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April 29, 2003

Hon. Bill Campbell
1444 N. Tustin Ave. #104
Orange, CA 92865

Dear Mr. Campbell:

It has come to our attention that churches in California have been forbidding parishioners from gathering signatures for ballot initiatives while on Church property. Presumably, this ban was inspired by the limitations that the Internal Revenue Code and regulations place on the political activities and lobbying of tax-exempt organizations. While we respect the care with which churches have acted in this area, we believe that the law is crystal clear that such activities would *not* in any way jeopardize their 501(c)(3) status.

The Becket Fund for Religious Liberty is an interfaith, nonpartisan, public interest law firm dedicated to promoting and defending the free, public expression of all religious traditions. The freedom of churches and their member to discuss any subject from any viewpoint—especially including abortion—has been a longstanding concern of The Becket Fund. For example, in *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997), we represented Jewish, Christian, and Muslim chaplains and service members in a successful challenge to a Pentagon gag-order that barred chaplains from preaching about the Partial Birth Abortion Ban Act and other legislation before Congress. And just before the November 2000 election, soon after Americans United for Separation of Church and State sent a letter to ministers nationwide in order to discourage them from discussing issues that may relate to political campaigns, we issued an open letter to correct the very misconceptions that AU's letter seemed designed to create. I've attached copies of both the *Rigdon* decision and the response to AU to this opinion letter.

As you know, section 501(c)(3) of the Internal Revenue Code (IRC or the Code) exempts certain non-profit organizations from taxation. Among the qualifications for the exemption are the following:

- “no substantial part of the activities of [the organization] is carrying on propaganda, or otherwise attempting, to influence legislation,” and
- the organization “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.”

26 U.S.C. § 501(c)(3) (emphases added). Thus, a church that is an exempt 501(c)(3) organization is subject to an absolute ban on political campaigning. Political campaigning, as defined by the IRS, is “participat[ing] or interven[ing], directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.” Treas. Reg. 1.501(c)(3)-(c)(iii).¹ This prohibition, however, does *not* extend to the attempting to influence legislation (commonly referred to as “lobbying”). Lobbying activity is not banned but only limited: Any such activity may not constitute a “substantial” part of a 501(c)(3) organization’s total activities.²

Therefore, the key question in determining whether the Church is permitted to allow solicitation of signatures for a petition on its property is whether such activity constitutes political campaigning (impermissible under the IRC) or influencing legislation (lobbying that is not banned but only limited). According to applicable regulations, ballot initiatives fall squarely within the scope of influencing legislation:

The term “legislation,” as used in this subdivision, includes action by the Congress, by any State legislature, by any local council or similar governing body, or *by the public in a referendum, initiative, constitutional amendment, or similar procedure*.

Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (emphasis added).³ The regulation goes on to state:

¹ A broad range of activities fall within this prohibition. Direct political activities include making statements, whether through oral, printed, or electronic media, supporting or opposing any candidate, political party or political action committee (PAC), creating a PAC, *see* Treas. Reg. § 1.527-6(g), rating candidates, *see* G.C.M. 39441 (Sept. 27, 1985), and providing or soliciting financial or in-kind support for any candidate, political party, or PAC. Indirect political activity includes that which reflects bias for or against any candidate, political party, or PAC, such as by distributing biased voter education materials or conducting a biased candidate forum or voter registration drive.

² Section 501(h) of the Code allows some organizations to elect to be subject to a sliding scale of permissible lobbying expenditures based on the size of the organization’s budget. Churches and certain affiliated religious organizations, however, are ineligible for this election.

³ *See also Politics and the Pulpit: A Guide to the Internal Revenue Code Restrictions on the Political Activity or Religious Organizations* at 6 (The Pew Forum On Religion and Public Life Sept. 2002) (“Referendums, constitutional amendments and similar ballot initiatives are classified as lobbying activities for purposes of the Internal Revenue Code. As such, they are subject to the insubstantial lobbying limitation, not the political activity prohibition.” (footnote omitted)), *available at* <http://pewforum.org/publications/reports/IRCbrochureBIG.pdf>.

An organization will not fail to meet the operational test [to qualify as a 501(c)(3) organization] merely because it advocates, as an insubstantial part of its activities, the adoption or rejection of legislation.

Id.

In fact, even the IRS' tax guide for exempt organizations states that "[l]egislation includes action . . . by the public in a referendum, ballot initiative, constitutional amendment or similar procedure." IRS TAX EXEMPT AND GOVERNMENT ENTITIES, Pub. 1828, *Tax Guide for Churches and Religious Organizations* at 5, available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf> It also states: "An IRC Section 501(c)(3) organization may engage in some lobbying, but too much lobbying activity risks loss of exempt status." *Id.* Therefore, a church's attempt to influence legislation, including ballot initiatives, will not jeopardize its tax-exempt status unless it constitutes a substantial part of its activities.

There is no hard-and-fast rule to determine when lobbying activity becomes "substantial" to the IRS, but it is clear that the proposed ballot initiative participation does not reach that level. Several older court decisions suggest that less than 5 percent of an organization's budget is acceptable and over 15 percent is unacceptable. See *Haswell v. U.S.*, 500 F.2d 1133 (Ct. Cl. 1974) (spending 16-20 percent of budget on lobbying exceeded limit); *Seasongood v. C.I.R.*, 227 F.2d 907 (6th Cir. 1955) (finding permissible spending less than 5 percent of time and effort on lobbying). IRS Pub. 1828 explains:

The IRS considers a variety of factors, including the time devoted (by both compensated and volunteer workers) and the expenditures devoted by the organization to the activity, when determining whether the lobbying activity is substantial.

Pub. 1828 at 5. As long as any such lobbying activity constitutes a very small portion of the Church's budget—or, as may be the case here, none at all—there should be no reasonable risk of jeopardizing the Church's 501(c)(3) status.

Moreover, even if the Church *itself* were (contrary to what is explained above) prohibited from discussing ballot initiatives—which it is not—the conduct of its parishioners undertaken apart from Church directives or endorsement still would not jeopardize its tax-exempt status. The relevant question in such a circumstance is whether that conduct engaged in on church property is officially attributable to the Church or whether the conduct is merely the act of individual members. The IRS has explained:

Only actions by the exempt organization can disqualify it from 501(c)(3) status. Since organizations act through individuals, it is necessary to distinguish those activities of individuals that are done in an official capacity, from those that are not. Only official acts can be attributed to the organization.

G.C.M. 34523 (June 11, 1971). Principles of agency law govern this determination. G.C.M. 34631 (Oct. 4, 1971). “Only (1) acts by . . . officials under actual or purported authority to act for the organization, (2) acts by agents of the organization within their authority to act, or (3) acts ratified by the organization, should be considered as activities ‘of the organization.’” *Id.* Therefore, while the Church may be responsible for the acts of clergy, other employees, and even parishioners if done in discharging their official, assigned duties, their *personal activities* are not attributable to the organization, “and are, therefore, not relevant to an investigation of the [organization’s] qualification for 501(c)(3) status.” *Id.*

In light of the above analysis, it is clear that the Church is free to allow its parishioners to discuss and solicit signatures for ballot initiatives on church property without jeopardizing its 501(c)(3) status. The Church itself is not prohibited from engaging in insubstantial lobbying activities, and unofficial lobbying activity faces no such limitation.

We welcome any further questions you may have.

Yours truly,

Kevin J. Hasson
President