ALLIANCE DEFENSE FUND
*Defending Our First Liberty*

# THE PULPIT INITIATIVE
# WHITE PAPER

In 1954, the U.S. Congress amended (without debate or analysis) Internal Revenue Code §501(c)(3) to restrict the speech of non-profit tax exempt entities, including churches. Section 501(c)(3) of the Internal Revenue Code regulates organizations that are exempt from federal income tax. Before the amendment was passed, there were no restrictions on what churches could or couldn't do with regard to speech about government and voting, excepting only a 1934 law preventing non-profits from using a substantial part of their resources to lobby for legislation.

The 1954 amendment, offered by then-Senator Lyndon Johnson, stated that non-profit tax-exempt entities could not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of[1] any candidate for public office." No official reason was given for the amendment, but scholars believe that Johnson offered the amendment to restrict the speech of two private foundations that supported Johnson's political opponent. Since the amendment passed, the IRS has steadfastly maintained that *any* speech by churches about candidates for office, including sermons from the pulpit, can result in loss of tax exemption.

The amendment dramatically impacted churches' exercise of First Amendment rights. Historically, churches have frequently and fervently spoken for and against candidates for office. Such sermons date from the founding of America, including sermons against Thomas Jefferson for being a deist; sermons opposing William Howard Taft as a Unitarian; and sermons opposing Al Smith in the 1928 presidential election. Churches have also been at the forefront of most of the significant societal and governmental changes in our history including ending segregation and child labor and advancing civil rights.

After the amendment, churches faced a choice of speaking out about candidates and risking their tax exemption, or remaining silent and protecting their tax exemption. Unfortunately, many churches have allowed the 1954 Johnson amendment to effectively silence their speech, even from the pulpit.

Ironically, fifty years after the amendment passed, and despite the strict IRS

[1] The words "or in opposition to" were added by Congress in 1987.

interpretation of it, the IRS has never punished a pastor for the content of his pulpit sermon.[2] *To date, there is no reported situation where a church has lost its tax exempt status or been directly punished for sermons delivered from the pulpit evaluating candidates for office in light of Scripture*. This may be because the IRS does not want to encounter the constitutional issues raised by punishing speech from the pulpit. Nonetheless, the IRS maintains that endorsing or opposing candidates or their views from the pulpit violates the Internal Revenue Code, and unfortunately, many churches either accept the IRS interpretation of the Code or simply avoid these topics altogether.

ADF believes that the Johnson amendment is unconstitutional in restricting the expression of sermons delivered from the pulpits of churches. This project is designed to return freedom to the pulpit by allowing pastors to speak from Scripture about the qualifications of America's potential political leaders.

## I. Prohibiting a Pastor's Sermon Either for or Against Candidates Violates the First Amendment to the United States Constitution.

The 1954 amendment, when used to restrict speech from the pulpit of a church, violates the First Amendment to the United States Constitution. The restriction excessively entangles the government with religion, violates a church's right to free exercise of religion, and violates a church's right to free speech.

### A. Establishment Clause

The Establishment Clause of the First Amendment states that, "Congress shall make no law respecting an establishment of religion…." One principle of the Establishment Clause is that the government must not become excessively entangled with religious affairs. Because the government and the church are distinct from one another under our constitution, the government may not meddle with internal church matters. If the government does meddle, and excessively entangles itself with the church, courts will strike the government action as unconstitutional.

The 1954 amendment is unconstitutional because its enforcement requires excessive entanglement with the church. First, the 1954 amendment requires that the government analyze and parse religious speech, which the government is not constitutionally competent to do. As one court stated, "[e]ven assuming [a pastor's] speech is in some sense political, it is not the role of this Court to draw fine distinctions between degrees of religious speech and to hold that religious speech is protected but religious speech with so-called political overtones is not."[3] Further, there is no practical way for the IRS to enforce §501(c)(3) other than to monitor a pastor's religious speech from the pulpit and make a determination that it is, from its view, too

[2] The IRS recently investigated the tax exempt status of All Saints Episcopal Church in Pasadena, California, over a sermon delivered by a guest speaker who maintained that Jesus would not vote for President Bush because of the Iraq War. After the church refused to cooperate with the IRS investigation, the IRS closed the examination without penalizing the church, even though the IRS claimed in the closure letter that the sermon constituted direct campaign intervention.

[3] *Rigdon v. Perry*, 962 F. Supp. 150, 164 (D.D.C. 1997).

"political." This ongoing and pervasive monitoring excessively entangles the government with religion.

Second, the prohibition forces the government to monitor not just religious speech about candidates' qualifications, but even religious speech about moral issues as well. The line between these concepts is difficult, if not impossible, to draw. The U.S. Supreme Court has recognized this:

> Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.[4]

Consequently, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."[5] Simply put, parsing pulpit speech is not a proper role for government, because it unconstitutionally entangles it with religion.

### B. Free Speech Clause

The Johnson amendment also violates the Free Speech Clause. The amendment is a "content-based" restriction on speech, which means that it discriminates against certain speech solely based on the content of the expression. In the context of the 1954 amendment, the IRS obviously must examine a pastor's sermon to determine whether or not it violates the amendment. Government agents must review sermons to determine when they become too "political" or, one may say, not religious enough. The Supreme Court has called such content-based discrimination "odious" and "disfavored" because it allows the government to silence speech it does not like.[6] Courts will permit such discrimination only when the government can demonstrate a compelling reason to do so. In this case, there is no compelling reason for the government to engage in such discrimination.

Although no clear reason was given in 1954 for the Johnson amendment, in 1987 Congress tried to fill that gap by saying that restricting the speech of non-profits kept the U.S. Treasury "neutral" in political matters. That statement has never been tested in court, but it's highly unlikely that this "neutrality" interest could be "compelling" when Congress already exempts political advocacy organizations from income taxes. For instance, Congress allows veteran's organizations to engage in unlimited lobbying, and exempts Political Action Committees (PACs) from income tax.

Some have argued that speech about candidates must be suppressed for tax-exempt groups because the exemption functions as a subsidy. That, however, is poor reasoning. There are at least six clear differences between exemptions and subsidies: (1) in a tax exemption no

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[4] *Buckley v. Valeo,* 424 U.S. 1, 42 n.50 (1976) (citation omitted).
[5] *Id.* at 42.
[6] *See, e.g. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 56 n.1 (1986).

money changes hands between the government and the organization; (2) a tax exemption does not provide one cent to an organization which relies solely on contributions; (3) the amount of a subsidy is determined by the government whereas an exemption is "open-ended;" (4) in a tax exemption, there is no periodic battle by the organization to increase or maintain the amount of money it receives as there would be with a subsidy; (5) a tax exemption is driven by the private choice of the taxpayer, while subsidies are driven by government policy considerations; and (6) a tax exemption does not convert a private group into an arm of the government whereas extensive subsidies might. Therefore, granting a tax exemption does not amount to subsidizing the speech of tax-exempt groups.

The Johnson amendment is also unconstitutional under the Free Speech Clause as an "unconstitutional condition" on tax exemption. While a pastor may preach in a sermon about an issue, under the Internal Revenue Code he may not support or oppose a candidate. The U.S. Supreme Court has stated that there is no compelling purpose for the government to extend a statutory privilege (like tax exemption) only on the condition that the recipient gives up a fundamental right (like free speech). In fact, the opposite is true. The "exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is . . . obnoxious . . ."[7] "To deny [a tax] exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."[8] The government may argue that the church is denied nothing because it can support or oppose a candidate and remain tax exempt by forming a separate 501(c)(4) political organization to speak for it. Such a separate organization, however, cannot speak for the church itself, so the church's rights remain violated. When the IRS conditions tax exemption on a church's silence about candidates, it has imposed an unconstitutional condition on the benefit of tax exemption.

### C. Free Exercise Clause

The prohibition also violates the free exercise of religion. Under the Free Exercise Clause, laws are closely scrutinized by courts when they discriminate against religion or when they substantially burden religious exercise and other constitutional rights are also at stake.

First, when the IRS threatens to revoke a church's tax exempt status for a pastor's sermon from the pulpit, it is expressly discriminating against religious speech. Such direct discrimination, and the prospect of civil or criminal penalties, make the amendment unconstitutional.

Additionally, because the Johnson 1954 amendment implicates a church's free exercise rights and its free speech rights, federal courts will require the government to have a compelling reason for restricting constitutional rights. As stated previously, the government has no compelling reason for the restriction. Therefore, it is unconstitutional.

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[7] *Follett v. Town of McCormick, S.C.*, 321 U.S. 573, 577 (1943) (internal citations omitted).
[8] *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

## II. Prohibiting a Pastor's Sermon Either for or Against Political Candidates Violates the Religious Freedom Restoration Act (RFRA).

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), which requires that the government have a compelling reason for passing any law that burdens the exercise of religion. The RFRA binds the federal government and offers a second route to challenge the lack of a compelling interest for the IRS regulations. The 1954 amendment substantially burdens a church's exercise of religion and the government has no compelling reason for imposing such a burden. Therefore, the amendment violates RFRA.

## CONCLUSION

Churches have too long feared the loss of tax exempt status arising from speech in the pulpit addressing candidates for office. Rather than risk confrontation, pastors have self-censored their speech, ignoring blatant immorality in government and foregoing the opportunities to praise moral government leaders. Pastors who long to be relevant to society and to preach the Gospel in a way that has meaning in modern America have to studiously ignore even the most tumultuous election season lest they draw the attention of the IRS.

ADF believes that IRS restriction on religious expression from the pulpitis unconstitutional. After 50 years of threats and intimidation, churches should confront the IRS directly and reclaim the expressive rights guaranteed to them in the United States Constitution.

If you are interested in being considered to participate in this project, please call ADF at (800) TELL-ADF or visit our website at www.telladf.org/church to let us know of your interest. [9]

[9] ADF does not endorse or oppose political parties or candidates, nor does it urge allegiance to any political party or candidate. ADF does believe that churches and pastors have the freedom to plainly speak Scriptural truth about the qualifications of candidates for public office regardless of the candidate's political affiliation.