



ISSUE BRIEF

Free Speech Fairness Act: Restoring First Amendment Speech Rights to Churches, Charities, and their Leaders

What is the Johnson Amendment?

The Johnson Amendment is a tax provision that prevents 501(c)(3) organizations from participating in political campaigns on behalf of, or in opposition to, a candidate for public office. The Johnson Amendment is an unconstitutional restraint on free speech, and is a tool the IRS uses to threaten and censor the First Amendment free speech rights of churches, charities, and their leaders. The Johnson Amendment was passed in 1954 and since then, has caused great confusion and concern regarding what tax exempt organizations and their leaders may say about moral issues and political candidates, partly because of the IRS's inconsistent enforcement of the law.

In fact, the IRS has even been inconsistent in individual cases. For example, the IRS investigated a tax exempt organization called Catholic Answers because it posted two e-letters questioning whether a presidential candidate who supported abortion should present himself for Holy Communion. Following its investigation, the IRS imposed a fine through excise taxes totaling \$101.93 for publication of the two e-letters, claiming they violated the Johnson Amendment. However, the IRS later reversed its assessment of the taxes and refunded the fine to Catholic Answers with interest, saying that the political activity was not "willful and flagrant."

How has the Johnson Amendment applied to churches?

For about a decade, pastors have willfully and flagrantly disobeyed the Johnson Amendment on Pulpit Freedom Sunday, a Sunday that is designated each year for challenging the Johnson Amendment, and sent their sermons to the IRS, inviting investigation. However, the IRS has not revoked a church's tax exempt status for endorsing candidates or political positions from the pulpit.

In 1995, the IRS did revoke The Church at Pierce Creek's tax exempt letter because the church purchased full-page advertisements in national newspapers. However, because churches are not required to apply for tax exempt status, revocation of the church's tax exempt letter had no lasting effect on the church's tax exempt status. Later, in 2005, All Saints Episcopal Church received a letter from the IRS after the pastor criticized President Bush and the Iraq war. But, in 2007, after two years of investigation, the IRS closed the investigation without revoking the IRS letter, but indicated it thought the church was wrong. These investigations and letters regarding possible violations of the Johnson Amendment continue to have a chilling effect on free speech.

Moreover, organizations like Americans United for Separation of Church and State use the Johnson Amendment as a tool for threatening churches into self-censoring regarding political issues. During election seasons, these organizations send churches letters threatening to report the churches to the IRS if

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they make certain types of statements about political candidates, in the hopes that these churches would be silenced on political issues from fear of an IRS investigation or audit. While these hostile organizations have reported some churches, it has been more than a decade since the IRS has attempted to revoke the tax exempt status of a church. The inconsistency with which the IRS has enforced the Johnson Amendment has only created greater need of rolling back the application of the Johnson Amendment, without fully repealing the law and upending the tax code.

How does Free Speech Fairness Act (“Fairness Act”) roll back the Johnson Amendment?

The Fairness Act would restore free speech to churches, charities, and their leaders who, since the Johnson Amendment’s passage, have effectively been silenced because of their charitable nature. The Fairness Act amends the Johnson Amendment to allow for political activity that is 1) made in the ordinary course of the 501(c)(3) organization’s regular and customary activities, so long as the activities carry out the organization’s tax exempt purpose, and 2) so long as the organization does not incur more than de minimis incremental costs.

Should the Fairness Act apply to all non-profit organizations, or just churches?

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

Wouldn’t the Fairness Act eliminate the need for 501(c)(4) organizations and PACs?

The Fairness Act does not allow 501(c)(3) organizations to purchase political campaign advertisements or to become political action committees. In addition, the Fairness Act does not allow donations to be earmarked for political purposes. Taxpayers will still only be able to deduct from their taxes contributions to charitable, tax exempt organizations. The idea behind the Fairness Act is not to allow 501(c)(3) organizations to take the place of 501(c)(4) organizations or political action committees, nor would that be its effect.

Would the Fairness Act be constitutional?

Based on the limited jurisprudence governing this issue, the Fairness Act would, in fact, more closely align the law governing 501(c)(3) organizations with the Constitution. Only a few cases have been litigated regarding an organization’s tax exempt status being lost because of engagement in political campaign activity. In one case, the IRS withdrew the tax exempt letter of a church, Church at Pierce Creek, because it purchased full page newspaper ads urging Christians not to vote for Bill Clinton.¹ The withdrawal of the letter was upheld by the D.C. Court of Appeals, which found that “the revocation of the Church’s tax-exempt status neither violated the Constitution nor exceeded the IRS’s statutory

authority.”² However, because churches are not required to apply to the IRS for tax exempt status, there is significant question about the implications of the court’s decision on the tax exempt status of churches. In addition, the Church at Pierce Creek’s activity would not be protected by the Fairness Act. The Fairness Act provides for speech in the ordinary course of the 501(c)(3)’s ordinary and customary activities, which further the tax exempt purpose of the organization, and do not exceed more than a *de minimis* incremental cost (the cost of the politically-related communication must be trivial).

That said, in the context of lobbying requirements on 501(c)(3) organizations, courts have held that Congress may impose some limits on the organization’s First Amendment activity in exchange for a government subsidy. For example, in *Regan v. Taxation with Representation*, the Supreme Court defined tax exemptions and deductions as forms of subsidies and held that Congress “has the authority to determine whether the advantage the public would receive from additional lobbying by charities is worth the money the public would pay to subsidize that lobbying.”³ Thus, *Regan* underscores the fact that, even if the courts ultimately held the Johnson Amendment to be constitutional, Congress retains the authority to restore the free speech rights of 501(c)(3) organizations, to free them up to speak about political candidates. In fact, the Fairness Act is a constitutional approach to alleviating the chilling effect the Johnson Amendment has on political speech and religion.

¹ *Branch Ministries v. Rossotti*, 211 F.3d 137, 140 (D.C. Cir. 2000).

² *Ibid*, 145.

³ *Regan v. Taxation with Representation*, 461 U.S. 540, 544, 550 (1983).