CHOOSING BETWEEN TAX-EXEMPT STATUS AND FREEDOM OF RELIGION: THE DILEMMA FACING POLITICALLY-ACTIVE CHURCHES

While just government protects all in their religious rights, true religion affords to government its surest support.[1]

I. INTRODUCTION

A. The Church at Pierce Creek: Facts of the Case

A recent study by the Pew Research Center for People & the Press found that, "[u]nlike three decades ago, a majority of Americans now believe that churches should speak out on social and political issues."[2] The study also discovered that "[o]ne in five regular churchgoers said the clergy in their place of worship express their views on candidates and elections, and 78 percent of those people approved of it."[3]

The Church at Pierce Creek (hereinafter "Pierce Creek"), a small, evangelical church in Vestal, New York, found out the hard way that the Internal Revenue Service (IRS) does not hold the same views as the churchgoers in the Pew Center's study. Five years ago, the church placed a full-page advertisement in *USA Today* and *The Washington Times*.[4] In response, the IRS revoked Pierce Creek's tax-exempt status in January 1995.[5] The ad read, in part:

1. George Washington, Letter to the Synod of the Dutch Reformed Church in North America (Oct. 9, 1789), THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, 432 n.83 (John C. Fitzpatrick, ed., 1939).
2. Laurie Goodstein, *White Evangelicals 'a Powerful' Bloc; Study on Politics and Religion Finds Once-Uniform Catholic Vote Split*, WASH. POST, June 25, 1996, at A6.
3. *Id.*
4. USA TODAY and WASH. TIMES, October 30, 1992.
5. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment (hereinafter "Plaintiff's Memo. Opp. Summ. J.") 7 (filed August 5, 1995).

CHRISTIAN BEWARE

Do not put the economy ahead of the Ten Commandments.
Did you know that Governor Bill Clinton. . .

Supports abortion on demand? (Violates Exo. 20:13, Lev. 20:1-5)

Supports the homosexual lifestyle, and wants homosexuals to have special rights? (Violates Exo. 20:14, Lev. 20:13. See also Rom. 1:26, 27)

Promotes giving condoms to teenagers in public schools? (Violates Exo. 20:12, Col. 3:5. See also Rom. 1:28-32)

Bill Clinton is promoting policies that are in rebellion to God's Laws. In our desire for change, do we really want as a president and a role model for our children a man of this character who supports this type of behavior?

. . . .

How then can we vote for Bill Clinton?

This advertisement was co-sponsored by The Church at Pierce Creek, Daniel J. Little, Senior Pastor, and by churches and concerned Christians nationwide. Tax-deductible donations for this advertisement gladly accepted. . . .

After learning of the advertisement, the IRS investigated Pierce Creek and revoked its tax-exempt status as a § 501(c)(3) organization. In defense of its action, the IRS cited the church's violation of the prohibition on political candidate campaigning, found in § 501(c)(3) of the *Internal Revenue Code* (I.R.C.).[6] Upon losing its tax-exempt

6. The political candidate campaigning prohibition requires that no § 501(c)(3) organization "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

status, Pierce Creek sued the IRS in the United States District Court for the District of Columbia[7] on April 17, 1995 under I.R.C. § 7428(a)(1)[8].

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public office." 26 U.S.C. § 501(c)(3) (1994). IRS regulations explain how to interpret the campaigning ban. Regulation 1.501(c)(3)-1(c)(3)(i) provides that "an organization is not operated exclusively for one or more exempt purposes if it is an 'action' organization." Treas. Reg. § 1.501(c)(3)-1(c)(3)(i) (1994). An "action" organization is:

> [one that] participates or interferes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office. . . . Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf or in opposition to such a candidate.

Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (1994).

The IRS has also stated that the campaigning ban "does not refer only to participation or intervention with a partisan motive, but to any participation or intervention which affects voter acceptance or rejection of a candidate." Rev. Rul. 78-160, 1978-1 C.B. 154. The I.R.C. does not define the term "candidate;" however, in Fulani v. League of Women Voters Education Fund, 882 F.2d 621 (2d Cir. 1989), the court implied that the prohibition of political campaign activity applies only to campaigns for political office. *Id.*

Unlike IRS restrictions on lobbying activities by § 501(c)(3) organizations, the prohibition on political candidate campaigning is absolute; § 501(c)(3) allows no degree of participation or intervention. Also, an organization's motive for engaging in the campaign activity is irrelevant in determining whether the campaigning ban has been violated. *See* Association of the Bar of the City of New York v. Commissioner, 858 F.2d 876 (2d Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989) (court upheld the denial of exempt status to an organization that rated elected judicial candidates, affirming the principle that the campaigning ban is absolute).

7. Branch Ministries, Inc. v. Richardson, No. 95-CV0724 (PLF) (filed April 17, 1995 D.D.C.). Pierce Creek is incorporated under the name "Branch Ministries, Inc." It is represented by The American Center for Law and Justice, a national not-for-profit public interest law firm dedicated to the defense of religious and civil liberties. This case is still in the discovery stage. On July 3, 1997, the United States District Court for the District of Columbia issued an opinion allowing Pierce Creek partial discovery regarding its claim that the IRS has selectively enforced the prohibition on political candidate campaigning. Branch Ministries, Inc. v. Richardson, ___ F. Supp. ___ 1997 WL 379007 (D.D.C. July 3, 1997). Judge Friedman ruled that Pierce Creek had "made a colorable showing sufficient to justify discovery that their political and/or religious beliefs may have played an impermissible role in the revocation of their tax exempt status." *Id.* at *5. *See* Section III, Part B for analysis of Pierce Creek's selective prosecution claim.

8. I.R.C. § 7428(a)(1) provides for a declaratory judgment regarding the status and classification of § 501(c)(3) organizations.

B. *The Significance of Tax-exempt Status*

I.R.C. § 501(c)(3) allows the following organizations to be exempt from taxation:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . 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 (except as otherwise provided in subsection (h)), *and which does 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.*[9]

This tax exemption applies to organizational income; that is, income that § 501(c) entities receive from contributions and related business transactions.[10]

Besides exemption from federal taxation on organizational income, § 501(c)(3) entities are entitled to a benefit that other § 501(c) organizations are not: donors to a § 501(c)(3) organization may, in calculating their personal income tax, deduct donations made to the organization from their gross income.[11] As one author has noted: "Certainly one of the most valuable benefits of tax-exempt status is the ability to attract tax-deductible contributions."[12]

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9. I.R.C. § 501(c)(3) (emphasis added).

10. Under I.R.C. § 511(a)(2)(A), the unrelated business income of churches is subject to taxation.

11. *See* I.R.C. §§ 170(c)(2) and 2055(a)(2).

12. RICHARD HAMMAR, PASTOR, CHURCH & LAW, 354 (1983). The United States Supreme Court has also recognized the benefits of tax-exempt status, commenting that I.R.C. § 501(c)(3) "accords advantageous treatment to several types of nonprofit corporations, including exemption of their income from taxation and deductibility by benefactors of the

Section 501(c)(3) organizations also receive numerous collateral benefits from their tax-exempt status. First, § 501(c)(3) organizations may receive tax exemption under federal excise and employment taxes. Additionally, organizations may also be exempt from some state and local income, property, sales, use or other forms of taxation.[13] Secondly, services performed for a § 501(c)(3) organization may be exempt from taxation under I.R.C. § 3306(c), the Federal Unemployment Tax Act.[14] Third, employees of § 501(c)(3) organizations are able to take advantage of § 403(b) of the Internal Revenue Code, which provides for favorable tax treatment for contributions to tax-sheltered annuities.[15] Fourth, § 501(c)(3) entities are often eligible to mail at preferred second or third class postal rates.[16]

Finally, churches are set apart from other tax-exempt entities in that they are not required to file forms with the IRS that would disclose information about their activities and finances. Churches are not required to file: 1) an application for § 501(c)(3) status,[17] which demands a "detailed" proposal of activities;[18] 2) an annual informational return, which other tax-exempt organizations are required to file to maintain their tax-exempt status;[19] and 3) as with

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amounts of their donations." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 28-29 (1976).

13. BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 31-32 (6th ed. 1992).

14. *Id.* at 33.

15. *Id.* at 32-33.

16. *Id.* at 33.

17. Under § 508(c)(1)(A), churches are exempt from filing an application for recognition of exemption.

18. "An organization. . . is not exempt from tax merely because it is not organized and operated for profit. In order to establish its exemption, it is necessary that every such organization claiming exemption file an application form. . . . An organization described in section 501(c)(3) shall submit with, and as a part of, an application . . . a detailed statement of its proposed activities." Treas. Reg. § 1.501(a)-1 (1994).

19. "In order to maintain its exempt status, an organization must file annual informational returns containing information about income, expenses, exempt-purpose disbursements, assets and liabilities, employee compensation, and contributions received. Section 6033, Internal Revenue Code. Excepted from the annual filing requirement are churches. . . ." DOUGLAS COOK, CASES AND MATERIALS ON NONPROFIT, TAX-EXEMPT ORGANIZATIONS 4-55, iii (1994 and Supp. 1995).

all tax-exempt organizations, churches are not required to file a corporate tax return.[20]

Pierce Creek is challenging the application of the I.R.C. § 501(c)(3) ban on participation or intervention in political campaigns (hereinafter "campaigning ban") to churches. It has asked that the court enter declaratory judgment in its favor and enter an injunction against the IRS. The injunction would prevent the IRS from enforcing their campaigning ban against the church (by revoking its tax-exempt status), thus allowing Pierce Creek to retain its tax-exempt status and the attendant benefits listed above.

C. Summation of Article

A popular viewpoint in legal circles is that a church should not be permitted to retain its tax-exempt status when it engages in conduct violative of the campaigning ban.[21] Critics of such churches explain that allowing churches to influence the election of lawmakers and continue to receive the benefits of tax-exemption enables those churches to "have their cake and eat it too."[22]

This comment will argue that churches should be free to speak against a political candidate without suffering the cost of taxation. Section II will detail how churches have historically been active in political matters concerning social and moral issues and demonstrate that taxation of churches for taking up their role as the moral conscience of this country is counter-productive. It will examine why churches have historically not been, and should not now be, taxed for their political involvement.

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20. The IRS has ordered Pierce Creek to file a corporate tax return, Form 1120, for the years beginning 1992. Brief for the Defendant in Support of Her Motion for Summary Judgment or, in the Alternative, to Dismiss the Complaint for Failure to State a Claim Upon Which Relief Can Be Granted (hereinafter Defendant's Summ. J. Memo.) at 16 (filed June 20, 1995).

21. *See, e.g.*, Reka Potgieter Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 VA. TAX REV. 71 (1991).

22. *See, e.g.*, Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 598 (1990); Robert Maddox, *Churches and Taxes: Should We Praise the Lord for Tax Exemption?*, 22 CUMB. L. REV. 471 (1992).

Section III will address two of the legal issues being litigated by Pierce Creek–freedom of speech and the Free Exercise Clause under the Religious Freedom Restoration Act (RFRA).[23] Section III also addresses the question of selective enforcement of the campaigning ban and the concomitant violation of Pierce Creek's right to equal protection of the laws. An analysis of the issues presented in both sections will show that the United States District Court for the District of Columbia should adjudge the application of the campaigning ban to churches as contrary to American history, unintended by Congress, and unconstitutional.

A decision by the district court favoring Pierce Creek would demonstrate that the existence of politically active, tax-exempt churches is not a case of churches having their cake and eating it too. Rather, a ruling in favor of Pierce Creek would recognize the long-standing tradition of churches to publicly pronounce moral judgment on the social and political views held by politicians, political candidates, and governments. In short, a decision vindicating Pierce Creek's public judgment on the candidacy of President Clinton will recognize the distinction between moral judgment and partisan politicking.

II. CHURCHES SHOULD NOT BE SUBJECT TO THE CAMPAIGNING BAN

One scholar on the subject of tax-exemption has commented that:

> [m]any Americans are predisposed to think that in their country religion and politics must be "separated" from one another. This view, of course, is attributed to the First Amendment to the Constitution, which states that Congress shall make no law "respecting an establishment of religion or prohibiting the free exercise thereof." The First Amendment precludes government from establishing a religion. It also

23. Pierce Creek asserts in a third issue–beyond the scope of this comment–that statutory construction of the Internal Revenue Code reveals that the IRS lacks the statutory authority to tax the religious activities of churches. *See* Plaintiff's Memo. Opp. Summ. J. at 8-17.

> prohibits government from interfering with the exercise of religion. However, it does not limit the right of religious communities to influence the conduct of government. Under the Constitution, while government may not play a role in religion, religion may play a role in government. . . . The matter for present consideration is whether and to what extent is the purpose of religious organizations, as traditional guardians of transcendent moral values, to influence the political resolution of moral questions.[24]

A. Churches have historically been active in social and political affairs.

In 1977, Dean M. Kelley, a noted authority on tax-exempt issues, commented on the long tradition of church participation in the political process, finding no reason for contemporary churches which publicly comment on politics to lose their tax-exempt status:

> Throughout the history of the nation–and long before–churches have been active in helping to shape the public policy of the commonwealth in ways they believe God desired. . . . [T]he dissenting clergy thundered against the tyranny of King George from their pulpits. . . . [T]he churches, acting corporately, brought an end to the practices of dueling by getting prohibitions against it written into the constitutions . . . and no one conceived that this activity had any bearing on their tax exemption. Churches were active in the effort to abolish slavery. . . . [They] pressed for laws against gambling . . . prostitution, and child labor. They have worked for laws advancing labor organizing, woman suffrage, civil rights, and family welfare.

24. BRUCE R. HOPKINS, CHARITY, ADVOCACY, AND THE LAW 577-78 (1992).

> In none of these instances [prior to 1934 when the restriction against 501(c)(3) organizations aiding a political candidate was instituted] was such public-spirited activity of the churches conceived to jeopardize their tax-exemption. Nor should it today. . . . The churches serve the public good by their participation in the civil discourse, and instead of being *penalized* for it. . . they should be *encouraged.*[25]

Churches have also historically been active in public elections and have not been penalized for their actions. During the presidential election of 1800, churches attacked the candidacy of Thomas Jefferson, who was rumored to be a deist.[26] A Dutch Reformed minister, Rev. William Linn, attacked Jefferson's candidacy through print, much in the same way that Pastor Daniel Little and Pierce Creek attacked Bill Clinton's candidacy in 1992.

Linn produced a pamphlet, *Serious Considerations on the Election of a President*, and asked the following questions: "Does Jefferson ever go to church? How does he spend the Lord's Day? Is he known to worship with any denomination of Christians? . . . Will you then, my fellow-citizens, with all this evidence. . . vote for Mr. Jefferson?"[27] Linn's church went unpunished for his criticism of Jefferson. Jefferson's supporters, in turn, freely defended Jefferson, also without sanction: "[T]he charge of deism. . . is false, scandalous and malicious[;] there is not a single passage in the *Notes on Virginia*, or any of Mr. Jefferson's writings, repugnant to Christianity; but on the contrary, in every respect, favourable [sic] to it."[28]

Church participation in public elections is not limited to that of two centuries past. In fact, "[s]ince the campaign of Thomas Jefferson, religious and political controversy has been prominent in

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25. DEAN M. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES 87 (1977) (emphasis added).

26. DAVID BARTON, THE MYTH OF SEPARATION 36 (1991).

27. *Id.* at 35-36.

28. *Id.* at 36 (quoting TUNIS WORTMAN, A SOLEMN ADDRESS TO THE CHRISTIANS AND PATRIOTS UPON THE APPROACHING ELECTION OF A PRESIDENT OF THE UNITED STATES).

approximately one of every three campaigns for presidency."[29] For example, a 1980 letter from an Archbishop of the Catholic Church, written on church stationary and read to congregations in Massachusetts, urged Catholics not to vote for pro-choice congressional candidates.[30] In 1960, a religious leader broadcast a sermon in which he warned against voting for John F. Kennedy. The sermon was printed and distributed during Kennedy's campaign.[31]

It is not surprising that churches have taken part in American politics, because, as the Supreme Court has recognized, Americans are "a religious people whose institutions presuppose a Supreme Being."[32] The very fact that the formation of our constitutional republic was premised on belief in an externally-imposed moral order[33] gives impetus to religious people, through their religious institutions, to participate in the political process. Two scholars on the subjects of religion and politics have commented on the connection between religion and public participation in the political process:

> The sociological evidence is there to be analyzed by all. It shows that Americans are an incorrigibly religious people, and that an overwhelming majority of them believe that both individual and social morality derive from revealed religion–that is, the Judeo-Christian tradition. Consequently, the relation between private faith and public policy–between religion and politics–is being explored, and advanced, with vigor.[34]

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29. Plaintiff's Memo. Opp. Summ. J. at 8 (citing n.3 to B. DULCE & E. RICHTER, RELIGION AND THE PRESIDENCY v, 1-11 (1962)).

30. *Id.* at n.4 (citing to Anthony Lewis, *Religion and Politics*, N.Y. TIMES, Sept. 8, 1980, at A31.)

31. *Id.* (citing to DULCE and RICHTER, *supra* note 29, at 159, 193, 204).

32. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

33. The concept of inalienable rights presupposes rights given to man by a higher power; rights externally-imposed and impossible for man to take away. *See, e.g.*, PHILIP E. JOHNSON, REASON IN THE BALANCE 133-34 (1995).

34. HOPKINS, *supra* note 24, at 7 (quoting NEUHAUS and CROMARTIE, Preface to PIETY AND POLITICS: EVANGELICALS & FUNDAMENTALISTS CONFRONT THE WORLD viii (1987)).

The federal government was unwilling to penalize the churches in the examples above for fulfilling their mandate to judge the moral stature of potential political leaders. History, therefore, demonstrates that Congress understood that restricting the speech of churches was not within its jurisdiction. That is, the exercise of religious speech, whether in support of or in opposition to the government cannot be censored by government. Thomas Jefferson, the architect of the so-called "wall of separation between Church and State,"[35] made clear this jurisdictional point in his second Inaugural Address:

> In matters of religion, I have considered that its free exercise is placed by the *Constitution independent of the powers of the General [federal] Government.* I have therefore undertaken on no occasion to prescribe the religious exercises suited to it, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies.[36]

James Madison clearly affirmed Jefferson's statement, declaring: "There is not a shadow of right in the general [federal] government to intermeddle with religion. . . . This subject is, for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it."[37]

Historical evidence, therefore, reveals the welcome participation of religious people and institutions in politics *and* the government's lack of jurisdictional authority to restrict the exercise of religion and religious speech. Coupled with the still fervent need and desire for current participation of religious bodies in politics, these facts should

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35. ADRIENNE KOCH and WILLIAM PEDEN, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 332 (1944).

36. JOHN W. WHITEHEAD, FUNDAMENTAL PRINCIPLES UNDERGIRDING THE AMERICAN CONSTITUTION 26 (1990) (quoting 8 THE WORKS OF THOMAS JEFFERSON 42 (H.A. Washington, ed. 1884)) (emphasis added).

37. *Id.* at 26-27 (quoting 5 THE WRITINGS OF JAMES MADISON 176, 132 (Gaillard Hunt, ed. 1910)).

put courts on notice to scrutinize closely any government entanglement with religious expression. Consequently, the government should not punish Pierce Creek for performing a function historically required of churches: the critique of government and governmental policies.

B. Religion's unique role in society distinguishes churches from secular § 501(c)(3) organizations; unless courts recognize that fact and exempt churches from the § 501(c)(3) restrictions, the church's important voice on moral, social, and political matters will be lost.

Churches are unique among § 501(c)(3) organizations in that their involvement in politics is inevitable due to the promulgation of a moral code by every major religion. As one commentator declared: "Religion and politics have been intertwined since the birth of our nation. In a democracy created to reflect the social fabric of its citizens, religious groups have always advocated moral positions to further or impede political causes and political campaigns."[38]

A church (or synagogue, mosque, temple, etc.) is naturally concerned with the total enterprise of religion.[39] Much legislation and government policy involves moral issues–naming some things as wrong or unlawful, and other things as right or commendable. As

38. Judy Ann Rosenblum, Note, *Religion and Political Campaigns: A Proposal to Revise Section 501(c)(3) of the Internal Revenue Code*, 49 FORDHAM L. REV. 536 (1981) (citations omitted).

39. *See, e.g.*, Wilfred R. Caron and Deirdre Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J. L. & POL. 169, 183 (1985). The responsibility of the Church to address the moral and religious dimensions facing this society derives from Catholic theology and social doctrine. As the Bishops have stated:

> [i]t is the Church's role as a community of faith to call attention to the moral and religious dimension of secular issues, to keep alive the values of the Gospel as a norm for social and political life, and to point out the demands of the Christian faith for a just transformation of society.

Id. (quoting POLITICAL RESPONSIBILITY: CHOICES FOR THE 1980S, A STATEMENT OF THE ADMINISTRATIVE BOARD OF THE UNITED STATES CATHOLIC CONFERENCE 2 (rev. ed. Mar. 22, 1984)).

such, some churches define their scope of purpose[40] to extend to the political process and government should not restrict those churches' right to do so.[41] A primary purpose of the church is to influence[42] and this purpose is generally achieved through articulation of the church's tenets. Thus, free speech is of paramount importance to churches, for through free speech religion is exercised and its purposes are more easily fulfilled.

Because religion and politics are so intertwined, the limitation on religious political speech–imposed by the § 501(c)(3) restrictions–causes irreparable harm to persons in a democratic society. This point is clearly seen through the broad protection which the Supreme Court has traditionally given political speech and the accompanying esteem in which the Court holds political speech. In *Buckley v. Valeo*, the Court stated that "[d]emocracy depends on a well-informed electorate,

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40. Section 501(c)(3) requires that organizations under this provision be organized under one of the enumerated purposes to qualify as a charitable organization. The provision exempts from taxation "[c]orporations. . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes [etc.]" I.R.C. § 501(c)(3).

41. In Holy Spirit Ass'n for Unification of World Christianity v. Tax Comm'n, the court said:

> [I]t is not the providence of the civil authorities to . . . [decide] what is to be denominated religious and what political or economic. It is for religious bodies themselves, rather than the courts or administrative agencies, to define, by their teachings and activities, what their religion is. The courts are obliged to accept such characterization of the activities of such bodies . . . unless it is found to be insincere or sham."

435 N.E.2d 662, 668 (N.Y. 1982).

42. In 1941, the Third Circuit Court of Appeals stated:

> Religion includes a way of life as well as beliefs upon the nature of the world and the admonitions to be "Doers of the word and not hearers only" (*James* 1:22) and "Go ye therefore, and teach all nations, . . ." (*Matthew* 28:19) are as old as the Christian Church. The step from acceptance by the believer to his seeking to influence others in the same direction is a perfectly natural one, and is found in countless religious groups.

Girard Trust Co. v. Comm'r, 122 F.2d 108, 110 (3d Cir. 1941) (omission in original).

not a citizenry legislatively limited in its ability to discuss and debate candidates and issues."[43] The Court recognized that

> [d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[44]

Political speech by churches should not be singled out as an exception to this statement. If it is, an important source of civil discourse will be lost.

Religion is given a special place in society because it provides those who acknowledge it with an "ultimate meaning."[45] Dean Kelley states that a byproduct of religion's basic function as the producer of ultimate meaning is the legitimization of the governing authorities: "This byproduct, legitimation, is not well understood even by the sociologists and political scientists who discerned it. . . . [P]eople derive from their basic framework of ultimate meaning a sense that it is right (or not right) to obey, affirm, and be loyal to a certain system of authority (or legitimated power)."[46] Religion, the source to which a large part of American society inevitably looks for endorsement or disapproval of its culture and government, must not be stifled in the name of finance, partisan politics, or "separation of church and state."

The Supreme Court recognized the benefit that society derives from the presence of religion when it affirmed the constitutionality of church tax exemption in *Walz v. Tax Commission*.[47] In *Walz*, the Court explained its rationale for exempting § 501(c)(3) organizations from income taxation: "The State has an affirmative policy that

43. 424 U.S. 1, 49 n.55 (1976) (per curiam).
44. *Id.* at 14 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
45. KELLEY, *supra* note 25, at 90.
46. *Id.*
47. 397 U.S. 664 (1969).

considers these groups as beneficial and stabilizing influences in community life and finds [tax exemption] useful, desirable, and in the public interest."[48] Mere affirmation of the constitutionality of church tax exemption, however, is not sufficient. In *Walz*, the Court's rationale for granting exemption does little to separate churches from secular charities.

In fact, the Court's reasoning could prove a major impediment to a judicial ruling that the campaigning ban is inapplicable to churches. For unless a court views churches as something more than a charitable organization that happens to hold religious services, it will not be convinced that churches should receive what the court may see as "special" treatment over secular charities.

In order to grant churches exemption from the campaigning ban, courts must recognize churches' unique and influential role on society as a vital originator of discourse on moral, social, and political issues. Courts must realize that various religious creeds call for their churches to engage and transform the culture through involvement with politics.[49] The reality of and need for religious involvement in all areas of public debate must be clearly presented to the courts.

C. The legislative history (or lack of it) behind the political campaign restriction reveals that Congress did not intend to stifle churches' unique moral, social, and political commentary.

The original rationale for implementing the political campaign restriction reveals that Congress did not intend to restrict churches' ability to comment on the character of political candidates. Rather, Congress implemented the restriction to prohibit § 501(c)(3) organizations from contributing financially to candidates' campaigns. "The IRS cites no authority for now taxing this Church's speech, other than a reliance upon its own interpretation of the Tax Code.

48. *Id.* at 673.

49. For example, politically-conservative Christian churches have interpreted *Matthew* 5:14 ("You are the light of the world. A city on a hill cannot be hidden.") to mean that Christians should engage the culture through every means, including politics. (New International).

This is not a sufficient reason for subjugating 'two centuries of uninterrupted freedom from taxation" which has served 'to help guarantee all forms of religious belief."[50]

In 1954, Congress added the "candidate campaign restriction" to the I.R.C.[51] The restriction was included in the I.R.C. without benefit of congressional hearings.[52] Senator Lyndon B. Johnson offered the amendment out of fear that a charitable organization had financed the campaign of a political opponent.[53] With respect to the amendment's purpose, Johnson said the proposed law would affect those who "intervene in any political campaign on behalf of any candidate for any public office."[54]

For over thirty years, Congress made no attempt to explain the rationale for the campaign restriction, nor did it comment on the ban's scope, save a passing mention in 1969 that § 501(c)(3) permitted "no degree of support for an individual's candidacy for public office."[55] In 1987, however,

> [a] small amount of clarification (but also some obfuscation) of the rule was offered . . . when Congress amended the Code as part of the Omnibus Budget Reconciliation Act of 1987 (OBRA). The amendments grew out of hearings by the House Ways and Means Subcommittee on Oversight, which was spurred to action not, evidently, by the activities of churches but by the widely publicized lobbying and campaign efforts of certain secular advocacy groups and the use by some politicians of Section 501(c)(3) organizations to

50. Plaintiff's Memo. Opp. Summ. J. 11 (quoting *Walz*, 397 U.S. at 678).

51. 100 Cong. Rec. 9604 (1954).

52. *Id.*

53. HOPKINS, *supra* note 13, at 327.

54. 100 Cong. Rec. 9604 (1954). The words "(or in opposition to)" were added to the I.R.C. in 1987. "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 (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.*" I.R.C. § 501(c)(3) (emphasis added).

55. H.R. REP. No. 413, 91st Cong., 1st Sess. § 32 (1969); S. Rep. No. 552, 91st Cong., 2d Sess. § 47 (1969).

> showcase their stands on issues in advance of their formal declarations of candidacy in upcoming presidential elections.[56]

The House of Representatives stated in its report, for the first time, a rationale for the campaign restriction, declaring that the "prohibition on political campaign activities . . . by charities reflects a Congressional policy that the U.S. Treasury should be neutral in political affairs."[57] The House report also "explicitly affirmed that the bar on campaign intervention by churches is absolute and that any amount of such conduct renders an organization wholly ineligible for exemption from federal income taxes and receipt of tax-deductible contributions."[58]

As applied to Pierce Creek, the campaign restriction today is a complete ban on a charitable organization's expression of *opinions* regarding political candidates. When one considers the setting from which the campaign restriction arose–from a nervous incumbent acting to prevent the funding of political opponents by charitable organizations–the restriction appears at *least* to be suspect as an impermissible restriction on political expression.[59] Senator Johnson's amendment attempted to prevent tax-exempt organizations from

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56. Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 228-29 (1992). Congress added the parenthetical phrase "(or in opposition to)" to § 501(c)(3)'s political campaign restriction to make clear that the campaign ban extended beyond efforts favoring a particular candidate. H.R. Rep. No. 391 (II), Omnibus Budget Reconciliation Act, 100th Cong., 1st Sess., pt. 2, at 1621 (1987).

57. H.R. REP. No. 100-391 (II), Omnibus Budget Reconciliation Act, 100th Cong., 1st Sess., pt. 2, at 1625 (1987).

58. Carroll, *supra* note 56, at 229. Carroll also notes, however, that the House report "also called for two tiers of excise tax penalties on the electoral activities of charitable organizations in a way that seems to contemplate instances in which exemption would not necessarily be revoked for such activity." *Id.* *See* Section III, Part III of this article for further exploration of the IRS's failure to invoke these excise tax penalties in the case of Pierce Creek.

59. One commentator suggests that the campaign restriction originated out of "overreaction to isolated incidents and periodic personal affront to individual legislators rather than response to either careful empirical data or sound theoretical underpinnings." Laura B. Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 337 n.130 (1990).

directly *financing* political campaigns, not from expressing opinions on the quality and character of the candidates and on the candidate' views. Congress, in both 1954 and 1987, worried about politicians' use of § 501(c)(3) organizations to either finance or begin their campaigns; the sparse amount of Congressional history on § 501(c)(3) evidences no intent by Congress to proscribe commentary by churches on candidates' moral qualifications.

It is one thing for a church or synagogue to be financially involved in a candidate's campaign with deductible gifts,[60] but it is quite another for a pastor or rabbi to speak out for or against a candidate with respect to matters germane to religion.[61] Pierce Creek must show that although all tax-exempt organizations are subject to the campaigning ban, the ban's restriction on churches affects them to a much greater degree than secular charities. The restriction upon religious political speech adversely impacts a central conviction of religion's purpose: the ability to address issues germane to its moral code with the objective of influencing others.[62] While charitable, educational, and scientific § 501(c)(3) organizations do not purpose to influence the public on issues considered "political," churches do. Morality is an underpinning of law and policy and thus many issues that churches are called to address involve government and politics.[63] As such, the campaign restriction eliminates an essential function of religion.

The unfortunate result of the I.R.C. restrictions is that no meaningful distinctions have been made between moral judgment and partisan politicking. This has made religious leaders fearful of fulfilling their duties to speak out on the nexus between religion and

60. For example, in April 1996 the Democratic Party raised $140,000 at the Hsi Lai Buddhist Temple in Hacienda Heights, California. Buddhist monks, who live on $40 monthly stipends, supposedly donated up to $5,000 each. Kevin Merida and Serge F. Kovaleski, *Mysteries Arise All Along the Asian Money Trail*, WASH. POST, Nov. 1, 1996, at A1. The IRS has not, however, taken action against the Buddhist temple. *See* Section III, Part B for further examination of potential selective prosecution of churches that support traditionally conservative policies.

61. *See supra* notes 40-43.

62. *See supra* note 43.

63. *See supra* notes 39-43.

modern day issues. The Pierce Creek case will hopefully make clear the distinction between the discussion of moral issues and campaign expenditures, while providing a coherent framework which allows churches commonsensical expression while facilitating the congressional purpose for the campaign restrictions.

III. THE CAMPAIGN PROHIBITION AS APPLIED TO CHURCHES VIOLATES RFRA AND THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION

A. The campaign ban places a substantial burden on churches' free exercise of religion, which the federal government does not have a compelling interest to restrict.

Pierce Creek asserts that the revocation of its tax exemption violates its right to freedom of religious expression under the Religious Freedom Restoration Act (RFRA).[64] Under RFRA, the

64. Since the filing of the complaint, the Supreme Court has declared RFRA to be unconstitutional. *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997). The Supreme Court's decision, however, did not address RFRA's applicability to the federal government. The Court only held that Congress lacked authority under section 5 of the Fourteenth Amendment to enact RFRA. *Id.* at 2162, 2164. Thus, because the constitutionality of legislation is decided on the narrowest possible ground, Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1452 (1995), RFRA is unconstitutional only as applied to state governments. *See* Bynum v. United States Capitol Police, No. 97-1337 (D.D.C.), Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss, or, in the Alternative, for Summary Judgment at 22-23. This brief, recently filed by the United States Government in United States District Court for the District of Columbia, states that:

> [T]he holding in *Flores* turned upon the authority of Congress to impose burdens upon the states. *See id.* at *6 ("Congress relied on its Fourteenth Amendment enforcement power in enacting the most far reaching and substantial of RFRA's provisions, those which impose requirements on the States."); *id.* at *8 ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on States") (footnote omitted).
>
> This reasoning does not extend to Congress's actions in the federal sphere. With respect to RFRA's application to federal law and the federal government, Congress enacted the statute pursuant to its substantive Article I powers coupled with its broad authority under the Necessary and Proper Clause, U.S. Const., art. I, § 8, cl. 18, rather than Section 5 of the Fourteenth Amendment. *See* S. Rep. No. 103-111, 103d

IRS: 1) does not have a compelling interest to prohibit the church from speaking out on candidates' moral qualifications; and 2) assuming, arguendo, that a compelling state interest exists to silence the church's voice, revocation of a church's tax-exempt status is not the least restrictive means for furthering any governmental interest. This is evidenced by the IRS's ability to apply excise taxes to organizations that engage in prohibited activity under § 501(c)(3).[65]

RFRA codified the compelling interest test as set forth in *Sherbert v. Verner*[66] and *Wisconsin v. Yoder*.[67] It applies to federal law which was "adopted before or after the enactment" of RFRA and is utilized "in all cases where free exercise of religion is substantially burdened. . . ."[68] RFRA provides that:

> Government may substantially burden a person's exercise of religion only if 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.[69]

Cong., 1st Sess. 13-14 (1993), *reprinted in* 1994 U.S.C.C.A.N. 1892, 1903; H.R. Rep. No. 103-88, 103d Cong., 1st Sess. 9 (1993). *Accordingly RFRA remains applicable to the federal government.*

Id. (emphasis added).

Lastly, guidelines recently issued by President also confirm that *Flores* only held RFRA unconstitutional as applied to state governments. "[U]nder the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, Federal governmental action that substantially burdens a private party's exercise of religion can be enforced only if it is justified by a compelling interest and is narrowly tailored to advance that interest." *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace*, Directive of President Clinton, 1997 WL 475412 at *11 (White House, August 14, 1997). Hence, RFRA may still be utilized in freedom of religious claims against the federal government.

65. *See* I.R.C. §§ 527, 4955.

66. 374 U.S. 398 (1963).

67. 406 U.S. 205 (1972).

68. The Religious Freedom Restoration Act of 1993 (hereinafter RFRA), 42 U.S.C. § 2000bb-2(b)1, 6(a) (Supp. 1995).

69. RFRA, 42 U.S.C. § 2000bb-1(b)1-2 (Supp. 1995).

1. The campaigning ban places a substantial burden on churches' free exercise of religion.

As shown above,[70] a primary function of some churches in America is to critique and legitimize public candidates and government policy. To tax churches for exercising what has been a historically-protected right[71] penalizes their valuable social and political commentary. The tax also seriously endangers the financial livelihood of churches, like Pierce Creek, that feel it is their duty to speak out on the moral qualifications of political candidates.

"[A]s stated in Dan Little's Declaration, the revocation of tax exempt status will put an end to the existence of [Pierce Creek] Church. Nothing could be more burdensome to the free exercise of religion than ending it."[72] A substantial burden on the free exercise of religion exists when a church loses its ability to survive financially when it exercises its sincere religious belief.

Beyond the disturbing fact that a church's existence could end if it continued to speak out on the moral qualifications of candidates, another substantial burden falls on churches when the campaigning ban is applied: having to file corporate tax return Form 1120.[73] This form would require churches to divulge vital information regarding their finances and leadership.[74] Government has no jurisdictional authority to access this information.[75] Being forced to divulge this information places a substantial burden on church members' autonomy to freely exercise their religion.

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70. *See* Section II, Part Two.
71. *See* Section II, Part One.
72. Plaintiff's Memo. Opp. Summ. J. 18.
73. *See supra* note 21.
74. 26 C.F.R. § 1.1247-2, 1.6012-2 (1996).
75. Biblically speaking, government exists only to reward good and punish evil. *See Romans* 13:4 (New International). As such, detailed knowledge of the internal operations of a church do not come within its ambit of authority. Legally, government cannot gain this knowledge without becoming excessively entangled with religion and thus risking a violation of the Establishment Clause. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970).

2. Application of the campaigning ban to churches does not further a compelling governmental interest.

The IRS does not have a compelling interest to prevent churches from addressing moral issues of the day. For the exercise of "[r]eligious speech, even responding to moral discourses of political candidates, is a protected constitutional right, not a privilege."[76] The United States Supreme Court, in *Follett v. Town of McCormick*,[77] declared that "*[t]he exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or previous restraint. For, to repeat, 'the power to tax the exercise of a [liberty] is the power to control or suppress its enjoyment.'*"[78] Therefore, according to the *Follett* Court, the government does not have a compelling interest to tax the exercise of a constitutionally protected right–the free exercise of religion and the freedom of speech.[79]

The IRS asserts the compelling interest that "the U.S. Treasury should be neutral in political affairs."[80] This interest is hardly compelling for

> to accept this argument one has to accept two distinct propositions. First, that tax exemption is a *direct* subsidy of whatever is said by a pastor. And second, that the Treasury *ab initio* endorses everything that is said from the pulpit by reason of tax exempt status. Those two unsupported logical

76. Plaintiff's Memo. Opp. Summ. J. 19.

77. 321 U.S. 573 (1944) (license tax on preacher is an unconstitutional restraint on freedom of religion).

78. Plaintiff's Memo. Opp. Summ. J. 21 (emphasis in original) (internal citations omitted).

79. Although the federal government possesses "not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government" THE FEDERALIST NO. 39 at 245 (James Madison) (Clinton Rossiter ed., 1961), this supreme authority is tempered by the requirement that the power exercised "be necessary to the public good . . . to guard as effectually as possible against a perversion of the power to the public detriment." THE FEDERALIST NO. 41 at 256 (James Madison) (Clinton Rossiter ed., 1961).

80. Defendant's Summ. J. Memo 39.

> leaps ignore "the critical difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Preachers have attacked political candidates' morality since the inception of our country . . . and by allowing this religious speech now the Government is neither breaching its neutrality, nor endorsing it.[81]

Finally, under *Follett*,[82] if the government has no compelling interest to tax pulpit preaching, it then has no compelling interest to tax preaching from a newspaper:

> If, as in *Follett*, there is no overriding interest which would allow the imposition of a tax on one who preaches religion, what compelling interest exists to tax a church that preaches religious doctrine in a newspaper? To grant the state the power to tax the church in this case is the equivalent of granting the IRS the power to suppress what is said in the pulpit. The IRS has shown no compelling justification for taking the actions it took here. . . ."[83]

In short, a compelling interest to suppress a church's free exercise of religion and its freedom of speech does not exist here because the government may not tax the exercise of constitutional rights[84] and because the government does not endorse everything it fails to censor.[85]

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81. Plaintiff's Memo. Opp. Summ. J. 22-23 (quoting Rosenberger v. University of Virginia, 115 S.Ct. 2510, 2522 (1995) (emphasis in original) (internal citations omitted).
82. 321 U.S 573 (1944).
83. Plaintiff's Memo. Opp. Summ. J. 23.
84. *Follett*, 321 U.S. 573.
85. *See* Board of Educ. v. Mergens, 496 U.S. 226 (1990).

3. Assuming, arguendo, that a compelling governmental interest exists, revocation of tax-exempt status is not the least restrictive means of furthering that compelling interest.

Under RFRA, the IRS must have a compelling justification for suppression of religious expression and use the least restrictive means available.[86] In the Pierce Creek case, the IRS has acknowledged three means by which it could have enforced the campaigning ban: "(1) a 10% tax on the $44,954 advertisement cost, pursuant to I.R.C. § 4955 (26 U.S.C.); (2) an injunction against further partisan political activity, pursuant to I.R.C. § 7409 (26 U.S.C.); and/or (3) revocation."[87] Among these alternatives, revocation is not the least restrictive means available.

In 1987, Congress added to the I.R.C. § 4955, a two-tier system of excise taxes on the campaign activities of § 501(c)(3) organizations.[88] "These intermediate penalties . . . apply to 'political expenditures,' defined in relevant part as 'any amount paid or incurred by a Section 501(c)(3) organization in any participation in, or intervention in . . . any political campaign.'"[89] A political expenditure triggers the first-tier tax, payable by the § 501(c)(3) organization, of 10 percent of the amount spent on the political expenditure.[90] If the first-tier tax is not paid in a timely fashion, then an additional tax, the second-tier, is invoked.[91] This second-tier tax functions as a more harsh penalty, as it imposes a 100 percent tax on the amount of the political expenditure.[92]

The existence of the excise taxes provides the IRS with a much less restrictive alternative to enforce the campaigning ban than does outright revocation of the church's tax-exempt status.[93] In fact, the

86. RFRA, *supra* note 68, at 42 U.S.C. § 2000bb-1(b)1-2.

87. Defendant's Summ. J. Memo 40.

88. Congress originally introduced the law as the "Tax-Exempt Organizations' Lobbying and Political Activities Accountability Act of 1987" H.R. 2942, 100th Cong., 1st Sess. (1987).

89. Carroll, *supra* note 56, at 229 (quoting I.R.C. § 4955(d)(1)).

90. *See* I.R.C. § 4955(a)(1).

91. *See* I.R.C. § 4955(b)(1).

92. *Id.*

93. Plaintiff's Memo. Opp. Summ. J. 24.

IRS's solution was recently deemed "unusual" and "draconian" by the United Stated District Court for the District of Columbia.[94] Moreover, congressional records recognize that revocation of tax-exempt status is an extreme measure:

> A conclusion that these provisions anticipate that some groups may continue an exempt existence after engaging in the forbidden activities is supported by the House OBRA Report's observation that the penalties were justified in part because "*the Internal Revenue Service may hesitate to revoke the exempt status of a charitable organization for engaging in political campaign activities in circumstances where that penalty may seem disproportionate.*"[95]

The IRS revoked Pierce Creek's tax-exempt status after the church placed full-page advertisements in two national newspapers.[96] These actions certainly seem to qualify as "circumstances where that penalty [revocation] may seem disproportionate."[97] In fact, Pierce Creek argues that

> [a]lthough this was the first alleged violation by the Church at Pierce Creek, and although the Church at Pierce Creek did not continue to exercise its free speech rights in a similar manner over the two year period of this investigation, the IRS nonetheless now asserts that leaping to the third and harshest punishment was the "least restrictive means" of enforcing whatever interest it had. [I]t is instructive to note

94. Branch Ministries, Inc. v. Richardson, ___ F. Supp. ___ 1997 WL 379007, *6 (D.D.C. July 3, 1997). *See infra* notes 105-11 for analysis of the district court's decision to grant Pierce Creek limited discovery into the IRS's files in order to determine whether the IRS selectively prosecuted the church.

95. Carroll, *supra* note 56, at 230 (quoting H.R. REP. No. 100-391 (II), *supra* note 57, at 1623) (emphasis added).

96. Plaintiff's Memo. Opp. Summ. J. 7.

97. *Id.*

> that the IRS' "solutions" to this "problem" predominantly focused on silencing the Church at Pierce Creek.[98]

Finally, in examining the hierarchy of potential penalties from which the IRS chose, Pierce Creek asserts that

> [t]he entire structure of this taxing scheme shows a congressional intent to attempt to gradually rectify the political involvement of charitable organizations (not churches) through ever increasing sanctions. It also illustrates a congressional intent that political involvement must have been fairly extensive prior to the imposition of the excise tax. The tax authorities here did not use this gradual procedure, even though it was self-apparent that the actual political involvement was, in relation to the other activities of this church, *de minimus*.[99]

If the district court finds that the IRS does have a compelling interest in applying the campaigning ban to Pierce Creek, the court should find that the facts of this case indicate that the IRS has ignored congressional intent in refusing to apply the excise tax system and thus has failed to employ the least restrictive means available.

98. Plaintiff's Memo. Opp. Summ. J. 24.
99. *Id.* at 29.

B. The IRS has failed to revoke the tax-exempt status of churches that have supported politically liberal candidates. The IRS, acting under the President whose candidacy Pierce Creek opposed, has thus engaged in selective prosecution of a politically-conservative church, denying Pierce Creek equal protection of the law.

1. The Constitution requires that tax laws be enforced uniformly; when similarly situated groups are not treated similarly, equal protection of the laws does not exist.

Common sense requires that the IRS enforce the tax laws uniformly. Pierce Creek argues that "[t]ax exemptions are subject to the limitation that they and the classification upon which they are based be reasonable, not arbitrary, and apply to all persons similarly situated."[100] Discrimination based on "differences of color, race, nativity, *religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers. . . would be. . . a denial of equal protection of the laws to the less favored classes.*"[101]

In its Memorandum in Opposition to Defendant's Motion for Summary Judgment, Pierce Creek requested that the court deny the IRS summary judgment because, *inter alia*, discovery was needed to prove that the IRS had selectively enforced the campaign prohibition and denied Pierce Creek equal protection of the laws.[102] Pierce Creek provided the IRS and the court with a large list of incidents in which religious groups and churches engaged in campaign activities for political candidates.[103] An overwhelming majority of the candidates

100. Plaintiff's Memo. Opp. Summ. J. 34 (quoting U.S. v. Dept. of Revenue, 202 F. Supp. 757, 759 (N.D. Ill.), *aff'd per curiam*, 371 U.S. 21 (1962)).

101. *Id.* at 34-35 (quoting American Sugar Ref. Co. v. Louisiana, 179 U.S. 89, 92 (1900) (emphasis added)).

102. Plaintiff's Memo. Opp. Summ. J. 37.

103. *See* Gayle White, *Q&A: Jay Alan Sekulow: Double Standard by IRS Alleged in Church Dealings; Critic Says It Targets Conservative Groups*, ATLANTA CONST., July 31, 1996, at 4A.

were politically liberal, and none of the groups were penalized by the IRS for their political campaign activities.[104]

On July 3, 1997, Judge Friedman of the United States District Court for the District of Columbia issued an opinion deciding the issue of discovery in the Pierce Creek case.[105] Finding that Pierce Creek had established the requisite colorable claim of selective prosecution, Judge Friedman allowed Pierce Creek partial discovery of the IRS's files to determine whether the IRS had selectively prosecuted the church.[106] The court found that "plaintiffs have made a colorable showing sufficient to justify discovery that their political and/or religious beliefs may have played an impermissible role in the revocation of their tax exempt status."[107] Although the district court found that "many of the instances cited by plaintiffs are substantially dissimilar to the instant case . . . [s]ome[,] however, warrant closer attention because they suggest greater church financial involvement and overt advocacy of identifiable political candidates."[108] The court

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104. *Id.*

105. Branch Ministries, Inc. v. Richardson, ___ F. Supp. ___ 1997 WL 379007 (D.D.C. July 3, 1997).

106. *Id.* at *5.

107. *Id.* To establish a colorable claim of selective prosecution and thus obtain discovery, one must show "that (1) she was singled out for prosecution from among others similarly situated and (2) that her prosecution was improperly motivated, i.e., based on race, religion, or another arbitrary classification." Plaintiff's Memo. Opp. Summ. J. 35 (quoting U.S. v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983)).

108. Branch Ministries, 1997 WL 379007 at *3-4. The court then cited these similar instances:

> During the 1988 presidential campaign Reverend Jesse L. Jackson, Sr. took up collections at churches around the country. See *I.R.S. Is Urged to Investigate Jackson's Church Collections*, N.Y. TIMES at B6 (Feb. 17, 1988). In 1980, two days before the Massachusetts' congressional primary, Boston's Roman Catholic Archbishop issued a letter that was read from pulpits throughout the state urging Catholics not to vote for pro-choice candidates, an act widely understood to refer to the two Democratic candidates. See Anthony Lewis, *Religion and Politics*, N.Y. TIMES at A31 (Sept. 17, 1980). Pro-choice activists subsequently brought an unsuccessful action seeking to force the Department of the Treasury to revoke the Catholic Church's tax exemption. See *Abortion Rights Mobilization v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982). Finally, in 1992 the IRS issued a warning to (but did not revoke the tax exempt status of) the Jimmy Swaggart Ministries for its endorsement of Reverend Pat Robertson for president in 1986. *See Jimmy Swaggart Ministry Admits Tax Law Violation*, L.A. TIMES at F17 (Feb. 1, 1992).

then stated that "[t]hese examples, although not restricted to any single political party or any one denomination, tend to suggest that the IRS treated BMI in a significantly different fashion from the way it has treated other churches and/or religious organizations that have engaged in overt political campaign activity."[109] Specifically, the court found that Pierce Creek had produced evidence showing that "'similarly situated [churches] could have been prosecuted, but were not,'"[110] and that "a colorable claim of intentional discrimination" exists.[111]

The Internal Revenue Service has selectively enforced the campaign prohibition against politically conservative churches and thus violated Pierce Creek's constitutional right to equal protection under the 14th Amendment.[112] The IRS has enforced the campaign ban against Pierce Creek and is reportedly investigating alleged violations of the ban by two other churches that favor Republican candidates and policies.[113] Yet, the IRS has turned its head while various Democratic candidates have campaigned and raised money at numerous churches.[114]

Id. at *4. *See infra* text accompanying notes 114-32 for further examination of the IRS's disparate treatment of Pierce Creek.

109. *Id.*

110. *Id* (quoting U.S. v. Armstrong, 116 S. Ct. 1480, 1488 (1996)).

111. *Id.* at *5.

112. Plaintiff's Memo. Opp. Summ. J. 37.

113. Americans United for Separation of Church and State have reported the Second Baptist Church of Houston and the Second Baptist Church of Lake Jackson, Texas to the IRS for violating the campaign prohibition, but the IRS has not affirmed or denied that an investigation is underway. *See, e.g.*, Linda Feldman, *Churches Risk Tax Standing By Becoming Too Political*, THE CHRISTIAN SCIENCE MONITOR, Apr. 1, 1996, at 1 (Second Baptist Church of Houston member placed pamphlets in the church, urging parishioners to attend a political precinct convention and vote for a particular slate of delegates); Jennifer Lenhart, *IRS Alerted to Lake Jackson Church's Alleged Politicking*, HOUSTON CHRONICLE, Aug. 27, 1996, at 15 ("Second Baptist Church of Lake Jackson . . . mailed 7,000 letters under its letterhead to churches and elected officials nationwide, urging them to vote against any candidate who supports abortion, partial birth abortion in particular.").

114. "Congress recognized that the political involvement prohibitions in IRC § 501(c)(3) presented selective enforcement problems. The Senate Finance Committee expressed concern almost twenty years ago that 'the standards are too vague and thereby tend to encourage subjective and selective enforcement.' S. Rep. No. 938 - pt. II, 94th Cong., 2d

2. The IRS's failure to revoke the tax-exempt status of churches that actively support liberal political candidates demonstrates that the IRS has selectively prosecuted Pierce Creek because of its politically conservative views.

The Supreme Court has stated that "cases delineating the necessary elements to prove a claim of selective prosecution [on the merits] have taken great pains to explain that the standard is a demanding one."[115] In order to prove a claim of selective prosecution, Pierce Creek must demonstrate "that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose."[116] Nevertheless, examples of inaction toward churches which advocated politically liberal candidates, in addition to other documentation that Pierce Creek may find in discovery, provide strong evidence that the Internal Revenue Service has selectively prosecuted Pierce Creek. For example, in 1984 a political advertising program, paid for by a § 501(c)(3) organization, favoring Walter Mondale was "'broadcast during a two week period around the Reagan/Mondale foreign and defense policy debate on October 21, 1984. . . .'"[117] The program "contained statements that 'could be viewed as demonstrating a preference for one of the political candidates' [Mondale]" and "'could be viewed' as having content such that 'individuals listening to the ads would generally understand them to support or oppose a candidate in an election campaign. . . .'"[118] Despite the factual similarities between Pierce Creek's 1992 newspaper advertisement and the 1984 political advertising program, the IRS Chief Counsel's office concluded that the § 501(c)(3) organization responsible for the advertising program did not violate the campaigning prohibition.[119]

Sess. 80, *reprinted in* U.S. Cong. & Ad. News 4030, 4104 (1976)." Plaintiff's Memo. Opp. Summ. J. 31.

115. U.S. v. Armstrong, 116 S. Ct. 1480, 1486 (1996).

116. *Id.* at 1487.

117. Plaintiff's Memo. Opp. Summ. J. 36 (quoting IRS Technical Advice Memorandum 8936002).

118. *Id.*

119. Priv. Ltr. Rul. 89-36-002 (May 24, 1989).

Another example reveals the IRS's discriminatory application of the campaigning ban. In his 1988 presidential campaign, Jesse Jackson enlisted the support of black churches nationwide.[120] At the beginning of the primary races, Jackson called on 500 black churches across the country to raise campaign funds in their January 31 Sunday collections.[121] After the money had been collected, Americans United for Separation of Church and State[122] filed a complaint with the Internal Revenue Service. In their complaint, Americans United asked that action be taken against two parties: the churches that participated in the Jackson fund-raising campaign and Jimmy Swaggart Ministries and several evangelical churches–two groups that reportedly participated in Pat Robertson's campaign.[123]

No action was taken against Jackson.[124] Commentator Anne Berrill Carroll explains that

> Jackson's use of church altars as political platforms and church congregations as sources of campaign contributions continued throughout the spring and summer. Black ministers around the nation openly endorsed Jackson and used their churches as bases for voter registration drives to get out the vote on behalf of Jackson and black candidates in other races.[125]

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120. *Jackson to Pass the Plate at Churches Sunday*, N.Y. TIMES, Jan. 28, 1988, at A23.

121. *Id.*

122. Americans United also filed the complaint against Pierce Creek that began the IRS investigation into the church's purchase of the advertisement. *See New York Church's Presidential Campaign Advertisement Violates Federal Tax Law, Americans United Tells IRS*, PRESS RELEASE, Americans United for Separation of Church and State, Nov. 4, 1992.

123. David E. Anderson, *IRS Asked to Scrutinize Churches in Politics*, UPI, Feb. 12, 1988.

124. Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 223 (Fall 1992).

125. *Id.* (citing to, *inter alia*: Thomas B. Rosenstiel, *Jackson Passes the Plate–From Church to Mansion*, L.A. TIMES, Mar. 25, 1988, at S10; Michael Tackett & Mitchell Locin, *Jackson Again Stumps from Pulpit*, CHI. TRIB., Mar. 7, 1988, at 5; Robin Toner, *Hosannas to God and Votes for Jackson*, N.Y. TIMES, Mar. 7, 1988, at A16; Merle English, *Jackson Campaign Mobilizing Churches*, NEWSDAY, Jan. 27, 1988, at 27; *Clergy Back Jackson*, UPI, Apr. 16, 1988.)

The Internal Revenue Service did take action, however, against Jimmy Swaggart Ministries, a politically conservative religious organization.[126] Shortly before the 1992 presidential primary races began, the IRS issued a warning to the religious community,[127] stating that Swaggart's endorsement of Pat Robertson's presidential candidacy violated the political candidate campaign prohibition.[128] As a result, Jimmy Swaggart Ministries had to take measures to ensure that the violations would not occur again.[129]

The IRS warning did little to prevent churches from endorsing candidates, including then-Governor Bill Clinton, during the 1992 presidential campaign.[130] Since the 1992 election, President Clinton and Vice-President Al Gore have not stopped making political appearances in churches. In 1994, President Clinton campaigned for Mario Cuomo at Bethel A.M.E. Church in Harlem, N.Y.[131] In April 1996, Vice-President Gore attended a well-publicized Democratic fund raiser at a Buddhist temple.[132] Evidently the IRS cares not to examine this apparent rule-breaking activity by the Executive Office, nor to penalize churches advocating a more politically acceptable viewpoint, for no sanctions or investigations have been reported.

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126. *Id.* at 225 (citing *Jimmy Swaggart Ministry Admits Tax Law Violation*, L.A. TIMES, Feb. 1, 1992, at F17).

127. *Id.* at 226 (citing *Shun Politics, Tax-Exempt Groups Told*, L.A. TIMES, Jan. 12, 1992, at B5).

128. *Id.* at 225 (citing *Shun Politics, supra* note 127).

129. *Id.* Swaggart's ministry was required to restructure its organization, establish a committee that would ensure compliance with the campaigning ban, and publicly admit violation of the campaigning ban. *Id.* at 226 n.44 (citing to *Shun Politics, supra*, note 127).

130. *Id.* at 225-26 n.47. The author lists numerous newspaper articles documenting a variety of politicians campaigning in churches. *E.g.*, Gwen Ifill, *Campaigning on Sundays Brings Out a Different Bill Clinton*, N.Y. TIMES, June 1, 1992, at A14; Robert Pear, *Nation Needs Healing, Clinton Says*, N.Y. TIMES, May 4, 1992, at B9; Gayle White, *Quayle Touts Traditional Values to Baptists*, ATLANTA J. & CONST., June 9, 1992, at A1; David Lauter & Sam Fulwood III, *Clinton, Brown Trying to Reach Out to Voters*, L.A. TIMES, June 1, 1992, at A1.

131. Plaintiff's Memo. Opp. Summ. J. 3.

132. *See* Kevin Merida & Serge F. Kovaleski, *Mysteries Arise All Along the Asian Money Trail*, THE WASH. POST, Nov. 1, 1996.

IV. CONCLUSION

Churches have historically been active in political matters concerning moral and social issues. This activity has included the evaluation of moral qualifications of political candidates. The IRS's taxation of churches which continue to fulfill this religious duty finds no support in congressional records or prior court decisions. Instead, applying the campaigning ban to churches is contrary to American history, unintended by Congress, and fails to meet constitutional muster under RFRA. Partisan politicking and campaign financing is clearly distinct from the exercise of moral judgment on a candidate for public office. The courts must clarify this distinction in order to insure that the church's vital voice on moral and social matters is not irretrievably lost. The IRS should not regulate church campaign activity that publicly judges a candidates' moral qualifications or positions on moral and social issues.

SHAWN A. VOYLES