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A New Johnson Amendment: Subsidy, Core Political Speech, and Tax-Exempt Organizations

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Seven decades ago, Congress enacted the so-called Johnson Amendment. This provision of tax law forbids tax-exempt public charities from endorsing or opposing candidates for office. Under the plain language of the Internal Revenue Code, an organization that violates the Johnson Amendment does not qualify as tax-exempt.

The legislative history underlying the Johnson Amendment is sparse, and it provides few clues as to Congress's reason for enacting it. In the ensuing years, though, it has become clear that Congress does not want to subsidize campaigning activities, and this has become the most convincing justification for the Johnson Amendment. However, the design of the current Johnson Amendment goes further than merely refusing to subsidize—it entirely prevents public charities from engaging in campaigning speech.

This prohibition raises significant constitutional concerns. Campaigning speech is a quintessential example of what the courts classify as "core political speech," and courts grant core political speech expansive protection. The Johnson Amendment's blanket prohibition on campaigning thus very likely violates public charities' First Amendment rights. Moreover, in part because of the draconian nature of the penalty, the Internal Revenue Service rarely enforces the Johnson Amendment.

This state of affairs is far from ideal. Having an unenforced, overly broad, likely unconstitutional law on the books prevents risk-averse public charities from engaging in behaviors that they are entitled to engage in, and at the

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same time, it does nothing to prevent bad actors from using subsidized speech to endorse and oppose political candidates.

This Article proposes an update and replacement for the Johnson Amendment. This new Johnson Amendment would directly target subsidies, requiring public charities to calculate the value of their political speech and requiring donors to reduce their charitable deductions by the share of such spending. It also proposes safe harbors for public charities that do not want to engage in partisan politics and do not want to have to calculate spending on politics. The new Johnson Amendment would accomplish the putative goals of the current Johnson Amendment without violating the First Amendment.

INTRODUCTION

On July 2, 1954, then-Senator Lyndon Johnson proposed an amendment to the extensive tax bill Congress was considering. His proposal added twenty-seven words to the Internal Revenue Code. Those words would prevent tax-exempt public charities from "interven[ing] in . . . any political campaign on behalf of any candidate for public office."[1] After the Chief Clerk read the proposed amendment, Senator Johnson had the opportunity to elaborate on its purpose. Rather than explaining, though, he simply informed his colleagues that he had discussed it with "the chairman of the committee, the minority ranking member of the committee, and several other members of the committee," and that they found it acceptable.[2]

Even without an explanation, Senator Johnson's amendment made it into the final legislation, and Congress codified the prohibition on tax-exempt charities participating in political campaigns.[3] In the years since, the language has changed slightly (today, it prohibits intervening on behalf of *or* "in opposition to" a candidate for office),[4] but its structure and effect have stayed the same. To qualify for tax-exempt status, a public charity or private foundation cannot endorse or oppose candidates for office or otherwise participate in political campaigns. A public charity or private foundation that does participate in political campaigns must, according to the law, lose its tax exemption.[5]

1. 100 CONG. REC. 9604 (1954).

2. *Id.* Presumably the committee Senator Johnson was referring to was the Senate Committee on Finance. *See, e.g.*, Shu-Yi Oei & Leigh Z. Osofsky, *Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels*, 104 IOWA L. REV. 1291, 1300 (2019) ("[T]he Senate's consideration of tax legislation is done via a tax-writing committee, the Senate Finance Committee.").

3. Internal Revenue Code of 1954, Pub. L. No. 591-736, 68A Stat. 163 (codified as amended at I.R.C. § 501(c)(3) (2018)).

4. I.R.C. § 501(c)(3) (2018).

5. Benjamin M. Leff, *Fixing the Johnson Amendment Without Totally Destroying It*, 6 U. PA. J.L. & PUB. AFFS. 115, 124 (2020) ("The penalty for violation of the Johnson Amendment is revocation of tax-exempt status, because an organization that engages in political campaign activity has not met the requirements set out in section 501(c)(3)."). On top of the loss of exemption, Congress has created an excise tax on exempt organizations' political expenditures. I.R.C. § 4955(a) (2018). The excise tax applies in addition to the loss of exemption, not in place of it. Treas. Reg. § 53.4955-1(a) (1995).

For such a simple and short statutory provision, the so-called Johnson Amendment [6] has engendered a significant amount of controversy. Churches have argued (unsuccessfully) that this prohibition on endorsing candidates infringes their constitutionally protected free-exercise rights.[7] Nonreligious charities have argued (unsuccessfully) that it unconstitutionally burdens their free-speech rights.[8] Strikingly, and despite their continuing lack of success in challenging the constitutionality of the Johnson Amendment, tax-exempt organizations continue to violate it, often without any legal consequence.[9]

Nonetheless, despite its limited enforcement, the Johnson Amendment carries outsized salience. Since at least 2001, several members of Congress have attempted to pass laws repealing some or all of it.[10] The list of congressional opponents of the Johnson Amendment includes current House Speaker Mike Johnson, who has sponsored the Free Speech Fairness Act every year since he was elected to Congress in 2017.[11] In 2008, the

6. While today the sobriquet "Johnson Amendment" is common shorthand for the prohibition on tax-exempt organizations supporting or opposing candidates for office, a Westlaw search indicates that its first use dates back to a 1997 Comment in the Regent University Law Review. Shawn A. Voyles, Comment, *Choosing Between Tax-Exempt Status and Freedom of Religion: The Dilemma Facing Politically-Active Churches*, 9 REGENT U. L. REV. 219, 235-36 (1997) ("Senator Johnson's amendment attempted to prevent tax-exempt organizations from directly *financing* political campaigns, not from expressing opinions on the quality and character of the candidates and on the candidate'[s] views.").

7. *See, e.g.*, Branch Ministries v. Rossotti, 211 F.3d 137, 142 (D.C. Cir. 2000) ("The Church claims that the revocation of its exemption violated its right to freely exercise its religion under both the First Amendment and the RFRA.").

8. *See, e.g.*, Regan v. Tax'n With Representation of Wash., 461 U.S. 540, 545, (1983) ("TWR contends that Congress' decision not to subsidize its lobbying violates the First Amendment.").

9. *See, e.g.*, Jeremy Schwartz & Jessica Priest, *Churches Are Breaking the Law and Endorsing in Elections, Experts Say. The IRS Looks the Other Way*, TEX. TRIB. (Oct. 30, 2022), https://www.texastribune.org/2022/10/30/johnson-amendment-elections-irs [https://perma.cc/T6NP-3JYQ].

10. Brittany N. Brantley, *Beyond Politics in the Pulpit: When Pastors Use Social Networks to Preach Politics*, 38 J. LEGIS. 275, 282-83 (2012).

11. Adam Chodorow, *Mike Johnson Wants to Unleash Ministers on Politics*, SLATE (Nov. 9, 2023), https://slate.com/business/2023/11/mike-johnson-speaker-johnson-amendment-religious-leaders-taxes.html [https://perma.cc/3DWC-9L73].

Alliance Defending Freedom began its Pulpit Freedom Sunday campaign, encouraging pastors to endorse candidates from the pulpit in an attempt to challenge the constitutionality of the provision.[12] And in a 2017 National Prayer Breakfast address, President Donald Trump promised to "get rid of and totally destroy the Johnson Amendment."[13] President Trump eventually issued an Executive Order that did little to achieve that destruction.[14]

Despite the intense opposition the Johnson Amendment receives from some quarters, it is popular in others. In 2016, the Pew Research Center polled Americans about their views on churches participating in politics. About half believed that churches should express their views on political and social issues, while half believed they should not.[15] But while other provisions in American tax law limit the amount of lobbying tax-exempt organizations can do, the Johnson Amendment only forbids *endorsing and opposing* candidates for office.[16] Thus, the fact that two-thirds of Americans opposed "church endorsement of candidates"[17] suggests that a significant majority of Americans support the goals of the Johnson Amendment, at least with regard to tax-exempt religious organizations. Moreover, several tax-exempt organizations, including churches, support it, fearful that without

12. Samuel D. Brunson, *Dear IRS, It Is Time to Enforce the Campaigning Prohibition. Even Against Churches*, 87 U. COLO. L. REV. 143, 145 (2016).

13. Julie Zauzmer & Sarah Pulliam Bailey, *Trump Wants to End the Johnson Amendment Today. Here's What You Need to Know*, WASH. POST (May 4, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/02/02/trump-said-hell-totally-destroy-the-johnson-amendment-what-is-it-and-why-do-people-care [https://perma.cc/QWS2-8Y23]. Destroying the Johnson Amendment would have fulfilled a promise to his evangelical Christian base. *See* WENDY BROWN, IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST 109 (2019).

14. Exec. Order No. 13,798, 82 Fed Reg. 21675 (May 9, 2017). The Executive Order prohibited the Treasury Department from denying or revoking a religious organization's tax-exempt status for religiously motivated speech that "has, consistent with law, not ordinarily been treated as participation or intervention in a political campaign." *Id.*

15. Gregory A. Smith, *Most Americans Oppose Churches Choosing Sides in Elections*, PEW RSCH. CTR. (Feb. 3, 2017), https://www.pewresearch.org/short-reads/2017/02/03/most-americans-oppose-churches-choosing-sides-in-elections [https://perma.cc/DPE7-VVYW].

16. *See* Treas. Reg. § 1.501(c)(3)-1(b)(3)(i) (as amended in 2017) (forbidding tax-exempt organizations from "devot[ing] more than an insubstantial part of its activities to attempting to influence legislation by propaganda").

17. Smith, *supra* note 15.

the prohibition "they would face pressure from politicians seeking endorsements."[18]

While support for the policies underlying the Johnson Amendment is widespread, there is no constituency that provides focused support for the rule as it currently stands. By contrast, opponents of the Johnson Amendment, while in the minority, are intensely opposed to it.[19] Public-choice theory suggests that this concentrated opposition, with only diffuse support, means that Congress faces intense pressure to repeal the Johnson Amendment while underestimating the political blowback that would ensue from a full repeal.[20]

In addition to the political pressures, there are reasons to believe that the Johnson Amendment may be at risk in the courts. In the early 1980s, the Supreme Court decision in *Regan v. Taxation With Representation of Washington* upheld the constitutionality of limits on public charities'

18. Tom Gjelten, *Another Effort to Get Rid of the "Johnson Amendment" Fails*, NPR (Mar. 22, 2018), https://www.npr.org/2018/03/22/596158332/another-effort-to-get-rid-of-the-johnson-amendment-fails [https://perma.cc/9YUJ-CVD2].

19. *See supra* notes 10-14 and accompanying text.

20. *See* Shmuel I. Becher, *The Alternative Meat of the Matter*, 98 TUL. L. REV. 99, 116 (2023) ("Public choice theory predicts that legislators, given the lack of a level playing field, will be prone to enact laws that confer benefits on specific, well-organized interest groups."); *cf.* Todd Donovan, *Direct Democracy as "Super-Precedent"?: Political Constraints of Citizen-Initiated Laws*, 43 WILLAMETTE L. REV. 191, 227 (2007) ("Put differently, a reasonably apathetic majority can pass an initiative that provides the majority no immediately visible material benefits, while having a disproportionate effect on a minority who are intensely aware of the measure's implementation (e.g., hunting regulations, gun controls, term limits). This increases the chances that the initiative might be amended or repealed."). Still, even in 2017, when Republicans controlled the presidency and both houses of Congress, they were unable to repeal the Johnson Amendment, suggesting that the concentrated and voluble opposition may not have the widespread support it appears to have. *See* Leff, *supra* note 5, at 120 ("Almost everyone (even Senator Charles Grassley, a voluble Johnson Amendment critic) agrees that it would be a bad idea to permit political campaign contributions to flow through charities, permitting donors a tax deduction that they would not be able to get if they supported candidates in any other way."); *see also* Sarah Binder, *How to Waste a Congressional Majority: Trump and the Republican Congress*, FOREIGN AFFS., Jan./Feb. 2018, at 78, 81 (describing the Trump Administration's struggles to implement its agenda).

political speech.[21] Over the intervening decades, though, a series of Supreme Court decisions have recognized stronger First Amendment protections for corporations, including for political speech.[22] While the Supreme Court has not explicitly overruled its decision in *Taxation With Representation*, its more recent decisions hint that it may no longer agree with that precedent.

Thus, if the Johnson Amendment represents a policy that a majority of Americans support, then it may be necessary to interrogate why it represents good tax policy and how Congress can achieve those policy goals in a less polarizing manner that faces less risk of being overturned on constitutional grounds.

This Article proceeds as follows: Part I discusses the rules that govern federal tax-exempt status. One of those rules—important for this Article—is that tax-exempt organizations cannot support or oppose candidates for office. While we have a limited understanding of its original purpose, one important justification for the rule is that the federal government has a policy against subsidizing electoral politics through the tax system. Part I explains how the indirect subsidy that public charities receive can become an indirect subsidy for campaigning activities.

Part II complicates this limitation on campaigning. While the government can decline to subsidize speech, it faces constitutional limitations on its ability to ban speech. Campaigning speech is "core political speech," a type of speech that merits the highest level of constitutional protection. Part II explains why the blanket prohibition on campaigning speech likely does not meet constitutional requirements, especially in light of the Supreme Court's current free-speech jurisprudence.

Part III points out that, as a practical matter, the potential unconstitutionality of the current Johnson Amendment may not matter. Before the courts can address its constitutional status, the Internal Revenue Service ("IRS") must deny or revoke a public charity's tax exemption. Otherwise, nobody has standing to challenge the prohibition. The IRS, however, has proven singularly unwilling to revoke charities' tax exemptions when they engage in politicking. Without IRS action, the rule can stay in the Code. Part III underscores some reasons why it is bad to have an unenforced but unconstitutional provision enshrined in the law.

In response to the potential unconstitutionality and underenforcement of the Johnson Amendment, Part IV proposes a new Johnson Amendment. This new Johnson Amendment would avoid both the over- and under-broad

21. 461 U.S. 540, 550 (1983).

22. *See infra* Section II.B.2.

nature of the current Johnson Amendment. Rather than prevent speech, it would merely eliminate the subsidy public charities receive for their campaigning activities. Tailoring the new Johnson Amendment to focus on the subsidy would address the problem that the Johnson Amendment seeks to solve.

Finally, Part V addresses two potential concerns about the new Johnson Amendment. The first is the question of constitutionality. It explains why, unlike the current regime, these new subsidy-focused rules do not unconstitutionally impinge on core political speech. Second, it explains why shifting from the current Johnson Amendment to the new Johnson Amendment will not transform tax-exempt organizations into conduits for political giving. Even without any Johnson Amendment, tax-exempt organizations would face a ceiling on how much their activities can involve noncharitable endeavors, including participating in politics. Thus, a tax regime without the current Johnson Amendment, much less one with the new Johnson Amendment, would not transform tax-exempt public charities into political-endorsement machines.

I. SUBSIDIZING (OR NOT) POLITICAL CONTRIBUTIONS

The Johnson Amendment is one part of the limitations public charities face on their ability to engage in noncharitable endeavors, including politics. Other tax-law provisions limit the extent of charitable political activity, but the Johnson Amendment prohibits public charities from engaging in partisan politics. Without the Johnson Amendment, public charities would have increased opportunities to engage in politics, including by supporting the preferred political activity of donors who benefit from tax deductions.

A public charity's[23] tax-exempt status comes with two major federal income tax benefits. First, tax-exempt organizations generally do not pay taxes on their income.[24] Second, donors to public charities who itemize their

23. There are two types of organizations exempt under section 501(c)(3) of the Internal Revenue Code: public charities and private foundations. *See* Tanya D. Marsh, *A Dubious Distinction: Rethinking Tax Treatment of Private Foundations and Public Charities,* 22 VA. TAX REV. 137, 153 (2002). While the Johnson Amendment applies to both, for purposes of this Article, I will generally focus on public charities.

24. I.R.C. § 501(a) (2018) ("An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle . . . ."). The exception to this general rule is that tax-exempt organizations must pay taxes on their unrelated business taxable income. *Id.* § 511(a).

deductions can deduct their charitable donations.[25] On top of the income tax deduction, donors to public charities can also deduct their donations in calculating their gift- and estate-tax liabilities.[26]

To qualify for these two benefits, a public charity must comply with a number of requirements, including meeting both an organizational and an operational test.[27] At a high level of generality, the organizational test requires a tax-exempt organization's articles of organization to limit its purpose to one or more enumerated tax-exempt purposes.[28] The operational test forbids a tax-exempt organization from engaging in more than an insubstantial number of activities that do not further an enumerated exempt purpose.[29]

Even if an organization meets the organizational and operational tests, moreover, it fails to qualify as tax-exempt if it distributes its earnings to "the benefit of private shareholders or individuals"[30]— what this Article calls the "noninurement requirement." The proscribed individuals here do not mean

25. *Id.* § 170(a)(1), (c). The ability to deduct donations comes with at least one additional requirement: While exemption does not require a particular place of incorporation, for donations to be exempt, the public charity must be "created or organized" in or under the law of the United States or any political division of the United States. *Id.* § 170(c)(2)(A).

26. *Id.* § 2055(a)(2); Treas. Reg. § 20.2055-2(a) (as amended in 2023).

27. Treas. Reg. § 1.501(c)(3)-1(a)(1) (as amended in 2017).

28. *Id.* § 1.501(c)(3)-1(b)(1)(i)(a). The Internal Revenue Code provides seven enumerated tax-exempt purposes: religious, charitable, scientific, testing for public safety, literary, educational, and prevention of cruelty to children or animals. *Id.* § 1.501(c)(3)-1(d)(1)(i).

29. *Id.* § 1.501(c)(3)-1(c)(1). For example, the IRS denied the Nationalist Movement's application for tax exemption. Nationalist Movement v. Comm'r, 37 F.3d 216, 218 (5th Cir. 1994). The Nationalist Movement's exempt purpose was to "conduct various social service programs for the poor and disadvantaged." *Id.* The services consisted primarily of counseling and First Amendment litigation. *Id.* The Fifth Circuit found that about forty-five percent of the Nationalist Movement's activities did not qualify as exempt purposes. *Id.* at 220. This amount, the court held, was more than an insubstantial amount and as such, it failed the operational test, and it did not qualify for an exemption from the federal income tax. *Id.* at 221.

30. Treas. Reg. § 1.501(c)(3)-1(c)(2) (as amended in 2017). Most state nonprofit statutes also incorporate a requirement that earnings not inure to the benefit of private entities. John D. Colombo, *Hospital Property Tax Exemption in Illinois: Exploring the Policy Gaps*, 37 LOY. U. CHI. L.J. 493, 499 n.35 (2006).

everybody—rather, they refer to those people with "a personal and private interest in the activities of the organization."[31]

The Johnson Amendment comes on top of the organizational, operational, and noninurement requirements for tax exemption. It is neither the sole nor the first limitation public charities face on lobbying, though it is the most absolute. In 1934, Congress amended the tax law to forbid public charities from using any "substantial part" of their activities to influence legislation or otherwise participate in partisan politics.[32] The new limitation represented a coda to a long-fought battle between the tax-exempt National Economy League, which publicly and aggressively opposed additional benefits for veterans, and the Roosevelt Administration.[33]

Senator David Reed, a member of the Senate Committee on Finance and proponent of the amendment, explained that the limitation was broader than he would have preferred.[34] Nevertheless, while it prevented worthy charitable lobbying, he believed its unintended effects were worth it: There was no reason, he explained, that "a contribution made to the National Economy League should be deductible as if it were a charitable contribution if it is a selfish one made to advance the personal interests of the giver of the money."[35] The original policy underlying this limitation, then, was to limit the ability of lobbyists to use federally subsidized dollars for "selfish" purposes.

The Johnson Amendment, enacted twenty years later, built on this limitation. It proved broader and narrower. It imposed an absolute political prohibition on public charities but only proscribed tax-exempt public charities from supporting or opposing candidates for office, leaving room for tax-exempt organizations to participate in other lobbying activities.[36] As with the organizational, operational, and noninurement criteria, the Johnson Amendment is a qualification requirement for tax exemption. An organization that violates it does not qualify as tax exempt, and as a result,

31. Treas. Reg. § 1.501(a)-1(c) (as amended in 2017).

32. Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 21 (2003).

33. *Id.* at 20.

34. *Id.* at 21.

35. 78 CONG. REC. 5861 (1934).

36. I.R.C. § 501(c)(3) (2018).

the Johnson Amendment mandates that it should lose its exemption, no matter how insubstantial the endorsement.[37]

The precise reason Congress enacted the Johnson Amendment has been lost to time, if it was ever known. Introduced on the Senate floor, Congress held no hearings on the provision, and after its passage, nobody created an explanatory legislative history.[38] The most commonly accepted explanation is that Senator Johnson believed that tax-exempt organizations had worked with a political opponent to challenge his incumbency.[39] He proposed changing the law to "put a stop to the meddling of these [tax-exempt] interlopers."[40] Given his reputation for being "sometimes cruel and vindictive,"[41] proposing a tax provision meant to strike back at political enemies does not seem out of character for Senator Johnson.

While that may have been his motivation, Senator Johnson was not the only member of Congress concerned about tax-exempt organizations' behavior. The day before Senator Johnson introduced his amendment to the rules for tax-exempt organizations, Senator Pat McCarran made a similar

37. United States v. Dykema, 666 F.2d 1096, 1101 (7th Cir. 1981) ("It should be noted that exemption is lost . . . by participation in *any* political campaign on behalf of any candidate for public office. It need not form a *substantial* part of the organization's activities."). The Joint Committee on Taxation informed the Senate Committee on Finance that, in spite of this blanket prohibition, as a practical matter, the IRS can and does "exercise its discretion by not seeking revocation of the organization's tax-exempt status in cases in which the violation was unintentional, involved only a small amount, and the organization subsequently corrected the violation and adopted procedures to prevent future improper political campaign activities." STAFF OF JOINT COMM. ON TAX'N, 117TH CONG., PRESENT LAW AND BACKGROUND RELATING TO THE FEDERAL TAX TREATMENT OF POLITICAL CAMPAIGN AND LOBBYING ACTIVITIES OF TAX-EXEMPT ORGANIZATIONS 6 n.24 (2022).

38. Samuel D. Brunson, *Reigning in Charities: Using an Intermediate Penalty to Enforce the Campaigning Prohibition*, 8 PITT. TAX REV. 125, 135 (2011).

39. Vaughn E. James, *The African-American Church, Political Activity, and Tax Exemption*, 37 SETON HALL L. REV. 371, 382 (2007).

40. 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, 768 (2001).

41. Edward W. Chester, *Lyndon Baines Johnson, an American "King Lear": A Critical Evaluation of His Newspaper Obituaries*, 21 PRESIDENTIAL STUD. Q. 319, 320 (1991).

proposal, albeit one that the Senate did not enact.[42] Senator McCarran proposed denying tax-exempt status to organizations that made "donations to subversive organizations or individuals."[43] In speaking to his fellow Senators, Senator McCarran laid out his case for why such a limitation was constitutional (based, he believed, on Congress's express authority to decide whether to grant exceptions from the income tax).[44] He also explained why he considered this change critical: "There is clear evidence," he said, "that many foundations have aided and supported Communist organizations and Communist fronts, and individual Communists."[45] If successful, his proposal would "dry up sources of funds now available for the advancement of the Communist program in this country."[46] While supporting communism differs from endorsing candidates for office, both represent core political speech. Moreover, Senator McCarran's proposal demonstrates that other legislators shared Johnson's concern about tax-exempt organizations' participation in politics; in fact, that concern (which was inextricably tied to anti-communism[47]) had bipartisan buy-in.[48]

So, while we lack a clear explanation of why Senator Johnson proposed this prohibition, or of why Congress accepted it, we do have some context for what Congress thought about tax-exempt organizations in 1954. And we know that Congress ultimately acted on its concerns. Since 1954, the law has forbidden public charities from campaigning. And, while the precise contours of the prohibition may be unclear on the margins,[49] the message is clear: Participating in political campaigns is inconsistent with public

42. Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet?*, 1 PITT. TAX REV. 35, 54 (2003).

43. 100 Cong. Rec. 9446 (1954).

44. *Id.* at 9447.

45. *Id.*

46. *Id.*

47. In fact, in 1950 and again in 1952, Johnson supported a pair of McCarran-sponsored bills that required Communist Party members to register with the government, banned them from federal employment, and made it easier to deport them. JULIE LEININGER PYCIOR, LBJ AND MEXICAN AMERICANS: THE PARADOX OF POWER 78 (1997).

48. Murphy, *supra* note 42, at 54.

49. *See, e.g.*, Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 ("Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case.").

charities' tax-exempt status.[50] When Congress passed the law, the question of "whether such prohibitions were wise was foreclosed."[51]

The Johnson Amendment has been part of the Internal Revenue Code since 1954, and to maintain the policy is to imply that it can be justified. Despite the lack of a recorded original purpose for the Johnson Amendment, over the years, academics and commentators have sought to justify its continued existence. According to Professor Benjamin Leff, the Johnson Amendment is justified, if at all, by the government's desire not to subsidize political partisanship.[52] If donors could launder their donations through tax-deductible donations to public charities, the federal government (and, by extension, taxpayers) would bear a portion of the cost of partisan political campaigns.[53] This nonsubsidization policy tracks with Congress's earlier limitation on the amount of lobbying public charities could perform.[54]

The idea that the policy underlying the Johnson Amendment is to prevent federal subsidy of candidate endorsements is strengthened by how the tax law treats political donations by for-profit organizations. The Code explicitly disallows deductions for amounts spent to support or oppose candidates for office, even if those amounts are ordinary and necessary

50. *See* Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 2017) (defining organizations that participate or intervene in political campaigns as "action organizations").

51. Houck, *supra* note 32, at 29. That foreclosure is not an inevitable part of the tax law, though. If a subsequent Congress found the Johnson Amendment unjustified or unnecessary, it could change section 501(c)(3) and allow public charities to endorse and oppose political candidates. Still, while Congress technically has the power to change the tax law, doing so is not costless. For practical reasons, Congress does not always change tax provisions it deems unwise. *See* Edward Yorio, *Federal Income Tax Rulemaking: An Economic Approach,* 51 FORDHAM L. REV. 1, 24 (1982) ("The transaction costs of obtaining the approval of the requisite number of congressmen are high, even if the approval of just the members of the tax writing committees is, as a practical matter, sufficient.").

52. Benjamin M. Leff, *"Sit Down and Count the Cost": A Framework for Constitutionally Enforcing the 501(c)(3) Campaign Intervention Ban*, 28 VA. TAX REV. 673, 676 (2009); *see also* Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 338 (1990) ("[S]upport of political expression, except in very limited circumstances, is just not an appropriate government expenditure.").

53. Leff, *supra* note 52.

54. *See supra* notes 32-35 and accompanying text.

expenses of a trade or business.[55] Congress disallowed trade or business deductions for campaign contributions in 1962, eight years after it enacted the Johnson Amendment. [56] While the enactment of this deduction prohibition cannot tell us why Congress enacted the Johnson Amendment, it provides evidence that today, Congress has a policy against the federal subsidy of campaign donations. As Professor Lloyd Hitoshi Mayer points out, the Johnson Amendment is consistent with this "sound policy of not permitting a deduction for contributions to support such activity."[57]

And how does the Johnson Amendment disallow federal subsidy of partisan politics? It is not precisely the same as the disallowance of a deduction for such expenditures. In the case of direct expenditures, a deduction would reduce the after-tax cost of making those campaign contributions.[58] If a public charity were to make a political donation, at least a portion of that donation could come from donations it received, donations that allowed donors to take a charitable deduction.[59] By reducing the cost

55. I.R.C. § 162(e)(1)(B) (2018).

56. Revenue Act of 1962, Pub. L. No. 87-834, § 3, 76 Stat. 960, 973.

57. Lloyd Hitoshi Mayer, *When Soft Law Meets Hard Politics: Taming the Wild West of Nonprofit Political Involvement*, 45 J. LEGIS. 194, 226 (2019).

58. It is important to keep in mind that not all deductions are subsidies. Some—particularly the costs of engaging in business—are "income-defining and, therefore, not a subsidy or incentive." J. Clifton Fleming, Jr. & Robert J. Peroni, *Reinvigorating Tax Expenditure Analysis and Its International Dimension*, 27 VA. TAX REV. 437, 476 (2008). But deductions for personal expenditures represent subsidies of those expenditures. Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 724 (1970) (noting that for personal expenses, a "deduction is a subsidy or tax expenditure").

59. I.R.C. § 170(a)(1) (2018). It is difficult to quantify the scope of this subsidy: The deduction for charitable contributions is an itemized deduction, meaning that only taxpayers who itemize can claim the deduction. *Id.* §§ 63(b), 67(b)(4). Since the 2017 Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017), the percentage of taxpayers who itemize has dropped from about one in four to about one in ten, *see* Roger Colinvaux, *Strings Are Attached: Shining a Spotlight on the Hidden Subsidy for Perpetual Donor Limits on Gifts*, 56 LOY. L.A. L. REV. 1169, 1203 (2023) ("Changes to the tax law in 2017 significantly shrunk the number of taxpayers eligible to claim the charitable deduction from roughly 26 percent to 9 percent of the taxpaying population."). But the fall in the number of taxpayers itemizing does not necessarily correspond to less subsidy of charitable contributions. True, from

to donors of making charitable donations, the charitable deduction represents a federal subsidy of charitable dollars.[60] To the extent a public charity makes political donations, at least a portion of those donations represents federally subsidized money.[61] In the most extreme hypothetical, absent a prohibition like the Johnson Amendment, pressure from large donors could force a public charity to turn into a conduit for political donations, allowing them to bypass the Code's prohibition on the deduction of political contributions.

It is important to note that a donor could not fully subvert a public charity, transforming it into a purely political vehicle. While the Johnson Amendment prohibits public charities from endorsing or opposing candidates for office, it is not the only prohibition on political activities that public charities face. In addition, only an insubstantial amount of a public charity's activities can be nonexempt activities. [62] Under Treasury regulations, even permissible political activities, like trying to influence

2019 to 2020, the number of taxpayers who took an itemized deduction for charitable contributions fell by 12.6%. INTERNAL REVENUE SERV., PUBL'N NO. 1304, STATISTICS OF INCOME: INDIVIDUAL INCOME TAX RETURNS COMPLETE REPORT 2020, at 22 (2022), https://www.irs.gov/pub/irs-prior/p1304--2022.pdf [https://perma.cc/KK5Z-HLEF]. But the amount of charitable deductions increased from just over $190 billion to almost $205 billion. *Id.* So, while the tax law subsidizes fewer donors' charitable contributions, the amount of the subsidy has nonetheless increased.

60. *See* Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 873 (2001) ("At the same time, it is of the utmost importance for religious [and other tax-exempt] organizations to remember that government policymakers have viewed the charitable contribution deduction from its beginning as an incentive and a subsidy, albeit an indirect subsidy.").

61. Not all would, of course. In 2012, almost 75% of public-charity revenues came from fees for goods and services, while just under 13% came from private contributions. Brice S. McKeever & Sarah L. Pettijohn, *The Nonprofit Sector in Brief 2014: Public Charities, Giving, and Volunteering* 5, URB. INST. (Oct. 2014), https://www.urban.org/sites/default/files/publication/33711/413277-The-Nonprofit-Sector-in-Brief--.PDF [https://perma.cc/E2UG-7K36]. Moreover, not all charitable donors qualify to take a deduction for their donations. Harvey P. Dale & Roger Colinvaux, *The Charitable Contributions Deduction: Federal Tax Rules*, 68 TAX LAW. 331, 346 (2015) (noting that taxpayers "who claim the standard deduction are not separately allowed a deduction for charitable contributions").

62. Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 2017).

legislation, do not qualify as exempt activities.[63] No bright line delineates where an activity transforms from insubstantial to substantial, but courts generally believe that when a nonexempt activity comprises more than fifteen or twenty percent of a public charity's activities, it has crossed that line.[64] While a world without the Johnson Amendment would provide more leeway for public charities to politick, substantially all of a charity's activities would still have to further its charitable mission. Otherwise, it would fail the operational test and, absent a tax exemption, would not provide a tax-deductible conduit for money that supports candidates.

Still, without the Johnson Amendment, a public charity could presumably use 5 to 10% of its annual expenditures to endorse candidates for office without jeopardizing its exempt status. That type of expenditure could potentially be substantial. Hypothetically, if an organization had $1 million of annual qualifying expenditures, a donor could make a $100,000 donation and request that the charity pass substantially all of the donation through to support a particular candidate. That political expenditure would represent slightly less than 10% of the charity's expenditures during the year, which would allow the charity to continue to qualify for a tax exemption. And why would a charity be willing to pass through the money? If the donor were a significant and important donor, that donor may have the wherewithal to pressure the charity to allocate additional donations in particular ways. Or the donor may make a substantial donation and allow the charity to keep a portion of the donation. It is even possible, under some circumstances, that the leadership of the charitable organization would agree with the donor's preferences.

In addition to the operational test requirements, the Johnson Amendment is supplemented by other tax law provisions discouraging political participation by tax-exempt organizations. The Code also provides for an excise tax on "political expenditures," which it defines as "any amount paid or incurred by a section 501(c)(3) organization in any participation in, or intervention in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." [65] This excise tax functions as a supplement to, not a replacement for, the Johnson Amendment.[66]

63. *Id.* § 1.501(c)(3)-1(c)(3).

64. Brunson, *supra* note 38, at 144.

65. I.R.C. § 4955(a)(1), (d)(1) (2018).

66. Treas. Reg. § 53.4955-1(a) (1995).

A public charity with political expenditures must pay an excise tax equal to 10% of the expenditure, which rises to 100% if the expenditure is not timely corrected.[67] Even without the Johnson Amendment, the excise tax would presumably prevent a public charity from agreeing to be a conduit for a political donor if it had to pay the IRS $100,000 for every $100,000 it passed through to a political candidate. But it would likely have little impact on other types of endorsement. For instance, the Johnson Amendment prohibits a pastor from endorsing a candidate for city council in the middle of her sermon.[68] But the excise tax, standing alone, would do very little to discourage that type of behavior because the additional marginal cost of a sentence in the middle of a sermon would be disappearingly small. The 100% excise tax would be virtually costless to the charity and to the donor.

Beyond preventing federal subsidy of partisan campaigning, there may also be other reasons to favor a limitation on tax-exempt organizations' ability to participate in partisan politics. For instance, Professor Philip Hackney has begun to look at the democratic accountability of tax-exempt organizations in recent years.[69] Public charities are not intrinsically accountable to the public.[70] While they can "choose democracy," most states also provide the option to choose "a self-perpetuating and omnipotent board of directors."[71] Professor Hackney argues that public financial disclosure does some work toward creating public accountability, but the required disclosure is incomplete.[72] On top of disclosure, some public

67. I.R.C. § 4955(a)(1), (b)(1) (2018). Managers who agree to the expenditure owe a 2.5% excise tax, which rises to 50% if uncorrected. *Id.* § 4955(a)(2), (b)(2). Managers' potential liability is capped, however, at not more than $10,000 for an uncorrected expenditure. *Id.* § 4955(c)(2).

68. *See, e.g.*, Schwartz & Priest, *supra* note 9 ("As the runoff for the Frisco City Council approached last year, [Pastor] Burden supported Jennifer White, a local veterinarian . . . during [a] May 2021 sermon in which Burden called [White] the 'candidate that God wants to win.'").

69. *See, e.g.*, Philip Hackney, *Public Good Through Charter Schools?*, 39 GA. ST. U. L. REV. 695, 772 (2023).

70. *Id.*

71. Dana Brakman Reiser, *Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits*, 82 OR. L. REV. 829, 829 (2003).

72. Philip Hackney, *Dark Money Darker? IRS Shutters Collection of Donor Data*, 25 FLA. TAX REV. 140, 147 (2021) (Noting that, while "[t]he return serves two primary functions: (1) to inform the IRS about facts related to matters of tax, and (2) to provide the public information about nonprofit entities that helps

charities have a broad base of donors; those donors could make public charities "accountable to a broad-based patronage of support."[73] In recent years, however, the pool of donors has contracted; donors today come disproportionately from the wealthy.[74] Thus, a broad donor pool may not make public charities democratically accountable.

Public charities are not alone in this public unaccountability. Corporations have moved from occupying a "subordinate role" in society[75] to being active participants, albeit participants without democratic accountability.[76] For-profit corporations do not face the same blanket prohibition on engaging in partisan politics as public charities.[77] The principal differences between for-profit corporations and public charities seem to be tax exemption and deductibility of donations, which underscores those two qualities of public charities as the principal reason for the Johnson Amendment.

The Johnson Amendment formally prevents tax-exempt public charities from endorsing or opposing candidates for office, a policy that even today enjoys widespread support.[78] American tax law includes other guardrails—including an excise tax and public disclosure requirements—that also work to regulate public charities' campaigning. Without the Johnson Amendment,

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the public to hold these organizations accountable," some donor information is not disclosed to the public).

73. Evelyn A. Lewis, *Charitable Waste: Consideration of a "Waste Not, Want Not" Tax*, 30 VA. TAX REV. 39, 94 (2010).

74. Drew Lindsay, *How America Gives Special Report: Breaking the Charity Habit*, CHRON. PHILANTHROPY (Oct. 3, 2017), https://www.philanthropy.com/article/how-america-gives-special-report-breaking-the-charity-habit [https://perma.cc/P8DU-8XXM].

75. Waheed Hussain & Jeffrey Moriarty, *Corporations, the Democratic Deficit, and Voting*, 12 GEO. J.L. & PUB. POL'Y 429, 431 (2014).

76. *Id.* at 432-33.

77. Paul Weitzel, *Protecting Speech from the Heart: How* Citizens United *Strikes Down Political Speech Restrictions on Churches and Charities*, 16 TEX. REV. L. & POL. 155, 157 (2011) ("After *Citizens United*, when individuals organize together as a for-profit corporation, they retain th[e] right [to endorse or denounce a candidate for office].").

78. *Poll: Americans Support the Johnson Amendment*, INDEP. SECTOR (Mar. 30, 2017), https://independentsector.org/resource/poll-americans-support-the-johnson-amendment [https://perma.cc/JH7R-UEBP].

though, the other guardrails are ineffective at preventing significant political participation by public charities.[79]

II. FREE SPEECH VS. THE JOHNSON AMENDMENT

While the majority of Americans support limitations on public charities' ability to engage in partisan politics, those restrictions fit uncomfortably with a constitutional regime that broadly protects political speech. Not only does the Constitution prohibit the government from "abridging the freedom of speech,"[80] but the Supreme Court grants special deference to "political speech."[81] In fact, the Court has held that "core political speech" is where First Amendment protection is "at its zenith."[82]

And what is *core* political speech? It is "speech used to participate in elections, campaigns, and political debates or advocacy over the administration of government."[83] More saliently, for any discussion of public charities and the Johnson Amendment, this most protected core political speech includes "the endorsement of candidates for office."[84]

79. Even the Johnson Amendment provides limited protection, given the IRS's general lack of enforcement. *See infra* notes 179-188 and accompanying text.

80. U.S. CONST. amend. I. While the Bill of Rights originally applied only to the federal government, about a century ago, the Supreme Court incorporated the Free Speech Clause of the First Amendment against the states. Gitlow v. New York, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

81. *See* Fed. Election Comm'n. v. Wis. Right to Life, Inc., 551 U.S. 449, 457 (2007) ("In drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it."); *see also* Daniel A. Horwitz, *A Picture's Worth a Thousand Words: Why Ballot Selfies Are Protected by the First Amendment*, 18 SMU SCI. & TECH. L. REV. 247, 253 (2015).

82. Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 187 (1999).

83. Francesca L. Procaccini, *Equal Speech Protection*, 108 VA. L. REV. 353, 375 (2022). Procaccini argues that this deference to core political speech is rhetorical, not substantive, and that the hierarchies of speech the Court has created are ultimately a myth. *Id.* at 354-55.

84. Sanders Cnty. Republican Cent. Comm. v. Bullock, 698 F.3d 741, 745 (9th Cir. 2012).

This Part will look broadly at the Supreme Court's jurisprudence regarding the regulation of political speech. In general, the Supreme Court grants the most robust protection for political speech and disfavors regulation on that political speech. And that robust protection has expanded in recent years to corporate speakers, such that earlier Supreme Court decisions allowing restrictions on the political speech of tax-exempt organizations may have less purchase today. In fact, based on recent Supreme Court decisions, if the questions of the Johnson Amendment's constitutionality appeared before the Court, it would likely hold the Johnson Amendment unconstitutional.

A. Regulating Core Political Speech

Of course, while core political speech enjoys the zenith of protection, that does not mean that the government must entirely leave it alone. The Supreme Court has held that some types of regulation of core political speech withstand First Amendment scrutiny; the government, after all, has a duty to ensure fairness and honesty in elections.[85] So, for instance, the Ninth Circuit upheld a Montana law that disallowed paying signature gatherers a set amount per signature.[86] Montana demonstrated that pay-per-signature arrangements "encourage, and are 'regularly stung' by, fraud."[87] While gathering signatures qualifies as core political speech, the government has a "compelling interest" in preventing fraud and can enact laws to do so.[88]

So, what standard do courts use in assessing restrictions on core political speech? The Supreme Court has endorsed an "exacting scrutiny" standard.[89] The Court's use of "exacting scrutiny" with respect to core political speech introduced a level of uncertainty into the First Amendment analysis of speech regulations. Sometimes, the Court uses *exacting scrutiny*

85. *Buckley*, 525 U.S. at 187.

86. Pierce v. Jacobsen, 44 F.4th 853, 866 (9th Cir. 2022).

87. *Id.*

88. *Id.* at 867.

89. Meyer v. Grant, 486 U.S. 414, 420 (1988) ("We fully agree with the Court of Appeals' conclusion that this case involves a limitation on political expression subject to exacting scrutiny.").

as a synonym for *strict scrutiny*.[90] Other times, it uses *exacting scrutiny* to describe a less-rigorous test, something between strict and intermediate scrutiny.[91]

In the core political speech context, though, in most cases, courts and commentators see exacting scrutiny as identical to strict scrutiny, irrespective of the label used.[92] Under the Supreme Court's exacting-scrutiny standard for core political speech, a law that burdens core political speech will only clear the constitutional bar if it "is narrowly tailored to serve an overriding state interest."[93] This test is identical to the test used under the strict scrutiny standard.[94] When it comes to the state attempting to regulate citizens' speech about candidates, lower courts also tend to apply the strict scrutiny test, whether they call it "strict" or "exacting" scrutiny.[95]

90. *See* Wash. Post v. McManus, 355 F. Supp. 3d 272, 289-90 n.14 (D. Md. 2019) ("The Court's application of the phrase 'exacting scrutiny' has not always been exacting in its own right, leading to considerable confusion. Scholars have noted the Court has at times used 'exacting scrutiny' and 'strict scrutiny' interchangeably."), *aff'd*, 944 F.3d 506 (4th Cir. 2019).

91. Alex Chemerinsky, *Tears of Scrutiny*, 57 TULSA L. REV. 341, 352 (2022).

92. *See, e.g.*, Am. C.L. Union of Nev. v. Heller, 378 F.3d 979, 992-93 (9th Cir. 2004) ("As a content-based limitation on core political speech, the Nevada Statute must receive the most 'exacting scrutiny' under the First Amendment. Such restriction will survive strict scrutiny only if 'it is narrowly tailored to serve an overriding state interest.'" (citations omitted)); James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections:* Davis*,* White*, and the Future of Judicial Campaign Financing*, 86 DENV. U. L. REV. 195, 225 (2008) ("Evidence that 'exacting scrutiny' means strict scrutiny can be found in the *Buckley* decision itself. In its discussion of the disclosure requirements, for example, the *Buckley* Court expressly described 'exacting scrutiny' as '[t]he strict test,' and included a discussion of 'least restrictive means' in its analysis, a hallmark of strict scrutiny.").

93. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

94. *See* Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 206 (1999) (Thomas, J. concurring) ("When considering the constitutionality of a state election regulation that restricts core political speech or imposes 'severe burdens' on speech or association, we have generally required that the law be narrowly tailored to serve a compelling state interest.").

95. *See, e.g.*, Fed. Election Comm'n v. Pub. Citizen, 268 F.3d 1283, 1287 (11th Cir. 2001) ("When a law burdens core political speech, we apply 'exacting scrutiny' to determine whether the law is narrowly tailored to serve an

The one electoral area where courts recognize exacting scrutiny as imposing a less-restrictive standard on the regulation of core political speech is in the area of mandatory disclosures. The Ninth Circuit explained that disclosure requirements may burden core political speech, but they neither prevent speech nor impose a ceiling on permissible speech.[96] As a result, laws mandating disclosure are subject to a version of exacting scrutiny that only requires a "substantial relationship" between the disclosure requirement and a "'sufficiently important' government interest."[97] Still, while disclosure mandates do not need to be the "least restrictive means" for the government to accomplish its goals, in 2021, the Supreme Court held that they still need to "be narrowly tailored to the government's asserted interest."[98]

Even where courts recognize a difference between strict and exacting scrutiny, that difference is limited. Laws that directly prevent or limit core political speech, as opposed to mandating disclosure, are subject to review under strict scrutiny and will only stand where they are narrowly tailored to serve an overriding government interest.[99]

B. Core Political Speech and Public Charities

The Supreme Court has found that endorsing candidates for office represents core political speech, and any regulation of such endorsement is subject to strict scrutiny review.[100] The Johnson Amendment, with its

'overriding' state interest."); Beaulieu v. City of Alabaster, 338 F. Supp. 2d 1268, 1276 (N.D. Ala. 2004) ("Thus, under the 'exacting scrutiny' applied by the Supreme Court in *McIntyre*, the City's prohibition of political speech . . . must fail unless it is narrowly tailored to meet an overriding governmental interest."), *aff'd*, 454 F.3d 1219 (11th Cir. 2006); Stewart v. Taylor, 953 F. Supp. 1047, 1054 (S.D. Ind. 1997) ("When statutes and regulations burden core political speech, courts must apply 'exacting scrutiny' when passing on the constitutionality of those laws and uphold them only when they are narrowly tailored to serve an overriding state interest.").

96. Chula Vista Citizens for Jobs & Fair Competition v. Norris, 782 F.3d 520, 535-36 (9th Cir. 2015).

97. *Id.* at 536.

98. Ams. for Prosperity Found. v. Bonta, 594 U.S. 595, 608 (2021).

99. Pest Comm. v. Miller, 626 F.3d 1097, 1107 (9th Cir. 2010).

100. Gary D. Allison, *Protecting Our Nation's Political Duopoly: The Supremes Spoil the Libertarians' Party*, 41 TULSA L. REV. 291, 326-27 (2005) ("The Court [in *Eu*

prohibition on endorsing or opposing candidates for office, provides a perfect example of the regulation of core political speech. Is the law narrowly tailored to serve an overriding government interest?

1. The Supreme Court Upholds Lobbying Limitations

The Supreme Court has not directly addressed the question of whether the Johnson Amendment survives strict (or exacting) scrutiny analysis.[101] It did, however, address the related question of whether the Code's limitations on the amount of lobbying that tax-exempt organizations can do complied with the First Amendment,[102] a question that, as framed by the litigants and the Supreme Court, proves analogous to the question of endorsement.

Taxation With Representation of Washington was a nonprofit corporation organized to promote a particular view of tax policy.[103] When it applied for tax-exempt status, the IRS denied its exemption on the grounds that a substantial part of its activities would consist of attempting to influence legislation.[104] That substantial lobbying disqualified Taxation With Representation from qualifying as exempt. The language of § 501(c)(3) of the Code provides that "no substantial part of the activities" of an organization exempt under that section can consist of "carrying on propaganda, or otherwise attempting, to influence legislation . . . ."[105] The Treasury Regulations expand on this prohibition: Any organization that attempts to lobby members of a legislative body in favor of or against legislation or otherwise advocates the adoption or rejection of legislation *as*

v. San Francisco County Democratic Central Committee] found that the endorsements constituted core political speech that could not be restricted absent a showing that it served compelling state interests.").

101. Moreover, those who would like to challenge the prohibition have very limited avenues to challenge it. To bring a suit challenging the constitutionality of the Johnson Amendment, a would-be tax-exempt organization would need to have their exemption denied or revoked on the grounds that they endorsed or opposed a candidate for office. *See* Brunson, *supra* note 12, at 163. If the IRS chooses not to enforce the Johnson Amendment, it remains immune from constitutional challenge. *Id.*

102. Regan v. Tax'n With Representation of Wash., 461 U.S. 540, 542 (1983).

103. *Id.* at 541-42.

104. *Id.* at 542.

105. I.R.C. § 501(c)(3) (2018).

a substantial part of its activities is classified as an "action organization."[106] An action organization does not qualify for tax exemption under § 501(c)(3).[107]

Taxation With Representation argued that this limitation on lobbying was an unconstitutional infringement of its First Amendment rights.[108] The district court granted the government summary judgment, and its ruling was affirmed by the D.C. Circuit.[109] The D.C. Circuit then reheard the case en banc.[110]

In its en banc decision, the D.C. Circuit decided that the limitation posed no First Amendment issue. Had the government been affirmatively suppressing Taxation With Representation's lobbying, the court would have applied a heightened level of scrutiny.[111] But Taxation With Representation *could* lobby; it merely lost its federal subsidy for doing so.[112] The tax law indirectly subsidizes public charities, exempt under § 501(c)(3), by allowing donors to deduct their donations, meaning they may donate with pre-tax dollars.[113] And the constitutional consequences of Taxation With Representation losing its federal subsidy as a result of its core political speech? The court was unconcerned, explaining that "First Amendment rights are not abridged . . . merely because the government refuses to subsidize those rights."[114]

The court acknowledged that even this lack of subsidy would be constitutionally troublesome if Taxation With Representation's exemption was conditioned on its waiving its First Amendment rights.[115] But that, the court asserted, was not what had happened. According to the court, Taxation With Representation could have lobbied all it wanted had it changed its corporate structure.[116] Rather than organizing itself as a single

106. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (as amended in 2017).

107. *Id.* § 1.501(c)(3)-1(c)(3)(i).

108. *Tax'n With Representation*, 461 U.S. at 542.

109. Tax'n With Representation of Wash. v. Regan, 676 F.2d 715, 718 (D.C. Cir. 1982).

110. *Id.*

111. *Id.* at 724.

112. *Id.*

113. Leff, *supra* note 52, at 683.

114. *Tax'n With Representation*, 676 F.2d at 724.

115. *Id.* at 726.

116. *Id.*

public charity, exempt under § 501(c)(3), it could form two entities: one a charity exempt under § 501(c)(3) and the other a social welfare organization, exempt under § 501(c)(4).[117] The charitable organization could still receive deductible donations, while the social welfare organization would face no limitation on its ability to lobby.[118] Ultimately, the court decided that Taxation With Representation's First Amendment rights had not been abridged.[119]

Still, even though Taxation With Representation lost on its First Amendment claim, the appeals court held that the limitation on public charities' ability to receive tax-deductible donations violated the Constitution.[120] Rather than the First Amendment, though, the court found that the law violated the Equal Protection Clause of the Fifth Amendment.[121] The court's Fifth Amendment analysis is largely beyond the scope of this Article, but in brief, the court believed that, while the government had no obligation to subsidize public charities' political engagement, it could not do so in a discriminatory manner.[122] Here, public charities faced a limitation on their ability to lobby. Veterans' organizations, exempt under a different subsection of § 501(c), could also receive deductible donations but faced no limitation on their ability to lobby.[123] That, the court said, was constitutionally impermissible. While there is a "brightline distinction between direct legislative promotion of speech, and indirectly facilitating speech by providing an organization with other kinds of support," once Congress decides to subsidize speech, it cannot discriminate based on the type of speaker.[124]

On appeal, the Supreme Court reversed the Court of Appeals on the Equal Protection question. It explained that Congress has the ability to make distinctions in the tax law and, unless those distinctions represent "a hostile and oppressive discrimination against particular persons and classes," the distinction is constitutional.[125] It upheld the lower court's conclusion about

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 745.

121. *Id.* at 744.

122. *Id.* at 726.

123. *Id.* at 731.

124. *Id.* at 741-42.

125. Regan v. Tax'n With Representation of Wash., 461 U.S. 540, 547-48 (1983).

the First Amendment, though. The First Amendment, it said, does not require Congress to subsidize lobbying.[126] Beyond referring to an earlier case, the Court's First Amendment analysis was fairly cursory.[127]

In his concurrence, Justice Blackmun expanded on the First Amendment analysis. While he agreed that the Code's limitations on lobbying did not violate Taxation With Representation's First Amendment rights, he emphasized that the conclusion rested on an assumption about the IRS's administration of the restriction.[128] Viewed in isolation, he wrote, the restriction in § 501(c)(3) on lobbying would violate the First Amendment. The government cannot deny benefits to taxpayers merely because they exercise protected rights.[129] And, in fact, the application of the limitation would not only prevent subsidized lobbying, it would "deprive[] an otherwise eligible organization of its tax-exempt status and its eligibility to receive tax-deductible contributions for all its activities, whenever one of those activities is 'substantial lobbying.'"[130] Standing alone, then, the restriction would, in fact, deny substantial benefits to an organization exercising its constitutional rights.[131]

So why did Justices Blackmun, Brennan, and Marshall (the latter two joining Blackmun's concurrence) agree with the majority? Because they expressly and explicitly adopted the reasoning of the Court of Appeals: The existence of § 501(c)(4) cleansed the constitutional defect.[132] As long as a public charity could form a related social welfare organization, exempt under § 501(c)(4), to do its lobbying, "the lobbying restriction was merely to ensure that 'no tax-deductible contributions are used to pay for substantial lobbying.'"[133] That dual structure, according to both the D.C. Circuit and the Supreme Court concurrence, ensured that the limitation on public charities' core political speech did not offend the First Amendment.

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126. *Id.* at 545.

127. In a footnote, the majority did embrace the IRS's policy that an organization could circumvent the lobbying limitations by forming sibling organizations, one exempt as a public charity under section 501(c)(3) and the other exempt as a social welfare organization under section 501(c)(4). *Id.* at 544 n.6.

128. *Id.* at 552 (Blackmun, J. concurring).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

Ultimately, the Supreme Court agreed with the IRS: Congress could constitutionally condition a public charity's tax exemption on its willingness to limit its core political speech. The lobbying limits did not violate the First Amendment rights of Taxation With Representation or that of any other public charity. The majority rested that conclusion on the fact that the limitations were indirect, and the concurring Justices rested that conclusion on the fact that an organization could restructure itself to avoid the limitation. The Court did not directly address the Johnson Amendment, but it is reasonable to think that the Court would have held the same way. There are differences, of course. The Johnson Amendment, for instance, represents a total proscription on endorsements, while the lobbying limitation only limits the amount. But the Court did not focus on the amount—it focused instead on the indirect burden the limitations placed on the speech of tax-exempt organizations.

2. Changing Jurisprudence

In the years since the Supreme Court's decision in *Taxation With Representation*, the landscape of corporate First Amendment rights has changed significantly. Notably, the Court seems more skeptical of the legal relevance of differentiating indirect and direct limitations, and it has expanded the scope of corporate First Amendment rights. These changes do not represent a categorical break with the earlier decisions, but rather, seem to be an agglomeration of small changes in emphasis when it comes to corporate constitutional rights.

Despite the Court's skepticism regarding the difference between indirect and direct limitations on First Amendment rights, it has not overruled its decision in *Taxation With Representation*. But subsequent to *Taxation With Representation*, the Supreme Court has expressly articulated the idea that government benefits cannot be conditioned on an organization giving up its speech rights. In *Agency for International Development v. Alliance for Open Society International*,[134] the Court held that a "funding condition" that affects a person's exercise of their First Amendment rights "can result in an unconstitutional burden on First Amendment rights."[135] It did not always, of course: The Court not only declined to overrule *Taxation With Representation*, but it reiterated that the Johnson Amendment did not represent an unconstitutional burden because public charities could

134. 570 U.S. 205 (2013).

135. *Id.* at 214.

reorganize in a dual structure with social welfare organizations,[136] thus adopting the reasoning of the Court of Appeals and the Supreme Court's previous concurrence. Because maintaining a dual structure did not unduly burden a public charity, the Johnson Amendment did not represent an unconstitutional condition.[137]

But in *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[138] the Court added yet another layer of skepticism concerning whether conditioning a government subsidy on the willingness to give up a First Amendment right was constitutionally permissible. In that case, the Court looked at a Missouri program that provided grants to schools, nonprofit daycares, and other nonprofit organizations to help them purchase rubber playground surfaces.[139] Under Missouri policy, though, churches and other religious organizations were "categorically disqualif[ied]" from receiving the grants.[140]

Missouri's defense of its policy mirrored the Court's holding in *Taxation With Representation*. In *Taxation With Representation*, the Supreme Court explained that a public charity has no right to have its lobbying subsidized.[141] Moreover, Congress neither denied public charities the ability to receive deductible donations nor forbade them from lobbying; it merely denied them tax-exempt status if they exercised their speech rights in that manner.[142] Similarly, the Missouri government argued that its policy did not "meaningfully burden the Church's free exercise rights"; it merely "declined to allocate to Trinity Lutheran a subsidy the State had no obligation to provide in the first place."[143] But in spite of the indirect nature of the imposition, here, the Court found that Missouri's policy was unconstitutional under the Free Exercise Clause of the First Amendment.[144] It emphasized that the Free Exercise clause prohibits not just "outright

136. *Id.* at 215.

137. *Id.*

138. 582 U.S. 449 (2017).

139. *Id.* at 453.

140. *Id.* at 454.

141. Regan v. Tax'n With Representation of Wash., 461 U.S. 540, 545 (1983).

142. *Id.*

143. *Trinity Lutheran*, 582 U.S. at 462-63.

144. *Id.* at 466.

prohibitions" on the exercise of religion, but also "*indirect* coercion or penalties."[145]

The Court's conclusion in *Trinity Lutheran* can be differentiated from its decision, almost thirty-five years earlier, in *Taxation With Representation*. Notably, while both are rooted in the First Amendment, free-exercise and free-speech jurisprudence differ [146] But their differences may not be material for this particular question; rather than being primarily a free-exercise/free-speech question, this is an unconstitutional conditions question. And "[a]lthough the dual nature of the Establishment Clause and Free Exercise Clause make the protections over religion somewhat distinctive, the basic functioning when it comes to unconstitutional conditions remains structurally comparable."[147]

Similarly, in recent years, the Court has begun to take corporate First Amendment rights more seriously. In *Burwell v. Hobby Lobby Stores*,[148] the Supreme Court explained that extending statutory and constitutional rights to corporations protects the rights of people associated with those corporations (including owners, employees, and officers).[149] The decision is not directly on point as to the question of the constitutionality of the Johnson Amendment because the Court expressly decided *Hobby Lobby* under the Religious Freedom Restoration Act, not the Constitution.[150] But it recognizes and provides a doctrinal justification for corporate rights.

And those corporate rights include the constitutional right to free speech. In *Citizens United v. Federal Election Commission*,[151] the Supreme Court affirmed that corporate status did not abrogate the protections the

145. *Id.* at 463 (emphasis added).

146. *See, e.g.*, Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 919 (9th Cir. 2007) (Karlton, J. concurring) ("As the First Amendment notes, religious speech is categorically different than secular speech and is subject to analysis under the Establishment and Free Exercise Clause without regard to the jurisprudence of free speech."), *abrogated by* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008).

147. Jennifer Davidson, *Lessons from* Trinity Lutheran*: An Entity-Based Approach to Unconstitutional Conditions and Abortion Defunding Laws*, 43 N.Y.U. REV. L. & SOC. CHANGE 581, 599 (2019).

148. 573 U.S. 682 (2014).

149. *Id.* at 706-07.

150. *Id.* at 736.

151. 558 U.S. 310 (2010).

Constitution offered for core political speech.[152] In his concurrence, Justice Scalia makes this point explicit: If speech fits within the scope of core political speech, "its nature as such does not change simply because it was funded by a corporation."[153] (Perhaps relevant for these purposes, Citizens United was a nonprofit corporation,[154] making the Court's holding even more on-point for tax-exempt organizations.)

There has been extensive commentary about the Court's holding in *Citizens United* that corporations enjoy the same speech rights—at least with respect to core political speech—as individuals do.[155] In that case, Citizens United challenged a law that banned corporations from making "electioneering communications" within a set period before certain federal elections.[156] These electioneering communications are communications that refer to specific candidates for office. In its holding in *Citizens United*, the Supreme Court "substantially narrowed the field for constitutionally permissible campaign finance regulation."[157] Critically for our purposes, it

152. Erica Goldberg, *First Amendment Cynicism and Redemption*, 88 U. CIN. L. REV. 959, 1002 (2019).

153. *Citizens United*, 558 U.S. at 393 (Scalia, J. concurring).

154. *Id.* at 319.

155. *See generally* Richard L. Hasen, *Nonprofit Law as the Tool to Kill What Remains of Campaign Finance Law: Reluctant Lessons from Ellen Aprill*, 56 LOY. L.A. L. REV. 1233 (2023); Chad Erpelding, Ruth Jebe & Jeff Lingwall, *Acorporation, Inc.: Corporate Form as Art Project and Advocacy*, 52 U. BALT. L. REV. 419 (2023); Joel M. Gora, *Free Speech Still Matters*, 87 BROOK. L. REV. 195 (2021); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335 (2015); Robert Weissman, *Let the People Speak: The Case for a Constitutional Amendment to Remove Corporate Speech from the Ambit of the First Amendment*, 83 TEMP. L. REV. 979 (2011), James Bopp, Jr., Joseph E. La Rue & Elizabeth M. Kosel, *The Game Changer: Citizens United's Impact on Campaign Finance Law in General and Corporate Political Speech in Particular*, 9 FIRST AMEND. L. REV. 251 (2010); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RSRV. L. REV. 497 (2010).

156. *Citizens United*, 558 U.S. at 320-21.

157. Nicholas Almendares & Catherine Hafer, *Beyond* Citizens United, 84 FORDHAM L. REV. 2755, 2764 (2016).

clarified that "the First Amendment protects the core political speech of companies just as strongly as it does for individuals."[158]

While *Citizens United*'s assertion that corporations are people (at least for free speech purposes) has received perhaps the most attention,[159] the Court made another move that is important in looking at the constitutionality of the Johnson Amendment. While it did not expressly refer to *Taxation With Representation*, the *Citizens United* Court undercut the earlier case's foundation. The Court dismissed the idea that the fact that a corporation could form a political action committee ("PAC"), which in turn could make electioneering communications, solved the First Amendment infirmities.[160] PACs are subject to significant regulatory and administrative burdens beyond what corporations themselves must comply with.[161] And perhaps more importantly, a PAC, the Court explained, "is a separate association from the corporation."[162]

While the Court did not overrule *Taxation With Representation*, it exposed the significant holes in that case's reasoning. And those holes are glaring. It cannot be, for instance, that the government can limit my speech as long as it allows my spouse, my children, or my siblings to speak. We are different people who can exercise our rights in different ways. Similarly, the legal personhood of a public charity is different from the legal personhood of a social welfare organization, even if they were formed by the same person and have the same board of directors. U.S. law recognizes and enshrines these formal differences.[163] Along those same lines, to the extent that corporations have speech rights, it cannot be that forming a new entity that can speak cures that unconstitutional infringement on the first entity's speech rights.

158. Kearston L. Wesner, *Is the Grass Greener on the Other Side of the Geofence? The First Amendment and Privacy Implications of Unauthorized Smartphone Messages*, 10 CASE W. RSRV. J.L. TECH. & INTERNET 1, 4-5 (2019).

159. Almendares & Hafer, *supra* note 157, at 2764 ("Although the case's treatment of corporations—and its holding that the corporate identity of the speaker does not diminish or alter its free speech rights—has received more attention . . . .").

160. *Citizens United*, 558 U.S. at 337.

161. *Id.* at 337-38.

162. *Id.* at 337.

163. *See, e.g.*, Laura Spitz, *The Case for Outside Reverse Veil Piercing in New Mexico*, 51 N.M. L. REV. 349, 349 (2021) ("A corporation is a distinct legal person. This is a foundational tenet of the modern American legal system.").

None of this is to say that the Johnson Amendment violates tax-exempt organizations' free speech rights. The Supreme Court has never adjudicated the question. The closest the issue has come was a D.C. Circuit opinion that found that the Johnson Amendment did not unconstitutionally burden an organization's free speech rights.[164] The D.C. Circuit's opinion on this point is less than compelling, however. It finds that the restriction does not violate the Free Speech Clause because it is "viewpoint neutral," banning support of *any* candidate, not merely candidates on one side or the other.[165]

But, as demonstrated above, viewpoint neutrality is not the standard that governs the regulation of core political speech; it is either exacting or strict scrutiny.[166] Either way, though, the government must have a compelling reason to regulate the speech in question, and it must narrowly tailor the regulation to achieve its compelling reason.[167]

Furthermore, the majority opinion in *Taxation With Representation* seemed to assume that the availability of a dual-entity structure allowed the Code's restriction on lobbying to be constitutional.[168] And Justice Blackmun believed that, even then, this limitation (which is less absolute and less stringent than the Johnson Amendment) would infringe a tax-exempt entity's constitutional rights but for the dual-entity structure.[169]

Even if the Supreme Court's decision in *Citizens United* does not undercut its reasoning in *Taxation With Representation*, the dual-entity structure may not protect the Johnson Amendment to the same degree that the Supreme Court found that it protected the limitations on lobbying. A social welfare organization, exempt under § 501(c)(4), faces no limitations on the amount of lobbying it can do, as long as that lobbying relates to its social welfare purpose.[170] Thus, if its speech can count as the speech of a related public charity (an assumption I would contest), the public charity has a virtually unlimited ability to engage in core political speech.

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164. Branch Ministries v. Rossotti, 211 F.3d 137, 144 (D.C. Cir. 2000).

165. *Id.*

166. *See supra* notes 92-95 and accompanying text.

167. *See supra* note 99 and accompanying text.

168. Regan v. Tax'n With Representation of Wash., 461 U.S. 540, 544 (1983).

169. *Id.* at 552 (Blackmun, J. concurring).

170. Ellen P. Aprill, *The Section 527 Obstacle to Meaningful Section 501(c)(4) Regulation*, 13 PITT. TAX REV. 43, 70 (2015) ("Similarly, a § 501(c)(4) organization must act in accordance with its exempt purpose. Thus, such organizations may lobby without limit, so long as the lobbying is related to their exempt purpose.").

The Johnson Amendment does not, however, precisely parallel the limitation on lobbying. Critically, social welfare organizations cannot engage in unlimited speech regarding the endorsement of candidates. Rather, the Treasury regulations expressly provide that the "promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."[171] Tax-exempt social welfare organizations do not face the same absolute ban on campaigning activities that public charities face.[172] But a social welfare organization's primary activities must be the promotion of social welfare, and the promotion of social welfare does not include campaigning activities.[173] Thus, *even if* the Supreme Court did not revisit its dual-entity justification for affirming the lobbying restrictions in light of its subsequent decision in *Citizens United*, when it comes to the Johnson Amendment, a social welfare organization does not provide an absolute mouthpiece for public charities' campaigning core political speech.

3. On (Not) Eliminating the Johnson Amendment Altogether

Between the lack of enforcement and the questionable constitutionality of the Johnson Amendment, it is worth addressing whether the law should prohibit tax-exempt organizations from endorsing candidates at all. Ultimately, while I believe the current iteration of the Johnson Amendment is fundamentally flawed, I also believe that it serves a worthy goal. As a normative matter, Congress should draft a restriction that is more likely to withstand judicial scrutiny *and* provides the IRS with a less onerous pathway to enforcement.

Why keep some iteration of the Johnson Amendment? I share with Judge Learned Hand an intuition that, even without any public subsidy, "[p]olitical agitation as such is outside the" realm of public charity.[174] While I believe that a blanket limitation on public charities' core political speech is constitutionally questionable, I also believe that the law should, at least on the margins, put its thumb on the scale in discouraging public charities

171. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (as amended in 1990).

172. Joseph S. Klapach, *Thou Shalt Not Politic: A Principled Approach to Section 501(c)(3)'s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504, 510 (1999) ("Additionally, § 501(c)(4) affiliates may participate only in a limited amount of political campaign activity.").

173. Rev. Rul. 81-95, 1981-1 C.B. 332.

174. Slee v. Comm'r, 42 F.2d 184, 185 (2d Cir. 1930).

from entering the partisan political realm. The American public broadly shares this intuition as well.[175]

As a normative matter, it is critical that any guardrails around tax-exempt organizations' speech comply with the protections of the First Amendment. However, to the extent that tax exemption provides a subsidy to an organization, it is similarly critical that the government sets protections around what gets subsidized. I believe, then, that, despite the constitutional precarity of regulation and the administrative obstacles to enforcement, it is essential to impose some limitation on tax-exempt organizations' endorsement of candidates for office.

III. GETTING AHEAD OF THE COURT

While it is possible that the Johnson Amendment would not stand under current Supreme Court jurisprudence, it is equally likely that the Supreme Court will not get the chance to review it. The difficulties of getting the question before the Supreme Court go beyond standard questions of constitutional standing, which, at minimum, requires a plaintiff to have suffered an injury, demonstrate a causal connection between that injury and the defendant's behavior, and show that the injury is redressable.[176]

On top of the general constitutional-standing requirement, a pair of federal statutes (the Declaratory Judgments Act and the Tax Anti-Injunction Act) prevent courts from engaging in pre-enforcement review of tax laws.[177] If a taxpayer wants to challenge the constitutionality of the Johnson Amendment, the taxpayer must wait until the IRS denies or revokes its exemption based on its endorsing or opposing a candidate for office.[178]

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175. *See supra* notes 15-18 and accompanying text.

176. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).

177. Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1165-66 (2008).

178. Brunson, *supra* note 12, at 162. A public charity could force the IRS's hand by applying for tax-exempt status and, in the application, noting that it intended to violate the Johnson Amendment. If the IRS rejected the public charity's exemption application, the charity could challenge the rejection. I.R.C. § 7428(a)(1)(A) (2018). If the IRS failed to act on the exemption application, after 270 days, the public charity could file for a declaratory judgment. *Id.* § 7428(b)(2). If, however, the IRS granted its exemption application, in spite of its assertion that it would violate the Johnson Amendment, the public charity could not challenge the prohibition on supporting or opposing

And the IRS never has to revoke a tax-exempt organization's exemption.[179] In fact, the IRS very rarely invokes the Johnson Amendment to revoke a public charity's exemption, even where the violation of the Johnson Amendment is clear and blatant.[180] In a pair of self-studies done in 2004 and 2006, the IRS evaluated its enforcement of the Johnson Amendment.[181] It selected 110 tax-exempt organizations that had been referred for violating the Johnson Amendment in 2004 and another 100 in 2006.[182] Although the referred tax-exempt organizations had directly contributed over $340,000 to candidates in 2006 alone,[183] the IRS only revoked the exemptions of four tax-exempt organizations and recommended the revocation of two more.[184] The IRS's lack of enforcement of the Johnson Amendment is particularly stark when it comes to religious organizations;[185] but even non-church public charities lose their exemptions as a result of endorsing or opposing candidates only in the rarest of circumstances.[186]

Why does the IRS enforce the Johnson Amendment sporadically at best? It has never explicitly laid out a policy reason—and, in fact, it has never explicitly acknowledged that it does not enforce the rule—but there are many reasons it may prefer not to. The IRS, including its division that

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candidates for office, even while the IRS could potentially sanction it for such behavior in the future. *See* Brunson, *supra* note 12, at 162 ("Together, the Declaratory Judgments Act and the Anti-Injunction Act effectively prevent courts from engaging in any 'pre-enforcement review of tax cases.'").

179. Brunson, *supra* note 12, at 163-64 (noting that the doctrine of administrative discretion gives the IRS leeway in deciding to enforce provisions of the tax law).

180. Leff, *supra* note 5, at 119.

181. INTERNAL REVENUE SERV., 2006 POLITICAL ACTIVITIES COMPLIANCE INITIATIVE 1, https://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf [https://perma.cc/F2JV-Q64B].

182. *Id.*

183. *Id.*

184. *Id.* at 5. In 2004, the IRS actually revoked five organizations' exemptions, but one was for a nonpolitical violation. *Id.*

185. Brunson, *supra* note 38, at 151 ("In only one court case has a church lost its tax-exempt status as a result of campaigning for or against a candidate.").

186. *Id.* at 151 ("[I]n only four cases—none of which involved a church—did the IRS revoke a public charity's tax-exempt status [for violating the Johnson Amendment].").

oversees exempt organizations, is overworked and under-resourced.[187] Revoking an organization's tax exemption is unlikely to produce substantial additional revenue for the government.[188] It may have decided that its limited resources are better deployed elsewhere.

In addition, Americans generally have a positive view of public charities. Nearly 40% of Americans "completely or very much" trust that nonprofits will do what is right.[189] That level of trust dwarfs the percentage of Americans who trust small businesses (20%), state and local government (14%), the federal government (6% trust Congress, while about 14% trust the President and the Supreme Court), and large businesses (6%).[190] Aggressive enforcement against the sector could hurt the IRS's reputation and otherwise impose significant costs on it, while raising little additional revenue.[191] On top of that, losing tax-exempt status could devastate a public charity.[192] That loss can impact both the charity's relationship with its

187. Philip T. Hackney, *Charitable Organization Oversight: Rules v. Standards*, 13 PITT. TAX REV. 83, 131 (2015).

188. Brunson, *supra* note 12, at 150 n.22.

189. Lilly Fam. Sch. of Philanthropy, *What Americans Think About Philanthropy and Nonprofits*, IND. UNIV. 21 (2023), https://scholarworks.iupui.edu/server/api/core/bitstreams/b5904a8a-5081-42cd-bd44-56740b98fb67/content [https://perma.cc/ZH45-XCLS].

190. *Id.*

191. Brunson, *supra* note 38, at 154. Notably, in 2013, the IRS "attracted the ire of members of Congress, particularly Republicans," when the Treasury Inspector General for Tax Administration reported that it was holding up the exemption applications for organizations with conservative-sounding names. Jennifer Mueller, *Defending Nuance in an Era of Tea Party Politics: An Argument for the Continued Use of Standards to Evaluate the Campaign Activities of 501(c)(4) Organizations*, 22 GEO. MASON L. REV. 103, 116 (2014). While it later came out that the IRS had not only held up the applications of apparently conservative groups, but also liberal groups and a host of other groups for tighter scrutiny, that subsequent knowledge did not prevent the IRS from facing real, and lasting, consequences. Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 99 CORNELL L. REV. ONLINE 41, 42 (2013). The IRS found itself at the center of a "media firestorm" over its "hidden political agenda." *Id.* The President fired the acting IRS Commissioner, congressional committees held hearings on the putative scandal, and the FBI investigated. *Id.* Even a decade later, it makes sense that the IRS would be hesitant to step into this world again.

192. James J. Fishman, *The Federalization of Nonprofit Regulation and Its Discontents*, 99 KY. L.J. 799, 805 (2011).

donors and its ultimate financial viability.[193] That type of hammer may, in many instances, be overkill when it comes to swatting small political endorsements and may ultimately undermine the legitimacy of the Johnson Amendment's penalty structure altogether.[194]

Despite the IRS's general lack of enforcement of the Johnson Amendment, though, the prohibition on endorsing and opposing candidates remains important. While a subset of public charities wants to eliminate it, many of them do not. Some religious and other tax-exempt organizations fear that, without the legal backstop that the Johnson Amendment provides, politicians would pressure them to provide endorsements.[195] Moreover, even without enforcement, the existence of the Johnson Amendment sends a message to public charities, private foundations, and the public at large that the government is opposed to subsidizing certain types of political speech.

While the Supreme Court has endorsed the doctrine of administrative discretion, which allows the IRS to decline to enforce the Johnson Amendment,[196] exercising that discretion comes at a cost. Perhaps most importantly, an executive agency's refusal to enforce the law undercuts the rule of law.[197] It hurts the IRS's reputation as an objective enforcer that does not consider issues extraneous to tax law.[198] The IRS publicly declining to

193. *Id.*

194. *Cf.* James Fallows Tierney, *Reconsidering Securities Industries Bars* 29 STAN. J.L. BUS. & FIN. 134, 195 (2024) ("What makes [these penalties] attractive—their severity—makes them risky for political legitimacy . . . .").

195. Tom Gjelten, *Another Effort to Get Rid of the "Johnson Amendment" Fails*, NPR (2018), https://www.npr.org/2018/03/22/596158332/another-effort-to-get-rid-of-the-johnson-amendment-fails [https://perma.cc/2XNW-P29Q].

196. Heckler v. Chaney, 470 U.S. 821, 837-38 (1985) ("The FDA's decision not to take the enforcement actions requested by respondents is therefore not subject to judicial review under the APA.").

197. Lawrence Zelenak, *Custom and the Rule of Law in the Administration of the Income Tax*, 62 DUKE L.J. 829, 851 (2012) ("To anyone who takes the rule of law seriously, it is troubling to contemplate that the Treasury and the IRS are almost unconstrained in their ability to make de facto revisions to the Internal Revenue Code enacted by Congress, as long as those revisions are in a taxpayer-favorable direction.").

198. *See, e.g.*, Francis R. Hill, *Auditing the NAACP: Misadventures in Tax Administration*, 49 EXEMPT ORG. TAX REV. 205, 205 (2005) ("At its core, the NAACP controversy arises from a combustible combination of a weak case on the merits with a muscular administrative response which together fuel

enforce a provision of the tax law decreases the public's perception that laws matter,[199] which may hurt tax compliance more broadly. Taxpayers are more likely to comply with their tax obligations when they believe that other taxpayers are also complying.[200]

This is not to say that an unenforced law has no benefits. Laws, even unenforced, serve an expressive purpose.[201] A law prohibiting a particular behavior signals that society views that behavior as disfavored.[202] But legislation is not the only way the government sends messages: It also sends messages through its behavior. And enacting a law with harsh penalties and then leaving it unenforced sends the message that "everybody is doing this and nobody is really serious about stopping it."[203]

Ultimately, it does not matter whether the IRS's unwillingness to enforce the Johnson Amendment more strongly communicates that the government disapproves of public charities endorsing candidates or that nobody cares to stop their endorsements. Bad actors—public charities that want to ignore the prohibition—know that they can endorse candidates with minimal risk of censure. By contrast, risk-averse public charities and those that value compliance with the law remain constrained and suffer political disadvantage.

Irrespective of its underlying motivation, moreover, the IRS's unwillingness to enforce the Johnson Amendment ensures that its constitutionality will not be adjudicated. And without that adjudication, the prohibition on public charities endorsing or opposing candidates for office remains in limbo, on the books but without any teeth. Proponents of the limitation on public charities' ability to participate in partisan politics can complain about widespread violations but can point to the existence of a law prohibiting that participation. Opponents of the limitation can complain

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concern about improper political influence on the Service in the closing days of a national election marked by intense concerns about the integrity of the voting process.").

199. Brunson, *supra* note 12, at 174.

200. Richard Lavoie, *Flying Above the Law and Below the Radar: Instilling a Taxpaying Ethos in Those Playing by Their Own Rules*, 29 PACE L. REV. 637, 655 (2009) ("No one wants to feel like a chump for paying taxes when they believe everyone else is freeloading.").

201. Joel S. Johnson, *Dealing with Dead Crimes*, 111 GEO. L.J. 95, 126-27 (2022).

202. *Id.* at 127.

203. Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 667 n.71 (2006).

about its existence but can engage in partisan politics with virtually no risk of sanction. In a way, everybody wins while, at the same time, everybody loses. But the status quo means that, to the extent public charities choose to endorse or oppose candidates for office, there will be at least some federal subsidy for these endorsements.

If the United States is serious about preventing these political subsidies, it must change something. And changing the IRS's enforcement priorities is probably not the most effective change because better enforcement would allow judicial challenges to the prohibition. There is a reasonable chance that, given the current state of core political speech jurisprudence, the courts would eliminate even the unenforced and vestigial prohibition that currently exists.

If U.S. residents want a robust check against subsidizing political campaigns—and they do[204]—Congress needs to step in and reimagine how it will prevent those subsidies. The current absolute ban on public charities endorsing candidates for office has not worked. With virtually no enforcement, many public charities are willing to be bold and flout the

204. In 2022, a Pew poll found that seventy-seven percent of adults in the United States believe that religious organizations should not endorse candidates for political office. Gregory A. Smith, Michael Rotolo & Patricia Tevington, *45% of Americans Say U.S. Should Be a "Christian Nation"*, PEW RSCH. CTR. (Oct. 27, 2022), https://www.pewresearch.org/religion/2022/10/27/45-of-americans-say-u-s-should-be-a-christian-nation [https://perma.cc/L9WV-C7CA]. The survey does not look for respondents' reasons; it is possible that some or all of the respondents believe that churches and other religious bodies should not engage in partisan politics because of their view of separation of church and state, rather than their view on the appropriateness of federal subsidies. And, in fact, half of the respondents to a 2013 Gallup poll would have supported direct federal funding of campaigns. Lydia Saad, *Half in U.S. Support Publicly Financed Federal Campaigns*, GALLUP (June 24, 2013), https://news.gallup.com/poll/163208/half-support-publicly-financed-federal-campaigns.aspx [https://perma.cc/Y7BN-V8AW]. But Gallup did not ask about public financing in a vacuum—respondents supported *replacing* private contributions with public funding (effectively ending private political donations). *Id.* Overall, Americans are skeptical of extreme amounts of spending on political campaigns, and skeptical of churches (and likely other public charities) participating, meaning that enacting an effective backstop against public charities endorsing or opposing candidates should be a political priority.

law.[205] Allowing this blatant disobedience of the law is damaging for at least two reasons. First, while the IRS lacks the resources to enforce the tax laws fully,[206] expressly refusing to enforce a particular provision indicates that a portion of the tax law is unimportant. More than twenty-five years ago, in 1987, the House Committee on the Budget expressed concern that the IRS was insufficiently enforcing the Johnson Amendment.[207]

This messaging is subsidiary, however, to a more fundamental reason: It forces the federal government to subsidize the endorsement of candidates for office. Not only is this type of subsidy unpopular,[208] but the legislature has expressly decided it is not the government's place to do so.[209] The prohibition on campaigning by public charities, the House Committee on Budget explained, "reflect[s] Congressional Policies that the U.S. Treasury

205. For example, on Pulpit Freedom Sunday in 2014, nearly 1,500 pastors preached sermons meant to violate the Johnson Amendment. Tamara Audi, *Preaching Politics, Pastors Defy Ban*, WALL ST. J., (Oct. 5, 2014), https://www.wsj.com/articles/preaching-politics-pastors-defy-ban-1412558726 [https://perma.cc/ANM6-X5C7]. More recently, there has been a virtual cottage industry in investigative reporters reporting on violations of the Johnson Amendment. In 2022, *ProPublica* and the *Texas Tribune* reported on twenty churches in Texas that endorsed or opposed candidates for office. Jessica Priest, Jeremy Schwartz & Chris Morran, *These 20 Churches Supported Political Candidates. Experts Say They Violated Federal Law*, PROPUBLICA, (Nov. 7, 2022), https://www.propublica.org/article/johnson-amendment-violation-examples [https://perma.cc/23N4-WBDB]. Six months later, the two news organizations reported on more churches that had endorsed three conservative Christian candidates. Jessica Priest, *Churches' Role in Abilene Election Prompts Calls for Investigations*, TEX. TRIB., (May 16, 2023), https://www.texastribune.org/2023/05/16/abilene-churches-election-donations-investigations [https://perma.cc/E8V7-LT4B]. And it is not just churches: In 2022, Chicago's *WTTW*, along with *ProPublica*, reported that the CEO of a tax-exempt hospital appeared in a political ad for Illinois Comptroller Susana Mendoza. Nick Blumberg & Vernal Coleman, *Medical Care and Politics Go Hand in Hand at Roseland Community Hospital*, WTTW, (Dec. 15, 2002), https://news.wttw.com/2022/12/15/medical-care-and-politics-go-hand-hand-roseland-community-hospital [https://perma.cc/JE62-WVJ6].

206. Ellen P. Aprill, *Why the IRS Should Want to Develop Rules Regarding Charities and Politics*, 62 CASE W. RSRV. L. REV. 643, 648 (2012) ("[T]he IRS . . . has a duty to ensure that the tax laws are obeyed, but must also consider how best to deploy its limited resources.").

207. H.R. REP. NO. 100-391, pt. 2, at 1624 (1987).

208. *See supra* note 204.

209. *See supra* notes 55-57 and accompanying text.

should be neutral in political affairs."[210] A quarter century after the House expressed its concerns, the IRS has done virtually nothing to prevent the Treasury from subsidizing political campaigns.

IV. ELIMINATING THE SUBSIDY FOR CAMPAIGNING

In short, most Americans do not want public charities supporting or opposing candidates for office. Congress has officially stated that it opposes any federal subsidy for partisan politicking. Yet the IRS refuses to enforce the Johnson Amendment as written in most cases. Even if it did enforce the Johnson Amendment as written, it almost certainly violates the Free Speech Clause of the First Amendment as a restraint on core political speech.

All of these problems can be solved, but the solution would require congressional action. If Congress redesigned the scope of the Johnson Amendment to narrowly target subsidized endorsements, it could solve the constitutional deficiency, give the IRS a tool it would be willing to use, and ultimately, curtail the ability of public charities to have their campaigning speech subsidized by the federal government. This Part will lay out how Congress could redesign the Johnson Amendment to accomplish these goals.

Congress should eliminate the absolute prohibition on public charities and other entities exempt under § 501(c)(3) from endorsing or opposing candidates for office. Rather than flatly prohibit this type of campaigning, it should instead disallow that portion of donors' charitable deductions that corresponds to the percentage of expenditures that went toward endorsing or opposing candidates for office. The following Sections will explain why this approach would be superior to the current (unenforced) approach, how this change could be implemented, and the challenges the IRS and public charities would face.

This Part will first explore some of the Johnson Amendment's deficiencies. The Johnson Amendment does not address the problem it purports to solve while, at the same time, it penalizes behavior that Congress has explicitly decided to subsidize. This Part will then turn to how to better target the Johnson Amendment to eliminate the subsidy for campaign speech without leaking into other areas of desirable subsidy. This Part will also address safe harbors to provide more certainty to public charities and their donors. Finally, this Part will discuss why the IRS may be more likely to enforce this version of the Johnson Amendment than the current version.

210. H.R. REP. NO. 100-391, pt. 2, at 1625.

A. The Current Penalty Is Under- and Overbroad

Disallowing a portion of donors' charitable deductions is a far more targeted, constitutional, and politically acceptable enforcement mechanism than revoking a public charity's exemption. The current approach is both under- and overbroad, making it difficult to stomach politically and ineffective at accomplishing its goal.

The Johnson Amendment's approach is under-broad because it does not actually eliminate the federal subsidy of campaign expenditures. And what is the subsidy of public charities? It arises primarily because of the tax deductibility of charitable donations. A donor who elects to itemize and who gives $100 to a public charity does not bear the full cost of the contribution because they can deduct the value of that donation. If the donor is in the top 37% tax bracket,[211] their charitable donation will reduce their tax liability by $37. Effectively, the donation costs a high-bracket donor $63 after taxes. But the charity still receives $100. The other $37 comes indirectly from the federal government as revenue it forewent.[212]

The deductibility attaches at the moment of contribution.[213] A deductible "charitable contribution" is a contribution made to a qualified public charity.[214] Under current law, a public charity does not lose its exemption for violating the Johnson Amendment until it endorses or opposes a candidate for office.[215] And donations made prior to a violation are still deductible to donors; this means that the money a public charity actually used to endorse a candidate (at least the first time it does so) qualified for the charitable deduction. The current law, then, allows public charities to use subsidized money to support or oppose candidates for office. It simply punishes them for doing so after the fact. It does not, however, prevent the use of subsidized money in political campaigns.

At the same time, it is also overbroad. While the United States has a policy of not subsidizing campaigning speech, denying or revoking an organization's tax exemption for violating the Johnson Amendment not only

211. I.R.C. § 1(j)(2) (2018).

212. Samuel D. Brunson, *"I'd Gladly Pay You Tuesday for A (Tax Deduction) Today": Donor-Advised Funds and the Deferral of Charity*, 55 WAKE FOREST L. REV. 245, 270 (2020) (charitable deduction "represents both a significant subsidy of the charity's mission and a significant amount of foregone federal revenue").

213. Treas. Reg. § 170A-1(b) (as amended in 2020).

214. I.R.C. § 170(c)(2) (2018).

215. *Id.* § 501(c)(3).

eliminates federal subsidies for its campaigning activities but also for the charitable activities that federal policy explicitly intends to subsidize. While there are several theories for *why* the government should subsidize charity, there is broad agreement that the charitable tax deduction *does* subsidize charity and that these subsidies (often, at least) benefit society.[216] Entirely eliminating this subsidy because a public charity endorses a candidate may function to discourage charities from endorsing candidates, but it also creates the perverse side effect of eliminating a desirable subsidy.[217]

While the penalty for violating the Johnson Amendment punishes behavior that federal policy wants to subsidize, its overbreadth could be explained as a policy meant to strongly discourage political campaigning. After all, it represents a metaphorical death penalty for public charities.[218] Without their tax exemptions, many public charities could not function.[219] But if the IRS chooses not to enforce the penalty, perhaps because of its draconian effect,[220] the penalty loses its deterrent power.[221]

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216. Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505, 518 (2010).

217. That is not to say that a public charity should never lose its exemption because of one thing it does. In *Bob Jones University v. United States*, the Supreme Court allowed the IRS virtually unlimited discretion to revoke exemptions where a charity violates a fundamental public policy or acts illegally. 461 U.S. 574, 591 (1983). Even in *Bob Jones*, though, the Supreme Court recognized that a single bad act did not justify revoking a tax exemption. But racial discrimination in education, it said, both went against a decades-long push by all three branches of the federal government to end racial discrimination in education *and* exerted a "pervasive influence" on the entire educational system. *Id.* at 593-94. Simply endorsing a candidate for office does not necessarily exert such a pervasive influence, though when it does, it makes sense to revoke an exemption.

218. Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMEND. L. REV. 1, 36 (2007) ("Initially, the only statutory penalty for violators [of the Johnson Amendment] was the charitable equivalent of the death penalty—revocation of tax-exempt status.").

219. *See* Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1437 (1998) (revoking tax exemption represents a "death sentence").

220. Brunson, *supra* note 38, at 152 ("[T]he penalty for campaigning is draconian, even where the infraction is minor or unintentional. In theory, a public charity must lose its tax exemption for a single instance of supporting a candidate.").

221. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 186 (2000) ("A would-be polluter may or may not be dissuaded by the

Rather than enforcing a regime that both fails to eliminate the subsidy for endorsing candidates and removes the subsidy of non-violative behavior, then, a targeted enforcement regime would be better positioned to prevent federal dollars from subsidizing political campaigns. Moreover, a targeted approach would be more politically palatable for the IRS, making it more likely that it would enforce the prohibition against campaigning.[222]

B. A More Targeted Solution[223]

One potential solution to the problem of subsidized candidate spending would be to adopt Justice Blackmun's concurrence in *Taxation With Representation*.[224] If public charities' campaigning activities were funded out of a sibling 501(c)(4) organization, the problem of subsidy would vanish.[225] From both a practical and a legal perspective, however, that solution does not work. From a practical perspective, the law already allows public charities to engage in politics through sibling social welfare organizations. But that has not stopped public charities from violating the Johnson Amendment, and it has not impelled the IRS to enforce the Johnson Amendment. From a legal perspective, as discussed above, the fact that one entity can speak through another likely does not remedy the constitutional imposition on core political speech.[226]

To the extent society wants to prevent the government from subsidizing candidate endorsements, then, there is another conceptually simple solution: Disallow that portion of charitable donations that go toward endorsing or opposing candidates for office. By disallowing that much—and

existence of a remedy on the books, but a defendant once hit in its pocketbook will surely think twice before polluting again.").

222. Brunson, *supra* note 38, at 156.

223. The reader will note that my proposed, more targeted solution imposes a relatively substantial administrative burden on a public charity that would (permissibly) engage in politics. That administrative burden is deliberate. While I believe that a blanket limitation on public charities' core political speech is constitutionally questionable, I also believe that the law should, at least on the margins, put its thumb on the scale in discouraging public charities from entering the partisan political realm.

224. Regan v. Tax'n With Representation of Wash., 461 U.S. 540, 551 (1983).

225. *See supra* notes 132-133 and accompanying text.

226. *See supra* Section II.B.2.

not more or less—the law would prospectively prevent subsidy without overreaching.

While this is conceptually simple, in practice, it is unwieldy.[227] After all, donors do not control public charities; they do not decide whether to endorse or oppose candidates for office.[228] And yet disallowing a portion of donors' deductions is necessary to eliminate the federal subsidy. So, how should this disallowance be implemented?

It would require several steps. First, the public charity would have to determine how much it spent on activities prohibited by the Johnson Amendment and how much it spent in total. With these two numbers, it could determine the portion of its expenditures that constituted endorsing or opposing candidates for office. That portion of each donor's donation to the organization would be disallowed as a deductible charitable donation.

For example, imagine that in 2025, a public charity spent $10,000 endorsing candidates for office. In addition, it spent another $90,000 on various charitable, noncharitable, and administrative expenses. Ten percent of its expenditures were prohibited by the Johnson Amendment. If Jane, who itemizes her deductions, donated $100 to the charity in 2025, she could only deduct $90. The other $10 would not be deductible.

227. To some extent, the unwieldiness of the solution is part of the point. This proposed regime is not meant to be punitive, but it is also not meant to be simple. Ultimately, I share the public's intuition that public charities should not participate in partisan politics. Some degree of administrative burden, which reinforces this public sentiment, does not seem out of place. There are other potential solutions, though. For instance, a public charity could create a "segregated fund" out of which it paid for campaigning. *See* Hackney, *supra* note 72, at 157. As long as donations earmarked to this fund were not deductible, and the public charity's campaigning expenditures solely came out of this segregated fund, it could be treated as a separate entity and not impact the charity's tax-exempt status. *See* I.R.C. § 527(f)(3) (2018). Even this solution would impose an administrative burden, though, namely by requiring a public charity to segregate and track spending from different accounts.

228. At least in theory they do not—under state nonprofit law, public charities are managed by a board of directors. Atinuke O. Adediran, *Nonprofit Board Composition*, 83 OHIO ST. L.J. 357, 359-60 (2022). In practice, though, large donors can apply significant amounts of pressure on public charities to adopt the donors' preferences. *See, e.g.*, Stephanie Saul, *Who Decides Penn's Future: Donors or the University?*, N.Y. TIMES, https://www.nytimes.com/2023/10/26/us/university-of-pennsylvania-donors-israel-hamas.html [https://perma.cc/N2QY-5TTB] (Oct. 27, 2023).

Of course, Jane does not necessarily know how much the public charity expended endorsing and opposing candidates for office during the year. The charity would have to send her (and the IRS) information about the disallowed deduction. While administratively burdensome, such a written acknowledgment is not unheard of in the public charity area. Already, tax-exempt organizations must provide a contemporaneous written acknowledgment to donors of any gift in excess of $250.[229] That written acknowledgment must already include the value of any goods or services a donor received in exchange for the donation.[230] This new rule would only require one additional step in preparing the written acknowledgment—that it also include the pro rata portion of the donation that corresponds with prohibited political spending. In addition, the public charity would need to send a copy of the written acknowledgment to the IRS.

The written acknowledgment to donors would serve two purposes. First, it would expressly inform them of the amount of their charitable donation that they could not deduct for tax purposes. Second, it would inform them that the tax-exempt public charity they donated to had endorsed or opposed a candidate for office. The first of these purposes would serve to eliminate the federal subsidy for campaigning—the same goal as the current Johnson Amendment—but without the under- or overbreadth. The second purpose would provide additional information to donors about how the public charity spent its money. Some donors may be comfortable donating to public charities that endorse or oppose candidates for office. Others, by contrast, may prefer not to. Currently, though, there is no publicly available signal to donors that a public charity endorses or opposes candidates for office, making it difficult for donors and potential donors to make an informed decision on that axis.[231]

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229. I.R.C. § 170(f)(8) (2018).

230. Treas. Reg. § 1.170A-13(f)(2)(iii) (as amended in 2020).

231. In addition, it may be useful to add a section to Form 990 about a tax-exempt organization's campaigning actions. Because Form 990 is a public document, this would allow potential donors to know whether the organization they were donating to participated in candidates' campaigns. I.R.C. § 6104(a)(3)(B) (2018); Treas. Reg. § 301.6401(a)-1(a) (as amended in 2012). While providing that information to prospective donors would have real value, this Article does not focus on that because the contents of Form 990 are governed by Treasury Department regulations and forms, not congressional action. *See* I.R.C. § 6033(a)(1) (2018) ("[E]very organization exempt from taxation under section 501(a) shall file an annual return, stating specifically the items of gross income, receipts, and disbursements, and such

Not every case of endorsements would involve $10,000 in spending, though. In some cases, the amount that a public charity spends on its campaigning activities—even if it engages in some campaigning activities—could be nearly nothing. We currently live in an era of "cheap speech."[232] The internet has made it possible for nearly costless speech to have an outsized practical impact.[233] The financial subsidy to public charities could, in some cases, fall well below the impact of an endorsement.[234] After all, while the financial subsidy is important, so is the implicit endorsement public charities enjoy as a result of their tax-exempt status.[235] To ensure that a new Johnson Amendment fully accounts for this possibility, it is critical for a public charity to reflect the full value of its endorsements; otherwise, it could use the cheapness of speech to circumvent the rule.[236] Requiring a public charity to calculate its spending and send notifications to donors would create frictions, undercutting the cheapness of cheap speech and reducing the ability of public charities to avoid the new Johnson Amendment.

It is important to note that this solution would not affect the tax-exempt status of organizations that support or oppose candidates for office. That is deliberate. As discussed earlier, revoking a tax-exempt organization's exemption because it violates the Johnson Amendment is an extreme penalty, and one which likely discourages IRS enforcement. [237] Any

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other information for the purpose of carrying out the internal revenue laws as the Secretary may by forms or regulations prescribe."); Treas. Reg. § 1.6033-1(a)(1) (as amended in 1971) (laying out required inclusions on Form 990). Any public disclosure requirement, then, would have to be implemented after Congress changed the statutory regime, and could be changed easily by changing Form 990 itself.

232. Ellen P. Aprill, *Amending the Johnson Amendment in the Age of Cheap Speech*, 2018 U. ILL. L. REV. ONLINE 1, 1 (2018).

233. *Id.* at 8.

234. Roger Colinvaux, *The Political Speech of Charities in the Face of* Citizens United*: A Defense of Prohibition*, 62 CASE W. RSRV. L. REV. 685, 751 (2012) ("[F]ully capturing the value associated with all political activities is critical.").

235. *See* SAMUEL D. BRUNSON, GOD AND THE IRS: ACCOMMODATING RELIGIOUS PRACTICE IN UNITED STATES TAX LAW 125 (2018) (explaining how the IRS recognizing the Church of Scientology as exempt has provided legitimacy to Scientology).

236. Aprill, *supra* note 232, at 8 (the availability of cheap campaigning speech "would loom particularly large for entities newly established to take advantage of any change in the campaign intervention prohibition").

237. *See supra* notes 191-193 and accompanying text.

enforcement action against the charity itself would need to be narrower than the revocation of its exemption. On top of that, in previous scholarship, David Herzig and I have argued that the tax exemption itself does not represent a subsidy for tax-exempt organizations because the purpose of the corporate income tax was to reach the otherwise potentially untaxed income of shareholders (and in addition, to regulate corporations).[238] Assuming that we are correct, taking remedial action against the exempt organization itself would be overbroad because the public charity's exemption does not represent a subsidy but, rather, represents an accurate tax base.

Our conclusion is not universally accepted, though: Courts and some commentators argue that, either always or at least under certain circumstances, tax exemption itself represents a subsidy of public charities.[239] If policymakers disagree with our conclusion that the exemption for public charities represents a better application of the income tax base and instead believe that the tax exemption itself represents an additional subsidy to public charities, they could require tax-exempt organizations to include these political expenditures in the definition of *unrelated business taxable income* in addition to disallowing a portion of donor deductions.[240] A tax-exempt organization would then owe taxes at

238. David J. Herzig & Samuel D. Brunson, *Let Prophets Be (Non) Profits*, 52 WAKE FOREST L. REV. 1111, 1134 (2017).

239. The Supreme Court, for example, has written that "[e]very tax exemption constitutes a subsidy." Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989). Its assertion, though, is in the context of a *sales tax* exemption. An exemption from paying sales tax is clearly an alteration to the general tax base and does represent a subsidy, at least to the extent the purchased goods will be consumed. So, while the Supreme Court was correct in context, it was not considering the income tax. The Supreme Court is not alone in its belief that a tax exemption represents a subsidy, though. Professor Donald B. Tobin asserts that public charities "receive a dual tax subsidy. Their income is not taxed, and donations to them are deductible by donors." Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1317 (2007). Others take a more nuanced position. Professor Lloyd Hitoshi Mayer argues that tax exemption "by itself is only a subsidy to a limited degree." Lloyd Hitoshi Mayer, *Nonprofits, Taxes, and Speech*, 56 LOY. L.A. L. REV. 1291, 1324 (2023).

240. Tax-exempt organizations must pay taxes at ordinary corporate rates on their unrelated business taxable income. I.R.C. § 511(a)(1) (2018). Including expenditures in the tax base seems intuitively odd, but it has precedent in current tax law. For example, a United States shareholder of a controlled

ordinary corporate rates on any amount of disallowed political spending it made.[241] Taxing the amount public charities spend on disallowed political expenditures would eliminate any subsidy that expenditure might entail. While I believe that taxing political expenditures is unnecessary to end the subsidy tax-exempt organizations receive, adding that to a pro-rata disallowance of charitable deductions would very clearly foreclose any argument that the federal government subsidized public charities' campaigning expenditures.

C. Safe Harbor

Though this proposed change to the Johnson Amendment would be far less punitive than the current regime, it would be far more administratively burdensome on tax-exempt organizations and far less popular among donors. A public charity would, in the first instance, have to determine the value of both its political spending and its overall spending. Determining its overall spending should not be too burdensome for many tax-exempt organizations: Any tax-exempt organization that files a Form 990 already must calculate and report its annual spending.[242]

But not all tax-exempt organizations need to file a Form 990; Congress exempted churches, churches' integrated auxiliaries, and associations of churches from any filing requirement.[243] The IRS has also effectively exempted smaller tax-exempt organizations. Most public charities with less than $50,000 in annual revenue are eligible to file a Form 990-N instead of a normal Form 990.[244] The Form 990-N requires certain identifying information but does not require any financial information beyond a

foreign corporation must include in its gross income the amount of any bribes, kickbacks, or other illegal payments to government officials, even though bribes, etc., are payments, not income. *Id.* § 952(a)(4).

241. *Id.* § 511(a)(1).

242. The 2023 version of Form 990 requires tax-exempt organizations to report their total annual expenditures on Line 18. *Form 990: Return of Organization Exempt from Income Tax*, INTERNAL REVENUE SERV. (2023), https://www.irs.gov/pub/irs-pdf/f990.pdf [https://perma.cc/9CWU-VF88].

243. I.R.C. § 6033(a)(3)(A)(i) (2018).

244. *Annual Electronic Filing Requirement for Small Exempt Organizations—Form 990-N (e-Postcard)*, INTERNAL REVENUE SERV. (Dec. 4, 2023), https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard [https://perma.cc/NM5Q-ERS9].

confirmation that the public charity did not have more than $50,000 in revenue.[245] Under the new regime, even organizations exempt from ordinary filing requirements, including churches and small charities, would have to calculate and report to the IRS their total expenditures for the year.

On top of total expenditures, a public charity would have to calculate the amount it expended to support or oppose candidates for office. Because any amount spent on candidate activities allows the IRS to revoke their exemptions, public charities currently do not need to quantify these expenses. But if the expenses will disallow some portion of donors' deductions (and possibly require public charities to include some amount as unrelated business taxable income), public charities would need to quantify those expenditures.

Some of these expenditures would be easy to calculate. Any cash given to or spent on a political campaign would count, as would expenses incurred by producing media that supports candidates. But other indirect expenses would also count. How should a public charity calculate, for instance, the value of compiling and allowing the use of its mailing, phone, and email lists?[246] What about a statement in a sermon or a newsletter by a pastor or a university president?[247] Moreover, given the high esteem in which constituents hold pastors and university presidents, should their statements demand a higher market value than others' might?[248]

There is likely no objective answer to these valuation questions, especially since many instances will be unique. The burden would fall on public charities themselves to determine the value of communications, and that valuation would have to be done in a way that would convince the IRS and courts that it was appropriate and accurate. Between the burden of calculating these expenditures and the uncertainty of whether the calculations will prove convincing, meeting these standards could prove burdensome.

In addition, public charities would need to collect and save contact information for all donors. Currently, while public charities must provide

245. *Id.*

246. *See* Leff, *supra* note 52, at 700 n.84, 712 n.115.

247. *See, e.g.*, Rev. Rul. 2007-41, 2007-1 C.B. 1421 (discussing such hypotheticals).

248. Brian Galle, *The LDS Church, Proposition 8, and the Federal Law of Charities*, 103 NW. U. L. REV. COLLOQUY 370, 375 (2009). ("Relatedly, a church's communication with its members is likely to carry far more weight than a similar message from an unrelated party to the same group. In commercial terms, the church has an established store of goodwill, which in a market setting would command a high premium.").

contemporaneous acknowledgment of gifts worth more than $250,[249] that acknowledgment can be made at the time of the gift. If a donation comes before the end of the public charity's taxable year, though, that charity does not know how much it will spend on disallowed politicking—or, for that matter, on other expenditures. The charity cannot calculate the percentage of charitable donations that donors cannot deduct until the end of the taxable year.

And this uncertainty extends to donors' tax planning. When they donate, they cannot know what percentage of the donation they will be allowed to deduct at the end of the year. As a result, donors cannot know in advance, as they do now, the after-tax cost of making charitable donations. This uncertainty surrounding the after-tax cost of donations could affect potential donors' decisions to donate. The general (though not universal) consensus among economists is that charitable giving is elastic.[250] That is, potential donors react to the price of donations.[251] And tax incentives exert a significant amount of influence over donors' decisions to donate. [252] Making the deductibility of charitable donations contingent upon actions outside a donor's control—actions that could, in fact, occur after the donor has made their donation—risks raising the cost of charitable donations and thus reducing the amount donated.

A new Johnson Amendment regime could easily deal with these two concerns, however. I propose that the new regime contain two safe harbor provisions, one prospective and the other retrospective. Under the prospective regime, a public charity would formally announce, prior to the beginning of the taxable year, that it will not endorse or oppose candidates for office. By electing into this prospective regime, a public charity would communicate to its potential donors that their donations will remain fully deductible because no part of their donations would represent federally subsidized electoral actions.

Of course, promising not to endorse or oppose candidates for office is different from not endorsing or opposing candidates for office, and this type of elective regime would need to be paired with a robust enforcement

249. *See supra* notes 229-230 and accompanying text.

250. John A. List, *The Market for Charitable Giving*, 25 J. ECON. PERSPS. 157, 172 (2011).

251. Todd Izzo, *A Full Spectrum of Light: Rethinking the Charitable Contribution Deduction*, 141 U. PA. L. REV. 2371, 2385 (1993).

252. Jon Bakija & Bradley T. Heim, *How Does Charitable Giving Respond to Incentives and Income? New Estimates from Panel Data*, 64 NAT'L TAX J. 615, 647 (2011).

mechanism. And here, the current Johnson Amendment's two-part penalty regime makes sense: A public charity that opts into the prospective regime and then endorses or opposes a candidate for office should face both the current excise taxes and should lose its tax exemption.

In the case of a public charity in the prospective safe harbor, the existing enforcement regime makes sense. In the first instance, the public charity owes an excise tax equal to 10% of the amount it expended on disallowed politicking, while any organization manager who approved the expenditure owes a 2.5% excise tax.[253] The amount of both excise taxes increases if the public charity fails to correct the spending.[254] These same entity- and individual-level excise taxes should apply when a charity opts into the prospective safe harbor and then violates its terms.

On top of the excise taxes, a public charity that opts into and then violates the terms of its safe harbor should lose its exemption, effective as of when the charity endorsed or opposed a candidate for office. While loss of exemption seems like a draconian penalty for violating the current Johnson Amendment, this proposed safe harbor regime changes the calculus. Upon opting into the safe harbor, a public charity becomes expressly aware of the consequences of violating its agreement. Moreover, if the charity decided during the year that it actually did want to endorse or oppose candidates, it could revoke its exemption for the subsequent year. A harsh penalty for violating the terms of an opt-in safe harbor is less unjust and more enforceable than a harsh penalty for exercising core political speech with no agreement with the IRS.

Critically, the fact that this is a safe harbor means that individuals who donate prior to the public charity violating its agreement will not lose any part of their charitable deduction. The donors—again, who do not exercise control over the public charity[255]—donated in reliance on the safe harbor and should be protected by it. But once a public charity has violated its agreement, the safe harbor no longer exists and taxpayers who donate after

253. I.R.C. § 4955(a) (2018).

254. *Id.* § 4955(b).

255. The calculus may be different if the charity endorsed or opposed a candidate at the behest of the donor; in that case, there may be reason for the donor to lose their charitable deduction. That loss, though, would not be because of the political actions of the charity. Rather, the donor would lose deductibility because they received a quid pro quo (support of a candidate) in exchange for their donation. Hernandez v. Comm'r, 490 U.S. 680, 690 (1989) (noting that the definition of "contribution or gift" in tax law excludes quid pro quo benefits).

then are donating to an organization that is not exempt. That does not automatically mean that taxpayers cannot deduct charitable donations they make after a revocation: Under IRS procedures, there is a window during which donations to an organization that has lost its exemption are still generally deductible, provided that the donor does not know that the organization has lost its exemption.[256] That window closes once the IRS publishes an announcement in the Internal Revenue Bulletin.[257]

In some cases, though, a public charity may not want to make a prospective election, either because it intends to endorse or oppose a candidate for office or because the charity is risk-averse and the risk of losing its exemption strikes it as too large a penalty. In that case, of course, it can choose to do nothing, and its donors may lose a portion of their deductions. But I propose a second, retrospective safe harbor. A public charity that elected into the second safe harbor would have to calculate how much it spent on disallowed politicking. But instead of informing donors that they could not deduct a portion of their donations, the charity could elect to cover the taxes instead. Itemizing donors would still be able to deduct the amount they donated. The public charity would pay taxes on the amount it spent at the top individual marginal tax rate in effect for the year.

Returning to the hypothetical from Section IV.B., imagine a public charity spent $10,000 in 2025 on disallowed politicking and another $90,000 on other expenses. If the charity elected into the prospective safe harbor, it would lose its exemption. But if it elected into the retrospective safe harbor, it would not have to notify its donors telling them that they could not deduct one-tenth of their donations. Instead, the charity would pay $3,700 in taxes to the IRS.[258]

Electing into this safe harbor would be costly to public charities. An electing public charity would not only have to come up with the cash to pay the tax, but it would also almost certainly pay more tax on the amount it spent to endorse or oppose candidates for office than donors would have paid in additional tax. After all, not all donors pay taxes at the top marginal tax rate. [259] And because the charitable deduction is an itemized

256. Rev. Proc. 68-17 § 3.1, 1968-1 C.B. 806.

257. *Id.* There are situations where the IRS can deny a deduction, even where the donor did not actually know about the revocation. *Id.* Those rules should apply, but the details are beyond the scope of this Article.

258. In 2024, the top federal income tax marginal rate was 37%. I.R.C. § 1(j)(2) (2018). 37% of $10,000 is $3,700.

259. Linda Sugin, *Competitive Philanthropy: Charitable Naming Rights, Inequality, and Social Norms*, 79 OHIO ST. L.J. 121, 132-33 (2018).

deduction,[260] not all charitable donors even qualify to deduct their charitable contributions.[261] Yet to benefit from this retrospective safe harbor, a public charity would have to pay taxes on *all* of its politicking expenditures at the top marginal tax rate applicable to individuals.

In addition, while this retrospective safe harbor would shield donors from losing a portion of their charitable deduction, a public charity would still need to send written acknowledgment to donors explaining what percentage of expenditures were for disqualified political speech and that the charity had elected to pay taxes on the amount. While the retrospective safe harbor would protect donors' deductions, they nonetheless deserve to know that the charity to which they donated used a portion of their donations to support or oppose candidates for office and that it used another portion of their donations to pay taxes on that amount. Donors may not care, but it may be a data point that they use in evaluating whether to support that charity in the future.

While these safe harbors are unnecessary—reducing donors' deductions is enough to eliminate the federal subsidy for campaigning speech by public charities—they may be helpful in preventing any disruption of charitable contributions. With the safe harbors available, a public charity can, in advance, assure donors that their full charitable donations will be deductible, irrespective of what the charity itself chooses to do. At the same time, the safe harbors ensure that if public charities endorse or oppose candidates for office, the charities do not receive a subsidy for the money used to endorse the candidate.

D. The IRS and the New Johnson Amendment

While enacting these changes to the Johnson Amendment would solve several problems with the current version, it leaves open the question of whether the IRS would enforce the new Johnson Amendment. Would the IRS enforce these more modest penalties for politicking, or as in the current version, would the prohibition go unenforced? If the new Johnson

260. *Id.* at 132 ("[T]he charitable deduction is only available to itemizers.").

261. There are itemizers who make charitable contributions up and down the income ladder, even without the benefit of an itemized deduction. *See* C. Eugene Steuerle et al., *Designing an Effective and More Universal Charitable Deduction*, TAX POL'Y CTR. 2, 4 (Mar. 17, 2021), https://www.taxpolicycenter.org/sites/default/files/publication/161574/designing-an-effective-and-more-universal-charitable-deduction_0.pdf [https://perma.cc/8CLN-6Q53].

Amendment is not enforced and amounts to a mere norm followed by some tax-exempt organizations but ignored by others, there is little value in going through the effort of creating new legislation.

There are reasons to believe that the IRS would be more likely to enforce the new Johnson Amendment, though. Two major impediments to the enforcement of the existing regime seem to be the IRS's finite enforcement resources and the unpopularity of revoking tax exemptions.[262]

And why would the new Johnson Amendment be different? In the first instance, enforcement would not provide less revenue to the government; revenue would likely *increase*. Loss of exemption, it turns out, in many cases would not result in substantively more revenue.[263] In many cases, loss of tax exemption effectively represents the death knell of a charitable organization.[264] If revoking an organization's tax exemption causes it to cease operations, revocation will not create additional taxable income because the organization will stop engaging in activities that could create taxable income altogether. Moreover, even if an organization continued to function after losing its exemption, it would not necessarily pay more in taxes. Nonexempt entities can deduct their "ordinary and necessary" business expenses, which reduces the amount of taxes they owe.[265]

By contrast, the new Johnson Amendment would disallow a portion of current charitable deductions made by donors. Disallowing a portion of donors' charitable deductions would provide additional revenue to the government that could help fund the law's enforcement.

Critically, this type of regime also corrects the draconian nature of the current Johnson Amendment. Nobody *enjoys* IRS enforcement actions, and the IRS always risks criticism when it focuses on enforcement.[266] But this type of enforcement—disallowing deductions—fits within the ordinary

262. *See supra* notes 187-194 and accompanying text.

263. *See supra* note 12 and accompanying text.

264. *See, e.g.*, Jennifer M. Smith, *Morse Code, Da Vinci Code, Tax Code and . . . Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches*, 23 J.L. & POL. 41, 50 (2007) ("[T]he loss of tax-exempt status for any church is potentially fatal.").

265. I.R.C. § 162(a) (2018).

266. Joshua D. Blank & Leigh Osofsky, *Democratic Accountability and Tax Enforcement*, 61 HARV. J. ON LEGIS. 251, 255 (2024) ("These realities of tax enforcement put the IRS in a difficult position: the IRS must focus its enforcement resources, but doing so places the IRS at risk of criticism for targeting.").

scope of the IRS's administrative duties.[267] Disallowing some or all of a charitable deduction does not represent a death knell for a charitable organization and would not strike the general public as a draconian penalty. Moreover, if a tax-exempt organization made the safe harbor election and then violated it, revoking the organization's election feels more expected, and thus more justified.

The new Johnson Amendment, then, not only allows for a more targeted approach to the problem of subsidized political endorsements; it largely solves the problems that currently impede IRS enforcement of the Johnson Amendment, shifting enforcement from the unusual and extreme into the ordinary and quotidian.

V. FREE SPEECH AND POLITICAL CONDUITS

As discussed above, one of the underlying motivations for this Article's rethinking of the Johnson Amendment is the concern that the current regime, which requires that a violator lose its tax exemption, violates the Free Speech Clause of the First Amendment.[268] Would these changes solve the potential First Amendment problems? And if they did, does the changed regime risk pulling all public charities within the orbit of political entities? In other words, will the new Johnson Amendment allow public charities to become political actors first, at the expense of their charitable mission?

I believe that the answers are, respectively, yes and no. With regard to the first question, the new regime would only be subject to rational-basis review, thereby complying with even the strictest reading of the First Amendment. And on the second and third questions, § 501(c)(3) of the Internal Revenue Code has a backstop that would ensure that public charities do not transform into conduits for donor money.

A. Core Political Speech Under the New Johnson Amendment

Nothing about changing the Johnson Amendment would change the fact that endorsing and opposing candidates for office constitutes core political speech, which receives the highest constitutional protection.[269] But

267. *See, e.g.*, I.R.S. Notice 2004-41, 2004-1 C.B. 31 ("In appropriate cases, the Service will disallow deductions for conservation easement transfers if the taxpayer fails to comply with the substantiation requirements.").

268. *See supra* Part II.

269. *See supra* notes 80-82 and accompanying text.

changing the Johnson Amendment from a disqualification regime to one targeted specifically at eliminating subsidies should have no problem satisfying the constitutional limitations.

Critically, the Supreme Court has held that when the government denies a subsidy for core political speech, it does not infringe on that speech.[270] Instead, the denial of a subsidy merely requires the speaker to bear the full cost of their speech.[271] That standard has been fully and clearly upheld in the context of the tax law's denial of a deduction for campaigning speech.[272]

The current regime penalizes a public charity for its core political speech. While no organization has the right to be exempt from tax, the Supreme Court has recognized that denying an exemption *as a result of an organization's speech* "is in effect to penalize them for such speech."[273] But again, refusing to subsidize speech is different from penalizing speech.[274]

The regime I propose is designed and targeted solely to eliminate the subsidies that public charities would otherwise receive for their campaigning actions and expenditures. By targeting subsidies rather than tax exemptions, courts would not apply strict scrutiny in analyzing the constitutionality of the new Johnson Amendment. [275] Without any infringement on speech rights, courts apply a rational-basis review. [276] Rational-basis review is highly deferential to the government: To uphold the state action, a court need only find a "reasonably conceivable state of facts" that justifies the law.[277] To win a challenge to a law evaluated under the

270. Miriam Galston, *When Statutory Regimes Collide: Will* Citizens United *and* Wisconsin Right to Life *Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867, 892 (2011).

271. *Id.*

272. Cammarano v. United States, 358 U.S. 498, 513 (1959).

273. Speiser v. Randall, 357 U.S. 513, 518 (1958).

274. Regan v. Tax'n With Representation of Wash., 461 U.S. 540, 549 (1983).

275. *Id.* ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.").

276. Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 359 (2009) ("Given that the State has not infringed the unions' First Amendment rights, the State need only demonstrate a rational basis to justify the ban on political payroll deductions.").

277. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993). Moreover, it is unnecessary that the legislature actually considered the reasonably conceivable state of facts that the court found. Goodpaster v. City of

rational-basis test "is a heavy legal lift for the challengers."[278] (One commentator has characterized rational-basis review as "scarcely amount[ing] to any review at all."[279])

If a public charity were to challenge this proposal, then, courts would apply the rational-basis test. And Congress has a reasonable and rational desire to deny subsidies to political campaigning. It has made that desire clear, both in the enactment of the Johnson Amendment in 1954 (albeit without any legislative history[280]) and in its denial of a deduction for campaign contributions. The legislative history of the Code's denial of a deduction for campaigning expenses does not actually address the reason for that denial; rather, it focuses on the concurrently enacted denial of a deduction for expenses related to legislative matters.[281] And the Senate's explanation for the provision does not focus on its desire not to subsidize political speech. Rather, the Senate Report highlights "administrative and enforcement problems and uncertainties" that the government and taxpayers faced under prior law.[282]

Still, there is a long history of the federal government refusing to subsidize political campaign expenses by tax-exempt *and* for-profit entities. And the rational-basis test does not require either that legislation have a long history or that the government explicitly lay out its goals. The fact that the government does not want to subsidize political speech and that such non-subsidy does not offend the constitution[283] is enough to uphold the new tax regime.

Ultimately, shifting from the current exemption-revoking Johnson Amendment to this new Johnson Amendment would balance free speech interests with the public's desire not to subsidize certain political speech. Public charities that wanted to weigh in on political campaigns could do so

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Indianapolis, 736 F.3d 1060, 1072 (7th Cir. 2013) ("The actual motivation (or lack thereof) behind the legislation is immaterial.").

278. Ind. Petrol. Marketers & Convenience Store Ass'n v. Cook, 808 F.3d 318, 322 (7th Cir. 2015).

279. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1290 n.137 (2007).

280. James, *supra* note 39, at 382 (describing the absence of legislative history).

281. S. REP. NO. 87-1881, at 21 (1962).

282. *Id.* at 22.

283. Chisolm, *supra* note 52, at 322 ("A simple government decision not to subsidize speech—even political speech—does not compromise the First Amendment rights of the speaker.").

without fear of potentially losing their tax exemption. At the same time, if they chose to do so, public charities would be required to go through a potentially onerous process of calculating how much they spent on campaign interventions. The onerous nature of this calculation should, on the margin, make it more expensive to intervene and discourage public charities from making interventions unless they consider such political speech truly important. That should satisfy individuals who, in the absence of the First Amendment, would prefer a blanket ban on political involvement as well as those charities that do not want to face pressure to intervene. And ultimately, there would be no actual penalty for intervention: The public charities' donors—and perhaps the public charity itself—would merely have to pay taxes on the amount that went into campaigning activities.

B. A Conduit for Political Donations

While the major justification for limiting the ability of public charities to engage in campaigning is to prevent the subsidy of these political expenditures, it is not the only concern people have. An important secondary concern is that large donors could use public charities as a conduit for supporting candidates they endorse.[284] My proposed new Johnson Amendment solves part of the conduit problem: Disallowing that portion of charitable deductions that corresponds to a charity's campaign spending would mean that a donor could not transform a nondeductible political expense into a deductible one by laundering it through a charity.

But donors with enough clout (and big enough wallets) could pressure charities they support to support their preferred candidates.[285] Even

284. Johnny Rex Buckles, *Is the Ban on Participation in Political Campaigns by Charities Essential to Their Vitality and Democracy? A Reply to Professor Tobin*, 42 U. RICH. L. REV. 1057, 1118 (2008) ("One is the concern that, in the absence of the ban, charities could be used as conduits to channel political contributions to further private interests.").

285. Even very wealthy public charities can cave to donor pressure. For instance, in the wake of accusations that the University of Pennsylvania failed to sufficiently combat antisemitism, donors pushed (successfully) for the ouster of university president M. Elizabeth Magill and chairman of the board of trustees Scott L. Bok. Stephanie Saul, Alan Blinder, Anemona Hartocollis & Maureen Farrell, *Penn's Leadership Resigns Amid Controversies over Antisemitism*, N.Y. TIMES, https://www.nytimes.com/2023/12/09/us/university-of-pennsylvania-

without federal subsidies, a public charity could effectively multiply an individual's donation; it has a pool of other donors' money to draw on in addition to a politically active donor's. And it is not just donors who might twist arms: Some charitable organizations worry that, without a backstop, politicians themselves would pressure charities to support their campaigns.[286] Many charities would prefer to focus on their charitable missions and not become conduits for political donations.[287] The risk of losing their exemption provides public charities with a justification for declining to comply with donor and politician pressure to support or oppose candidates for office.[288]

Eliminating the current iteration of the Johnson Amendment, with its (theoretically) mandatory loss of exemption, provides space for public charities to legitimately support and oppose candidates for office. Loss of the federal subsidy takes away the financial advantage of using a public charity as a conduit for political deductions, but that may not be politically involved donors' only motivation. While the new rule eliminates the *federal*

president-resigns.html [https://perma.cc/72BU-7SKC] (Dec. 11, 2023). The University of Pennsylvania should be better shielded from the whims of donors than many, if not most, public charities. According to its Form 990, at the end of 2021 it had more than $24.6 billion in net assets. *Form 990: Return of Organization Exempt from Income Tax*, TRS. OF THE UNIV. OF PA. (2021), https://projects.propublica.org/nonprofits/organizations/231352685/202321459349300747/full [https://perma.cc/2YTG-CYZW]. The university received almost $2 billion in donations and grants, suggesting that no individual donor should be able to impose too much pressure. *See Form 990*, *supra*. Moreover, its program service revenue, which does not depend on the good graces of donors, was over triple its revenue from donors. *Form 990, supra*. Yet all of this wealth and these diversified streams of revenue did not ultimately protect the university from donor pressure.

286. Tom Gjelten, *Another Effort to Get Rid of the 'Johnson Amendment' Fails*, NPR (Mar. 22, 2018), https://www.npr.org/2018/03/22/596158332/another-effort-to-get-rid-of-the-johnson-amendment-fails [https://perma.cc/ZXY4-K525].

287. *Id.* (noting that a recent effort to repeal Johnson Amendment "ran into stiff opposition from nonprofit organizations and many church groups who said that without the amendment they would face pressure from politicians seeking endorsements").

288. Samuel D. Brunson & Philip T. Hackney, *A More Capacious Conception of Church*, 56 LOY. L.A. L. REV. 1135, 1160 (2023) (arguing that the Johnson Amendment "provide[s] some space for good-faith actors to decline to participate in politics").

subsidy, as long as the public charity had other donors, it could effectively subsidize the donor's desired donation. Any amount it spent on political actions would come not only from the politically involved donor's money, but from other donor contributions, too.

Still, even if a charity were willing to bear the administrative costs and potential reputational harm with donors that political action would entail, current law has a ceiling on the amount of endorsing or opposing that public charities can do. To qualify as exempt, the Code requires a charity to operate "exclusively" for one or more enumerated purposes.[289] Treasury regulations relax the exclusivity requirement, but only allow an "insubstantial" portion of a charity's activities to be "in furtherance of" anything other than "an exempt purpose."[290]

The Code and the Treasury regulations lay out seven qualifying exempt purposes.[291] None of the enumerated exempt purposes includes electoral politics.[292]

In fact, the Treasury regulations make clear that lobbying, endorsing candidates, and any other type of political activities do not constitute qualifying exempt purposes.[293] As such, even if the law allowed public charities to endorse or oppose candidates for office, that political activity would belong in the basket of nonexempt activities. A public charity could only engage in an insubstantial amount of all of those nonexempt purposes put together.[294] And what constitutes an "insubstantial" amount of nonexempt activity? The Code itself does not answer this question, but the Sixth Circuit has held a charity's political actions to be insubstantial where less than 5% of its activities constituted influencing politics.[295] At the same time, the former United States Court of Claims held that a charity that

289. I.R.C. § 501(c)(3) (2018).

290. Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 2017).

291. I.R.C. § 501(c)(3) (2018); Treas. Reg. § 1.501(c)(3)-1(d)(1) (as amended in 2017) (defining exempt purposes to include religious, charitable, scientific, testing for public safety, literary, educational, and prevention of cruelty to children or animals).

292. *See* I.R.C. § 501(c)(3) (2018); Treas. Reg. § 1.501(c)(3)-1(d)(1) (as amended in 2017).

293. Treas. Reg. § 501(c)(3)-1(c)(3) (as amended in 2017).

294. Brunson, *supra* note 38, at 144.

295. *Id.* (citing Seasongood v. Comm'r, 227 F.2d 907, 912 (6th Cir. 1955)).

allocated between 16% and 20% of its annual expenditures toward influencing legislation failed the "no substantial part" test.[296]

With the new Johnson Amendment, this "insubstantial" test would become a more important backstop against public charities functioning as political conduits, and Congress or the Treasury Department may be well-advised to draw a bright line distinguishing "insubstantial" from "substantial." Congress is capable of doing this—in 1976, it enacted an elective regime that created objective dollar limitations for the lobbying expenditures of public charities that opted into the regime.[297] Congress could make this elective limit mandatory or could endorse a percentage limitation along the lines of the judicial decisions.

Whether or not Congress decides to create a bright-line limitation, though, under current law, public charities still face a ceiling on the amount of their activities and expenditures that can go toward campaigning. Even where those limitations are ambiguous, the "no substantial part" rule applies and will limit the ability of donors and politicians to fully co-opt public charities and transform them into purely political entities.

That is not to say that public charities will face no pressure to engage in campaigning activities; my proposal provides an explicit space where they can do precisely that. Whether or not the American public wants public charities to have any space to engage in partisan politics, the space created by my proposal ensures that public charities can exercise their core right to political speech. And the "no substantial part" rule ensures that public charities continue to spend the bulk of their effort pursuing exempt, not political, purposes.

CONCLUSION

In the seven decades it has been part of the tax law, the Johnson Amendment has stirred up significant controversy and inspired untold pages of scholarship. It has not, however, led to a significant amount of enforcement by the IRS. The IRS has not explained why it has chosen to underenforce the prohibition on tax-exempt organizations supporting or opposing candidates for office, but the underenforcement likely derives from at least two concerns. The first is the sheer magnitude of the revocation penalty. While the magnitude of that penalty may be justified where a tax-exempt organization uses significant amounts of its resources

296. *Id.* (citing Haswell v. United States, 500 F.2d 1133, 1146 (Ct. Cl. 1974)).

297. Jill S. Manny, *Nonprofit Legislative Speech: Aligning Policy, Law, and Reality*, 62 CASE W. RSRV. L. REV. 757, 769-70 (2012).

and activities to engage in electoral politics, it is harder to justify where campaigning activities are de minimis. Still, the current Johnson Amendment requires disqualification in either instance.

The second likely reason for underenforcement is the Johnson Amendment's questionable constitutionality. Supporting and opposing candidates is core political speech, and restrictions on core political speech are subject to the most stringent review courts traditionally perform.[298] The IRS may not wish to expend the resources or political capital necessary to impose a penalty that would be both unpopular and overturned by the courts.[299]

And yet there is broad agreement that the federal government should not subsidize campaigning activities, whether those activities are done by taxpayers or tax-exempt organizations.[300] But because enforcement of the current Johnson Amendment is sparse and likely unconstitutional, in the current world of tax-exempt organizations, good-faith public charities refrain from participating in electoral politics, even where they would prefer to exercise their core political speech, while bad-faith actors do what they want politically with subsidy and without penalty.[301]

Perhaps the law has been addressing the problem of tax-exempt organizations endorsing or opposing candidates for office in the wrong way. It has attempted to erect a wall to prevent public charities from entering the partisan political arena. But that wall has proven, for practical and constitutional purposes, untenable.

Instead of maintaining a wall that indirectly addresses the underlying problem with tax-exempt participation, then, Congress should directly address the problem. The problem is, we do not want to subsidize this type of electoral participation. But the Johnson Amendment is both over- and underinclusive in this regard.

It does not have to be. As I have demonstrated in this Article, Congress could narrowly tailor an updated Johnson Amendment to remove the subsidy. To do that, it would disallow a portion of donors' charitable deduction equivalent to the amount the charity spent on unsubsidized campaigning. It could also impose a tax, at the highest individual rate in

298. *See supra* notes 82-84 and accompanying text.

299. *Cf.* Richard Schmalbeck & Lawrence Zelenak, *The NCAA and the IRS: Life at the Intersection of College Sports and the Federal Income Tax*, 92 S. CAL. L. REV. 1087, 1114 (2019) ("The IRS has limited political capital even in the best of times . . . .").

300. *See supra* notes 55-57 and accompanying text.

301. Brunson & Hackney, *supra* note 288, at 1160-61.

effect at the time, directly on the public charity on the amount it spent on its campaigning activities, if it believes that tax exemption itself represents a subsidy.

This approach—removing a subsidy, but not punishing speech—would fit comfortably within the First Amendment. The loss of deduction and the tax on a portion of expenditures does not prevent or punish campaigning speech; it merely eliminates the federal subsidy for that speech. But a public charity that wanted to endorse or oppose a candidate for office and was willing to forgo this subsidy could still do so.

Replacing the current Johnson Amendment with an updated and targeted one would, in short, accomplish Congress's policy goals within the framework of the First Amendment. It would not encourage campaigning speech by public charities, but it would also not forbid that speech. Updating the Johnson Amendment would effectively close the door on seven decades of unnecessary controversy and allow both the IRS and public charities to focus on their respective duties and goals.

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