



Testimony
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Committee on Oversight and Government Reform
Subcommittee on Health Care, Benefits, and Administrative Rules
Subcommittee on Government Operations

“Examining a Church’s Right to Free Speech”

By
Christiana Holcomb, Legal Counsel
Alliance Defending Freedom

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Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to testify on the important issue of a Church's Right to Free Speech.

For the first 200-plus years of our nation's history, America's churches enjoyed their constitutional right to free speech. They guided and shepherded their people on the important issues of their day—religious, cultural, and, yes, political. They applied Scripture to every aspect of life, including candidates and elections. They were, as Dr. Martin Luther King, Jr., once said, “the conscience of the state.” And as a result, churches were at the forefront of some of the most dramatic social and political changes in our nation's history.¹

But since 1954, that right to free speech has been denied to America's churches. With one last-minute amendment, one voice vote, and one stroke of a pen, the Church's voice was silenced. Her pastors, muzzled. And instead, one of the most powerful and unaccountable bureaucracies in the federal government—the Internal Revenue Service (IRS)—was given the authority to censor churches.

Remarkably, the Johnson Amendment was passed without any consideration of the constitutional rights of churches. Perhaps this can be partly explained by the fact that churches simply were not the amendment's intended target. Then-Senator Lyndon Johnson was looking for a way to silence two secular nonprofits who were jeopardizing his chances for reelection. So he sponsored an amendment to a tax bill designed to shut down his political opponents. And, thus, without debate, without legislative analysis, and without congressional hearings, the Johnson Amendment was enacted into federal law.

Even though churches were not the target of the Johnson Amendment, they have been in its cross-hairs ever since. For over sixty years, the Johnson Amendment has hung like Damocles sword over America's churches. Pastors are fearful. They want to faithfully preach the whole counsel of God and apply Scripture to every aspect of life. But they fear that one misstep could incur intrusive IRS audits, crippling financial penalties, and risk their church's tax-exempt status. These pastors want to be law-abiding citizens, but they are confused about the law's parameters and so they self-censor out of fear of violating the law.

Put simply, the status quo is untenable. And it is time for Congress to act.

Alliance Defending Freedom has been involved in the effort to free the pulpit from IRS censorship for nearly a decade now. As our attorneys reviewed the Johnson Amendment, we came to the conclusion that not only does this tax law harm real people—real churches—but it violates the United States Constitution as well.

I want to highlight just two of those constitutional violations.

¹ See, e.g., Deirdre Dessingue, *Prohibition in Search of Rationale: What the Tax Code Prohibits; Why; To What End?*, 42 B.C. L. Rev. 903, 923 (2001) (listing national independence, abolition of slavery, gambling, child labor, prostitution, abortion, civil rights, etc.).

I. The Johnson Amendment is unconstitutionally vague and unevenly enforced in violation of the Due Process Clause, leaving churches and legal experts alike to guess at the law's requirements.

The first problem with the Johnson Amendment and its implementing regulations is that no one knows with any certainty what the law requires. The Congressional Research Service, in a 2008 report to Congress on the Johnson Amendment, stated: "The line between what is prohibited and what is permitted can be difficult to discern."²

The Johnson Amendment states that Section 501(c)(3) tax-exempt entities (including churches) 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.³

The law clearly prohibits direct endorsements, that much is certain. But it is anyone's guess what else the law prohibits. After all, what does it mean to "participate in" or "intervene in" a campaign?

Theoretically, the federal agency charged with interpreting and applying this law should have enacted clarifying regulations. But the IRS has only muddied the waters. Over the past sixty years, the IRS has issued what can charitably be described as increasingly vague and confusing guidance.

For example, IRS regulations prohibit directly or *indirectly* participating in or intervening in a campaign for political office.⁴ No one knows what exactly Congress meant by participating or intervening in a campaign, but it is far less certain what those activities look like when done "indirectly."

Additionally, the IRS uses a "facts and circumstances test" for evaluating whether a church has violated the Johnson Amendment.⁵ In essence, the agency says it will consider all the facts and circumstances of an incident in determining whether it violates the law. Such a method sounds nice in theory, but is a political bludgeon in fact. Federal bureaucrats have the power to apply the law at their own whim, leaving citizens with little clue as to the law's parameters. The IRS refuses to produce clear guidelines that the average person can follow with reasonable certainty, preferring to instead police violations after the fact in an ad hoc manner.

Worse, the IRS has gone so far as to say that a church could violate the Johnson Amendment without even mentioning a candidate by name. It asserts that a nonprofit can "surreptitiously"

² ERIKA LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV. RL 34447, CHURCHES AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FINANCE LAWS 2 (2008).

³ 26 U.S.C. § 501(c)(3).

⁴ See Treas. Reg. 1.501(c)(3)-1(c)(3)(iii).

⁵ See, e.g., Rev. Ruling 78-248. Note that this "facts and circumstances" language is also available in the Tax Guide for Churches and Religious Organizations available on the IRS' website.

intervene in a political campaign by using “code words” such as “pro-life,” “pro-choice,” “conservative,” or “liberal.”⁶

Complicating matters further is the IRS’s vague, sporadic, and inconsistent enforcement of the Johnson Amendment. Some churches openly endorse or oppose candidates for political office, and hear nothing from the IRS. Other churches make a passing reference to how Jesus might have viewed the Iraq war, and trigger a 22-month audit.⁷

Adding to the confusion are a host of legal scholars and tax experts who disagree about the law’s boundaries. If the experts cannot decide what the law requires, how can the average citizen or busy pastor discern what conduct is permitted by the law?

Every election cycle, we at Alliance Defending Freedom receive numerous calls from concerned pastors, who are fearful of violating the law and inviting intrusive IRS audits, incurring financial penalties, and even risking their church’s tax-exempt status. These pastors want to be law-abiding citizens, they want to honor God by obeying their governing authorities, but they are confused about the law’s parameters.

The Johnson Amendment is unconstitutionally vague in violation of the Fourteenth Amendment’s due process guarantee. The Fourteenth Amendment requires that citizens be informed with a reasonable degree of certainty of what the law requires so that they can conform their conduct accordingly. As the Supreme Court has noted, “Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone...than if the boundaries of the forbidden areas were clearly marked.”⁸ But the Johnson Amendment is a black hole. Rather than gaining clarity as the decades roll by, churches have received increasingly vague guidance from the federal agency charged with enforcing the law against them. As a result, churches are in legal limbo, unable to determine what the law proscribes and permits.

II. The Johnson Amendment unconstitutionally authorizes federal bureaucrats to muzzle a church’s speech in violation of the Free Speech Clause.

This legal limbo and vagueness fosters an atmosphere of fear among churches who do not want to find themselves in the IRS’s crosshairs. This results in pervasive chill and massive self-censorship among America’s church leaders. Because when speech restrictions are vague, “[m]any persons...will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.”⁹

⁶ See Judith E. Kindell & John F. Reilly, *Election Year Issues*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 1993, at 400, 411 (1992), available at www.irs.gov/pub/irs-tege/eotopicn93.pdf.

⁷ See ERIKA LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV. RL 34447, CHURCHES AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FINANCE LAWS 9-10 (2008) (discussing All Saints Episcopal Church).

⁸ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal cites and quotation marks omitted).

⁹ *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citation omitted).

Which leads to the second constitutional violation—the Johnson Amendment violates the First Amendment’s free speech guarantee.

Churches have a right to speak freely without government censorship. No one surrenders their constitutional rights simply by passing through the church doors. And no church should be forced to surrender its freedom of speech in exchange for a particular tax status.

Imagine if the government required churches to give up their Fourth Amendment right to be secure against unreasonable searches and seizures in exchange for a particular tax status—it would be absurd. Yet the Johnson Amendment demands the equivalent of churches: give up your right to free speech, or the IRS will revoke your tax-exempt status. Yet religious speech is at the core of First Amendment protection,¹⁰ and it is difficult to think of any speech more at the heart of religious speech than that which comes from the pulpit.

Yet even America’s pulpits are not sacrosanct. The IRS specifically asserts its right to censor pulpit speech. The IRS’s *Tax Guide for Churches and Religious Organizations* includes specific examples of situations that violate the Johnson Amendment, and included within the list is a minister preaching a sermon and endorsing a candidate from the pulpit.¹¹

One notorious example of the IRS applying the Johnson Amendment to a pastor’s sermon from the pulpit is the 2005 IRS audit of All Saints Episcopal Church in Pasadena, California.¹² A pastor preached a sermon at All Saints entitled “If Jesus Debated Sen. Kerry and President Bush” that included critiques of the president’s policies based on that minister’s deeply-held religious conviction on the issues. The IRS launched a months-long investigation into the incident, but took no punitive action.

Adding to confusion are advocacy groups that use the Johnson Amendment as a bludgeon to intimidate pastors and churches into silence on all things political. For example, Americans United for Separation of Church and State (AU) is notorious for sending threatening letters to churches each election cycle, warning them against “politicking” and misrepresenting the law’s boundaries.¹³ This cultivates and exacerbates an atmosphere of fear among churches who then further retreat from fully declaring the whole counsel of God on current cultural issues.

These threats, legal vagueness, inconsistent enforcement, and muzzle on church speech have resulted in a pervasive chill and self-censorship among America’s pastors. Pastors want to be law-

¹⁰ See, e.g., *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (religious speech, “far from being a First Amendment orphan,” enjoys full and robust protection under the Free Speech Clause).

¹¹ See INTERNAL REVENUE SERV., PUB. NO. 1828, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 8 (2009), available at <https://www.irs.gov/pub/irs-pdf/p1828.pdf> (example 4).

¹² See ERIKA LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV. RL 34447, CHURCHES AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FINANCE LAWS 9-10 (2008).

¹³ By way of example, one such threatening letter can be found here: https://au.org/files/pdf_documents/14-9-25_ReligiousLeaderLetter.pdf. Alliance Defending Freedom’s response to this letter is available here: <http://www.adfmedia.org/files/2014ADFAUResponse.pdf>.

abiding citizens, but they cannot determine with any certainty the bounds of the law. And as a result, they steer so far away from any remotely political statements that they chill a substantial amount of protected speech in the process.

III. Conclusion

In conclusion, it is time for Congress to act. The status quo is untenable, and America's churches need a legislative fix.

We cannot leave this to the judicial branch to resolve. No court has ever addressed these constitutional questions related to the IRS's ability to monitor and censor what a pastor preaches from the pulpit. And, as you may know, the IRS holds all the cards in determining when it gets into court, how, and with whom. Federal law prohibits anyone from affirmatively suing the IRS outright to contest the Johnson Amendment's constitutionality.¹⁴

In 2008, Alliance Defending Freedom launched its Pulpit Initiative, designed to encourage pastors to exercise their constitutional freedoms to apply Scripture to every aspect of life—including candidates and elections—and invite the IRS to test the constitutionality of the Johnson Amendment in federal court. Beginning in 2008 with 33 churches, pastors preached sermons about the candidates running for office and made specific recommendations about how the congregation should vote based on their scriptural evaluation. As a courtesy, they then mailed those sermons to the IRS. Each year since, the Pulpit Freedom movement has grown and expanded to thousands of participating churches.

The goal was to trigger an IRS enforcement action so that ADF could then challenge the Johnson Amendment in federal court. In the nine years since this project began, the IRS has not brought any action against a Pulpit Freedom pastor. Only one pastor—of thousands—was briefly harassed and audited, but the IRS later dropped that investigation without penalty. At the conclusion of that ordeal, the pastor commented that he knew no more about what violated the Johnson Amendment than when he started.

So, the untenable status quo continues. The Johnson Amendment has not changed, nor has the IRS guidance. At any given point, the IRS may resume targeting churches. A few years ago, it told one atheist group that it had a list of 99 churches that merited high-priority investigation.¹⁵

Alliance Defending Freedom's primary concern is to protect the rights of churches. The Johnson Amendment has already done incalculable damage to the constitutional rights of America's churches to speak and teach their faith freely. If federal bureaucracies are allowed to continue censoring the speech of pastors and intruding into America's pulpits, it is anyone's guess what they might attempt to control next.

¹⁴ See 26 U.S.C. § 7421 *et seq.* (Tax Anti-Injunction Act); see also 28 U.S.C. § 2201(a) (authorizing declaratory judgments "except with respect to Federal taxes").

¹⁵ See Letter of Mary A. Epps, Acting Director, EO Examinations, to The Honorable Tamara W. Ashford, Acting Assistant Attorney General (June 27, 2014), attached as Exhibit A to Plaintiff's Memorandum in Support of Motion to Dismiss, *Freedom From Religion Foundation, Inc. v. Koskinen*, No. 12-cv-0818 (D. Wis. July 29, 2014), available at <https://ffrf.org/images/A19508.PDF>.

Therefore, it is time for Congress to act. The Free Speech Fairness Act (H.B. 781) is the best solution that we at Alliance Defending Freedom have seen to these constitutional problems. The bill simply creates a relief valve for free speech, while leaving in place the remaining nonprofit boundaries. It allows churches to speak as they would in the ordinary course of their ministries without fear of IRS retribution. And such a fix would allow America's churches to once more be that conscience of the nation, contributing to the public discourse and national debate as the Constitution permits and as their religious beliefs require.