

RELIGION LAW

Expert Analysis

## Politics From the Pulpit: Can a Church Really Say That?

By Barry Black, Christopher Byrnes and Hillary Byrnes

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**W**ith the 2024 election less than three months away, there could not be a better time for clergy and churches to refresh themselves on the legal parameters on what they can do and say about candidates, political parties, and public policy in an election year. Understandably, religious organizations and leaders often have strong religious and moral convictions on matters of public policy. When political parties and candidates have differences on policy matters, religious leaders often feel compelled to publicly bear witness to those convictions in the context of discussing elections. Religious organizations and leaders are faced with the same

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legal limitations as their secular tax-exempt counterparts. That is, organizations described in section 501(c)(3) of the Internal Revenue Code (the Tax Code), may not participate in, or intervene in (including the publishing or distributing of

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statements), any political campaign on behalf of (or in opposition to) any candidate for federal, state, or local public office. This is known as the prohibition on political campaign intervention. This column will focus principally on the Tax Code's limitations on churches and clergy in their ministerial (non-personal) capacity and will not address any additional limitations imposed by federal election law.

At a minimum, the Tax Code's prohibition constrains churches—and clergy speaking on behalf of a denomination or house of worship—from explicitly endorsing or donating church funds or resources to a candidate for public office. For example, the U.S. Court of Appeals for the District of Columbia Circuit upheld the IRS's revocation of tax-exempt status for a church in Binghamton, New York, that had taken out full-page advertisements in *USA Today* and *The Washington Times* four days before the 1992 U.S. presidential election urging Christians not to vote for then-candidate Bill Clinton. See *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000). But does the same prohibition prevent clergy and churches from taking stands on political issues on which parties and candidates themselves take public stands?

### Clergy May Always Advocate for Issues

Tax-exempt organizations, both religious and secular, may certainly take positions on public policy issues, including issues that divide candidates in an election for public office. But any issue advocacy that functions as political campaign intervention is forbid-

den. The Internal Revenue Service looks at all the facts and circumstances surrounding a communication to determine whether issue advocacy has crossed the line into political campaign intervention. IRS Revenue Ruling 2007-41 (Rev. Rul. 2007-41) identifies these key factors in the determination: (1) whether the statement identifies one or more candidates for a given public office; (2) whether the statement expresses approval or disapproval for one or more candidates' positions and/or actions; (3) whether the statement is delivered close in time to the election; (4) whether the statement makes reference to voting or an election; (5) whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office; (6) whether the communication is part of an ongoing series of communications by the organization on the same issue and that are made independent of the timing of any election; and (7) whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office. The IRS considers a communication in its entire context before arriving at any conclusion.

A communication may still be considered political campaign intervention even if it does not identify a specific candidate by name. For example, it could be political campaign intervention if a pastor encourages his congregation to vote only for candidates that support a particular set of issues, and there is one candidate in the race that supports those issues. Also, the IRS has taken the position that use of certain "code words" to describe candidates and parties could constitute campaign intervention in some cases. See I.R.S. Tech. Adv. Mem. 91-17-001 (Sept. 5, 1990). Election-

year guidance from the IRS has often warned tax-exempt organizations about using terms like "conservative," "liberal," "pro-life," "pro-choice," or "anti-choice" to describe candidates. See Judith E. Kindell and John F. Reilly, Election Year Issues, I.R.S. Exempt Organizations Continuing Professional Education Technical Instruction Program FOE FY 1993, at 411 (1992).

Communications explicitly identifying a candidate's or party's position with the religious organization's position are risky. Communications explicitly referencing the election or someone as a candidate are riskier than those that do not. Communications made closer in time to the election will be scrutinized more than those issued more remotely. Communications that are part of an ongoing series of communications on the same issue predating the election are less risky. See Rev. Rul. 2007-41. Churches and clergy should consult with counsel if they have concerns about statements in their sermons or church bulletins.

#### **Churches and Clergy May Educate Voters In a Nonpartisan, Neutral Manner**

Church and clergy are free to educate voters on issues and candidates but may only do so in a nonpartisan and neutral fashion. One such way to educate voters is a voter guide, perhaps based on a questionnaire posed to candidates. Voter guides are usually short documents intended to help voters compare candidates' positions on a set of issues. As you may have gathered from IRS Rev. Rul. 2007-41, any document that identifies candidates and their positions close in time to an election could result in campaign intervention. But the IRS did describe particular types of voter guides that were permissible in its Revenue Ruling 78-248 (Rev. Rul. 78-248).

Generally, if churches and clergy wish to disseminate a voter guide, they should make sure that neither the structure nor the content of the guide shows any evidence of bias or prejudice for or against a candidate or group of candidates. Additionally, the guide should cover a broad range of issues of interest to the electorate as a whole, rather than issues only of interest to the organization and its supporters. See Rev. Rul. 78-248. The IRS generally prefers to see a broad range of issues (at least three unrelated topics) because wide-ranging topics are less likely to signal what the "correct" response is from the organization's perspective. Churches wishing to prepare candidate questionnaires and voter guides may take additional steps to ensure compliance, e.g. use open-ended questions for candidates, avoid yes/no, support/oppose, or multiple-choice formats for questionnaires, do not include questions or organizational statements that hint at the "correct" answer or compare the candidate's position to the organization's views on the issue, avoid paraphrasing or summarizing a candidate's positions

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or responses, and do not coordinate with a candidate on the content of the questions, among other steps. See Rev. Rul. 2007-41.

One example of a voter guide by a major religious denomination is the document "Forming Consciences for Faithful Citizenship," published quadrennially by the U.S. Conference of Catholic Bishops (USCCB). See "Forming Consciences for Faithful Citizenship," U.S. Conf. of Catholic Bishops (last revised Dec. 2023). The USCCB typically publishes the latest

iteration of “Forming Consciences for Faithful Citizenship” the year before each U.S. presidential election. The document discusses a wide variety of issues of interest to the Catholic faithful. According to the USCCB, “Forming Consciences for Faithful Citizenship” “reflects the perennial role of the Church in public life in proclaiming timeless principles: the infinite worth and dignity of every human life, the common good, solidarity, and subsidiarity.” *Id.* (Introductory Note).

### **Churches and Clergy May Invite Candidates to Address Congregations Under Certain Conditions**

At a minimum, churches may not allow any campaign activity or fundraising to take place at a church event. Nor may representatives of the church make any statements favoring or opposing a candidate.

Churches and clergy may, however, always invite individuals who are candidates for public office to appear at events in their non-candidate capacity. For example, a church could invite a public figure who is also a candidate to speak at a church event or worship service because he or she is a former or current office-holder, because he or she is considered an expert in a given subject matter, or because the public figure has led a distinguished military, legal, or public service career. The church should document the non-political reasons for the invitation and avoid mentioning the public figure’s election or candidacy, both in advertisements and during the event. See Rev. Rul. 2007-41.

Churches could invite candidates to speak at church events as candidates subject to additional limitations. The IRS will look to whether the church provided an equal opportunity to participate to other candidates seeking the same office. In

determining whether candidates are given an equal opportunity to participate, the IRS will consider the nature of the event—if an organization invites one candidate to speak at its well-attended annual banquet, but invites the opposing candidate to speak at a sparsely attended general meeting, then the organization has likely violated the political campaign prohibition, even if the manner of presentation for both speakers is otherwise neutral. See Rev. Rul. 2007-41. It is not legally required that all invited candidates accept in order for the event to go forward. If inviting all candidates becomes a practical problem, the church may apply reasonable, objective criteria consistently and non-arbitrarily to decide whom to invite (such as only those who have received a certain share of popular support as reflected in at least one recent recognized credible and independent poll). See Judith E. Kindell and John F. Reilly, *Election Year Issues*, I.R.S. Exempt Organizations Continuing Professional Education Technical Instruction Program FOE FY 2002, at 374-375, citing I.R.S. Tech. Adv. Mem. 96-35-003 (April 19, 1996).

Churches could invite several candidates for the same office to speak at a public forum, which is typically a public meeting or assembly allowing for open discussion of issues by candidates where candidates appear sequentially (as opposed to a debate, in which candidates directly engage each other at the same time). The church should have an independent nonpartisan panel prepare and present questions for the candidates at the forum. The topics discussed should cover a broad range of issues that are of interest to the public. The church should give each candidate an equal opportunity to present his or her view on each of the issues discussed. The moderator should

neither imply nor express approval or disapproval of the candidates. See Rev. Rul. 2007-41.

### **What to Do if a Church or Clergy Member Crosses the Line in an Election Year**

Churches and clergy should consult with counsel versed in both nonprofit compliance matters and the needs of religious clients. A violation of the campaign intervention prohibition may result in the denial or revocation of tax-exempt status by the IRS, the loss of exemption from New York income, sales and use taxes, and enforcement or regulatory actions by the New York attorney general. See Office of the N.Y. State Att’y Gen. Charities Bureau, *Guidance for Tax-Exempt Organizations on Political Activity and Lobbying* at 2 (Oct. 2020). But churches should also bear in mind that the Tax Code limits the IRS’s authority to conduct tax inquiries and examinations of churches, conventions, or associations of churches. See Barry Black and Christopher Byrnes, “Religious Organizations Differ From Other Nonprofits—Here’s Why That Matters,” *NYLJ* (Aug. 30, 2023). More importantly, though, all agencies of the federal government are constitutionally bound to treat statements from a religious organization or cleric no differently from statements made by a secular nonprofit organization and must not engage in viewpoint discrimination in enforcing federal law (including the Tax Code). Counsel for churches and clergy must be ready to wield a variety of constitutionally unique swords and shields to protect their client’s ability to morally and spiritually shape voters and citizens. See Barry Black and Christopher Byrnes, “The Unique Role of Counsel for Religious Organizations,” *NYLJ* (Mar. 1, 2024).