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LIGHTING THE WAY: THE JOHNSON AMENDMENT STANDS STRONG AGAINST DARK MONEY IN POLITICS

Whitney Untiedt*

I will get rid of and totally destroy the Johnson Amendment and allow our representatives of faith to speak freely and without fear of retribution. I will do that. Remember.

—President Donald J. Trump¹

Wrapping itself in the cloak of “religious freedom,” the current administration, supported by many conservative members of Congress, has overtly pursued repeal of the Johnson Amendment,² an oft-cited clause in the Internal Revenue Code that prohibits certain nonprofit organizations from endorsing political candidates or making campaign contributions.³ The consequences of deregulating the prohibition on tax-deductible political donations could imperil our country’s traditions of electoral process.

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¹ Elizabeth Landers, *Trump: I will ‘destroy’ Johnson amendment*, CNN (Feb. 2, 2017), <https://www.cnn.com/2017/02/02/politics/johnson-amendment-trump/index.html> (last visited Oct. 14, 2018). The full quotation, which is excerpted in the cited article, is contained in the accompanying video.

² See, e.g., Steve Scalise and Randy Weber, *Restoring religious liberty*, THE WASHINGTON TIMES (July 26, 2018), <https://www.washingtontimes.com/news/2018/jul/26/trump-leads-the-way-to-restore-religious-liberty-w/> (last visited Oct. 14, 2018); Remarks by Vice President Pence at the National Religious Broadcasters’ Annual Convention, Nashville, Tenn., (Feb. 27, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-national-religious-broadcasters-annual-convention/> (last visited Oct. 14, 2018); To restore the Free Speech and First Amendment rights of churches and exempt organizations by repealing the 1954 Johnson Amendment, H.R. 172, 115th Congress § 1 (2017).

³ 26 U.S.C. § 501(c)(3). The complete text of the applicable section states as follows: “Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”

The Johnson Amendment, Defined

The Johnson Amendment, named after its legislative sponsor then-Senator Lyndon B. Johnson, refers to statutory language adopted in 1954 providing that certain tax-exempt organizations may not “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”⁴ Sen. Johnson’s addition to H.R. 8300, a bill that was passed into law, adopted as the Internal Revenue Code of 1954, and codified at 26 U.S.C. § 501,⁵ was approved by the Republican-led Senate without discussion or debate.⁶

Importantly, the Johnson Amendment’s bar on intervention in political campaigns and legislative processes does not apply to all entities organized as nonprofits; only organizations created under subsection 501(c)(3) of the Code are constrained by the prohibition.⁷ To grasp the full implications of the Johnson Amendment—and of the efforts to repeal it—one must look past the punditry hype to understand which organizations and individuals are regulated and what activities are, and are not, constrained.

Political Restrictions Limited to 501(c)(3) Organizations

The Internal Revenue Services has established 27 types of nonprofit organizations that may be exempted from paying state or federal taxes.⁸ Recognized tax-exempt entities include labor organizations,⁹ teachers’ retirement funds,¹⁰ black lung trusts,¹¹ and civic leagues.¹² While all 27 types of nonprofits allow the entity itself to avoid taxation, only one organizational structure offers individual contributors a tax benefit: a 501(c)(3) “Religious, Educational, Charitable, Scientific, Literary, Testing for Public Safety, to Foster National or International Amateur Sports Competition, or Prevention of Cruelty to Children or Animals” organization.¹³ Contributions made to a qualifying 501(c)(3) organization carry a two-part benefit—they are not taxable as income

⁴ 26 U.S.C. § 501(c)(3).

⁵ An Act to revise the internal-revenue laws of the United States, H.R. 8300, 83rd Congress § 2 (1954).

⁶ 100 Cong. Rec. 9604 (1954).

⁷ See 26 U.S.C. § 501(c)(3).

⁸ 26 U.S.C. § 501(a); Tax-Exempt Status for Your Organization, United States Department of the Treasury Internal Revenue Service, Publication 557 (Rev. Jan. 2018), at 67-68.

⁹ 26 U.S.C. § 501(c)(5).

¹⁰ 26 U.S.C. § 501(c)(11).

¹¹ 26 U.S.C. § 501(c)(21).

¹² 26 U.S.C. § 501(c)(4).

¹³ 26 U.S.C. § 501(c)(3).

to the entity, and they may be deducted against the taxable income of the donor.¹⁴ While 501(c)(3) religious organizations have been at the forefront of the Johnson Amendment debate, it is important to understand that this section of the Code applies equally to nonprofit charities, private educational organizations including institutions of higher education, child and animal welfare organizations, and numerous other types of entities.

In order to qualify for and maintain 501(c)(3) status, a nonprofit organization must meet three requirements: “(1) it is organized and operated exclusively for an exempt purpose; (2) its net earnings do not inure to the benefit of any private shareholder or individual; and (3) its activities do not... attempt[] to influence legislation.”¹⁵ Although unsubstantial or incidental activities in support of a non-exempt purpose may not encumber an entity’s 501(c)(3) status, “[o]ne substantial non-exempt purpose will make an organization ineligible for tax-exempt status, even if all of its other purposes are exempt.”¹⁶ In keeping with these requirements, qualifying organizations must refrain from overtly attempting to influence legislation and from endorsing or making financial contributions to—or in opposition to—a political candidate, in exchange for receiving the two-fold tax benefit under 501(c)(3).

However, the Johnson Amendment does not prohibit *all* politically-related activity of a 501(c)(3) entity. The Internal Revenue Service has provided guidance on some types of nonpartisan “voter education” activities that do not violate the Johnson Amendment, including publishing legislators’ voting records and candidate questionnaire responses without commentary that may indicate the bias of the organization,¹⁷ broadcasting reasonable and equal air time to candidates for public office,¹⁸ providing public forums for lectures on

¹⁴ 26 U.S.C. § 501(a); 26 U.S.C. § 170(c).

¹⁵ *Family Trust of Mass., Inc. v. United States*, 892 F.Supp.2d 149, 155 (D.D.C.2012) (quoting *Church of Visible Intelligence The Governs the Universe v. United States*, 4 Cl.Ct. 55, 61 (1983)). The third element of the operational test, that qualifying entities may not participate in the political process, incorporates the Johnson Amendment language. Courts have consistently held that “[b]ecause the requirements are stated in the conjunctive they *all* must be met.” *Educational Assistance Foundation for the Descendants of Hungarian Immigrants in the Performing Arts, Inc., v. United States*, 111 F.Supp.3d 34, 39 (2015) (quoting *Easter House v. United States*, 12 Cl.Ct. 476, 483 (1987), *aff’d*, 846 F.2d 78 (Fed.Cir. 1988)) (emphasis in original); 26 C.F.R. § 1-501(c)(3)-1.

¹⁶ *Church of Spiritual Technology v. United States*, 26 Cl.Ct. 713, 730 (1992) (citing *Better Business Bureau v. United States*, 326 U.S. 279, 283, 66 S.Ct. 112, 114, 90 L.Ed. 67 (1945)).

¹⁷ Rev. Rul. 78-248, 1978-1 C.B. 154.

¹⁸ Rev. Rul. 74-574, 1974-2 C.B. 160.

political issues,¹⁹ and conducting public candidate debates.²⁰ Additionally, many 501(c)(3) nonprofits, including religious organizations, regularly participate in voter registration drives, lobby lawmakers, and take public positions on social and political “hot button” causes—none of which jeopardizes their tax-exempt status.

Further, the Code does not prohibit a 501(c)(3) entity from forming a separate but related nonprofit, such as a 501(c)(4) advocacy corporation,²¹ which is not constrained by the Johnson Amendment language—but which does not create a tax benefit for financial contributors. Indeed, this type of structure is common among politically-interested organizations on both the “left” and the “right” of the spectrum,²² with the advocacy corporations regularly contributing to political discourse through words, actions, and monetary donations that the charitable entities cannot undertake.²³

Constitutional Application of the Johnson Amendment

While the Supreme Court’s evolving interpretation of the First Amendment as applied to corporate entities has chipped away at federal regulation of political spending by nonprofit organizations,²⁴ the Johnson Amendment language applicable to 501(c)(3) organizations has been uniformly upheld by the courts.

While the Court has found that the government does not have a compelling interest that justifies infringement of a corporate entity’s political speech

¹⁹ Rev. Rul. 66-256, 1966-2 C.B. 210.

²⁰ Rev. Rul. 86-95, 1986-2 C.B. 73; *see also Fulani v. League of Women Voters Educ. Fund*, 684 F.Supp. 1185, 1194 (S.D.N.Y. 1988) (holding in part that the League of Women Voters did not violate its tax-exempt status by hosting primary debates that limited participation to only qualified candidates affiliated with the Democratic or Republican party).

²¹ 26 U.S.C. § 501(c)(4).

²² For example, the American Civil Liberties Union, incorporated as a 501(c)(4) entity that may accept non-deductible contributions, has established the American Civil Liberties Union Foundation as a 501(c)(3) organization that offers tax deductions for donations; the National Rifle Association operates a host of interrelated 501(c)(3) and 501(c)(4) organizations, each with a purpose that comports with the controlling section of the Code.

²³ *See FEC v. Beaumont*, 539 U.S. 146, 149 (2003), overruled on other grounds by *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010). In *Beaumont*, the Court recognized that 501(c)(4) organizations can and do establish funds for political action committees that may be legally “controlled by the sponsoring corporation, whose employees and stockholders or members generally may be solicited for contributions.”

²⁴ *See Citizens United*, 558 U.S. at 319, 130 S. Ct. at 886 (overruling *McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003) and *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990)); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263, 107 S. Ct. 616, 630, 93 L. Ed. 2d 539 (1986).

generally, such holdings have been issued in cases involving nonprofits organized under 501(c)(4)²⁵—not 501(c)(3). To date, cases involving 501(c)(3) entities, including educational organizations and churches, have repeatedly held that enforcement of the Code’s requirements for obtaining and maintaining tax-exempt status does not violate the Constitution.²⁶

In 1983, the Supreme Court rebuked a claim by two religiously-affiliated universities that their written policies endorsing institutional racial discrimination were protected by the First Amendment, because, the schools argued, they “engage[d] in racial discrimination on the basis of sincerely held religious beliefs.”²⁷ In upholding the Internal Revenue Service’s revocation of the organizations’ 501(c)(3) status, the Court found that the discrimination violated “deeply and widely accepted views of elementary justice” that racism must be eradicated in education.²⁸ The Court acknowledged that revocation of donor tax benefits would impact the schools’ funding, but reasoned that such action does not prevent or prohibit the observation of protected religious beliefs.²⁹

Seventeen years later, the D.C. Circuit took up the question of whether 501(c)(3) status revocation infringed upon an organization’s constitutionally-protected religious freedom.³⁰ In *Branch Ministries*, an Arkansas church took out newspaper advertisements urging Christians not to vote for then-candidate Bill Clinton in the 1992 presidential election³¹—a direct violation of the Johnson Amendment prohibition against political influence. The circuit court handily dispensed of the church’s assertions that its constitutional rights had been infringed and its voice chilled on the basis of religious discrimination; rather, the court held that the government’s action was precipitated by the organization’s flagrant participation in campaign politics.³² Further, where “[t]he sole effect of the loss of the tax exemption will be to decrease the amount of money available to the Church for its religious practices,” the government’s

²⁵ Both Citizens United and Massachusetts Citizens for Life, Inc., are registered with the Internal Revenue Service as 501(c)(4) entities. However, both organizations also operate separate 501(c)(3) charitable foundations, which were not the subject of the litigation cited *supra* note 24.

²⁶ See *Branch Ministries v. Rossotti*, 211 F.3d 137, 143-44, 341 U.S.App.D.C. 166, 172-73 (2000) (affirming *Branch Ministries v. Rossotti*, 40 F.Supp.2d 15 (D.D.C. 1999)); *Bob Jones University v. United States*, 461 U.S. 574, 604, 103 S.Ct. 2017, 2035, 76 L.Ed.2d 157 (1983).

²⁷ *Bob Jones University*, 461 U.S. at 602-3, 103 S.Ct. at 2034.

²⁸ *Id.* at 592, 103 S.Ct. at 2029.

²⁹ *Id.* at 603-4, 103 S.Ct. at 2035.

³⁰ *Branch Ministries*, 211 F.3d at 142, 341 U.S.App.D.C. at 172.

³¹ *Id.* at 139, 341 U.S.App.D.C. at 168.

³² *Id.* at 142, 241 U.S.App.D.C. at 171.

action is “not constitutionally significant” and does not overstep the organization’s First Amendment protections.³³

In each of these instances, the courts recognized that the organizations could legally and without violation of the Johnson Amendment create a related 501(c)(4) entity for the purpose of direct participation in political discourse.³⁴ So long as the organizations have an available alternative means of contributing their voices to the political debate, courts have consistently held that the Johnson Amendment passes constitutional muster.³⁵

Repercussions of Repealing the Johnson Amendment

To claim that religious leaders are hamstrung by the Johnson Amendment³⁶ is at best misinformed—and at worst, purposefully disingenuous. Though no proponent of repeal has publicly acknowledged as such, it certainly appears likely that at least one driving force behind the effort is to create a scheme in which unregulated “dark money”³⁷ contributions to candidates and PACs can be funneled through 501(c)(3) organizations that offer tax deductions to donors. In effect, the existence of tax-deductible political donations would place the ultimate burden for financing campaigns on taxpayers themselves³⁸ - to the tune of an estimated \$2.1 *billion* in lost revenue.³⁹

The very purpose of the Johnson Amendment is, as the Supreme Court has recognized, not to place limits on the free exercise of speech and religion, but

³³ *Id.* (citing *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 391, 110 S.Ct. 688, 696, 107 L.Ed.2d 796 (1990); *Hernandez v. Commissioner*, 490 U.S. 680, 700, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989)) (internal quotations omitted).

³⁴ *See, e.g., Branch Ministries*, 211 F.3d at 143, 241 U.S.App.D.C. at 172; *FCC v. League of Women Voters*, 468 U.S. 364, 400, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984); *Regan v. Taxation With Representation*, 461 U.S. 540, 552–53, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) (Blackmun, J., concurring).

³⁵ *See Branch Ministries*, 211 F.3d at 143; *League of Women Voters*, 468 U.S. at 400.

³⁶ *See, e.g., Michael Burke, Trump falsely claims he got rid of law banning churches from endorsing candidates: report*, THE HILL (August 28, 2018), <https://thehill.com/homenews/administration/404053-trump-falsely-told-evangelical-leaders-he-got-rid-of-law-banning> (President Trump was quoted in Michael Burke’s report, stating, “The Johnson Amendment has blocked our pastors from speaking their minds from their own pulpit. If they want to talk about Christianity, if they want to preach or talk about politics, they’re unable to do so.” These statements are patently and provably untrue.).

³⁷ *Dark money*, Merriam-Webster.com Dictionary, (<https://www.merriam-webster.com/dictionary/dark%20money>) (The term dark money refers to “money contributed to nonprofit organizations (especially those classified as social welfare organizations and business leagues) that is used to fund political campaigns without disclosure of the donors’ identities.”).

³⁸ *Bob Jones University*, 461 U.S. at 591.

³⁹ *Markup of the Tax Cuts and Jobs Act*, YOUTUBE (Nov. 6, 2017), <https://www.youtube.com/watch?v=8rUjwgqNyMY&feature=youtu.be&t=54m39s> (Testimony of Thomas A. Barthold, Chief of Staff of the Joint Committee on Taxation, before the United States House of Representatives Committee on Ways and Means).

rather to require nonprofit organizations “to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code.”⁴⁰ That rationale certainly seems fair, no? A significant majority of Americans thinks so; in an Associated Press-NORC Center for Public Affairs poll conducted in August 2018, only 13% of respondents favored “allowing religious leaders to endorse candidates while retaining their tax exempt status”—as compared to 57% who opposed the proposition, including 38% who voiced strong opposition.⁴¹ The National Association of State Charities Officials,⁴² an alliance of 99 religious and denominational organizations incorporated under 501(c)(3),⁴³ and more than 5,800 charitable nonprofits and foundations⁴⁴ have sent letters to Congress urging lawmakers to protect the Johnson Amendment from repeal and cautioning against exploiting religious and charitable institutions as “another cog in a political machine or another loophole in campaign finance laws.”⁴⁵

Deregulation of the Johnson Amendment protection against political interference by tax-exempt organizations could cost the American public, taxpayers, and the electoral system even beyond what is readily accountable—trust in our system of government could be eroded beyond repair if politically-motivated donors are allowed to claim tax deductions for campaign and PAC contributions, and nonprofits may be forced to redirect significant funds from mission-driven purposes to political spending in order to retain the favor of lawmakers.

Do we want an America where Habitat for Humanity builds homes for low-income families, or builds a war chest for presidential campaigns? Where World Day of Prayer USA funds programs for survivors of human trafficking, or funds the campaigns of Congressional incumbents? Where the Partnership for

⁴⁰ *Cammarano v. United States*, 358 U.S. 498, 513, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959).

⁴¹ *The August 2018 AP-NORC Center Poll*, The Associated Press-NORC Center for Public Affairs Research (2018).

⁴² Letter from National Associate of State Charities Officials to U.S. House of Representatives Speaker Paul Ryan et al (Aug. 23, 2017), available at <https://www.givevoice.org/sites/default/files/NASCO%20Letter%20to%20Congressional%20Leaders%20re%20Johnson%20Amendment%208.23.2017.pdf>.

⁴³ Letter from Religious Organizations to U.S. House of Representatives Speaker Paul Ryan et al (Apr. 4, 2017), available at <http://bjconline.org/wp-content/uploads/2017/04/Letter-from-faith-groups-opposing-politicization-of-houses-of-worship.pdf>.

⁴⁴ Letter from Nonprofit Organizations to U.S. House of Representatives Speaker Paul Ryan et al (Oct. 1, 2018), available at <https://www.givevoice.org/sites/default/files/community-letter-in-support-of-nonpartisanship-5-12-update.pdf>.

⁴⁵ Letter from Religious Organizations U.S. House of Representatives Speaker Paul Ryan et al (April 4, 2017), available at <https://bjconline.org/wp-content/uploads/2017/04/Letter-from-faith-groups-opposing-politicization-of-houses-of-worship.pdf>.

America's Children advocates for at-risk youth, or advocates for a third-party gubernatorial candidate? Common sense and the Constitution accept the Johnson Amendment's reasonable restrictions on the use of tax-deductible donations—and deregulation is a dangerous proposition indeed.