply with and for the IRS to enforce), and rarely results in any punishment being imposed on non-complying organizations or excise tax revenues being collected for the U.S. Treasury. Several legal scholars have questioned the constitutionality of the prohibition.²⁴ The only

²¹ *Id.* at 5.

²² *Id.* at 4.

²³ See, e.g., Deirdre Dessingue, Prohibition In Search of a Rationale: What the Tax Code Prohibits; Why; To What End? 42 B.C. L. Rev. 903. (2001).

²⁴ See, e.g., Laura Brown Chisolm, Politics and Charity: A Proposal For Peaceful Coexistence, 58 Geo. Wash. L. Rev. 308 (1990); Erik J. Ablin, The Price of Not Rendering to Caesar: Restrictions On Church Participation in Political Campaigns, 13 Notre Dame J.L. Ethics & Pub. Pol'y 541 (1999); Steffen N. Johnson, Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations, 42 B.C. L. Rev. 875 (2001); Chris Kemmitt, RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere, 43 Harv. J. on Legis. 145 (2006); Keith S. Blair, Praying for a Tax Break: Churches, Political Speech, and the Loss of Section 501(c)(3) Tax Exempt Status, 86 Denv. U.L. Rev. 405 (2009).

sure effect of the prohibition has been to cause headaches for the IRS, especially when a church is accused of overstepping the prohibition's tenuous borders.²⁵

A Prohibition Without a Purpose? Congress Gave No Reasons for Enacting the Electioneering Prohibition

Although “charitable” organizations have been exempt from paying federal income tax for as long as there has been a tax, it was not until 1934 that any limits were placed on their political activities, and then only on lobbying, not electioneering. An early Senate version of the bill that would become the Revenue Act of 1934 proposed limits on electioneering as well as a lobbying by denying a charitable contribution deduction for “contributions made to an organization a substantial part of whose activities is participation in partisan politics or in carrying on propaganda, or otherwise attempting to influence legislation.”²⁶ However, the Conference Committee deleted the “partisan politics” language, one congressman stating that “we were afraid that this prohibition was too broad, and we succeeded in getting the Senate conferees to eliminate [the provision concerning] partisan politics.”²⁷ Thus, the 1934 Revenue Act imposed a restriction on lobbying only.

But in 1954, then-Senator Lyndon B. Johnson introduced a floor amendment to the Revenue Act of 1954 that would prohibit electioneering by section 501(c)(3) organizations. No hearings were held on the subject, and there is no discussion of the Johnson amendment in the Act's legislative history, but Johnson's remarks on the Senate floor suggest that he intended merely to extend the existing lobbying restrictions to electioneering and not to creating a new, more punitive regime for electioneering.²⁸

Revocation is Toughest Sanction

Section 501 of the Internal Revenue Code effectuates Congress's determination to favor organizations set up and operated to further certain purpose deemed beneficial to society at large (such as religious, charitable, and educational purposes) by exempting such organizations from federal income tax. Similarly, with section 170(c)(2), Congress

²⁵ For example, the Alliance Defense Fund (ADF) is intent on challenging the constitutionality of the electioneering prohibition. During the 2008 presidential campaign, ADF organized Pulpit Freedom Sunday, when “32 pastors in different parts of the country spoke out on candidates and their stands on the issues during church services, hoping to provide the IRS into revoking participating churches' exemptions and thereby spark a showdown in court. So far, the IRS response has been silence, so the ADF is planning another effort for this fall. An ADF attorney said Pulpit Freedom Sunday will take place every year until pastors have the right to preach freely from their pulpits.” 2009 TNT 145-6 (July 31, 2009).

²⁶ S. Rep. no. 558, 73d Cong., at 26 (1934).

²⁷ 78 Cong. Rec. 7831 (1934).

²⁸ The transcript in the Congressional Record reads: “Mr. Johnson of Texas: Mr. President, this amendment seeks to extend the provisions of section 501 of the House bill, denying tax-exempt status to not only those people who influence legislation but also to those who intervene in any political campaign on behalf of any candidate for any public office” (100 Cong. Rec. 9604 (1954))

encourages the public to support organizations that further religious, charitable, educational, and other “exempt” purposes, by allowing a deduction from federal income tax for contributions to such organizations. It is logical that Congress would not want tax-exempt organizations to engage in activities that further a purpose that is not one of those for which tax exemption is accorded. Likewise, it is logical that Congress would not want tax-deductible contributions used to further a purpose that is not one of the purposes that the charitable contribution deduction was meant to encourage. Under common law, political purposes are not considered to be charitable purposes. Reflecting case law, the Restatement of the Law on Trusts, Second, says that “a trust to promote the success of a particular political party is not charitable.”²⁹ Therefore, it is logical that Congress would want to discourage tax-exempt organizations from engaging in political activities.

But other kinds of activities that do not further an exempt purpose are discouraged under the tax law without resort to revocation of exemption for the slightest infraction. The general rule is that a section 501(c)(3) organization must engage *primarily* in activities that accomplish exempt purposes; i.e., an organization is not regarded as operated exclusively for exempt purposes if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.³⁰ Put another way, an organization generally will not lose its exemption under section 501(c)(3) for merely engaging in an activity that is not in furtherance of exempt purposes as long as non-exempt activities do not constitute a substantial part of overall activities. For example, an exempt organization may operate a trade or business and maintain its exemption as long as it is not organized and operated for the primary purpose of carrying on an unrelated trade or business.³¹ Rather than revoke the exempt status of an organization that engages in an unrelated trade or business, the Code subjects the organization to a tax on its unrelated business income.³²

The lobbying restrictions are in harmony with this “insubstantial part” rule, because they condone an insubstantial level of lobbying. An organization that elects to limit its lobbying expenditures to the levels prescribed in section 501(h) and 4911 is subject to tax only if it exceeds those expenditure levels, and it does not risk the loss of exemption unless it substantially exceeds those levels over the course of several years. In contrast, the absolute ban on electioneering with its hair-trigger revocation penalty is an anomaly.

Although electioneering is not the only activity that is absolutely proscribed by the terms of section 501(c)(3), it is the only proscribed activity for which there is no effective alternative. For example, section 501(c)(3) also contains a prohibition on inurement; i.e., “no part of the net earnings” of a section 501(c)(3) organization may “[inure] to the benefit of any private shareholder or individual.” But because “inurement” is difficult to prove (much less

²⁹ Restatement (Second) of Trusts § 374, cmt. k (1959).

³⁰ Treas. Reg. § 1.501(c)(3)-1(c)(1).

³¹ Treas. Reg. § 1.501(c)(3)-1(e).

³² I.R.C. §§ 511-514.

understand), and the penalty, even for a scintilla of inurement is so onerous (revocation of tax-exempt status), the inurement prohibition is rarely enforced. Eventually Congress enacted section 4958 to impose taxes, as an alternative to revocation, with respect to certain types of inurement (known as excess benefit transactions) involving public charities. Treasury regulations to section 4958 set out procedures that charities can follow to establish the reasonableness of their transactions with insiders, thereby giving charities a degree of confidence that such transactions will not be considered inurement that results in revocation.

Like inurement, the precise scope of proscribed electioneering is difficult to define. Like the inurement prohibition, the electioneering prohibition imposes an onerous penalty on an offending organization – loss of tax-exempt status. But unlike inurement, there is no alternative, less onerous scheme, similar to section 4958, for deterring electioneering. For although section 4955 imposes taxes on political expenditures, most violations of the electioneering prohibition do not involve “expenditures,” but merely speech, and section 4955 provides no “safe harbor” by which a charity might establish that certain speech is permissible issue advocacy rather than impermissible electioneering.

The problem with an absolute prohibition on electioneering is that there is no “bright line” between issue advocacy and partisan politics. The IRS can construe speech to be electioneering even if no mention is made of an election or a person’s status as a candidate for public office. For example, the James Madison Center for Free Speech filed a lawsuit in federal district court challenging an IRS determination that Catholic Answers, a section 501(c)(3) charity, had made “political expenditures” because its president, Karl Keating posted a message on the organization’s website prior to the 2004 election in which he argued that John Kerry (then a presidential candidate) should not receive Holy Communion because of his “pro-abortion” positions. The lawsuit accuses the Treasury regulations of being vague and overbroad and, consequently, of chilling the First Amendment free speech rights of non-profit organizations. The suit asks that the regulations on “political intervention” be struck down or narrowly construed to encompass only speech that expressly advocates the election or defeat of a clearly identified candidate.³³

The Parameters of a “Facts-and-Circumstances” Electioneering Test are Difficult to Circumscribe

While the IRS has issued guidance to help charities understand the types of behavior that could constitute electioneering,³⁴ the “facts and circumstances” approach used by the IRS for determining a violation of the ban causes church and charity officials a great deal of confusion and anxiety. A Congressional Research Service report says that “the statute and regulations do not offer much insight as to what [electioneering] activities are prohibited.”³⁵

³³ Complaint available at <http://www.jamesmadisoncenter.org/CAKK/CAKKComplaint.pdf>

³⁴ See, e.g., Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

³⁵ Erika Lunder, Tax-Exempt Organizations: Political Activity Restrictions and Disclosure Requirements, Cong. Res. Serv., Sept. 11, 2007.

Even the IRS officials responsible for investigating violations of the electioneering prohibition have difficulty discerning its scope. An audit by the Treasury Inspector General for Tax Administration (TIGTA) found that “[IRS] employees responsible for identifying and researching referrals with alleged political interventions ... did not always understand why certain referrals were not included in the initiative [by the Referral Committee].” TIGTA recommended that the director of the IRS’s EO function “seek to improve the consistent understanding of prohibited political intervention criteria within the EO function.”³⁶

Enforcement Efforts Sap IRS Resources And Revocations are Rare

Proving a violation of the electioneering prohibition, like proving inurement, is often difficult. And proving electioneering by church officials is particularly fraught with difficulty because the IRS is prohibited by the church audit procedures of section 7611 from conducting a church tax inquiry or examination unless a “high-level Treasury official reasonably believes (on the basis of facts and circumstances recorded in writing) that the church” has engaged in activity that puts its tax-exempt status in doubt. The staff of the Joint Committee on Taxation found that the church audit procedures “[make] it more difficult for the IRS to initiate an examination of a church even if there is clear evidence of impermissible activity on the part of the church and [hampers] IRS efforts to educate churches with respect to actions that are not permissible, such as what constitutes impermissible political campaign intervention.”³⁷

Testifying before the House Ways and Means Committee in 2002, then-director of the IRS Exempt Organizations office, Steven Miller, said “this is a challenging area for the IRS to administer. This is not the first time that Congress has reviewed our activities in this area.” Miller went on to list some of those challenges:

First we have the issue of attribution. Was an individual making a pronouncement in his or her individual capacity, or can the pronouncement be attributed to the tax-exempt organization...?

A second difficult issue is whether a given pronouncement constitutes political campaign intervention. In this area specifically, the IRS is faced with reviewing both the content and circumstances surrounding the distribution of voter guides during worship services or on church property....

Finally, the section 4955 excise tax that can be used in lieu of revocation may not be effective [because] the tax is based on expenditures. Yet there are times when this excise tax does not correspond to the prohibited intervention. For example what is the expenditure

³⁶ Treasury Inspector General For Tax Administration, Improvements Have Been Made to Educate Tax-Exempt Organizations and Enforce the Prohibition Against Political Activities, but Further Improvements Are Possible 2-3 (June 18, 2008).

³⁷ Staff of the Joint Committee on Taxation, Report of Investigation of Allegations Relating to Internal Revenue Service Handling of Tax-Exempt Organization Matters, JCS-3-00, at 19 (2000).

related to an endorsement of a candidate during a sermon from the pulpit? ... [All] these considerations ... taken together ... make the area more challenging to regulate.³⁸

Before 2004, the IRS only occasionally looked into third-party allegations electioneering activities. Miller testified at the 2002 Hearings that the IRS had “revoked religious organizations or religious-affiliated organizations four or five times in the last 20 years.”³⁹ But because the IRS “has seen a growth in the number and variety of allegations of [charities intervening in political campaigns] during election cycles ... coupled with the dramatic increases in money spent during political campaigns,” the IRS initiated a Political Activities Compliance Initiative (PACI) for the 2004 election cycle, the objective of which was to promote compliance with the electioneering ban by expeditiously reviewing allegations of political intervention by tax-exempt organizations and initiating examinations when deemed appropriate. Since the 2004 Initiative, the IRS has continued to conduct political activity compliance initiatives during Federal election years.

For the 2004 Initiative, the IRS received 166 referrals alleging prohibited political campaign intervention by section 501(c)(3) organizations, among which were nineteen allegations that a church official had endorsed a political candidate during regular church services. The number of referrals is quite small considering that GuideStar reports that there are 1.8 million “IRS-recognized tax-exempt organizations,”⁴⁰ and the Yearbook of American and Canadian Churches reports that there are 331,000 church congregations in the United States.⁴¹ The IRS selected 110 organizations for examination, including 47 churches. The examinations mainly concerned tax-exempt organizations that had allegedly been involved in a single instance of potentially prohibited electioneering. Forty-six referrals alleged the distribution of printed materials such as printed documents or signs supporting a particular candidate or biased voter guides. Thirty-five referrals alleged improper verbal statements, such as a church official endorsing a candidate during church services, or candidates making campaign speeches at functions sponsored by a tax-exempt organization. Thirty-four referrals alleged the distribution of prohibited electioneering material electronically such as on a Website or in an email. And fifteen referrals alleged inappropriate political contributions. In the majority of cases, the examination concluded with the IRS issuing a closing letter to the tax-exempt organization warning the organization of the consequences of future prohibited electioneering. However, six examinations resulted in the revocation of the organization’s tax-exempt status. Of the 107 examinations concluded by December 2008, the IRS had substantiated electioneering by sixty two organizations.⁴²

³⁸ Review of Internal Revenue Code Section 501(c)(3) Requirements for Religious Organizations, Hearing Before the Subcomm. On Oversight of the H. Comm. On Ways and Means, 107th Cong. (2002).

³⁹ *Id.* at 15 (2002).

⁴⁰ <http://www2.guidestar.org/rxg/analyze-nonprofit-data/index.aspx>; GuideStar maintains a database of tax-exempt organizations.

⁴¹ Julia Duin, Americans Leaving Churches in Droves, Washington Times, Sept. 21, 2008, at A09.

⁴² Treasury Inspector General for Tax Administration, Statistical Profile of Alleged Political Intervention by Tax-Exempt Organizations in the 2004 Election Season (May 12, 2009)

The Treasury Inspector General for Tax Administration, in its audit of the 2004 Initiative, observed that excise taxes on political activities are difficult to assess either because “tax-exempt assets were not used” or because “it is difficult to calculate the amount of tax-exempt assets used in a prohibited activity.... As a result, it is rare for the IRS to assess excise taxes at the conclusion of an examination.... In 5 of the 99 cases, the IRS assessed excise taxes in the amount of \$12,945.37.” The audit report also observed that “by their very nature, IRS examinations are highly intrusive and require resources of both the IRS and the tax-exempt organization being examined. In addition, some political activity examinations are lengthy due to their complexity and the fact that certain cases involve additional legal requirements that must be followed,” probably an allusion to the church audit procedures. “For example, some of the initial examinations in the 2004 Initiative started in late 2004, while some of the examinations were not completed until mid-2007 or early 2008, and three were still ongoing when we completed our fieldwork.”⁴³

For the 2006 election cycle, the IRS received 237 referrals, among which were 13 allegations that a church official had endorsed a political candidate during regular church services. The IRS selected 100 organizations for examination, including 44 churches. As of March 30, 2007, at which time only 40 examinations had been closed, the IRS had substantiated political intervention by, and had issued written advisories to, only 4 churches. In neither 2004 nor 2006 did the IRS revoke, or propose to revoke, the exempt status of a church.⁴⁴

The IRS undertook another PACI for the 2008 2010 election cycles, but results have not yet been reported.

Issues for Consideration

Prior legislative proposals addressing the electioneering prohibition focused solely on churches. However, as discussed earlier, church status can be gamed. In addition, providing exceptions or separate rules for churches does not significantly reduce IRS’s enforcement burden. We considered several ideas for reform of this provision but, again, lacked the expertise in constitutional law to make an informed recommendation. However, two ideas we believe would survive a constitutional challenge are:

- 1) Replace the prohibition with a limitation similar to the lobbying restrictions, or
- 2) Retain prohibition but define “Participate In” or “Intervene In” in terms of expenditures and electioneering communications per federal election law.

⁴³ *Id.*

⁴⁴ Internal Revenue Service, 2006 Political Activities Compliance Initiative, at http://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf

Appendix B – Identified Law Journal Articles Addressing Political Expression by 501(c)(3) Organizations



This index contains a listing of scholarly articles on the issue of political expression by churches and other 501(c)(3) organizations.

- *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, Elizabeth Kingsley & John Pomeranz, 31 WM. MITCHELL L. REV. 55 (2004)
- *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, Richard W. Garnett, 42 B.C. L. REV. 771 (2001)
- *Branch Ministries, Inc. v. Rossotti: First Amendment Considerations to Loss of Tax Exemption*, Deborah J. Zimmerman, 30 N. KY. L. REV. 249 (2003)
- *Campaign Signs and the Collection Plate—Never the Twain Shall Meet?*, Ann M. Murphy, 1 PITT. TAX REV. 35 (2003)
- *Can the IRS Silence Religious Organizations*, Meghan J. Ryan, 40 IND. L. REV. 73 (2007)
- *Choosing Between Tax-Exempt Status and Freedom of Religion: The Dilemma Facing Politically Active Churches*, Shawn A. Voyles, 9 REGENT U. L. REV. 219 (1997)
- *Churches and Campaign Intervention: Why the Tax Man Is Right and How Congress Can Improve His Reputation*, Eric R. Swibel, 57 EMORY L.J. 1605 (2008)
- *Churches, Politics, and the Charitable Contribution Deduction*, Ellen P. Aprill, 42 B.C. L. REV. 843 (2001)
- *Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches That Engage in Partisan Political Speech?*, Johnny Rex Buckles, 84 IND. L.J. 447 (2009)
- *Federal Tax Code Restrictions on Church Political Activity*, Deirdre Dessingue Halloran & Kevin M. Kearney, 38 CATH. LAW. 105 (1998)
- *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, Lloyd Hitoshi Mayer, 6 FIRST AMENDMENT L. REV. 1 (2007)

- *How Religious Organizations and Churches Can Be Politically Correct*, Wyatt McDowell, 42 *BRANDEIS L.J.* 71 (2003)
- *I.R.C. § 501(c)(3): Practical and Constitutional Implications of “Political” Activity Restrictions*, Wilfred R. Caron & Deirdre Dessingue, 2 *J.L. & POL.* 169 (1985)
- *If You Are a Good Christian You Have No Business Voting for this Candidate: Church Sponsored Political Activity in Federal Elections*, Kelly S. Shoop, 83 *WASH. U. L.Q.* 1927 (2005)
- *Ignore the Rumors—Campaigning from the Pulpit Is Okay: Thinking Past the Symbolism of Section 501(c)(3)*, Michael Hatfield, 20 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 125 (2006)
- *Is the Ban on Participation in Political Campaigns by Charities Essential to their Vitality and Democracy?, A Reply to Professor Tobin*, Johnny Rex Buckles, 42 *U. RICH. L. REV.* 1057 (2008)
- *LBJ, the IRS, and Churches: The Unconstitutionality of the Johnson Amendment in Light of Recent Supreme Court Precedent*, Erik W. Stanley, 24 *REGENT U. L. REV.* 237 (2012)
- *Making Speech Truly Free: Applying the Principles of Citizens United to 501(c)(3) Organizations*, Daniel J. Schmid, 6 *LIBERTY U. L. REV.* 205 (2011)
- *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, Patrick L. O’Daniel, 42 *B.C. L. REV.* 733 (2001)
- *Morse Code, Da Vinci Code, Tax Code . . . Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches*, Jennifer M. Smith, 3 *J.L. & POL.* 41 (2007)
- *Not Even a Peep? The Regulation of Political Campaign Activity by Charities Through Federal Tax Law*, Johnny Rex Buckles, 75 *U. CIN. L. REV.* 1071 (2007)
- *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, Steffen N. Johnson, 42 *B.C. L. REV.* 875 (2001)
- *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, Edward McGlynn Gaffney, Jr., 40 *DEPAUL L. REV.* 1 (1990)

- *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations under the Internal Revenue Code and Related Laws*, Oliver A. Houck, 69 BROOK. L. REV. 1 (2003)
- *Pious Politics: Political Speech Funded Through I.R.C. § 501(c)(3) Organizations Examined Under Tax Fairness Principles*, Richard J. Wood, 39 ARIZ. ST. L.J. 209 (2007)
- *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, Donald B. Tobin, 95 GEO. L.J. 1313 (2007)
- *Political Silence at Church: The Empty Threat of Removing Tax-Exempt Status for Insubstantial Attempts to Influence Legislation*, David M. Anderson, 2006 BYU L. REV. 115 (2006)
- *Political Speech of Charitable Organizations Under the Internal Revenue Code*, John Michael Clear, 41 U. CHI. L. REV. 352 (1974)
- *Politicking from the Pulpit: An Analysis of the IRS's Current Section 501(c)(3) Enforcement Efforts and How It Is Costing America*, Stephanie A. Bruch, 53 ST. LOUIS U. L.J. 1253 (2009)
- *Politics and Charity: A Proposal for Peaceful Coexistence*, Laura Brown Chisolm, 58 GEO. WASH. L. REV. 308 (1990)
- *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, Lloyd Hitoshi Mayer, 89 B.U. L. REV. 1137 (2009)
- *Praise the Lord and Pass the Voter Guides*, Elizabeth J. Kingsley, 18 TAX'N OF EXEMPTS 278 (2007)
- *Praying for a Tax Break: Churches, Political Speech and the Loss of Section 501(c)(3) Tax Exempt Status*, Kenneth S. Blair, 86 DENV. U. L. REV. 405 (2009)
- *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; to What End?*, Deirdre Dessingue, 42 B.C. L. REV. 903 (2001)
- *Prophetic Speech and the Internal Revenue Code: Analyzing I.R.C. § 501(C)(3) in Light of the Religious Freedom Restoration Act*, Zachary Cummings, 20 REGENT U. L. REV. 151 (2008)
- *Reaping Where They Have Not Sowed: Have American Churches Failed to Satisfy the Requirements for the Religious Tax Exemption*, Vaughn E. James, 43 CATH. LAW. 29 (2004)

- *Regaining Their Political Voices: The Religious Freedom Restoration Act's Promise of Delivering Churches from the Section 501(c)(3) Restrictions on Lobbying and Campaigning*, Jason M. Sneed, 13 J.L. & POL. 493 (1997)
- *Religion and Political Campaigns: A Proposal to Revise Section 501(c)(3) of the Internal Revenue Code*, Judy Ann Rosenblum, 49 FORDHAM L. REV. 536 (1981)
- *Religion in Politics and the Income Tax Exemption*, Joel E. Davidson, 42 FORDHAM L. REV. 397 (1973)
- *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, Anne Berrill Carroll, 76 MARQ. L. REV. 217 (1992)
- *Rendering a Taxing New Tide on IRC 501(c)(3): The Constitutional Implications of H.R. 2357 and Alternatives for Increased Political Freedom in Houses of Worship*, Benjamin S. De Leon, 23 REV. LITIG. 691 (2004)
- *Rendering unto Caesar or Electioneering for Caesar? Loss of Church Tax Exemption for Participation in Electoral Politics*, Alan L. Feld, 42 B.C. L. REV. 931 (2001)
- *RFRA Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, Chris Kemmitt, 43 HARV. J. ON LEGIS. 145 (2006)
- *Saving the Preachers: The Tax Code's Prohibition on Church Electioneering*, Nicholas P. Cafardi, 50 DUQ. L. REV. 503 (2012)
- *"Sit Down and Count the Cost": A Framework for Constitutionally Enforcing the 501(c)(3) Campaign Intervention Ban*, Benjamin M. Leff, 28 VA. TAX REV. 673 (2009)
- *Tax Consequences When Churches Participate in Political Campaigns*, Allan J. Samansky, 5 GEO. J.L. & PUB. POL'Y 145 (2007)
- *The 501(c)(3) Campaign Prohibition as Applied to Churches: A Consideration of the Prohibition's Rationale, Constitutionality, and Possible Alternatives*, Jeffrey Mikell Johnson, 2 LIBERTY U. L. REV. 557 (2008)
- *The African-American Church, Political Activity, and Tax Exemption*, Vaughn E. James, 37 SETON HALL L. REV. 371 (2007)
- *The Christian Coalition as a Tax-Exempt Organization: Federal Income Tax Recommendations for the Politically Active TEO*, Shannon L. Race, 43 WAYNE L. REV. 1931 (1997)

- *The Fairness Doctrine as an Alternative to Enforcing the Ban on Political Intervention by Churches*, Vickramjit Sharma, 6 Conn. Pub. Int. L.J. 299 (2007)
- *The Free Exercise Clause and the Internal Revenue Code's Restrictions on the Political Activity of Tax-Exempt Organizations*, Ellis M. West, 21 WAKE FOREST L. REV. 395 (1986)
- *The Political Speech of Charities in the Face of Citizens United: A Defense of Prohibition*, Roger Colinvaux, 62 CASE WESTERN L. REV. 685 (2012)
- *The Politically Active Church*, Douglas H. Cook, 35 LOY. U. CHI. L.J. 457 (2004)
- *The Politics of Faith: Rethinking the Prohibition on Political Campaign Intervention*, Mark Totten, 18 STAN. L. & POL'Y REV. 298 (2007)
- *The Politics of Politicking under IRC §501(c)(3): A Guide for Politically Active Churches*, Steven B. Imhoof, 5 NEXUS 97 (2000)
- *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, Erik J. Ablin, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541 (1999)
- *Thou Shall Not Politic: A Principled Approach to Section 501(c)(3)'s Prohibition of Political Campaign Activity*, Joseph S. Klapach, 84 CORNELL L. REV. 504 (1999)
- *Wanted: A Bright-Line Test Defining Prohibited Intervention in Elections by 501(c)(3) Organizations*, Kay Guinane, 6 FIRST AMENDMENT L. REV. 142 (2007)
- *When a King Speaks of God; When God Speaks to a King: Faith, Politics, Tax Exempt Status, and the Constitution in the Clinton Administration*, Randy Lee, 63 LAW & CONTEMP. PROBS. 391 (2000)
- *Why Churches Cannot Endorse or Oppose Political Candidates*, James D. Davidson, 40 REV. REL. RES. 1 (1998)

Commission on Accountability and Policy for Religious Organizations



Mr. Michael Batts, Commission Chairman, is a CPA and the president and managing partner of Batts Morrison Wales & Lee, an accounting firm dedicated exclusively to serving nonprofit organizations across the United States. He is a member of the ECFA board and its former chairman. Mr. Batts has more than 25 years of experience serving nonprofit organizations. He is a national speaker and author, having written three books and numerous professional articles on matters related to the nonprofit sector. Mr. Batts was recently inducted by the National Association of Church Business Administration into its Hall of Fame in recognition of his significant professional contributions to the church community.

Mr. Dan Busby is the president of ECFA. He served as controller with the University Hospitals in Kansas City, as the founding partner of a CPA firm in Kansas City, and the chief financial officer of The Wesleyan Church denominational offices in Indianapolis. Serving with ECFA since 1998, Mr. Busby became the president in 2009. He has been Zondervan's church and nonprofit tax and finance author since 1990, and is a noted speaker across the United States.



Rev. Luis Cortés, Jr., is the founder of Esperanza, Philadelphia, one of the largest Hispanic evangelical networks in the nation. A national leader of Hispanic concerns, he has provided technical assistance to over 450 Hispanic nonprofits with funding over \$11 million. He founded The National Hispanic Prayer Breakfast in Washington, DC and was a founding board member of United Bank, the first African American-owned bank in Pennsylvania. He serves on the board of the Federal Home Loan Bank of Pittsburgh (an SEC corporation and a GSE), for which he also previously served as vice chairman; the boards of the Cancer Treatment Center, northeast region; and The American Bible Society.

Mr. Mark Davis currently serves as a ministry consultant to numerous churches and schools in the areas of strategic planning, finance, accounting, governance, and development. He served as the executive pastor of one of the top ten largest churches in the United States for 24 years. Mr. Davis has served on numerous boards including 4KIDS of South Florida, the Christian Community Foundation, Sheridan House Ministries, Taylor University, and the Standards Committee of ECFA.



Mr. Stephen Douglass is the president of Campus Crusade for Christ (Cru), Orlando, which is one of the largest nonprofit organizations in the United States. Campus Crusade (Cru) exists to help fulfill the Great Commission by winning, building, and sending in the power of the Holy Spirit and helping the body of Christ do evangelism and discipleship. Mr. Douglass is also an author, speaker, and radio host.

Mr. Richard Hammar is an attorney, CPA, general counsel for the Assemblies of God in Springfield, Missouri, and best-selling author specializing in legal and tax issues for churches and clergy. Mr. Hammar has written over 100 books, and is a noted speaker in the church world. He is a former ECFA board member.



Mr. Mark Holbrook is the president and CEO of the Evangelical Christian Credit Union, Brea, California, a \$3.2 billion (assets under management) financial cooperative serving the banking needs of ministries across the United States and missionaries around the world. Mr. Holbrook has served on several nonprofit ministry boards.

Dr. Joel Hunter is senior pastor of Northland, A Church Distributed, in Longwood, Florida, a pioneering congregation of 15,000 that uses technology to connect people in worship around the globe. Dr. Hunter is also a member of the board of the National Association of Evangelicals and the World Evangelical Alliance. He served during the inaugural year on the U.S. President's Advisory Council on Faith-based and Neighborhood Partnerships.



Mr. Lauren Libby is president of TWR, Cary, North Carolina. Mr. Libby co-founded Educational Communications in Colorado Springs, which comprises 15 radio stations and 28 translators. He formerly served at The Navigators in various senior executive posts. Mr. Libby is a member of the boards of Northwestern College, NRB, and ECFA, and a former ECFA Standards Committee chair.

Dr. Jo Anne Lyon is the general superintendent of The Wesleyan Church, Indianapolis, Indiana, and a member of the ECFA board. She was previously the founder and CEO of World Hope International, Alexandria, Virginia, a faith-based relief and development organization alleviating suffering and injustice in 30 countries.



Rev. William Townes, Jr., a CPA, is vice president for convention finance for the Executive Committee of the Southern Baptist Convention (SBC), Nashville, where he provides oversight of the financial operation of the Executive Committee and the organization of the annual SBC meeting. Previously, Rev. Townes served as the chief financial officer for the Georgia Baptist Convention and chief development officer for the North American Mission Board, Atlanta.



Dr. Kenneth Ulmer is senior pastor and teacher of Faithful Central Bible Church, Inglewood, California. He ministers under the favor of God and is a nationally known speaker and author. Dr. Ulmer is also the former president of The King's University as well as a founding board member, adjunct professor, and dean of The King's University at Oxford, an annual summer session held at Oxford University.

Dr. Dolphus Weary is president of the Rural Education and Leadership (R.E.A.L.) Christian Foundation, Richland, Mississippi. He is a noted author and speaker on racial reconciliation issues. Previously, he served 27 years with Mendenhall Ministries, a multi-faceted Christian community development ministry, which was used as a model to launch the now Christian Community Development Association (CCDA); and then 10 years as the executive director/president of Mission Mississippi, a statewide movement encouraging the Body of Christ in Mississippi to work at eliminating racism. He serves on a number of national and local boards, including Belhaven University and InterVarsity Christian Fellowship. He is a former ECFA board member.



Mr. David Wills is president of the National Christian Foundation, Alpharetta, Georgia, serving over 9,000 families by providing giving solutions and tools to maximize resources for Kingdom purposes. An attorney, Mr. Wills is a member of the boards of ECFA (and board chairman), Generous Giving, Hope for the Heart, ProVision Foundation, and the Cathy Family Foundations (Chick-Fil-A). He is the co-author of two books and a frequent lecturer.

Panel of Religious Sector Representatives

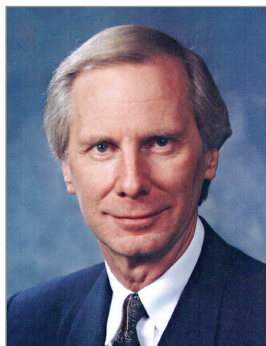


Mr. Ed Anderson, CPA, is senior vice president and CFO of Compassion International, Inc. in Colorado Springs. Compassion International is one of the world's largest Christian child development organizations, serving more than 1.2 million children in 26 of the world's poorest countries. Leading the finance function of Compassion International for over 30 years, Mr. Anderson has launched successful non-governmental organizations in seven international locations. He has also served as a member of the ECFA Standards Committee.

Mr. Boyd Black has served as associate general counsel with The Church of Jesus Christ of Latter-day Saints, Salt Lake City. He is a frequent lecturer on legal topics and has authored numerous articles on nonprofit issues. He is a member of the Committee on Exempt Organizations, Section of Taxation; co-chairman of the Subcommittee on Religious Organization of the American Bar Association.



Mr. Mike Buster earned his bachelor's degree from Ouachita Baptist University and his master's degree from Southwestern Baptist Theological Seminary. For the past 23 years he has been on staff at Prestonwood Baptist Church, Plano, Texas, and serves as the executive pastor. He has served as adjunct professor at three Southern Baptist theological seminaries. Mr. Buster also serves on the board of trustees for GuideStone Funds, Ouachita Baptist University, Amazon Outreach, and Bridge Builders Ministry.



Dr. Paul Cedar serves as the chairman/CEO of the Mission America Coalition/The US Lausanne Committee that includes over 500 national ministry leaders. Dr. Cedar has served as the president of the Evangelical Free Church of America for six years. He has served as chairman of the Lausanne Committee for World Evangelization and is a member of the National Prayer Committee and the board of the U.S. Center for World Missions and on the advisory boards of a number of strategic ministries. Dr. Cedar is the author of eight books. He has served as pastor in several churches, adjunct professor or visiting professor at five U.S. theological seminaries, and has lectured at colleges and theological seminaries in other parts of the world.

Mr. Danny de Armas is the senior associate pastor at First Baptist Church Orlando, where he leads the staff and oversees the ministry programs and business functions of the church. He earned his bachelor's degree in education at the University of Central Florida and his master of divinity degree from New Orleans Baptist Theological Seminary.



Mr. Nathan J. Diament is the director of public policy for the Union of Orthodox Jewish Congregations of America in Washington, DC. He is an honors graduate of Yeshiva University and the Harvard Law School. Mr. Diament has worked closely with members of both political parties to craft legislation addressing religious liberty issues, education reform, tax and fiscal issues, and more. In 2009, he was appointed by President Obama to serve as one of 25 members of the President's Faith Advisory Council.

Bishop Henry Fernandez is an author, entrepreneur, and the senior pastor of The Faith Center in Fort Lauderdale, with more than 10,000 members. He is the founder/chancellor of the University of Fort Lauderdale. He is a visionary who developed his business and financial acumen in the corporate arena and is now committed to helping people reach their full potential.





Mr. J. Daniel Gary is administrative counsel for the General Council on Finance and Administration (GCFA) of The United Methodist Church in Nashville. As part of his work for GCFA, he provides guidance on a wide variety of legal issues affecting churches, including charitable giving, legislative and political campaign activities, and clergy compensation. Mr. Gary received his Ph.D. in mathematics from the University of Illinois and his J.D. from the Washington and Lee University School of Law.

Mr. Jon A. Laria, CPA, is CFO of OneHope in Pompano Beach, Florida. As the CFO of international religious organizations for the past 15 years, he has developed policies and procedures that ensure compliance on clergy housing allowance, political activism, executive compensation, and ministerial tax status. At conferences, Mr. Laria has equipped thousands of church leaders in accounting, budgeting, and compliance matters. He also has extensive experience auditing publicly-held companies and restoring and/or maintaining compliance with SEC reporting requirements. He has served on the boards of various public and nonprofit organizations and authored the book “Win Your War Against Debt.”



Sr. Georgette Lehmuth, OSF (Franciscan Sister of Our Lady of Perpetual Help), has served as president and CEO of the National Catholic Development Conference (NCDC) in Hempstead, New York for eleven years. NCDC is an association of about 400 religious charitable institutions, promoting ethical, accountable professional fundraising in the context of ministry. She worked collaboratively regarding regulatory and tax issues, as well as with the U.S. Postal Service. She has spoken at various conferences both in the United States and abroad regarding ethical, accountable fundraising. For the seventh time, she has received recognition by the *Nonprofit Times* as one of the Top 50 Persons of Power and Influence in the nonprofit community.



Mr. Robert Lipps is an attorney and CPA with over 25 years of experience working with many of the nation’s largest religious organizations as board member, general counsel, CFO and insurance broker, advising on complex legal, financial, tax, and risk management matters.

Dr. Ingrid Mattson is a Muslim religious leader and Islamic Studies scholar who was for many years professor at Hartford Seminary in Connecticut and director of their center for Christian-Muslim relations. Her research focuses on Islamic ethics and law in society. Dr. Mattson earned her Ph.D. in Islamic studies from the University of Chicago in 1999. Among her publications is *The Story of the Qur’an*, which was selected in 2012 by the NEH for its “Bridging Cultures” program. From 2006 to 2010, she served as president of the Islamic Society of North America (ISNA); she previously served two terms as vice president, and she is the first woman to serve in either position.



Mr. Simeon May has been the chief executive officer for the National Association of Church Business Administration since 1998. He is an ordained minister, a CPA, a Certified Church Administrator, and a Certified Association Executive. Mr. May has been a member of the First Baptist Church of Richardson, Texas, since 1976, and served the church as its minister of business administration for almost 15 years.



Dr. Uma Mysorekar is president of the Hindu Temple Society of North America. She has initiated numerous programs to bring the community together including spiritual and cultural activities. She has also initiated interfaith meetings to bring about awareness of Hinduism and has spoken at numerous functions to educate people on Hinduism. She is charged with responsibility for daily affairs, temple expansion, communication, and the implementation of programs that address the psychological and emotional issues facing children growing up within two diverse cultures.

Mr. Paul D. Nelson served as ECFA's president from 1994 to 2006, and was honored with the designation of President Emeritus. He was named "Nonprofit Executive of the Year" in 1996 by *The Nonprofit Times* for ECFA's leadership in bringing about a successful settlement to the Foundation for New Era Philanthropy scandal. In 2005, he was recognized as one of the Times "Top 50 Power and Influence" honorees. From 2004 to 2007, he served as a member of the Panel on the Nonprofit Sector, convened by Independent Sector. Mr. Nelson currently serves on the board of World Vision U.S.



Mr. Anthony R. Picarello, Jr., is associate general secretary and general counsel for the United States Conference of Catholic Bishops (USCCB) in Washington, DC. As associate general secretary, Mr. Picarello oversees the policy and advocacy work of the USCCB, and as general counsel, he leads the office that serves as in-house counsel to the USCCB and administers the National Diocesan Attorneys Association. Mr. Picarello is a member of the bars of Virginia and the District of Columbia and is admitted to practice before the U.S. Supreme Court and most federal courts of appeals. He has argued religious freedom cases before federal district and appellate courts.



Mr. Peter Rathbun is the general counsel of American Bible Society in New York City. A graduate of Georgetown University Law Center, Mr. Rathbun has counseled nonprofit religious organizations for over 20 years, first in private practice and now in-house. Prior to law school, he spent 15 years in corporate information technology management in California.

Rabbi David Saperstein has served as director of the Religious Action Center of Reform Judaism for more than three decades. Rabbi Saperstein has headed several national religious coalitions and serves on the boards of numerous national organizations, including the NAACP, People For the American Way, National Religious Partnership on the Environment, and the World Bank's World Faith Development Dialogue. In 1999, he was elected as the first chair of the U.S. Commission on International Religious Freedom, and in 2009 he was appointed by President Obama as a member of the first White House Council on Faith-Based and Neighborhood Partnerships. Also an attorney, Rabbi Saperstein teaches seminars in both First Amendment Church-State Law and in Jewish Law at Georgetown University Law School.

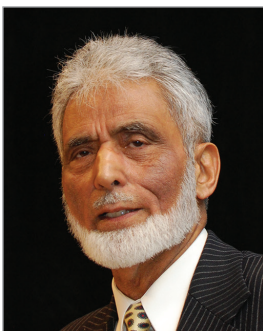


Rabbi Julie Schonfeld started her career as a congregational rabbi on the Upper West Side of Manhattan. She began working for the Rabbinical Assembly in New York City, spearheading projects on rabbinic development and women in the rabbinate, before becoming the executive vice-president of the Rabbinical Assembly (RA), the international association of Conservative/Masorti rabbis, in 2009. The Rabbinical Assembly offers rabbinic support, programming, mentorship, and works on major projects including liturgical publications, public policy, social justice, and professional development. Most recently, she was named one of the Forward 50; *Newsweek* named her one of the 50 most influential rabbis in 2011; and she was appointed to President Obama's Council for Faith-Based and Neighborhood Partnerships.



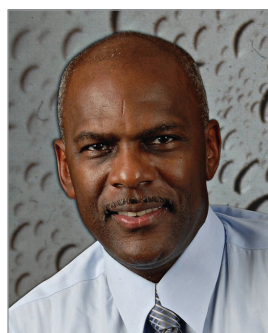
Ms. Sherre Stephens is the director of executive services at GuideStone Financial Resources in Dallas. Ms. Stephens focuses primarily on retirement and compensation strategies for executives and key leadership of organizations and large churches. She works extensively with church plans, executive deferred compensation arrangements, and ministers' tax issues. She often speaks to employee benefit professionals on these topics and writes for a number of publications.

Dr. Siva Subramanian is the co-founder of Sri Siva Vishnu Temple, the Association of Hindu Jain Temples of Metropolitan Washington, DC, and the Council on Hindu Temples of North America, as well as serving as first vice president of Interfaith Organization. He is also a board member of Hindu American Seva Charities and a founding board member of Hindu American Community Services Inc. Dr. Subramanian is also a professor of Pediatrics and Obstetrics and Gynecology, and is the Chief of Neonatology at Medstar Georgetown University Hospital (MGUH), Washington, DC. He is published extensively, has taught Religious Traditions in Health Care, and served on the Dean's Council on Bioethics and as senior ethicist at MGUH. Dr. Subramanian is a faculty associate at Kennedy Institute of Ethics and past chairman of the Hospital Ethics Committee and Pediatric Ethics Committee.



Dr. Sayyid M. Syeed is the national director for Interfaith and Community Alliances at the Islamic Society of North America (ISNA), Washington, DC, the oldest and the largest American Islamic organization. Previously, he served for 12 years as secretary general (CEO) of ISNA, a national umbrella of some 300 Islamic organizations. In that capacity, in the wake of 9/11, Dr. Syeed worked closely with the U.S. Treasury Department to promote best practices and transparency in the Muslim organizations in the United States.

Mr. Thomas E. Wetmore has been associate general counsel for the world headquarters of the Seventh-day Adventist Church in Silver Spring, Maryland, since 1984. He received a J.D. from George Washington University in 1984. Licensed to practice in Maryland, the District of Columbia, and Florida, he has been an active member since 1989 of the ABA Tax Section, Exempt Organizations Committee and is currently co-chair of the Religious Organizations Subcommittee. His practice areas are tax, employee benefits, contracts, corporate, and general nonprofit law.



Mr. Jerry Luren White is the chief financial officer for Mt. Zion Baptist Church in Nashville. Mt. Zion has more than 25,000 members, with Bishop Joseph W. Walker, III, as senior pastor. Mr. White has a degree in accounting from Southern University and an MBA from Texas A&M University. He is a Certified Public Accountant and a Certified Internal Auditor with over 35 years of accounting and finance experience, including an international assignment in Frankfurt, Germany.

Mr. Steven Woolf serves as senior tax policy counsel in the Washington, DC office of the Jewish Federations of North America (JFNA). In his position, Mr. Woolf fulfills the role of chief advocate and lobbyist on legislative proposals, administrative regulations, and public policy issues before Congress and the Executive Branch regarding nonprofit tax issues. He works closely with endowment and planned giving colleagues at JFNA and in the over 150 Jewish Federations throughout North America. Mr. Woolf spent most of his career working in the National Tax Office of the Big Four accounting firm, PricewaterhouseCoopers and its predecessor, Coopers & Lybrand. He represented clients on tax, legislative, and regulatory issues before Congress and the Treasury Department, and obtained numerous tax rulings from the Internal Revenue Service. He received his J.D. from American University.



Panel of Nonprofit Sector Representatives



Ms. Linda Czipo is executive director of the Center for Non-Profits, New Jersey's state association of nonprofits, which strengthens the state's nonprofit community through advocacy, public education, legal and management assistance, and member services. Her nonprofit sector experience spans over 25 years. Ms. Czipo is a public policy committee member and past board treasurer of the National Council of Nonprofits and a member of the New Jersey Commission on National and Community Service.

Mr. David Evans is U.S. president and global executive officer of the international relief and development organization Food for the Hungry (FH). He is based in FH's Washington, DC office. In this role, he serves on a four-person global executive leadership team that oversees and directs FH's worldwide operations. His specific areas of responsibility include oversight for all international programs implemented by FH, grant funding from the United States and other northern governments, private resource development in the United States and abroad, and U.S. strategic partnerships.



Mr. Renny Fagan joined the Colorado Nonprofit Association in Denver in March 2009. The Colorado Nonprofit Association provides capacity building resources and technical assistance to almost 1,400 members and advocates on behalf of the entire nonprofit sector. Previously, Mr. Fagan served as the state director for U.S. Senator Ken Salazar, a Colorado Deputy Attorney General, Director of the Colorado Department of Revenue, and began his public service as a state legislator. He earned degrees from Northwestern University School of Law and the University of Chicago.



Mr. Matthew Hamill oversees the National Association of College and University Business Officers' (NACUBO) policy, research, government, and public relations activities from their Washington, DC office. Before joining NACUBO, he held positions at a variety of nonprofit organizations, including The Institute for Higher Education Policy, Independent Sector, and the National Association of Independent Colleges and Universities. Mr. Hamill served as district representative for Rep. Matthew F. McHugh (NY) and as legislative director for Rep. Robert T. Matsui (CA).

Mr. Kyle H. Hybl currently serves as trustee, senior vice president, and general counsel for El Pomar Foundation in Colorado Springs. He is also past chairman of the Board of Regents of the University of Colorado System. Mr. Hybl serves as chairman of the Police Foundation of Colorado Springs and is on the board of directors for the Air Force Academy Foundation, Goodwill Industries Foundation, and Colorado Springs World Arena. He also serves on the Board of Regents of The Fund for American Studies and the Alliance for Charitable Reform steering group. Mr. Hybl is a former Air Force Captain and Judge Advocate. He is a graduate of the University of Colorado, Boulder, where he received both his Bachelor of Arts and Juris Doctor degrees.



Ms. Margaret Linnane is the executive director of the Rollins College Philanthropy & Nonprofit Leadership Center located in Winter Park, Florida. She has full administrative responsibility for the college's multi-purpose resource center dedicated to providing a broad range of education programs, seminars, and services for volunteer and staff leadership of nonprofit organizations. Prior to joining the Philanthropy Center in 2004, Ms. Linnane served as executive director of the Second Harvest Food Bank of Central Florida in Orlando for 18 years.



Dr. William C. McGinly has 35 years of nonprofit management experience and is president and CEO of the Association for Healthcare Philanthropy (AHP), representing 5,000 executives raising funds for nonprofit health care providers. Dr. McGinly, who has been named for the past 13 consecutive years in the *NonProfit Times* Power & Influence Top 50, is a former board member for the Center on Philanthropy at Indiana University Indianapolis, a past chairman of the Greater Washington Society of Association Executives (GWSAE), an active member of the American Society of Association Executives (ASAE), an I/D/E/A/ Fellow, a Certified Association Executive (CAE), and received his doctorate in administration from American University.

Mr. Chuck McLean is responsible for conducting research for GuideStar, Williamsburg, Virginia, and customers interested in nonprofit sector data. He also works to identify new data sources and ways to present data effectively to GuideStar users. He has 15 years of experience as a teacher and researcher in various institutions of higher education. A graduate of Christopher Newport University, Mr. McLean also received an M.S. degree in mathematics from the College of William and Mary.



Mr. Justin Pollock is principal and founder of OrgForward, a nonprofit consultancy working with nonprofit agencies and capacity builders to develop strategies that encourage organizational sustainability. His practice focuses on strengthening the confluence of organizational leadership, programming, finance, and infrastructure. Prior to launching OrgForward, Justin served as COO for Maryland Nonprofits where he was responsible for the overall programming, finance, human resources, and membership activities. He brings a diverse set of experiences to his presentations as an educator and organizational consultant. He has more than 20 years of experience in the education and nonprofit fields with an extensive background in the areas of leadership development, organizational management, group process facilitation, curriculum development, teambuilding, and adult education. Justin holds a dual B.A. in Organizational Theory and Environmental Studies from Pitzer College and an M.Ed. in curriculum and teacher education from Stanford University.



Ms. Pat Read works with nonprofits and foundations in developing and implementing policy advocacy strategies, fundraising and earned income programs, and board governance. Ms. Read has over 25 years of experience in the nonprofit and philanthropic community, having served as senior vice president for public policy at Independent Sector, project director of the Panel on the Nonprofit Sector, executive director of the Colorado Nonprofit Association, and vice president for program services at The Foundation Center.

Dr. Patrick M. Rooney is associate dean academic affairs and research at Indiana University Lilly Family School of Philanthropy in Indianapolis, and a nationally recognized expert and speaker on philanthropy. He is frequently quoted by national news media and has served on several national advisory committees. As the Center's director of research, he built it into one of the nation's premier research organizations, leading research projects for organizations such as Giving USA Foundation, Bank of America, American Express, Google, and United Way Worldwide.



Mr. William A. Schambra is the director of the Hudson Institute's Bradley Center for Philanthropy and Civic Renewal in Washington, DC. Prior to joining the Hudson Institute in January of 2003, he was director of programs at the Bradley Foundation in Milwaukee. Before joining Bradley in 1992, Mr. Schambra served as a senior advisor to and chief speechwriter for Attorney General Edwin Meese III, Director of the Office of Personnel Management Constance Horner, and Secretary of Health and Human Services Louis Sullivan. He was also director of Social Policy Programs for the American Enterprise Institute, and co-director of AEI's "A Decade of Study of the Constitution." He was appointed by President Reagan to the National Historical Publications and Records Commission, and by President George W. Bush to the board of directors of the Corporation for National and Community Service. Mr. Schambra has written extensively on the Constitution, the theory and practice of civic revitalization, and civil society.



Ms. Sandra Swirski is an attorney with more than two decades of experience in public policy. Ms. Swirski has advised two senior U.S. senators, was an executive at a Fortune 10 company, has advised multinational clients at a premier professional services company, and has founded two public policy/government affairs firms in Washington, DC, including Urban Swirski & Associates. Currently her practice focuses on advising Fortune 500 executives and leaders of nonprofit organizations on public policy and government affairs issues.

Ms. Christy L. Tharp is the chief financial officer for Feed The Children (FTC), Oklahoma City, one of the ten largest international charities in the United States. She is responsible for financial reporting and management, and serves as a key management leader providing professional and ethical guidance to maintain integrity and uphold the expectations of regulatory agencies and donors. Ms. Tharp also has eight years' experience with the international public accounting firm of Deloitte & Touche, LLP, where she was an audit manager, serving many different industries including a large client base of nonprofit organizations.



Mr. David L. Thompson is the vice president of public policy at the National Council of Nonprofits in Washington, DC, the nation's largest nonprofit network representing over 25,000 charitable nonprofit organizations through their state associations. He previously served as director of government affairs at Independent Sector and as senior counsel and policy director to the Senate Health, Education, Labor and Pensions Committee. Mr. Thompson began his career in private law practice, specializing in labor and employment law. He holds a bachelor's degree from Emory University and a law degree from the University of Georgia.

Ms. Anne Wallestad is the president and CEO of DC-based BoardSource, the only national organization focused exclusively on strengthening nonprofit governance and inspiring board service. Prior to joining BoardSource's leadership team in 2008, Ms. Wallestad served in leadership roles with a number of local and national nonprofits, including the Human Rights Campaign, the Boys & Girls Clubs of Central Iowa, and the Gay & Lesbian Victory Fund and Leadership Institute. She is also an experienced trainer, and has worked with boards and volunteer networks to strengthen volunteer management, fundraising, and events planning skills. Ms. Wallestad holds a B.A. in English and Sociology from Drake University in Des Moines, Iowa, and currently serves as a member of the university's regional advisory board for the Washington, DC metro area.



Mr. Robert Zachritz is the senior director at World Vision U.S. for Advocacy and Government Relations. Prior to joining World Vision in 2003, Mr. Zachritz worked for almost 15 years within the U.S. Congress for both Republican and Democratic members of Congress. He received a bachelor of arts in international relations from Michigan State University and a master of arts in international trade/business from George Mason University. He has studied overseas at Cambridge University in England and in Moscow, Russia. Mr. Zachritz has traveled to nearly 40 countries—mostly on humanitarian business in Africa, Asia, Latin America, and the Middle East.

Panel of Legal Experts



Mr. Timothy Belz is a lawyer in private practice in St. Louis. During the last 20 years, he has handled dozens of cases concentrating on the constitutional rights of individuals and organizations, especially First Amendment rights of free speech and religious freedom. Mr. Belz is a 1972 graduate of Covenant College and a 1976 graduate, with high honors, of the University of Iowa Law School, where he graduated Order of the Coif.

Mr. Thomas C. Berg, James L. Oberstar Professor of Law and Public Policy at the University of St. Thomas in Minneapolis, is an expert on religious liberty and church-state interactions. He has written four books and nearly 100 articles on law-religion issues; has written more than 30 briefs in religion cases in the U.S. Supreme Court and lower courts; and has testified several times before Congress and state legislatures. Before entering academia, he represented nonprofit organizations, among other clients, at the Mayer Brown law firm in Chicago.



Mr. John Butler specializes in serving exempt organizations. Areas of focus include tax exemption, unrelated business income, benefit plans, compensation, minister and missionary taxation, and charitable solicitations. He has been with CapinCrouse, LLP, Greenwood, Indiana, since 1994. Prior to association with CapinCrouse, Mr. Butler had a private law practice and served with Campus Crusade for Christ as in-house legal counsel (the last three years as legal department director). Mr. Butler received both B.A. and J.D. degrees from the University of Georgia.

Mr. Todd Chasteen specializes in nonprofit law as corporate counsel with Samaritan's Purse, a Christian international crisis relief agency based in Boone, North Carolina. He was a member of the Advisory Committee on Self-Regulation of the Charitable Sector and the Government Oversight and Self-Regulation Work Group for the Panel on the Nonprofit Sector, which provided recommendations on nonprofit best practices to the United States Senate Finance Committee. He also served on the ECFA Legislative Committee and the TRUST Coalition reviewing nonprofit issues.



Mrs. Erika E. Cole is the managing attorney for The Law Offices of Erika E. Cole, LLC, a law firm located in Owings Mills, Maryland, which serves church and ministry clients. Mrs. Cole represents many churches of over 10,000 members, as well as smaller congregations. She is also the founder of The Church Compliance Conference, an annual event designed to inform and inspire pastors and leaders about legal compliance matters. She has served as an adjunct professor at Loyola College (MBA Program) and the University of Baltimore School of Law, and is a sought-after speaker in church law matters. Mrs. Cole is a member of the ECFA board.

Dr. James A. Davids is a graduate of Calvin College and Duke University School of Law. Upon graduation from Duke, Mr. Davids practiced law in Chicago for 25 years before going to Washington, DC to serve in the U.S. Department of Justice. From 2001 to 2003, Mr. Davids served as the deputy director of the Department of Justice's Task Force for the Faith-Based & Community Initiative. Since 2003, he has taught constitutional law at Regent University's School of Government in Virginia Beach, Virginia.





Ms. Deirdre Dessingue recently retired after 32 years in the office of general counsel at the United States Conference of Catholic Bishops. For her entire legal career, Ms. Dessingue specialized in the law of tax-exempt organizations, with particular interest in the prohibition on political campaign intervention. Ms. Dessingue received both her undergraduate and law degrees from the Catholic University of America in Washington, DC. She was with the Exempt Organizations Division of the IRS National Office for five years. From 2001 to 2005, she served as a member of the IRS Advisory Committee on Tax Exempt and Government Entities (ACT). For ten years, she served as co-chair of the Religious Organizations subcommittee of the American Bar Association (ABA) Tax Section's Exempt Organizations Committee. Ms. Dessingue is admitted to the bar in the District of Columbia and in New Jersey. She currently offers consulting services for tax-exempt religious organizations.

Mr. Derek Gaubatz is a recognized expert in religious liberty law and currently serves in Richmond, Virginia, as general counsel of the International Mission Board (IMB) of the Southern Baptist Convention. Prior to joining the IMB, Mr. Gaubatz served for several years as the Director of Litigation of The Becket Fund for Religious Liberty. He is a graduate of Stanford Law School.



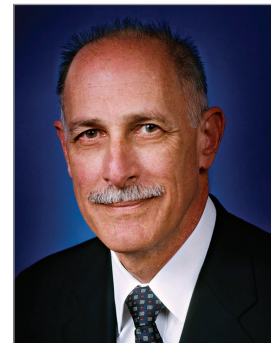
Dr. David Gibbs, Jr., is the founder and president of the Christian Law Association, a nationwide ministry that provides legal assistance to churches, pastors, and Christians free of charge. Dr. Gibbs is the author of seven books and has served with the Christian Law Association for over 40 years. During his years of service, he has appealed and argued before 15 different state supreme courts.

Mr. Laurence A. Hansen is a partner in the Chicago office of Locke Lord LLP, where he focuses on employee benefits, executive compensation, and tax-exempt organizations. Among his clients are various religious organizations, including retirement and benefit plans covering thousands of participants throughout the United States.



Mr. Emanuel ("Emil") J. Kallina, II, is the managing member of Kallina & Associates, LLC, which focuses its practice on estate and charitable planning for high net-worth individuals and represents charitable organizations in complex gifts. Mr. Kallina works extensively with charitable lead and remainder trusts, supporting organizations, and private foundations. He has also practiced business law, corporate tax law, partnerships, and real estate. Mr. Kallina founded the website CharitablePlanning.com, which provides professionals the tools needed to complete planned and major gifts.

Mr. Dennis Kasper, a partner in the Los Angeles office of the law firm Lewis Brisbois Bisgaard & Smith LLP, has 30 years of experience representing charitable organizations and businesses. His charitable clients include churches, schools, denominational bodies, mission organizations, and multinational religious charities, in addition to public benefit organizations.



Mr. Steven T. McFarland has 30 years of experience in law practice and public service, in which he has directed the Center For Law and Religious Freedom of the Christian Legal Society, spearheaded the Faith-Based and Community Initiative in the U.S. Department of Justice, directed a federal commission for international religious freedom, served prisoners abroad at Prison Fellowship International, and now serves as chief legal officer of World Vision in Washington, DC, a Christian relief and development ministry serving vulnerable children worldwide.



Mr. G. Daniel (“Danny”) Miller is a partner in the Washington, DC office of Conner & Winters LLP. He graduated from Vanderbilt University in 1971 and received his law degree from the Vanderbilt University School of Law in 1974. Mr. Miller specializes in employee benefits and advises church benefit programs and religious nonprofits nationally. Mr. Miller is a Fellow of the American College of Employee Benefits Counsel and is a former member of the Advisory Committee to the Commissioner of the Tax-Exempt and Government Employers Division of the Internal Revenue Service.

Mr. Charles O. Morgan, Jr., is a tax lawyer, specializing in trusts, estates and charitable organizations. He is a graduate of Wheaton College, and holds a law degree from the University of Miami and Masters of Laws in Taxation (*cum laude*) from New York University. He is chairman of the audit committee of Billy Graham Evangelistic Association, executive director of the Don Shula Foundation, board member of Chatlos Foundation and the Orange Bowl Committee, and former board member of the Christian Legal Society. Mr. Morgan is author of *Jesus Online*.



Mr. Michael P. Mosher, an Illinois attorney and founder of Mosher & Associates, has concentrated his legal practice on serving the needs of charitable, religious, and educational organizations since 1976. Today, Mr. Mosher represents several hundred religious institutions throughout the country, assisting with a wide range of tax and corporate law issues and promoting principles of good governance. He teaches the law of tax-exempt organizations at three universities in Chicago and is a frequent speaker at nonprofit and legal seminars.



Ms. Lisa A. Runquist, attorney at law in Los Angeles, has represented nonprofits for 35 years. She is the winner of both the Outstanding Lawyer Award and the Vanguard (Lifetime Achievement) Award from the American Bar Association (ABA) Business Law Section, NP Committee. She is the author/editor of *Guide to Representing Religious Organizations* (2009), *The ABC's of Nonprofits* (2005), and *Nonprofit Resources* (2007), as well as serving as ABA liaison to the ALI/ABA Principles of the Law of Nonprofit Organizations, ABA Advisor to ULC Uniform Unincorporated Nonprofit Association Act, and ABA Advisor to ULC Model Protection of Charitable Assets Act.

Mr. Kevin Snider is chief counsel for Pacific Justice Institute in Sacramento, California. He has litigated numerous high profile First Amendment cases. Mr. Snider has taught church law to seminary students and is a frequent presenter on church law and religious liberties. He counsels pastors relating to church issues, and advises leaders of faith-based nonprofits on corporate matters. Mr. Snider is admitted to practice in the California and District of Columbia Bars.



Mr. Frank Sommerville, JD, CPA, is a shareholder in the law firm of Weycer, Kaplan, Pulaski & Zuber, P.C. He is also Board Certified in Tax Law by the Texas Board of Legal Specialization. Mr. Sommerville has served religious institutions of all sizes and all major faith communities (Christian, Jewish, Muslim, and Hindu). He is a regular contributor to many publications, including *Christianity Today*, *Your Church*, and *PPC's Nonprofit Tax & Governance Guide: Helping Organizations Comply* (2011). Trained as a commercial litigator, he has successfully litigated many court cases involving religious organizations. He frequently trains nonprofit and religious organizations regarding legal risks and compliance issues.



Mr. Erik Stanley serves as senior legal counsel with the Alliance Defending Freedom (ADF). He has focused his practice on appellate law, free speech, traditional family values, pro-life, and religious liberty constitutional law. Mr. Stanley has filed, briefed, and argued numerous trial and appellate cases on constitutional issues throughout the United States. He graduated from Temple University School of Law in the top five percent of his class and is a member of the Florida, Kansas, and the District of Columbia bars, as well as the U.S. Supreme Court and numerous federal district and appellate court bars.

Mr. Mathew D. Staver is the founder and chairman of Liberty Counsel, an international nonprofit litigation, education, and policy organization. He also chairs Liberty Counsel Action, Liberty Action, PAC, and Freedom Federation. He serves as dean and professor of law at Liberty University School of Law. He is a trustee for The Timothy Plan, a publicly-traded family of mutual funds. He serves on a number of nonprofit boards. Mr. Staver has written ten books, several hundred scholarly publications, and more than 210 published legal court opinions. He is board certified in appellate practice by the Florida Bar and has the highest AV rating given to attorneys by Martindale-Hubbe. He is an accomplished constitutional litigator and has argued twice before the U.S. Supreme Court.





Mr. James R. Walker is a partner at Rothgerber Johnson & Lyons LLP in Denver. His broad practice includes advising charities, religious organizations, and donors on tax-related matters. Mr. Walker assisted the Panel on the Nonprofit Sector in its response to the U.S. Senate Finance Committee in 2004 to 2006. In 2008, he secured a high profile private letter ruling from the IRS's National Office for a Colorado Type III supporting organization. He also helps religious leaders navigate through campaign restrictions.

Mr. Charles M. (“Chip”) Watkins is an attorney with Webster, Chamberlain & Bean, LLP, Washington, DC. Mr. Watkins served as an attorney in the office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations) of the Internal Revenue Service from 1981 through 1985. Mr. Watkins counsels and represents religious and other tax-exempt organizations on tax, employee benefits, corporate governance, fundraising, contracts, and other legal and regulatory matters. Mr. Watkins is a member of the District of Columbia Bar, and a ruling elder of McLean Presbyterian Church in McLean, Virginia.



Mr. Thomas Winters is the founding partner of Winters & King, Inc., a Tulsa, Oklahoma law firm. He teaches as an adjunct professor on nonprofit law, and is a frequent presenter at nonprofit conferences. He has worked with many nonprofit clients facing inquiries by governmental entities including the IRS and Senate Finance Committee.

Legal Counsel to the Commission



Bryan Cave LLP



Mr. Stuart Lark is a partner with Bryan Cave LLP. For more than 15 years, his practice has focused on advising nonprofit clients on corporate, tax, transactional, and other matters related to their unique missions. Mr. Lark helps clients navigate complex matters involving corporate structure (including formation and governance), operations (joint ventures, trademarks, commercial activities, international transactions), finance, mergers and acquisitions, and taxes (IRS rulings, unrelated trade or business income tax, private foundation rules, property and sales tax).

In addition, Mr. Lark counsels many clients with respect to religious accommodations in the law, including tax exemptions, faith-based employment rights, government benefits, immigration, church property disputes, and other matters. He previously served as legal counsel for the Christian Legal Society's Center for Law and Religious Freedom in Washington, DC. He has also written many papers and amicus briefs on critical religious liberty issues, including two briefs recently filed on behalf of 32 national religious organizations in U.S. Supreme Court cases impacting religious hiring rights.

Mr. John Wylie is a partner in the Bryan Cave LLP Colorado Springs office. For nearly 30 years, Mr. Wylie has focused on advising nonprofit organizations, including religious, charitable, sports, health care, and educational institutions, as well as private foundations. He led the firm's nonprofits team for 10 years, and currently co-leads with Mr. Lark the firm's practice with religious organizations. Mr. Wylie not only brings technical experience to his practice, but he also has a deep understanding of nonprofit organizations and a unique sensitivity to their priorities and legal needs. Mr. Wylie served on the national board of directors of Christian Legal Society for 10 years, including two years as president and chairman of the board.



Mr. Wylie's experience includes such activities as obtaining private letter rulings from the IRS, structuring mergers, joint ventures and "strategic alliances" between nonprofit organizations, as well as between nonprofits and for-profits, providing counsel regarding the international activities of such organizations and negotiating and closing mergers and major asset transactions.

Holland & Knight



Dr. Nathan A. Adams, IV, is a partner with Holland & Knight practicing in appellate and complex commercial litigation and assisting or serving as general counsel for a number of institutions with special emphasis on educational, healthcare, hospitality, nonprofit, and religious institutions. Dr. Adams has briefed and argued dozens of appeals in courts nationwide and extensively litigated and advised regarding diverse subject matter, such as Federal and state constitutional provisions; church autonomy doctrine, contractual requirements; intellectual property, unrelated business income, statutory and common law discrimination laws; false claims and deceptive trade practices; public records, ethics and elections laws; restrictive covenants; and fraudulent conveyance claims. Dr. Adams received his M.A. and Ph.D. from the University of Florida and J.D. from the University of Texas School of Law and is a Board Certified Specialist in Education Law.

Prior to joining Holland & Knight, Dr. Adams served as counsel for the Executive Office of the Governor, Department of Education, Division of Community Colleges, State Board of Education, Board of Governors, and Center for Law and Religious Freedom. He serves on the Board of the Florida Education Foundation, Florida Tax Watch Center for Smart Justice; as president-elect, Echo Ministries, as chairman of the Education Law Committee of The Florida Bar; and head of the Holland & Knight Religious Institutions Team.

Mr. Stuart Mendelsohn practices in the areas of real estate, land use, litigation, government affairs, and corporate law. His clients include a broad range of corporations, nonprofit organizations, builders, and developers. He serves as outside general counsel to a large religious nonprofit. Mr. Mendelsohn serves as executive partner for Holland & Knight's Northern Virginia office.



Mr. Mendelsohn served eight years on the Fairfax County, Virginia, Board of Supervisors and two years as vice chairman of the Fairfax County School Board. He has also served on a number of regional transportation commissions, land use committees, and councils.

Prior to entering private practice, Mr. Mendelsohn was a senior manager of a defense contractor.

In the community, he has committed an extensive amount of time to community service in Fairfax County, the Commonwealth of Virginia, and nationally.

In Appreciation



The Commission expresses its deep appreciation to ECFA for sponsoring, facilitating, and providing logistical support for the Commission's proceedings and for doing so with excellence. More specifically, the Commission expresses appreciation to:

- ECFA's board of directors for its support and guidance, and
- ECFA's leadership team and staff for their tireless effort:
 - Dan Busby, President
 - John Van Drunen, Vice President and General Counsel
 - Michael Martin, Director of Member Services and Associate Legal Counsel
 - Scott Anderson, Web Developer
 - Stephanie Guido, Assistant to the Commission
 - Travis Huntsman, Graphic Designer
 - Joy May, Layout
 - Marsha Miller, Executive Assistant
 - Kim Sandretzky, Director of Communications
 - Michelle Szabo, Assistant to the Commission

The Commission also expresses sincere gratitude to the organizations and individuals who provided the funding to make the work of the Commission possible.

About ECFA



Founded in 1979, ECFA is an independent national accreditation organization for Christian organizations. ECFA establishes standards for governance, financial management, and fundraising. When organizations apply for accreditation, they commit to comply with all of ECFA's standards all of the time.

More than 1,750 churches, denominational organizations, colleges and universities, seminaries, K-12 schools, media ministries, rescue missions, adoption and orphan ministries, domestic and international mission groups, relief and development organizations, youth ministries, and other organizations are accredited by ECFA.

More information about ECFA is available at ECFA.org.

The views expressed in the accompanying report by the Commission on Accountability and Policy for Religious Organizations were developed by the Commission and its Panels, independently of the operations of ECFA.



COMMISSION ON ACCOUNTABILITY AND
POLICY FOR RELIGIOUS ORGANIZATIONS

For additional copies of the report, please visit

ReligiousPolicyCommission.org