MEMORANDUM

TO: Tabin Cosio, Instructor
FROM : Lael Wageneck
SUBJECT: Tax--exempt religious organizations
DATE: 09/12/2012

Tax--exemptions for non--profits exist so contributors have the added incentive to make donations. The government bestows tax--exempt status with the assumption that these groups act in a nature that benefits the community more than it benefits the organization monetarily. An amendment to the tax code stating that tax--exempt organizations could not "participate in, or intervene in…any political campaign on behalf of or in opposition to any candidate for public office," was added in 1954. The "Johnson Amendment", named after then Senator Lyndon B. Johnson, also prohibits 501c3s from donating to political campaigns on behalf of the organization. The amendment has incited questions of its constitutionality based on the First Amendment. On December 7, 2011, Congressman Walter Jones (R--NC) introduced H.R. 3600 to repeal the Johnson Amendment.

The amendment prohibits churches from endorsing candidates, but it does not prohibit them from discussing issues related to an election. On September 10, 2012, Americans United for the Separation of Church and State sent a complaint to the Internal Revenue Service regarding a statement that was made in a bulletin published by St. Raphael's Parish in El Paso, TX. The statement read, "I am asking all of you to go to the polls and be united in replacing our present president with a president that will respect the Catholic Church in this country." An example of a statement that complies with IRS rules could simply state what it means to display respect for the Catholic Church and the importance of that respect in the character of candidates for political office. Some groups believe however that a moderate restriction to free speech is nonetheless an unfair restriction. The Alliance Defending Freedom (ADF) is promoting October 7, 2012 as "Pulpit Freedom Sunday," which encourages pastors to preach "biblical Truth (sic) about candidates and elections from their pulpits."

The Supreme Court has previously ruled that the government can limit speech in certain circumstances. The 1990 case of *Employment Division v. Smith* (494 U.S. 872) held that a law may burden religious practice so long as it applies the law to religious and non--religious practice alike. By this measure the Johnson Amendment is constitutional because it places the limit to free speech on all 501c3 organizations and not just churches. A 501c4 on the other hand may use donations for political speech based on the 2010 case of *Citizens United v. Federal Election Commission* (558 U.S. 50). One way for churches to avoid a tax penalty which would not require a change in policy, would be for the church to create a 501c4 and hold meetings that use political speech outside of the regularly scheduled sermons.

Is the Johnson Amendment good policy? Both sides of the political spectrum have argued for and against government restriction of free speech. Liberals argue that pastors should not engage in political speech from the pulpit while conservatives argue that unions should not use member's dues to fund political campaigns. Conversely, liberals have argued that the government should not limit speech for organizations that the government provides a financial benefit to like controversial art created through NEA grants in the same way conservatives believe churches should not limit their speech while they receive a tax--exemption benefit. It would appear that the system for delivering political speech in the United States has so many channels that the retention or elimination of the Johnson Amendment would have little effect on a non--profit's ability to deliver their message.

MEMORANDUM

TO: Tabin Cosio, Instructor
FROM : Lael Wageneck
SUBJECT: Tax---exempt religious organizations --- Actors
DATE: 09/18/2012

The case to remove the Johnson Amendment includes official actors from all branches of government. Rep. Walter Jones Jr. (R--NC3) introduced H.R. 3600 in the House of Representatives. The bill was originally introduced to the Ways and Means Committee in 2007 as H.R. 2275. The bill falls under the authority of the Ways and Means Committee because the primary duty of this committee is oversight of bills that raise revenue. A similar piece of legislation, the Religious Freedom Act of 2007 (S. 178), was introduced by Sen. James Inhofe (R--OK) to the Senate Committee on Finance. While S. 178 had no cosponsors, three democrats and five republicans cosponsored H.R. 2275 and two republicans and two democrats cosponsor H.R. 3600. While a Representative or Senator running for office would be considered an official actor in developing policy, a challenger who is not currently holding an office would be an unofficial actor.

Since the Johnson Amendment refers to the participation in elections, the Federal Election Commission, which is an independent body made up of members appointed by the President and confirmed by the Senate. Non--profit designation falls under the authority of the Internal Revenue Service, which is a bureau of the Department of the Treasury.

The Supreme Court has historically ruled on many free speech issues and would likely have a role in deciding the constitutionality of the Johnson Amendment. The 2010 case of Citizens United v. Federal Election Commission (558 U.S. 50) ruled that sections of the Bipartisan Campaign Reform Act violated the First Amendment by prohibiting corporations and unions from using funds to air electioneering ads 60 days before a general election.

The major unofficial actors in the development of this policy are the 501c3s and 501c4s. The group most likely to be affected by any change in policy would be pastors and church members. As 501c3s, churches could legally have pastors deliver their opinions on this policy from the pulpit since repealing the Johnson Amendment is an issue and not a candidate. But in 2004, Pastor Chan Chandler of East Waynesville Baptist Church in North Carolina kicked out nine members of the congregation who supported John Kerry's candidacy for President. Forty church members left following the results of the vote. By May of 2005, Chandler himself resigned under pressure from the pulpit and the nine ousted members were free to return. While some members left with Chandler, some of the 40 who had previously left eventually returned. Other 501©3s include social advocacy groups like Americans United for the Separation of Church and State and the Alliance for Defending Freedom. Unlike 501c3s, a 501c4 has more flexibility in terms of promoting a social agenda and lobbying. More organizations are navigating the line between religious speech and political speech by creating a 501c3 and a 501c4 under a single group. For example, the National Organization for Marriage (NOM) created the NOM Education Fund as a 501c3 and NOM, Inc. as a 501c4. Where donations to the NOM Education Fund were used to support a group of firemen who sued after they were forced to participate in a gay pride parade, NOM, Inc. funding has been used to create PACs that support legislation against gay marriage. According to the Human Rights Campaign, NOM has deep ties to the Church of Latter Day Saints, the Catholic Church and evangelical Christians. According to NOM's 2010 990 form, their top 10 donors make up 90% of their over 8 million dollars in contributions.

MEMORANDUM

TO: Tabin Cosio, Instructor
FROM : Lael Wageneck
SUBJECT: Tax-exempt religious organizations
DATE: 09/25/2012

While HR 3600 intends to solve the problem of the government restricting a church's right to free speech, the bill raises a false argument. Pastors have the freedom to speak from the pulpit on political issues. What a pastor cannot do is use church resources to support or fund political campaigns. The government provides tax exempt status for churches so they can direct more of their assets to charitable activities. While supporters of HR3600 could argue that the Johnson Amendment imposes an unconstitutional burden on churches, the U.S. Supreme Court ruled in 1983 with Regan v. Taxation with Representation (461 U.S. 540) that congress was not required to provide a 501c3 with public money for the purpose of lobbying. Justice William Rehnquist wrote in the unanimous view of the court that "the prohibition against lobbying in 501c3 did not violate the First Amendment, since Congress, pursuant to 501c3, had not infringed on any First Amendment rights or regulated any First Amendment activity."

Many variables make it difficult to create politically feasible alternatives to the current law. While the IRS considers many characteristics of an organization in determining whether or not it is a real church, it can be argued that some churches and their activities do not agree with most people's definition of a church. For example, The Temple of Set (TOS - a registered 501c3) is an offshoot of the Church of Satan registered in Santa Barbara. While The Temple of Set could preach "do what thou wilt shall be the whole of the law," their priest could not legally tell followers they should vote for Mitt Romney because his economic policies are the least personally restrictive. If HR 3600 was signed into law, TOS could use church funds to publish campaign information supporting the Romney campaign without penalty. This raises a point that the Johnson Amendment protects the Romney campaign from unsolicited endorsements from churches they do not agree with. A situation like this occurred in June when African-American New York City Councilman Charles Barron received an endorsement from Ku Klux Klan leader David Duke.

The argument for retaining the Johnson Amendment is that while free speech is a right, tax exemption is a privilege. Some benefits of incorporating as a 501c3 are tax exemptions for the church, tax deductions for parishioner gifts, consolidation of legal actions like owning property or suing other organizations or individuals. The government provides these benefits because non-profits are expected to benefit the community. If TOS did not want to be silenced by the Johnson Amendment, it could create a 501c4 which would allow it to promote a social agenda and donate funds to candidates. It would not however be able to provide a tax deduction for donors. This hypothetical situation with TOS however elicits questions about the definition of a church. Should the government provide benefits to churches that do not have a religious or ethical mandate for charity? Should the government provide benefits to churches that advocate anarchy?

Maybe the burden on churches could be lessened and allow for 15% of all donations to be used for politicking with the agreement that churches would be more transparent with how their funds are received and used. A double standard by advocates against the Johnson Amendment is while they would like churches to have a loud voice in political matters, they would like individual members and donors to

remain anonymous. Churches have the benefit of not having to file forms that disclose names of donors, members, and compensation amounts for leadership. If supporters of HR 3600 would like churches to have a larger voice, one alternative would be for churches to also accept the responsibility of turning in 990s forms each year. Proponents of the Johnson Amendment might accept churches engaging in political campaigns if they could see how much and how often church funds were spent on politicking.

The rules and regulations of 501c3s and the loopholes they navigate to use donations for their occasionally illegal purposes are too much to include in a one-page memo. The issues raised by HR 3600 rally political bases and that is likely its only purpose. Revoking the Johnson Amendment will likely never happen due to a lack of cosponsors or large bipartisan support. Pastors, parishioners, and other donors have many alternatives for supporting political campaigns and that is probably how it should be.