

Testimony of
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Before the
Committee on Oversight and Government Reform
Subcommittees on Health Care, Benefits, and Administrative
Rules and Subcommittee on Government Operations
on
The Johnson Amendment
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President Trump has publicly stated that one key priority for him in the area of religion is to “totally destroy” the so-called “Johnson Amendment,” a provision of the federal law that prohibits houses of worship, like all tax-exempt organizations, from endorsing or opposing political candidates and political parties or spending money for such purposes.

The President has given different explanations for this policy. One is that churches “will lose their tax-exempt status if they openly advocate their political views.” Not so. They may express their views on political issues as they see fit. They may even lobby on those views, albeit the amount of money they can spend on such activities is regulated in the same way it is regulated for secular tax-exempt organizations.

The President has said: “I think maybe that will be my greatest contribution to Christianity – and other religions—is to allow you, when you talk religious liberty, you have the right to do it. You don’t have any religious freedom, if you think about it.” Clearly a bit of an exaggeration in light of the restrictions on religious worship, attacks on houses of worship, blasphemy laws, ethnic cleansing and genocidal actions from non-state actors faced by billions across the globe, which I had to address over the past two years as the U.S. Ambassador at Large for International Religious Freedom. I take seriously any sincere claim about infringement of religious liberty in the United States or around the world, including those religious liberty concerns expressed by colleagues here, but to suggest that there is no religious freedom if electioneering is not allowed from the pulpit, in a country that is the envy of most religious communities elsewhere,

diminishes the vastness of the struggle for religious freedom in too many countries.

There are eight compelling reasons why the Johnson Amendment should not be changed and the current restrictions left in place.

First, repealing current law would almost certainly have a divisive impact on houses of worship. There are enough divisions over theology and music and liturgy and pastors, without importing America's explosively divisive electoral differences. Our houses of worship are among the few places that people of different cultural, political, ethnic divides can find the sense of unity and comity so desperately needed in our nation today. What is a pastor to do if a congregant who is major donor now makes his church gift contingent on an endorsement from the pulpit for his or her preferred candidate? What if a congregant asks a pastor for an endorsement when the pastor has endorsed other candidates in other elections? Once down that path, painful pressure to endorse any congregant running for office arises. What if two congregants are running against each other for the same office? Does the pastor have to choose between who will get her endorsement and who won't – even as the pastor is trying to minister to the needs of the candidates and their families?

As Leith Anderson, President of the National Association of Evangelicals, observed:

“Most pastors know the parishioners have diverse political opinions and fear being pressured to choose and endorse some while alienating others. They are grateful for the rule that keep them out of political endorsement differences and battles.”

Second, relatedly, while constitutional rights are not subject to majoritarian view, if we are talking rather about wise versus unwise or counterproductive legislation, the will of the people ought to be considered as one factor in your decision-making.

Polls overwhelmingly demonstrate that the public, parishioners and clergy are opposed to such partisan politicking from houses of worship. They don't want their houses of worship plunged into our current partisan arms races nor a

partisan political wedge dividing their sense of comity and community. And overwhelmingly clergy do not want this for their parishioners or their houses of worship either.

In one recent poll (Sept. 2016) on the subject, done by the Christian polling company Lifeway, they found that 8 in 10 people said it is inappropriate for pastors to endorse candidates in church. Among clergy, 9 out of 10 oppose it. A more recent Public Religion Research Institute poll found only 22% of Americans favor such a policy. Looked at through the lens of party affiliation, 62% of Republicans and 78% of Democrats reject this idea.

A Feb. 2017 National Association of Evangelicals “Evangelical Leaders Survey” upheld the Lifeway survey findings: 90% of evangelical leaders do not think that pastors should endorse politicians from the pulpit. As George O. Wood, general superintendent of Assemblies of God (hardly a liberal denomination, theologically or otherwise) commented on the poll:

“Our focus should be on the gospel. If we begin to endorse candidates, then we are politicizing the Church, diluting our message, and bringing unnecessary division among our people. It is sufficient that we can speak on issues without endorsing specific candidates for office.”

These views are affirmed by a letter you received last month from 4,500 non-profit groups cutting across religious, political, ideological lines urging strongly that the Johnson Amendment be maintained. So too a letter you received from 99 national, regional and state denominations and faith groups.

Now I mention these polls, these letters, these statements from prominent religious leaders because there are three witnesses on the opposing view and I urge that this Committee take seriously the breadth of the denominations and religious leaders who support maintaining the restrictions.

Third, pastors and other clergy have free speech right now. Under the current rules, they can speak right now on policy issues and moral issues as they see fit, even during election season. In a personal capacity, without the use of church funding, clergy have the same citizen rights to endorse or oppose candidates or

parties as anyone else. They can run for public office (and many have) and, if elected, serve in public office (some having done so even while continuing to serve as the pastors of their churches.). Churches can hold candidate fora and educate their members and communities on the issues that arise in a campaign.

Clergy even have the free speech right to endorse from the pulpit. What they cannot do is engage in partisan political activity using a government subsidy in the form of tax exemptions and tax-deductible contributions for their houses of worship. The only restriction on any of these actions is that if the house of worship wishes to enjoy tax-exempt status, the house of worship cannot engage in electioneering activity (opposing or supporting specific candidates or parties), cannot spend any funding for such activity and its clergy or other leaders cannot engage in such activity in their official capacity.

The key case upholding this standard on constitutional grounds is *Regan v. Taxation with Representation of Washington* (461 U.S. 540 (1983) (TWR). Justice Rehnquist, hardly a liberal on such issues, classified the tax exemptions and tax deductions given to contributions to 501(c)(3)s as government subsidies. Differentiating these from the holding in *Walz v. Tax Commission* (which held that lifting the burden of taxation is different than directly supporting the non-profit), the Court stated that “...in stating that exemptions and deductions, on the one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical.” (TWR 461 U.S. at 544 n.5.) The position that tax exemptions convey government support has been reaffirmed by other cases since that time.

And in those very rare cases where the IRS has acted against a church for electioneering, as with the full page ads against President Clinton taken out by the Pierce Creek church, the court has upheld such restriction against free speech claims holding that revoking the church’s tax exemption as a consequence of violating the endorsement prohibition was not a substantial burden since first, free exercise of religion would not be limited, but rather electioneering simply would be unsubsidized, and second, the church had an “alternate channel” for its messages.

Fourth, the prohibition against electioneering by non-profits prevents undermining the structure of campaign finance regulations. If the Johnson

Amendment is repealed entirely and political donors can bypass other restrictions by giving their campaign contributions through a church AND get a tax deduction for it, we will see a massive diversion of campaign funding to houses of worship, which will become slush funds for local, state, and national campaigns. And since churches do not report who their donors are, funneling campaign donations through houses of worship would greatly reduce transparency in election campaigns, thus becoming conduits for dark money and undermining sensible campaign finance rules,

Fifth, therefore, if houses of worship become involved in campaigning, they run the risk of extensive government regulation and monitoring of their religious activities. Right now, religious autonomy is protected in pervasively sectarian entities (houses of worship, parochial schools, etc.) by a range of exemptions from various reporting requirements, including 990s and lobby disclosure requirements, as well as by tougher standards to trigger IRS audits, etc. If we insist to be treated like every other entity for electioneering purposes, then the government has two choices. It may say “yes, we will treat you like everyone else” and impose campaign finance rules, regulations and monitoring on houses of worship. Alternatively, it will continue exemptions from reporting contributions and contributors, and allow houses of worship to spend their funds on partisan politics without any transparency – thereby opening up a channel for more electoral funding abuses.

Sixth, if, as he implied, this about religious freedom, and the President intends to revoke the Johnson Amendment not in its entirety but only insofar as religious groups are concerned, then a slew of other constitutional issues arise in favoring religious over non-religious non-profits. Under the ruling of the High Court in *Texas Monthly v. Bullock* 489 U.S. 1, 14 (1989), the Constitution bars providing special tax benefits to religious entities that would not be provided to similarly situated secular non-profits. Courts would require the same treatment for all non-profits as were given to houses of worship.

Seventh, there are those who take the position of the Free Speech Fairness Act (H.R. 781). This legislation would change the Johnson Amendment such that any statement made in the course of the organization’s regular and customary activity, so long as no more than a de minimis incremental expense is used, would

not violate an organization's tax-exempt status. (By "de minimis incremental" I presume the legislation means additional expenses beyond its normal expenses.

While this sounds like H.R. 781 is aimed at securing and enhancing freedom of the pulpit, in its actual language, it applies to all non-profits and it affects all statements by anyone connected with the house of worship or non-profit. The concerns and criticisms I made of changing the rules for houses of worship would apply to all (c)3s.

Further, it sounds like proponents envision a single sermon.

But let me offer some hypotheticals of the implications of a proposal that says any statement is allowed that does not involve extra expenses:

Suppose instead of one sermon, in every scheduled sermon for the half-year running up to the election, the pastor(s) endorses various candidates and reiterates those endorsements?

Suppose in every regular bulletin and regular email over those six months, the pastor or church leaders focus on endorsements of a party or a candidate(s)?

Suppose with the costs of local calls being de minimis these days, they allow their phones to be used for campaign phone banks?

Suppose a church has their congregants fill out cards for the offerings for later tax verification (putting their money and card in an envelope which they hand in) — and the church then adds envelopes and cards to fill out for contributions to the candidates they endorse and collect those with the offerings and someone from the campaign comes by every week and collects them.

Or suppose the President of Notre Dame or Catholic University adds a single sentence to their regular email to their scores of thousands of alumni : "I believe based on sound religious reasoning you should all vote for Candidate A and oppose Candidate B." Certainly de minimis but is that how tax deductible money should be used?

In each of these there is no extra funding. They are doing (giving sermons, sending

bulletins or emails, collecting offerings) what they would normally do.

Are proponents of this legislation arguing that although you might disapprove on other grounds, that as far as the law is concerned, this ought to be allowed because it really doesn't constitute using tax exempt and tax deductible funding for partisan political purposes? What is the cumulative value of the salaries and the overhead of the congregation in making this electioneering possible? If the church is funded by tax deductible contributions, are not these contributions subsidizing this electoral activity? If the church has the benefit of tax exemption to support its eleemosynary work, does not the tax exemption support everything the church does including its endorsement activities? Everything about the church is subsidized by tax exempt and tax deductible money. And that is as true of one sermon as six months of sermons; of one bulletin as six months of bulletins.

Eighth, you have a complicated problem as to what constitutes "free speech" or "a statement" in terms of this legislation. Since the court has held in the *Buckley v. Valeo*, *Boston v. Belotti*, *Citizens United* thread that giving money to candidates is expressive conduct protected under the First Amendment, there will certainly be those who argue that lifting the Johnson Amendment through this free speech legislation would need to include speech expressed through campaign contributions and churches should likewise be allowed to engage in such activities. How will you write the legislation to prevent the application of *Texas Monthly* in this manner? Again, unless the courts would require the church to report under campaign contribution legislation, there are arguably no more than de minimis additional costs. The money would have been spent for something else, so why not for this expressive purpose? So, if the form of endorsement speech as described in this legislation were allowed, it would open the Pandora's box of tax-deductible funds being used for campaign contributions discussed above.

Lifting the 501(c)(3) partisan politicking restrictions are not just bad legal policy and bad public policy, but bad religious policy as well. I urge the committee to maintain the Johnson Amendment that has served so well to protect our non-profits and houses of worship from being turned into campaign slush funds and dividing their members along partisan political lines.