



# Churches and Campaign Activity: Analysis Under Tax and Campaign Finance Laws

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October 9, 2012

Congressional Research Service

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[www.crs.gov](http://www.crs.gov)

RL34447

## Summary

As the 2012 election cycle heats up, there are allegations that some houses of worship have engaged in impermissible activities. Under the Internal Revenue Code (IRC), churches and other houses of worship with tax-exempt 501(c)(3) status may not participate in campaign activity. They are permitted under the tax laws to engage in other activities that are political in nature (e.g., distribute voter guides and invite candidates to speak at church functions) so long as the activity does not support or oppose a candidate. Additionally, religious leaders may engage in campaign activity in their capacity as private individuals without negative tax consequences to the house of worship.

The tax code's political campaign prohibition is sometimes referred to as the "Johnson Amendment," after then-Senator Lyndon Johnson, who introduced the provision as an amendment to the Revenue Act of 1954. While some have argued the prohibition violates the free exercise and free speech rights of houses of worship under the First Amendment, the two federal courts of appeals to address the issue have not agreed with this position. In recent years, numerous churches have participated in an event known as "Pulpit Freedom Sunday," during which pastors preach a political sermon. A purpose of the event is to develop litigation for another challenge to the prohibition on First Amendment grounds. This year, Pulpit Freedom Sunday was held on October 7, 2012.

Separate from the prohibition in the tax code, the Federal Election Campaign Act (FECA) also regulates the ability of houses of worship to engage in electioneering activities.

In the 112<sup>th</sup> Congress, H.R. 3600 would repeal the Johnson Amendment, thus permitting houses of worship and other 501(c)(3) organizations to engage in campaign activity without jeopardizing their tax-exempt status so long as the other criteria for tax-exempt status are met.

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**B**oth tax and campaign finance laws are relevant in analyzing whether churches and other houses of worship may engage in campaign activity. Under the tax laws, houses of worship that benefit from 501(c)(3) tax-exempt status may not participate in such activity. They are also subject to regulation under campaign finance laws.

## Tax Law

Houses of worship are among the organizations described in Section 501(c)(3) of the Internal Revenue Code (IRC).<sup>1</sup> Benefits that arise from this status include exemption from federal income taxes and eligibility to receive tax-deductible contributions.<sup>2</sup> In return, 501(c)(3) organizations 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.”<sup>3</sup> This is an absolute prohibition. A house of worship with 501(c)(3) status that engages in any amount of campaign activity may have its 501(c)(3) status revoked by the IRS. It may also, either in addition to or in lieu of revocation, be taxed on its political expenditures.<sup>4</sup>

In 2002, the IRS indicated that only two churches have lost their 501(c)(3) status due to campaign intervention.<sup>5</sup> One of these is the Church at Pierce Creek in Binghamton, New York, which took out newspaper advertisements opposing a presidential candidate four days before the 1992 election. The identity of the second is not clear. Several non-church religious organizations have also had their 501(c)(3) status revoked, including Christian Echoes National Ministry. It has been reported that The Way International, Christian Broadcasting Network, and Old Time Gospel Hour came to settlement agreements with the IRS which included revocations for certain years.<sup>6</sup>

## Legislative History of the Prohibition

The IRC’s campaign prohibition is sometimes referred to as the “Johnson Amendment,” after then-Senator Lyndon Johnson, who introduced the provision as an amendment to the Revenue Act of 1954. He analogized it to the lobbying limitation, enacted in 1934, under which “no substantial part” of a 501(c)(3) organization’s activities may be lobbying; however, he mischaracterized the

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<sup>1</sup> IRC §501(c)(3) describes entities “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition ... or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation ... and which does not participate in, or intervene in ... any political campaign on behalf of (or in opposition to) any candidate for public office.” The IRC is found in Title 26 of the U.S. Code.

<sup>2</sup> See IRC §§501(a), 170(c)(2).

<sup>3</sup> IRC §501(c)(3).

<sup>4</sup> See IRC §4955. Organizational managers may also be subject to tax. Other consequences for the flagrant violation of the prohibition include the IRS immediately determining and assessing all taxes due and/or seeking injunctive and other relief to enjoin the house of worship from making additional political expenditures and to preserve its assets. See IRC §§6852, 7409.

<sup>5</sup> See *Review of Internal Revenue Code Section 501(c)(3) Requirements for Religious Organizations: Hearing Before the Subcommittee on Oversight of the Committee on Ways and Means*, Serial 107-69 (May 14, 2002) (statement of Steven Miller, Director, EO, IRS).

<sup>6</sup> See *Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15, 22 (D.D.C. 1999); Thomas B. Edsall, *Christian Network to Pay IRS Fine; Millions Were Spent to Promote Pat Robertson’s ‘88 Campaign*, WASH. POST, March 21, 1998; Robert D. Hershey Jr., *Falwell’s Gospel Hour Fined for Political Activity*, N.Y. TIMES, April 7, 1993.

limitation by saying organizations that lobbied were denied tax-exempt status, as opposed to only those that engaged in substantial lobbying.<sup>7</sup> The act's legislative history has no further discussion of the provision. It has been suggested that he proposed it either as a way to get back at an organization that supported an opponent or as an alternative to a proposal denying tax-exempt status to organizations making grants to subversive entities and individuals.<sup>8</sup>

## Prohibited Activities

IRC Section 501(c)(3) only prohibits campaign intervention.<sup>9</sup> Other types of political activities are permitted.<sup>10</sup> The line between what is prohibited and what is permitted can sometimes be difficult to discern. Clearly, houses of worship with 501(c)(3) status may not make statements that endorse or oppose a candidate, publish or distribute campaign literature,<sup>11</sup> or make any type of monetary or other contribution to a campaign.

On the other hand, they may conduct political activities not related to elections, such as issue advocacy, lobbying, and supporting or opposing appointments to nonelective offices.<sup>12</sup> Additionally, they may engage in certain election-related activities so long as the activities do not indicate a preference for or against any candidate. Some biases can be subtle and whether an activity is campaign intervention will depend on the facts and circumstances of each case.<sup>13</sup> For example, churches may create and distribute voter education materials that do not indicate a preference towards any candidate.<sup>14</sup> According to the IRS, however, there are numerous ways in which the material could show bias, such as by not including all candidates on an equal basis, supporting a slate of candidates (even if the criteria are nonpartisan and objective), comparing the

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<sup>7</sup> See 100 Cong. Rec. 9,604 (1954) (statement of Sen. Johnson).

<sup>8</sup> See Judith E. Kindell and John Francis Reilly, Election Year Issues, IRS 2002 EO CPE Text, 448-51 (2002).

<sup>9</sup> For further discussion of the campaign intervention prohibition, see CRS Report R40141, *501(c)(3) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Laws*, by (name redacted) and (name redacted).

<sup>10</sup> Some activities, although permissible, may be taxable. See IRC §§527(f), 4945.

<sup>11</sup> See Treas. Reg. §1.501(c)(3)-1(c)(3)(iii).

<sup>12</sup> See Rev. Rul. 2007-41, 2007-1 C.B. 1421; IRS Notice 88-76, 1988-2 C.B. 392. Although lobbying is allowed, “no substantial part” of the organization’s activities may be “carrying on propaganda, or otherwise attempting, to influence legislation.” IRC §501(c)(3). The determination of whether a substantial amount of lobbying has occurred depends on the facts and circumstances of each case. Some case law suggests that “no substantial part” is between 5% and 20% of an organization’s expenditures, although courts generally examine the lobbying in the broad context of the group’s purpose and activities. See *Seasongood v. Comm’r*, 227 F.2d 907, 912 (6<sup>th</sup> Cir. 1955); *Haswell v. United States*, 500 F.2d 1133, 1142-47 (Ct. Cl. 1974); *Christian Echoes Nat’l Ministry, Inc. v. United States*, 470 F.2d 849, 855-56 (10<sup>th</sup> Cir. 1972); *Krohn v. United States*, 246 F. Supp. 341, 347-49 (D. Colo. 1965). Unlike most other 501(c)(3) organizations, churches and other houses of worship may not elect under Section 501(h) to measure their lobbying expenditures against numerical standards and are therefore not subject to the excise tax for substantial lobbying. Some churches lobbied not to be eligible for the Section 501(h) election because they were concerned that their inclusion would be interpreted as congressional approval of *Christian Echoes*, in which the U.S. Court of Appeals for the Tenth Circuit held that the lobbying limitation in Section 501(c)(3) did not violate a church’s First Amendment rights. The legislative history of the election provision explicitly states that its enactment does not indicate congressional approval or disapproval of the *Christian Echoes* decision. See Joint Comm. on Tax’n, *General Explanation of the Tax Reform Act of 1976*, JCS-33-76, at 416 (1976).

<sup>13</sup> For information on the factors the IRS considers in determining whether various activities violate the political campaign prohibition, see Rev. Rul. 2007-41, 2007-1 C.B. 1421; IRS Publication 1828, *Tax Guide For Churches and Religious Organizations*, at 7-13; CRS Report R40141, *501(c)(3) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Laws*, by (name redacted) and (name redacted).

<sup>14</sup> See Rev. Rul. 2007-41, 2007-1 C.B. 1421.

church's position on issues with those of the candidates, or covering only those issues important to the church.<sup>15</sup> Other factors that may be important in a specific factual situation include the timing of the material's distribution and to whom it is distributed.<sup>16</sup>

Houses of worship may invite candidates to appear at services and other functions so long as no bias for or against a candidate is exhibited.<sup>17</sup> If an individual appears as a candidate, factors that may indicate the activity was permissible include the following: other candidates were provided an equal opportunity to speak; the entity made clear it was not supporting or opposing any candidate; and no fundraising occurred. If the individual appears in a role other than as a candidate, relevant factors may include the following: he or she was chosen to speak for non-candidacy reasons and spoke solely in that capacity; no campaign activity occurred in connection with the event; the house of worship maintained a nonpartisan atmosphere at the event; and the event's announcement indicated the non-candidate capacity in which the individual was appearing and did not mention the candidacy or election. It should be emphasized that even if these factors are met, the appearance could still be impermissible because bias was exhibited in some other way.

The tax laws do not prohibit religious leaders from participating in campaign activity as individuals.<sup>18</sup> Religious leaders may endorse or oppose candidates in speeches, advertisements, etc., in their capacity as private citizens. A leader may be identified as being from a specific house of worship, but there should be no intimation that he or she is speaking as a representative of it. The house of worship may not support the activity in any way. Thus, a leader may not make campaign-related statements in the entity's publications, at its events, or in a manner that uses its assets. This is true even if the leader pays the costs of the publication or event.

## **Tax Inquiries and Examinations**

IRS inquiry into the tax status of a house of worship and examination of its records and activities raise concerns under the First Amendment's Free Exercise Clause, which states that "Congress shall make no law prohibiting the free exercise [of religion]...." Due to this issue, IRC Section 7611 provides special rules for tax inquiries and examinations of churches and other houses of worship, and these apply when the IRS looks into whether the entity has engaged in campaign activity.

In order for the IRS to begin such an inquiry, an "appropriate high-level Treasury official" must reasonably believe, on the basis of written facts and circumstances, that the house of worship may no longer qualify for 501(c)(3) status.<sup>19</sup> The IRS must then provide written notice to the house of worship that includes an explanation of the inquiry's general subject matter and the concerns that gave rise to it, among other things. If the entity's response does not sufficiently address the IRS's

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<sup>15</sup> See Rev. Rul. 67-71, 1967-1 C.B. 125; Rev. Rul. 78-248, 1978-1 C.B. 154; *Ass'n of the Bar of the City of New York v. Comm'r*, 858 F.2d 876 (2<sup>nd</sup> Cir. 1988).

<sup>16</sup> See Rev. Rul. 80-282, 1980-2 C.B. 178 (ruling it was permissible for an organization's monthly newsletter to include a compilation of legislators' voting records on selected issues along with the organization's position on those issues because it was sent to the usual small number of subscribers and not targeted to areas where elections were occurring).

<sup>17</sup> See Rev. Rul. 2007-41, 2007-1 C.B. 1421.

<sup>18</sup> See *id.*

<sup>19</sup> See IRC §7611(h)(7); Treas. Reg. §301.7611-1T, Q&A (1); see also discussion of *United States v. Living Word Christian Center* *infra* note 23 and accompanying text.

concerns and the agency decides to proceed to an examination of its records and religious activities, the IRS must provide a second written notice. This notice must include a copy of the inquiry notice, a description of the records and activities the IRS seeks to examine, an offer for a conference to discuss and resolve concerns, and copies of IRS documents collected or prepared for the examination that are subject to disclosure under the Freedom of Information Act and tax laws.

In general, the inquiry and examination must be completed within two years after the examination notice was sent. The appropriate IRS counsel must approve any revocation of 501(c)(3) status, notice of deficiency, or tax assessment and determine that the Section 7611 requirements were met. The IRS is limited on further inquiries and examinations occurring within a five-year period.

### *Appropriate High-Level Treasury Official*

Before the IRS can begin an inquiry, an “appropriate high-level Treasury official” must reasonably believe that the house of worship may no longer qualify for 501(c)(3) status. The statute and regulations define “appropriate high-level Treasury official” in terms of high-level IRS regional officers.<sup>20</sup> However, those positions are obsolete after changes made to the agency’s structure by the IRS Restructuring and Reform Act of 1998.<sup>21</sup> Following the 1998 act, the “reasonable belief” determination was made by the Director of Exempt Organizations, Examinations.<sup>22</sup>

In 2009, a federal district court held that the person holding this position was of insufficient rank to make the Section 7611 determination, which led the IRS to suspend tax inquiries of houses of worship.<sup>23</sup> Later that year, the IRS issued proposed regulations that would provide for the Director, Exempt Organizations to make the determination, explaining that person “is a senior executive who reports to the Commissioner/Deputy Commissioner, Tax Exempt and Government Entities Division, and who is responsible for planning, managing, directing and executing nationwide activities for Exempt Organizations.”<sup>24</sup> Some have argued that the Director, Exempt Organizations does not meet the criteria to be “an appropriate high-level Treasury official” because the position is not sufficiently high-ranking or independent.<sup>25</sup> The regulations have not

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<sup>20</sup> See IRC §7611(h)(7) (“The term ‘appropriate high-level Treasury official’ means the Secretary of the Treasury or any delegate of the Secretary whose rank is no lower than that of a principal Internal Revenue officer for an internal revenue region”); Treas. Reg. §301.7611-1, Q&A(1) (IRS church tax inquiry may only begin “when the appropriate Regional Commissioner (or higher Treasury official)” makes the reasonable belief determination).

<sup>21</sup> P.L. 105-206, §1001.

<sup>22</sup> See IRS Internal Revenue Manual 4.76.7.4.1 (June 1, 2004).

<sup>23</sup> See *United States v. Living Word Christian Center*, Civil No. 08-mc-37 ADM/JJK, 2009 U.S. Dist. LEXIS 6902 (D. Minn. January 30, 2009) (adopting magistrate judge’s report found at 2008 U.S. Dist. LEXIS 106639 (D. Minn. November 18, 2008)).

<sup>24</sup> Dep’t of the Treasury, Internal Revenue Service, *Notice of Proposed Rulemaking: Amendments to the Regulations Regarding Questions and Answers Relating to Church Tax Inquiries and Examinations*, 74 Fed. Reg. 39003, 39005 (August 5, 2009).

<sup>25</sup> See, e.g., *Transcript of IRS Hearing on Proposed Rules Giving Director of EO Authority to Pursue Church Tax Inquiries*, January 20, 2010, Daily Tax Report (statement by Marcus S. Owens, attorney at Caplin & Drysdale and former Director, Exempt Organizations) (“It would be quite difficult for either the director of the EO Division or the TE/GE commissioner to provide a truly independent review of church tax inquiry decisions that were guided by strategic priorities or selection criteria that they themselves have a hand in creating. Further delegating approval authority to an official who is directly involved in EO enforcement could call into question the objectivity of the church audit process.”)

been finalized, although their finalization has been included in the IRS's priority guidance plans for the past several years.<sup>26</sup> Some have expressed concern that failure to finalize the regulations prevents IRS enforcement.<sup>27</sup>

## Constitutionality of the Prohibition

Some have argued that the political campaign prohibition violates the free exercise and free speech rights of churches under the First Amendment of the U.S. Constitution.<sup>28</sup> The Supreme Court has not addressed this issue.<sup>29</sup> Two U.S. Courts of Appeals have upheld the prohibition against First Amendment challenges.

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<sup>26</sup> See, e.g., Dep't of the Treasury, *2011-2012 Priority Guidance Plan*, dated September 2, 2011, Daily Tax Report.

<sup>27</sup> See, e.g., *Letter from Marcus S. Owens, Caplin & Drysdale, to Emily S. McMahon, Acting Assistant Secretary (Tax Policy), Dept' of the Treasury*, dated April 27, 2012, Daily Tax Report ("As church-tax compliance issues are likely to increase as the 2012 elections draw closer: it is imperative that the regulations project be finalized."); *Letter from CLERGYVoice to Treasury Secretary Timothy Geithner*, dated July 25, 2011, Daily Tax Report ("We have grave concerns over the current inability of the IRS to enforce the federal tax laws applicable to churches.... Since the District Court's decision [in *Living Word Christian Center*], the IRS has been unable to address violations of the federal tax law by churches.... [T]he Proposed Regulations have not been finalized and may well be legally infirm. Moreover, no interim procedures that conform to the requirements of section 7611 have been promulgated. This administrative defect permits organizations claiming to be churches to conduct all manner of activity inappropriate for religious institutions and to hide from scrutiny by the federal government."); see also Diane Freda, *Exempt Organizations Unit Limits New Projects in 2011 as Other Areas of IRS Call*, Daily Tax Report (Jan. 14, 2011) (hereinafter *Freda 2011 BNA article*) (reporting that Alliance Defense Fund attorney Eric Stanley, whose group is involved in Pulpit Freedom Sunday, stated in January 2011 that "The IRS is not auditing anyone right now" and "I'm hopeful once they finalize those regulations, if they choose not to come after churches, it is going to be abundantly clear that it is their own choice not to do so."). For discussion of Pulpit Freedom Sunday see *infra* note 28.

<sup>28</sup> U.S. Const. amend. I ("Congress shall make no law ... prohibiting the free exercise [of religion]; or abridging the freedom of speech ..."). In recent years, some pastors have delivered political sermons at events known as "Pulpit Freedom Sunday," as part of an initiative by the Alliance Defending Freedom (ADF) to develop litigation to challenge the constitutionality of the campaign intervention prohibition. The most recent Pulpit Freedom Sunday was held on October 7, 2012, and ADF estimated that almost 1600 pastors participated. See Erik Stanley, *Objections Debunked: Government Can't Require Churches to Abandon Constitutional Freedoms*, at <http://blog.speakupmovement.org>. According to news reports, some pastors have expressly advocated for a presidential candidate at these events, while others discussed political issues without naming a candidate. See, e.g., Diane Freda, *Pastors Disregard Rules on Politicking; Americans United Files Complaints With IRS*, Daily Tax Report (September 30, 2008). If the Pulpit Freedom Sunday events lead to litigation, it could provide a court with the opportunity to examine the scope of the IRS's authority to determine that a violation of the prohibition occurred in situations where no express endorsement was made. See *id.* (quoting noted tax attorney Greg Colvin as saying that "the IRS has also said it could go after churches that make much milder statements, including if they just talk about an issue that is slanted toward one candidate. That has real constitutional problems."). Due to taxpayer confidentiality rules, the IRS is not permitted to disclose the status of any investigations related to the events. In January 2011, it was reported that the churches involved in the 2010 Pulpit Freedom Sunday had not had contact with the IRS beyond receiving letters from the agency acknowledging their complaints. See *Freda 2011 BNA article, supra* note 27 (reporting that "[ADF attorney Eric] Stanley said several of the churches that participated in Pulpit Freedom Sunday in 2010 did receive form letters from IRS thanking them for their complaint (the pastors reported themselves to IRS so the service could see their sermons). 'Other than that, there has been absolutely nothing going on,' Stanley said."). As discussed above, the IRS suspended church tax inquiries after losing the 2009 *Living Word Christian Center* case. See discussion *supra* note 23 and accompanying text.

<sup>29</sup> The Court has held that the 501(c)(3) lobbying limitation does not violate an organization's free speech rights. See *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 545-46 (1983) (reasoning that "Congress has merely refused to pay for the lobbying out of public moneys" and "again reject[ing] the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State [internal citations omitted]").



In 1972, the Tenth Circuit Court of Appeals examined the issue in *Christian Echoes National Ministry, Inc. v. United States*.<sup>30</sup> The IRS had revoked a non-church religious organization's 501(c)(3) status for violating the lobbying and campaign activity restrictions. One issue was whether the restrictions violated the organization's First Amendment rights. The district court held the restrictions were unconstitutional, reasoning that the First Amendment did not allow the government to examine the organization's activities, which were based on sincere religious belief, to determine whether they were religious or political.<sup>31</sup> The Tenth Circuit flatly rejected that reasoning because it "is tantamount to the proposition that the First Amendment right of free exercise of religion, ipso facto, assures no restraints, no limitations and, in effect, protects those exercising the right to do so unfettered."<sup>32</sup> The court said such analysis would "compell[] [it] to hold that Congress is constitutionally restrained from withholding the privilege of tax exemption whenever it enacts legislation relating to a nonprofit religious organization."<sup>33</sup>

Instead, the Tenth Circuit held the lobbying and campaign activity limitations did not violate the First Amendment. The court stated that the Free Exercise Clause "is restrained [by the limitations] only to the extent of denying tax exempt status and then only in keeping with an overwhelming and compelling Governmental interest: That of guarantying that the wall separating church and state remain high and firm."<sup>34</sup> Stating the maxim that a "tax exemption is a privilege, a matter of grace rather than right," the court also found that the limitations did not violate the organization's free speech rights, reasoning that the organization was free to choose whether it would limit its activities in exchange for the benefits of tax-exempt status.<sup>35</sup> The court ended by explaining that

The Congressional purposes evidenced by the 1934 and 1954 amendments are clearly constitutionally justified in keeping with the separation and neutrality principles particularly applicable in this case and, more succinctly, the principle that government shall not subsidize, directly or indirectly, those organizations whose substantial activities are directed toward the accomplishment of legislative goals or the election or defeat of particular candidates.<sup>36</sup>

In 2000, the Court of Appeals for the D.C. Circuit held in *Branch Ministries v. Rossotti* that the revocation of a church's tax-exempt status for campaign intervention did not violate its free exercise and free speech rights.<sup>37</sup> In 1992, four days before the presidential election, the church placed advertisements in USA Today and the Washington Times advocating against then-candidate Bill Clinton and soliciting tax-deductible donations. The IRS revoked the church's 501(c)(3) status. After the district court granted summary judgment in favor of the IRS,<sup>38</sup> the church appealed, alleging the revocation violated its rights under the First Amendment and the Religious Freedom Restoration Act (RFRA), among other things.<sup>39</sup>

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<sup>30</sup> 470 F.2d 849 (10<sup>th</sup> Cir. 1972).

<sup>31</sup> *See id.* at 856.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 857.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> 211 F.3d 137 (D.C. Cir. 2000).

<sup>38</sup> *Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15 (D.D.C. 1999).

<sup>39</sup> 42 U.S.C. §2000bb, et seq. Under RFRA, the federal government "shall not substantially burden a person's exercise (continued...)

The D.C. Circuit Court of Appeals found that the church had failed to show, as required under law, that its right to freely exercise its religion had been substantially burdened.<sup>40</sup> According to the court, the revocation's only burden on the church was less money for its religious activities and such burden "[wa]s not constitutionally significant."<sup>41</sup> Also rejecting the church's claim that it was substantially burdened because it had no other means to communicate its opinions about candidates, the court explained that it was constitutionally sufficient that the church could set up a related 501(c)(4) social welfare organization that could then establish a political action committee (PAC).<sup>42</sup> The court brushed aside the fact that the church could not give the tax-deductible contributions it received to the PAC, reasoning that the Supreme Court "has consistently held that, absent invidious discrimination, 'Congress has not violated [an organization's] First Amendment rights by declining to subsidize its First Amendment activities.'"<sup>43</sup>

The court also rejected the church's claim that the IRS had committed viewpoint discrimination, thus violating its free speech rights. The court reasoned that the campaign prohibition was viewpoint neutral because all 501(c)(3) organizations were subject to it, "regardless of candidate, party, or viewpoint."<sup>44</sup>

## **IRS Political Activity Compliance Initiative**

The political activity compliance initiative was developed by the IRS in 2004 due to concerns that 501(c)(3) organizations were violating the campaign prohibition. It consists of two parts: (1) the IRS conducts public outreach to educate organizations about the prohibition and (2) a fast-track procedure to review allegations of campaign activity, with safeguards to ensure the Section 7611 requirements are met. The IRS used the initiative for the 2004, 2006, and 2008 election cycles.<sup>45</sup>

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(...continued)

of religion even if the burden results from a rule of general applicability, ... [unless] it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1. RFRA was enacted in response to a Supreme Court case, *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which had lowered the standard of review for free exercise challenges to neutral, generally applicable laws.

<sup>40</sup> See 211 F.3d at 142.

<sup>41</sup> *Id.* (quoting *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 391 (1990) and citing *Hernandez v. Commissioner*, 490 U.S. 680, 700 (1989) (the "contention that an incrementally larger tax burden interferes with [] religious activities ... knows no limitation")).

<sup>42</sup> See *id.* at 143 (citing *Taxation With Representation*, 461 U.S. at 552-53 (Blackmun, J., concurring) and *FCC v. League of Women Voters*, 468 U.S. 364 (1984)).

<sup>43</sup> *Id.* at 143-44 (quoting *Taxation With Representation*, 461 U.S. at 548 and citing *Cammarano v. United States*, 358 U.S. 498, 513 (1959) ("Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do ...")).

<sup>44</sup> *Id.* at 144.

<sup>45</sup> While the 2004 initiative was proceeding, reports in various media outlets raised the question of whether the IRS had been politically motivated in looking at organizations so close to the 2004 election. See, e.g., Mike Allen, *NAACP Faces IRS Investigation*, WASH. POST, October 29, 2004; Vincent J. Schodolski, *Political sermons stir up the IRS: Effort to enforce tax-exempt rules or bid to bully pulpits?* CHIC. TRIB., November 20, 2005. In response, the IRS Commissioner asked the Treasury Inspector General for Tax Administration (TIGTA) to investigate whether the IRS had engaged in any improper activities while conducting the project. In 2005, TIGTA released a report concluding that the IRS had used appropriate, consistent procedures during the initiative. TIGTA Report 2005-10-035, *Review of the Exempt Organizations Function Process for Reviewing Alleged Political Campaign Intervention by Tax Exempt Organizations* (February 2005), available at <http://www.tigta.gov>.

The results from 2004 and 2006 are discussed below.<sup>46</sup> The IRS has not updated the 2006 data or released the 2008 results, and the agency has not publicly discussed the initiative since 2008. It has been suggested this is due to the *Living Word Christian Center* decision. As discussed above, that case held the IRS was not following the statutory procedure required in church tax inquiries and led the IRS to suspend such inquiries.<sup>47</sup>

In the 2004 initiative, 132 cases, 63 of which involved houses of worship, were selected for review. Twenty-two of the cases, including 16 house of worship cases, were determined not to merit examination. Of the remaining 110 cases, 47 involved houses of worship. As of the most recent IRS update in 2007, 46 of the 47 had been closed. In four of them, the IRS determined that the house of worship did not violate the campaign prohibition. In the other 42 cases, the IRS issued a written advisory, which meant that the agency determined the church had engaged in campaign activity but did not impose a penalty because there were mitigating factors. Mitigating factors included that (1) the activity being of a one-time nature or done in good faith reliance on the advice of counsel and (2) the organization correcting the conduct (e.g., recovering any funds that were spent) and establishing steps to prevent future violations. Impermissible activity included the distribution of church bulletins and inserts supporting or opposing candidates, church officials supporting or opposing candidates during services or church functions, candidates being allowed to use church facilities, and distribution of biased voter guides and candidate ratings.

In 2006, the IRS selected 100 cases for examination, 44 of which involved houses of worship. As of the most recent IRS update in 2007, the IRS had closed 14 of the 44 cases, issuing written advisories in four of them and not finding substantiated campaign activity in the other 10. The types of campaign activity were similar to those found in 2004. The IRS also looked at state campaign finance databases to determine whether 501(c)(3) organizations had made campaign contributions from 2003 to 2005. The IRS found 269 apparent incidences of contributions, of which 87 involved church contributions totaling \$45,151. As of the 2007 update, 86 of the 87 cases remained open; the IRS determined one case did not merit examination.

## Campaign Finance Law

The Federal Election Campaign Act (FECA),<sup>48</sup> which regulates the raising and spending of campaign funds, is separate and distinct from the tax code. FECA prohibits corporations—including incorporated 501(c)(3) religious entities—from using general treasury funds to make contributions in connection with federal elections.<sup>49</sup> While FECA does not prohibit unincorporated 501(c)(3) organizations from making such contributions, the IRC prohibits all 501(c)(3) organizations, regardless of corporate status, from making such contributions, as discussed above.

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<sup>46</sup> The 2004 report is available at [http://www.irs.gov/pub/irs-tege/final\\_paci\\_report.pdf](http://www.irs.gov/pub/irs-tege/final_paci_report.pdf). The 2006 report, which includes updated 2004 data, is available at [http://www.irs.gov/pub/irs-tege/2006paci\\_report\\_5-30-07.pdf](http://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf).

<sup>47</sup> See Simon Brown, *IRS Quiet About Election Cycle Enforcement, Says Former Director*, 128 TAX NOTES 935 (August 30, 2010) (reporting statements by Marcus Owens, a former IRS EO director, about the impact of *Living Word Christian Center*).

<sup>48</sup> 2 U.S.C. §431 *et seq.*

<sup>49</sup> 2 U.S.C. §441b(a).

In its ruling in *Citizens United v. FEC*,<sup>50</sup> the Supreme Court invalidated the prohibitions in FECA on corporations and labor unions using their general treasury funds to make “independent expenditures,” which are communications “expressly advocating the election or defeat of a clearly identified candidate” that are not coordinated with any candidate or party,<sup>51</sup> and “electioneering communications,” which are broadcast, cable, or satellite transmissions that refer to a clearly identified federal candidate and aired within 60 days of a general election or 30 days of a primary.<sup>52</sup> The Court determined that these prohibitions constitute a “ban on speech” in violation of the First Amendment.<sup>53</sup> Due to the tax code prohibition discussed above, houses of worship with 501(c)(3) status are generally not permitted to engage in the activities regulated by FECA, and thus the *Citizens United* decision does not appear to impact them in a significant manner.

It should be noted that the activities that constitute electioneering under the IRC and FECA are not necessarily identical. For example, it is possible that an issue advocacy communication, depending on its timing and content, might be an electioneering communication under FECA, but might not be treated as campaign intervention under the IRC.<sup>54</sup> Such a communication would need to comply with FECA disclosure requirements for electioneering communications meeting certain monetary thresholds, if applicable.<sup>55</sup>

## Legislation in the 112<sup>th</sup> Congress

In the 112<sup>th</sup> Congress, legislation, H.R. 3600, has been introduced that would repeal the IRC provision that prohibits 501(c)(3) organizations from engaging in campaign activity. If the bill were enacted into law, houses of worship with 501(c)(3) tax-exempt status would be able to engage in campaign activity without jeopardizing their tax-exemption so long as the other criteria for such status were met. This means that even if the bill were enacted into law, campaign activity (and any other non-exempt purpose activity) could not be the houses of worship’s primary activity,<sup>56</sup> and an entity that significantly benefited partisan interests could still jeopardize its tax-exempt status.<sup>57</sup>

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<sup>50</sup> 130 S. Ct. 876 (2010). For an analysis of this case, see CRS Report R41045, *The Constitutionality of Regulating Corporate Expenditures: A Brief Analysis of the Supreme Court Ruling in Citizens United v. FEC*, by (name red acted).

<sup>51</sup> 2 U.S.C. §431(17).

<sup>52</sup> 2 U.S.C. §434(f)(3).

<sup>53</sup> See *Citizens United*, 130 S. Ct. at 898.

<sup>54</sup> See Rev. Rul. 2004-6; 2004-1 C.B. 328.

<sup>55</sup> 2 U.S.C. §434.

<sup>56</sup> See *Better Business Bureau of Washington D.C., Inc. v. United States*, 326 U.S. 279 (1945) (interpreting the “organized and operated exclusively” requirement in a statute providing an exemption from social security taxes to mean “the presence of a single [non-exempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purposes”). For other tax-exempt organizations, such as 501(c)(4) social welfare organizations, the IRS has ruled that campaign activity does not further a tax-exempt purpose and therefore cannot be the group’s primary activity. See, e.g., Rev. Rul. 81-95, 1981-1 C.B. 332 (ruling that lawful participation in campaign activity would not affect the §501(c)(4) status of an organization whose primary activity was promoting social welfare).

<sup>57</sup> See *American Campaign Academy v. Comm’r*, 92 T.C. 1053 (1989) (organization that operates for the benefit of private interests, such as members and entities of one political party, on a more than insubstantial basis may not qualify for 501(c)(3) status).

The bill would not change the current IRC reporting requirements. Houses of worship, unlike most tax-exempt organizations, are not required to file an annual information return (Form 990) with the IRS.<sup>58</sup> Tax-exempt organizations permitted to engage in political activities must generally report information about those activities on the form's Schedule C.<sup>59</sup> Thus, while the bill would permit houses of worship to engage in campaign activities, it would not require them to report to the IRS on those activities.

Finally, the bill expressly provides that its provisions “shall not invalidate or limit any provision of the Federal Election Campaign Act of 1971.”

In prior Congresses, there were bills that took different approaches to permitting houses of worship to engage in some level of campaign activity. For analysis of this legislation, see CRS Report RL32973, *Churches and Campaign Activity: Analysis of the Houses of Worship Free Speech Restoration Act and Similar Legislation*, by (name redacted) and (name redacted).

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<sup>58</sup> See IRC §6033(a)(3)(A)(i).

<sup>59</sup> Some types of 501(c) organizations may engage in campaign activities, including 501(c)(4) social welfare organizations, 501(c)(5) labor unions, and 501(c)(6) trade associations. For more information, see CRS Report RL33377, *Tax-Exempt Organizations: Political Activity Restrictions and Disclosure Requirements*, by (name redacted).

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