ALLIANCE DEFENSE FUND
Defending Our First Liberty

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June 2004

Dear Pastors:

A great battle rages within our nation; a battle to determine whether the very foundation of our society—one man and one woman, joined in marriage—will survive. Advocates of same-sex "marriage" fight fiercely for their "rights," focusing on individuals' emotions and government benefits. But marriage is more than feelings and money; its about providing a mom and a dad for every child; about building a strong society through time-tested, certain methods rather than radical social experiments. Indeed, the very reason that governments choose to benefit and regulate marriage is because it is the proven basis for western civilization. Proponents of same-sex "marriage" cannot show otherwise.

I write to assure you that the Alliance Defense Fund will spare no effort to ensure that Christians will not be silenced in the battle for marriage.

In the past decade, radical advocates of same-sex "marriage" have sought to establish new "rights" in Alaska, Hawaii, Vermont, Massachusetts, Arizona, and elsewhere. All but one of these battles resulted in their defeat—and pro-homosexual forces may yet be defeated in Massachusetts, where court actions and constitutional amendments to defend traditional marriage remain very much alive.

Across America, citizens are fighting to save marriage by advancing pro-marriage legislation at the state and federal level. Homosexual activists know that their arguments will fail if they are put squarely before our nation's citizens, and they do all that they can to prevent the issue from ever coming to a vote. Thus, pro-homosexual groups are threatening churches across the nation with the loss of tax-exempt status, and/or they allege that various state political campaign laws were violated, when churches simply preach about marriage or allow petitions on their property. It is a simple scare tactic, designed to silence Christians.

Such tactics are not new. They have been tried time and again, and have consistently failed. For example, in 1996, 1998, and 2000, pro-homosexual activists targeted churches that supported a proposition in California that defined marriage as being between one man and one woman. In one mailing, activists sent out some 80,000 threat letters. *See* Erik J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 Notre Dame J. L. Ethics & Pub. Pol'y 541, 557 (1999). These would-be censors failed to suppress Christian speech—the California measure ultimately passed and no church had its tax-exempt status revoked. These tactics of hate and intolerance must fail again in 2004.

By this letter, we assure you that churches have broad constitutional rights to express their views on marriage, as explained below. Furthermore, other activities such as allowing parishioners to sign petitions for legislative action to protect marriage are almost undoubtedly permissible under federal tax law. In the same way, the First Amendment to the United States Constitution most likely prevents states from demanding that churches register as a "political committee" or report "contributions" when the churches merely preach about marriage or allow petitions to be signed at their facilities.

If you are contacted by any government official or private activist group on such issues, please call us immediately. The Alliance Defense Fund's attorneys will promptly review your situation and make every effort to defend your church's legal rights to speak freely in support of marriage. Below we briefly discuss the relevant law.

Legal Analysis: Federal tax law

There are two broad areas of concern regarding the effect of political activity by churches that hold tax exempt status under Internal Revenue Code ("IRC") § 501(c)(3). First, the IRC prohibits churches from participating or intervening in the political campaign of a *candidate* for public office. However, the IRC is much more accommodating in regard to churches that work to influence *legislation*, allowing such activity so long as a "substantial part" of church efforts is not devoted to such activities. This "legislative" issue is what we are concerned about here.

Fortunately, the courts understand that advocating morality, both in church and in civil life, is properly at the heart of religious faith:

> Religion includes a way of life as well as beliefs upon the nature of the world and the admonitions to be "Doers of the word and not hearers only" (James 1:22) and "Go ye therefore, and teach all nations . . ." (Matthew 28:19) are as old as the Christian Church. The step from acceptance by the believer to his seeking to influence others in the same direction is a perfectly natural one, and is found in countless religious groups.

Girard Trust Co. v. Comm'r, 122 F.2d 108, 110 (3d Cir. 1941) (emphasis added; omission in original). As the Supreme Court put it, "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies, and private citizens have that [constitutional] right." *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1969).

Whether a church devotes a "substantial" part of its resources to influencing legislation is a question of facts and circumstances, *Kentucky Bar Foundation, Inc. v. Commissioner*, 78 T.C. 971 (1982), and courts have taken different approaches to the matter. For example, in *Seasongood v. Commissioner*, 227 F.2d 907 (6th Cir. 1955), the court established a five percent (5%) safe harbor rule based on total expenditures applied to legislative activities. *Id*. at 912. More recently, the decision in *World Family Corporation. v. Commissioner*, 81 T.C. 958 (1983) raised that bar when the Tax Court ruled that an exempt organization's lobbying activities which utilized between five and ten percent of the group's resources were "insubstantial."

It should be noted that one court relied on a balancing test, rather than a percentage of expenditures, in determining that a tax exempt religious organization had devoted a "substantial part" of its resources to influencing legislation. *See Christian Echoes Nat'l Ministry, Inc. v. U.S.,* 470 F.2d 849 (10th Cir. 1972). This court observed that the percentage test obscured the "complexity of balancing the organization's activities in relation to its objectives and circumstances." *Id*. at 855.

The *Christian Echoes* court stated that "the political [activities of a charity] must be balanced in the context of the objectives and circumstances of the organization to determine whether a substantial part of its objectives [not just expenditures] was to influence or attempt to influence legislation." *Id*. However, the lobbying undertaken by the Christian Echoes ministry went far beyond simply preaching about a moral issue or circulating petitions for proposed legislation. Rather, the group "attempted to mold public opinion in civil rights legislation, medicare, the Postage Revision Act of 1967, the Honest Election Law of 1967, the Nuclear Test Ban Treaty, the Panama Canal Treaty, firearms control legislation, and the Outer Space Treaty." *Id*. It urged its supporters to take no less than 22 different actions to influence American and international politics, including urging congressional representatives to support or oppose specific bills, abolish the federal income tax, withdraw from the United Nations, and so on. *Id.* Under these unusual facts—<u>including support of candidates</u> as well as legislation—the *Christian Echoes* court found that the defendant organization had devoted a "substantial part" of its resources to lobbying and affirmed the revocation of its tax exempt status. *Id*. at 858.

Unless a church has an extensive history of lobbying efforts (as exemplified by the *Christian Echoes* case) it is extremely unlikely that simple efforts to defend marriage, such as preaching about marriage or making petitions available to be signed—would be seen as a "substantial" portion of church resources. Such activities should be entirely permissible under federal tax law. Certainly, a church that devotes less than five percent of its resources to influencing legislation should be on very safe ground in this respect.

<u>State Political Campaign Law</u>

State governments have an interest in informing the public about campaign financing. The theory is that such information helps voters evaluate which interests are supporting particular legislation. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding federal campaign disclosure requirements). Yet however strong that interest may be, it does not justify imposing campaign law willy-nilly on churches that incidentally support legislation.

It is not possible to consider the political campaign laws of each state in this brief letter. Nonetheless, any requirement that a church register as a "political action committee" or report "expenditures" supporting legislation, simply because the church preached about marriage or allowed parishioners to sign petitions, raises serious questions under the Free Speech Clause and Free Exercise Clause of the First Amendment to the United States Constitution.

Indeed, the courts have recognized that applying broadly worded campaign reporting statutes to groups that do not engage in <u>substantial</u> advocacy would violate the First Amendment. For example, in *New Jersey State Chamber of Commerce v. New Jersey Election Law*

Enforcement Commission, 411 A.2d 168 (N.J. 1980), various secular groups challenged a campaign reporting law as being unconstitutionally overbroad because it was triggered by virtually any communication between a private person and a legislator which sought to "influence" legislation. The court held that the law was constitutional, but only if it was narrowly construed so that it applied "only to persons whose direct, express, and intentional communication with legislators for the purpose of affecting the outcome of legislation are undertaken on a substantial basis." *Id.* at 179*, accord Bemis Pentecostal Church v. Tennessee*, 731 S.W.2d 897 (Tenn. 1987) (holding church responsible to report expenditures for purchasing media advertisements that opposed specific liquor legislation, but also held that broadcasting the church's religious services and distributing church newsletters, even if advocating a particular election result, were not subject to campaign law). In other words, campaign law is not *carte blanche* for the government to limit private church speech or religious exercise.

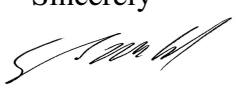
Other issues are implicated by unlimited application of state political campaign laws to churches. For example, demanding that churches register as "political committees" would operate as a "prior restraint" on speech, which is strongly disfavored under the U. S. Supreme Court's First Amendment jurisprudence. Similarly, it would chill the speech of other churches that would rightfully fear investigation and possible punishment by state election officials. Both situations offer solid bases to invalidate a state campaign law if that law were applied to churches in this context.

This is not mere rhetoric. Today, the Alliance Defense Fund sued the Montana Commissioner of Political Practices after she began investigating a church for purported violations of election law. According to the radical pro-homosexual group that sparked the investigation, the church automatically became a "political committee" because it watched a pro-marriage program in an evening worship service and allowed parishioners to sign a state marriage amendment petition on their way out the door. Thanks to a courageous pastor, a willing local attorney, and our Alliance, we are taking this issue to court to demonstrate that such misapplication of the law renders it unconstitutional.

Homosexual activists' outrageous, intolerant effort to stop churches from expressing their faith will succeed only if pastors succumb to fear and stand mute when marriage is attacked. But nothing in the law supports these activists' demands, and no pastor should yield to fear. Rather, pastors can (and should) speak clearly regarding moral truth and freely participate in the political processes within the limits set forth by our laws.

This material is a brief overview of a complex area of the law and should not be construed as legal advice relevant to a particular church's situation. If you have questions or believe that your church's rights were violated, please feel free to contact me.

Sincerely



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