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Citation: 38 J. Legis. 275 2012



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## BEYOND POLITICS IN THE PULPIT: WHEN PASTORS USE SOCIAL NETWORKS TO PREACH POLITICS

*Brittany N. Brantley\**

*“But Peter and John spoke right back, Whether it’s right in God’s eyes to listen to you rather than God, you decide. As for us, there’s no question—we can’t keep quiet about what we’ve seen and heard.” - Act 4:19-20, The Message Bible*

### I. INTRODUCTION

“Don’t tattle. Always make fun of those different from you. Never say anything, unless you’re sure everyone feels exactly the same way you do.”<sup>1</sup> The advice of Homer Simpson has been partially ignored by our society. For centuries, the Church has been at the forefront of social and political issues. The Catholic Church has spoken out against abortion and gay marriage. The Black Church focused its fight on oppression and civil rights. The diverse nature of each church provided a diverse voice to politics. However, in recent decades, Congress and the Internal Revenue Service (IRS) have mandated that the Church sit on the sidelines and watch. Churches and their Pastors are forbidden from discussing any political candidates at any official church services. But how does the IRS know what each of the roughly 400,000 churches is doing and saying on Sunday? People are tattling on them. Various watchdog groups, like Americans United, report churches and other section 501(c)(3) organizations to the IRS each year for political campaign intervention. The Church, for the most part, has stayed true to the first two portions of advice that Homer Simpson gave. They don’t tattle on each other, though they sometimes tattle on themselves.<sup>2</sup> In addition, the conservative religious right has spoken out against people who do not have the same beliefs as them. On the other hand, other people, groups, and organizations (cue Americans United) are more inclined to follow Homer’s last piece of advice: “Never say anything, unless you are sure everyone else feels the same way.” They believe that Pastors and their churches should not be able to speak on politics—that a large church’s endorsement gives a political party or candidate an unfair advantage. Put simply, churches will raise a whole lot of money for candidates if they are permitted to engage in political advocacy.

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\* Juris Doctor Candidate, 2013, Notre Dame Law School. I would like to thank the members of the *Journal of Legislation* for their diligent editing; Professor Lloyd H. Mayer, for his editing and expertise; my parents, Gary and Lynn Brantley, for their unwavering love and support; my siblings, Gary, Bryan, Keristen, Brigitte, and Katrina, for setting the bar high; Bryan P., for love, encouragement, and ideas; Finally, I dedicate this Note to my uncle, the late Bishop Norman L. Wagner—his life, his leadership, and his legacy.

1. *The Simpsons: Bart the General* (FOX television broadcast Feb. 4, 1990).

2. For a discussion on Pulpit Freedom Sunday see *infra* Part III.

To complicate matters even further, the development of the Internet and Social Networks have given churches and their pastors another medium to communicate with a broader number of people and spread their gospel. Increasingly, pastors are creating Facebook and Twitter pages to relay their religious messages. However, the problem arises when a Pastor uses those same pages to relay his personal feelings about politics.

Part II of this note will provide an overview of the history of the political campaign prohibition. Part III will explain how churches have attempted to be completely exempt from the prohibition. Part IV will discuss the acts of Individuals of a section 501(c)(3) organization in their individual capacities. Part V will discuss how the development of the Internet has broadened the scope of the prohibition. It will also discuss how pastors use their websites and social media pages. Finally, Part VI will suggest some steps that the Internal Revenue Service and the Federal Election Commission can take to ensure that section 501(c)(3) organizations are aware of what constitutes a violation on social media pages.

## II. HISTORY OF THE POLITICAL CAMPAIGN PROHIBITION

In 1913, Congress enacted what is now known as the income tax exemption for charitable, religious, and educational organizations.<sup>3</sup> In 1954, then-Senator Lyndon B. Johnson added the political campaign prohibition as an amendment to the Revenue Act.<sup>4</sup> The prohibition provided the Internal Revenue Code (IRC) section 501(c)(3) organizations may “not participate in, or intervene in (including the publishing or distributing of statement), any political campaign on behalf of (or in opposition to)<sup>5</sup> any candidate for public office.”<sup>6</sup> Congress enacted this amendment, which denied charity tax-exempt status to any organization that violated the prohibition.<sup>7</sup> Although Congress enacted the prohibition, it is unclear why then-Senator Johnson proposed the amendment, and there is no legislative history to explain the reasons behind its enactment.<sup>8</sup> The lack of history left the

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3. I.R.C. § 501(c)(3) (2006) (explaining that an organization must be organized and operated exclusively for the exempt purposes set forth in § 501(c)(3), and its earning may not inure to any private shareholder or individual). A list of approved exempt purposes include: religious, charitable, scientific, testing for public safety, literary, educational, or prevention of cruelty to children or animals. *Id.*

4. Judith E. Kindell & John Francis Reilly, *Election Year Issues*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2002 335, 336 (2001), available at <http://www.irs.gov/pub/irs-utl/topici02.pdf><http://www.irs.gov/pub/irs-utl/topici02.pdf>. See generally <http://www.irs.gov/pub/irs-utl/topici02.pdf> S. Rep. No. 73-558 (1934) (explaining that Johnson’s amendment was the first time such an amendment was enacted). However, in 1934 there was an un-enacted provision which extended the lobbying restriction to “participation in politics.” *Id.* This provision was deleted due to over breadth, while the lobbying restriction remained. *Id.*

5. Kindell & Reilly, *supra* note 4, at 338 (explaining that the phrase “in opposition to” was added by Congress in 1987 as an amendment to include those groups who opposed the election or reelection of certain candidates).

6. I.R.C. § 170(c)(2)(D) (2006).

7. See *id.*

8. See, e.g., Kindell & Reilly, *supra* note 4, at 448-49 (presenting four theories behind the enactment of the prohibition, including the theory that he was concerned that his opponent in the Senatorial Primary,

Internal Revenue Service and the Treasury Department to determine the scope of the prohibition. The Treasury Department defined “candidate for public office” as an “individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, state, or local.”<sup>9</sup>

There are several penalties for violating the political campaign intervention prohibition.<sup>10</sup> In 1987, Congress enacted I.R.C. section 4955, which imposes taxes on any political expenses of section 501(c)(3) organizations.<sup>11</sup> The organizations would have to pay an initial ten percent tax on each taxable expenditure plus an additional 100 percent tax on each uncorrected taxable expenditure.<sup>12</sup> I.R.C. section 4955 had two purposes. First, Congress believed it needed to impose a penalty other than complete revocation because some violations were small, unintentional, and corrected for the future.<sup>13</sup> In these cases, revocation was disproportionate to the violations.<sup>14</sup> Second, Congress realized that revocation was not enough for those organizations that ceased operations after engaging in prohibited political activities.<sup>15</sup> I.R.C. section 4955 imposed the tax regardless of whether the organization maintained its tax-exempt status.<sup>16</sup>

The political campaign intervention prohibition forbids charitable organizations from endorsing candidates, donating to their campaigns, engaging in fund raising, distributing statements, or becoming involved in any activities that could benefit or harm any candidate.<sup>17</sup> This includes any activity that encourages people to support a candidate without regard to his party affiliation.<sup>18</sup> In order to determine who has violated the prohibition, the Internal Revenue Service looks at all the facts and circumstances.<sup>19</sup> All section 501(c)(3) organizations that are exempt from federal

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Dudley Dougherty, was financially benefitting from charitable organizations); Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733, 768 (2001) (arguing that involvement of tax-exempt churches in political activity was not a motive behind Johnson's amendment); see also NINA J. CRIMM & LAURENCE H. WINER, POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS 116-117 (2011) (proposing that legislators were possibly driven by self-interested, partisan purposes); Ann M. Murphy, *Campaign Signs and the Collection Plate – Never the Twain Shall Meet?*, 1 PITT. TAX REV. 35, 50, 53-54 (2003) (stating that Congress was motivated by the political activities of charitable organizations and its distaste for the McCarthy era).

9. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 2008); see Kindell & Reilly, *supra* note 4, at 342 (explaining that “offers himself, or is proposed by others” can also refer to an individual who has not yet announced his intent to seek office but may still be considered to have offered himself as a nominee for that office; the fact that a person is a prominent public figure does not automatically make him a candidate for public office).

10. See I.R.C. §§ 4911, 4912, 4945, 4955, and 527(f) (1988).

11. I.R.C. § 4955 (1988).

12. *Id.*

13. H.R. Rep. No. 100-391, pt. 2, at 1623-24 (1987).

14. *Id.*

15. *Id.* at 1624.

16. *Id.*

17. *Charities May Not Engage in Political Campaign Activities*, IR-2004-59, INTERNAL REVENUE SERV. (Apr. 28, 2004), <http://www.irs.gov/newsroom/article/0,,id=122887,00.html>.

18. *Id.*

19. Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1421-26 (ruling on twenty-one situations to help 501(c)(3) organizations determine acceptable and unacceptable activity). For example, organizations are permitted to engage in voter registration drives, voter education, and candidate debates. *Id.* However, these activities

income tax and that are eligible to receive tax deductible charitable contributions under section 170(c)(2) are prohibited from engaging in political campaign activity. Even churches, which are not required to file an application to be recognized as a charity, are exposed to the prohibition.<sup>20</sup>

Although the prohibition applies to section 501(c)(3) organizations that are eligible to receive charitable contributions under section 170(c)(2), it does not apply to tax-exempt organizations that are not eligible to receive these tax free contributions.<sup>21</sup> If an organization, specifically its leadership, wants to engage in political campaign activity, it can create an affiliated, tax exempt organization. The separate organizations can share resources; however, charitable funds cannot be used to pay for activities that the charitable organization cannot engage in itself.<sup>22</sup> Churches and other charities are also permitted to engage in a limited amount of lobbying.<sup>23</sup> The prohibition applies solely to electioneering, which deals with electing individuals. It does not apply to lobbying, which deals with the passage of particular issues. Although section 501(c)(3) organizations are permitted to engage in limited lobbying activities, they cannot participate in *any* electioneering activities.

### III. CHURCHES AND POLITICAL CAMPAIGN ACTIVITY

#### A. Generally

Under the prohibition, churches can invite political candidates to speak at their services as long as there is no bias toward a specific candidate. In order for the churches' activities to be permissible, the following factors must be met: (1) other candidates must be given the opportunity to speak; (2) the church must not support or oppose the candidate; (3) and the church cannot engage in any fundraising for the candidate.<sup>24</sup>

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should be nonpartisan and guides should not rank candidates. *Id.* Timing of issue advocacy is also a factor. Organizations that only advocate for issues during election season are not looked upon favorably and these actions could be considered political activity. *Id.*

20. See, e.g., *Branch Ministries v. Rossotti*, 211 F.3d 137, 141-42 (D.C. Cir. 2000).

21. See Kindell & Reilly, *supra* note 4, at 353.

22. See Ward L. Thomas & Judith E. Kindell, *Affiliations Among Political, Lobbying and Educational Organizations*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2000 255, 259 (1999), available at <http://www.irs.gov/pub/irs-tege/eotopics00.pdf><http://www.irs.gov/pub/irs-tege/eotopics00.pdf><http://www.irs.gov/pub/irs-tege/eotopics00.pdf><http://www.irs.gov/pub/irs-tege/eotopics00.pdf><http://www.irs.gov/pub/irs-tege/eotopics00.pdf> (stating requirements for non charitable affiliates: separate legal organization; separate records and bank accounts; and time allocation between the organizations for shared officers, directors, employees, goods, services, and facilities).

23. See *Charities, Churches and Politics*, INTERNAL REVENUE SERV. <http://www.irs.gov/newsroom/article/0,,id=161131,00.html><http://www.irs.gov/newsroom/article/0,,id=161131,00.html><http://www.irs.gov/newsroom/article/0,,id=161131,00.html> (last updated Jul. 12, 2007); see also *Political and Lobbying Activities*, INTERNAL REVENUE SERV., <http://www.irs.gov/charities/charitable/article/0,,id=120703,00.html> (last updated Jan. 30, 2012) (explaining the difference between political activities and legislative activities).

24. See Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1421-26.

For several years, churches<sup>25</sup> have taken the position that the “Johnson Amendment” should not apply to them. Several legal scholars have written articles defending churches against the prohibition.<sup>26</sup> A 2001 survey indicated that there have been several violations of the political campaign prohibition by churches.<sup>27</sup> According to the survey, six percent of evangelical Protestant clergy, two percent of mainline Protestant clergy, and one percent of Roman Catholic clergy endorsed one or more candidates from the pulpit during the 2000 election cycle.<sup>28</sup>

Many churches have decided to take part in politics from the pulpit regardless of the penalties they may face.<sup>29</sup> In 2008, the Alliance Defense Fund initiated a tradition called “Pulpit Freedom Sunday”, in which it encouraged pastors to speak freely without regard for the Internal Revenue Service or the “Johnson Amendment.” In 2008, 33 pastors in 23 states participated in Pulpit Freedom Sunday.<sup>30</sup> These numbers increased to 80 pastors and almost 100 pastors in 2009 and 2010, respectively. In 2011, 539 Pastors participated in Pulpit Freedom Sunday, demonstrating the continued defiance of churches against the Johnson Amendment.

One Pastor in Wisconsin endorsed a candidate from the pulpit by stating, “If you drive by my house, you are going to see a John McCain and Sarah Palin sign in my yard. So, if I were you in the voting booth, I would cast a vote for life. . . . Now, I don’t want anyone to misunderstand me, . . . I am not releasing any kind of official endorsement. . . . It is your choice.”<sup>31</sup>

On Pulpit Freedom Sunday 2011, Reverend Anthony Locke preached to his congregating stating, “many ministers are telling their congregation that it is a

25. For purposes of the article, the word “church” includes houses of worship of all faiths.

26. See, e.g., Keith S. Blair, *Praying for a Tax Break: Churches, Political Speech and the Loss of Section 501(c)(3) Tax Exempt Status*, 86 DENV. U. L. REV. 405 (2009) (arguing that churches should be excepted from the prohibition and be able to speak to their congregation freely); Richard W. Gamett, *A Quiet Faith? Taxes, Politics and the Privatization of Religion*, 42 B.C. L. REV. 771 (2001) (arguing that the political campaign intervention prohibition harms churches and privatizes religion); Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875 (2001) (arguing for freedom of pastors to speak about politics in church); Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 5 GEO. J.L. & PUB. POL’Y 145 (2007) (arguing against the regulation of speech between pastors and their congregations); Jennifer M. Smith, *Morse Code, Da Vinci Code, Tax Code and...Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches*, 23 J.L. & Pol. 41 (2007) (arguing that § 501(c)(3) was not intended to include churches and it would be unconstitutional if applied to churches).

27. See Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1149 (2009) (citing Corwin E. Smidt, *The World Is Not My Home? Patterns of Clerical Involvement in Politics over Time*, in PULPIT AND POLITICS: CLERGY IN AMERICAN POLITICS AT THE ADVENT OF THE MILLENNIUM 301, 312 (Corwin E. Smidt ed., 2004)).

28. *Id.*

29. See Suzanne Sataline et al., *Partisan Sunday Sermons Test Federal Tax Laws*, WALL ST. J., Sept. 29, 2008, at A12; Press Release, Alliance Def. Fund, ADF Prepared to Defend Churches Against Possible IRS Free Speech Investigations, available at <http://www.alliancedefensefund.org/news/story.aspx?cid=4692> (discussing when the Alliance Defense Fund recruited about 30 pastors to preach about the moral qualifications of candidates who were seeking public office for “Pulpit Freedom Sunday” on September 28, 2008).

30. Press Release, Alliance Def. Fund, *supra* note 29.

31. CRIMM & WINER, *supra* note 8, at 2 (quoting Pastor Luke Emrich, Sermon at the New Life Church, West Bend, Wisconsin (Sept. 28, 2008)).

moral hazard to vote for politicians who support abortion, bigger debt and less God given [sic] liberty. I don't know how you feel about that, but I support this agenda."<sup>32</sup>

Despite many churches' blatant violation of the prohibition, the Internal Revenue Service has only challenged a few charities on this front.<sup>33</sup> In *Branch Ministries v. Rossotti*, the United States Court of Appeals upheld the revocation of the tax exempt status of the Church at Pierce Creek.<sup>34</sup> The court held that the church and its pastor violated the prohibition because it placed full-page political advertisements in two national newspapers a few days before the 1992 presidential election.<sup>35</sup> The church countered by arguing that the IRS exceeded its authority and violated the church's freedom of religion under the First Amendment, as well as the Religious Freedom Restoration Act.<sup>36</sup> The court rejected this argument, suggesting that perhaps the church's rights would have been violated if the church did not have the option to engage in electioneering.<sup>37</sup> However, the church had the option of forming an affiliated organization under section 501(c)(4)<sup>38</sup> and could then form a political action committee for the purposes of political campaign intervention.<sup>39</sup>

Further, *Branch Ministries* raised the point that the Internal Revenue Service was engaging in "selective prosecution" by singling out their church.<sup>40</sup> They then provided a list of churches that were also violating the prohibition.<sup>41</sup> The Service responded by acknowledging that if in fact there were other churches engaging in political activity, they too, had violated the prohibition.<sup>42</sup> However, the court held that Branch Ministries was the only church that had placed advertisements in national newspapers.<sup>43</sup>

Although Branch Ministries was the only church that had its tax exempt status revoked by the Internal Revenue Service, the Service has been known to revoke the

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32. Reverend Anthony R Locke, Strengthen Your Hands, Sermon at the First Presbyterian Church of Tucker, Tucker, Ga (Oct. 2, 2011), available at <http://www.firstprestucker.org/sermon-archive/sermon-archive-2/2011-10-02/>.

33. See, e.g., *Branch Ministries*, 211 F.3d at 139 (prohibiting the church from placing full ad in the newspaper about then-candidate Bill Clinton); *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 856-58 (10th Cir. 1972) (affirming revocation of tax exempt status for a ministry's radio broadcast discussing candidates for public office).

34. See *Branch Ministries*, 211 F.3d at 145.

35. *Id.* at 140, 142 (The article stated: "Christian Beware. Do not put the economy ahead of the Ten Commandments. . . . Bill Clinton is promoting policies that are in rebellion to God's laws. . . . How then can we vote for Bill Clinton?") The advertisement also included a notice that stated that it was co-sponsored by the Church, its senior Pastor and other churches and Christians. The ad then stated that the donations for the ad would be tax deductible. See Petitioner's Brief at 9, *id.* (No. 99-5097).

36. *Id.* at 140-41; see also Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2006).

37. *Branch Ministries*, 211 F.3d at 143.

38. *Id.* Under § 501(c)(4), organizations are formed and operated exclusively for the promotion of social welfare. 501(c)(4) organizations cannot have political activities as their primary activity, but they can form §527 organizations, which are operated for political purposes. See I.R.C. §§ 501(c)(4), 527 (2006).

39. *Branch Ministries*, 211 F.3d at 143; see also I.R.C. § 527 (2006).

40. See *Branch Ministries*, 211 F.3d at 144.

41. *Id.*

42. *Id.*

43. *Id.*

exempt statuses of other religious organizations a little more freely.<sup>44</sup> In 1972, a religious corporation, Christian Echoes National Ministry, Inc., also lost its section 501(c)(3) status for participating in substantial lobbying and political campaign activity.<sup>45</sup> Dr. Billy James Hargis, an ordained minister, formed the organization and its mission was to “battle against Communism, socialism and political liberalism, all of which are considered arch enemies of the Christian faith.”<sup>46</sup> The religious corporation sponsored religious radio and television broadcasts, a national magazine, and educational institutions.<sup>47</sup> Christian Echoes used its broadcasts and publications to launch an attack on certain candidates and incumbents.<sup>48</sup> The corporation also endorsed Barry Goldwater for president.<sup>49</sup> Christian Echoes argued that the court impinged upon its First Amendment right of free exercise of religion.<sup>50</sup> The court rejected this by stating, “tax exemption is a privilege, a matter of grace rather than right.”<sup>51</sup>

Although the Internal Revenue Service has not often revoked the tax exempt status of churches, it has made inquiries into the activities of some churches to determine whether they have violated the prohibition.<sup>52</sup> On October 31, 2004, just a few days before the election, Pastor Emeritus at All Saints Church preached a sermon called “If Jesus Debated Senator Kerry and President Bush.”<sup>53</sup> The sermon prompted the Internal Revenue Service to investigate the church.<sup>54</sup> The Service determined that the sermon did violate the prohibition but did not penalize the church for it.<sup>55</sup>

44. See, e.g., Thomas B. Edsall & Hanna Rosin, *IRS Denies Christian Coalition Tax Exempt Status*, WASHINGTON POST, June 11, 1999, at A4 (discussing the ten year attempt by the Coalition to gain tax exempt status and the reasons why the IRS refused to grant it because of involvement in political activity); Robert D. Hershey Jr., *Falwell's Gospel Hour Fined for Political Activity*, N.Y. TIMES, Apr. 7, 1993, at A16 (explaining that Falwell reached a settlement with the IRS, which resulted in the loss of tax exempt status for 1986 and 1987 along with a payment of \$50,000 in tax for the two years).

45. See *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972).

46. *Id.* at 852.

47. *Id.*

48. *Id.*

49. *Id.* at 856.

50. *Id.* at 853.

51. *Id.* at 857.

52. See, e.g., Jacqueline L. Salmon, *IRS Investigating Obama's Church*, WASH. POST, Feb. 26, 2008, <http://voices.washingtonpost.com/44/2008/02/irs-investigating-obamas-church-2.html>; Rebecca Trounson, *IRS Ends Church Probe but Stirs New Questions*, L.A. TIMES, Sept. 24, 2007, at A1.

53. George F. Regas, Rector Emeritus, Sermon at All Saints Church, If Jesus Debated Senator Kerry and President Bush (Oct. 31, 2004), available at [http://www.npr.org/programs/atc/features/2005/dec/irs\\_church/originalsermon.pdf](http://www.npr.org/programs/atc/features/2005/dec/irs_church/originalsermon.pdf).

54. See Letter from Marsha A. Ramirez, Dir., EO Examinations, Dep't of the Treasury, to All Saints Church (Sept. 10, 2007) (on file with author).

55. *Id.*; see also, Trounson, *supra* note 44 (explaining that the end of the IRS investigation into the church caused confusion about what was prohibited); Letter from Marcus S. Owens, Counsel to All Saints Church, to Linda E. Stiff, Acting Commissioner, IRS (Sept. 21, 2007) (on file with author); Letter from Marcus S. Owens, Counsel to All Saints Church, to J. Russell George, Treasury Inspector General for Tax Administration (Sept. 21, 2007) (on file with author) (addressing concerns about the investigation into the church and whether or not the IRS shared the church's information with the Department of Justice). The church suggested that the involvement of the Justice Department could constitute a politically motivated inquiry. *Id.*



In 2008, the IRS investigated then-Senator Barack Obama's church, United Church of Christ for possible political activity.<sup>56</sup> The Presidential Candidate had addressed almost 10,000 church members at the United Church of Christ gathering at Hartford Civic Center on June 23, 2007.<sup>57</sup> Forty Obama campaign volunteers also worked at tables outside the center to encourage people to vote for him.<sup>58</sup> The church stated that they had taken proper precautions to ensure that no political activity had taken place.<sup>59</sup> The Internal Revenue Service concluded that United Church of Christ had not violated the campaign prohibition by inviting then-Senator Obama to speak at the fundraising that was not done or supported by the church.<sup>60</sup>

### *B. Failed Attempts at Legislation in Reaction to the Johnson Amendment*

Partly in reaction to the Branch Ministries outcome, legislators have attempted to create law that would exempt religious organizations and houses of worship from the political campaign intervention prohibition. In 2001 Representative Walter Jones of North Carolina proposed "The Houses of Worship Political Speech Protection Act (H.R. 2357)" to the 107<sup>th</sup> Congress. The Act would have permitted clergy members to endorse candidates from the pulpit and maintain the exempt status of their organizations.<sup>61</sup> The bill was drafted by Pat Robertson's American Center for Law and Justice, and not surprisingly, had the support of other conservative leaders, including Jerry Falwell and James Dobson. Although the bill quickly garnered 116 cosponsors in the House of Representatives, it failed to pass in the then Republican-controlled House.<sup>62</sup>

The failure of H.R. 2357 did not prevent Representative Walter Jones from introducing "The Houses of Worship Free Restoration Act, H.R. 235" to the 108<sup>th</sup> Congress.<sup>63</sup> Under this law, churches would not lose their tax exempt status because of "content, preparation, or presentation of any homily, sermon, teaching,

56. See Salmon, *supra* note 52.

57. Letter from Marsha A. Ramirez, Dir., EO Examinations, Dep't of the Treasury, to United Church of Christ (May 13, 2008) (on file with author).

58. *Id.*

59. J. Bennett Guess, *Obama's General Synod Speech Prompts IRS to Investigate UCC's tax-exempt Status*, UNITED CHURCH OF CHRIST (Feb. 26, 2008) <http://www.ucc.org/news/obama-speech-in-2007-prompts-1.html> (The church had invited 60 leaders to speak at the conference to discuss various fields of expertise. Also, the church had extended the invitation to Senator Obama a year before he became a presidential candidate. The church had also made sure to tell attendees that electioneering was prohibited at the event).

60. Letter from Marsha A. Ramirez, Dir., EO Examinations, Dep't of the Treasury, to United Church of Christ (May 13, 2008), available at <http://www.ucc.org/news/pdf/irmsayltr.pdf>. (explaining that the activities of United Church of Christ did not constitute political intervention and that the church continues to qualify for tax exempt status under section 501(c)(3)).

61. H.R. 2357, 107th Cong. (2001). (The law would have allowed churches to apply the "no substantial part" test of lobbying to political campaign activity as well. The no substantial part test allows a 501(c)(3) organization to engage in a limited amount of lobbying so long as the lobbying does not constitute a substantial part of the organization's activities. Each church would have been judged on a case by case basis to determine whether their activities met the test.)

62. *Id.*

63. H.R. 235, 108th Cong. (2003).

dialectic, or other presentation made during religious services or gatherings.” This bill was distinctive from the previous proposed bill in two ways. First, this bill would narrow the type of activities that churches could engage in. Second, unlike H.R. 2357, churches could engage in an unlimited amount of political speech in their sermons and from their pulpits. This bill, like H.R. 2357 did not pass through the House either. Legislators have consistently introduced and reintroduced similar bills in an effort to repeal the Johnson Amendment, but have consistently failed to even get out the committee.<sup>64</sup> Perhaps this is due to the split in the religious community regarding the issue.

#### IV. ACTS OF INDIVIDUALS IN THEIR PRIVATE CAPACITIES

Leaders of a section 501(c)(3) organization are permitted to engage in political activities in their individual capacities.<sup>65</sup> However, the leaders cannot be politically active at work.<sup>66</sup> The individual is not permitted to use the organization’s financial resources, facilities, or personnel for campaign intervention.<sup>67</sup> Further, in order to avoid confusion, the official must take an extra step by making sure to indicate “clearly and unambiguously” that the actions taken or the statements made are those of the individuals and not of the organization.<sup>68</sup> Whether or not the individuals are truly acting in their own capacity is an evidentiary question.<sup>69</sup>

If the section 501(c)(3) organization does not authorize acts of individuals, but explicitly or implicitly ratifies the actions, these actions may be attributed to the organization.<sup>70</sup> The organization must disavow the actions in a timely manner.<sup>71</sup> The organization is also responsible for making sure that the unauthorized actions do not reoccur.<sup>72</sup>

Citizens for Responsibility and Ethics in Washington (CREW) wrote a letter to the IRS reporting James Dobson for prohibited political campaign activity through his nonprofit organization, Focus on the Family. CREW complained that Dobson was using the influence of his nonprofit and its resources to endorse political candidates. However, the IRS ruled that Dobson was speaking on behalf of himself

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64. See, e.g., Religious Freedom Act of 2007, S. 178, 110th Cong. (2007); To Restore the Free Speech and First Amendment Rights of Churches and Exempt Organizations by Repealing the 1954 Johnson Amendment, H.R. 2275, 110th Cong. (2007); Religious Freedom Act of 2006, S. 3957, 109th Cong. (2006); Houses of Worship Free Speech Restoration Act of 2005, H.R. 235, 109th Cong. (2005); Houses of Worship Free Speech Restoration Act, H.R. 235, 108th Cong. (2003); Houses of Worship Political Speech Protection Act, S. 2886, 107th Cong. (2002); Bright-Line Act of 2001, H.R. 2931, 107th Cong. (2001); see also H.R. 2275, 110th Cong. (2007) (attempting to repeal the prohibition entirely). See generally, ERIKA LUNDER & L. PAIGE WHITAKER, CRS REPORT FOR CONGRESS, CHURCHES AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FINANCE LAW 7-10 (2008).

65. See Kindell & Reilly, *supra* note 5, at 363 (“The prohibition on political campaign activity applies only to IRC 501(c)(3) organizations, not to the activities of individuals in their private capacity.”).

66. *Id.* at 364.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 365.

71. *Id.*

72. *Id.*

and not on behalf of the organization because he cannot be held responsible for what newspapers and journals report.<sup>73</sup>

The Internal Revenue Service presents four scenarios in which religious leaders endorse political candidates for public office.<sup>74</sup> The first scenario involves a pastor who places a full-page advertisement in the local newspaper on behalf of himself and five other well known ministers in the area.<sup>75</sup> The newspaper lists the church and adds that, "Titles and affiliations of each individual are provided for identification purposes only."<sup>76</sup> In addition, the advertisement is not financially sponsored by any of the churches but rather the candidate's campaign committee.<sup>77</sup> The IRS reasons that this is not political campaign intervention and was made in the minister's individual capacity.<sup>78</sup>

Scenario two involves another pastor whose church publishes a monthly church newsletter, which is then distributed to all members of the church.<sup>79</sup> The Pastor has a section in the newsletter titled "My Views."<sup>80</sup> One month before the election, the Pastor of this church writes, "It is my personal opinion that Candidate U should be reelected."<sup>81</sup> The Pastor uses his own funds to pay for a portion of the cost to publish the newsletter.<sup>82</sup> However, because the newsletter is an official publication of the church, the statements of the pastor constitute campaign intervention, which is attributed to the church.<sup>83</sup>

In scenario three, the pastor attends a press conference, three weeks before the election, at a candidate's headquarters.<sup>84</sup> He endorses the candidate, but does not say he is speaking on behalf of the church.<sup>85</sup> A local newspaper then reports the pastor's endorsement and writes that he is the pastor of the church.<sup>86</sup> However, according to the IRS, this situation is not indicative of campaign intervention because the pastor did not make the endorsement at an official church function; neither did he use the church's assets or publication to voice his personal views.<sup>87</sup> Just because he did not clearly state he was not speaking on behalf of the church, the fact he did not say he was speaking on behalf of the church is enough to shield

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73. Letter from Melanie Sloan, Executive Director, Citizens for Responsibility and Ethics in Washington to Mark W. Everson, Comm'r, Internal Revenue Serv. (Nov. 28, 2005)), <http://citizensforethics.org/files/DobsonComplaintandattachments.pdf>; Jeffrey Feldman, *Frameshop, Donahue Smear of Edwards May Have Violated 501(C)(3) Laws*, [http://jeffrey-feldman.typepad.com/frameshop/2007/02/frameshop\\_donah.html](http://jeffrey-feldman.typepad.com/frameshop/2007/02/frameshop_donah.html) (Feb. 8, 2007).

74. See Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1422; see also INTERNAL REVENUE SERV., TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 7 (2009).

75. See *id.*

76. See *id.*

77. See *id.*

78. See *id.*

79. INTERNAL REVENUE SERV., TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 8 (2009).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 7.

85. *Id.*

86. *Id.*

87. *Id.*

the church from responsibility.<sup>88</sup>

Finally, scenario four involves a pastor who, during church services, preached a message on various issues, including voting in the upcoming election.<sup>89</sup> The pastor concludes his message by saying, "It is important that you all do your duty in the election and vote for Candidate W."<sup>90</sup> This situation is clearly campaign intervention because he instructs his members to vote for a particular candidate during church service.<sup>91</sup> This church is in jeopardy of losing its tax exempt status.<sup>92</sup>

A Political Action Committee (PAC) is an organization that is regulated by federal and state election laws.<sup>93</sup> One of the main goals of a PAC is to campaign for or against political candidates. Pastors are permitted to establish independent PACs in their individual capacities.<sup>94</sup> The PAC must be completely unconnected to the section 501(c)(3) organization.<sup>95</sup> The Internal Revenue Service has created following factors that show when the PAC is connected to the exempt organization: (1) name similarity between the PAC and the exempt organization; (2) excessive overlap of directors in the two organizations; and (3) the sharing of resources and facilities between the two organizations.<sup>96</sup>

#### V. POLITICAL CAMPAIGN ACTIVITY ON THE INTERNET

It would seem that the same rules that apply generally to section 501(c)(3) organizations on the political campaign intervention prohibition would apply in Internet situations as well. According to the Internal Revenue Service, when a section 501(c)(3) organization uses the Internet to conduct its activities, including email messages or having a website, the prohibition applies.<sup>97</sup> The Service specifies this fact by stating that if an organization posts content on its web site in favor of or in opposition to a candidate, it will be treated as if it distributed printed matter, broadcasts, or made oral statements about the candidate.<sup>98</sup>

501(c)(3) organizations increasingly use the Internet as a tool to communicate with current members and potential future members. They also sometimes link their web sites to other web sites that are maintained by various organizations.<sup>99</sup> By

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88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 7-8.

93. PACs, although a subset of I.R.C. section 527 organizations, are regulated by federal and state campaign finance laws. The Internal Revenue Code regulates 527 organizations. 527s must register and report to the IRS, while PACs must register with the Federal Election Committee.

94. Kindell and Reilly, *supra* note 4, at 366.

95. *Id.*

96. *Id.*

97. *Id.* at 382

98. *Id.*

99. See Internal Revenue Service, Memorandum for All EO Revenue Agents, Political Campaign Activity on the Internet (July 28, 2008 (explaining), <http://www.irs.gov/pub/irs-tege/internetfielddirective072808.pdf>) (The IRS stated before the 2008 election that the IRSIRSit would not pursue cases involving a link between a 501(c)(3) organization's web site and the home page of an affiliated

doing this, organizations indirectly provide more information to their members that they feel is important or relevant.

An exempt organization has a choice whether or not to create a link to another organization's web site.<sup>100</sup> Therefore, the organization is responsible for all consequences that result from creating and maintaining these links. This scenario presents a control issue because rarely can one organization dictate what another completely separate organization publishes. In addition, because content may be upgraded and changed over a period of time, the section 501(c)(3) organization would have to periodically, or even frequently, check the content of the linked web site and then determine whether or not to maintain its link.

The Internal Revenue Service makes sure to clarify that candidate related material on the linked web site does not by itself constitute political campaign intervention.<sup>101</sup> The IRS will look at the facts and circumstances of each case to decide whether the activity is prohibited.<sup>102</sup> The relevant facts and circumstances include: (1) whether all candidates are represented, (2) whether the context of the web site represents campaign intervention, (3) whether an exempt purpose is served by including the link on the exempt organization's web site, and (4) whether the political intervention is a direct link or an indirect link.<sup>103</sup>

Like it did for the individual capacities of church leaders, the IRS provides scenarios which may or may not constitute political intervention on the Internet.<sup>104</sup> These scenarios apply to all section 501(c)(3) organizations, but for the purposes of note, I am only concerned with churches.

In the first scenario, imagine a church that posts an unbiased, nonpartisan voter guide on its web site.<sup>105</sup> The church includes various candidates and there are links to their individual web sites.<sup>106</sup> The links state, "For more information on Candidate X, you may consult [URL]."<sup>107</sup> This does not constitute political campaign intervention because the links are provided to educate the voters, which is an exempt purpose.<sup>108</sup>

In situation two, a church maintains a web site with information about its staff

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501(c)(4) organization. However, it could pursue cases that link to a page other than the home page. This allowed 501(c)(3) organizations to link to the home page of a 501(c)(4) without regard for the rest of the content on the organization's web site. The IRS did not specify whether it would pursue a case if content on the homepage of the 501(c)(4) organization contained political activity.).

100. See Internal Revenue Service National Office Technical Advice Memorandum (Feb. 20, 2009), <http://www.irs.gov/pub/irs-wd/0908050.pdf> (A 501(c)(3) organization that has formed an affiliated section 501(c)(4) organization can choose whether or not to have separate web sites. However, in 2009, the IRS said that a section 501(c)(3) engaged in political activity when it shared its web site with its 501(c)(4) organization. The 501(c)(3) logo appeared on the 501(c)(4) pages and the 501(c)(4) pages contained political endorsements. Even though the 501(c)(4) organization paid a portion of the costs to host the web site, the IRS attributed the endorsements to the 501(c)(3) organization.)

101. Rev. Rul. 2007-41, 2007-25 C.B. 1421, at 1426.

102. *Id.*

103. *Id.*

104. *Id.* at 1422.

105. *Id.* at 1426

106. *Id.*

107. *Id.*

108. *Id.*

as well as directions to the church.<sup>109</sup> On one page of the website, the church describes its mission and provides information about its denomination.<sup>110</sup> At the bottom of the page there are links to other web sites titled "More Information."<sup>111</sup> These links include other churches and articles about religion.<sup>112</sup> There is also a link to a national newspaper that mentions and praises the church's outreach program.<sup>113</sup> On another section of the newspaper's website, there is a page containing editorials that the newspaper has published.<sup>114</sup> Several of these editorials endorse candidates in an upcoming election.<sup>115</sup> The church has not intervened in a political campaign by maintaining the link because its purpose in maintaining the link is to educate its members and the public about the church's outreach programs.<sup>116</sup> The link does not indicate whether or not the church favors or opposes these candidates.<sup>117</sup>

The final scenario discusses a church that maintains information about the details of the church services, community outreach programs, biographies of ministers, and activities that the members of the congregation engage in.<sup>118</sup> A member of the church is running for a seat on city council.<sup>119</sup> Right before the election, the church posts a message on its web site saying, "Lend your support to your fellow church member in Tuesday's election for city council."<sup>120</sup> This action by the church constitutes political campaign intervention and the church is in jeopardy of losing its exempt status.<sup>121</sup>

If a section 501(c)(3) organization takes a position on an issue and then provides information about candidates who support or oppose that position, the organization is in jeopardy of losing its tax exempt status.<sup>122</sup> It does not matter if the two pieces of information are on separate pages on the web site, or even if the organization's position is on the web site and information about the candidate's position was distributed in print form.<sup>123</sup> The IRS considers timing, proximity, and references between the elements.<sup>124</sup>

A 501(c)(3) organization is permitted to host a blog in order to air its message to a broad audience. However, like links to web sites, the organization must monitor the blog postings. Posts written by staff of the organization cannot contain any political advocacy that opposes or supports a public candidate. Even if the staff

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *See id.* at 1426.

117. *See id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *See* Memorandum from Internal Revenue Serv., *supra* note 99.

123. *Id.*

124. *Id.*

member writes from his home on his own time, he must ensure that his posts are free of any political activity because like the church newsletter, a blog on the church's website would be considered an official church publication. The IRS has not made clear how a blogger who is not an employee of the organization would be treated if he blogged on the web site. However, if the blog contains a disclaimer separating the views from the blogger from its organization, the views will generally not be attributed to the organization.<sup>125</sup>

A section 501(c)(3) organization may not allow its facilities, resources, or personnel to be used for political campaign intervention. This would presumably mean that a leader of an organization would not be permitted to use the organization's computer to be involved in political activity, regardless of whether it is after work hours or on his own time.<sup>126</sup> Many times a pastor spends more time at his church than he does at his home. Even though his "working hours" may be from 8 a.m. to 4 p.m., he would not be able to use the church's facilities to engage in political activity. However, the Internal Revenue Service does not venture further to specify whether or not a leader of an organization would be permitted to use his personal smart phone, at work, to endorse a candidate. But if we take "facilities" at face value, the smart phone would be included in the prohibition if the pastor uses it at work.<sup>127</sup>

### A. Social Media

Increasingly, political committees use social networking sites to campaign for their candidates.<sup>128</sup> Neither the IRS nor the Federal Election Committee has given clear advice to social networks about Internet activity.<sup>129</sup> In 2000, the Service requested public comments on several questions regarding to tax exempt

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125. *Id.* (explaining that comments from the general public will also usually not be attributed to the organization, but there should be a disclaimer stating that the views expressed on the site are not those of the organization's.).

126. A 501(c)(4) organization may permit its computers to be used to support a candidate in "occasional, isolated, or incidental circumstances" in their individual capacity. This individual employee's contributions will not be attributed to the organization.

127. What if the pastor takes measures to go across the street from his church with his smartphonesmart phone in order to engage in political activity? Would it make a difference if he did this during working hours or during his lunch break?

128. See AARON SMITH, PEW RESEARCH CTR., *THE INTERNET AND CAMPAIGN 2010*, (2011), available at <http://pewresearch.org/pubs/1931/online-political-use-2010-over-half-us-adults.pdf> (During the 2008 election cycle, 52 percent of social network users, or 14 percent of all adults, used social networking sites to either take part in the political process or to access information about the campaign. In 2010, that number increased, as 22 percent of all adults used social networking for political purposes. During the 2010 cycle, more 12 million voters clicked the "I voted" link on their Facebook pages.).

129. See, e.g., Letter from Federal Election Commission to Mark E. Elias, Jonthan S. Berkon & Rebecca H. Gordon (June 15, 2011) (explaining that the Commission could not reach a conclusion about political activity on Facebook and therefore did not issue an Advisory Opinion); see also Announcement 2000-84, 200-42 I.R.B. 385 (Oct. 16, 2000) ("What facts and circumstances are relevant in determining whether information on a charitable organization's website about candidates for public office constitutes intervention in a political campaign by the charitable organization or is it permissible charitable activity consistent with the principles set forth in Rev. Rul. 78-248, 1978-1 C.B. 154, and Rev. Rul. 86-95, 1986-2 C.B. 73 (dealing with voter guides and candidate debates?)").

organizations' use of the Internet.<sup>130</sup> Many organizations replied with well thought out opinions.<sup>131</sup> In addition, Facebook requested an advisory opinion from the Federal Election Committee on April 26, 2011, concerning political activity on its web site.<sup>132</sup> However, it is safe to assume that the broad rules that apply to section 501(c)(3) organizations and political activity intervention in general apply to social networking sites. According to the Alliance for Justice, while there are no specific rules regarding social networks, a 501(c)(3) organization should not do anything that shows bias in favor of or in opposition to a political candidate.<sup>133</sup> For example, if a 501(c)(3) organization maintains a Facebook page and a Twitter page, and decides to "friend" or follow a candidate, it may imply that the organization shows likes or shows a preference toward that candidate. To avoid being biased, the organization should "friend" and "follow" all candidates who request it equally.<sup>134</sup> Twitter should be distinguished from Facebook in that on Facebook, if a political candidate requests to be the friend of a 501(c)(3) organization, the organization takes one step to either reject or accept the person as its friend. However, Twitter requires a two-step process. First, the political candidate would request to follow the organization<sup>135</sup> and the organization would approve or deny the request. Second, the organization can decide whether or not it would like to follow the political candidate. This second part could raise red flags for organizations because it insinuates that the organization likes the particular candidate and wants to see what the candidate is saying. On the other hand, the organization could argue that it is merely interested in being educated on the views of the candidate. The safest route, though, would be to not follow any political candidates back.

A section 501(c)(3) organization should also be careful about what it includes in its tweets, status updates, and texts. It should only include information that it would communicate in other materials. The organization should only tweet about a

130. See generally Announcement 2000-84, *supra* note 129.

131. See, e.g., Comm. on Exempt Orgs., *Comments on IRS Announcement 2000-84 on the Need for Guidance Clarifying the Application of Internal Revenue Code Provisions to Use of the Internet by Exempt Organizations*, A.B.A., 18-19 (Feb. 27, 2001), [http://www.americanbar.org/content/dam/aba/migrated/tax/pubpolicy/2001/0102cmt2000\\_84irs.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/tax/pubpolicy/2001/0102cmt2000_84irs.authcheckdam.pdf) (proposing that a section 501(c)(3) organization should be permitted to link to a broad range or politically diverse PACs, among other things); OMB Watch Letter to the IRS on Charities' Internet Use: Part 2, OMB WATCH (Feb. 21, 2002), <http://www.ombwatch.org/node/44><http://www.ombwatch.org/node/44><http://www.ombwatch.org/node/44> (proposing that the IRS only issue guidance when it is needed in certain situations and should only focus on situations that deal with fraud and abuse of the internet by tax exempt organizations).

132. Political committees use Facebook to disseminate information to the public about candidates and upcoming events. The committees also upload pictures, videos and request feedback from viewers.

133. See generally ALLEN MATTISON, ALLIANCE FOR JUSTICE, INFLUENCING PUBLIC POLICY IN THE DIGITAL AGE: THE LAW OF ONLINE LOBBYING AND ELECTION-RELATED ACTIVITIES (2011), available at [http://www.afj.org/for-nonprofits-foundations/resources-and-publications/digital\\_age\\_public\\_policy.pdf](http://www.afj.org/for-nonprofits-foundations/resources-and-publications/digital_age_public_policy.pdf).

134. The analysis may be different with regard to "liking" or "friending" a public official and not a candidate for public office. Facts and circumstances may include the timing in relation to the election, whether the organization "likes" all members of a particular party, and comments by the organization on the social networking site referring to that official, among others.

135. If the organization has a public open page, a request would be unnecessary. The 501(c)(3) organization would not control who follows its page. However, when the page is locked or private, the organization has to actively click "Accept" when it receives a follow request.



candidate when providing information to its members about that candidate and other candidates also. A 501(c)(3) organization probably crosses the line when it “retweets”<sup>136</sup> something that a candidate has tweeted on his own page.<sup>137</sup> If a candidate posts something on the 501(c)(3) organization’s Facebook wall, the organization should either delete the post or add a disclaimer that separates the organization from the comment.

If a section 501(c)(3) organization encourages its employees to use their personal social media pages to publicize their work activity, the organization should make sure its employees do not engage in any political activity on those same pages.<sup>138</sup> It is difficult to manage an employee’s social networking page. The organization should make sure that if the employees use the personal account to say personal things, the employees should make it very clear that they are speaking on behalf of themselves and not on behalf of the organization.<sup>139</sup>

Similarly, if the leader of a 501(c)(3) organization uses a social networking account, the organization must make sure it is clear that his views are separate from the organization.<sup>140</sup> If the organization’s staff manages his pages, it is likely that the IRS will be able to attribute what is said on his pages to the organization. This would seem to fall under the “facilities, resources, and personnel” category.

In the context of churches and their pastors, social media becomes even more complicated. Many pastors of churches identify themselves as Pastor James Black<sup>141</sup> or Bishop James Black in every aspect of their lives, including on social media. Furthermore, being a Pastor seems to be a twenty four-seven job. Imagine Pastor Black has a Facebook page that he regularly uses to promote the church services and to speak on different issues concerning the church. He usually posts uplifting statuses about faith. However, he sometimes discusses politics on his page and supports a certain candidate in the upcoming election. Is his church engaging in prohibited political campaign intervention? The organization might argue that it is not because his Facebook page is his personal account. It will likely argue that according to the revenue ruling, he has not used the church’s resources and he was not speaking at an official church service.<sup>142</sup> However, what if the time stamp on his status update indicates that he is posting during working hours? Would it matter if people associate him with his church? Although “friends” of a 501(c)(3) organization are not considered members of the organization, what if the majority of the friends on the pastor’s page are members of his church?<sup>143</sup>

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136. Similar to forwarding a text or an e-mail, a retweet acknowledges that you like something that was said by one of your followers and you want to then share that information with the rest of your followers.

137. If the 501(c)(3) organization has created an affiliated 501(c)(4) organization, the 501(c)(4) can use social networking sites such as Facebook, Twitter, and YouTube to conduct political activity, as long as that activity does not constitute a substantial portion of the organization’s activities.

138. See Mattison, *supra* note 133, at 24.

139. *Id.*

140. *Id.* at 25.

141. This name is completely fictional and there is no specific Pastor John Black that I am referring to in these examples.

142. See discussion on Revenue Rul. 2007-41 examples, *supra* note 19.

143. See Treas. Reg. § 56-.4911-5. The Internal Revenue Service treats communications with a 501(c)(3) organization’s members more favorably than it does with the general public. For purposes of the IRS, a

Imagine Pastor Black also having a personal web site in which he uses to promote all of his ministries, including his church ministry. On the web site he provides a link to his social networking site, which shows him engaging in political activity. On its face, this seems like this is not enough to hold the church accountable for his actions. However, on a page of his web site, he lists his contact information with church's address and phone number along with the name of the church's secretary. The IRS could argue that he is using the church's facilities.

A third scenario involves Pastor Black's church, which maintains a web site that primarily provides information about the church's beliefs, services and directions to the church. On a section of the web site, there is a page that contains the Pastor's biography. The church provides links to the Pastor's Twitter account that says, "Follow Pastor Black." On Pastor Black's twitter page, he has just tweeted, "Herman Cain does not hold a candle to President Obama. Two different leagues." It would seem that the Pastor is engaging in political advocacy. He favors President Obama over Herman Cain. Since the church provided the link to his Twitter page, and apparently failed to monitor the content of this link, Pastor Black's statements could be attributed to the church.

Finally, imagine a scenario where the church's web site links to Pastor Black's personal ministry web site. On Pastor Black's ministry web site, he has included a link to his Facebook account, where he sometimes engages in political advocacy. Although there is no direct link, this situation could create a problem for his church.

In October 2011, Americans United reported Pastor Robert Jeffress and First Baptist Church in Dallas for Political Campaign Intervention.<sup>144</sup> Pastor Jeffress did an interview with Chris Matthews on MSNBC's *Hardball* and endorsed Governor Rick Perry for President. He also claimed that although Governor Mitt Romney is a good, moral person, Mormonism is a cult.<sup>145</sup> The statements that Pastor Jeffress made are allowable because he was speaking in his individual capacity. The problem arose when First Baptist Church, the 501(c)(3) organization, put the links to the YouTube videos on its official web site.<sup>146</sup>

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member is defined as someone who pays dues or makes a contribution of more than a nominal amount, makes a contribution of more than a nominal amount of time; or is one of a limited number of honorary or life members who have more than a nominal connection with organization and who were chosen for a valid reason.

144. See Press Release, Americans United, IRS Should Investigate Dallas Church for Endorsing Rick Perry, Says Americans United, (Oct. 11, 2011), available at <http://www.au.org/media/press-releases/irs-should-investigate-dallas-church-for-endorsing-rick-perry-says-americans>.

145. Scott Baker, *Perry 'Tersely' Repudiates Key Backer Who Called Romney a 'Cult' Member*, THE BLAZE (Oct. 8, 2011, 1:04am), <http://www.theblaze.com/stories/perry-terseley-repudiates-key-backer-who-called-romney-a-cult-member>.

146. See Billy Hallowell, *So, Why is a 'Church-State Separation' Group Asking the IRS to Investigate Pastor Jeffress?*, THE BLAZE (Oct. 12, 2011, 6:28pm), <http://www.theblaze.com/stories/so-why-is-a-church-state-separation-group-asking-the-irs-to-investigate-pastor-jeffress><http://www.theblaze.com/stories/so-why-is-a-church-state-separation-group-asking-the-irs-to-investigate-pastor-jeffress><http://www.theblaze.com/stories/so-why-is-a-church-state-separation-group-asking-the-irs-to-investigate-pastor-jeffress> (The church posted, "On MSNBC's popular program, "'Hardball,'" Dr. Jeffress spoke with host Chris Matthews about personally endorsing Rick Perry, why we should prefer Mitt Romney to Barack Obama, and his recent comments regarding Mormonism.").

## VI. PROPOSED SOLUTIONS

All these scenarios have the potential to create major problems for the Internal Revenue Service because of the lack of guidance that has been given concerning tax exempt organizations' use of the Internet. Not only does the Service have to deal with Pastors and their churches on "Pulpit Freedom Sunday", but it also must deal with the constantly evolving Internet. If organizations do not know the rules regarding what they can do on the Internet, they will not be able to follow them. It is likely that given the choice between their tax breaks and their ability to preach about politics during election season, churches would quickly choose the former. However, confusion about what actually constitutes political campaign intervention has left many churches frustrated.

The Political Activity Compliance Initiative (PACI) was initiated by the IRS to deal with numerous violations by 501(c)(3) organizations.<sup>147</sup> The IRS must take an active position about Pulpit Freedom Sunday. The Service either needs to pursue the cases, or amend its rules regarding political activities by churches. It has not investigated or penalized one church in three years since the initiative started. Its apparent ambivalence is giving the churches the green light to continue and defy the IRS. One Pastor went so far as to say,

Here's what I need you to do liberal media: File a complaint with the IRS; tell them that Oct. 17 is the day that Pastor Brad Brandon is going to come out and endorse a candidate from behind the pulpit. . . . I know you just can't wait to tattle on poor little Pastor Brandon. Well, here's your opportunity to get me in trouble and tell on me.<sup>148</sup>

Although it is clear that the IRS needs to work out some procedural issues, it needs to expedite the process of resolving any issues so that there will be less confusion about what is and what is not prohibited.<sup>149</sup>

There have been numerous suggested approaches that the IRS should take in order to make the prohibition clearer, including a bright line test and safe harbor option. The bright line test would give 501(c)(3) organizations a clear standard on what is permitted versus what is prohibited. However, there is no bright line test in the Code. The problem with the facts and circumstances test that is currently in

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147. Stephen H. King, *'Political Correctness' for Section 501(c)(3) Organizations*, 18 TAX'N OF EXEMPTS 75, 75-77 (2006) (During the 2004 election season several "watchdog" organizations wrote letters to the IRS complaining that many 501(c)(3) organizations were violating the campaign prohibition by engaging in political advocacy. 132 cases were referred to the IRS within 4four months. The IRS closed twenty-two of the cases because they did not deserve an examination. The IRS concluded that 75seventy-five percent of the cases involved prohibited political campaign activity. FiveThree of the cases resulted in tax exempt revocation).

148. Andy Birkey, *Hastings Pastor Endorses Emmer from Pulpit*, MINN. INDEP., Oct. 18, 2010, <http://minnesotaindependent.com/72509/hastings-pastor-endorses-emmer-from-pulpit>.

149. See Susan N. Gary, *Church Need Not Comply with IRS Audit*, NONPROFIT L. PROF BLOG (Feb. 4, 2009), <http://lawprofessors.typepad.com/nonprofit/2009/02/church-need-not.html> (discussing the IRS' case against the Living Word Christian Center in Minnesota because of prohibited political activity.). The church argued that the IRS violated The Church Audit Procedures Act. The court agreed, ruling that the audit was not authorized by an appropriate high-level Treasury Department officer. Under the Act, no one lower than a regional commissioner could begin an audit.

place is that it is not used until after the organization has been reported to the IRS for prohibited activity. The test is therefore a reactive effort by the IRS to fix a problem. The bright line test would give a well-defined rule in *advance* of any wrongdoing. However, opponents of the bright line test argue that the test would make it easier for evade IRS enforcement.<sup>150</sup> Further, a bright line test might be overly broad and unconstitutional.

Another option would be to implement a safe harbor, similar to the Federal Election Committee's.<sup>151</sup> This would prove especially useful for political activity on the Internet, where the lines are even blurrier. A safe harbor test for Internet activity could be imposed to clarify what web links are prohibited. For example, an organization that links to another page would not be responsible for all of the content on the other page. Instead, if the organization's link proves that it was used to further its exempt purpose or to educate the public, it should not matter whether or not the linked web site contains political speech. Further, multiple links should not be taken into account when assessing whether or not an organization has violated the prohibition.<sup>152</sup> The safe harbor should also be implemented for social networking sites. If a pastor is tweeting or using Facebook with his own personal account, and the church has not provided a link to his page on their official web site, the church should not be held accountable for his actions. However, if employees of the church often update his statuses or tweets for him with information about official church business, the line gets even blurrier. It is necessary that the IRS give guidance on what constitutes prohibited activity in this realm. To be safe, a pastor should have a completely separate account. If he decides to use "Pastor" or "Bishop" in front of his name on his account, there should be a disclaimer that says, "titles are for identification purposes only." If he is promoting his church services on his site, it is difficult to identify whether or not he is doing it in his official capacity or individual capacity. The safe harbor could impose a four part test that could insulate the church from IRS enforcement if: (1) less than 25% of the pastor's posts reference official church activities or less than 25% of his posts reference political advocacy; (2) he does not tweet or Facebook during work hours or at church facilities; (3) he does not mention a specific candidate or party when he is discussing a particular issue; and (4) the church does not provide a link to either his personal ministry web site or his social networking site.

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150. See, e.g., Elizabeth J. Kingsley, *Bright Lines? Safe Harbors?*, 20 TAX'N OF EXEMPTS 1 (2008).

151. See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 476-78 (2007) (mandating that the FEC narrow and clarify the definition of political speech); see also 11 C.F.R. § 114.15(b) (2011) (explaining the FEC's subsequent three factor safe harbor test that defines which kinds of speech fall outside of the prohibition: (1) the speech must not mention any election, candidacy, political party, opposing candidate, or voting by the general public; (2) the speech must not take a position on any candidate's or officeholder's character, qualifications, or fitness for office; and (3) the speech focuses on legislative, executive, or judicial matter or issue and "(A) Urges a candidate to take a particular position or action with respect to the matter or issue, or (B) Urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue").

152. For example, a 501(c)(3) organization should not be responsible if a web site it has linked to also links to an organization that is politically active.

## VII. CONCLUSION

Although the IRS has been extremely conservative and leery of the Internet, it needs to keep up with modern technological advancements. The more the Internet evolves, the less 501(c)(3) organizations will use printed materials. Not only does the IRS need to amend its current rules concerning printed materials, it also needs to face its fears and venture into the Internet and social networks. If not, the tattling will have been in vain.