



# MEMORANDUM

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## Political Speech & Non Profit Tax Issues

The First Amendment to the United States Constitution protects a church's right to speak out on the moral issues affecting society. In addition, while the Internal Revenue Code prohibits churches from assessing the qualifications of specific candidates for public office, it does not infringe upon a church's inherent right to speak out on the morality of specific political issues.

The Supreme Court has unequivocally found that religious speech is at the apex of protected speech under the First Amendment. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). The Supreme Court stated that "in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Id.* at 760. Although the Court also held that "private religious expression receives preferential treatment under the Free Exercise Clause," and while *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U. S. 819, 828 (1995) stands for the proposition "discrimination against speech because of its message is presumed to be unconstitutional."

In addition, the Trump Administration has issued a salient Executive Order that ensures respect for religious and political speech. Executive Order 13798, published on May 4, 2017, states in pertinent part that "All executive departments and agencies (agencies) shall, to the greatest extent practicable and to the extent permitted by law, respect and protect the freedom of persons and organization to engage in religious and political speech." *See* Exec. Order No. 13798, 82 FR 21675, 2017 WL 1832983(Pres.). The order directs the Department of Treasury to ensure, to the extent permitted by law, that it does not take any adverse action against any individual, house of worship, or other religious organization because such individual or entity speaks or has spoken about moral or political issues from a religious perspective. *Id.* While a Presidential Executive order lacks the precedential value of a Supreme Court opinion, this order has not been withdrawn, revised, or invalidated so far.

The Supreme Court also noted in upholding tax exemptions for churches:

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

*Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 670 (1970).

As a first principle, the government may not censor a church's speech on moral issues of the day without running afoul of the First Amendment. However, the Internal Revenue Code has circumscribed the rights of 501(c)(3) organizations to engage in political speech.

In exchange for the receipt of tax-exempt status, 26 U.S.C. § 501(c)(3) absolutely prohibits churches and other tax-exempt organizations from campaigning for or against a candidate for public office. If a church participates or interferes, directly or indirectly, in any political campaign for or against any candidate for public office, including by publishing and distributing certain written material or making oral statements regarding the candidate, then a church can lose its tax-exempt status for violating the campaigning ban. 26 C.F.R. § 1.501(c)(3)-1(c)(3)(iii) (2014). Quite simply courts have interpreted § 501(c)(3) to ban any degree of participation or intervention in a campaign for public office. *Ass'n of the Bar of N.Y. v. Comm'r*, 858 F.2d 876, 881 (2d Cir. 1988).

While the ACLJ believes that this campaigning ban impermissibly infringes on the First Amendment rights of churches, it is nevertheless the current law. Consequently, churches desiring to keep their tax-exempt status must stringently adhere to it.

While some provisions within the Internal Revenue Code prohibit a church from engaging in certain political conduct, it also provides "an alternate means by which [a church could] communicate its sentiments about candidates for political office." *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000). In *Rossotti*, the court explained that a church that wishes to be more politically active can form a political action committee ("PAC") within a church-created 501(c)(4) organization. *Id.* However, a church that wishes to do this must proceed carefully. The related 501(c)(4) organization must be separately incorporated from the church and it "is also subject to the ban on intervening in political campaigns." *Id.* However, to legally circumvent this ban, the church-created 501(c)(4) organization may form a PAC which "would be free to participate in political campaigns." *Id.*; see also 26 C.F.R. § 1.527-6(f), (g) (2014). It is the PAC formed within the 501(c)(4) organization that may engage in political activities, not the 501(c)(4) organization. *Branch Ministries*, 211 F.3d at 143. As long as churches follow this procedure, churches can indirectly support or oppose political campaigns or legislation.

Public charities and houses of worship may permit the use of auditoriums, meeting rooms and gymnasium facilities for civic or political events, such as polling places on Election Day, without violating the political intervention ban. The facilities of public charities and houses of worship may also be rented to third parties, including candidates or political parties, as long as they are not provided free or at a reduced charge, they are made available on the same and equal

basis to all candidates and political committees, and such events are not promoted or advertised by the charity or house of worship. *See* I.R.S. Publ'n 1828, at 13 (2008), *available at* <http://www.irs.gov/pub/irs-pdf/p1828.pdf>; Rev. Rul. 2007-41, 2007-1 C.B. 1421.

In addition, churches may distribute voter guides without running afoul of the campaign ban. 26 U.S.C. § 501(c)(3) organizations and churches may make available, or distribute, a voter guide which includes all viable candidates for an elective office, provided they follow certain guidelines. Rev. Rul. 78-248, 1978-1 C.B. 154; Rev. Rul. 80-282, 1980-2 C.B. 178.

Specifically, the material must be neutral and unbiased in its statement of candidates and must include candidates' positions on a broad range of issues. A voter guide cannot endorse candidates or direct individuals to vote for or against a candidate. Also, the voter guide must not contain editorial comments about any political party aimed at inducing voters in a particular way. This includes grading the candidate on his or her positions on the issues of the day. If church-distributed voting guides adhere to these restrictions, a church will not run afoul of the candidate campaigning ban. Of note, churches and other § 501(c)(3) tax-exempt organizations may also engage in voter registration efforts, provided such efforts are neutral.

The IRS has also conditioned a church's tax-exempt status on the requirement that "no substantial part of the activities" of the organization may constitute "carrying on propaganda, or otherwise attempting, to influence legislation." 26 U.S.C. § 501(c)(3). If a substantial part of the activities of an exempt organization, such as a church, consists of lobbying, the organization will not be tax-exempt under § 501(c)(3). However, certain tax-exempt organizations may elect to engage in limited lobbying activities under the objective expenditure allowances calculated under 26 U.S.C. § 501(h). It is important to note that churches are ineligible to make this election. 26 U.S.C. § 501(h)(3), (4).

Organizations which cannot make the expenditure elections under § 501(h) are governed by the "substantial part of activities" test. In regard to determining what constitutes a "substantial part of the activities" of a tax-exempt organization, the issue of substantiality is essentially a question of fact and circumstance. *See Ky. Bar Found., Inc. v. Comm'r*, 78 T.C. 921 (1982).

Based on relevant case law, it appears that, as long as an organization expends only five percent (5%) or so of its overall expenditures on legislative activity, such activity will be regarded as "insubstantial" and not result in a loss of exemption. *Seasongood v. Comm'r*, 227 F.2d 907, 912 (6th Cir. 1955) (establishing a five percent (5%) safe harbor rule); *World Family Corp. v. Comm'r*, 81 T.C. 958 (1983) (finding that an exempt organization's lobbying activities which were less than ten percent (10%)—but more than five percent (5%)—of its total efforts being "insubstantial").

It should be noted, however, that in *Christian Echoes Nat'l Ministry, Inc. v. U.S.*, 470 F.2d 849 (10th Cir. 1972), the Tenth Circuit Court of Appeals rejected the "substantiality" test when a radio ministry directly intervened in a political campaign and engaged in lobbying activities. Instead, the *Christian Echoes* court explained "substantiality" of the political activity should be assessed based on "whether a *substantial* part of [an organization's] activities [not just expenditures] was to influence or attempt to influence legislation." *Id.* at 855.

In light of the vagueness of the substantiality test, Congress enacted 26 U.S.C. § 501(h), the Expenditure Election, to define what amount of expenditures on lobbying is “substantial.” Exempt organizations, other than churches and private foundations, may elect to be subject to definite limitations on the amount of permissible lobbying activities and expenditures. 26 U.S.C. § 501(h); 26 U.S.C. § 4911(defining the tax incurred by 501(h) organizations on excess expenditures to influence legislation). In no event, however, regardless of the size of the charity, may the permitted total level of expenditures for lobbying exceed \$1,000,000 for any one year. 26 U.S.C. § 4911(c).

In sum, churches have clear First Amendment rights to speak out on the moral issues of the day, and to develop, prepare, and distribute information on issues of public policy. These rights include the distribution of voter guides which are neutral and unbiased in the presentation of a candidate’s position on a broad range of issues. Also, voter guides cannot endorse candidates, or urge individuals to vote for or against candidates. Churches also have the right to engage in a limited amount of lobbying activity, as long as such activity does not constitute a “substantial” part of a church’s total activities. Moreover, non-church exempt organizations may engage in lobbying activity so long as they do not exceed the expenditure limitations specified in § 501(h).

#### **DISCLAIMER**

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