WHY ALL CHURCHES SHOULD BE A 508(c)(1)(a)

Cleveland Futch & Dan Peterson*

I. Free Expression of Religion and Freedom of Speech or Not, That is the Question

There is considerable confusion today on what pastors can and cannot say from the pulpit.[1] Most of this confusion rests squarely on the structural foundation of the church. If the church is founded as a 501(c)(3), the church has free speech restrictions.[2] All 501(c)(3) organizations are prohibited from influencing legislation and political campaigns.[3] As social issues have become political issues, churches and church leaders are increasingly avoiding issues, avoiding taking positions, and selectively addressing Biblical principles and training Godly leaders out of fear of what might happen if they do. Now more than ever churches need to lead in the call of training and developing leaders in our communities and nation consistent with Biblical beliefs. Our hope is that professionals who advise religious leaders will remain open to learning a better way to structure churches and church ministries to affect that call. The purpose of this analysis is to show the dangers and restrictions of the church foundation as a 501(c)(3) compared to the benefits and rights of the church being a 508(c)(1)(a).[4]

In 1954 our U.S. Congress amended Section 501(c)(3) of the tax code to include language that these organizations could no longer "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." The bill was introduced by then Senator Lynden Johnson to silence two private foundations that supported his political opponent. Before this amendment there were no speech restrictions on churches. Since the amendment passed, the IRS has maintained that church's speech and pastor's sermons, in the IRS' sole judgement, could be interpreted as supporting or opposing candidates or attempting to influence legislation and can result in the church losing its tax exempt status. Many churches and church leaders accept this interpretation of the Code and avoid speech that could be construed as political. We believe that the speech restrictions of the Johnson Amendment in Section 501(c)(3) are unconstitutional in restricting speech of pastors and churches.

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*Cleveland Futch. Email: cleveland@helpinghandoutreach.org. M.B.A. Finance & Accounting, University Puget Sound, J.D., University Puget Sound, C.P.A., M.A. Theological Studies, Faith Evangelical Seminary.
*Dan Peterson. Email: dan@helpinghandoutreach.org. M.A. Ed Adm. University Puget Sound, B.A. Central Washington University.

[1] All section references are to the Internal Revenue Code of 1986, as amended, and the Treasury regulations promulgated thereunder.

[2] A Church may be incorporated or unincorporated. Throughout this analysis we use the terms "founded" and "organized" to mean incorporated. Additionally, churches may, but are not required to, apply to the IRS for an "letter of determination" as an tax exempt 501(c)(3) organization. The IRS considers churches to be organizations described under section 501(c)(3) irrespective of whether they apply for an "letter of determination". In other words, even if a church does not apply for 501(c)(3) status, the IRS still considers them to be just that. The Tax Code (26 U.S.C.) regulates activities of nonprofits, however, the Tax Code does not form or empower Faith Based Organizations. Formation and empowerment of nonprofits come from state laws, and state laws vary from state to state.

[3] *See* reg. section 501-(c)(3)… "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."

[4] *See* reg. section 508-(c)(1)(a). Exempts churches from having to apply to the IRS for recognition of tax exemption….also applies to ''a convention or association of churches'' or an ''integrated auxiliary'' of a church. The purpose of this analysis includes only the restrictions stated and compared and does not include or insinuate other areas of tax law restrictions or requirements for nonprofits.

Many people presuppose that the Tax Code laws are black and white. The reality is the Tax Code is full of exceptions to rules and requirements. For example, all 501(c)(3) organizations have to file a tax return, except churches,[5] and, all 501(c)(3) organizations can be audited the same as can for profit corporations, except churches.[6] In addition, the Tax Code provides no definition of "church", nor do the treasury regulations, nor has the U.S. Supreme Court. There is no statute anywhere that says a "church" has to be a 501(c)(3). Nowhere in Section 501(c)(3) is the word "church" used. In practice the IRS has developed their own definition for "church" and the guidelines for these entities to be described as 501(c)(3) organizations, yet their definition is not based on statutory authority.

There are other exceptions in the Tax Code with special rules concerning churches. For example, churches may operate retirement plans for their employees that do not comply with general retirement plan requirements.[7] Church ministers may opt out of Social Security requirements for self- employment tax.[8] Church ministers are exempted from federal unemployment taxes.[9] Church ministers are entitled to a housing allowance without being subjected to income tax.[10] All these exceptions are for churches and church ministers. These exceptions are not available to other types of 501(c)(3) organizations.

Churches, Integrated Auxillaries, and Association of Churches, hereinafter Faith Based Organizations (FBO's), have rights that no other non-profits enjoy. The First Amendment guarantees the right of "Free" exercise of religion.[11] The First Amendment also guarantees the right of "Freedom" of speech. Only FBO non-profits enjoy these dual rights. Any law or rule passed that conflicts with these rights would be unconstitutional. FBO's have the right to speak freely about social and political issues without losing tax-exempt status, however most voluntarily waive this constitutional right in applying and receiving a "Letter of Determination" as a 501(c)(3).

All 501(c)(3) FBO's have waived their rights. Corporations, like people, can waive rights. You can waive your right to a hearing, waive your right to speedy trial, even waive your *Miranda* rights if arrested. A waived right can be final on appeal.[12] If an FBO chooses to apply and then receives recognition of exemption from the IRS they also waive rights. First, in organizing for their exempt purpose FBO's are required to waive free expression of religion and free speech in order to qualify. Second, in operating for their exempt purpose the IRS has sole discretion to vacate FBO's tax exempt status at the IRS' discretion and interpretation for any violation of 501(c)(3) restrictions.

In the only case where the IRS sanctioned a church for campaigning, the churches 501(c)(3) status was ripe for consideration. In *Branch Ministries v. Rossotti*, the church lost its tax exempt letter of determination for violating 501(c)(3) restriction on politics. The church paid for a billboard advertisement

[5] *See* reg. section 6033(a)(3)
[6] *See* reg. section 7611(a)(1)(a & b)
[7] *See* reg. section 414(3)
[8] *See* reg. section 3121(w)(3)
[9] *See* reg. section 3309(b)(1)(A)
[10] *See* reg. 107
[11] *See* First Amendment of US Constitution. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech."
[12] *See Berghuis v. Thompkins*, 560 U.S. 370, 386-388 (2010) (docket 08-1470).

on a freeway that expressed opposition to a candidate running for political office. The IRS investigated and revoked the churches tax exempt letter of determination. When the church brought suit they raised several constitutional defense arguments. The district court, however, looked at the Tax Code. The court ruled, "irrespective of whether it was required to do so, the church applied to the IRS for an advance determination of its tax-exempt status. The IRS granted that recognition and now seeks to withdraw it."[13] If your FBO foundation is established as a 501(c)(3) your FBO has to abide by 501(c)(3) restrictions.

There is no law that prohibits churches from speaking on candidates, politics, or legislation. The 501(c)(3) speech restrictions apply only to corporations that are organized as a 501(c)(3). Churches that believe it is their responsibility to raise and foster Godly leaders in our representative democracy may do so, but not as a 501(c)(3).

There is also no statute anywhere that says an FBO is required to be a 501(c)(3). In fact, there are several ways an FBO could be organized. An FBO could be organized as a 501(c)(4), a 501(d), and even a for profit corporation. An FBO also can and should be organized as a 508(c)(1)(a).

II. Section 501(c)(3) Restrictions on Speech and Religious Expression Violates the Establishment Clause, Free Speech Clause, Free Exercise Clause of the First Amendment, and the Religious Freedom Restoration Act (RFRA).

First, the application for 501(c)(3) status is in direct conflict with the Establishment Clause of the First Amendment. Do FBO's have to apply for permission from a government regulatory agency to exercise constitutional rights? What does the application look like? Who makes the decision on the application? What is the criteria for determining the application? Is the same criteria used equally in all applications? Are some criteria more important than others? People and corporations do not have to apply to any government agency in order to enjoy a right guaranteed in the U.S. Constitution.

The IRS publishes instructions for filling out the 501(c)(3) application. The instructions state the only way to receive application approval is to accept restrictions on speech and religious exercise.[14] Consider 501(c)(3) FBO restrictions in light of the First Amendment and especially the word "free." The word "free" has a legal definition and according to Blacks Law Dictionary 9th Edition includes, "having legal and political rights, not subject to the constraint or domination of another, characterized by choice, rather than by compulsion or constraint, unburdened, unrestricted and unregulated, costing nothing."[15]

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[13] *See*, *e.g.*, *Branch Ministries v. Rossotti*, 211 F.3d 137, 145 (D.C. Cir. 2000) (approving the IRS's revocation of a church's § 501(c)(3) tax-exempt advance determination because the church impermissibly intervened in a political campaign). Further, three tax-exempt organizations risked losing their tax-exempt statuses as a result of their politicking during the 2004 campaign season. *See IRS Finds Prohibited Political Activity in Majority of Exempt Group Exams*, 74 U.S.L.W. 2524, 2524 (Mar. 7, 2006) [hereinafter *IRS Finds Prohibited Political Activity*].

[14] See www.irs.gov Instructions for Form 1023 page 9 for Part VIII…"If you answer "Yes," you are not qualified for tax exemption under section 501(c)(3) and should reconsider whether the filing of application Form 1023 is appropriate for your organization."

[15] See Blacks Law Dictionary 9th Edition for legal definition of "Free"

In addition to the problem of an application, the application questions are even more troubling. The application questions are in direct conflict with First Amendment rights. All organizations, including churches, who apply to the IRS for a Letter of Determination as a 501(c)(3) are required to file Form 1023. Part VIII of the application asks 1) "Do you support or oppose candidates in political campaigns in any way?" and, 2) "Do you attempt to influence legislation?"[16] If you answer yes to either of these questions your application is denied; even if your organization is a bona fide church! What exactly does "in any way" mean? What exactly does "attempt" mean? Who is going to tell an FBO if they cross the line? What is the line between what can and cannot be said?

The application requires government to unnecessarily entangle itself with FBO's in matters of religious speech and religious expression. For many churches political activity is necessary to spread their faith and values into everyday life. Many churches define their mission to include an obligation to speak out on and attempt to influence public affairs. There is no practical way for our government to monitor these restrictions other than to meddle itself in the daily life of churches. The IRS would need to monitor religious speech about moral issues and issue advocacy and examine pastor's sermons to determine whether or not it violates the Johnson Amendment. Even worse, examinations would need to be ongoing and an FBO could be safe one week but another week be discriminated against.

The application also requires FBO's to give up a right for an exemption. Denying a tax exemption to an FBO for exercising religious and speech rights is unconstitutional.[17] In *Speiser v. Randall*, the U.S. Supreme Court held that "to deny a tax exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech."[18]

The IRS treats religious organizations no differently than other tax-exempt organizations.[19] Due to the unclear line between political and religious issues, the fear of IRS regulations compels religious organizations to remain silent on issues that are both political and religious. The result chills FBO's freedom of religion and political speech and burdens their free exercise of religion. Combined, these burdens make the IRS's application of 501(c)(3) regulations inherently unconstitutional to FBO's.[20] The U.S. Supreme Court has consistently held when a government agency, rule, or interpretation of a rule, goes beyond the intent of congress the rule is void.[21] In *Chevron U.S.A. Inc.* v. *Natural Resources Defense*

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[16] *See* www.irs.gov/pub/irs-pdf/f1023.pdf Part VIII, #1 and 2.

[17] *See*, *e.g.*, *Speiser v. Randall*, 357 U.S. 513, 518, 528-29 (1958) (holding that a law conditioning veterans' tax benefits on veterans swearing not to advocate the forcible overthrow of the government is unconstitutional)

[18] *Speiser*, 357 U.S. at 518.

[19] *See*, *e.g.*, *Fund for the Study of Econ. Growth & Tax Reform v. IRS*, 161 F.3d 755, 760 (D.C. Cir. 1998) (applying the general interpretation of § 501(c)(3) to an organization dedicated to reforming the U.S. tax system*); League of Women Voters v. United States*, 180 F. Supp. 379, 383 (Ct. Cl. 1960) (stripping an organization of its 501(c)(3) tax-exempt status because it engaged in excessive lobbying); *see also supra* Part I (outlining the IRS's interpretation of § 501(c)(3) as applied to all § 501(c)(3) organizations).

[20] A *Smith* hybrid claim involves both a free exercise claim and a free speech claim. *See generally Employment Div. v. Smith*, 494 U.S. 872 (1990) (outlining the *Smith* hybrid claim), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 109-280, 107 Stat. 1488, *as recognized in Holt v. Hobbs*, *135 S. Ct. 853, 190 L. Ed. 2d 747 (2015) and Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006)

[21] *See FDA v. Brown & Williamson Tobacco Corp*. 529 U.S. No. 98-1152 (2000) "Because this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). Under *Chevron*, a reviewing court must first ask "whether Congress has directly spoken to the

Council, Inc. the court held that**, "**a reviewing court must first ask 'whether Congress has directly spoken to the precise question at issue.'" *Id.,* at 842. If Congress has done so, the inquiry is at an end; the court "must give effect to the unambiguously expressed intent of Congress." In *City of Arlington v. FCC* the court held "No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority."[22]

Similarly in *Loving v. Internal Revenue Service,* the U.S. Court of Appeals ruled against the IRS who was trying to regulate all tax preparers, not just CPA's, enrolled agents, and tax attorneys. The court held the IRS lacks statutory authority to promulgate or enforce their new regulatory scheme for "registered tax return preparers". The IRS does not have authority to make or enforce rules not granted by congress or in conflict with existing law.[23]

Second, all 501(c)(3) organizations have to pay either a $400 or $850 fee. This is in direct conflict with the legal definition of "free" in the First Amendment. It makes no difference if it is a tax or processing fee, money required for consideration of an application for a church is not free. [24]

Third, all 501(c)(3) applications are reviewed and scrutinized by a government employee. IRS employees are often motivated, or pressured, to deny and restrict conservative non-profit application approval.[25] For example, Genesis Community Church applied to the IRS for 501(c)(3) "church" status. The church application sat with the IRS for over five years. The application was received by a government employee but was never approved even though they are a bona fide church![26]

Fourth, the criteria for determining if an FBO qualifies as a 501(c)(3) is vague and capricious. There is no legal definition for the word "church". The IRS, however, has developed and publicized their own criteria they consider for evaluating an application for "church" status. In their own words, the criteria and requirements vary from application to application. The U.S. Supreme Court stated in *Grayned v City of Rockford* "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined" The court also noted vagueness includes the following: "if a vague law impermissibly delegates basic policy matter to (government officials) for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application"….and, "where a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms." [27]

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precise question at issue." *Id*., at 842. If Congress has done so, the inquiry is at an end; the court "must give effect to the unambiguously expressed intent of Congress." *Id*., at 843; see also *United States* v. *Haggar Apparel Co*., 526 U. S. 380, 392 (1999); *Holly Farms Corp.* v. *NLRB*, 517 U. S. 392, 398 (1996)."

[22] *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)

[23] *See Loving v. Internal Revenue Service, U.S. Court of Appeals, District of Columbia No. 13-5061 (2014)*, The IRS does not have authority to make or enforce rules not granted by congress.

[24] See Blacks Law Dictionary 9th Edition for legal definition of "Free"….<1) Having legal and political rights…2) Not subject to the constraint or domination of another…3) Characterized by choice, rather than by compulsion or constraint…4) Unburdened…5) Not confined by force or restraint…6) Unrestricted and unregulated…7) Costing nothing…..>

[25] *See* Treasury Inspector General Report May 14, 2013, Reference Number 2013-10-053

[26] Phone call with Pastor David Zoerhoff, Genesis Community Church, PSL, January 8, 2014; now a 508c1a church.

[27] *See Grayned v City of Rockford*, 408 U.S. 104, 109-09 (1972)

Fifth, all 501(c)(3) organizations, including FBO's, have restrictions on free speech.[28] The restriction on free speech is a direct result of the "Johnson Amendment" of 1954. The amendment added the language of "influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."[29] In 1987 congress added the words, "or in opposition to". Before these amendments were approved, FBO's had no restrictions on what they could or could not say about politics and legislation. While these restrictions on free speech are in direct conflict with the First Amendment and the Religious Freedom Restoration Act, most FBO's have chosen to apply for a determination as a 501(c)(3).

If an organization formed under section 501(c)(3) is taken to court for violating restrictions on speech, the complaint typically includes: a) evidence the organization applied for a letter of determination as a 501(c)(3) and contracted with the IRS accepting restrictions, b) the organization's letter of determination acknowledges the agreement between the FBO and the IRS, and c) the IRS restrictions and tax exempt status granted from the agreement is enforceable.[30]

Speech restriction on politics and legislation violates the free exercise and free speech rights of FBO's under the First Amendment of the U.S. Constitution. The U.S. Supreme Court has ruled non FBO 501(c)(3) organizations have these restrictions and the restrictions do not violate "free speech rights."[31] It is important to note the U.S Supreme Court has never ruled on a case involving both free exercise of religion and free speech rights.[32] However, In a lower court ruling in *Rigdon v Perry ,* free speech and religious exercise were at the forefront of the decision. In this case the district court rejected the arguments advanced by the government to support censorship of speech from the pulpit; "it is not the role of this court to draw fine distinctions between degrees of religious speech and to hold that religious speech is protected but religious speech with so-called overtones is not." ID. at 164. The court also held that any government interest for a censorship policy was "outweighed by the ….chaplains' right to autonomy in determining the religious content of their sermons." Id. At 162.[33]

Another challenge to the Johnson Amendment restrictions is the Religious Freedom Restoration Act (RFRA). The RFRA requires the federal government in advance of any assessment of penalty on FBO's free exercise of religion and speech to show a compelling government interest and be the least restrictive means of furthering that compelling interest.[34] In the case of 501(c)(3) FBO's, even a minor infraction of engaging in politics can mean complete loss of tax exempt status. The 501(c)(3) prohibition on support or opposition of candidates in political campaigns and any attempt to influence legislation have the effect of suppressing speech. These rules also prohibit issue advocacy. The consequence in either scenario is

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[28] *See* reg. section 501-(c)(3)… "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."

[29] *See* Congressional Record, July 2, 1954:9604; New York Times, July 3, 1954:6

[30] *See, e.g., Branch Ministries v. Rossotti*, 211 F.3d 137, 145 (D.C. Cir. 2000), See also *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), See also *Cammarano v. United States* 358 U.S.. 498 (1959)

[31] The Court held that 501(c)(3) lobbying limitation does not violate an organization's free speech rights. *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540-46 (1983). However, the organization was not a church or even a religious organization.

[32] *See* Congressional Research Service, Churches and Campaign Activity: Analysis Under Tax Campaign Finance Laws October 9, 2012

[33] See *Rigdon v Perry*, 962 F, SUPP. 150 (D.D.C. 1997)

[34] The Religious Freedom Restoration Act of 1993, Pub. Law No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. Section 2000bb

the same, the penalty of being taxed. The penalty is the same for substantial and insubstantial violations. What makes this even more complicated is that section 501(c)(3) has been amended numerous times over the years. With each amendment, additional restrictions were applied.

The punishment for any violations is the same, loss of tax exemption and additional penalties. Congress's drafting of rules for tax exempt organization was never intended to penalize advocacy. In *Cammarano v. United States* Justice Douglas pointed out that penalties should not be punitive.[35] His concern was whether a rule might operate, irrespective of its purpose, to penalize speech.

Churches do not have an alternate channel for speech. Some have suggested that a 501(c)(3) FBO can just form a Political Action Committee (PAC) as an alternative channel. Even if they could it is burdensome and would still not allow for unfettered speech. A PAC will also lose it's tax exempt status if it engages in unrelated lobbying activity.[36] In *Citizens United v. FEC* the U.S. Supreme Court said, "Even if a PAC could somehow allow a corporation to speak-and it does not- the option to form a PAC does not alleviate the First Amendment problems"….PAC's are burdensome alternatives; they are expensive to administer and subject to extensive regulation"[37] The court struck down this theory as a viable excuse for speech restriction. If the alternate channel theory scenario is indeed applied to FBO's, there would be a direct loss of free speech and an indirect loss of tax deductible contributions. Therefore, even with a 501(c)(3) FBO and a 501(c)(4) alternative, there is still restricted speech.

Some people have suggested, based on *Reagan v. Taxation With Representation (TWR),* that 508(c)(1)(a) organizations are bound to political and legislative speech restrictions.[38] This argument is unpersuasive. TWR was not church. TWR was not a religious organization. In fact, TWR was not even an approved tax exempt organization. TRW had applied for a "Letter of Determination" of 501(c)(3) status but the application was denied. In this case the U.S. Supreme Court stated they have never held that Congress must grant a benefit to a person or organization who wishes to exercise a constitutional right. However, the court did confirm they have held that government may not deny a benefit to a person or organization who wished to exercise a constitutional right.[39] Since 508(c)(1)(a) organizations are already tax exempt as a right they do not have to give up that right (religious exercise and free speech) as a condition of tax exemption.

In 2010 the U.S. Supreme Court ruled in *Citizens United* that a federal law prohibiting nonprofit corporations from engaging in politics is unconstitutional.[40] The Court held that "First Amendment

[35] *See* Cammarano v. United States, 358 U.S. 498, 515 (1958) (Douglas, J., concurring)

[36] *See* Rev. Rul. 2004–6, 2004–1 C.B. 328 ("Organizations that are exempt from federal income tax under § 501(a) as organizations described in § 501(c)(4) . . . may, consistent with their exempt purpose, publicly advocate positions on public policy issues."); Rev. Rul. 81–95, 1981–1 C.B. 332 ("Thus, an organization may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is primarily engaged in activities that promote social welfare.").

[37] *See* Citizens United v. FEC, 130 S. Ct. 876, 897 (2010)

[38] *In Regan v. Taxation With Representation of Washington*, 461 U.S. 540-46 (1983). "This Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right. [461 U.S. 540, 546]"…" TWR is certainly correct when it states that we have held that the government may not deny a benefit to a person because he exercises a constitutional right. See Perry v. Sindermann, 408 U.S. 593, 597 (1972)."

[39] *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972)

[40] *See* Citizens United v. Federal Election Commission, No. 08-205, 558 U.S. 310 (2010)

protection extends to corporations,"[41] and "political speech does not lose First Amendment protections simply because its source is a corporation."[42]

Citizens United abrogates *Regan* and *Branch Ministries*.[43] *Citizen United* is about corporate speech rights. The U.S. Supreme Court ruling in favor of *Citizens United* helps recognize the right of FBO's to engage in political speech. First, the plaintiff was a nonprofit corporation. Second, *Citizen* rejected the argument in *Regan* and *Branch Ministries* that a person can be forced to give up a right (speech) for a benefit (tax exemption). Third, *Citizen* rejected the argument that a nonprofit can just form a 501(c)(4) affiliate in order to express it's free speech rights. Fourth, if the *Regan* decision remains, then Congress can silence any speech. The U.S. Supreme Court stated, "State law grants corporations special advantages- such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets"… and, "It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights."[44] Why then would a FBO choose to apply for a "Letter of Determination" as 501(c)(3)?

Other people argue that 508(c)(1)(a) organizations still have to meet all 501(c)(3) requirements, see *Taylor v Commissioner.* [45] This tax court case is about a donation being allowed or disallowed, not tax exempt status of nonprofits. The plaintiff, Mr. Taylor, made a donation to a religious organization that lost it's tax exempt status for failure to pay employment taxes. Mr. Taylor made a claim his donation should still be allowed as a tax deductible contribution, but he offered no facts and no evidence to support his position. Mr. Taylor lost because he failed to provide <u>any</u> evidence to support his claim and he bore the burden of proof.

The assertion from this case that 508(c)(1)(a) organizations still have to meet 501(c)(3) requirements is fatally flawed for several reasons. Nowhere in section 508(c)(1)(a) are these requirements listed. Most 501(c)(3) organizations have to file a tax return yearly. All organizations wanting formal recognition of 501(c)(3) status have to apply. Neither of these "requirements" apply to a 508(c)(1)(a) FBO's. There are additional 501(c)(3) requirements prohibiting participation in politics or legislation. Any requirement granting tax exemption on condition of denying free expression of religion and free speech is unconstitutional. The court's expression of this opinion, which is not the resolution of the specific issue before the court in this case, is dictum.[46] The issue to be decided before the tax court was solely and only a question of charitable deduction. The court was not making any decision or determination of qualification for an FBO as a tax exempt organization. Even if the tax court had made a determination that 508(c)(1)(a) organizations must meet all 501(c)(3) requirements to be tax exempt and receive tax deductible contributions, the opinion would likely be overturned in appeal because it conflicts directly

[41] *See* Citizens United, 130 s. Ct. at 899

[42] *Id* at 900 (quoting First National Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978).

[43] *See* Citizens United v. Federal Election Commission, No. 08-205, 558 U.S. 310 (2010)

[44] *See* Citizens United, 130 S. Ct. at 905 (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658-59, 680 (1990)(internal citations omitted).

[45] *See Jack Lane Taylor v. Commissioner of Internal Revenue* No. 14021-98 T.C. Memo 200-17; 2000 Tax Ct. Memo Lexis 17; 79 T.C.M. (CCH) 1364 (2000)

[46] *See* Black Law Dictionary 9th Edition for definition of "Obiter dictum"; includes "A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential, …often shortened to dictum."

with the First Amendment and the Religious Freedom Restoration Act (RFRA). There is no authority, statute, or court ruling that says a church is required to be a 501(c)(3).

501(c)(3) restrictions on FBO's require them to give up a right for an exemption. The U.S. Supreme Court has stated that there is no compelling purpose for the government to extend a statutory privilege (like tax exemption) only on the condition that the recipient gives up a fundamental right (like free speech). In fact, the opposite is true. The "exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is . . . obnoxious . . ."[47] The Court further explained in *Thomas v. Review Bd. of Indiana Employment Security Div.,* "A person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program" and further, "…where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."[48]

Sixth, all 501(c)(3) organization's application and subsequent supporting documents are open to public inspection to any person or any organization.[49] Since May, 2013 the IRS has been under investigation by the FBI, U.S. Treasury Inspector General, and the U.S. House Ways and Means Committee for allegedly violating federal laws and discriminating against conservative and Christian organizations. There are also several lawsuits pending against the IRS. The record from these investigations revealed illegal release of documents and targeting of conservative organizations. [50]

Seventh, if an FBO is applying for a letter of determination as a 501(c)(3) it is required to accept all six restrictions. There is no other way to receive a determination.

The conclusions to be drawn from these points are that 501(c)(3) restrictions are being used to silence FBO's voice on issues central to church beliefs, prohibiting the influence of the church to develop leaders, and prohibiting religious influence in our representative democracy.

III. Section 508(c)(1)(a) Benefits for Faith Based Organizations (FBO's)

Churches, integrated auxillaries, and association of churches do not have to apply as a 501(c)(3) in order to be tax exempt and offer tax deductibility for contributions. All organizations seeking tax exempt status must apply to the IRS except FBO's. FBO's can be formed under Section 508(c)(1)(a) and enjoy "mandatory exceptions" from these requirements. Section 508(c)(1)(a) was codified in the Internal Revenue Code (IRC) in order to formally establish the right to "free" exercise of religion which had been

[47] *See Follett v. Town of McCormick*, S.C., 321 U.S. 573, 577 (1943) (internal citations omitted).

[48] *See Thomas v. Review Bd. of Indiana Employment Security Div., 450 U. S. 707 (1981)*

[49] *See* reg. section 6104(a)(1)(a). "…such application or notice shall be open to public inspection...."

[50] *See* www.treasury.gov/tigta/auditreports/2013reports/20134008fr.pdf; *See also* www.thomasmoresociety.org, Memo to U.S. House Ways and Means Committee May 16, 2013 with 150 pages of evidence of IRS harassment of conservative organizations dating back to 2009.

a tacit standard upon which America was founded and governed since it gained its independence.[51] A 508(c)(1)(a) is, by the very nature of its creation, a religious, non-profit, tax-exempt organization.[52]

Section 508 was part of the legislation passed in the Tax Reform Act of 1969 (H.R. 13270), codified as Public Law 91-172[53] The intent of our U.S. Congress in passing Section 508(c)(1)(a) was to make sure that important First Amendment religious and speech rights were protected when they overhauled and authorized sweeping new changes to the Tax Code in 1969. The Act included substantial changes in the treatment of private foundations and 501(c)(3) organizations. The changes included requirements that organizations seeking tax exempt status had to first apply, file a tax return annually, comply with rules and regulations that the IRS may from time to time prescribe, keep records of income and expenses, and render under oath statements about the organization.[54] Churches were specifically excepted from these requirements.[55]

According to the U.S. House and U.S. Senate Staff of the Joint Committee on Internal Revenue Taxation, the reason for the new laws was because "Congress believed that the Internal Revenue Service was handicapped in evaluating and administering the tax laws by the lack of information with respect to many organizations". [56] The Joint Committee published the *General Explanation* to the other members of Congress as source material to explain the Tax Reform Act of 1969 as finally enacted. "Under prior law, an organization was exempt if it met the requirements of the code, whether or not it sought an "exemption certificate" from the Internal Revenue Service."[57] In other words, churches were not required to apply to the IRS for approval before the Act. Following passing, the Act required new exempt organizations to notify the Internal Revenue Service that they are applying for recognition of their section 501(c)(3) exempt status. Congress had to enact a particular rule to specifically exempt churches from these new requirements or the new legislation would be in conflict with the Constitution.[58] Section 508(c)(1)(a) was necessary to formally ensure that government did not unnecessarily entangle itself with the organization and operation of churches.

FBO's can be organized and operate under Section 508(c)(1)(a) of the Tax Code the same as they can be organized and operate under any other section of the Tax Code.

A 508(c)(1)(a) FBO has a constitutional and legal right to form; therefore, there is no required application to seek approval of tax exempt status.

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[51] *See* The principles of "Free Exercise" are specifically guaranteed in the First Amendment of U.S. Constitution and further codified in 42 U.S.C. § 2000bb, Religious Freedom Restoration Act.

[52] *See* reg. section 508-(c)(i)(a)

[53] *See* Public Law 91-172 approved December 22, 1969 by the U.S. House vote 381 to 2, and U.S. Senate 71 to 6, signed by the President December 30, 1969.

[54] *See* reg. section 6033.

[55] *See* reg. section 6033(a)(3).

[56] *See* General Explanation of the Tax Reform Act of 1969 H.R. 13270, 91st Congress, Public Law 91-172 Prepared by the Staff of the Joint Committee on Internal Revenue Taxation page 55, December 3, 1970

[57] *Id* at 54

[58] *Id* at 55, "These notice requirements do not apply to churches and their integrated auxillaries….to conventions or associations of churches"

A 508(c)(1)(a) FBO tax exemption stems from the First Amendment and is not a government subsidy. Some arguments have been presented supporting speech restrictions on politics and legislation for churches as necessary so government does not subsidize religion. This viewpoint does not comport by definition and is a well settled matter of case law.

The legal definition of "exemption" is "freedom from a duty, liability, or other requirement; an exception".[59] The legal definition of a "subsidy" is "a grant, usually made by the government, to any enterprise whose promotion is considered to be in the public interest. Although governments sometimes make direct payments (such as cash grants), subsidies are usually indirect…"[60] It is clear that 508(c)(1)(a) FBO's do not receive a government subsidy. A subsidy occurs when money changes hands between the government and the organization. A subsidy is determined by the government whereas an exemption is not. A subsidy is allocated and monitored by the government whereas an exemption is not. Therefore, tax exemption of churches does not amount to subsidizing speech.

It is well settled by our U.S. Supreme Court that granting churches tax exemption is not government subsidizing religion. In *Waltz v Tax Commission New York* our U.S. Supreme Court made clear granting a tax exemption to churches is not a government subsidy. The court stated, "In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement"…."The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state"…and, "There is no genuine nexus between tax exemption and establishment of religion." [61]

Revisiting the U.S. Supreme Court's well settled jurisprudence case on content-based tax exemptions is *Arkansas Writers' Project, Inc. v. Ragland*.[62] In this case government agencies and officials who pick and choose some organizations to receive tax exemption and others not based on the content of their speech was ruled unconstitutional. In this case the court held that discrimination "on the basis of the content of the message cannot be tolerated under the First Amendment."[63]

All donations to a 508(c)(1)(a) FBO's are tax deductible to donors to the fullest extent of law. Section 170(b) of the IRC states donations are automatically tax deductible to "churches or a convention or association of churches."

A 508(c)(1)(a) FBO has free speech rights. All 501(c)(3) organizations have speech restrictions. Nowhere in the U.S. Constitution are FBO's speech and legislative rights restricted. These restrictions come solely from the Tax Code as amended in 1954. These restrictions apply only to organizations that apply and are approved under the Tax Code. If an organization is not organized as a 501(c)(3), these restrictions do not apply. In fact, there are many different types of non-profits and they do not all have the same restrictions

[59] *See* Blacks Law Dictionary 9th Edition for legal definition of "Exemption"
[60] *See* Blacks Law Dictionary 9th Edition for legal definition of "Subsidy"
[61] *See* Waltz v. Tax Comm'n, 397 U.S. at 397 U.S. 674 (1970)
[62] *See* Arkansas Writers Project, Inc. v. Ragland 481 U.S. 221 (1987)
[63] *Id* at 221, 230

or benefits. Our government already allows some non-profits tax-exemption when they influence legislation and speak directly on politics. For example, Congress has established and approved Political Action Committees (PAC's)[64] to be exempt from income tax and allows Veteran's Organizations[65] to be tax exempt and enjoy unlimited lobbying.

508(c)(1)(a) FBO's have no annual income tax filing requirement, such as, Form 990. A 508(c)(1)(a) organization is also not required to keep records, render statements under oath, nor comply with rules and regulations for reporting that the IRS may from time to time prescribe.[66] All non 501(c)(3) FBO organizations are required to file a tax return each year. If they do not file returns timely the organizations tax exemption is automatically revoked after three years.[67]

Section 508(c)(1)(a) organizations, since they are not of record with the IRS, are not exposed to public scrutiny. In the case of Section 501(c)(3) entities, all applications and subsequent correspondence are available to any who request it, including those who are opposed or hostile toward religion.[68]

The Religious Freedom Restoration Act (RFRA) applies to 508(c)(1)(a) organizations as equally as a person. RFRA prohibits Government "from substantially burden[ing] *a person's* exercise of religion even if the burden results from a rule of general applicability" unless the Government "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." 42 U.S.C. §§2000bb–1(a), (b) (emphasis added). FBO's are unique because furthering their religious "autonomy … often furthers individual religious freedom as well." (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 342 (1987) (Brennan, J., concurring in judgment)). Not only does RRFA apply to nonprofit corporations, the U.S. Supreme Court held it applies to for-profit corporations. "RFRA was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required."[69] The court held that "Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA's definition of "persons."[70]

IV. Conclusion

There remains a heavy price for FBO's organizing and operating with 501(c)(3) speech restrictions. Churches and church ministries do not have to live in fear of losing their tax exempt status for speech on leadership, legislation, and politics. Pastors can speak the truth without compromise. People do have a choice in how they form their FBO. What will churches and church ministries do to meet the challenges and increased need to speak the truth without fear or compromise and train Godly leaders consistent

[64] *See* reg. section 501(c)(4)
[65] See reg. section 501(c)(19)
[66] *See* reg. section 6033(a)(3).
[67] See Pension Protection Act of 2006, Public Law 109-280
[68] *See* reg. section 6104.
[69] *See Burwell v. Hobby Lobby*, 573 U.S._____(2014). As discussed, n. 3, *supra*, in *City of Boerne* we stated that RFRA, by imposing a least-restrictive-means test, went beyond what was required by our pre-*Smith* decisions.
[70] *Id*

with their beliefs? Make sure your FBO has a strong and lasting foundation to make a positive and lasting difference. Make sure your FBO is a 508(c)(1)(a).