NOTE

SOLVING ONE PROBLEM, CREATING ANOTHER: RELIGIOUS PREFERENCE IN THE JOHNSON AMENDMENT'S LATEST EXCEPTION

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This Note examines the constitutional concerns raised by a proposed consent decree in recent litigation challenging the Johnson Amendment, which bans electoral intervention by 501(c)(3) organizations. It argues that the Amendment's justification as a conditional government subsidy mischaracterizes case law and the tax code, and that the Amendment is not narrowly tailored to survive strict scrutiny. It then argues that the consent decree proposed by the IRS and plaintiff organizations, which creates a carve-out exempting only religiously motivated speech from a religious leader to their congregation, violates the Establishment Clause and the Free Speech Clause of the Constitution by privileging religious viewpoints. The decree also fails to address the Johnson Amendment's defects: it preserves vagueness and risks distorting the political landscape by channeling electoral advocacy into entities that are already exempt from disclosure requirements applicable to other 501(c)(3)s, while continuing to silence secular nonprofits that must comply with such requirements. Finally, this Note proposes a neutral, activity-based legislative alternative that would protect free speech for all 501(c)(3) organizations while safeguarding against large-scale, tax-favored electoral campaigning through targeted taxation and disclosure requirements.

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INTRODUCTION

Under current law, 501(c)(3) organizations, which include religious, charitable, and educational nonprofits, must refrain from engaging in electoral speech in order to remain tax-exempt.[1] This limitation, commonly known as the "Johnson Amendment," is rationalized as a safeguard against using nonprofits as conduits for unrestricted, tax-free political campaigning, but has also been criticized since inception as a direct violation of the First Amendment.[2] Recent litigation initiated by religious organizations challenges the Johnson Amendment's constitutionality, and has given rise to a proposed carve-out exempting religious speakers addressing their congregation from this restriction.[3] This carve-out is framed as necessary to avoid unconstitutionally disfavoring religious traditions that view political engagement as integral to faith, but it does not extend to secular nonprofits, which would remain subject to existing speech restrictions.[4] While the Johnson Amendment's breadth, vagueness, and resulting speech-chilling effect warrant reform, this carve-out is an inadequate solution. It raises new Free Speech and Establishment Clause concerns by favoring religious viewpoints over secular ones, leaves most of the Johnson Amendment's chilling effect intact, and introduces vagueness of its own. Its implementation through a consent decree is also a procedurally limited mechanism for the system-wide revision envisioned.

This Note argues that the Johnson Amendment's broad status-threatening sanction should instead be addressed legislatively. It should be replaced by an activity-based taxable-expenditure model that applies equally to religious and secular charities, preserves 501(c)(3) status, taxes defined campaign-intervention expenditures, and requires targeted disclosure to detect potential tax-favored campaign financing. The aim of such a proposal is not to depoliticize the nonprofit sector, but to prevent large-scale electioneering from being financed with deductible dollars while preserving robust speech and religious autonomy on equal terms for religious and secular speakers alike.

This Note proceeds in three Parts. Part I describes *National Religious Broadcasters v. Werfel* and argues that the government's "tax exemption as subsidy" framing is inconsistent with Supreme Court precedent and with the structure of the tax code, and that the compelling interests cited in favor of the Johnson Amendment are insufficient to pass strict scrutiny. Part II critiques the proposed consent decree carve-out as both unconstitutional and impractical because

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[1] I.R.C. § 501(c)(3).

[2] *See* Benjamin M. Leff, Fixing the Johnson Amendment Without Totally Destroying It, 6 U. PA. J. L. & PUB. AFF. REV. ONLINE 115, 117 (2020) (explaining that the Johnson Amendment prevents "donors from receiving a tax deduction by passing their campaign finance contribution through a 501(c)(3) organization when they could not get a tax deduction for a campaign contribution in any other context," and that it has sparked debate "for a long time."); Samuel D. Brunson, *A New Johnson Amendment: Subsidy, Core Political Speech, and Tax-Exempt Organizations*, 43 YALE L. & POL'Y REV. 354, 357 (2025) (explaining that various organizations have challenged the Johnson Amendment for violating free speech and free exercise protections).

[3] *See* Joint Motion for Entry of Consent Judgment, Nat'l Religious Broadcasters v. Long, No. 6:24-cv-00311-JCB, ECF No. 35, at 4 (E.D. Tex. July 7, 2025).

[4] *Id.*

it raises Establishment Clause and viewpoint-discrimination concerns, preserves vagueness, and lacks procedural capacity to produce reliable nationwide guidance. Part III proposes a taxable-expenditure-and-disclosure alternative designed to reduce chilling effects, improve administrability, and maintain neutrality across 501(c)(3) organizations.

I. OPPOSITION TO THE NRB CONSENT DECREE AND THE MISCONSTRUED "SUBSIDY" DEFENSE OF THE JOHNSON AMENDMENT

A. Litigation: *Nat'l Religious Broadcasters v. Werfel*

On August 28, 2024, two religious nonprofits and two churches sued the IRS in the Eastern District of Texas on the grounds that the Johnson Amendment to the Internal Revenue Code violates their free speech and free exercise rights to engage in political speech and endorse electoral candidates.[5] As noted above, the Johnson Amendment refers to the clause in § 501(c)(3) of the tax code, enacted in 1954, which prohibits tax-exempt nonprofits from "participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[6] Qualifying nonprofit organizations that violate this requirement risk losing their tax-exempt status under § 501(c)(3) and the deductibility of their donors' donations under § 170.[7] Plaintiffs argued the law chilled speech and forced self-censorship, noting that, absent this prohibition, they would have freedom to "communicate their views about candidates' positions that are relevant" to their religious convictions.[8] They also alleged a pattern of selective enforcement, arguing the IRS disproportionately enforces the Johnson Amendment against right-leaning entities and deliberately refrains from enforcing it against left-leaning entities, effectively favoring one viewpoint over another.[9]

On July 7, 2025, the parties agreed to an order enjoining the IRS from "enforcing the Johnson Amendment against Plaintiff Churches based on speech by a house of worship to its congregation in connection with religious services through its customary channels of communication on matters of faith, concerning electoral politics viewed through the lens of religious faith."[10] The joint motion concedes that some denominations view instructions on all aspects of life, including electoral

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[5] For readability, this Note generally uses "church" as shorthand for houses of worship generally (including synagogues, mosques, temples, and other congregations), unless the context indicates a narrower legal usage. In this case, the plaintiff organizations are: National Religious Broadcasters, Sand Springs Church, First Baptist Church Waskom, and Intercessors For America; Complaint for Declaratory Relief, Nat'l Religious Broadcasters v. Werfel, No. 6:24-cv-00311, ECF No. 1, at 42, 45 (E.D. Tex. Aug. 28, 2024) (now captioned *Nat'l Religious Broadcasters v. Long*); *see also* Jeremiah Price & Jack Moore, Case: *National Religious Broadcasters v. Werfel*, CIVIL RTS. LITIG. CLEARINGHOUSE (July 17, 2025), https://clearinghouse.net/case/46774/? [https://perma.cc/W7F4-R3JA].

[6] I.R.C. § 501(c)(3).

[7] I.R.C. § 170.

[8] Complaint for Declaratory Relief, *supra* note 5, at 3, 7.

[9] *Id.*; *see also* Price & Moore, *supra* note 5.

[10] *See* Joint Motion for Entry of Consent Judgment*, supra* note 3, at 4.

politics, as part of the exercise of their religious beliefs.[11] It contends that enforcing the Johnson Amendment's speech prohibition on religious entities effectively favors faiths that do not view electoral politics as integral to their practice over those that do, thereby violating the Establishment Clause.[12] The parties emphasize that interpreting the Johnson Amendment to reach internal worship communications would violate "the clearest command of the Establishment Clause:" [...] that the government may not 'officially prefe[r]' one religious denomination over another."[13]

Notably, the motion does not address the plaintiffs' Free Speech Clause claims or their other causes of action.[14] Since its filing, a number of religious and secular advocacy groups have filed motions opposing or supporting the consent motion. The court permitted participation from nearly all movants as amici but denied intervention by Americans United for Separation of Church and State.[15] The consent judgment still awaits a merits decision from the district court.[16]

B. Current Opposition to the Motion

Campaign Legal Center, Public Citizen, and Common Cause—three nonprofit public advocacy groups focused on campaign finance regulation and government accountability—filed a joint amicus brief opposing the consent decree proposed by the parties. They argue that (1) approving the motion would result in an unprecedented expansion of "dark money" in America by creating a conduit for "anonymous, tax-deductible election spending;" that (2) the Johnson Amendment does not violate the First Amendment because tax exemptions are a "form of subsidy;" and that (3) even if it did, the Amendment would survive strict scrutiny.[17]

1. The Subsidy Theory Mischaracterizes Tax Exemptions

While these organizations raise critical objections, their argument unduly minimizes the speech-chilling effect of the Johnson Amendment. They argue that the Johnson Amendment does not burden speech but simply denies a benefit that

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[11] *Id.*

[12] *Id.* at 4. (interpreting the Johnson Amendment as reaching internal religious communications would "treat religions that do not speak directly to matters of electoral politics more favorably than religions that do so").

[13] *Id.* at 4. (quoting Catholic Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n, 145 S. Ct. 1583, 1591 (2025) (quoting Larson v. Valente, 456 U.S. 228, 246 (1982))).

[14] *Id.*

[15] Price & Moore, *supra* note 5.

[16] *See* Order denying Americans United's motion to intervene, Nat'l Religious Broadcasters v. Bessent, No. 6:24-cv-00311-JCB, Doc. 102 (E.D. Tex. Dec. 12, 2025).

https://storage.courtlistener.com/recap/gov.uscourts.txed.232590/gov.uscourts.txed.232590.102.0.pdf [https://perma.cc/H5Y9-V36V]; Bob Smietana, Judge rules Americans United can't intervene in Johnson Amendment case, Episcopal News Service, (Jan 6, 2026), at 2, https://episcopalnewsservice.org/2026/01/06/judge-rules-americans-united-cant-intervene-in-johnson-amendment-case/ [https://perma.cc/G5YY-CT9X].

[17] Brief of Amici Curiae Campaign Legal Center, Public Citizen, & Common Cause Opposing the Parties' Joint Motion for Entry of Consent Judgment at 1, 18, 22, Nat'l Religious Broadcasters v. Long, No. 6:24-cv-00311-JCB (E.D. Tex. July 31, 2025) (ECF No. 51-1).

nonprofits can choose to forego in exchange for free speech rights.[18] But this "choice" is largely illusory. The financial viability of the charitable sector depends on tax exemptions and deductions, which enable organizations to attract contributions and fully devote them to their missions. While tax deductibility is not the driving incentive for donors to religious institutions, its complete removal would foreseeably reduce charitable contributions, especially for secular charities, whose donors are more likely to itemize their deductions.[19] When tax incentives to donate are reduced, charitable contributions by itemizers decrease.[20] Nonprofits rely on deductible donations and government grants as their main sources of income, both of which are conditioned on § 501(c)(3) compliance.[21] The choice to either self-censor or risk losing essential sources of revenue is not a meaningful one.

This detached "choice" framework conflates the absence of taxation with direct government subsidies. Amici cite *United States v. American Library Ass'n* (2003) for the proposition that "a refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."[22] But *American Library* dealt with libraries receiving federal funds, a direct subsidy, not a tax exemption.[23] They also rely on the Court's statement in *Regan v. Taxation With Representation of Washington* (1983) that "tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system."[24] However, this statement carried no precedential weight. It had no bearing on the outcome of the case, which did not turn on whether exemptions constitute subsidies and where the Johnson Amendment was not even at issue. Instead, the Court upheld Congress's denial of 501(c)(3) status to an entity organized around political advocacy, falling outside of the statute's permitted purposes.[25] This holding is fully consistent with treating exemptions as non-subsidies. Properly understood, *Regan* is an eligibility determination defining the scope of the charitable classification, not a holding that tax exemptions are synonymous with subsidies.

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[18] Brief of Amici Curiae, *supra* note 17, at 20 (it is ultimately "up to Plaintiffs to decide whether to accept the conditions that come with section 501(c)(3) status.").

[19] *See* Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 845-846 (2001) (noting that "many, perhaps most" religious contributions are not deducted, and that "[a]t the highest income levels, gifts to colleges and universities, hospitals, and arts and cultural organizations account for a much larger share of gifts" than contributions to religious organizations).

[20] *See* Howard Husock, The Tax Cuts and Jobs Act and Charitable Giving by Select High-Income Households, American Enterprise Institute (Apr. 2022), at 4, https://www.aei.org/wp-content/uploads/2022/04/The-Tax-Cuts-and-Jobs-Act-and-Charitable-Giving-by-Select-High-Income-Households.pdf [https://perma.cc/F9U8-LV49].

[21] *See* Lloyd Hitoshi Mayer & Zachary B. Pohlman, *What Is Caesar's, What Is God's: Fundamental Public Policy for Churches*, 44 HARV. J.L. & PUB. POL'Y 145, 213 (2021).

[22] Brief of Amici Curiae, *supra* note 17, at 21.

[23] United States v. American Library Association, Inc., 539 U.S. 194, 231 (2003).

[24] Brief of Amici Curiae, *supra* note 17, at 28; Regan v. Tax'n With Representation of Wash., 461 U.S. 540, 544 (1983).

[25] *See Regan*, 461 U.S. at 544; Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 2008).

In fact, the Supreme Court has explicitly distinguished tax exemptions from direct government support and held that denying an exemption based on speech is effectively a penalty on speech.[26] The Court's clearest guidance on this question comes from *Walz v. Tax Commission* (1970), which upheld New York's property tax exemption for religious organizations and expressly declared that "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."[27] The Court reiterated this view in *Arizona Christian School Tuition Org. v. Winn* (2011), where it rejected a challenge to a school tuition tax credit and explained that income cannot be "treated as if it were government property even if it has not come into the tax collector's hands" and distinguished "tax benefits" from "governmental expenditures."[28] Supreme Court precedent confirms that the government does not *fund* 501(c)(3) charities, but rather abstains from imposing a fiscal burden on them.[29] By restricting charities' access to public fora, the Johnson Amendment in effect regulates them rather than denies them aid, and thus warrants closer judicial scrutiny than differential funding.[30]

2. The Structure of the Tax Code Undermines the Subsidy Theory

The distinction between tax exemptions and government subsidies is already implicit in the tax code. If a tax exemption was equivalent to direct funding, § 501(c)(3) would have been a form of direct government support for religion since its inception, particularly because religious entities automatically fall under § 501(c)(3) and are therefore tax-exempt by default, without any input on their part.[31] Such an explicit legislative codification of government support of religion would be an overt violation of the Establishment Clause.[32] This was surely not Congress's intent. Tax exemptions are instead recognized as a means of limiting entanglement between church and state, including by the Supreme Court.[33]

Setting aside the legal inconsistencies of equating tax exemptions with direct government support, there remains a practical argument that tax exemptions have the same "net economic effect as a direct payment from the government."[34] However, the difference between direct government expenditures and tax

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[26] *See* Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 675-76 (1970); Speiser v. Randall, 357 U.S. 513, 518 (1958).

[27] *Walz*, 397 U.S. at 675-76.

[28] Arizona Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 144 (2011).

[29] *See id.*

[30] *See* Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1268 (2008).

[31] *See* Treas. Reg. § 1.6033-2.

[32] *See* Johnny Rex Buckles, *Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches That Engage in Partisan Political Speech?*, 84 IND. L.J. 447, 457 (2009); Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.").

[33] *See* Buckles, *supra* note 32, at 457; *Walz*, 397 U.S. at 675-76.

[34] Alan L. Feld, *Rendering Unto Caesar or Electioneering for Caesar? Loss of Church Tax Exemption for Participation in Electoral Politics*, 42 B.C. L. REV. 931, 937 (2001).

exemptions is structural; it goes far beyond a mere semantic distinction.[35] Tax exemptions of nonprofits reflect the appropriate tax base for their income structure; they are not part of the corporate income tax base.[36] Unlike corporations, charities do not have individual owners who can personally participate in their profits.[37] The primary rationale for corporate taxation—preventing shareholders from deferring income by retaining it inside the corporation—does not apply in the charitable context.[38] This is also why 501(c)(3) organizations engaging in commerce "leave behind their [...] taxation protections and enter the state's taxation cognizance."[39] Tax exemptions only apply to an organization's non-commercial activities; its "unrelated business taxable income," is subject to corporate-rate income tax.[40] Nonprofit organizations therefore receive no true fiscal privilege from § 501(c)(3). Their exemptions are limited to nonmarket activities outside the sphere of commercial exchange.

Further, if charitable tax exemptions were true governmental subsidies, they would be treated as federal tax expenditures.[41] The Department of the Treasury and the congressional Joint Committee on Taxation do not treat them as such, recognizing that income derived from a nonprofit's non-business activities is "outside the normal income tax base," which the Treasury defines as "the sum of consumption and the change in net wealth in a given period of time," reflecting the widely accepted Haig-Simons theory.[42] Tax exemptions and deductions are largely used to adjust taxable income to approximate this ideal tax base by limiting taxable income to resources used for personal consumption or wealth accumulation. This is why the Treasury lists social security benefits, which are exempt from taxation, as a tax expenditure, but does not do so for business deductions under § 132.[43] Social security benefits enable recipients to consume more than they otherwise would, making them income. Deductible business expenses, in contrast, are necessary costs of doing business, not direct increases in the taxpayer's ability to consume.[44] The Treasury ensures that only what it considers to be departures from

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[35] *Cf. Regan*, 461 U.S. at 549; *see also* Roger Colinvaux, *The Political Speech of Charities in the Face of Citizens United: A Defense of Prohibition*, 62 CASE W. RES. L. REV. 685, 723 (2012).

[36] David J. Herzig & Samuel D. Brunson, *Let Prophets Be (Non)Profits*, 52 WAKE FOREST L. REV. 1111, 1112 (2017).

[37] Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980).

[38] Herzig & Brunson, *supra* note 36, at 1134-35.

[39] Reece Barker, *A Memorial and Remonstrance Against Taxation of Churches*, 47 BYU L. REV. 1001, 1009 (2022).

[40] I.R.C. § 511(a)(1).

[41] Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244, 245-46 (1969).

[42] Joint Comm. on Tax'n, *Estimates of Federal Tax Expenditures for Fiscal Years 2023-2027*, JCX-59-23, at 9 (Dec. 7, 2023), https://www.jct.gov/getattachment/4bb6796c-df84-4179-9226-8cce61c7c4b5/x-59-23.pdf [https://perma.cc/PA33-GZQA]; U.S. Dep't of the Treasury, Off. of Tax Analysis, *Tax Expenditures: Fiscal Year 2025*, at 25 tbl. 1 (Mar. 11, 2024) (Table 1, listing charitable contribution deductions but not charitable tax exemptions), https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2025.pdf [https://perma.cc/Y8RT-SR73].

[43] Treasury, *Tax Expenditures: Fiscal Year 2025*, *supra* note 42, at 25 tbl. 1.

[44] Bittker, *supra* note 41, at 248.

its defined income tax baseline are counted as federal expenditures, and charitable exemptions are *not* a departure from that baseline.[45] Finally, even if charitable exemptions *were* classified as tax expenditures, any "cost" estimate would assume that charities' finances would remain unchanged if § 501(c)(3) were repealed. In reality, it is virtually impossible to determine the true cost of tax provisions that distort behavior.[46]

3. Charitable Contribution Deductions Are Not Subsidies

Donation deductions under § 170 should likewise not be characterized as direct government subsidies of 501(c)(3) organizations because they reflect a fair definition of income and encourage private support of community programs otherwise paid for by all taxpayers.[47]

Placing charitable deductions outside of the "normal" income tax base is not as straightforward as for § 501(c)(3) exemptions. The Department of the Treasury, for example, treats charitable donations as part of its defined income baseline and lists them as tax expenditures.[48] But what the Treasury considers to be a subsidy depends on its own interpretation of its taxable income baseline; it is not neutral nor inherent to any kind of deduction or exemption.[49] A fairer and more accurate representation of the income tax baseline would exclude § 170 donation deductions. Under the Haig-Simons definition—adopted by the Treasury and the Joint Committee on Taxation—the optimal measure of taxable income is a taxpayer's personal consumption and their accumulation of wealth in the form of real goods and services.[50] This definition does not neatly capture charitable contributions, which more closely resemble transfers directed toward publicly-oriented ends than "personal consumption" for the donor's own benefit.

Because taxpayers choose whether and how to allocate their contributions, charitable donations are often likened to personal gifts, which are not taxable to the

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[45] U.S. Dep't of the Treasury, Off. of Tax Analysis, *Tax Expenditures: Fiscal Year 2025*, at 1-2 (Mar. 11, 2024) (explaining that what counts as a "tax expenditure" depends on the baseline tax system and defining tax expenditures as exceptions to that baseline); *id.* at 25 tbl. 1 (listing "Deductibility of charitable contributions" among tax expenditures, but not listing any general exemption for § 501(c)(3) charitable organizations).

[46] Bittker, *supra* note 41, at 247.

[47] But note that in the religious nonprofit context, the charitable-contribution deduction is not the primary driver of donations, as many church donors do not itemize and therefore receive no marginal tax benefit from the deduction. *See* Aprill, *supra* note 19, at 845-46 (explaining that only about 30% of taxpayers itemize, and that for standard-deduction taxpayers the after-tax cost of giving is the same as the before-tax cost).

[48] Treasury, *Tax Expenditures: Fiscal Year 2025*, *supra* note 42, at 25 tbl. 1.

[49] *See generally* Bittker, *supra* note 41, at 249, 253.

[50] *See* SEAN LOWRY, CONG. RESEARCH. SERV., HEALTH-RELATED TAX EXPENDITURES: OVERVIEW AND ANALYSIS, R44333, at 3 (Jan. 8, 2016) ("JCT uses a modified Haig-Simons baseline definition of income (consumption plus changes in net wealth in a given period)."); U.S. DEP'T OF THE TREASURY, OFF. OF TAX ANALYSIS, TAX EXPENDITURES: FISCAL YEAR 2025, at 1 (Mar. 11, 2024) (explaining that Treasury's estimates are "patterned on a comprehensive income tax," which "defines income as the sum of consumption and the change in net wealth."); William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 313, 320 (1972).

recipient and are not deductible for the donor.[51] However, there are significant differences between personal gifts to individuals and charitable donations. Personal gifts transfer consumption capacity from one individual to another. In contrast, charitable contributions transfer personal income to organizations "operated exclusively" for a limited selection of purposes defined by the tax code, not to any other individual simply for the purpose of gift-giving.[52] Donation deductions refine the ideal tax base by distinguishing personal consumption from the financing of public goods, and in turn serving a primary purpose of income taxation by promoting the redirection of private resources toward recognized public causes.[53] They were enacted out of concern that high-income tax rates put in place during World War I would reduce charitable contributions, and studies show that, among higher-income itemizers, giving increases as the after-tax price of giving decreases.[54]

Charitable deductions thus function as tax base refinements.[55] Like business and medical expense deductions, they exclude from taxable income resources that do not represent personal consumption.[56] Although donors choose whether to give, unlike taxpayers with medical needs, business deductions similarly involve discretionary costs, yet are not considered subsidies.[57]

Even if deductions are in fact government benefits, they are not discretionary benefits that can be used to control speech. Section 170 is a generally available tax feature triggered by objective taxpayer behavior, not a targeted grant program. It functions more like a structural measurement of taxable income than a selective subsidy the government may condition on the recipient's viewpoint.

Alternatively, in the religious context, even if donation deductions were government subsidies that could be conditioned on recipients' speech, their effect would remain minimal, because most contributors to religious institutions do not itemize and therefore do not benefit from § 170.[58] Income and religious

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[51] *See* Andrews, *supra* note 50, at 348-49.

[52] I.R.C. §501(c)(3) (for religious, charitable, scientific, or educational purposes).

[53] *See* Minn. H.R. Research. Dep't, *A Review of Selected Tax Expenditures* at 40 (Nov. 2013), https://www.house.mn.gov/hrd/pubs/taxexpend.pdf [https://perma.cc/P4V9-ZJEV].

[54] *See id.* at 39, 41, 44.

[55] *See* Bittker, *supra* note 41, at 249-50.

[56] I.R.C. § 162(a) (deduction for "ordinary and necessary" expenses paid or incurred in carrying on a trade or business); I.R.C. § 262(a) (no deduction for "personal, living, or family expenses"); I.R.C. § 170(a)(1) (charitable contribution deduction); I.R.C. § 213(a), (d)(1) (medical expense deduction; *see* Andrews, *supra* note 50, at 381-82.

[57] *See* I.R.C. § 162; I.R.C. § 62(a)(1).

[58] Lloyd Hitoshi Mayer & Ellen P. Aprill, *Tax Exemption Is Not a Subsidy—Except for When It Is*, 172 TAX NOTES FED. 1887, 1892 (Sept. 20, 2021), https://www.taxnotes.com/featured-analysis/tax-exemption-not-subsidy-except-when-it/2021/09/17/7830q#7830q-0000029, [https://perma.cc/K3ES-9F7T] (noting that, given the current standard deduction, only a small minority of taxpayers claim the charitable contribution deduction); JANE G. GRAVELLE ET AL., CONG. RESEARCH. SERV., R45922, TAX ISSUES RELATING TO CHARITABLE CONTRIBUTIONS AND ORGANIZATIONS, R45922, at 5 (June 15, 2020) (reporting that the Joint Committee on Taxation estimated that approximately 13% of taxpayers itemized deductions in 2019); JOINT COMM. ON TAX'N, EXAMINING CHARITABLE GIVING AND TRENDS IN THE NONPROFIT SECTOR, JCX-2-22, at 7 (Mar. 14, 2022) (explaining that taxpayers who take the standard deduction do not receive an

commitment levels are much better indicators of religious contributions than the tax benefits they provide.[59] More than three-quarters of all charitable contributions from taxpayers earning less than $40,000 are directed to religious organizations.[60] In contrast, contributions to universities, hospitals, and arts and cultural organizations constitute a much larger share of donations from high-income taxpayers.[61] This suggests that removing donation deductions would likely have little effect on donations to religious institutions—which are associated with a higher risk of undetected campaign intervention—while potentially reducing contributions to secular causes that help alleviate the state's responsibility to meet public needs.[62] This would undermine the tax system's role in reallocating private resources toward public purposes and undercuts the claim that § 170 is a sufficiently substantial government "benefit" to justify the Johnson Amendment's speech restrictions.

Under a refined understanding of the tax base, charitable exemptions and deductions are structural features of the income tax, not discretionary benefits the government may withhold to influence speech.

4. The Johnson Amendment Would Not Survive Strict Scrutiny

Amici contend that even if the Johnson Amendment was a restriction on protected speech rather than a mere discretional subsidy, it would survive strict scrutiny because the government has a compelling interest to (1) prevent tax-deductible donations from becoming "vehicles for financing political campaigns" and (2) maintain the "integrity and neutrality of the charitable sector."[63] However, the Johnson Amendment is far from sufficiently narrowly tailored to survive strict scrutiny. This standard requires the government to employ the least restrictive means of achieving a compelling interest.[64] A general way of advancing an interest is not sufficient. The "compelling" interests cited by amici are either not sufficiently compelling or could be remedied through much narrower means.

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additional tax benefit for charitable contributions); *see* Aprill, *supra* note 19, at 845-46 (arguing that the charitable contribution deduction is not the primary driver of donations to religious organizations and discussing the importance of nonitemizers).

[59] *See* Aprill, *supra* note 19, at 846-47; *see generally*, Charles T. Clotfelter, *Federal Tax Policy and Charitable Giving* at 274 (1985).

[60] *See* Aprill, *supra* note 19, at 846; Jonathan Meer & Benjamin A. Priday, *Generosity Across the Income and Wealth Distributions*, 74 NAT'L TAX J. 675, 679 (2021) [https://perma.cc/7QX3-MQ7Z] (noting that the share of religious contributions trends downward as income levels rise); JANE G. GRAVELLE, ECONOMIC ANALYSIS OF THE CHARITABLE CONTRIBUTION DEDUCTION FOR NON-ITEMIZERS, CONG. RSCH. SERV. REP. NO. RL31108, at CRS-10 tbl. 4 (Jan. 26, 2007).

[61] Aprill, *supra* note 19, at 846; *see also* Gravelle, *supra* note 58, at CRS-10 tbl. 4.

[62] *See* Lloyd Hitoshi Mayer & Ellen P. Aprill, *21st Century Churches and Federal Tax Law*, 2024 U. ILL. L. REV. 939 (2024) (explaining that exemption from Form 990 and special audit procedures limit oversight of churches by the IRS, media, and public).

[63] Brief of Amici Curiae, *supra* note 17, at 23-4.

[64] *See* PHILIP HAMBURGER, LIBERAL SUPPRESSION: SECTION 501(C)(3) AND THE TAXATION OF SPEECH 224 (Univ. of Chi. Press 2018).

a. Political Speech Receives the Highest Level of Constitutional Protection

Political speech is afforded the highest level of judicial scrutiny. Courts have recognized that "core political speech," encompassing speech surrounding elections, campaigns, and political advocacy, is where First Amendment protection is "at its zenith."[65] Recent Supreme Court precedent suggests that the Court continues to adhere to this understanding. Most notably, in *Citizens United v. Federal Election Commission* (2010), the Supreme Court defined political speech as "the means to hold officials accountable to the people" and "an essential mechanism of democracy" that "must prevail against laws that would suppress it."[66] Since then, the Court has reaffirmed its stance that "'[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation' of our system of government" and that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office."[67] This robust protection of political speech has led the Court to strike down restrictions even when compelling anticorruption interests were cited as a defense.[68]

The Supreme Court has also held that the government cannot force an entity to choose between financial benefits and First Amendment rights.[69] In *Agency for International Development v. Alliance for Open Society International* (2013), the Court explained the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected...freedom of speech even if he has no entitlement to that benefit," and that "a funding condition can result in an unconstitutional burden on First Amendment rights."[70] The Court has similarly held that a tax cannot be "levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment," as it "restrains in advance those constitutional liberties…and inevitably tends to suppress their exercise."[71] This principle was applied in *Speiser v. Randall* (1958), which invalidated a California law conditioning a property tax credit for veterans on their signing of a declaration that they did "not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means."[72] There, the Court found that "a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech, and that "[t]o

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[65] Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 187 (1999); Brunson, *A New Johnson Amendment, supra* note 2 at 360, 372.

[66] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010).

[67] Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734 (2011) (citing Buckley v. Valeo, 424 U.S. 1, 14 (1976), and Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989)).

[68] *Id.* at 751.

[69] *See* Tebbe, *supra* note 26, at 1325.

[70] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214 (2013) (citing Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 59 (2006)).

[71] Murdock v. Com. of Pennsylvania, 319 U.S. 105, 114 (1943).

[72] Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1346 (2007).

deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."[73]

Proponents of the Johnson Amendment attempt to differentiate it from the law invalidated in *Speiser* by highlighting that the California law was intended to punish individuals for engaging in "the wrong type of speech" and to control the content of their speech, unlike the more "neutral" Johnson Amendment, which prohibits all political campaign intervention.[74] However, the Supreme Court has explicitly stated that unconstitutional content-based restrictions extend "not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."[75] By conditioning a tax benefit on the suppression of electoral speech, the Johnson Amendment does just that.

This suppression is sometimes justified on the grounds that § 501(c)(4) provides an alternative channel for nonprofit political engagement through the creation of separate "social welfare" organizations.[76] But this provision alone does not cure 501(c)(3) speech restrictions.[77] Section 501(c)(4) allows only political lobbying that "relates to" social welfare purposes, which cannot be "direct or indirect participation . . . on behalf of or in opposition to any candidate for public office," leaving much of the speech restricted under § 501(c)(3) unprotected.[78]

More importantly, requiring the formation of a separate entity to engage in speech of a particular content is itself a burden on speech.[79] While the government may impose "reasonable time, place, or manner regulations," such regulations "may not be based upon either the content or subject matter of speech."[80] The creation of a separate entity is not practically available to all 501(c)(3) organizations. Because 501(c)(4) entities are subject to complex and costly requirements, this option is feasible for large organizations like the ACLU or megachurches, but not for smaller, local charities.[81] This alternative therefore

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[73] Speiser v. Randall, 357 U.S. 513 (1958).

[74] Tobin, *supra* note 72, at 1346.

[75] Fed. Commc'ns Comm'n v. League of Women Voters of Cal., 468 U.S. 364, 384 (1984) (quoting Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 537 (1980)).

[76] I.R.C. § 501(c)(4); *see Regan*, 461 U.S. at 544-45 (noting IRS practice permitting separately incorporated affiliates with adequate records so deductible § 501(c)(3) funds are not used for the affiliate's restricted activity); Hamburger, *supra* note 64, at 243-4.

[77] *See* James Bopp, Jr. & Zachary S. Kester, *Holding the Service's Feet to the Fire: Applying Citizens United and the First Amendment to the IRC § 501(c)(3) Political Prohibition*, 11 ENGAGE: J. FED. SOC'Y PRAC. GROUPS 75-80 (Dec. 2010) (arguing that *Citizens United* casts serious doubt on the veracity of the "alternate channel doctrine").

[78] *See* Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii); Brunson, *supra* note 2, at 386; Hamburger, *supra* note 64, at 242.

[79] *See Citizens United,* 558 U.S. at 337 (noting that "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations"); Brunson, *supra* note 2, at 384.

[80] Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 530 (1980).

[81] See ALLIANCE FOR JUSTICE, THE PRACTICAL IMPLICATIONS OF AFFILIATED 501(C)(3)S AND 501(C)(4)S at 1 (June 11, 2018), https://afj.org/wp-content/uploads/2018/06/The_Practical_Implications_of_Affiliated_501c3s_andc4s.pdf, [https://perma.cc/G9TG-4C7A] (noting that it is "not uncommon for a 501(c)(3) to establish an affiliated 501(c)(4)"); 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i) (2025) (defining a § 501(c)(4) as operated

skews the political speech landscape in favor of large, established organizations and constrains the expressive capacity of smaller, community-based ones.

This asymmetry explains why, as amici note, 501(c)(4) organizations serve as "vehicle(s) for political actors seeking to circumvent federal campaign-finance laws" despite the robust disclosure laws they are subject to. But this defect does not justify broad restrictions on 501(c)(3) speech. It should instead be addressed through stronger enforcement and disclosure requirements.

The Supreme Court's recent protection of political speech and its rejection of the "choice" and the "alternative channels" arguments suggest that the Johnson Amendment may be a vestige of the past that would not survive under current First Amendment doctrine.[82]

b. The Compelling Interests Cited Do Not Justify the Reach of the Johnson Amendment

Amici cite two "compelling" interests to justify the Johnson Amendment's speech restriction. First, they note that "the government has a compelling interest in ensuring that tax-deductible contributions made to charitable organizations do not become vehicles for financing political campaigns."[83] While this is undeniably a legitimate concern and an important government interest, it does not require a safeguard as sweeping as the complete removal of an entire organization's tax-exempt status based strictly on its speech. Far narrower tools, such as denying the deductibility of funds used for campaign expenditures, taxing such expenditures, or imposing disclosure requirements, could prevent campaign-finance abuses without suppressing protected speech.

The Johnson Amendment is drafted so vaguely and applied so broadly that it cannot withstand strict scrutiny. It holds that 501(c)(3) organizations cannot "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."[84] Official IRS guidance interprets this prohibition expansively, barring virtually all forms of communications on electoral politics at the federal, state, and local levels.[85] It encompasses financial contributions; public statements, including statements made exclusively to an organization's members, such as in a Sunday sermon or at an annual meeting; the distribution of an entity's own material

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"exclusively for the promotion of social welfare," meaning "primarily engaged" in promoting the community's "common good and general welfare" and explaining that affiliated § 501(c)(3) and § 501(c)(4) organizations "must be separate legal entities," including separate incorporation formalities and separate financial records); I.R.S., INSTRUCTIONS FOR SCHEDULE R (FORM 990) at 1 (Rev. Dec. 2024) (describing detailed reporting required for "related organizations" and transactions between the filing organization and related organizations).

[82] *See* Leff, *supra* note 2, at 136.

[83] Brief of Amici Curiae, *supra* note 17, at 23.

[84] 26 U.S.C. § 501(c)(3).

[85] *See* Buckles, *Constitutional Norm, supra* note 32, at 449-50; I.R.S., ELECTION YEAR ACTIVITIES AND THE PROHIBITION ON POLITICAL CAMPAIGN INTERVENTION FOR SECTION 501(C)(3) ORGANIZATIONS, Fact Sheet FS-2006-17, at 2 (Feb. 2006), https://www.irs.gov/pub/irs-news/fs-06-17.pdf [https://perma.cc/G9GK-U4G8].

or materials prepared by other organizations; and the use of an entity's facilities for candidates—all of which would be prohibited.[86] The ban also applies to political speech focused on specific issues of particular interest to an organization, regardless of explicit candidate endorsement.[87] Although the prohibition is "not intended to restrict free expression on political matters by leaders of organizations speaking for themselves, as individuals," it nevertheless applies to any electoral endorsement by a church leader who explicitly labels a statement as "my views" or "my personal opinion," and who personally pays for the space in which it appears, so long as the statement is published in an official church publication.[88] IRS guidance explains that the prohibition also extends to religious statements by religious leaders to their congregations during regular worship services.[89] Section 501(c)(3) therefore encompasses speech that is virtually cost-free and thus cannot reasonably be treated as unlawful tax-favored political intervention, rendering the provision far from narrowly tailored to the government's interest in limiting tax-free electioneering.[90]

The IRS also applies a "facts and circumstances" standard, rather than a clear test, a regime that is itself rare and uneven.[91] This lack of clarity creates uncertainty and unduly chills speech, as organizations attempt to gauge which statements might be deemed impermissible and risk losing their tax-exempt status if they misinterpret the IRS's limits.[92]

In practice, enforcement is rare, but it can be unyielding when it does occur.[93] In *Christian Echoes Nat'l Ministry, Inc. v. United States* (1973), a religious broadcasting ministry lost its tax-exempt status for violating the lobbying restriction of §501(c)(3) and for "us[ing] its publications and broadcasts to attack

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[86] I.R.S., *Election Year Activities*, *supra* note 85, at 2-3.

[87] *Id.* at 7 ("Even if a statement does not expressly tell an audience to vote for or against a specific candidate, an organization delivering the statement is at risk of violating the political campaign intervention prohibition if there is any message favoring or opposing a candidate"); Tobin, *supra* note 72, at 1349.

[88] I.R.S., *Election Year Activities*, *supra* note 85, at 3; Buckles, *Constitutional Norm, supra* note 32, at 449-50; I.R.S., TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS, at 8 (Publication 1828, Rev. Aug. 2015), https://www.irs.gov/pub/irs-pdf/p1828.pdf [https://perma.cc/XFB4-QGB8].

[89] *See* Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise* (2009), NOTRE DAME LAW SCHOOL, at 1146; I.R.S. Tax Guide for Churches, *supra* note 88, at 8 (explaining that a situation where a minister urges the congregation to vote for a particular candidate while preaching during a regular worship service is an example of political campaign intervention by a church; this would be negated by the consent motion if approved).

[90] *See* Hamburger, *supra* note 64, at 228-9, explaining that the Johnson Amendment's overinclusion of speech relative to the government's anti-subsidy rationale applicable only to *some* of this speech is the opposite of narrow tailoring.

[91] *See* Fact Sheet FS-2006-17, *supra* note 85, at 1; *see* Brunson, *supra* note 2, at 388, explaining that the IRS revoked or recommended exemption revocations of only six of 210 tax-exempt organizations that had directly contributed over $340,000 to candidates in 2006 alone.

[92] *See* Tobin, *supra* note 72, at 1350-52.

[93] *See* Brunson, *A New Johnson Amendment, supra* note 2, at 388 (explaining that the IRS revoked or recommended exemption revocations of only six of 210 tax-exempt organizations that had directly contributed over $340,000 to candidates in 2006 alone).

candidates and incumbents who were considered too liberal," although it "did not formally endorse specific candidates for office."[94] The Second Circuit even revoked the tax-exempt status of the Association of the Bar of the City of New York, a non-partisan, non-political nonprofit, because it released a ranking of candidates for appointive and elective judgeships. The Court determined that these ratings were intended to influence voters and were therefore an intervention in electoral politics, violating § 501(c)(3).[95]

Other election-related activities are subject to multi-factor analyses to determine their validity.[96] For example, the IRS subjects get-out-the-vote efforts to a multi-factor test examining how candidates or parties are or are not named, whether the message encourages more than merely registration, and whether all services are offered without regard to voters' political preference.[97] The IRS does not consider an organization's motivations or intent for holding a particular activity in determining whether a violation occurred, but it considers the timing of its activities—the more contemporaneous a communication is with an election, the higher the level of scrutiny applied by the IRS.[98] These sweeping and imprecise standards fail to effectively target unlawful tax-favored campaigning and instead unduly chill the free expression of nonprofits.

The second compelling interest cited in the amicus brief is preserving "the integrity and neutrality of the charitable sector."[99] But the integrity and neutrality of the charitable sector are better protected by allowing it to exist as a free, independent part of civil society, not by policing its speech.[100] Enforcing the view that faith and charitable missions must remain entirely distinct from electoral politics is in itself an imposition of a governmental preference onto private actors. It is not neutral and does not preserve the independence of charities.[101] Before the Johnson Amendment, religious and charitable organizations exercised full speech rights and have served as alternative sources of government-established social policy.[102] For example, Black churches were the principal driving force in the advancement of the Civil Rights movement, and the relationship between Black churches and political endorsements has remained strong even after the passage of the Johnson Amendment.[103] Similarly, 501(c)(3) organizations like the Brennan Center for Justice or the Innocence Project have shaped major legal and social reforms that can hardly be divorced from politics. By confining the charitable sector to a non-political—or at least not vocally political—role, the Johnson Amendment

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[94] Christian Echoes Nat. Ministry, Inc. v. United States, 470 F.2d 849, 856 (10th Cir. 1972).

[95] Ass'n of Bar of City of New York v. Comm'r*,* 858 F.2d 876, 879 (2d Cir. 1988).

[96] *See* Mayer, *Politics at the Pulpit, supra* note 89, at 1147.

[97] *See* I.R.S., *Election Year Activities*, *supra* note 85, at 2, 4-5, 7.

[98] *See* Tobin, *supra* note 72, at 1349-50; I.R.S. *Tech. Adv. Mem. 89-36-002* (Sept. 8, 1989).

[99] Brief of Amici Curiae, *supra* note 17, at 24.

[100] *See* HAMBURGER, *supra* note 64, at 231.

[101] *See id*. at 211.

[102] *See id*. at 211, 231; Charities, Churches and Politics, INTERNAL REVENUE SERVICE (Dec. 5, 2025), https://www.irs.gov/newsroom/charities-churches-and-politics [https://perma.cc/C8H7-H54G].

[103] Fredrick C. Harris, *Black Churches and Civic Traditions: Outreach, Activism, and the Politics of Public Funding of Faith-Based Ministries*, 149-50 (Oxford Univ. Press 2003).

"reshape[s] private [entities] into the government's vision of them" and suppresses their role as an independent check on governmental power.[104] Allowing all 501(c)(3) organizations to speak freely would preserve their integrity and neutrality better than conditioning their tax-exemptions on the content of their speech, especially given the imprecise and broad interpretation of the statute by IRS guidance and its uneven application by the courts.[105]

II. THE CONSENT DECREE FAILS TO REMEDY THE JOHNSON AMENDMENT'S DEFECTS

The consent decree is not a neutral and sufficient fix to the Johnson Amendment's defects. Its religion-only safe harbor raises First Amendment concerns, preserves vagueness, and risks distorting the political landscape.

Americans United for the Separation of Church and State (AUSCS), a national public-interest organization, filed a motion to intervene as a defendant in the *NRB* litigation on the grounds that adopting the proposed consent decree would deprive secular nonprofits like AUSCS of equal treatment under the law,[106] and to pursue its mission of "ensuring the continued viability of the Johnson Amendment."[107] The Eastern District of Texas denied AUSCS's motion, finding that it lacked a uniquely protectable interest and that its position was adequately represented by the IRS for Rule 24 purposes.[108] AUSCS's unequal treatment argument highlights the central flaw in the proposed consent decree: it treats 501(c)(3) charities differently based on their religious status and creates an exception that unduly favors religion. While entering the consent judgment would offer *some* relief to the vagueness and chilling effect of the Johnson Amendment, it in turn creates new constitutional violations through its establishment and viewpoint discrimination defects.

A. The Proposed Decree Offers Some Relief

The proposed consent decree addresses *some* of the shortcomings of the Johnson Amendment. First, it answers the long-standing question of whether 501(c)(3)'s speech prohibition applies to religious leaders speaking to their congregation.[109] Case law precedent has been a limited source of guidance on this question. Courts rarely enforce the Johnson Amendment, and when they do, their

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[104] *See* HAMBURGER, *supra* note 64, at 211, 231 (noting that "one of the key advantages of idealistic associations is that, in espousing their ideals, they can challenge consensus and other complacent thinking," and that allowing the government to stifle idealistic speech directly contradicts its supposed aim to protect the political process).

[105] Jason M. Sneed, *Regaining Their Political Voices: The Religious Freedom Restoration Act's Promise of Delivering Churches from the Section 501(c)(3) Restrictions on Lobbying and Campaigning*, 13 J.L. & Pol. 493, 505 (1997).

[106] Proposed Intervenor's Opposed Motion to Intervene as Defendant at 6, Nat'l Religious Broadcasters v. Long, No. 6:24-cv-00311 (E.D. Tex. July 10, 2025) (ECF No.37) at 6, 11.

[107] *Id*. at 12.

[108] Nat'l Religious Broadcasters v. Bessent, No. 6:24-cv-00311 (E.D. Tex. Dec. 12, 2025) (Barker, J.).

[109] *See* MAYER, *Politics at the Pulpit*, *supra* note 89, at 1139.

enforcement deals with external communications.[110] By contrast, official IRS guidance has indicated that the prohibition extends to internal, member-facing communications.[111] Despite the sporadic enforcement of the Johnson Amendment, which is likely linked to its questionable constitutionality, the IRS had never publicly agreed not to enforce it or suggested that it could violate constitutional rights.[112] This proposed agreement is therefore a significant and clarifying concession.[113]

Second, it recognizes that religious exercise is burdened by the Johnson Amendment, and alleviates this burden. The proposed decree states that "[f]or many houses of worship, the exercise of their religious beliefs includes teaching or instructing their congregations regarding all aspects of life, including guidance concerning the impact of faith on the choices inherent in electoral politics," and that regulating such communications would create "serious tension" with the Establishment Clause.[114] While often presented as a necessary anti-establishment separation between religion and politics, the Johnson Amendment itself violates the religion clauses by allowing the government to dictate the scope of one's religion and how its members may practice it.[115] Some denominations find that politics cannot be divorced from their faith. An intrusion into the speech of religious leaders to their congregation is therefore an imposition of the government's view on the practice of a religion and a burden on its exercise. In the case of plaintiff churches, they hold the "religious conviction that they must teach and preach about all areas of life," including "issues [...] that may arise in the public arena."[116] Their complaint supports this position by citing scripture linking religious duty to political convictions.[117] They claim that issues such as "religious freedom, the right to life, racism, and the duties of parents to their children" are matters of faith and politics

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[110] *Id*; *see* Branch Ministries v. Rossotti, 211 F.3d 137, 139 (D.C. Cir. 2000) (enforcing the prohibition on a church's purchase of newspaper ads critical of then-candidate Bill Clinton); Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 851-53 (10th Cir. 1972) (upholding tax-exempt revocation where religious ministry's radio broadcasts and other public communications discussed candidates).

[111] *See* I.R.S., *Election Year Activities*, *supra* note 85, at 3 (noting that "leaders cannot make partisan comments [...] at official functions of the organization").

[112] *See* BRUNSON, *A New Johnson Amendment*, *supra* note 2, at 416.

[113] Nat'l L. Rev., *IRS Enters into Consent Decree Limiting Application of Johnson Amendment; New Position Allows Churches to Endorse Candidates in Certain Situations* (July 7, 2025), https://natlawreview.com/article/irs-enters-consent-decree-limiting-application-johnson-amendment-new-position [https://perma.cc/XN49-JB7G].

[114] *See Joint Motion for Entry of Consent Judgment*, *supra* note 3, at 4.

[115] *See, e.g.*, Rebecca S. Markert, *Defending the Johnson Amendment as a Critical Tool to Preserve Democracy and Religious Freedom*, CANOPY F. (Dec. 17, 2025), https://canopyforum.org/2025/12/17/defending-the-johnson-amendment-as-a-critical-tool-to-preserve-democracy-and-religious-freedom/ [https://perma.cc/P26K-X688] (presenting the Johnson Amendment as preserving the constitutional principle of separation between church and state by keeping partisan politics from becoming entangled with tax-exempt religious activity).

[116] Complaint for Declaratory Relief, *supra* note 5, at 10, 45.

[117] *Id*. at 11. In their complaint, plaintiff churches express their belief that they have a duty to teach the full counsel of the Word of God, and to declare when candidates have deviated from the right or the left of God's standards.

that cannot be separated and are treated differently by different political candidates.[118]

As noted *supra* Section I.B, many Black churches have long viewed political engagement as integral to their religious mission. They have been the few available political outlets for Black Americans in their fight for racial justice and served as a "nurturing ground for several African-American politicians."[119] The Johnson Amendment has forced many of these churches to refrain from direct political engagement despite their persisting fusion of faith and political activism.[120] Black Protestants are more likely than predominantly white Christian groups to say churches should be allowed to endorse political candidates, and they are also more likely to report that religious leaders in their congregation spoke directly for or against a specific presidential candidate.[121] This history and data show that the Johnson Amendment uniquely chills Black churches' civic role.

Other religious communities share the view that faith is inseparable from politics. A number of Muslim organizations in the United States have defined civic engagement as a "religious mandate," "a core part of [their] faith," and as "among

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[118] *Id*. at 45.

[119] Vaughn E. James, *The African-American Church, Political Activity, and Tax Exemption*, 37 SETON HALL L. REV. 371, 371 (2007).

[120] Supad Kumar Ghose, *The Role of the Black Church in the American Civil Rights Movement*, 36 J. BLACK STUD. 3 (2005); Sneed, *supra* note 105, at 495-6 ("Despite lackluster enforcement, the prohibition on lobbying and campaigning by charities has effectively silenced the voice of religious organizations in the political realm. Faced with the removal of the federal income tax exemption and other penalties if they speak out or become involved in the political process, most religious groups have chosen to forego political involvement, denying what many feel is their religiously-motivated responsibility to speak out on issues of faith that intertwine with politics.").

[121] *See* Gregory A. Smith, "Most Americans Oppose Churches Choosing Sides in Elections," PEW RSCH. CTR. (Feb. 3, 2017), https://www.pewresearch.org/short-reads/2017/02/03/most-americans-oppose-churches-choosing-sides-in-elections/ [https://perma.cc/L4NC-SCX6] (reporting that 45% of Black Protestants, compared with 21% of white mainline Protestants, say it is acceptable for churches to endorse political candidates); PEW RSCH. CTR., Many Americans Hear About Politics at Church, (Aug. 8, 2016), https://www.pewresearch.org/religion/2016/08/08/many-americans-hear-politics-from-the-pulpit/ [https://perma.cc/57CB-D86Y] (reporting that Black Protestants are "particularly likely" to hear clergy speak directly in support of or in opposition to a presidential candidate (29% hearing support for a candidate and 29% hearing opposition) while "roughly one-in-ten or fewer" of Catholic, white evangelical, and white mainline Protestant churchgoers report the same); *see also*, Fredrick C. Harris, *Black Churches and Civic Traditions: Outreach, Activism, and the Politics of Public Funding of Faith-Based Ministries*, 149 (referring to a 1992 National Black Politics Study survey reporting that Black churchgoers are significantly more likely than white churchgoers "to believe that churches or political leaders should back political candidates or that a minister had a right to promote a particular point of view during church services").

the highest forms of *Amal As-Saleh,*" or righteous action.[122] Jewish religious leaders have also defined voting as a *mitzvah* rooted in religious obligation.[123]

By acknowledging that some denominations cannot separate faith from political life, the proposed decree offers a safeguard against Establishment and Free Exercise Clause violations. It ensures that the government does not favor faiths based on their relation to politics nor dictate how one should interpret and practice their religion. Allowing courts to do so would overstep their "judicial function and judicial competence … [by] inquir[ing] whether the petitioner or his fellow worker more correctly perceived the commands of their common faith … [and acting as] arbiters of scriptural interpretation."[124] The carve-out thereby protects the freedom of conscience guaranteed by the Free Exercise Clause—an essential limit on state power that allows citizens to prioritize their own deeply held convictions and the obligations that flow therefrom over the preferences of the state.[125] It also advances the anti-establishment conception of religious equality. This approach tracks James Madison's view that religious freedom is secured through "free competition between religions," whereby "every denomination would be equally at liberty to exercise and propagate its beliefs," regardless of its popularity.[126]

Finally, the proposed decree would mitigate *some* of the Johnson Amendment's speech-chilling effects. By permitting religious leaders to speak freely to their congregation, it aims to create a "safe space" for plaintiff churches and similarly situated entities, giving some of the actors subject to the Johnson Amendment clear assurance that their speech is protected. This can reduce the self-censorship effect that even rarely enforced speech regulations can have and is especially warranted for religious entities, which automatically fall under § 501(c)(3) without any filing or action on their part.[127]

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[122] Council on Am.-Islamic Rels.-Phila., *CAIR-Philadelphia, Emgage Pennsylvania to Co-Host Muslim City Hall Day in Philadelphia* (July 29, 2025), https://pa.cair.com/pressrelease/city-hall-day-2025/ [https://perma.cc/3HJV-W76S]; America Indivisible et al., *Muslim Civic Engagement Toolkit for Community Members*, 2 (2020), https://static1.squarespace.com/static/5981f5496a496374f7c99213/t/5f3bfdba53a8362458834f68/1597767104386/muslim_civic_engagement_toolkit_for_community_members.pdf [https://perma.cc/YB2D-3DP8]; Sound Vision, *Civic Engagement for Palestine Is Not Politics but Amal Saleh (Righteous Action)* (n.d.), https://www.soundvision.com/article/civic-engagement-for-palestine-is-not-politics-but-amal-saleh-righteous-action [https://perma.cc/KN9H-HBH5].

[123] Union for Reform Judaism, *What's So Jewish About Voting?*, https://reformjudaism.org/beliefs-practices/social-justice-reform-judaism/whats-so-jewish-about-voting [https://perma.cc/W56W-J9Y6]; Temple B'nai Torah (Wantagh), The Voice (Oct. 2020), https://tbtwantagh.org/wp-content/uploads/sites/101/2020/10/Newsletter-October-2020-The-Voice-2.pdf [https://perma.cc/532P-DJK4].

[124] Thomas v. Rev. Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 716 (1981).

[125] Allen D. Hertzke, RELIGIOUS FREEDOM IN AMERICA: CONSTITUTIONAL ROOTS AND CONTEMPORARY CHALLENGES 10 (University of Oklahoma Press: Norman 2015).

[126] Larson v. Valente, 456 U.S. 228, 245 (1982).

[127] *See* Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 393 (1988) (describing self-censorship as a "harm that can be realized even without an actual prosecution"); I.R.C. § 6033(a)(3)(A)(i); Treas. Reg. § 1.6033-2.

B. The Proposed Decree Violates the Establishment Clause

While the decree offsets the establishment concerns inherent in the favoring of "apolitical" faiths, its selective application is itself a violation of the Establishment Clause because it favors religious speech over secular speech. The decree creates a narrow carve-out that protects only "communications from a house of worship to its congregation in connection with religious services through its usual channels of communication on matters of faith," which includes "guidance concerning the impact of faith on the choices inherent in electoral politics."[128] It leaves out all nonreligious 501(c)(3) organizations, which remain restricted even when speaking directly to their members about the impact of their charitable mission on "the choices inherent in electoral politics."[129] This special carve-out effectively creates government endorsement of religious viewpoints and violates the free speech and religion clauses of the First Amendment.[130]

This defect can be evaded by framing the carve-out as necessary to protect free exercise. In fact, the legal basis for the decree rests on religious-liberty and Establishment Clause grounds, not on free-speech grounds. It treats speech on electoral choices connected to faith as religious exercise and holds that its restriction creates "serious tension with the First Amendment's Establishment Clause" by treating "religions that do not speak directly to matters of electoral politics more favorably than religions that do so."[131] The Supreme Court has long established that the religion clauses occasionally require selective carve-outs that apply to certain faiths in order to protect their free exercise. Landmark examples include *Sherbert v. Verner* (1963), which invalidated the denial of unemployment benefits to a Seventh-day Adventist who was unable to find work that did not require her to work on her Sabbath; or *Wisconsin v. Yoder* (1972), which recognized a religious exemption for Amish children from compulsory schooling beyond the eighth grade.[132] The Court has also held that religious speech is doubly protected by the Free Speech *and* the Free Exercise Clause, arguably suggesting that religious speech could, in some cases, benefit from a level of protection not extended to secular speech.[133]

However, the Supreme Court has also held that disparate tax treatment based on the religious nature of speech violates the First Amendment. In *Texas Monthly, Inc. v. Bullock* (1989), it invalidated a sales tax exemption that applied solely to religious publications. It held that, just as the government cannot burden the practice of religion, it also cannot endorse it at the expense of nonreligious

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[128] *See Joint Motion for Entry of Consent Judgment*, *supra* note 3, at 3-4.

[129] *Id*. at 4.

[130] *See Everson*, 330 U.S. at 15 (explaining that courts cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another").

[131] *See Joint Motion for Entry of Consent Judgment*, *supra* note 3, at 3-4.

[132] *See* Sherbert v. Verner, 374 U.S. 398, 410 (1963); Wisconsin v. Yoder, 406 U.S. 205, 236, (1972); *but see* Employment Div. v. Smith, 494 U.S. 872 (1990) (displacing Sherbert's strict-scrutiny test for generally applicable, neutral laws). Sherbert's compelling-interest framework remains in force under RFRA, *see* 42 U.S.C.A. §§ 2000bb through 2000bb-4.

[133] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 523 (2022).

viewpoints.[134] Governmental policies with secular purposes may "incidentally benefit religion," but they can only be upheld when the "benefits derived by religious organizations flow[] to a large number of nonreligious groups as well."[135] When benefits are "confined to religious organizations," the Court does not "hesitat[e] to strike them down."[136]

Even when distinguishing *Texas Monthly* from *NRB*, the carve-out proposed by the consent decree remains invalid because it effectively advances religion. While the Johnson Amendment plausibly places a heavier burden on religious exercise than the negligible burden of sales tax on religious publications at issue in *Texas Monthly,* the Supreme Court has made clear that even when religious exercise is burdened, free-exercise carve-outs are not without limits. In *Estate of Thornton v. Caldor* (1985), it invalidated an absolute Sabbath accommodation as an undue privilege for religious observers over others. It found that a state cannot require *all* employers to accommodate religious observers on any day that they observe the Sabbath, with no comparable allowance for nonreligious observers.[137] Unlike the targeted exemptions in *Sherbert* and *Yoder*, which accommodated specific burdens without disadvantaging others, the *Caldor* rule impermissibly conferred a special privilege on religious employees over secular ones. A valid carve-out must not impose exclusive advantages nor create unequal treatment among non-participants.

Like in *Caldor*, the carve-out delineated in the consent decree grants a unique, religion-specific license for political speech that is explicitly denied to secular charitable organizations.[138] Selectively enforcing a restriction based on whether the speaker and audience are religious while penalizing the same speech by secular organizations amounts to impermissible favoring of religion.

By effectively creating a "faith test" for speech, this carve-out also fosters entanglement between the government and religion in violation of the Establishment Clause.[139] The decree permits political speech only insofar as it is guided by one's faith, requiring the IRS to assess the religious motivations of speech to determine an entity's eligibility for the exemption.[140] If applied as described, this rule would lead to excessive monitoring, or at minimum, to a "significant risk that the First Amendment will be infringed" that compels close

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[134] Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 8-9, (1989) ("The Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.").

[135] *Id*. at 10-11.

[136] *Id*. at 11.

[137] Est. of Thornton v. Caldor, Inc., 472 U.S. 703, 711 (1985).

[138] *See Joint Motion for Entry of Consent Judgment*, *supra* note 3, at 3-4.

[139] *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (noting that a law must not have the primary effect of advancing or inhibiting religion, and must not foster excessive entanglement between church and state); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828-31 (1995) (calling viewpoint discrimination an "egregious form" of content discrimination and explaining that the government cannot exclude speech from a forum because it expresses a religious viewpoint).

[140] *See Joint Motion for Entry of Consent Judgment*, *supra* note 3, at 3-4.

judicial scrutiny.[141] The Supreme Court has recognized that even "good intentions by [the] government" cannot "avoid entanglement with the religious mission" when the state inserts itself into the internal operations of a religious entity.[142]

C. The Proposed Decree Violates the Free Speech Clause

1. Viewpoint Discrimination

In addition to the establishment concerns posed by its inherent religious favoritism, the proposed decree also violates the Free Speech Clause by creating an impermissible viewpoint restriction. The Supreme Court has consistently held that a public forum cannot exclude speech based on its religious viewpoint.[143] The same logic applies in reverse: speech cannot be excluded on the basis of its *nonreligious* viewpoint. While the Court typically takes a viewpoint neutrality approach to protect *excluded* religious speech and opts for an establishment rationale to disallow religious favoritism, its reasoning in *Texas Monthly* implies that the viewpoint neutrality logic applies in both directions.[144] The *Texas Monthly* analysis invalidating a religious-only tax exemption on publications relied in part on *Widmar v. Vincent* (1981), which held that a university student group cannot be excluded from a generally open public forum because of the religious nature of its speech. An open forum must be available "to a broad class of nonreligious as well as religious speakers."[145] By relying on this reasoning to invalidate a preference for religious speech, the Court demonstrated that the viewpoint rationale constrains favoritism and disfavors alike.

The consent decree unmistakably violates this viewpoint neutrality principle. It limits protection to houses of worship on Establishment-Clause grounds while leaving nonreligious speakers unprotected despite the fact that political speech can be just as integral to their organizational purpose. Just like certain religious denominations cannot detach their mission from politics, neither can civil rights groups, environmental nonprofits, and many other secular organizations.[146]

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[141] *See Lemon*, 411 U.S. at 195 (1973); N.L.R.B. v. Cath. Bishop of Chicago, 440 U.S. 490, 502 (1979).

[142] *Cath. Bishop*, 440 U.S. at 502.

[143] *See Rosenberger*, 515 U.S. at 828-31 (1995); Widmar v. Vincent, 454 U.S. 263, 269-70 (1981).

[144] *See* Vikram David Amar & Alan E. Brownstein, *New Policies by the Trump Administration Involving the Potential Intersection of Religious and Political Speech Highlight Unresolved Tensions Between Free Exercise and Free Speech Doctrines*, VERDICT (Aug. 15, 2025), https://verdict.justia.com/2025/08/15/new-policies-by-the-trump-administration-involving-the-potential-intersection-of-religious-and-political-speech-highlight-unresolved-tensions-between-free-exercise-and-free-speech-doctrines; *Texas Monthly*, 489 U.S. at 8-9.

[145] *Texas Monthly*, 489 U.S. at 11; *Widmar*, 454 U.S. at 277.

[146] *See* Kim Stallwood, *The Politics of Animal Rights Advocacy*, RELATIONS: BEYOND ANTHROPOCENTRISM 47 (2013), https://www.ledonline.it/index.php/Relations/article/view/9/7 [https://perma.cc/C7HZ-25E3] (explaining animal-rights advocacy is fundamentally political); *see also* Environmental Defense Fund, *Policy: Driving Meaningful Environmental Reforms*, ENV'T DEF. FUND, https://www.edf.org/solution/policy [https://perma.cc/8DQM-Q78F] (describing EDF's

This discrimination cannot be cured by labeling the carve-out as a free exercise protection because religious advocacy is a form of speech protected by the Free Speech Clause, not a freestanding religious entitlement unavailable to secular speakers. The Free Exercise Clause is not meant to duplicate the Free Speech Clause's protection on expression, otherwise the Free Speech Clause would suffice on its own. This is why the Supreme Court relies on the Free Speech Clause to protect excluded religious speech, as opposed to the Free Exercise Clause.[147] In *Widmar*, "religious worship and discussion" were protected under the Free Speech Clause as "forms of speech and association protected by the First Amendment."[148] Justice Scalia underscored this framing in *Capitol Square Review & Advisory Bd. v. Pinette* (1995) by noting that "private religious speech [...] is as fully protected under the Free Speech Clause as secular private expression."[149] Although religious expression can be "doubly protected" by both the Free Speech and Free Exercise Clauses, there is no category of speech that receives protection solely under the Free Exercise Clause without also being covered by the Free Speech Clause.[150] The distinctive work of the Free Exercise Clause lies in safeguarding religiously motivated conduct and preventing discriminatory burdens on religious observers, not in conferring extra speech rights on religious speakers. Rather than "protect[ing] religious observers against unequal treatment"—the true purpose of the Free Exercise Clause—the consent decree subjects *non-observers* to unequal treatment.[151]

The decree's exclusionary carve-out is all the more troubling because it regulates the very category of speech triggering the most searching constitutional review. Viewpoint discrimination is "particularly acute when [it] implicates political decision-making or skews political speech in the marketplace of ideas" precisely because "a major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs, [which] includes discussions of candidates."[152] As Justice Stevens noted in *McIntyre v. Ohio Elections Commission*, "discussion of public issues and debate on the qualifications of candidates" receive the highest protections because they "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[153] Regulating such discussions on the basis of their religious motivation means that this interchange of

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mission as advancing environmental reforms through policy change); Nat. Res. Def. Council, *About NRDC*, NRDC, https://www.nrdc.org/about [https://perma.cc/E2G6-ZBCR] (describing NRDC's environmental mission as pursued through policy advocacy; noting clean-energy investments were "gutted by President Trump").

[147] *See* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 762 (1995) (discussing Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993), where a "school district violated an applicant's free-speech rights by denying its use of the facilities solely because of the religious viewpoint of the program it wished to present").

[148] *Widmar*, 454 U.S. at 269.

[149] *Pinette*, 515 U.S. at 753.

[150] *See Kennedy*, 597 U.S. at 543.

[151] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993).

[152] Amar & Brownstein, *supra* note 144, citing Harry Kalven and John Hart Ely; Mills v. State of Ala., 384 U.S. 214, 218-19 (1966).

[153] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995), citing Roth v. United States, 354 U.S. 476, 484 (1957).

ideas is no longer "unfettered," but rather tainted by governmental preferences, defeating the very purpose of the First Amendment. Government regulation of political discourse violates basic democratic norms and erodes the legitimacy of the electoral process by entrenching a state-backed orthodoxy about who may speak in elections.[154]

2. Content-based Restriction

Even if this differential treatment of speakers is characterized as a valid selective enforcement safe harbor, the decree discriminates on speaker identity *and* message content. It therefore remains a content-based restriction that will trigger strict scrutiny.[155] Under the new guidance, the protected status of speech would still depend on *what* is said: specifically, whether electoral advocacy is framed in religious terms, forcing the government to scrutinize and classify the communicative content before conferring protection. As the Supreme Court explained in *Reed v. Town of Gilbert* (2015), "a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed."[156] Such laws are "presumptively unconstitutional" and subject to strict scrutiny.[157] Scrutinizing the "religiosity" of speech concerning electoral politics to determine its permissibility fits squarely under this framework.

The decree's rationale would also not stand in other spheres where political speech is prohibited. The Hatch Act, for example, prohibits federal employees from expressing their support or opposition to political candidates while on duty.[158] Allowing religious speech where political speech is disallowed would raise new questions: Would "a sign at a federal employee's desk stating that G-d supports a particular candidate now [be] permitted while other political endorsements remain prohibited?" Such a result would invert the principle of viewpoint neutrality by permitting religious political speech where all other political advocacy is barred, and it would highlight why a religion-specific carve-out cannot survive strict scrutiny. [159]

3. Vagueness

The same vagueness that undermines the Johnson Amendment persists in the proposed decree, preserving the risk of arbitrary enforcement and chilling

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[154] *See generally* Hamburger, *supra* note 64, at 192, 231.

[155] *See* Reed v. Town of Gilbert Ariz., 576 U.S. 155, 159 (2015) (holding that regulatory distinctions based on the message conveyed are content-based restrictions subject to strict scrutiny).

[156] *See id*. at 171.

[157] *See id*. at 163.

[158] *See* 5 U.S.C. § 7324(a)(1) (2018); U.S. Off. of Special Couns., *A Guide to the Hatch Act for Federal Employees*, 2 (Sept. 2014) (explaining that covered employees "may not engage in political activity . . . directed at the success or failure of a . . . candidate . . . while the employee is on duty"). https://osc.gov/Documents/Outreach%20and%20Training/Handouts/A%20Guide%20to%20the%20Hatch%20Act%20for%20Federal%20Employees.pdf [https://perma.cc/28Q2-J3KM].

[159] *See* Amar & Brownstein, *supra* note 144.

protected speech.[160] The order requires the IRS to make a series of indeterminate judgments: what counts as a "house of worship" or a "religious service"? How to distinguish between "matters of faith" and ordinary advocacy?[161] What are "customary channels of communication," and how long must an entity have been using this channel for it to be customary?[162] Professor Edward Zelinsky provides an insightful illustration of this limitation:

> Consider a church with a traditional marquee board on its lawn. Suppose that for the upcoming Sunday, the marquee board's message invites everyone who walks or drives by to come to services at 10 a.m. and hear a sermon titled 'The Importance of Protecting Fetal Life' or 'The Importance of Protecting Women's Choice.' The marquee board is likely 'customary,' but it is placed outside, where all members of the public (not just the church's congregants) can see it and its message.[163]

This illustration was echoed by a variety of satirical nativity scenes displayed in front of churches condemning the Trump administration's immigration crackdown during the 2025 Christmas season. Lake Street Church in Evanston, Illinois, for example, portrayed baby Jesus in zip-tie handcuffs and a foil blanket to mirror the treatment of ICE detainees.[164] The nativity scene at St. Susanna Parish in Dedham, Massachusetts, displayed a large poster saying "ICE was here."[165] Could such displays count as a communication "to [the church's] congregation"?

Defining what constitutes a "congregation" is yet another hurdle. Many churches direct their messages at a broader audience than their formal membership, and they often conduct services open to the public, including people of all faiths.[166]

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[160] *See Complaint for Declaratory Relief*, *supra* note 5, at 44 (plaintiff churches argued that the Johnson Amendment is unconstitutionally vague and violates their due process rights); Bopp & Kester, *supra* note 77, at 77 (arguing that the Johnson Amendment is unconstitutionally vague).

[161] *See Joint Motion for Entry of Consent Judgment*, *supra* note 3, at 3.

[162] *Id* at 4.

[163] Edward A. Zelinsky, *Johnson Amendment Scope Unsettled Despite National Religious Broadcasters Settlement*, TAX NOTES TODAY FEDERAL (Aug. 15, 2025), https://www.taxnotes.com/tax-notes-today-federal/exempt-organizations/johnson-amendment-scope-unsettled-despite-national-religious-broadcasters-settlement/2025/08/15/7sxhf [https://perma.cc/7FCM-8QWQ].

[164] *See* Richard Luscombe, *'The holy family is in hiding': nativity scenes at US churches push back on ICE*, THE GUARDIAN (Dec. 12, 2025), https://www.theguardian.com/us-news/2025/dec/12/church-jesus-nativity-scenes-mock-ice-trump [https://perma.cc/CL3V-QMXF].

[165] *See* Samantha Chaney & Paul Burton, *Controversial 'ICE was here' nativity display in Massachusetts to remain until priest speaks to archbishop*, CBS NEWS (Dec. 8, 2025), https://www.cbsnews.com/boston/news/ice-was-here-nativity-dedham/ [https://perma.cc/LQP7-ALHU].

[166] *See, e.g.,* Christ Church Cathedral, *Ashes to Go* (Mar. 5, 2025), https://cccindy.org/eventcalendar/ashes-to-go/ [https://perma.cc/T3R6-6G53] (describing a church-sponsored service as "available and open to all people" and stating: "All are welcome regardless of religious belief or faith tradition"); Pew Rsch. Center, *Americans' Experiences with Virtual Religious Services* (June 2, 2023), https://www.pewresearch.org/religion/2023/06/02/americans-experiences-with-virtual-religious-services/ [https://perma.cc/4CJA-QLVH] (reporting that "nearly

The Supreme Court has made clear that the government may not condition a congregational charity's eligibility for tax benefits on whether it limits its services to its own members.[167] Religious nonprofits will therefore be left guessing whether their public-facing expressions of faith will be deemed internal, "congregational" speech, or prohibited political intervention.

This accumulation of imprecise guidance would confer great discretion to regulators and may chill speech even in the absence of abuse.[168] In *City of Lakewood v. Plain Dealer Publishing Co.* (1988), the Supreme Court held that:

"a law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official."[169]

Under current IRS guidance, § 501(c)(3) campaign-intervention rules are administered through open-ended, "facts-and-circumstances" line-drawing, a problematic approach given the severe consequences of a violation.[170] It fails the due process requirement of fair notice and predictability, and chills speech because regulated entities cannot know ex ante what conduct will be deemed unlawful.[171] The decree does not resolve this structural defect. It shifts the uncertainty from "what counts as political intervention" to "what counts as permitted, religiously motivated political intervention," replacing indeterminate inquiries with new ones and preserving the due-process and First Amendment pathologies.

In the aggregate, the consent motion's drawbacks cannot be cured simply by the proposition that political speech can be a form of free exercise that requires a unique carve-out, or that religious speech is doubly protected. When analyzing the order under an establishment-favoritism framework, *Texas Monthly* and *Caldor* suggest that the carve-out looks more like a religion-only privilege than a neutral accommodation of burdened exercise and is therefore presumptively unconstitutional. Under a viewpoint discrimination *or* a content-based restriction framework, strict scrutiny would apply and the government would have to present compelling interests and narrow tailoring for its exclusion of secular viewpoints. This standard is almost impossible to overcome when speech is regulated based on a speaker's identity.[172] Even if the double protection of religious speech reinforces

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three-quarters of virtual viewers watch services at a congregation they do not attend in person," including viewers who watch at least one congregation other than the one they attend most often in person and viewers who do not have an in-person congregation).

[167] *See* Cath. Charities Bureau, Inc. v. Wisconsin Lab. & Indus. Rev. Comm'n, 605 U.S. 238 (2025).

[168] *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988).

[169] *Id*. at 763.

[170] I.R.S., *Election Year Activities*, *supra* note 85, at 1.

[171] Bopp & Kester, *supra* note 77, at 77.

[172] *See Citizens United*, 558 U.S. at 340 (noting that laws burdening political speech are subject to strict scrutiny and warning that speaker-identity restrictions are often a means of controlling content).

religious entities' right to political speech, this should not diminish the right of secular organizations to speak.[173]

D. Selective Enforcement Will Distort the Political Landscape

Beyond its defective First Amendment rationale, the carve-out also poses serious public policy concerns. Allowing only religiously motivated political speech within the charitable sector will skew political endorsements towards a narrow set of religio-political views from actors already heavily criticized for mixing religion and politics.[174] As explained *supra* Section II.B, religion and politics can be closely connected and the government should not seek to censor speech that results from this connection. But allowing only speech that results from it while continuing to censor speech stemming from the close connection between secular charitable causes and politics will distort political public discourse. A relatively narrow set of faith-based networks already exerts outsized influence on questions of public policy.[175] Religiously motivated political influence is heavily concentrated in one political party and is strongly associated with hardline positions on firearms, abortion, and LGBTQ rights.[176] While these views and their religious motivations do not represent the majority of Americans, their influence is actively shaping education and health-care policy.[177] For example, public school book bans have increased by 33% across the country in the 2022-2023 school year, a change largely due to an increase in religiously motivated public policy.[178] State policy on

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[173] *Cf*. Hamburger, *supra* note 64, at 191-2 (explaining that special protections for political speech should not diminish protections for other kinds of speech).

[174] *See, e.g.*, Tim Alberta, *The Only Thing More Dangerous Than Authoritarianism*, THE ATLANTIC (Dec. 25, 2023), https://www.theatlantic.com/ideas/archive/2023/12/christian-nationalism-danger/676974/ [https://perma.cc/TQ59-HU59] (arguing that "Christian nationalism" is "ascendant" both "inside the Church" and "inside the Republican Party," and criticizing the weaponization of Christianity for electoral power).

[175] *See* David Taylor, *Project Blitz: The Legislative Assault by Christian Nationalists to Reshape America*, THE GUARDIAN (June 4, 2018), https://www.theguardian.com/world/2018/jun/04/project-blitz-the-legislative-assault-by-christian-nationalists-to-reshape-america [https://perma.cc/P5P4-SVJV]; Steve Rabey, *Family Policy Alliance Battles 'Satan' with Plan to End Abortion and IVF, Outlaw Porn, Stop Transgender Identity and Take Over Public Schools*, BAPTIST NEWS GLOBAL (Apr. 8, 2024), https://baptistnews.com/article/family-policy-alliance-battles-satan-with-plan-to-end-abortion-and-ivf-outlaw-porn-stop-transgender-identity-and-take-over-public-schools/ [https://perma.cc/Y5H3-Y3SW].

[176] *See* Public Religion Research Institute, *A Christian Nation? Understanding the Threat of Christian Nationalism to American Democracy and Culture* (Feb. 8, 2023), https://prri.org/research/a-christian-nation-understanding-the-threat-of-christian-nationalism-to-american-democracy-and-culture/ [https://perma.cc/E8Y4-BQR4]; Gregory A. Smith et al., *Religion and Views on LGBTQ Issues and Abortion*, Pew Research Center (Feb. 26, 2025), https://www.pewresearch.org/religion/2025/02/26/religion-and-views-on-lgbtq-issues-and-abortion/ [https://perma.cc/X933-SDJS].

[177] *See, e.g.*, Avery Lotz, *Florida Leads the Country in Book Bans*, PEN AMERICA SAYS, AXIOS (Sept. 22, 2023), https://www.axios.com/local/miami/2023/09/22/florida-leads-country-book-bans-pen-america [https://perma.cc/ZZ2F-DFUZ].

[178] *See, e.g.*, *id.*; Joseph B. Tamney & Stephen D. Johnson, *Christianity and Public Book Banning*, 38 REV. RELIGIOUS RSCH. 263 (1997); Claire Armitstead, *'It's a Culture War That's*

reproductive care has also been increasingly influenced by religious views, with the Alabama Supreme Court ruling that frozen human embryos are entitled to legal protections, citing scripture in its reasoning.[179] Other politically active religious denominations with opposite views can contribute to the diversification of voices, but they cannot replace the viewpoints of secular nonprofits that remain excluded from political discourse.

The potential impact of this distortion on the balance of the political system will be exacerbated by the disclosure scheme of § 501(c)(3) and deepen the transparency and campaign-finance integrity concerns used to justify the Johnson Amendment.[180] Limiting this carve-out to "house[s] of worship" would mean that only entities exempt from financial disclosure may engage in electoral speech. Because houses of worship and their affiliated organizations are exempt from filing 990 forms, information on their staff pay, board membership, and financial details is not made available to the public.[181] Other 501(c)(3) organizations must make this information publicly available, enhancing accountability and transparency in their operations.[182] Enabling 990-exempt entities to engage in direct political endorsements without affording the same right to secular charities will dangerously distort campaign financing by creating a "new class of 'dark money' entities capable of engaging in secret, tax-deductible campaign spending"—the principal concern amici advanced in defense of the Johnson Amendment and against the decree.

This distortion risk is also amplified by the fact that, under IRS rules, "churches" qualifying as 990-exempt entities are not confined to traditional, single-denomination congregations with a single creed. For example, the Family Research Council, a conservative advocacy group, qualifies as an "association of churches" under IRS regulations and is exempt from filing a 990 form.[183] While it defines itself as having a "biblical worldview," it does not represent a single denomination. Rather, it works with churches from several evangelical Christian

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Totally Out of Control': The Authors Whose Books Are Being Banned in US Schools, THE GUARDIAN (Mar. 22, 2022), https://www.theguardian.com/books/2022/mar/22/its-a-culture-war-thats-totally-out-of-control-the-authors-whose-books-are-being-banned-in-us-schools [https://perma.cc/2H3T-5RVU].

[179] *See, e.g.*, Michelle Boorstein, *Alabama Judge Says God Opposes IVF. Religions Hold Varied Views*, WASH. POST (Feb. 28, 2024), https://www.washingtonpost.com/nation/2024/02/28/alabama-ivf-embryos-religion-beliefs/ [https://perma.cc/K2HF-3LJU]; Sabrina Talukder, *How the Alabama IVF Ruling Is Connected to Upcoming Supreme Court Cases on Abortion*, Center for American Progress (Mar. 11, 2024), https://www.americanprogress.org/article/how-the-alabama-ivf-ruling-is-connected-to-upcoming-supreme-court-cases-on-abortion/ (noting that in the Alabama IVF case, Chief Justice Tom Parker wrote a "23-page concurring opinion" citing "the King James Bible, the Ten Commandments, the Book of Genesis, and other biblical sources" as the basis for his legal reasoning).

[180] *See* Amar & Brownstein, *supra* note 144.

[181] *See* I.R.C. § 6033(a)(3)(A)(i); Treas. Reg. § 1.6033-2.

[182] *See* Lloyd Hitoshi Mayer, *How the U.S. Government Can Stop "Churches" from Getting Treated Like Real Churches by the IRS*, THE CONVERSATION (Sept. 26, 2024), https://theconversation.com/how-the-us-government-can-stop-churches-from-getting-treated-like-real-churches-by-the-irs-237922 [https://perma.cc/U2L2-F6DF].

[183] *See id.*

denominations.[184] This means that the political speech allowed by the carve-out may not be limited to specific viewpoints stemming from a particular denomination's belief on a given political question, but may instead encompass the speech of virtually any religious group that meets enough of the criteria delineated by the IRS to determine what qualifies as a church, which draw "heavily on the traditional characteristics of Protestant Christian churches."[185] Because some ideologically driven groups can qualify as "churches" and evade the disclosure requirements that apply to other nonprofits, the decree's selective enforcement entrenches an uneven political playing field.

E. The Consent Decree Is Not an Adequate Vehicle to Modify the Johnson Amendment

The consent decree is not an appropriate remedy to the defects of the Johnson Amendment because of its limited direct applicability. If accepted by the Eastern District of Texas, the order would only officially protect the two plaintiff churches in the case from enforcement.[186] Any authority it may have on future cases and other religious entities would only be persuasive.[187] This order does not itself create a "new substantive rule of general applicability."[188] At most, it publicly commits the IRS to a narrow interpretation of the Johnson Amendment.[189]

Scholars have long recognized that the Johnson Amendment is too vague and ambiguous to be interpreted and enforced solely through the judiciary.[190] When relying on court rulings to assess their own compliance, charities struggle to balance a number of factors that do not apply uniformly across cases.[191] This fragmentary guidance increases the complexity already inherent in deciphering the tax code, heightens the risk of noncompliance, and makes it harder for the IRS to detect noncompliance.[192] It also enables arbitrary, unpredictable, and discretionary enforcement, which is particularly problematic for regulations that tend to chill speech, and even more so when those regulations implicate political speech that requires utmost protection from governmental interference.[193] This is why clear, bright-line rules in objectively measurable terms established via regulatory or

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[184] *See id*.

[185] *See id*.

[186] See Nat'l Religious Broadcasters v. Bessent, No. 6:24-cv-00311, at 3 (E.D. Tex. Dec. 12, 2025) (Barker, J.) (order denying motion to intervene).

[187] *See id.* at 6.

[188] *See* Ellen P. Aprill, *Misunderstanding National Religious Broadcasters*, TAX NOTES (July 25, 2025), https://www.taxnotes.com/featured-analysis/misunderstanding-national-religious-broadcasters/2025/07/24/7ss1m [https://perma.cc/X48X-8JFS].

[189] *See id*.

[190] *See* Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMEND. L. REV. 1, 31-32 (2007); *see also* Ellen P. Aprill, *Why the IRS Should Want to Develop Rules Regarding Charities and Politics*, 62 CASE W. RES. L. REV. 674-675 (2012).

[191] *See* Mayer, *Grasping Smoke, supra* note 190, at 31-32.

[192] *See* Aprill, *Why the IRS Should Want to Develop Rules Regarding Charities and Politics*, *supra* note 193, at 670 (noting that self-serving bias leads people to "interpret ambiguous information in ways that resound to their benefit)"; Mayer, *Grasping Smoke, supra* note 190, at 32.

[193] *See* Mayer, *Grasping Smoke, supra* note 190, at 32.

legislative channels are needed to address the ambiguity and sporadic enforcement of the Johnson Amendment.[194] As explained *supra* Section II.C, the consent decree remains too vague to meet this standard.

The inadequacy of incomplete standards established through judicial precedent is magnified by the broad scope of § 501(c)(3). The Johnson Amendment governs over 1.5 million organizations, most of them small and financially limited.[195] Currently, about 60% of all U.S. nonprofits are "very small" 501(c)(3) organizations with annual budgets below $50,000.[196] The cost of legal advice needed to delineate speech boundaries based on limited precedent, ad hoc IRS enforcement actions, or isolated consent decrees is significantly greater than it would be to interpret an objective and detailed rule. Given the large number of small, resource-constrained organizations at risk, the severe consequences of losing tax-exempt status, and the gravity of potential free speech violations, the government must do more. The burden should fall on regulators to craft a clear standard that does not require nonprofits to guess and speculate.

A legislative amendment or an official Treasury regulation would more effectively resolve the First Amendment concerns posed by § 501(c)(3). The Johnson Amendment should be replaced by a comprehensive legislative framework that (1) restores full free speech rights to all 501(c)(3) organizations, not only to religious leaders in narrow circumstances, and (2) prevents unlimited, tax-free campaign funding via donations to nonprofits by imposing disclosure requirements and disallowing the use of tax-exempt dollars to fund dedicated electoral activity. Such a framework will inevitably maintain some vagueness and require case-by-case assessments, which will likely still lead to litigation, but it can at least eliminate the chilling effect of the Johnson Amendment and correct the establishment concerns of the consent decree.

III. A TAXABLE-EXPENDITURE ALTERNATIVE TO THE JOHNSON AMENDMENT

Part III proposes a neutral alternative that would preserve 501(c)(3) status across the board, but tax defined campaign-intervention expenditures and require targeted disclosure when deductible dollars fund measurable election activity.

A. Prior Reform Proposals

Scholars and legislators have offered a range of proposals to address the Johnson Amendment's defects. Some proposals, like the Houses of Worship Political Speech Protection Act introduced by New Hampshire Senator Bob Smith in 2002, would track the current "substantiality" framework of §501(c)(3) by

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[194] *See id.*

[195] *See* Aprill, *Why the IRS Should Want to Develop Rules Regarding Charities and Politics*, *supra* note 193, at 665-666 ("43 percent of all organizations exempt under section 501(c)(3) and more than 68 percent of public charities were churches or normally had annual gross receipts of less than $25,000").

[196] Grace Sato, The 'Invisible Majority': What We Know About Very Small Nonprofits," Candid (May 1, 2025), https://candid.org/blogs/data-insights-very-small-nonprofits-make-up-majority-us-nonprofits/ [https://perma.cc/B2U3-DCHT].

permitting churches to engage in an "insubstantial" amount of campaign activity while retaining 501(c)(3) status. However, this bill failed to define what would count as "substantial" in operational terms.[197] Other proposals resemble closely the proposed consent decree and would codify a narrow safe harbor allowing clergy to express political views during religious services so long as the views are not disseminated beyond the assembled congregation.[198] These approaches seek to reduce chilling effects, but they either reintroduce administrability problems by relying on an undefined substantiality line, or solve the problem only for houses of worship while leaving secular charities subject to the same high-stakes, status-threatening regime.

A more developed scholarly alternative is Professor Samuel Brunson's two-safe-harbors proposal. Under his prospective safe harbor, a charity would formally commit to refrain from endorsements for the upcoming taxable year, assuring its donors that their gifts remain fully deductible. If the charity violates this pledge, it would face excise taxes and loss of tax-exempt status. Alternatively, charities could choose to engage in political campaigning and could elect to preserve their donors' full deductibility by paying taxes on the disallowed amount at the top individual marginal rate, while providing donor-facing notice about its political spending share. Finally, a charity could decline these options and do nothing, but its donors may then lose a portion of their deductions.[199] Brunson's framework shifts the penalty away from automatic revocation and provides a more tailored mechanism to target political expenditures specifically. However, because an organization that elects the prospective safe harbor risks losing its tax-exempt status, this framework maintains a significant penalty that hinges entirely on the difficult task of defining what qualifies as an endorsement.

A more viable legislative alternative to the Johnson Amendment would draw on the strengths of these proposals and replace the current categorical ban, triggering the complete loss of tax-exempt status with a taxable-expenditure model that distinguishes taxable from non-taxable activities, applicable to *all* 501(c)(3)s, without ever jeopardizing the tax-exempt status of the whole organization. It would retain full tax exemption for live, in-person charitable or religious events, even if they include incidental political remarks, but treat electoral speech that is broadcast or otherwise transmitted beyond the room in the context of a political event as a taxable expenditure. Donations would still be entirely tax-deductible to donors, but large-donor corruption would be deterred by requiring all 501(c)(3) organizations engaging in taxable political activity to disclose the total dollar amount and percentage of donations used to fund measurable campaign expenditures. These

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[197] *See* Houses of Worship Political Speech Protection Act, S. 2886, 107th Cong. (2002) (as introduced) (proposing to permit church campaign intervention so long as it is not a "substantial part" of a church's activities); Keith S. Blair, *Praying for a Tax Break: Churches, Political Speech, and the Loss of Section 501(c)(3) Tax Exempt Status*, 86 DENVER L. REV. 433 (2009).

[198] *See* Houses of Worship Free Speech Restoration Act of 2005, H.R. 235, 109th Cong. (2005) (as introduced) (protecting churches from loss of exempt status based on sermon content during religious services and permitting expression of personal political views during services if not disseminated beyond members and guests assembled).

[199] Brunson, *A New Johnson Amendment, supra* note 2, at 405-07.

expenditures would include political advertisements, mailings, digital campaigns, and expenses associated with electoral campaigning events. Unlike the broad scope of the IRS's "facts and circumstances" standard that extends the Johnson Amendment to virtually all politically connoted speech said in certain contexts, even when it does not explicitly endorse a particular candidate, this proposal would be limited to political endorsements or oppositions in which (1) measurable expenditures have been incurred and (2) the purpose of the event is clearly political, as opposed to a mission-driven event with incidental political speech.

This hybrid design attempts to remedy the defects of existing proposals. Unlike substantiality-based reforms which lack specificity, it supplies an administrable metric by tying liability to measurable campaign expenditures. Unlike narrow clergy safe harbors, it applies to all 501(c)(3)s and protects live speech without creating a religion-only carve-out. And unlike Brunson's prospective safe harbor, it avoids making exemptions hinge on contested endorsement line-drawing by shifting the consequence away from organization-wide revocation and toward activity-level taxation linked to paid, mass dissemination beyond the room.

B. Defining Taxable Activities

Under this proposal, live events are presumptively tax-exempt. But if they are broadcast *and* primarily organized as electoral campaigning events, the costs of the whole event are treated as non-exempt. If the political focus is ambiguous or secondary to the charitable mission, the default remains tax exemption. For example, no taxes would be imposed on the expenses associated with a typical Sunday mass—which many churches have started to broadcast since the Covid-19 pandemic—regardless of what is said during the service. The purpose of the event is clearly primarily religious.[200] However, if a religious organization's broadcast event is (1) advertised as a rally or summit around elections, (2) co-sponsored or co-hosted by a political organization—PACs, 501(c)(4)s, or campaigns, or (3) if a reasonable attendee would understand the event's purpose as political advocacy instead of religious worship, then the expenditures relating to the event as a whole will be taxed.

For example, expenses associated with the annual "Pray Vote Stand Summit" hosted by the Family Research Council, a 501(c)(3) nonprofit qualifying as an "association of churches" focused on promoting conservative Christian views on family and social issues, would be taxable under my proposal.[201] The 2024 summit was promoted as a political event; it was organized to discuss the

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[200] Barna Grp., *What Research Has Revealed About the New Sunday Morning*, BARNA (June 3, 2020), https://www.barna.com/research/new-sunday-morning/ (reporting that "[t]he majority of pastors (96%) reports their churches have been streaming their worship services online during the pandemic").

[201] *See* Mayer, *How the U.S. Government Can Stop "Churches"*, *supra* note 182; Family Rsch. Council, "Today: FRC and FRC Action to Hold Fourth Annual Pray Vote Stand Summit" (Press Release) (Oct. 3, 2024), https://www.frc.org/newsroom/today-frc-and-frc-action-to-hold-fourth-annual-pray-vote-stand-summit [https://perma.cc/BXS3-QTGF].

"upcoming election" and "policy issues," and it was cohosted with FRC Action, FRC's 501(c)(4) political affiliate.[202] Given its aim to mobilize "Governance Engaged Conservatives" and its almost exclusively politically-focused programming, a reasonable attendee would understand the summit to be a political advocacy event as opposed to a religiously-focused event.[203]

This rule echoes some of the vagueness concerns of the Johnson Amendment and the proposed decree when the tax status of an expense relies entirely on whether the third prong is met. For example, a church might livestream a Sunday service not advertised as an election "summit" and not co-hosted with any campaign, PAC, or 501(c)(4), yet invite a candidate to address the congregation and explicitly ask for votes. A reasonable attendee would view this conduct as electoral advocacy although the event is nominally "worship." In most cases, it will be possible to discern whether an event is primarily political campaigning or primarily religious with some incidental political speech. Where both aims are equally at play and no distinction can be made, the default rule will be to avoid excessive intrusion and treat the event as non-taxable. Even in cases where the distinction drawn by regulators is questionable, the only consequence that an organization will have to suffer is paying taxes on expenses associated with the event at hand. Removing the risk of losing tax-exempt status altogether will lower the stakes and significantly lift the chilling effect of the current rule.

The same rule would apply to secular organizations: if an event's focus is primarily political as opposed to relating to the nonprofit's general mission, it will be taxable. Like with religious entities, the difficulty arises when the political purpose overlaps with the charitable purpose. If the political purpose cannot be said to clearly override the charitable purpose, then the event will remain fully tax-exempt. For example, suppose that a climate nonprofit organizes a conference on renewable energy entitled "The Growing Importance of Renewable Energy." Imagine that the conference is streamed online and features scientists and community leaders speaking on current renewable energy issues and the importance of renewable energy for climate protection. A few guest politicians urge the audience to "support pro-climate candidates this November" or even to "support Harris." Here, although the event features an electoral endorsement, the main focus of the event relates to the organization's mission more broadly. The event as a whole is not primarily organized as electoral campaigning; it is best understood as an informational, mission-driven conference. Under this model, an endorsement that occurs within a mission-dominant event will still be treated as incidental and will not turn the event into a taxable expenditure. The inquiry should focus on why the organization convened the event, not on isolated remarks by a few speakers that the organization cannot control. Taxing the entire event based on stray speech would chill mission-driven programming.

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[202] *See* Family Rsch. Council, *supra* note 201; *see also* Pray Vote Stand Summit, *Preliminary Schedule* (Oct. 3, 2024), https://downloads.frc.org/EF/EF24I99.pdf (agenda listing sessions and programming focused on the 2024 election and election-related policy strategy).

[203] *See* Family Rsch. Council, *supra* note 201.

Beyond campaigning events, this taxable-expenditure model will also apply to ads, mailings, and written materials used to endorse or oppose candidates. Taxable communications will include express endorsements or oppositions to political candidates, functional equivalents of such express endorsements, and coordinated campaign communications co-created or sponsored by a campaign, political party, PAC, or a 501(c)(4). The taxed expenses will be all measurable costs associated with the communication: printing and postage costs, digital costs, text or email platform fees, and staff or contractor time directly spent on producing or distributing the material. General statements of issue advocacy such as "support renewable energy", "protect unborn life", or "ICE was here" will not be taxable. While this distinction is content-based, it is nowhere near as intrusive as the risk of losing tax-exempt status entirely. In essence, it formalizes what § 501(c)(3) already aims to do: protect and promote *only* the religious, charitable, and educational activities of qualifying entities.[204] By taxing only non-qualifying activities, this revision removes outsized consequences that chill speech and interfere with organizations' core missions while continuing to prevent large-scale tax-exempt political campaigning.

To illustrate this model, take the facts of *Branch Ministries v. Rossotti* (2000). Four days before the 1992 presidential election, Branch Ministries placed full-page ads opposing the election of Bill Clinton in the Washington Times and USA Today. The ads were entitled "Christian Beware," and asserted that Clinton supported abortion on demand, the homosexual lifestyle, and giving condoms to teenagers in public schools; and stated that the Bible warned not to follow in his sin.[205] A small-print disclaimer at the bottom of the page noted that the ad was co-sponsored by The Church at Pierce Creek and other churches and concerned Christians nationwide, and solicited tax-deductible donations to fund the advertisement.[206] The IRS revoked Branch Ministries' 501(c)(3) status on the grounds that the ads constituted prohibited campaign intervention. The D.C. Circuit upheld that revocation.[207] Under the proposed taxable-expenditure model, Branch Ministries would not lose its tax-exempt status, but any funds spent on these advertisements would be taxable to the church. Donors would maintain their donation deductions, but they would be informed of the percentage of donations used on such advertisements via public disclosures. While this form of enforcement still requires oversight of publications, the significantly reduced financial consequences for speakers make it more protective of speech and religious exercise rights.

C. Disclosure, Administrability, and Implementation

Beyond taxable expenses, this model would also discourage big-donor tax-free campaigning by expanding disclosure requirements for 501(c)(3) entities.

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[204] *See* I.R.C. § 501(c)(3) (qualifying organization must be "organized and operated exclusively" for charitable, educational, religious, or other exempt purposes).

[205] Branch Ministries v. Rossotti, 211 F.3d 137, 138 (D.C. Cir. 2000).

[206] *See id.*; *see also* Feld, *supra* note 34, at 933.

[207] *Branch Ministries*, 211 F.3d at 139.

Under current law, non-church 501(c)(3)s must answer the Form 990 "required schedules" checklist and complete Schedule C, which requires a narrative description of direct and indirect political campaign activity, the dollar amount of political campaign expenditures, and related details.[208] My proposal would impose an analogous reporting obligation to religious entities when they incur measurable political expenditures such as paid electoral ads, mailings, digital advocacy, or costs of broadcasting political events. It would not impose a full Form-990 requirement on all churches, but rather require churches that engage in political campaigning to provide the funding details of these activities. They would disclose the percentage of all donor funds spent on taxable political campaigning activities, the total dollar amount spent on such activities, and the identity of donors above a certain threshold. Information on spending totals and percentages would be disclosed publicly, but donor identity would be disclosed only to the IRS.[209]

Public reports on the amount of tax-deductible funds used in political campaigning track what Form 990 already requires from nonreligious nonprofits, promotes accountability and transparency to protect donors, and prevents a small number of donors from using the charitable-deduction subsidy to finance campaigns. It is also less intrusive on religious entities than a complete revocation of § 6033, which exempts them from filing Form 990.[210] Revoking this section altogether would impose heavy disclosure requirements not limited to fund use on all churches, regardless of whether they engage in any political activity. This would unnecessarily raise administrative costs and intrude on internal operations.

Extending targeted disclosure requirements to religious entities would allow the IRS to rely more on standardized self-reporting to assess taxable campaign expenditures, rather than depending primarily on third-party complaints and retroactively revoking 501(c)(3) status after violations have occurred. The descriptions of campaigning activities and the dollar amounts expended already reported by nonreligious 501(c)(3)s in Schedule C of Form 990 serve as a basis for the IRS to audit nonprofits and ensure that insiders do not benefit themselves at the

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[208] Internal Revenue Service, *Schedule C (Form 990), Political Campaign and Lobbying Activities* (2025), https://www.irs.gov/pub/irs-pdf/f990sc.pdf, (pt. I-A, line 1 requires a description of direct and indirect political campaign activities (in pt. IV), pt. I-A, line 2 requires the total political campaign activity expenditures; Internal Revenue Service, *Instructions for Schedule C (Form 990), Political Campaign and Lobbying Activities* (2025), https://www.irs.gov/pub/irs-pdf/i990sc.pdf.

[209] This mirrors the Form 990 public-disclosure regime applicable to most § 501(c)(3) public charities: donor identities are reported to the IRS but generally excluded from the publicly available return, while non-identifying financial information remains publicly accessible. *See* I.R.C. § 6104(b) (providing that nothing in the public-disclosure provisions authorizes disclosure of contributors' names and addresses for most exempt organizations); Internal Revenue Serv., *Instructions for Form 990 Return of Organization Exempt From Income Tax* (2025) (explaining that donor names and addresses reported on Schedule B are generally not included in the publicly disclosed copy for most filers, though other contribution information remains subject to public inspection).

[210] I.R.C. § 6033(a)(3)(A)(i) (excepting "churches" etc. from the annual return requirement); Internal Revenue Serv., *Filing Requirements for Churches and Religious Organizations,* https://www.irs.gov/charities-non-profits/churches-religious-organizations/filing-requirements-for-churches-and-religious-organizations (stating that churches and certain church-affiliated orgs are "excepted from filing" the annual information return).

expense of donors.[211] It also encourages honest dealing and enables the public to assess the efficiency and commitment of different nonprofit organizations.[212] Extending these requirements to religious entities will significantly increase the oversight power of the IRS and correct an unjustified accountability imbalance between religious and secular nonprofits.

In order to implement this requirement, the IRS should require all 501(c)(3) nonprofits, including religious entities, to file an annual Political Expenditure Report only if, during the taxable year, it (1) incurs aggregate "measurable political expenditures" exceeding $2,500, and (2) those expenditures also exceed 0.25% of the organization's total annual expenditures.[213] Measurable political expenditures will include:

- paid electoral ads (on TV, the radio, digital, or print),
- mass electoral mailings and text banking,
- costs of broadcasting or streaming political events (production, platform fees, paid boosting),
- vendor payments for candidate-advocacy content distribution, and
- all costs incurred in hosting political events.

The $2,500 and 0.25% thresholds will leave out truly small or incidental activity while still capturing meaningful campaign spending. To prevent easy circumvention, the rule should also include the following provisions:

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[211] Form 990, Schedule C, "Political Campaign and Lobbying Activities" https://www.irs.gov/pub/irs-pdf/f990sc.pdf?; John Montague, *The Law and Financial Transparency in Churches: Reconsidering the Form 990 Exemption*, 35 Cardozo L. Rev. 203, 205-06 (2013).

[212] *See* Montague, *supra* note 211, at 205-6.

[213] These low thresholds are intended to function as a de minimis safe harbor while remaining sensitive to the reality that modern political communications can be disseminated at very low marginal cost; pairing an absolute dollar floor with a percentage-of-budget trigger also cabins the filing obligation to organizations for which campaign spending is more than incidental while minimizing compliance burden for truly small charities. Cf. Internal Revenue Serv., *Annual Electronic Filing Requirement for Small Exempt Organizations—Form 990-N (e-Postcard)* (Oct. 9, 2025) (reflecting the IRS's use of simplified, thresholded reporting for organizations with gross receipts "normally" at or below $50,000); Internal Revenue Serv., *Form 990 Series—Which Forms Do Exempt Organizations File?* (Aug. 20, 2025) (summarizing tiered filing thresholds, including eligibility for simplified filings by smaller organizations); Internal Revenue Serv., *Instructions for Form 990* (2025) (explaining that Form 990 filing generally turns on specified gross-receipts and asset thresholds); Katie L. Roeger, Amy S. Blackwood & Sarah L. Pettijohn, *Small Nonprofit Organizations: A Profile of Form 990-N Filers* 3 (Urban Inst., 2011) (explaining that the vast majority of nonprofits are small and report less than $25,000 in gross receipts.); Ellen P. Aprill, *Amending the Johnson Amendment in the Age of Cheap Speech*, 2018 U. ILL. L. REV. ONLINE 9 (discussing how "cheap speech" complicates reliance on high de minimis thresholds for political intervention).

- expenditures must be aggregated across entities affiliated, controlled, or commonly managed by the nonprofit;[214]
- taxable expenditures include amounts paid directly *or indirectly*, including through agents, intermediaries, or related parties, to the extent such amounts finance measurable political expenditures; and
- in-kind activities should be counted at fair market value. For example, donated ad production or subsidized distribution will be valued at FMV when used for taxable political activity.[215]

These reports will disclose the total dollar amount and percentage of donation funds spent on specified political expenditures, which will be used to calculate the taxes owed by the organization, and the identities of its donors, which will remain private. What counts as "electoral" or "political" for the purposes of this rule is defined in Section III.B. For events, the inquiry turns on whether the event is advertised as a rally or summit, co-sponsored or co-hosted by a political organization, or reasonably understood by an attendee as primarily political. For communications, covered activity includes express endorsements or oppositions of candidates, their functional equivalents, and coordinated campaign communications.

To detect violations, a dedicated "Political Expenditure Report" unit or sub-team within the existing IRS Exempt Organizations Division could audit by cross-checking reported expenses against vendor payments to marketing firms, publicly visible ads, announcements and reports on political summits, related-party transactions, sudden donor spikes followed by ad buys, among others. Violations would include failure to file when thresholds are met, material understatements of political expenditures, and misclassification of expenditures, like labeling an event "educational" in the report when it was advertised as a political summit and qualifies as a taxable expenditure.[216] The penalties for violations would mirror standard tax-violation penalties: late-filing and accuracy-related penalties, interest on underpayments, mandatory amended filings and increased examination

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[214] *See, e.g.*, 11 C.F.R. § 110.3(a)(1), (a)(1)(ii) (treating contributions made or received by affiliated political committees as made or received by a single committee for purposes of aggregation).

[215] *See, e.g.*, 11 C.F.R. § 100.52(d)(1)-(2) (defining "anything of value" to include in-kind contributions and valuing goods or services provided free or at less than the usual charge at the "usual and normal charge").

[216] *See, e.g.*, I.R.C. § 6651 (late-filing and late-payment penalties); I.R.C. § 6652(c) (penalties for failure to file required exempt-organization returns/reports); I.R.C. § 6662 (accuracy-related penalties); I.R.C. § 6601 (interest on underpayments); I.R.C. §§ 6001, 6011 (recordkeeping and filing/reporting obligations supporting mandatory corrected/amended submissions); I.R.C. § 7602 (examination and summons authority supporting increased examination/audit frequency); I.R.C. § 6663 (civil fraud penalty for heightened civil sanctions in egregious cases); I.R.C. §§ 7201, 7203, 7206 (potential criminal referral for willful evasion, willful failure to file, and fraud/false statements).

frequency, and in extreme cases, heightened civil penalties and potential referral for criminal investigation.[217]

D. Cheap Speech

A major limitation under this expenditure-based model is that speech can often be completely cost-free. Large-scale digital campaigns that include streamed videos, tweets, or email blasts can reach millions of people in a few seconds and exert great influence with minimal costs.[218] By treating broadcasting-related costs like paid distribution, platform fees, list acquisition, production expenses, and staff or contractor rates, this rule will capture at least *some* measurable electoral speech-related costs. To the extent that electoral activity is genuinely cost-free, existing § 501(c)(3) doctrine still operates as a backstop. A qualifying organization must be *"*organized and operated exclusively*"* for charitable, educational, religious, or other exempt purposes, and "no substantial part of its activities may consist of carrying on propaganda, or otherwise attempting to influence legislation."[219] Even without the electoral speech restriction of the Johnson Amendment, the activities of 501(c)(3) organizations are significantly limited. Sustained political advocacy can jeopardize 501(c)(3) status when it becomes an ongoing part of the organization's program rather than an incidental means of furthering its mission.[220] Even if a nonprofit organization's electoral speech costs are nonexistent and therefore nontaxable, the organization as a whole remains subject to the strict organizational purposes requirements of § 501(c)(3).

But can cost-free activities even be understood as subsidized by tax exemptions or deductions if they incur no measurable cost? Professor Ellen P. Aprill says yes, because the credibility and goodwill that provide speaking entities a large audience and substantial influence were "built up with tax-deductible dollars."[221] This view calls for a model that shifts the focus of limitations from 501(c)(3)'s expenses to §170 donation deductions, but as noted *supra* Section I.B.1, such a shift would have a minimal financial effect considering that few people itemize their deductions, and it would risk discouraging charitable donations from

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[217] *Id.*

[218] *See* Aprill, *Amending the Johnson Amendment*, *supra* note 213, at 8.

[219] I.R.C. §501(c)(3); *see* Treas. Reg. § 1.501(c)(3)-1(c)(1), https://www.irs.gov/pub/irs-tege/eotopicc85.pdf (providing that "operated exclusively" means the organization must be operated primarily for exempt purposes and that more than an insubstantial nonexempt purpose defeats exemption); *see also* Better Bus. Bureau of Wash., D.C., Inc. v. United States, 326 U.S. 279, 283 (1945) (holding that an organization is not exempt under § 501(c)(3) if it has a substantial nonexempt purpose, even if it also pursues exempt purposes).

[220] *See* Seasongood v. Commissioner, 227 F.2d 907, 912 (6th Cir. 1955) (suggesting that spending less than 5% of time and effort on political activities was insubstantial for § 501(c)(3) purposes; Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849, 855 (10th Cir. 1972) (ruling that a church that regularly urged its audience to contact Congress and take political action via its publications and that regularly supported or opposed political candidates engaged in substantial propaganda because it was a major, ongoing part of the organization's program, not a side activity).

[221] *See* Aprill, *Amending the Johnson Amendment*, *supra* note 213, at 10.

itemizing donors.[222] This is why disclosure requirements play an important role in curtailing large-scale, tax-free political campaigning. Aprill proposes a sweeping disclosure regime based on the Supreme Court's endorsement of disclosure as a less restrictive regulation of speech in *Citizens United*.[223] She proposes the complete public disclosure of the identity of all 501(c)(3) donors, unless the organization commits not to engage in political campaigning, or donors specify that their contributions cannot be used for such activities.[224]

My proposal is narrower: it requires public disclosure only of aggregate political spending totals and percentages. It limits donor identity disclosure to the IRS, triggered only when the organization engages in measurable taxable campaign expenditures, which includes costs associated with the release of widely disseminated electoral material. While this leaves activities where virtually no money is spent off the radar, it preserves enforcement and anti-corruption benefits where there is a real subsidy risk while avoiding the privacy and associational costs of universal public donor lists. When no funds are spent on political messaging, there is no risk of misallocation of donor funds. The reach and credibility of nonprofits may be an indirect result of the deductible donations they receive, but it is up to donors to decide whether to continue supporting the actions of recipient organizations. Widely disseminated messaging coupled with public disclosure of measurable political intervention should be sufficient for donors to decide on their own whether to donate to a specific organization.

E. Impact and Tradeoffs

By reducing the chilling effect of the Johnson Amendment, defining taxable campaign-intervention expenditures more precisely, and holding all 501(c)(3) organizations to the same activity-based standard, this proposal would make enforcement more consistent and administrable.

The increased financial transparency and accountability for religious entities would also remedy the "black box" in religious contributions.[225] Because religious nonprofits are exempt from filing Form 990, there is currently no straightforward way for the IRS or the public to know how these institutions use their donated funds.[226] The limited disclosure requirement for defined campaigning activities preserves the entanglement-limitation purpose of § 6033 while still providing donor transparency and deterring churches from misusing funds.[227]

The taxable-expenditure model also protects constitutional liberties while preserving the integrity of the charitable sector. By replacing the Johnson Amendment's all-or-nothing penalty with proportionate consequences and ensuring that routine worship services and ordinary mission programming remain

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[222] *See id.*; *supra* Section I.B.1.

[223] *See* Aprill, *Amending the Johnson Amendment*, *supra* note 213, at 16.

[224] *See id.* at 17.

[225] *See* Lloyd Hitoshi Mayer, "Churches, Transparency, and $100 Billion," Nonprofit L. Prof Blog (Dec. 2019) (stating that "[c]hurch finances and assets … can be a black box").

[226] *See* Montague, *supra* note 211, at 206.

[227] *See id.* at 215; I.R.C. § 6033(a)(3)(A)(i).

fully tax-exempt, this model protects free exercise, free speech, and nonprofit autonomy while placing all 501(c)(3)s on an equal footing and preserving donation deductibility.[228]

This approach aligns with Supreme Court precedent. The Court has repeatedly indicated that the government may refuse to fund lobbying or political activity without infringing the First Amendment, provided speakers remain free to engage in that activity using their own resources. In *Cammarano v. United States*, the Court explained that taxpayers were "not being denied a tax deduction because they engage in constitutionally protected activities," but were simply required "to pay for those activities entirely out of their own pockets."[229] This proposal extends that logic to campaign intervention: charities may speak freely without the artificial pressure to create a separate § 501(c)(4) vehicle, but they cannot use deductible donor funds to finance significant electioneering without bearing the tax liability. Additionally, it removes unconstitutional conditions that force organizations to choose between receiving valuable financial benefit or surrendering speech rights.[230]

Despite these benefits, my proposed model retains significant drawbacks. First, it imposes a new administrative burden on all 501(c)(3) organizations engaging in non-incidental political programming. Nonprofits would need to track, categorize, and substantiate covered activities and their associated costs, and to file additional disclosures when thresholds are met. These compliance and accounting obligations will require staff time and new recordkeeping systems, increasing operating expenses. Because the triggering thresholds are relatively low—in order to capture as much "cheap speech" as possible—extra costs will disproportionately penalize smaller organizations that are already resource-limited.

Second, this burden also poses a new risk of government entanglement with religion. The Supreme Court has found that "tax valuation of church property, tax liens, tax foreclosures" and "continuing surveillance" by the government would constitute excessive entanglement with religion and that "church support of government" has historically led to improper entanglement.[231] This is why § 6033(a)(3)(A)(i), which exempts religious nonprofits from filing Form 990, is often justified as reducing entanglement risk. [232] However, the Supreme Court has also found that moderate compliance requirements do not necessarily impede religious activities and that "routine and factual inquiries" commonly associated with the enforcement of tax laws "bear no resemblance to the kind of government

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[228] *See generally* Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, *supra* note 19, at 845-6*;* Clotfelter*, supra* note 59, at 23 (explaining that the charitable deduction primarily influences itemizing taxpayers and that many charities depend disproportionately on donations from such donors); Brunson, *A New Johnson Amendment, supra* note 2, at 411-412.

[229] Cammarano v. United States, 358 U.S. 498, 513 (1959).

[230] *See* Tebbe, *supra* note 30, at 1322-25 (arguing that while the government may refuse to subsidize protected activity, it may not deny unrelated benefits solely because an entity engages in that activity with private funds, analogizing to *FCC v. League of Women Voters*).

[231] *Walz*, 397 U.S. 664, at 674.

[232] *See* I.R.C. § 6033(a)(3)(A)(i); Montague, *supra* note 211, at 215.

surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion."[233]

Third, the model leaves some lingering vagueness as to what exactly constitutes a taxable activity. Protecting as much speech as possible while also preventing tax-free political campaigning necessarily requires some kind of content-based restriction and some level of contextual inquiry. The gray areas not clearly defined by my proposed definition of measurable political expenditures will inevitably lead to litigation. The default rule of assuming an activity is tax-exempt when its primary purpose cannot be easily defined and the reduced stakes of activity-specific taxation aim to remedy this defect.

Finally, as noted in Section III.C, an array of cost-free—and therefore tax-free—political advocacy will persist under any expenditure-based regime, and many nonprofits already use such avenues extensively.[234] This model is not intended to prevent political activity by nonprofits, but rather to enable them to speak freely while also limiting excessive redirecting of tax-free funds to political campaigning. Limiting the deductibility of donations would only be an indirect and imprecise attempt to reduce electoral intervention. Ensuring that donors are well-informed on the political activities of the organizations they support is more important and more attainable than preventing political advocacy by tax-exempt organizations. To this end, this proposal exchanges the Johnson Amendment's blunt, status-threatening sanction for a more proportionate, administrable regime that taxes defined campaign-intervention expenditures and increases transparency where there is a subsidy risk. Although it introduces new compliance costs and cannot eliminate "cheap speech" intervention entirely, it narrows the channel through which deductible dollars can finance large-scale electioneering without forcing the IRS to police mission-driven programming through sweeping revocation.

CONCLUSION

The Johnson Amendment has long been criticized as an unconstitutional mechanism for preventing tax-favored campaign intervention.[235] Its vague "facts and circumstances" framework combined with its all-or-nothing threat of revocation chills speech and invites uneven and insufficient enforcement. These defects must be remedied, but the carve-out presented in the consent decree proposed in *NRB v. Werfel* fails to do so. By excluding secular nonprofits entirely, it retains much of the speech-chilling effect of the Johnson Amendment, and it violates both the Free Speech and the Establishment Clauses by creating a

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[233] Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 305 (1985); *Texas Monthly*, 489 U.S. 1, at 21.

[234] Lewis Faulk et al., *The Retreat of Influence: Exploring the Decline of Nonprofit Advocacy and Public Engagement* 57 (Indep. Sector, July 2023), https://independentsector.org/wp-content/uploads/2023/07/PENS-Advocacy-Report.pdf, (reporting that "[e]ighty-five percent of nonprofits . . . report having one or more social media accounts," and that "47.3% of all nonprofits used social media to raise awareness of an issue with the public").

[235] Benjamin Leff, *Challenging the Johnson Amendment: What SAFE SPACE Gets Right—and Wrong*, 185 Tax Notes Fed. 51, 51 (2024).

viewpoint-based classification dependent on the religious motivations of electoral speech. If accepted, its impact as an effective fix to the Johnson Amendment would also be limited by its vagueness and posture as a case-specific judicial order officially binding only on the parties before the court.

This Note has argued that reform should instead proceed legislatively and should replace revocation with proportionate, activity-based taxation. A taxable-expenditure model preserves 501(c)(3) status for charities and houses of worship while taxing defined campaign-intervention expenditures, including political advertisements, paid distribution, mass mailings, and the measurable costs of broadcasting events that are primarily organized as electoral campaigning. Coupled with disclosure requirements for political spending, this framework limits the conversion of deductible dollars into electioneering without forcing charities to choose between speaking and remaining tax-exempt.

No administrable regime can eliminate all political influence, particularly in an era of "cheap speech" that enables broad messaging at negligible costs. But lawmakers should not seek to purge political advocacy from the charitable sector, which has long been part of its role in civil society.[236] Instead, they should seek to harmonize free speech protections with the prevention of tax-free campaigning while maintaining equality among all speaking organizations. To that end, a taxable-expenditure and disclosure framework offers a more evenhanded and workable path forward than either the Johnson Amendment's current revocation regime or a religion-only carve-out adopted through consent decree.

[236] *See* Hamburger, *supra* note 64, at 231.