To Repeal or Not Repeal: The Johnson Amendment

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I. INTRODUCTION

"An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."[1]

In a recent address to the National Prayer Breakfast, President Donald J. Trump reiterated his promise to get rid of the Johnson Amendment and "allow our representatives of faith to speak freely and without fear of retribution."[2] The Johnson Amendment is a piece of 1954 legislation that regulates what tax-exempt organizations—including churches and religious institutions—can say and do when it comes to politics. The Johnson Amendment states:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on

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1. New York Times Co. v. Sullivan, 376 U.S. 254, 297 (1964) (Black, J., concurring).

2. President Donald J. Trump, Remarks at the National Prayer Breakfast (Feb. 2, 2017), https://www.whitehouse.gov/the-press-office/2017/02/02/remarks-president-trump-national-prayer-breakfast.

> behalf of (or in opposition to) any candidate for public office.[3]

For decades, there has been fierce debate about the constitutionality and general legality of the Johnson Amendment. Critics say that it limits the free speech and free exercise rights of religious leaders in violation of the First Amendment,[4] while supporters of the status quo believe that the Johnson Amendment is an important part of the separation of church and state, without which churches, charities, and their respective memberships would be left dangerously open to partisan manipulation.[5]

In four parts, this Article will take a non-partisan, in-depth look at the issue. Part II will provide a short history of the Johnson Amendment's passage and its subsequent interpretation. Part III will explore the arguments regarding its constitutionality. Part IV will examine some of the current reform and repeal actions being taken. Finally, we offer some practical recommendations for the future.

II. The History and Application of the Johnson Amendment

A. Development and Passage

Historically speaking, until the 1960s, our nation had a longstanding practice of church involvement in the political activity of

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3. I.R.C. § 501(c)(3) (2012).

4. *See, e.g.*, Michelle Terry, *How the Johnson Amendment Threatens Churches' Freedoms*, ACLJ, https://aclj.org/free-speech/how-the-johnson-amendment-threatens-churches-freedoms (last visited Oct. 28, 2017) (quoting Dr. Jay Sekulow, Chief Counsel, ACLJ) ("[T]he 1954 Johnson Amendment [is] a '[62]-year-old federal tax law that prevents religious leaders from truly exercising their constitutionally-protected free speech rights when they act in their official capacity as a pastor or head of a religious, tax-exempt organization.'").

5. *See, e.g.*, David Wolpe, *A Rabbi Defends the Johnson Amendment*, ATLANTIC (Feb. 19, 2017), https://www.theatlantic.com/politics/archive/2017/02/a-rabbi-defends-the-johnson-amendment/516981/ ("Believe me, once endorsements are permitted, they will become expected. . . . You may as well affix an elephant or a donkey instead of a cross on your church, because that is how it will be seen—a Republican church or a Democratic one.").

the day.[6] Proponents of the Johnson Amendment who try to make arguments from tradition (that is, that the Johnson Amendment has been here for a while, and therefore it must be fine) must first acknowledge that it was once commonplace for pastors to preach about political issues and candidates:

> Historically, churches had frequently and fervently spoken for and against candidates for government office. Such sermons date from the founding of America, including sermons against Thomas Jefferson for being a deist; sermons opposing William Howard Taft as a Unitarian; and sermons opposing Al Smith in the 1928 presidential election. Churches have also been at the forefront of most of the significant societal and governmental changes in our history including ending segregation and child labor and advancing civil rights.[7]

In 1862, President Abraham Lincoln and Congress created the position of commissioner of Internal Revenue, whose job was to collect an income tax that would be used to pay for the war.[8] Congress repealed the income tax a decade later, then revived it in 1894, and the Court ruled in 1895 that the income tax was unconstitutional.[9] It was only after Wyoming ratified the 16th Amendment in 1913 that the necessary three-quarter majority of states was met, giving Congress the constitutional authority to enact an income tax.[10] It was in that year

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6. *See generally* JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 306–38 (3d ed. 2011) (collecting and summarizing religious liberty cases from 1815 to 2010).

7. ALL. DEF. FUND, THE PULPIT INITIATIVE: EXECUTIVE SUMMARY 1 (2009) [hereinafter PULPIT INITIATIVE EXEC. SUMM.], http://adfwebadmin.com/userfiles/file/Pulpit_Initiative_executive_summary_candidates%203_11_10.pdf; *accord* DAVID L. CHAPPELL, A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW 128 (2004); WALTER I. TRATTNER, CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA 196 (1970). *Cf. also* WITTE & NICHOLS, *supra* note 6, at 21–37 (explaining the extent to which various sects and officials within them wrote and spoke on religious liberty, a political issue in and of itself).

8. *Brief History of IRS*, INTERNAL REVENUE SERV., https://www.irs.gov/uac/brief-history-of-irs (last updated Aug. 6, 2017).

9. *Id.*

10. *Id.*

that taxpayers first saw the now-infamous Form 1040, levying a tax of 1% on incomes greater than $3,000 and a 6% surtax on incomes greater than $500,000.[11] Since then, the Internal Revenue Service ("IRS") has been responsible for collecting and managing the United States' income tax system.[12]

The idea of limits on tax exemptions for churches and accompanying restrictions on lobbying activity actually predate Lyndon Johnson's Amendment. Churches first received their tax-exempt statuses under the Revenue Act of 1913, and then, in 1934, Congress narrowed the exemption to exclude churches and all non-profit organizations that participated in lobbying activities.[13] It was only in 1954 that then-Senator Lyndon Johnson included the provision that related to elections,[14] which was more pragmatic than ideological.

Johnson served as a United States senator from Texas before he became this nation's 36th president.[15] He was the Minority Leader in the Senate in 1953, and when the power shifted from one party to the other in 1954, he became the Democratic Majority Leader.[16] It was on July 2, 1954, that he proposed the addition to the tax provision which now bears his name.[17] The exact portion that Senator Johnson proposed to be added at that time, following the existing tax exemption for charitable organizations, allowed tax exemptions to those organizations which do not "influence legislation, and which do[] not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."[18] Congress added the words "in opposition to" after the

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11. *Id.*

12. *Id.*

13. Roger Colinvaux, *The Political Speech of Charities in the Face of* Citizens United*: A Defense Prohibition*, 62 CASE W. RES. L. REV. 685, 692–93 (2012).

14. J.R. Labbe, Opinion, *The First Church of Electioneering?*, FORT WORTH STAR-TELEGRAM, Feb. 27, 2008, at D1.

15. FRANK FREIDEL & HUGH SIDEY, THE PRESIDENTS OF THE UNITED STATES OF AMERICA (2006), *reprinted in Lyndon B. Johnson*, THE WHITE HOUSE, https://www.whitehouse.gov/1600/presidents/lyndonbjohnson (last visited Oct. 28, 2017).

16. *Id.*

17. 100 CONG. REC. 9604 (daily ed. July 2, 1954) (statement of Sen. Johnson).

18. *Id.*

words "on behalf of" in 1987, thus broadening the scope of the prohibition on political activity.[19]

When Senator Johnson introduced the amendment, he categorized its changes to the current wording by saying, "[T]his amendment seeks to extend the provisions of section 501 of the House bill, denying tax-exempt status to not only those people who influence legislation but also to those who intervene in any political campaign on behalf of any candidate for any public office."[20] Johnson stated that he had met with other high-ranking members of the Senate prior to the introduction of this amendment, and that he "under[stood] that the amendment [was] acceptable to them. [He] hope[d] the chairman [would] take it to conference, and that it [would] be included in the final bill which Congress passe[d]."[21] The final note in the Congressional Record concerning the Johnson Amendment states, "The amendment was agreed to."[22]

The story behind the story is that Johnson was facing re-election that year, and money from tax-exempt organizations funded by out-of-state donors meant he would be facing strong opposition during the primary.[23] At the time the Johnson Amendment was introduced, Senator Johnson had recently faced political difficulties in his home state from certain organizations.[24] A study by a Purdue sociologist in the late-1990s found that "[t]he IRS rule that strips tax exemption from churches engaged in electioneering was born of Lyndon Johnson's Texas politics, not the U.S. Constitution."[25]

The organizations that Senator Johnson wanted to silence were the Facts Forum and the Committee for Constitutional Government ("CCG").[26] These groups were considered "the two major 'anti-

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19. Ass'n of the Bar of New York v. Comm'r, 858 F.2d 876, 879 (1988).

20. 100 CONG. REC. 9604 (daily ed. July 2, 1954) (statement of Sen. Johnson).

21. *Id.*

22. *Id.*

23. GAG ORDER 58 (Gary Cass ed., 2005) (citing BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 327 (6th ed. 1992)).

24. Jay Sekulow, *Should Religious Leaders Be Able to Endorse Political Candidates?*, ACLJ, https://aclj.org/us-constitution/should-religious-leaders-be-able-to-endorse-political-candidates- (last visited Oct. 28, 2017).

25. Larry Witham, *Texas Politics Blamed for '54 IRS Rule – LBJ Wanted to Keep Senate Seat*, WASH. TIMES, Aug. 27, 1998, at A4.

26. *Id.*

communist' organizations" attempting to thwart Senator Johnson's bid for reelection.[27] During this time of McCarthyism and Texas politics, there was no real general election, making the Democratic primary election itself the de facto general election.[28] His opponent was the relatively unknown thirty-something World War II veteran Dudley Dougherty, who was spun as a vehement anti-communist, but who later told Johnson in a hand-written letter after the election that he "had a rather unhappy role to play, that of ultraconservative."[29] The bulk of the money that was being used against Johnson and others was coming from outside the state via 501(c)(3) organizations—namely the Facts Forum and CCG—which were both receiving tax benefits for themselves *and* those who were making donations to the organizations.[30] Texas Senator Mike Moroney once described the Facts Forum as "the largest and most ambitious propaganda machine ever set up in this country."[31] What is important is that the Johnson Amendment was "prompted by Johnson's desire to challenge McCarthyism, protect the liberal wing of the Democratic Party in Texas, and win re-election."[32] But whatever his motive,

> [f]our months prior to elections, without a hearing or debate, LBJ forced an amendment on the Senate floor to prohibit all non-profit groups from engaging in political campaigning or electioneering. LBJ received only sparse opposition in 1954, as many of his peers were eager to extinguish "McCarthyism" and the "Red hunt" once and for all.[33]

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27. Aaron Tyler, *Preserving the Moral Compass: House of Worship Speech Protection Act Is Defeated*, 45 J. CHURCH & ST. 717, 720 (Oct. 1, 2003).

28. *Id.*; Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733, 742 (2001).

29. O'Daniel, *supra* note 28, at 742–43.

30. *Id.* at 743–44.

31. James D. Davidson, *Why Churches Cannot Endorse or Oppose Political Candidates*, 40 REV. RELIGIOUS RES. 16, 28 (1998) (quoting THE REPORTER, Nov. 29, 1956).

32. Witham, *supra* note 25.

33. Tyler, *supra* note 27, at 721.

Senator Johnson's motivation for passing the Johnson Amendment seems clear, yet no one seems to precisely know why Congress decided to enact it. It was adopted without debate, committee discussions, or consideration of its effects on churches.[34]

Still, whether his intention was to restrict churches or simply to silence those non-profits who opposed him in that election year, the consequences of this restriction have been far-reaching in both the religious and political arenas. It is worth noting that this is the case even though the change was more symbolic than substantive: at the time of passage of the Johnson Amendment, those organizations the IRS defined as "charitable" arguably already excluded political organizations that would otherwise fall under a different classification.[35] Furthermore, a Republican Congress enacted the then-uncontroversial Johnson Amendment, and a Republican, President Dwight Eisenhower, signed it into law.[36] The ironic fallout for Senator Johnson was that the IRS even questioned the exemption status of religious institutions that favored him over others. During his 1964 run for the presidency, the religious publications of *Christian Century* and *Christianity & Crisis* temporarily lost their tax-exempt statuses after they endorsed then-Senator Johnson.[37]

There are two additional points on this subject that are worth discussing. First, prior to 1954, churches were reluctant to endorse or oppose candidates for fear that, "if they went out on political limbs, their actions would reveal political divisions in all except the most homogeneous churches."[38] Intra-church disputes have long been an issue within the United States, leading to protracted litigation that leaves all parties worse for the wear.[39] One standout exception to this

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34. *Pastors to Protest IRS Rules on Political Advocacy*, PEW RES. CTR. (Sept. 19, 2008), http://www.pewforum.org/2008/09/19/pastors-to-protest-irs-rules-on-political-advocacy/.

35. *See* Colinvaux, *supra* note 13, at 702–04 (discussing the distinction between charitable and political organizations as a guiding principle for the Johnson Amendment).

36. Jeremy W. Peters, *The Johnson Amendment, Which Trump Vows to "Destroy," Explained*, N.Y. TIMES (Feb. 2, 2017), https://www.nytimes.com/2017/02/02/us/politics/johnson-amendment-trump.html.

37. Davidson, *supra* note 31, at 29.

38. *Id.*

39. *See generally, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (employment dispute between a teacher and the church

rule was Alfred E. Smith, who rallied wide support from a Catholic base that ensured his reelection to the New York governorship and eventual run for President in 1928.[40] Still, even this led to a Protestant backlash against what was seen as a Catholic attempt to usurp a Protestant America.[41]

Second, even when the tax code says that they cannot be involved in politics, churches have traditionally found a way around the problem.[42] For example, John F. Kennedy's run for office was marked by opposition from Protestant clergy in the National Conference of Citizens for Religious Freedom, and even a sermon from Rev. W.A. Criswell of the First Baptist Church in Dallas, who railed against the idea of a "Roman Catholic in the White House."[43] The story goes that H.L. Hunt, the Texas oil tycoon that bankrolled the Facts Forum, had copies of the sermon transcript made and sent to more than a hundred thousand people.[44] In the end, Kennedy was credited with fixing this issue when he addressed Protestant leaders by stating, "I believe in an America where the separation of church and state is absolute—here no Catholic prelate would tell the President (should he be a Catholic) how to act, and no Protestant minister would tell his parishioners for whom to vote."[45]

After a period of quiet, during the late 1980s and early 1990s new legislation pushed the IRS to increase its policing of tax-exempt organizations. In 1987, Representative J.J. Pickle of Texas used his

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that employed her); *see also* Jones v. Wolf, 443 U.S. 595 (1979) (dispute over church property following a denominational schism); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (employment dispute between a bishop and his church); Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969) (dispute over title to church property ownership when the vestries of two local churches withdrew from the larger national church organization); Kreshik v. Saint Nicholas Cathedral of Russian Orthodox Church, 363 U.S. 190 (1960) (dispute over use and occupancy of a church building).

40. Robert A. Slayton, *When a Catholic Terrified the Heartland*, N.Y. TIMES: CAMPAIGN STOPS (Dec. 10, 2011, 4:42 PM), https://campaignstops.blogs.nytimes.com/2011/12/10/when-a-catholic-terrified-the-heartland/.

41. Davidson, *supra* note 31, at 29.

42. *See id.*

43. *Id.*

44. *Id.*

45. *Id.*

position on the House Ways and Means Subcommittee on Oversight to investigate non-profit 501(c)(3) organizations that might have used funds from the sale of Iran-Contra arms to push conservative congressional candidates and fund other lobbying efforts.[46] The result was the passage in 1987 of Internal Revenue Code Section 4912, which stipulates that any organization found to have engaged in substantial lobbying would face "a tax on the lobbying expenditures of such organization for such taxable year equal to 5 percent of the amount of such expenditures" and has remained in place since.[47]

B. Attempts to—and Possible Consequences of—Amending the Johnson Amendment

Many members of Congress have attempted to pass bills that would allow churches and religious organizations to become more involved in the political process, including allowing pastoral endorsements from the pulpit, while maintaining the tax-exempt status of the church or religious organization; all of them have failed.

On June 28, 2001, Representative Walter Jones of North Carolina introduced H.R. 2357. The Houses of Worship Political Speech Protection Act was put forth with the purpose of "[a]mend[ing] the Internal Revenue Code to permit a churches and other houses of worship to engage in political campaigns," provided that doing so did not become a "substantial part of [its] activities."[48] The bill failed to pass with a vote of 178-239 on October 2, 2002.[49]

In 2005, Representative Jones tried again with the Houses of Worship Free Speech Restoration Act of 2005, but it also failed to pass. Its purpose was "[t]o amend the Internal Revenue Code of 1986 to protect the religious free exercise and free speech rights of churches

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46. Simon Brown, *The Persistence of Pulpit Politicking: Will the IRS Finally Crack Down on Unlawful Church Electioneering?*, CHURCH & STATE (June 2016), https://www.au.org/church-state/june-2016-church-state/featured/the-persistence-of-pulpit-politicking.

47. I.R.C. § 4912(a) (2012).

48. Houses of Worship Political Speech Protection Act, H.R. 2357, 107th Cong. (2001).

49. *Final Vote Results for Roll Call 429*, OFFICE OF THE CLERK OF THE U.S. H. OF REPS. (Oct. 2, 2002, 10:47 AM), http://clerk.house.gov/evs/2002/roll429.xml.

and other houses of worship."[50] This bill was referred to the Ways and Means Committee, but it never passed, and two years after it was introduced, it officially failed.[51]

Rep. Jones introduced nother recent piece of legislation concerning this issue, H.R. 2275, on May 10, 2007, and it was referred to the Ways and Means Committee.[52] Similar to the previous failed bills, the purpose of 2275 was "[t]o restore the Free Speech and First Amendment rights of churches and exempt organizations by repealing the 1954 Johnson Amendment."[53] Despite eight co-sponsors joining, including Representatives Jesse Jackson, Jr., Ron Paul, and Duncan Hunter,[54] the bill did not make it out of committee.[55]

Although attempts to amend the Johnson Amendment have failed,[56] such a move would not necessarily result in churches or religious organizations being turned into political machines. It would, however, make it easier for religious leaders to speak out clearly about the issues and candidates that shape the lives and affect the futures of millions of people of faith. Conversely, the fact that the Johnson

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50. Houses of Worship Free Speech Restoration Act of 2005, H.R. 235, 109th Cong. (2005).

51. *H.R. 235 – Houses of Worship Free Speech Restoration Act of 2005*, CONGRESS.GOV, https://www.congress.gov/bill/109th-congress/house-bill/235/all-actions?overview=closed#tabs (last visited Oct. 28, 2017).

52. *H.R. 2275 – To Restore the Free Speech and First Amendment Rights of Churches and Exempt Organizations by Repealing the 1954 Johnson Amendment*, CONGRESS.GOV, https://www.congress.gov/bill/110th-congress/house-bill/2275/all-actions?overview=closed#tabs (last visited Oct. 28, 2017).

53. H.R. 2275, 110th Cong. (2007).

54. *H.R. 2275 – To Restore the Free Speech and First Amendment Rights of Churches and Exempt Organizations by Repealing the 1954 Johnson Amendment*, CONGRESS.GOV, https://www.congress.gov/bill/110th-congress/house-bill/2275/cosponsors (last visited Oct. 28, 2017).

55. *H.R. 2275 – To Restore the Free Speech and First Amendment Rights of Churches and Exempt Organizations by Repealing the 1954 Johnson Amendment*, CONGRESS.GOV, https://www.congress.gov/bill/110th-congress/house-bill/2275/all-actions?overview=closed#tabs (last visited Oct. 28, 2017).

56. *See* Stephanie Strom, *The Political Pulpit*, N.Y. TIMES (Sept. 30, 2011), http://www.nytimes.com/2011/10/01/business/flouting-the-law-pastors-will-take-on-politics.html ("This weekend, hundreds of pastors, including some of the nation's evangelical leaders, will climb into their pulpits to preach about American politics, flouting a decades-old law that prohibits tax-exempt churches and other charities from campaigning on election issues.").

Amendment is only observed in the breach means that, on a practical level, no one's speech is actually being chilled. Regardless, the fate of the Johnson Amendment has lingered at the forefront of political discourse on religious freedom, so the next section will delve into the modern interpretation and enforcement of the Act.

C. Modern Interpretation and Enforcement of the Johnson Amendment

1. IRS Guidance and Practice

The modern wave of increased attention to regulating the political activity of 501(c)(3) organizations began in 2004 with the creation of the Political Activities Compliance Initiative.[57] This Initiative consisted of the IRS sending letters and news releases to all interested parties the agency deemed to be at risk of violating the amendment.[58] For the 2008 election cycle, and in subsequent election cycles, the IRS merely reiterated their goals for preventing violations of the restrictions of § 501(c)(3) of the Tax Code; a letter from Lois G. Lerner ("Ms. Lerner"), for example, then Director of the Exempt Organizations section of the IRS, stated that the IRS sought to educate and provide guidance to the public, relevant communities, and organizations while maintaining a meaningful enforcement presence on this topic.[59] Education and enforcement are thus the two arms of

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57. *See generally* Letter from Lois G. Lerner, Dir., Exempt Orgs., Tax Exempt and Gov't Entities Div., Internal Revenue Serv., Dep't of the Treasury, to Marsha Ramirez, Dir., Examinations, Rob Choi, Dir., Rulings & Agreements, and Bobby Zarin, Dir., Customer Educ. & Outreach, Tax Exempt and Gov't Entities Div., Internal Revenue Serv., Dep't of the Treasury (Apr. 17, 2008), http://www.irs.gov/pub/irs-tege/2008_paci_program_letter.pdf [hereinafter Letter from Lerner].

58. The IRS sent letters to national political party committees outlining the scope of Section 501(c)(3) as it relates to political activity. The IRS also noted that the FEC's monthly newsletter contained guidance for candidates to help them avoid imperiling the tax-exempt status of charities. Press Release, IRS, IRS Continues Program on Political Campaign Activity by Charities; Stresses Education and Enforcement (Apr. 17, 2008), https://www.irs.gov/newsroom/irs-continues-program-on-political-campaign-activity-by-charities-stresses-education-and-enforcement.

59. Letter from Lerner, *supra* note 57, at 1.

the IRS's Exempt Organizations ("EO") division.[60] Ms. Lerner wrote, "As in the past, this committee of career civil servants with extensive EO tax law experience will continue to determine which cases to pursue, and the project coordinator will help ensure consistency."[61]

The section of the IRS website pertaining to 501(c)(3)s and the restrictions placed upon them concerning political involvement lists the requirements for classification as a tax-exempt organization.[62] A 501(c)(3) organization cannot be an "action organization," meaning that "it may not attempt to influence legislation as a substantial part of its activities and it may not participate in any campaign activity for or against political candidates."[63]

Another section entitled "The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations" provides a list of more specific activities that directly violate the regulation.[64] For instance, "[c]ontributions to political campaign funds or public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate the prohibition against political campaign activity."[65] In addition, any educational activity which has "evidence of bias" constituting "favor of one candidate over another" or opposition to any candidate would be "prohibited participation or intervention."[66] The site further explains that, even if the bias is not overt, but only "ha[s] the effect of favoring a candidate or group of candidates," the IRS will still find an organization in violation of the provision.[67]

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60. *Id.* at 2–3.

61. *Id.* at 1.

62. *Exemption Requirements – 501(c)(3) Organizations*, IRS, https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-section-501c3-organizations (last updated Aug. 27, 2017) [hereinafter *Exemption Requirements*].

63. *Id*.

64. *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, IRS, https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations (last updated Sept. 13, 2016) [hereinafter *Section 501(c)(3) Restrictions*].

65. *Id.*

66. *Id.*

67. *Exemption Requirements*, *supra* note 62.

Not every possible manner of political involvement, however, is so clearly forbidden. The IRS itself states that the prohibition of "[c]ertain activities or expenditures" would have to be taken in context of the surrounding "facts and circumstances."[68] If nonprofits act in a non-partisan manner, they will likely be acceptable.[69] Examples of approved activities include "certain voter education activities (including presenting public forums and publishing voter education guides)."[70]

In June 2007, the IRS released Revenue Ruling 2007-41, which examined twenty-one examples that illustrate the application of the rule to help determine whether a 501(c)(3) organization's actions violate restrictions on political intervention.[71] The purpose of this ruling was to give exempt organizations a clear idea of what constitutes a violation of the law.[72] The twenty-one situations described in the ruling are divided into seven categories, such as "Voter Education, Voter Registration and Get Out the Vote Drives" and "Issue Advocacy vs. Political Campaign Intervention."[73] Two examples from the ruling are Situations 5 and 9:

> *Situation 5*. Minister *C* is the minister of Church *L*, a section 501(c)(3) organization and Minister *C* is well known in the community. Three weeks before the election, he attends a press conference at Candidate *V*'s campaign headquarters and states that Candidate *V* should be reelected. Minister *C* does not say he is speaking on behalf of Church *L*. His endorsement is reported on the front page of the local newspaper and he is identified in the article as the minister of Church *L*. Because Minister *C* did not make the endorsement at an official church function, in an official church publication

68. *Section 501(c)(3) Restrictions*, *supra* note 64.

69. *See id.*

70. *Id.*

71. Rev. Rul. 2007-41, 2007-1 C.B. 1421.

72. *Political Campaign Intervention by 501(c)(3) Tax-Exempt Organizations – Educating Exempt Organizations*, IRS, https://www.irs.gov/charities-non-profits/charitable-organizations/political-campaign-intervention-by-501c3-tax-exempt-organizations-educating-exempt-organizations (last updated Aug. 27, 2017).

73. Rev. Rul. 2007-41, 2007-1 C.B. 1421.

> or otherwise use the church's assets, and did not state that he was speaking as a representative of Church *L*, his actions do not constitute campaign intervention by Church *L*.
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> . . . .
>
> *Situation 9*. Minister *F* is the minister of Church *O*, a section 501(c)(3) organization. The Sunday before the November election, Minister *F* invites Senate Candidate *X* to preach to her congregation during worship services. During his remarks, Candidate *X* states, "I am asking not only for your votes, but for your enthusiasm and dedication, for your willingness to go the extra mile to get a very large turnout on Tuesday." Minister *F* invites no other candidate to address her congregation during the Senatorial campaign. Because these activities take place during official church services, they are attributed to Church *O*. By selectively providing church facilities to allow Candidate *X* to speak in support of his campaign, Church *O*'s actions constitute political campaign intervention.[74]

According to the "Holdings" section of the document, a little over half of the situations addressed would not constitute a violation.[75] Despite the purpose of the ruling, these results suggest that applicable standards are so vague that a single misstep could potentially decimate a church.

Additionally, much of the IRS's "Tax Guide for Churches and Religious Organizations: Benefits and Responsibilities under the Federal Tax Law" reiterates what is on the IRS website;[76] however, it also goes into more detail as to what types of organizations constitute a church.[77] In practice, the IRS later uses this vague guidance to

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74. *Id.*

75. *Id.*

76. *See generally* IRS, U.S. DEP'T OF TREASURY, PUB. NO. 1828, TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 1–18, http://www.irs.gov/pub/irs-pdf/p1828.pdf (last visited Feb. 24, 2017) [hereinafter TAX GUIDE].

77. TAX GUIDE, *supra* note 76, at 33.

determine an entity's eligibility for an exemption,[78] putting well-meaning religious institutions right in the federal government's crosshairs.

2. IRS Enforcement of Violations

The IRS states that "[v]iolating [certain] prohibition[s] may result in denial or revocation of tax-exempt status and the imposition of certain excise taxes."[79] An excise tax is "[a] tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)."[80] While the IRS has published many documents educating 501(c)(3) organizations about the restrictions on political involvement, there are instances in which the IRS does not follow and enforce the provisions as they were written and intended, even in those cases in which the guidelines would seem to give clear instructions. Following the 1987 change in the IRS regulations, for example, some high-profile crackdowns occurred. Most notably, the IRS investigated Reverend Jerry Falwell's "Old Time Gospel Hour" over a four-year period, leading to his organization paying $50,000 in back taxes in 1993 and retroactively losing its tax-exempt status for 1986 and 1987 due to having engaged in partisan activity.[81]

In *Branch Ministries v. Rossotti*, the Court of Appeals for the D.C. Circuit outlined the procedure that the IRS follows to determine whether a church has violated the requirements for tax-exemption and

78. *See generally* Erik W. Stanley, *LBJ, The IRS, and Churches: The Unconstitutionality of the Johnson Amendment in Light of Recent Supreme Court Precedent*, 24 REGENT U. L. REV. 237, 248–60 (2011). *See also, e.g.*, S-C-C, Non-Precedent Decision of the Administrative Appeals Office, U.S. Citizenship and Immigration Servs. 4 n.2 (Oct. 31, 2017), https://www.uscis.gov/sites/default/files/err/C1%20-%20Immigrant%20Religious%20Workers/Decisions_Issued_in_2017/OCT312017_01C1101.pdf (describing IRS use of the Tax Guide to adjudicate questions of exempt status of religious organizations).

79. *See Section 501(c)(3) Restrictions*, *supra* note 64.

80. *Excise*, BLACK'S LAW DICTIONARY (8th ed. 2004).

81. *See generally* David E. Anderson, *Jerry Falwell's Ministry Fined for Taking Role in Politics*, WASH. POST (Apr. 10, 1993), https://www.washingtonpost.com/archive/local/1993/04/10/jerry-falwells-ministry-fined-for-taking-role-in-politics/ce8c87b3-0740-4b1b-a691-df39e73064fb/.

whether revocation of their status is necessary.[82] The court explained the process, noting that there are special restrictions on the IRS's ability to investigate the tax status of a church: the Church Audit Procedures Act ("CAPA") sets out the circumstances under which the IRS may initiate an investigation of a church and the procedures the agency must follow in such an investigation.[83] When a high-level Treasury official develops a "reasonable belief" that a church may not qualify for an exemption pursuant to 501, the IRS has statutory authority to undertake a "church tax inquiry."[84] If the inquiry does not produce satisfactory results, the IRS may continue with the "second level of investigation: a 'church tax examination.'"[85] In this part of the investigation, the IRS examines the organization's records and activities to determine whether the organization is a church for taxation purposes.[86]

The "Tax Guide for Churches and Religious Organizations: Benefits and Responsibilities under the Federal Tax Law" offers a more specific analysis of the IRS's mode of inquiry. It contains a section entitled "Special Rules Limiting IRS Authority to Audit a Church," which discusses when the IRS may conduct further investigations into a 501(c)(3) organization or an organization that is applying for such status.[87] This section of the guide states that investigations into a church's tax status can only occur after the Director of Exempt Organizations Examinations "reasonably believes, based on a written statement of the facts and circumstances, that the organization: (a) may not qualify for the exemption or (b) may not be paying tax on an unrelated business or other taxable activity."[88] The section also describes the audit process, informing churches that, if a reasonable belief exists, and the IRS notifies the church of its inquest, then the church has time (typically 90 days) to respond and explain the issues that have caused the inquiry.[89] If the investigation is not complete, or the church fails to respond, the IRS sends a second

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82. Branch Ministries v. Rossotti, 211 F.3d 137, 139–40 (D.C. Cir. 2000).
83. *Id.* (citing I.R.C. § 7611).
84. *Id.* at 140 (citation omitted).
85. *Id.*
86. *Id.*
87. TAX GUIDE, *supra* note 76, at 31.
88. *Id.*
89. *Id.* at 32.

letter.[90] At this point, the organization can meet with a representative from the IRS to discuss the issue.[91] Once the examination begins, it must end within two years after the IRS sends the second letter.[92] This process does not always reach the examination stage, and in many instances the IRS finds that there has been no grievous violation that would constitute grounds for revocation of the organization's tax-exempt status.[93]

According to the letter from Ms. Lerner to three other directors within the IRS, the goals for enforcement were two-fold.[94] The letter directed the focus of the Political Activities Compliance Initiative ("PACI") to "allegations of more egregious violations and the cases that result from them."[95] The four types of cases which the letter said needed close monitoring are those that involved issue advocacy and potential campaign intervention, internet cases in which an organization's website links to other organizations' websites in a way that would violate the Johnson Amendment, potential campaign contributions by 501(c)(3) organizations, and 501(c)(4) organizations making political expenditures in lieu of political action committees.[96]

Notably, the letter itself acknowledges some of the inherent ambiguities in the IRS's guidance and interpretations of the Code. The letter cites the situations covered in Revenue Ruling 2007-41 and states that the IRS has faced situations that are not immediately answerable by the holdings of those hypothetical violations.[97] In addition, the letter states that the EO should be ready to face specific "taxpayer challenges, which may lead to court . . . ."[98]

Throughout Ms. Lerner's letter, she often repeats the mantra that the PACI will examine reports of violations within the context of the "facts and circumstances" of each instance.[99] This leads one to assume that the law may not be as clear as the IRS would hope and that

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90. *Id.*
91. *Id.*
92. *Id.*
93. *See id.*; *infra* Section II.C.4.
94. *See* Letter from Lerner, *supra* note 57, at 1.
95. *Id.* at 2.
96. *Id.* at 2–4.
97. *Id.* at 2; *cf.* Rev. Rul. 2007-41, *supra* note 71.
98. Letter from Lerner, *supra* note 57, at 2.
99. *See generally id.* at 2–3.

the volumes of educational resources it produced do not fully cover the potential spectrum of this regulation. In fact, when investigating Internet cases, Ms. Lerner even goes so far as to deem such arbitrary facts as "the number of 'clicks' that separate the objectionable material from the 501(c)(3)'s Web site" to be a "significant consideration" as to whether there has been a violation.[100]

The IRS guidance is not helpful for churches seeking to follow the law. The guidance is vague and expressly states that the IRS would determine on a case-by-case basis whether to enforce 501(c)(3) regulations, with a careful review of the specific facts found in each situation. Such unclear guidance, in turn, leads to toothless threats of litigation and sporadic and unreliable enforcement.

3. Current and Recent Litigation Resulting in Revocation of Tax-Exempt Status of Church

The court in *Branch Ministries v. Rossotti* discussed the first instance in which the IRS ever revoked an organization's tax-exempt status for violating the rules of tax-exemption. The D.C. Circuit affirmed the revocation in 2000, a full 46 years after Congress enacted the Johnson Amendment.[101] The court recounted the facts are as follows: "Four days before the 1992 presidential election, Branch Ministries, a tax-exempt church, placed full-page advertisements in two newspapers in which it urged Christians not to vote for then-presidential candidate Bill Clinton because of his positions on certain moral issues."[102] Branch Ministries was the organization that operated the Pierce Creek Church in New York.[103] It accepted donations from people across the nation in support of the two advertisements, which it published in *USA Today* and *The Washington Times*.[104]

The Church's attempt to influence the presidential campaign prompted an inquiry by the IRS in 1992, which led to a church tax examination from 1993 to 1995 that ended in the revocation of the Church's tax-exempt status in January 1995.[105] Upon losing its tax-

100. *Id.* at 2.
101. Branch Ministries v. Rossotti, 211 F.3d 137, 139 (D.C. Cir. 2000).
102. *Id.*
103. *Id.* at 140.
104. *Id.*
105. *Id.*

exempt status, the church and its pastor filed suit, alleging that the IRS had "acted beyond its statutory authority, . . . the revocation violated [the church's] right to free exercise of religion guaranteed by the First Amendment and the Religious Freedom Restoration Act, and [that the church] was a victim of selective prosecution in violation of the Fifth Amendment."[106]

The D.C. Circuit focused mainly on the Church's allegation that the revocation of its tax-exempt status was an infringement upon the Church's rights under the First Amendment and RFRA.[107] The Church contended that revocation of its tax-exempt status would "threaten its existence" and would "make its members reluctant to contribute the funds essential to its survival."[108] In response to these concerns, the D.C. Circuit held that, "[b]ecause of the unique treatment churches receive under the Internal Revenue Code, the impact of the revocation is likely to be more symbolic than substantial."[109] The church can still consider itself a church and even be a 501(c)(3) organization with all benefits that come with that classification.[110] The only difference is that, when donors are audited after the revocation, they have the burden to show that the donee is in fact a church, instead of receiving the presumption of that fact which is given with a tax-exempt status classification.[111] The court found the church's selective-prosecution claims to be baseless, and it affirmed the lower court's summary judgment decision in favor of the IRS.[112] *Branch Ministries* was the first case ever that involved the IRS revoking the tax-exempt status of a bonafide church pursuant to the Johnson Amendment.[113] As the next section demonstrates, the IRS ignores the vast majority of violations.

106. *Id.* at 139.
107. *Id.* at 142–44.
108. *Id.* at 142.
109. *Id.*
110. *Id.*
111. *See id.* 142–43.
112. *Id.* at 144–45.
113. *Branch Ministries v. Rossotti*, GEORGETOWN UNIV.: BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFFAIRS, https://berkleycenter.georgetown.edu/cases/branch-ministries-v-rossotti (last visited Sept. 11, 2017).

4. Situations That Did Not Result in Revocation of Church's Tax-Exempt Status

According to the Alliance Defending Freedom ("ADF," formerly the Alliance Defense Fund), there have been no reported revocations of a church's tax-exempt status or other punishment to date—despite the IRS's strict interpretation of the tax code—for sermons delivered from the pulpit,[114] which is distinct from Branch Ministries losing its status for evaluating candidates for office in light of Scripture.

In the "2006 Political Activities Compliance Initiative" report, the IRS gives statistical results from the investigations it conducted in the 2004 and 2006 election cycles due to reported violations of the tax code.[115] The report compares the results of 2006 to those of 2004, showing that, although there were 237 reported violations in 2006, compared to 166 reported in 2004, the IRS only examined 100 and 110 in those years, respectively.[116] The report also lists statistics for types of alleged violations: organizations printing and distributing documents in support of candidates; official statements made during normal services; candidates speaking at official functions; distribution of improper voter guides or candidate ratings; posting signs on organization properties endorsing candidates; posting on organization websites; official verbal endorsement; organizations making political contributions to a candidate; allowing a non-candidate to endorse a candidate during a speech at an organization event; and use of organization facilities for a political campaign event.[117]

Despite these allegations and examinations, the IRS investigations that eventually closed found that—despite those confirmed violations that concerned church involvement in political activity—not one time did the IRS revoke the church's tax-exempt status.[118] In 2004, there were 42 instances in which the IRS found that "[p]olitical intervention [was] substantiated," and in 2006 there were

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114. PULPIT INITIATIVE EXEC. SUMM., *supra* note 7.

115. IRS, 2006 POLITICAL ACTIVITIES COMPLIANCE INITIATIVE 1 (May 30, 2007) [hereinafter 2006 PACI REPORT], https://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf.

116. *Id.*

117. *Id.* at 4.

118. *Id.* at 5.

four instances of the same.[119] Despite the IRS stating unequivocally that such political involvement is "absolutely prohibited,"[120] however, only a "written advisory [was] issued" in each of those cases.[121]

An example of a situation in which the IRS carried out an inquiry and investigation following church politicking occurred in the case of the All Saints Episcopal Church in Pasadena, California.[122] While the pastor, the Reverend George F. Regas, did not specifically endorse a candidate for president, he gave a sermon two days before the 2004 election that criticized the Iraq war and then-President George W. Bush's tax cuts.[123] The IRS told the Church it needed to produce all political documents and materials created in 2004.[124] The Church responded to the IRS stating that it would not comply with the orders and would not send the documents.[125] The IRS offered not to pursue the case "if the church would admit wrongdoing and agree not to hold similar sermons in the future," but All Saints refused.[126] Reverend Barry Lynn of Americans United for Separation of Church and State suggested that the IRS's treatment of churches was not equal.[127] He offered the example of a Baptist preacher in Arkansas who gave a sermon that was critical of then-candidate John Kerry and supportive of President George W. Bush that did not elicit an IRS investigation.[128]

Eventually, the IRS determined that revocation of All Saints' tax-exempt status was not necessary. On September 10, 2007, almost three years after the sermon in question, the IRS notified the church that, although it did violate the tax code when Reverend Regas gave

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119. *Id.*

120. *Section 501(c)(3) Restrictions*, *supra* note 64.

121. 2006 PACI REPORT, *supra* note 115, at 5.

122. Celeste Kennel-Shank, *IRS vs. Pulpit*, SOJOURNERS, Feb. 2006, https://sojo.net/magazine/february-2006/irs-vs-pulpit.

123. *Id.*

124. Louis Sahagun, *Church Votes to Fight Federal Probe*, L.A. TIMES, Sept. 22, 2006, at B1.

125. *Id.*

126. *IRS Audits Church for Anti-War Sermon*, CTR. FOR EFFECTIVE GOV'T (Nov. 15, 2015), http://www.foreffectivegov.org/node/771.

127. *See id.* ("Barry Lynn said that while he could understand why the IRS might question the All Saints sermon, he cannot understand 'why the tax agency did not take the same view about an even more partisan sermon by a Baptist pastor in Arkansas who preached on the successes of George Bush.'")

128. *Id.*

his anti-war sermon, it would be able to retain its tax-exemption.[129] The IRS, however, failed to explain the reasoning behind its decision.[130] This constant back and forth exposes the ongoing enforcement problem that the Johnson Amendment poses: vague rules with vague guidance breeds inconsistency and disparate treatment.

D. ADF Pulpit Initiative

On September 28, 2008, the ADF conducted a nationwide event called "Pulpit Freedom Sunday."[131] That day, pastors who were involved in the event gave Scripture-based sermons from the pulpits comparing and contrasting the differing positions of the presidential candidates.[132] The pastors discussed important issues in the 2008 election year and talked about candidates' stances on those issues.[133] This was a planned violation of the Johnson Amendment.[134] The purpose of the initiative was to create litigation stemming from the violations that would allow the court system to deem this provision of the tax code unconstitutional under the Free Speech Clause of the First Amendment.[135]

Specifically, the ADF designed Pulpit Freedom Sunday with a narrow purpose and only intended for the event to involve what pastors preached on the day of the event—not get-out-the-vote campaigns or partisan activities.[136] The ADF stated that the reasoning behind the initiative was not to promote any candidates or to encourage churches

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129. Rebecca Trounson, *IRS Ends Church Probe but Stirs New Questions*, L.A. TIMES (Sept. 24, 2007), http://articles.latimes.com/2007/sep/24/local/me-allsaints24.

130. *Id.*

131. PULPIT INITIATIVE EXEC. SUMM., *supra* note 7. *See also generally* Strom, *supra* note 56.

132. PULPIT INITIATIVE EXEC. SUMM., *supra* note 7.

133. Press Release, All. Def. Freedom, Pulpit Freedom Sunday (Sept. 25, 2008) [hereinafter PFS Press Release], http://adflegal.org/detailspages/press-release-details/pulpit-freedom-sunday.

134. PULPIT INITIATIVE EXEC. SUMM., *supra* note 7.

135. *Id.* at 2. *See generally* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

136. All. Def. Fund, *The Alliance Defense Fund Pulpit Initiative: What It Is – What It's Not*, THE BLACK ROBE REGIMENT, http://www.blackrobereg.org/uploads/2/8/9/8/2898266/pfs_what_it_is.pdf (last visited Nov. 3, 2017) [hereinafter All. Def. Fund, *Pulpit Initiative: What It Is*].

to preach about one political party over another.[137] Instead, the ADF created Pulpit Freedom Sunday to allow churches to make decisions for themselves about whether they want their pastor preaching about politics.[138] The ADF does not believe that churches need to or must delve into the foray of politics but that the pastor and the church—not the IRS—should decide whether to discuss political matters.[139] The ADF's stance is that this area is no place for the IRS, and the current restrictions on what pastors can preach without a church losing its tax-exempt status violate the right of freedom of speech, which is at "the very heart of the First Amendment."[140]

One of the 33 pastors who participated in Pulpit Freedom Sunday was the Reverend Ronald Johnson, Jr. of Living Stones Fellowship Church in Crown Point, Indiana.[141] Following the event, Reverend Johnson explained why he participated in Pulpit Freedom Sunday: "If we cannot discuss any and all topics, including those the IRS may deem 'political,' even within our communities of faith, we will become what Martin Luther King Jr. called an 'irrelevant social club without moral or spiritual authority.'"[142] Reverend Johnson's Pulpit Freedom Sunday sermon focused on two issues—abortion and same-sex marriage—and explained where then-Senator Barack Obama and Senator John McCain stood on those issues.[143] His sermon discussed each candidate's political positions in relation to Biblical principles, and he presented a slideshow contrasting the candidates' views.[144] While Reverend Johnson did not endorse McCain, he made a point to conclude that Obama's views were contrary to the Biblical

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137. *Id.*

138. *Id.*

139. *See, e.g.*, PFS Press Release, *supra* note 133 ("The real effect of the Johnson Amendment is that pastors are muzzled for fear of investigation by the IRS.").

140. *Id.*; Morse v. Frederick, 551 U.S. 393, 423 (2007) (Alito, J., concurring).

141. Peter Slevin, *33 Pastors Flout Tax Law with Political Sermons*, WASH. POST (Sept. 29, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/09/28/AR2008092802365.html?sid=ST2008092802689 [hereinafter Slevin, *33 Pastors*].

142. Ron Johnson Jr., *Pulpit Politics Is Free Speech*, U.S. NEWS & WORLD REP., Nov. 17, 2008, at 10, 10.

143. Slevin, *33 Pastors*, *supra* note 141.

144. *Id.*

principles he had highlighted.[145] He summed up his reflection on Pulpit Freedom Sunday by saying that it did not purport to "promot[e] political parties or agendas or establish[] a 'theocracy.' It's about our right to bring kingdom principles and solutions to bear on contemporary social problems if we so choose. A pastor may choose not to, but it's the pastor's choice, not the choice of the IRS."[146]

Not all members of the clergy supported the ADF's actions. A group of Christian and Jewish clergy, and former IRS employees, including a former EO director, tried to stop Pulpit Freedom Sunday from occurring.[147] The group's purpose was to call the IRS's attention to the "flagrant disregard of the ethical rules" and to have the IRS investigate whether the ADF itself was putting its tax-exempt status in jeopardy.[148] In addition, a spokesman for the group Americans United for Separation of Church and State called the ADF's plan "a 'stunt' that is part of an effort by the religious right to build a church network that will 'put their candidates into office. It's part of the overall game plan.'"[149] In the end, no actual case was brought before a court on this issue.

III. CONSTITUTIONALITY OF THE JOHNSON AMENDMENT

The Johnson Amendment has all the makings of a hot-button issue in American politics: it involves tax law, the First Amendment's religion clauses, and general free speech claims. There are essentially three constitutional arguments against the Johnson Amendment: (1) it violates the religion clauses of the First Amendment in that it raises both Free Exercise and Establishment Clause concerns; (2) it has negative implications for Free Speech; and (3) it represents an unconstitutional condition on a federal benefit.

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145. *Id.*

146. Johnson, *supra* note 142.

147. Peter Slevin, *Ban on Political Endorsements by Pastors Targeted*, WASH. POST (Sept. 8, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/09/07/AR2008090702460_pf.html [hereinafter Slevin, *Endorsements Targeted*].

148. *Id.*

149. *Id.* (quoting Joe Conn, spokesman for Americans United for Separation of Church and State).

First, perhaps the most often-raised contention against the Johnson Amendment involves the religion clauses of the First Amendment.[150] The restriction on what a church pastor can and cannot say, or what a church can and cannot support, infringes on the institution's right to free exercise when, for instance, a pastor feels called to mention something overtly political, or a congregant asks for guidance on such an issue. While it is true that the Supreme Court's ruling in *Employment Division v. Smith*[151] severely limited the protection that religion receives from neutral rules of general applicability,[152] the Religious Freedom Restoration Act ("RFRA") codifies pre-*Smith* case law and requires that any federal restriction on free exercise further a compelling governmental interest with no less restrictive means.[153] At the same time, from an Establishment perspective, by its very nature of policing speech the Johnson Amendment excessively entangles the government in the affairs of a religious organization, as it requires the government to parse through sermons assessing political nuances.[154] Second, in terms of free speech, opponents of the Johnson Amendment contend that it involves content-based speech discrimination and is therefore presumptively unconstitutional.[155] Third and finally, one last constitutional argument that has been advanced in favor of repealing the Johnson Amendment is that it creates an unconstitutional condition on the exercise of a fundamental right or rights.

On the other side, proponents of the Johnson Amendment could articulate arguments to address each of the opponents' three constitutional concerns. First, Congress's passage of the Johnson

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150. *See, e.g.*, Alan Brownstein, *Free Speech vs. Religion Clauses Discussion Question: Is the 1954 Johnson Amendment Constitutional?*, LIBERTY, http://www.libertymagazine.org/contributor/free-speech-vs.-religion-clauses (depublished web content) (on file with the University of Memphis Law Review); *accord supra* Sections II.B & II.D.

151. 494 U.S. 872 (1990).

152. The Court in *Smith* held that, if a law was neutral and generally applicable, then citizens were not entitled to a religious exemption. *Id.* at 884–85.

153. *See* WITTE & NICHOLS, *supra* note 6, at 123–27.

154. *See supra* Section II.C.

155. *Cf.* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

Amendment is neutral both on its face and in application. While some religious institutions fall under 501(c)(3) of the tax code, the Johnson Amendment also governs plenty of other kinds of non-religious charitable organizations that also have tax-exempt status. Forcing the government to allow for some kind of religious exception to this neutral law would not only violate the Establishment Clause but would be tantamount to giving preferential treatment to religious organizations. Further, the Johnson Amendment does not limit the rights of the individual, as any pastor, preacher, or parishioner may freely engage in their own religious exercises as they see fit. Organizations are just as free to say and do what they believe, but they cannot expect the government to endorse that speech by conferring the benefit of tax-exemption on them while they do it. Consistent with the traditional American values approach, anyone is free to do as they wish, but they should not expect the government to actively support them as they do so. Second, the Johnson Amendment does not censor free speech any more than it tries to censor religious expression. The First Amendment provides for freedom from government intervention in the form of criminal punishment or denial of a forum in which to speak, but denial of a benefit is not censorship. Finally, the giving of tax-exempt status is a power squarely within the purview of Congress. As the Court discussed in *NFIB v. Sebelius*,[156] the range of purposes that Congress's use of the Taxing Clause power will serve is substantial; if Congress has the power to take something away completely, then it surely has the power to curtail the thing somewhat.[157]

The following sections will elaborate on these points and counterpoints of constitutionality.

A. The Religion Clauses Arguments

The Johnson Amendment's proponents point out that it governs *all* 501(c)(3) organizations and is thus neutral on the question of

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156. 567 U.S. 519 (2012).

157. *Compare* McCulloch v. Maryland, 17 U.S. 316, 431 (1819) ("[T]he power to tax involves the power to destroy."), *with NFIB*, 567 U.S. at 572 ("Congress's use of the Taxing Clause to [influence conduct] is . . . not new.").

religion.[158] Churches and church leaders, they argue, like any other charitable organizations, are also free to discuss or advocate for any issue they want, even issues that directly relate to hot-button campaign issues (including but not limited to abortion, same-sex marriage, immigration, etc.).[159] The purpose of the tax break is subsidizing religious (and other charitable) practice, and all the Johnson Amendment does is make sure we keep the holy separate from the mundane: "The Johnson Amendment ensures that citizens of all faith traditions (or no faith tradition) are not inadvertently financially supporting church-based politicking. It also ensures that the government is not entangled in underwriting partisan political activity."[160]

This argument fails to address the case of the pastor who feels it is his *religious* obligation to tell his clergy which candidate to support. Suppose that Candidate A supports a position antithetical to the values of Church X. If the pastor believes that a vote for A is a sin, it would seem to violate his or her free exercise rights to prevent him or her from saying so by curbing that religious speech. To the extent that the argument views the speech as purely political and not religious, it is simply not the government's place to (a) monitor religious organizations and (b) dictate what is or is not a matter of religion.[161]

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158. *See* Wolpe, *supra* note 5 ("The law's essential intent holds – to permit a generally neutral space where different political views can coexist in an increasingly fragmented and fractious society.").

159. *Id.*

160. Tim Neville & Deb Walker, *Point/Counterpoint: Should the Johnson Amendment Be Changed to Allow Politics from the Pulpit?*, COL. SPRINGS GAZETTE (Feb. 18, 2017), http://gazette.com/pointcounterpoint-should-the-johnson-amendment-be-changed-to-allow-politics-from-the-pulpit/article/1597169.

161. *See* Agostini v. Felton, 521 U.S. 203 (1997) (holding that federal funding for education on parochial school grounds does not violate the Establishment Clause as long as it is neutrally administered); *see also* Lee v. Weisman, 505 U.S. 577, 589 (1992) ("The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."); Aguilar v. Felton, 473 U.S. 402, 409–10 (1985) ("When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters."), *overruled on other grounds by Agostini*, 521 U.S. at 236; Sch. Dist. of City of Grand Rapids v. Ball, 473 U.S. 373

While some have made the claim that the Johnson Amendment is safe because its application is neutral, secular, and generally applicable in that it requires nonprofits of all stripes to avoid political partisanship in exchange for enjoying tax-exemption benefits, that argument ignores the fact that religion *is* different, and religious institutions are entitled to separate, extra protections under RFRA.[162] When it comes to religion, a restrictive law must narrowly further a compelling governmental interest to survive constitutional inquiry.[163]

Others have made the claim that any solution that removes this condition only for churches would arguably violate the Establishment Clause,[164] which is why opponents call for the repeal of the Johnson Amendment as it relates to all—even secular—charitable organizations.[165] The truth, though, is that RFRA provides an answer here as well: religious charities *are* different and, by federal law, their religious speech *is* sometimes treated differently than speech from a secular speaker. One instance of such a carve-out, as it relates to the

(1985) (same), *overruled on other grounds by Agostini*, 521 U.S. at 236; Meek v. Pittenger, 421 U.S. 349, 370 (1975) ("The prophylactic contacts required to ensure that teachers play a strictly nonideological role . . . necessarily give rise to a constitutionally intolerable degree of entanglement between church and state."); Lemon v. Kurtzman, 403 U.S. 602, 619 (1971) ("A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal believes and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.").

162. *See generally* 42 U.S.C. § 2000bb (2012) (setting forth Congress's purpose in RFRA).

163. *Cf. generally* Harkness v. Sec'y of the Navy, 858 F.3d 437, 447 (citing Larson v. Valente, 456 U.S. 228, 246 (1982)) ("[I]f the challenged government practice prefers one religion over another, we apply strict scrutiny in adjudging its constitutionality.").

164. Armando, *Hobby Lobby Demonstrates That RFRA Violates the Establishment Clause*, DAILY KOS (July 7, 2014, 2:00 PM), http://www.dailykos.com/story/2014/7/6/1311432/-Hobby-Lobby-demonstrates-that-RFRA-violates-the-establishment-clause.

165. Charles M. Kester, *Churches Have No Business Speaking in Favor of Political Candidates*, LIBERTY, http://www.libertymagazine.org/contributor/churches-have-no-business-speaking-in-favor-of-political-candidate (depublished web content) (on file with the University of Memphis Law Review).

Johnson Amendment, is proposed legislation that would limit the exception only to de minimis speech and not actual money.[166] This would help address the anxiety many institutions' leaders feel when deciding whether something they are discussing is just a moral issue or one that would result in a violation under the Johnson Amendment. Even removing religious connotations from the speech at issue, however, does not resolve the constitutional question; the Johnson Amendment implicates free speech rights generally, too.

B. Free Speech

The Free Speech Clause of the First Amendment reads, in applicable part, "Congress shall make no law . . . abridging the freedom of speech . . . ."[167] There are two ways to view the applicability of the Free Speech Clause to the Johnson Amendment: (1) the Johnson Amendment itself is viewpoint discrimination; or (2) it is not problematic because it merely reflects government speech.[168]

1. The Johnson Amendment and Free Speech

Plaintiffs have regularly challenged the constitutionality of the Johnson Amendment as a violation of the Free Speech Clause of the First Amendment. To date, however, these challenges have all failed. In *Cammarano v. United States*,[169] for example, the Supreme Court upheld the Johnson Amendment, finding that Congress had not infringed any First Amendment rights or regulated any First Amendment activity; Congress simply chose not to pay for the petitioner's lobbying.[170] Additionally, in *Christian Echoes National Ministry, Inc. v. United States*,[171] the Tenth Circuit upheld the Johnson

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166. *See infra* Section IV.B.

167. U.S. CONST. amend. I.

168. *See* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1928–31 (2006). Professor Volokh posits that government tax programs may be designated public forums subject to the Free Speech Clause, arguably allowing for content-based discrimination while excluding viewpoint discrimination. This framing could lead to different conclusions vis-à-vis the Johnson Amendment.

169. 358 U.S. 498 (1959).

170. *Id.* at 504–05.

171. 470 F.2d 849 (10th Cir. 1972).

Amendment against a church's claims that the statute's prohibition on its political speech violated its First Amendment rights.[172] In reversing the district court, the Tenth Circuit wrote:

> In light of the fact that tax exemption is a privilege, a matter of grace rather than right, we hold that the limitations contained in Section 501(c)(3) withholding exemption from nonprofit corporations do not deprive Christian Echoes of its constitutionally guaranteed right of free speech.[173]

The Supreme Court once again upheld the Johnson Amendment in *Regan v. Taxation with Representation of Washington*.[174] This time, the IRS denied 501(c)(3) status to an organization because it appeared substantially likely that the organization would engage in political activity in violation of the Johnson Amendment.[175] In a unanimous opinion, the Court reiterated, "Congress is not required by the First Amendment to subsidize lobbying."[176]

These examples make the viability of a constitutional challenge to the Johnson Amendment on free speech grounds appear grim. The result of these opinions would seem to be a firm judicial position that the government has no obligation to provide tax exemptions for political spending, even though the law gives exemptions for other forms of speech, namely charitable speech.[177] More recent case law on free speech, however, suggests that the Johnson Amendment may not be as constitutionally secure as these early decisions make it appear.

In 1984, in *FCC v. League of Women Voters*,[178] the Supreme Court struck down a portion of the Public Broadcasting Act of 1967 on free speech grounds.[179] Congress had conditioned the allocation of federal funds to non-commercial broadcasting stations' educational

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172. *Id.* at 857.
173. *Id.*
174. 461 U.S. 540 (1983).
175. *Id.* at 542.
176. *Id.* at 546 (citing Cammarano v. United States, 358 U.S. 498, 513 (1959)).
177. Volokh, *supra* note 168, at 1925.
178. 468 U.S. 364.
179. *Id.* at 398–99.

programing on those stations' agreements not to editorialize.[180] According to the Court: "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."[181] The Court previously reached this conclusion in the election context in *Buckley v. Valeo*,[182] when it explained:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[183]

We should note that, in contrast, a strong dissent depicted the constitutional challenge as a Faustian bargain, because the stations made a deal with the government knowing full well the expectations and concessions and then chose to renege on the deal.[184] Still, this case evidences the first appearance of a crack in the foundation supporting the Johnson Amendment.

Later, in *Austin v. Michigan Chamber of Commerce*,[185] the Supreme Court upheld a statute prohibiting corporations from using corporate treasury funds for independent expenditures for political speech.[186] In so doing, the Court held that the prohibition could apply to non-profits and that it did not violate the Equal Protection Clause of the Fourteenth Amendment.[187] *Austin* would appear to support the Johnson Amendment: if Congress can bar corporations from political

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180. *Id.* at 366.

181. *Id.* at 381–82 (quoting Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940) (quotation marks omitted)).

182. 424 U.S. 1 (1976).

183. *Id.* at 14 (citing Roth v. United States, 354 U.S. 476, 484 (1957)).

184. *League of Women Voters*, 468 U.S. at 403 (Rehnquist, J., dissenting).

185. 494 U.S. 652 (1990), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

186. *Id.* at 668–69.

187. *Id.* at 662–63, 666.

speech, then it can obviously do the same to a special category of non-profits. The Supreme Court, however, overruled itself in *Austin* when it recently decided *Citizens United v. Federal Election Commission*.[188] Justice Scalia's dissent in *Austin* explains why:

> In permitting Michigan to make private corporations the first object of this Orwellian announcement, the Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe. I dissent because that principle is contrary to our case law and incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the "fairness" of political debate.[189]

In his dissent, Justice Scalia further argued that it is "rudimentary" that the government cannot force someone to forego First Amendment rights in exchange for enjoying tax advantages.[190]

The Supreme Court struck down the "electioneering communications" provision of the Bipartisan Campaign Reform Act of 2002 ("BCRA") as-applied in *Federal Election Commission v. Wisconsin Right to Life*,[191] holding that a prohibition on speech calling for the election or defeat of a candidate uttered too close to an election violated the Free Speech Clause of the First Amendment.[192] Moreover, in his concurrence, Justice Scalia decried as unconstitutional some of the limits on "issue advocacy" versus "express advocacy" of candidates.[193]

Each of these later cases reveal potential cracks in the free speech jurisprudence defending the Johnson Amendment. Should courts draw the easy parallel between prohibitions on issue advocacy under BCRA and political activity by 501(c)(3) organizations under the Johnson Amendment, the statutory language could be in trouble.

188. 558 U.S. 310, 365 (2010).

189. 494 U.S. at 679–80 (Scalia, J. dissenting).

190. *Id.* at 680 (Scalia, J. dissenting) (citing Pickering v. Bd. of Educ. of Township High Sch. Dist. No. 205, 391 U.S. 563 (1968); Speiser v. Randall, 357 U.S. 513 (1958)).

191. 551 U.S. 449 (2007).

192. *Id.* at 481–82.

193. *Id.* at 452–54 (2007) (Scalia, J. concurring).

Citizens United, the most recent decision by the Supreme Court's most recent decision on restrictions on organizations' political speech, adds fuel to the free speech fire and spells almost certain constitutional trouble for the Johnson Amendment.

2. *Citizens United* & Its Implications for the Johnson Amendment

The 2010 *Citizens United v. Federal Election Commission* case involved the electioneering rule of BCRA, which prohibited corporate expenditures for express advocacy by corporations.[194] The Court struck down the prohibition in strident terms: "*No* sufficient governmental interest justifies limits on the political speech of *nonprofit* or for-profit corporations."[195] In explaining its holding, the Court reiterated that Congress "may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each."[196]

Moreover, the Court in *Citizens United* explicitly rejected an alternative-channels-of-speech argument. In *Citizens United*, the government argued that the ban on corporate speech was valid because the corporation could still speak through a separate PAC; the Court, however, noted that a "PAC is a separate association from the corporation."[197] As one commentator has noted, the "speech of the corporation's PAC is not the same as speech by the corporation, and therefore, the ban is a ban."[198] Therefore, the Court directly undercut the principal arguments underpinning the constitutionality of the Johnson Amendment in both *Branch Ministries v. Rossotti* and *Regan v. Taxation with Representation of Washington* in its most recent ruling on point, *Citizens United*.[199]

194. *Citizens United*, 558 U.S. at 310.

195. *Id.* at 365 (emphasis added).

196. *Id.* at 341.

197. *Id.* at 337.

198. Colinvaux, *supra* note 13, at 721.

199. *Id.* at 737 ("This raises yet another major challenge to the tax exemption system potentially presented by *Citizens United*: the extent to which *any* limitations on speech are permitted in connection with the tax exemption of *any* exempt organization.").

On their face, the Court's opinion in *Citizens United* "strongly suggest[s] the Political Activities Prohibition is problematic" and "suggest[s] existential (neigh constitutional) peril" for the Johnson Amendment.[200] If *Citizens United* stands for the proposition that Congress cannot single out certain groups for limitations or suppression of speech, then surely using the tax code to regulate certain organizations' speech encroaches on their constitutional rights "just as surely as the Electioneering Rule singled out corporations and barred their speech."[201]

According to at least one scholar, however, there is arguably a way for the courts to differentiate the strident and obviously applicable holding of *Citizens United* from the legality of the Johnson Amendment. *Citizens United* focused on four factors: the purpose of the legislation, the type of sanction, the nature of the ban as a ban on speech, and the preferential treatment of speech and speakers.[202] It is arguable that, as to all four factors, the Johnson Amendment is different from the Electioneering Rule of BCRA.[203]

First, as to the purpose of the Johnson Amendment, it is arguable that Congress was not choosing to suppress or prefer speech, but merely "defin[ing] charity to exclude political activity."[204] In this way, "the Rule is not primarily about suppressing speech."[205] In fact, "political activity, and expenses for and income from partisan speech, is and always has been a special subject for the tax law."[206] Regardless of its primary purpose or Congress's stated intent that "their overriding purpose is not to regulate speech," however, "both sections of the Code [§ 501(c)(3) and § 170(c)] directly implicate speech."[207]

Second, as to burden on speech, the Johnson Amendment should be viewed as a tax classification rather than an entity-level rule. *Citizens United* focused on the organization and its speech as an

200. *Id.* at 724–25.
201. *Id.* at 724.
202. *Id.* at 709.
203. *Id.*
204. *Id.* at 711.
205. *Id.* at 712.
206. *Id.* at 714.
207. *Id.* at 712.

entity.[208] Because § 501(c)(3) organizations are products of the tax code, however, and the tax code defines organizations as broader than just their specific tax classification—it defines them as a series of interconnected entities for tax purposes—the speech of that organization could come from a § 501(c)(3) arm or a § 501(c)(4) arm.[209] Arguably, such a conceptual framework might enable courts to retool *Citizens United*'s alternative-avenues-of-speech analysis and sustain the Johnson Amendment on older First Amendment precedent.[210]

Third, courts can arguably use this same tax-classification framework to explain how the Johnson Amendment does not prefer or restrict certain speech or speakers.[211]

Fourth, as to sanctions, the penalty for violating the Johnson Amendment—an excise tax or loss of tax-exempt status—is far less severe than the one contemplated by the Electioneering Rule at issue in *Citizens United*: a criminal sanction.[212] In fact, in concluding its opinion, the Court noted that "it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute's purpose and design."[213] Thus, arguably, "measured as a form of suppression," the criminal sanctions involved "likely suppresses the speech of many, in accordance with its design," while the loss of a tax

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208. *See* 558 U.S. 310, 393 (2010) ("Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.").

209. A 501(c)(4) organization is a social welfare organization formed for a specific purpose, but its primary purpose cannot be to endorse a candidate for office or a political position. *See* I.R.C. § 501(c)(4) (2012).

210. Colinvaux, *supra* note 13, at 721–23.

211. As Colinvaux writes:

> [T]he Political Activities Prohibition does not target the speech of section 501(c)(3) organizations as organizations as did the Electioneering Rule. Rather, the Political Activities Prohibition is a condition to receive a particular tax status, not a prohibition directed to the organization per se. Thus, importantly, although section 501(c)(3) status formally does not survive political speech, the entity retains its identity as a corporation (assuming it was so organized) and may speak.

Id. at 725.

212. *Id.* at 718–21.

213. *Citizens United*, 558 U.S. at 372.

status is simply of a "different order."[214] While of a different order, however, even the Johnson Amendment's *supporters* recognize that the "threat of a loss of tax exemption" is nonetheless "a form of suppression."[215]

While these arguments attempt to defend the Johnson Amendment from the implications of *Citizens United*, they require a great deal of re-conceptualizing the issue and working around the strident language of the Court. In the end, while courts in the future may want to limit the holding of *Citizens United*, the Court has increasingly liberalized its First Amendment jurisprudence since 2010.[216] In fact, the effect of the holding in *Citizens United* is that the government cannot prevent PACs organized as "social welfare" organizations under § 501(c)(4) from making unlimited tax-exempt contributions to support express advocacy. Thus, the only organizations barred from this political exchange are § 501(c)(3) organizations.[217] Moreover, the Court's language regarding prohibitions on speech of any organization is strident and clear: it is for the public to decide what to hear and believe and not the government's job to censor or cabin such speech.[218] Of course, this analysis assumes that this issue is really about private as opposed to government speech. The next section pushes back on that assumption.

3. Government Speech and Viewpoint Discrimination

Another way of thinking about the interaction between the Free Speech Clause and the Johnson Amendment is to assume that the Johnson Amendment is facially valid because it merely expresses government speech. The question, of course, is whether the government's conditioning of a tax-exemption on an organization's

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214. Colinvaux, *supra* note 13, at 721.

215. *See id.* (discussing the similarities between sanctions and the loss of tax-exempt status).

216. *See* SpeechNow.Org v. FEC, 599 F.3d 686, 694–95 (D.C. Cir. 2010) (expanding the implications of *Citizens United*).

217. Terry Connelly, *Follow the Money—Trump, Repealing The "Johnson Amendment," and* Citizens United, HUFFINGTON POST (July 22, 2016), http://www.huffingtonpost.com/terry-connelly/follow-the-moneytrump-rep_b_11093482.html.

218. *Citizens United*, 558 U.S. at 372.

silence regarding a particular class of issues can be considered an expression of the government's opinion relating to that issue.

The Supreme Court held in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* that "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."[219] Without this exemption, the government "would [simply] not work."[220] In *Walker*, a nonprofit organization brought an action against the Texas Department of Motor Vehicles alleging that the government had violated its right to free speech because the government had denied the nonprofit's application to order specialty license plates with the Confederate flag on them.[221] The Court concluded that the state had the right to decide the message it wanted to convey on license plates: "[A]s a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf."[222]

In terms of content discrimination concerns, Professor Eugene Volokh argues that government tax programs may be considered designated public forums, and they are thus subject to the Free Speech Clause, arguably allowing content discrimination but excluding viewpoint discrimination.[223] If we assume that the government is merely expressing its own view within this designated forum, we should remember that the Supreme Court continually refuses "to hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because in advancing those goals the program necessarily discourages alternative goals."[224] The Supreme Court has also held that certain forms of government speech may

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219. 135 S. Ct. 2239, 2245 (2015) (citing Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009)).

220. *Id.* at 2246 (quoting *Summum*, 555 U.S. at 468) (expressing the impossibility of ever creating or running a program with which not even one person disagreed) ("[I]t is not easy to imagine how government could function if it lacked th[e] freedom to select the messages it wishes to convey.").

221. *Id.* at 2244–45.

222. *Id.* at 2246

223. Volokh, *supra* note 168, at 1929.

224. *Walker*, 135 S. Ct. at 2246 (citing Rust v. Sullivan, 500 U.S. 173, 194 (1991)).

"implicate the free speech rights of private persons," and that even in cases of government speech the "First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees."[225] Take *Walker*, for example, in which the Court acknowledged that the government cannot force "the State's ideological message" on a person's car or license plate.[226]

In terms of the Johnson Amendment, however, just as in *Walker*, there is no issue of compelled speech. The government is not requiring churches to alter their beliefs, stop their support for a politician, or change their message in any way. The Johnson Amendment merely explains how and where Congress will spend public funds within its jurisdiction and notifies the public as to its actions. For those who would raise the specter of viewpoint discrimination, the Court once again provides an answer in *Walker*:

> When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says . . . . Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization? "[I]t is not easy to imagine how government could function if it lacked th[e] freedom" to select the messages it wishes to convey. We have therefore refused "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the

225. *Id.* at 2252.

226. *Id.* at 2253 (citing Wooley v. Maynard, 430 U.S. 705, 715 (1977)).

> program in advancing those goals necessarily discourages alternative goals."[227]

Perhaps the government should be free to advance its own permissible goals, which is not in any way an act of impermissible viewpoint discrimination.

Still, the speech Congress subsidizes through tax exemptions cannot really be characterized as "government speech." First, religious institutions do not speak for the government when they express religious messages. That would, of course, violate the Establishment Clause.[228] Second, the government also cannot use its resources and voice to support political candidates.[229] Third, the theoretical distinction is actually quite easy to draw: while the government is allowed to fund certain forms of speech with which it agrees, that does not necessarily give it the prerogative to support the relinquishing of fundamental rights.[230] In all of these instances, the religious institutions are speaking for themselves, regardless of what the government does or does not do.

C. Unconstitutional Conditions

The difference between when constitutional and unconstitutional conditions occurs is the difference between "conditions that define the limits of the Government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate

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227. *Id.* at 2246 (citation omitted).

228. Brownstein, *supra* note 150.

229. *Id.*

230. Analogically, for example, as the Court recognized in *Perry v. Sindermann*, the government

> may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which (it) could not command directly." Such interference with constitutional rights is impermissible.

408 U.S. 593, 597 (1972) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

speech outside the contours of the federal program itself."[231] In a scenario involving a church, an organization that would undoubtedly qualify for 501(c)(3) status and the relevant tax exemption would have to forgo their constitutional speech rights to receive the same tax exemption that all other similar organizations receive. There is no meaningful choice here, as many organizations depend on tax exemption to exist, making it a Hobson's choice[232] between either existing or not.

The counterargument is that all organizations have some threshold between physical solvency and not, with the government reserving the benefit of tax exemption to those issue-based organizations that exist for the sake of charity and not for politics. If the government has the "greater power" to give tax exempt status to all 501(c)(3) organizations, then it surely has the power to take it completely away.[233] Qualifying institutions do not have a right to the exemption, but rather receive it subject to a congressional limiting principle like the Johnson Amendment.[234] Even if it were a benefit, Kathleen Sullivan addressed the question of the unconstitutional-conditions doctrine in this way:

> [N]othing about the doctrine of unconstitutional conditions rules out the possibility that some conditions or selective subsidy schemes designed to pressure rights will be upheld in compelling cases . . . .

231. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, 133 S. Ct. 2321, 2323 (2013).

232. Nina Rastogi, *Sophie's Choice and Other Choice Choices*, SLATE (Jul. 12, 2011, 6:19 PM), http://www.slate.com/blogs/browbeat/2011/07/12/what_s_a_sophie_s_choice_what_about_a_hobson_s_choice_.html ("[A Hobson's choice is a] situation where one may choose the thing that is offered or else take nothing at all.")

233. *See* Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 5 GEO. J. L. & PUB. POL'Y 145, 172–73 (2007).

234. *Cf.* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 7 (1988) ("Thus, in the context of individual rights, the [unconstitutional-conditions] doctrine provides that on *at least some occasions* receipt of a benefit to which someone has no constitutional entitlement does not justify making that person abandon some right guaranteed under the Constitution." (emphasis addd)). Deductively, then, there are *other* occasions in which Congress may limit constitutional rights to confer a benefit on a person to which the person has no right.

> . . . .
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> . . . Rather, such conditions should be treated as infringing speech and thus in need of strong justification, but as arguably justified by the need for an efficient or depoliticized bureaucracy.[235]

The threshold inquiry, then, is whether the denial of this exemption is better classified as the permissible withholding of a conditional benefit or an unconstitutional penalty. The finer point then becomes the nature of the right. Content-based speech discrimination of any kind is presumptively unconstitutional, requiring a very high burden on the government to prove why the limitation is acceptable.[236] It is arguable, however, that the tax exemption is not available contingent on the forfeiture of a right, but as a tax benefit that organizations can choose to seek or forgo. Religious organizations, or any group that would otherwise currently fall within the Johnson Amendment's ambit, can set aside the tax exemption and conduct business as usual, but the government benefit is only available when organizations shoulder the burden. The case law is simply unclear on this topic,[237] so resolution must come from somewhere else.

On the whole though, with arguments on both sides, there remains the looming specter of serious constitutional violation on the one hand, and no demonstrably clear reason for keeping the status quo on the other. It is unclear in what direction litigation on this issue will go, but the need for an answer is growing over time.

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235. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1503–04 (1989).

236. *See, e.g.*, Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (citing, inter alia, Cohen v. California, 403 U.S. 15, 24 (1971)) ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *see also* R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992) (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) (Kennedy, J., concurring)) ("Content-based regulations are presumptively invalid.").

237. *Compare* Locke v. Davey, 540 U.S. 712 (2004) (holding that denial of a publicly funded state scholarship to student who was seeking a degree in pastoral ministries did not violate the Constitution), *with* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (concluding that a Missouri law that denied playground resurfacing material for a private parochial day care was unconstitutional).

IV. ALTERNATIVE FORWARD-LOOKING PROPOSALS

A. Further IRS Guidance

Recognizing the need for further clarification, the Internal Revenue Service has produced election guidelines in the election years since 2004.[238] The regulations, however, are still unclear for churches and other organizations as to what the tax code allows and what types of activity would violate the Johnson Amendment.[239] Therefore, one concern with further regulation from the IRS is that, in each election cycle, the factors that determine what activity could cause the revocation of a church's tax exempt status become less clear. "The IRS has issued a news release on the subject in every presidential election year since 1992."[240] Simply put, the IRS's attempts at clarification are not working: since 1992, churches trying to comply nevertheless continue acting in ways that trigger IRS investigations,[241] while others, like participants in Pulpit Freedom Sunday-like initiatives, are purposely engaging in civil disobedience to initiate a case[242]—but none of them have not been able to get the IRS's interest. These inconsistencies continue while breeding a system that is simply untenable for some.

B. Repeal or Amend the Johnson Amendment

Instead of further regulation by the IRS, other options for clarification in this area include repealing the Johnson Amendment or passing another piece of legislation giving the right to endorse and oppose political candidates back to clergy and churches. Three bills introduced in the 115th Congress could either completely revoke or

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238. *Charities, Churches and Politics*, IRS, https://www.irs.gov/uac/charities-churches-and-politics (last updated July 12, 2007).

239. Terry Mattingly, *Johnson Amendment: Confusion and Fightin' Words*, USA TODAY (May 11, 2017), https://www.usatoday.com/story/life/community/2017/05/11/johnson-amendment-confusion-and-fightin-words/101540184/.

240. Press Release, IRS, IRS Continues Program on Political Campaign Activity by Charities; Stresses Education and Enforcement (Apr. 17, 2008), https://www.irs.gov/pub/irs-news/ir-08-061.pdf.

241. *See, e.g.*, *supra* text accompanying notes 122–130.

242. *See supra* Section II.D.

limit the effects of the Johnson Amendment. Representative Walter Jones has been advocating for H.R. 172, which would repeal the Johnson Amendment in its entirety.[243] A concern exists that, if Congress repeals the Johnson Amendment, then § 501(c)(3) organizations could receive tax-deductible donations, and donors would be completely shielded from disclosure of political donations, which would hinder transparency.[244] Donors could deduct any contributions from their annual income, which creates incentives for people to switch from giving money to PACs and super PACs (which are required to identify their donors) to 501(c)(3)s.[245]

Separately, Representatives Steve Scalise (R-LA) and Jim Lankford (R-OK) introduced H.R. 781 and S. 264, respectively, a pair of identical bills.[246] Each of these bills would create an exception to this part of the Internal Revenue Code that allows § 501(c)(3) charitable organizations to speak about government or electoral activity "in the ordinary course of the organization's regular and customary activities" which "results in the organization incurring not more than a *de minimis* cost" without the risk of losing their tax-exempt statuses.[247]

The Jones bill would transform the political landscape, as few restrictions on 501(c)(3) charitable organizations using money to support political campaigns would remain, and the organizations would be able to shield their donors from transparency.[248] The Scalise

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243. To Restore the Free Speech and First Amendment Rights of Churches and Exempt Organizations by Repealing the 1954 Johnson Amendment, H.R. 172, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-bill/172.

244. *See, e.g.*, LaShawn Y. Warren, *3 Reasons the Johnson Amendment Should Not Be Repealed*, CTR. FOR AM. PROGRESS (Apr. 6, 2017, 9:00 AM), https://www.americanprogress.org/issues/religion/news/2017/04/06/430104/3-reasons-johnson-amendment-not-repealed/ ("Repeal would remove needed transparency around campaign donations.").

245. *See id.*

246. *Compare* Free Speech Fairness Act, H.R. 781, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-bill/781/text, *with* The Free Speech Fairness Act, S. 264, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/senate-bill/264/text.

247. *Policy Update: "Johnson Amendment" in the 115th Congress*, COUNCIL ON FOUNDS. (Feb. 7, 2017) (quoting H.R. 781 and S. 264), http://www.cof.org/page/policy-update-johnson-amendment-115th-congress.

248. *Id.*

and Lankford bills would only create a "carve-out" for 501(c)(3) organizations to speak about the political process in their normal course of activities.[249] These bills could address the legitimate complaints of churches that accuse the Johnson Amendment of chilling free speech. Critics, however, may argue that these bills could still pave the way for additional money to flow from charitable organizations into electoral activity, since under *Citizens United* express advocacy is a form of protected speech under the First Amendment.[250] It would be hard to say that some speech (non-de-minimis expenditures) is still somehow prohibited. Because the courts, the IRS, and Congress are unlikely sources of relief, Johnson Amendment opponents must look elsewhere still.

C. The Executive Option

A third option would be for President Trump to issue an executive order—something he did multiple times in his first few weeks in office.[251] In fact, a leaked draft of an executive order focusing on religious freedom contained language that would essentially overturn the Johnson Amendment by directing the IRS to change its tack on enforcement of the Johnson Amendment.[252] The White House has since said that the Trump Administration may not issue the draft order,[253] which provided that:

> The Secretary of the Treasury shall ensure that the Department of the Treasury shall not impose any tax or tax penalty, delay or deny tax-exempt status, or disallow tax deductions for contributions made under 26 U.S.C. 501(c)(3), or otherwise make unavailable or deny any tax benefits to any person, church, synagogue, house of worship or other religious organization. (1) on the basis

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249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. Sarah Posner, *Leaked Draft of Trump's Religious Freedom Order Reveals Sweeping Plans to Legalize Discrimination*, THE NATION, https://www.thenation.com/article/leaked-draft-of-trumps-religious-freedom-order-reveals-sweeping-plans-to-legalize-discrimination/ (last updated Feb. 2, 2017).

> of such person or organization speaking on moral or political issues from a religious perspective where religious speech of similar character has, consistent with law, not ordinarily been treated as an intervention in a political campaign by the Department of the Treasury . . . .[254]

This language, if adopted by the Trump Administration via executive order, would clarify what churches can and cannot do by prohibiting enforcement of the Johnson Amendment against churches acting in good faith and by protecting the tax-exempt status of 501(c)(3) organizations that participate in the political process. Essentially, it does the same thing as the Scalise and Lankford bills while avoiding the constitutional question of differentiating between monetary and non-monetary speech. It would, however, leave open the possibility of enforcement if a church does take advantage of the opening in ways that have not been traditionally acceptable, like egregious cases in which a church might essentially become a front for a super PAC. Further, by restricting the Treasury Department's enforcement authority, the order's language helps keep the issue out of the courts, where unelected jurists who are not accountable to the polity could give the imprimatur of the federal Judiciary to their personal policy preferences through their jurisprudence.

V. CONCLUSION

The Johnson Amendment has several real and problematic shortcomings. It potentially violates the free exercise rights of church leaders who believe they have deeply rooted religious obligations to speak on certain topics. It may also violate the free speech rights of all charitable organizations, and to the extent that government is allowed to limit speech in some instances, it may also present an unconstitutional condition. A recent report by the Commission on Accountability and Policy for Religious Organizations found that, on a practical level, the Johnson Amendment chills the speech of some religious leaders, while other churches regularly violate the law with

254. *Id.*

impunity.[255] Given the possibly unconstitutional and definitely dysfunctional status quo, something needs to be done.

In theory, a bi-partisan committee from all sides of the spectrum could work with the IRS in creating new guidelines that specifically outline what is and is not a violation of the Johnson Amendment. In practice, such a committee is likely to remain indefinitely deadlocked. While repealing the Johnson Amendment might at first glance seem like the answer, it would most certainly provoke a partisan fight. That might be the best approach to address the Johnson Amendment's issues, but a legislative "fix" will likely lead to future culture clashes. The same thing might happen, albeit likely at a slower rate, if Congress enacts a carve-out for de minimis church activity. For all of these reasons, in the end, it seems that President Trump was right in his first inclination on how to deal with the Johnson Amendment, and very possibly also in his initial draft approach: an Executive Order that ensures churches can say what they feel compelled to say, while not differentiating between different forms of permissible speech. Currently, litigation on this issue is pending, as the Freedom From Religion Foundation has sued the President over his Executive Order on the subject.[256] We hope that this Article can serve as a resource for those on both sides of this issue.

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255. COMM'N ON ACCOUNTABILITY & POLICY FOR RELIGIOUS ORGS., GOVERNMENT REGULATION OF POLITICAL SPEECH BY RELIGIOUS AND OTHER 501(C)(3) ORGANIZATIONS: WHY THE STATUS QUO IS UNTENABLE AND PROPOSED SOLUTIONS 15 (2013), http://religiouspolicycommission.org/.

256. *FFRF Sues Trump over Church Politicking*, FREEDOM FROM RELIGION FOUND. (May 4, 2017), https://ffrf.org/news/news-releases/item/29320-ffrf-sues-trump-over-church-politicking.