



ADVANCING FAITH, FAMILY AND FREEDOM

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Submitted to the Oversight Subcommittee on Health Care, Benefits, and Administrative Rules

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Hearing on Rights of Churches to Free Speech

FAMILY RESEARCH COUNCIL

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## **Introduction**

Chairman Jordan and Members of the Sub-Committee: Thank you for convening this hearing regarding the importance of protecting the free speech rights of churches and other not-for-profit organizations and their leaders.

Churches and other non-profit organizations have important roles in society – helping the sick, feeding the poor, counseling the down-trodden – ministering to people in need. Because of their special role in society, they are tax exempt. For almost two hundred years, their work and non-profit status did not compromise their ability to speak freely about political candidates and issues. That is until 1954, when then-Senator Lyndon Johnson used his political power to weaken organizations politically opposed to him by conditioning non-profit organizations’ tax-exempt status on their remaining silent on political candidates.

The Johnson Amendment, Section 501(c)(3) bars “[c]orporations... organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes” from “participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.” Since its passage, the Johnson Amendment has been used to muzzle and censor pastors and leaders of non-profit organizations and to chill the political speech of tax-exempt organizations, religious and nonreligious, on both sides of the aisle.

Thus, in order to restore the First Amendment free speech rights of non-profit organizations, including churches, it is necessary for Congress to permit 501(c)(3) organizations to make statements regarding political campaigns (which may urge the election or defeat of a candidate) in the ordinary course of the non-profit’s regular and customary activities, as it carries out its tax exempt purpose, so long as the non-profit does not incur more than minimal costs in making the statement.

## **Background**

The First Amendment to the U.S. Constitution provides in part, “Congress shall make no law... abridging the freedom of speech.” While courts have determined over the years that this right is not absolute, the spirit of the amendment affirms the participation of all persons in political discourse, even pastors and leaders of non-profit organizations. The Johnson Amendment undermines the First Amendment rights of pastors and other non-profits in a variety of ways: IRS guidance is vague and fails to clearly establish what speech violates the law, the law is selectively enforced, and the law is enforced and then that enforcement is rescinded.

The vagueness of the IRS guidance is clear through IRS regulations which state, “[c]ertain activities or expenditures may not be prohibited depending on the facts and circumstances,” underscoring that no one knows precisely what kind of spoken or written comment on a candidate will draw the attention of the IRS. This vagueness chills free speech. For example, a non-profit organization focused on environmental issues, and that regularly publishes a newsletter on conservation projects, may want to briefly highlight a candidate’s efforts in connection with a conservation effort. But if the entity does not know if its statement will cause

the IRS to withdraw its tax-exempt status, it will err on the side of caution and self-censor. This is unfortunate because many tax-exempt organizations have much to contribute to the public policy debate in their areas of expertise. Moreover, to this day, the IRS has remained secretive about “new procedures” it has adopted to monitor churches’ political involvement.

In addition to the vague guidance, the IRS has secret rules for investigating churches, rules that were developed in a legal settlement the IRS made with an atheist group. These secret rules have reportedly been applied in almost one hundred investigations the IRS has initiated in response to a program led by Alliance Defending Freedom and championed by Family Research Council called “Pulpit Freedom Sunday,” which encourages pastors to speak from the pulpit on political matters and political candidates. Despite churches being investigated for their sermons, the IRS has not withdrawn the tax-exempt status of these churches. Whether that is due to the IRS being frightened by the public perception of prosecuting churches, or because the agency knows the Johnson Amendment is unconstitutional when applied in this context, is unclear. Either way, the chilling effect of the Johnson Amendment is unconstitutional and requires a legislative fix from Congress.

The stifling effect of the Johnson Amendment is exacerbated by the fact that some activist organizations rely on the Johnson Amendment in letters to churches warning of impending doom at the hands of the IRS if they make political statements that violate their 501(c)(3) requirements. These activist organizations have also reported churches to the IRS, which have led to investigations by the IRS that can overwhelm the administrative staff of small churches, even though the IRS has not ultimately revoked the church’s tax-exempt status. These types of IRS actions also chill the speech of pastors. In fact, in 2005, All Saints Episcopal Church, in California, received a letter from the IRS because in 2004, a pastor there criticized President George Bush and the Iraq war. After two years of investigation, in 2007, the IRS closed the case without revoking the IRS letter, but indicated it thought the pastors’ statements violated the law. The Johnson Amendment may not have been intended to suppress pulpit speech when it was passed, but it certainly has the unfortunate effect of being used in this way today.

The IRS has also selectively enforced the law, targeting certain non-profit organizations while ignoring others who engage in similar behavior, causing significant confusion regarding how the Johnson Amendment will be applied. The IRS also has a history of enforcing the law in cases, only to later refund the penalty paid by the tax-exempt organization. For example, in 2004, a charity called Catholic Answers posted two e-letters questioning whether then-presidential candidate John Kerry, also a Catholic, should present himself for Holy Communion because of his support for abortion. After investigating, the IRS imposed excise taxes against the church. However, the IRS later refunded the assessment, with interest, finding the church’s political activity was not “willful and flagrant.” The IRS similarly initiated an investigation of the NAACP after its chairman gave one speech that included negative commentary on George W. Bush’s presidential candidacy. The investigation concluded with the IRS issuing a tax against the NAACP. While the IRS subsequently closed the investigation and refunded the excise tax the NAACP paid, the organization was dragged through an unnecessary two-year investigation. The fact that the IRS would spend resources on such investigations, and impose penalties against churches and non-profits, only to refund them later, causes confusion for tax-exempt organizations and is a wasteful use of IRS resources. Churches and non-profits are forced to

spend their limited resources complying with and defending against IRS inquiries into alleged violations of the Johnson Amendment. The IRS's enforcement of the Johnson Amendment is unjust and inequitable. All 501(c)(3) nonprofit organizations, religious and otherwise, should be able to engage in low-cost political communications free from the threat of government prosecution or harassment.

### **Pastors' Historical Involvement in Politics**

Pastors have historically been heavily involved in political matters. Since the birth of our nation, pastors and churches have been at the forefront of shaping public debate and voters' choices regarding their public servants. This began in 1776 with the Black Robe Regiment of pastors who also served as military leaders. One such pastor and service member, Peter Muhlenberg said, "I am a clergyman it is true, but I am a member of the society as well as the poorest layman, and my liberty is as dear to me as any man." His brother, Frederick Augustus Muhlenberg, also a minister of the gospel, was elected as the first Speaker of the US House of Representatives in 1789. In fact, the Bill of Rights, which guarantees our First Amendment freedoms of religion and speech, bears just four signatures: the clerk of the House of Representatives, the Secretary of the Senate, John Adams, Vice President of the United States and President of the Senate, and Frederick Muhlenberg, Speaker of the House of Representatives.

The participation of pastors in political movements was also forged during the desegregation movement when Dr. Martin Luther King, Jr., and others spoke out forcefully from the pulpit on political matters. Dr. King once wrote, "The church must be reminded that it is not the master or the servant of the state, but rather the conscience of the state. It must be the guide and the critic of the state, never its tool." Requiring churches and non-profit organizations to choose between their tax-exempt status and political speech relegates the church to a servant of the state. We must ask ourselves, what would America look like today had the Black Robe Regiment, Dr. King, or the likes of Rev. Lyman Beecher, a leading abolitionist, been muzzled by the IRS? It is imperative that the speech rights of pastors and non-profit leaders be restored.

### **Free Speech Fairness Act**

February 1, 2017, Senator James Lankford (R-Okla.) and Congressmen Steve Scalise (R-La.) and Jody Hice (R-Ga.) introduced the Free Speech Fairness Act (S. 264, H.R. 781) in order to roll back the unconstitutional impact of the Johnson Amendment, while preventing churches from becoming political action committees or lobbying organizations. The Free Speech Fairness Act amends the Johnson Amendment to allow for political activity that is made in the ordinary course of a 501(c)(3) organization's regular and customary activities, so long as the activities carry out the organization's tax exempt purpose, and so long as the organization does not incur more than de minimis incremental costs, or minimal costs, for the activity.

Amending the Johnson Amendment in this way will allow all 501(c)(3) organizations breathing room to communicate about how candidates for public office have addressed issues important to the non-profit organization. At the same time, the law will continue to prevent tax-exempt

organizations from financing a candidate or buying political advertisements to get the candidate elected. These protections are extended to all 501(c)(3) organizations, religious and non-religious, conservative and liberal, and regardless of their organizational mission. These changes are not only a win for churches and other tax-exempt organizations, but also for all people who want an educated electorate. The Free Speech Fairness Act is a win for voters as a whole.

### **Why Should the Free Speech Fairness Act Apply Beyond Churches?**

While churches need protections, other 501(c)(3) organizations also need speech protections, as it is impractical to parse protections for churches and their integrated auxiliaries and conventions, from other non-profits. In fact, many of the radio stations and television broadcasting organizations that air the sermons of pastors are non-profit organizations that would not qualify as a church-affiliated organization, and would not receive protection if the legislation only protect churches. Thus, these organizations would not be permitted to air sermons in their entirety, but would have to censor sermons of pastors if they were to mention political candidates. This would have the effect of continuing to chill the speech of pastors whose sermons are broadcast through other non-profit organizations. In addition, it is inequitable, and perhaps even unconstitutional, to allow churches and their integrated auxiliaries to engage in some political campaign activities without also allowing other religious ministries and secular 501(c)(3) charities to do the same. Thus, the speech of all non-profits should be liberated through the Free Speech Fairness Act.

### **Churches and Non-Profit Leaders Disinterested in Political Speech**

How and whether a particular pastor or non-profit leader engages in political speech on behalf of or in opposition to a particular political candidate is not the focus of the Free Speech Fairness Act and should not be the focus of this hearing. Rather, the focus should be ensuring the law does not prohibit speech protected by the Constitution. Pastors and non-profit leaders who wish to speak about political candidates should be free to do so, even though some may elect to abstain from such engagement. The government allowing the type of speech that was permitted for almost two hundred years, before the passage of the Johnson Amendment, does not effectuate a requirement that non-profit entities engage in political speech. The Free Speech Fairness Act simply provides a safe space for pastors and other non-profit leaders to speak, without the fear of being harassed, singled out for discriminatory treatment, or losing their tax-exempt status, and thus, their ability to operate.

### **Conclusion**

Penalizing pastors and leaders of other 501(c)(3) organizations, and muzzling them because of their non-profit status, is likely an unconstitutional restriction on speech. At the very least, it is a problematic censoring of the speech that affects the religious and non-religious alike, and ultimately, the very fabric of American culture and politics. Doing good in society, whether as a church, a homeless shelter, a refugee resettlement organization, or any other charitable, religious, educational, or similar 501(c)(3) organizations, should not engender a muzzle, and the political speech rights of churches and non-profit leaders should be restored. While Congress and the Administration has much more work to do to restore religious liberty for Americans, addressing

the Johnson Amendment's stifling of free speech is an essential component of restoring a robust understanding of American's First Amendment freedoms.

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