

**THOU SHALT NOT ELECTIONEER: RELIGIOUS NONPROFIT POLITICAL ACTIVITY AND THE THREAT  
“GOD PACS” POSE TO DEMOCRACY AND RELIGION**

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INTRODUCTION

One month before the 2014 midterm elections, Dr. Jim Garlow, the pastor of Skyline Church in La Mesa, California, broke the law. At his Sunday church service, Garlow endorsed Democratic U.S. Congressman Scott Peters in California’s Fifty-Second Congressional District over his openly gay Republican opponent Carl DeMaio.<sup>1</sup> “[Y]ou cannot have the advancing of the radical homosexual agenda and religious liberty at the same time, in the same nation,” Garlow explained to his congregation.<sup>2</sup> While DeMaio shared many of the pastor’s ideological positions, Garlow instructed his congregants to either support the Democratic incumbent or abstain from the election, warning that a DeMaio victory would mark the vanguard of a socially liberal Republican Party and the absence of a political home for Evangelical Christians.<sup>3</sup>

As a condition of tax-exempt status under Internal Revenue Code § 501(c)(3), houses of worship—like all charitable organizations—may not “participate in, or intervene in . . . any political campaign.”<sup>4</sup> A spiritual leader’s endorsement of a congressional candidate from the pulpit is a textbook violation of this tax-code provision,<sup>5</sup> known as the “electioneering prohibition.” As part of an initiative called Pulpit Freedom Sunday, Garlow delivered his sermon in an act of civil disobedience, joining with other faith leaders in a coordinated effort to publicly flaunt the law and protest what they view as unconstitutional infringement of religious liberty and freedom of expression. Since 2008, over 3,800 pastors have participated in Pulpit Freedom Sunday.<sup>6</sup> Participating pastors send copies of their sermons to the IRS, hoping to challenge the law’s validity in court.<sup>7</sup> Pulpit Freedom Sunday participants do not disguise their intentions. Garlow, for example, concluded his 2014 Pulpit Freedom Sunday sermon by saying, “[I]f, by chance, a member of the IRS gets this sermon and is listening, sue me.”<sup>8</sup> More than ever

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<sup>1</sup> Tamara Audi, *Preaching Politics, Pastors Defy Ban*, WALL ST. J., Oct. 6, 2014, at A6.

<sup>2</sup> SkylineChurch, *Skyline Church: October 5, 2014*, VIMEO (Oct. 6, 2014, 9:31 PM), <http://vimeo.com/108190109> [<http://perma.cc/4X5V-WGFB>] (quotation at 47:43).

<sup>3</sup> *Id.*

<sup>4</sup> I.R.C. § 501(c)(3) (2012).

<sup>5</sup> See I.R.S. News Release FS-2006-17 (Feb. 2006), <http://www.irs.gov/uac/Election-Year-Activities-and-the-Prohibition-on-Political-Campaign-Intervention-for-Section-501%28c%29%283%29-Organizations> [<http://perma.cc/8BUL-DXHQ>].

<sup>6</sup> Press Release, Alliance Defending Freedom, Pulpit Freedom Participation Exceeds 1,800 Pastors, Continues Through Election Day (Oct. 10, 2014), <http://www.adfmedia.org/News/PRDetail/?CID=81033> [<http://perma.cc/JFH8-9YEZ>].

<sup>7</sup> ALLIANCE DEFENDING FREEDOM, PULPIT FREEDOM SUNDAY: FREQUENTLY ASKED QUESTIONS AND COMMON OBJECTIONS 4 (Aug. 15, 2014), <http://alliancedefendingfreedom.org/content/campaign/2014/Pulpit-Freedom-Sunday/Resources/PFS-Recruiting-Packet.pdf> [<http://perma.cc/3534-LPCX>] (“[I]f a pastor is punished for something he says during a sermon, Alliance Defending Freedom will bring a lawsuit to protect the constitutional rights of the pastor and the church with the hope of having the Johnson Amendment declared unconstitutional.”).

<sup>8</sup> SkylineChurch, *supra* note 2 (quotation at 54:30).

before, Garlow and other opponents of the electioneering prohibition may stand poised to realize their goals. Recent Supreme Court decisions lifting restrictions on political speech<sup>9</sup> and granting religious exemptions to facially neutral laws<sup>10</sup> situate the electioneering prohibition at the epicenter of tectonic jurisprudential shifts.

Left-leaning religious entities also chafe under the restrictions imposed by the electioneering prohibition. In the aftermath of the 2004 presidential election, for example, the IRS launched an investigation against All Saints Episcopal Church in Pasadena, California after its rector, Reverend Ed Bacon, delivered an antiwar sermon two days before the election.<sup>11</sup> Bacon did not explicitly endorse a candidate, but depicted Jesus moderating a presidential debate and reprimanding President George W. Bush by saying, “Mr. President, your doctrine of preemptive war is a failed doctrine. Forcibly changing the regime of an enemy that posed no imminent threat has led to disaster.”<sup>12</sup> Ultimately, the IRS concluded its investigation without penalizing the church but reiterated its position that the church had violated the law.<sup>13</sup> In opposing the investigation, Bacon warned, “If the IRS prevails, it will have a chilling effect on the practice of religion in America.”<sup>14</sup>

Despite conflict between the government and both progressive and conservative religious entities over the electioneering prohibition, the Supreme Court has never examined its legality. The Tenth Circuit upheld the provision under the Free Exercise Clause, holding that the “overwhelming and compelling Governmental interest . . . [in] guarantying that the wall separating church and state remain[s] high and firm” justifies any burden imposed by conditioning tax-exempt status on nonintervention in political campaigns.<sup>15</sup> More recently, the D.C. Circuit upheld the provision under the Religious Freedom Restoration Act (RFRA), a statute that requires courts to apply strict scrutiny to facially neutral federal laws that substantially burden the free exercise of religion.<sup>16</sup> The court held that the electioneering prohibition does not trigger RFRA scrutiny because it does not substantially burden the free exercise of religion.<sup>17</sup>

But since courts last examined the provision, the Supreme Court has invalidated both state<sup>18</sup> and federal<sup>19</sup> laws barring corporations from intervening in electoral politics. These laws resemble the electioneering prohibition in substance, if not underlying rationale.<sup>20</sup> Additionally, the Supreme Court granted closely held corporations RFRA exemptions from the Patient Protection and Affordable Care Act

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<sup>9</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam); *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>10</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>11</sup> Louis Sahagun, *Sermon Moves IRS to Act*, L.A. TIMES, Sept. 16, 2006, at A1.

<sup>12</sup> Patricia Ward Biederman & Jason Felch, *Antiwar Sermon Brings IRS Warning*, L.A. TIMES, Nov. 7, 2005, at A1.

<sup>13</sup> Sam Kim, *IRS Ends Two-Year Probe of California Church’s Anti-War Sermon*, CTR. FOR EFFECTIVE GOV’T (Sept. 25, 2007), <http://www.foreffectivegov.org/node/3451> [<http://perma.cc/6FRU-95RF>].

<sup>14</sup> Sahagun, *supra* note 11.

<sup>15</sup> *Christian Echoes Nat’l Ministry, Inc. v. United States*, 470 F.2d 849, 857 (10th Cir. 1972).

<sup>16</sup> Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb-1 (2012). For an explanation of the legal standard imposed by RFRA, see *infra* note 58 and accompanying text.

<sup>17</sup> *Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C. Cir. 2000).

<sup>18</sup> *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam).

<sup>19</sup> *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

<sup>20</sup> *Compare* 2 U.S.C. § 441b (2012) (recodified at 52 U.S.C. § 30118), *invalidated by Citizens United*, 558 U.S. at 310, *and* MONT. CODE ANN. § 13-35-227 (2010), *invalidated by Am. Tradition P’ship*, 132 S. Ct. at 2490, *with* I.R.C. § 501(c)(3) (2012).

(ACA)'s contraceptive mandate in *Burwell v. Hobby Lobby Stores, Inc.*, according substantial deference to the companies' characterization of the burden the law imposed on religious practice<sup>21</sup> and undercutting the reasoning used most recently to uphold the electioneering prohibition.<sup>22</sup>

Neither the Tenth Circuit nor the D.C. Circuit closely examined the purpose of the electioneering ban or weighed the importance of its goals against free exercise values. A more pointed exploration of the issue offers an interesting example of the delicate legal balance required when governmental interests and religious practice intersect. From the earliest days of the republic, religion has played a crucial role in American civic life. Alexis de Tocqueville described religion as a salve to the isolation and uncertainty inherent in individual liberty<sup>23</sup> and as a force capable of encouraging free people to forgo self-interest in favor of the collective good.<sup>24</sup> On the other hand, Thomas Jefferson and James Madison recognized the capacity of religion, especially when supported by the machinery of the state, to be a destructive source of division antithetical to democratic principles.<sup>25</sup>

Today, public opinion exhibits the same ambivalence. Religion plays an undeniable and important role in spurring many citizens to social consciousness and action. About two-thirds of Americans believe houses of worship contribute to solving important social problems, and more than three-quarters believe that such institutions strengthen morality in society.<sup>26</sup> Faith leaders have played central roles in the social movements that have reshaped American history and sociopolitical reality. But Americans also believe religion should play a limited role in political discourse, with nearly two-thirds opposing houses of worship endorsing political candidates and more than half opposing religious leaders' involvement in politics entirely.<sup>27</sup>

Accordingly, public law reifies the tension evident at the republic's founding and persisting in the polity today. At the constitutional level, the Free Exercise Clause<sup>28</sup> allows for the flourishing of religious

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<sup>21</sup> See 134 S. Ct. 2751, 2775–79 (2014).

<sup>22</sup> Other legal issues raised by the electioneering prohibition not addressed in this Note include potential free speech challenges to the provision. *E.g.*, Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875, 887–90 (2001); Erik W. Stanley, *LBJ, the IRS, and Churches: The Unconstitutionality of the Johnson Amendment in Light of Recent Supreme Court Precedent*, 24 REGENT U. L. REV. 237, 266–67 (2012). This Note also does not examine the tax code provision's effect on secular charities.

<sup>23</sup> 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 744–45 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1835) (“When authority no longer exists in religious matters, any more than in political matters, men are soon frightened by the sight of this limitless independence.”).

<sup>24</sup> *Id.* at 745–46 (“[There exists no] religion that does not impose on each man some duties toward the human species or in common with it, and that does not in this way drag him, from time to time, out of contemplation of himself.”).

<sup>25</sup> See THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 172 (Richmond, J.W. Randolph 1853) (“Our sister States of Pennsylvania and New York, however, have long subsisted without any establishment [of religion] at all. . . . They have made the happy discovery, that the way to silence religious disputes is to take no notice of them.”); THE FEDERALIST NO. 10, at 46 (James Madison) (“Religion [has] divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.”).

<sup>26</sup> PEW FORUM ON RELIGION AND PUB. LIFE, “NONES” ON THE RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION 60–61 (2012), <http://www.pewforum.org/files/2012/10/NonesOnTheRise-full.pdf> [<http://perma.cc/UA3H-7DAU>].

<sup>27</sup> *Id.* at 73.

<sup>28</sup> U.S. CONST. amend. I, cl. 2 (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”).

life that Tocqueville valued, while the Establishment Clause<sup>29</sup> prohibits the entanglement between government and religion that Jefferson and Madison feared.<sup>30</sup> At the statutory level, tax exemptions and deductions incentivize the proliferation of religious institutions, but the electioneering prohibition disables those same institutions from exerting the type of influence that other special interests wield in American politics. By striking this balance, the tax code attempts to advance the virtues of religion in civic life while limiting its vices.

This Note contends that, despite *Hobby Lobby* and *Citizens United*, the electioneering prohibition is valid under RFRA. Although it imposes a substantial burden on the free exercise of religion, the prohibition prevents entanglement between government and religion. Part I examines the origins of the electioneering prohibition and situates it within the constellation of campaign finance regulation. Part II argues that the electioneering prohibition substantially burdens the free exercise of religion by barring religious organizations from engaging in political advocacy targeted at securing policy goals rooted in religious belief. Part III argues that the electioneering prohibition cannot be justified as the least restrictive means of arresting the corrupting influence of money in politics or of preventing government subsidization of partisan political activity. The provision is, however, narrowly tailored to the compelling interest in preventing undue entanglement between government and religion. Accordingly, Part III concludes that the electioneering prohibition is valid under RFRA.

## I. THE ELECTIONEERING PROHIBITION IN CONTEXT

Though different in origin and purpose, the electioneering prohibition resembles other limitations that lawmakers have imposed on politically engaged entities. Section I.A discusses the historical origins and evolution of the electioneering prohibition. Section I.B describes recent decisions overturning campaign finance laws and situates the electioneering prohibition within the wider landscape of political speech regulation. Section I.C argues that campaign finance deregulation magnifies the importance of the electioneering prohibition because it alone prevents religious organizations from exerting unlimited influence over the electoral process.

### A. *Historical Origins of the Electioneering Prohibition*

Little legislative history exists to explain Congress’s purpose when it adopted the electioneering prohibition as an amendment to the Internal Revenue Act of 1954. Circumstantial evidence suggests less than altruistic origins. Senator Lyndon Johnson—the sponsor of the amendment—secured office in 1948 by the barest of margins and under dubious circumstances.<sup>31</sup> As his sophomore election approached,

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<sup>29</sup> *Id.* cl. 1 (“Congress shall make no law respecting an establishment of religion . . .”).

<sup>30</sup> Some scholars and jurists take the position that the Establishment Clause, as originally conceived, bars only the adoption of a national religion and interference with state establishments of religion. *E.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1835–36 (2014) (Thomas, J., concurring); DONALD L. DRAKEMAN, *CHURCH, STATE, AND ORIGINAL INTENT* 260–62 (2010); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317 (1986). This originalist interpretation of the Constitution finds historical support in many practices from the early days of the republic at odds with modern Establishment Clause jurisprudence. RICHARD H. JONES, *ONE NATION UNDER GOD?* 13–15 (2012). This Note takes no position on the original meaning of the constitutional provision and assumes the continuing validity of the reigning framework for evaluating potential Establishment Clause violations established in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), and its progeny.

<sup>31</sup> See ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT* 312–14 (1990) (describing a post-Election Day “discovery” of uncounted ballots in a Duval County, Texas precinct that delivered the Democratic runoff primary to Johnson).

Johnson feared for his political future, and strong evidence suggests that he inserted the electioneering prohibition provision into the pending legislation due to concerns over two secular nonprofit organizations advocating for his defeat.<sup>32</sup> In sponsoring the amendment, Johnson apparently did not intend to restrict the political activities of houses of worship; in fact, he relied heavily on church support for his reelection against a Catholic opponent in overwhelmingly Protestant Texas.<sup>33</sup>

Johnson's intentions aside, the electioneering prohibition, at its inception, accorded with limitations placed on other entities formed primarily for apolitical purposes. The Taft-Hartley Act, enacted in 1947, prohibited unions and corporations (including nonprofit corporations) from spending general treasury funds in support of or in opposition to candidates for federal office.<sup>34</sup> Like other campaign finance infractions, violation of the corporate- and union-expenditure ban authorized civil penalties and, in instances of knowing and willful violations, criminal sanctions.<sup>35</sup> Despite the new restrictions, corporations and labor unions circumvented and openly violated Taft-Hartley, undermining its efficacy.<sup>36</sup>

The electioneering prohibition restricts a broader range of activities than Taft-Hartley did,<sup>37</sup> but it reflects the regulatory ethos of the era that broadly opposed partisan political activity by groups other than political committees such as candidate committees, traditional political action committees (PACs), and political parties.<sup>38</sup> In effect, the electioneering prohibition discouraged circumvention of campaign finance laws by providing a strong tax incentive for 501(c)(3) organizations to refrain from those activities that the Taft-Hartley Act prohibited.

#### B. *From Super PACs to God PACs*

Today, the electioneering prohibition appears incongruous with the restrictions on other entities engaged in partisan political activity. *Citizens United v. FEC* invalidated the modern iteration of Taft-Hartley's ban on corporate and union expenditures<sup>39</sup> and gave rise to new vehicles for electoral advocacy. The decision precipitated a paradigm shift in campaign finance jurisprudence in two respects. First, the Court overturned prior case law permitting restrictions on political speech based on the government's interest in reducing the distortive effects of large aggregations of money in politics.<sup>40</sup> Second, the decision adopted a narrowed definition of political corruption that sanctions only those regulations targeted strictly

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<sup>32</sup> 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, 753–62 (2001).

<sup>33</sup> *Id.* at 768–69.

<sup>34</sup> Labor-Management Relations Act, Pub. L. No. 80-101, § 304, 61 Stat. 136, 159 (1947), *invalidated by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>35</sup> 2 U.S.C. § 437g(a)(5)–(6), (d)(1)(A) (2012) (recodified at 52 U.S.C. § 30109).

<sup>36</sup> Jeremiah D. Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y.U. L. REV. 1033, 1039–40 (1965).

<sup>37</sup> Compare 2 U.S.C. § 441b(a), (b)(1) (prohibiting corporate or union expenditures in connection with federal elections or primaries), with I.R.C. § 501(c)(3) (2012) (prohibiting *participation* or *intervention* in any political campaign).

<sup>38</sup> *United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am. (UAW-CIO)*, 352 U.S. 567, 578 (1957) (“[J]ust as the great corporations had made huge political contributions to influence governmental action or inaction . . . the powerful unions were pursuing a similar course, and with the same untoward consequences for the democratic process.”); V.O. KEY, JR., *POLITICS, PARTIES & PRESSURE GROUPS* 508–12 (5th ed. 1964).

<sup>39</sup> 558 U.S. 310, 365 (2010) (invalidating 2 U.S.C. § 441b's ban on corporate- and union-funded independent expenditures).

<sup>40</sup> *Citizens United*, 558 U.S. at 349–56, 365.

at preventing and punishing overt exchanges of money for political favors.<sup>41</sup> *Citizens United* led to the creation of super PACs—political committees that may solicit contributions of unrestricted size and spend unlimited amounts of money on campaign advertisements, so long as they do not directly contribute to or coordinate their efforts with candidates.<sup>42</sup> The decision also directly enabled politically engaged 501(c)(4) social welfare organizations—known colloquially as dark-money groups—to solicit and spend unlimited amounts without revealing donor names.<sup>43</sup> This lack of transparency stems from the Internal Revenue Code’s comparatively weak disclosure provisions relative to the rules governing traditional political organizations.<sup>44</sup> Super PACs and dark-money groups have proliferated in state politics as well since the Court extended *Citizens United* to invalidate state bans on corporate independent expenditures in *American Tradition Partnership v. Bullock*.<sup>45</sup>

The creation of new entities operating in the post-*Citizens United* campaign finance framework continues. *McCutcheon v. FEC* invalidated the cap on the aggregate amount that individuals may donate annually to political parties, traditional PACs, and candidates during an election cycle.<sup>46</sup> This has encouraged the establishment of joint fundraising committees—dubbed “max PACs”—groups that collect large contributions from single donors and disperse the money among an assortment of the aforementioned groups.<sup>47</sup> A rider in a recent \$1.1 trillion appropriations bill increased the amount that individuals may contribute to national political parties annually, supercharging max PACs’ fundraising capacity.<sup>48</sup>

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<sup>41</sup> *Id.* at 359 (interpreting valid campaign finance restrictions as combating quid pro quo corruption); *see also* *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (affirming that any restriction on political speech must combat quid pro quo corruption); Linda Greenhouse, *An Indecent Burial*, N.Y. TIMES (Apr. 16, 2014), [http://www.nytimes.com/2014/04/17/opinion/an-indecent-burial.html?\\_r=0](http://www.nytimes.com/2014/04/17/opinion/an-indecent-burial.html?_r=0) [<http://perma.cc/KX85-FC8B>] (“It wasn’t until the Roberts court’s *Citizens United* decision in 2010 that the court shrank the definition of corruption to quid pro quo bribery. . . . [I]n his *McCutcheon* opinion, Chief Justice Roberts . . . extend[ed] *Citizens United*’s narrow definition of corruption . . .”).

<sup>42</sup> *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (holding that contribution limits are unconstitutional as applied to an independent expenditure-only group); Dave Levinthal, *How Super PACs Got Their Name*, POLITICO (Jan. 10, 2012, 12:57 PM), <http://www.politico.com/news/stories/0112/71285.html> [<http://perma.cc/Q6YM-Y39V>].

<sup>43</sup> *Citizens United*, 558 U.S. at 319 (identifying *Citizens United* as a nonprofit corporation); Kim Barker, *Two Dark Money Groups Outspending All Super PACs Combined*, PROPUBLICA (Aug. 13, 2012, 12:50 PM), <http://www.propublica.org/article/two-dark-money-groups-outspending-all-super-pacs-combined> [<http://perma.cc/3XRU-5V8Z>]; *FAQs*, CITIZENS UNITED, <http://www.citizensunited.org/frequently-asked-questions.aspx> [<http://perma.cc/ZG5K-4NN4>].

<sup>44</sup> *See Additional Discussion of H.R. 5175, the DISCLOSE Act, Democracy is Strengthened by Casting Light on Spending in Elections: Hearing on H.R. 5175 Before the H. Comm. on H. Admin.*, 111th Cong. 113–15 (2010) (statement of Brennan Center for Justice).

<sup>45</sup> 132 S. Ct. 2490, 2491 (2012) (per curiam). *See generally* CHISUN LEE ET AL., BRENNAN CTR. FOR JUSTICE, *AFTER CITIZENS UNITED: THE STORY IN THE STATES* (2014), [http://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United\\_Web\\_Final.pdf](http://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf) [<http://perma.cc/T99R-CWTP>].

<sup>46</sup> 134 S. Ct. 1434, 1442 (2014).

<sup>47</sup> *McCutcheon*, 134 S. Ct. at 1456; Eliza Newlin Carney, ‘Max PACs’ Poised to Exploit Supreme Court Decision on Campaign Finance, CQ WKLY. (Apr. 29, 2014, 9:12 AM), <http://public.cq.com/docs/weeklyreport/weeklyreport-000004464536.html> [<http://perma.cc/2VKF-3SZU>].

<sup>48</sup> 2 U.S.C. § 441a (2012) (recodified at 52 U.S.C. § 30116); Press Release, Democracy 21, Who Shot John: The Story of How \$777,600 Contribution “Limits” Ended Up in the Omnibus Bill (Dec. 15, 2014), <http://www.democracy21.org/legislative-action/press-releases-legislative-action/fred-wertheimer-who->

Still standing amid these sweeping changes, the electioneering prohibition bars 501(c)(3) charities—including religious organizations—from participating in the bonanza of unregulated electoral activity central to the past three election cycles.<sup>49</sup> Political operatives would gain significant advantages from electioneering through religious nonprofits. First, while 501(c)(3)s enjoy tax-exempt status just as 501(c)(4)s and political committees do,<sup>50</sup> contributions to 501(c)(3)s are also tax deductible.<sup>51</sup> The ability to attract donors with the promise of a tax benefit would greatly aid political groups in generating revenue. Second, houses of worship, unlike other charitable organizations or political committees, need not file with government agencies before securing tax benefits.<sup>52</sup> A house of worship need only hold itself out to the public as a house of worship to begin deriving advantage from tax-exempt status and soliciting tax-deductible contributions.<sup>53</sup>

Together, the advantages available to houses of worship under the tax code, if utilized for political purposes, could build on the deregulated foundation established by super PACs, dark-money groups, and max PACs. Without the electioneering prohibition and without additional changes to the tax code, groups claiming to be houses of worship could sprout up during election season and solicit unrestricted tax-deductible contributions from the public to spend in unlimited amounts supporting or opposing candidates for political office. These hypothetical organizations—which this Note refers to as “God PACs”—would further contribute to the trend of elections being bankrolled by secretive groups financed by a small coterie of wealthy donors seeking to reshape the landscape of American politics.<sup>54</sup>

### C. *The Continued Importance of the Electioneering Prohibition*

Despite the seeming incongruity between the electioneering prohibition and the prevailing deregulatory climate surrounding political speech, the provision serves distinct and important purposes that necessitate its survival. In an era in which outside spending plays such an outsized role in the political process, the electioneering prohibition takes on even greater importance. God PACs could have severe consequences for American democracy. Critiquing the view that special interest groups effectively represent individuals in the political process, Professor Schattschneider observes, “The flaw in the

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shot-john-the-story-of-how-777600-contribution-limits-ended-up-in-the-omnibus-bill/  
[<http://perma.cc/MB2G-5YZJ>].

<sup>49</sup> See generally ADAM CROWTHER, PUB. CITIZEN, OUTSIDE MONEY TAKES THE INSIDE TRACK (2012), <http://www.citizen.org/documents/outside-spending-dominates-2012-election-report.pdf> [<http://perma.cc/ETS9-GFED>]; SUNDEEP IYER, BRENNAN CTR. FOR JUSTICE, POST-ELECTION ANALYSIS: 2012 TOSS-UP HOUSE RACES (2013), <http://www.brennancenter.org/sites/default/files/publications/Post-Election%20Analysis%202012%20Toss-Up%20House%20Races.pdf> [<http://perma.cc/5LXE-7QWA>]; IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, ELECTION SPENDING 2014: 9 TOSS-UP SENATE RACES (2014), [http://www.brennancenter.org/sites/default/files/analysis/Buying\\_Time/Election\\_Spending\\_2014.pdf](http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/Election_Spending_2014.pdf) [<http://perma.cc/6QKX-2BHL>].

<sup>50</sup> I.R.C. §§ 501(c)(1)(a), (c)(3), (c)(4), 527(a) (2012).

<sup>51</sup> *Id.* § 170(a)(1), (c)(2).

<sup>52</sup> 26 C.F.R. § 1.508-1(a)(3)(a) (2015).

<sup>53</sup> IRS, TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 3 (2013), <http://www.irs.gov/pub/irs-pdf/p1828.pdf> [<http://perma.cc/9SXZ-B3MP>].

<sup>54</sup> See Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1318 (2007) (“Because [501(c)(3)s] will be the only organizations to receive a subsidy for campaign speech, these organizations will become ideal entities for political campaign donors[ ] . . . [as] mechanisms or conduits for unlimited tax-deductible political contributions.”).

pluralist heaven is that the heavenly chorus sings with a strong upper-class accent.”<sup>55</sup> By this, he means that the proliferation of interest groups fails to ensure a political system responsive to the will of the people because the wealthy have the resources to ensure better representation of their views.<sup>56</sup> Similarly, permitting religious organizations to join super PACs, dark-money groups, and max PACs in contributing to the electoral discourse could lead to a chorus that sings from a sectarian hymnal and imprints public policy with religious values alien to many or even most citizens’ beliefs.

As the outcomes of recent campaign finance decisions suggest, however, the 501(c)(3) electioneering prohibition is vulnerable to challenge on free speech grounds. For a restriction on political speech to pass constitutional muster, the law must be narrowly tailored to serve a compelling state interest.<sup>57</sup> Because the electioneering prohibition specifically restricts religious organizations from engaging in partisan political activity, these groups may also challenge the provision under RFRA, under which laws that substantially burden the free exercise of religion must be the least restrictive means of furthering a compelling state interest.<sup>58</sup>

This Note assesses the validity of the electioneering prohibition under RFRA, instead of under the Free Speech Clause, for two reasons. First, the Supreme Court’s recent decision in *Burwell v. Hobby Lobby Stores, Inc.* articulated a test for determining whether facially neutral laws substantially burden the free exercise of religion that is significantly more deferential to the party claiming the burden than prior RFRA case law.<sup>59</sup> The decision’s rationale could prove fruitful to religious organizations eager to engage in political activities. Second, examining the validity of the law under RFRA allows for a careful examination from the vantage point of religious practice and the role of religion in American democracy. Since constitutional review under the Free Speech Clause would also subject the electioneering prohibition to strict scrutiny,<sup>60</sup> a narrower examination of the law’s validity under RFRA may reveal arguments that would be helpful in countering a broader free speech challenge to the provision.

## II. THE ELECTIONEERING PROHIBITION SUBSTANTIALLY BURDENS FREE EXERCISE RIGHTS

While the electioneering prohibition has survived judicial scrutiny in the past, recent developments in free exercise and campaign finance jurisprudence unsettle the assumptions on which those prior decisions relied. Section II.A examines the rationale by which the D.C. Circuit upheld the electioneering prohibition under the RFRA. Section II.B highlights a trend of increased deference to organizations claiming that facially neutral laws burden their religious practice, typified by the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.* Section II.C argues that *Citizens United v. FEC* forecloses the argument that the electioneering prohibition does not burden the free exercise of religion because other avenues exist for religious organizations to engage in political activity.

### A. Past Application of RFRA to the Electioneering Prohibition

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<sup>55</sup> E.E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 34–35 (2d ed. 1975).

<sup>56</sup> See LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 257–67 (2008) (providing empirical evidence of senator ideology and roll call vote responsiveness to high- and middle-income constituents’ ideology and issue preferences, but not those of low-income constituents).

<sup>57</sup> *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

<sup>58</sup> 42 U.S.C. § 2000bb-1 (2012).

<sup>59</sup> See *infra* notes 81–85 and accompanying text.

<sup>60</sup> Johnson, *supra* note 22, at 887–89.

The sole appellate court to consider the validity of the 501(c)(3) electioneering prohibition under RFRA upheld the provision by finding that it did not substantially burden the free exercise of religion.<sup>61</sup> In *Branch Ministries v. Rossotti*, the D.C. Circuit reviewed the revocation of a religious nonprofit's tax-exempt status after a church affiliated with the organization placed full-page campaign ads in the *Washington Times* and *USA Today* four days before the 1992 election.<sup>62</sup> The ads condemned then-Arkansas Governor Clinton's positions on social issues including abortion, homosexuality, and contraception, stating, "Bill Clinton is promoting policies that are in rebellion to God's laws," and asked readers, "How then can we vote for Bill Clinton?"<sup>63</sup> The advertisements also invited readers to make tax-deductible contributions to the church.<sup>64</sup>

The D.C. Circuit held that the electioneering prohibition did not substantially burden the church's free exercise of religion because "the Church does not maintain that a withdrawal from electoral politics would violate its beliefs."<sup>65</sup> Even if the church did engage in politics as a matter of religious conviction, the court stated in dicta that the church's free exercise of religion still would not be substantially burdened because it could separately incorporate as a 501(c)(4) social welfare organization, which could in turn form a PAC arm that could participate in political campaigns.<sup>66</sup> The court reasoned that any burden imposed on Branch Ministries' free exercise of religion could be avoided through other channels for the political speech it deemed central to its faith.<sup>67</sup> No burden on the free exercise of religion existed because the government imposed no restriction on the quantity or quality of the group's speech; it merely controlled the manner by which the group could speak by requiring it to funnel its advocacy through the media of a 501(c)(4) and affiliated PAC.<sup>68</sup>

The corporate structure the D.C. Circuit envisioned to accommodate Branch Ministries' desire to engage in political activity is quite common. Like 501(c)(3)s, 501(c)(4)s are nonprofit corporations exempted from paying federal corporate income taxes,<sup>69</sup> but they may engage in a greater degree of political activity.<sup>70</sup> Additionally, donations to 501(c)(4)s, unlike 501(c)(3)s, generally are not tax deductible as charitable contributions.<sup>71</sup> Examples of prominent 501(c)(4) organizations include the Sierra Club<sup>72</sup> and NARAL Pro-Choice America<sup>73</sup> on the left and the National Rifle Association<sup>74</sup> and the Koch

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<sup>61</sup> *Branch Ministries v. Rossotti*, 211 F.3d 137, 144 (D.C. Cir. 2000).

<sup>62</sup> *Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15, 17–18 (D.D.C. 1999), *aff'd*, 211 F.3d 137 (D.C. Cir. 2000).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Branch Ministries*, 211 F.3d at 142.

<sup>66</sup> *Id.* at 143.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 143–44.

<sup>69</sup> I.R.C. § 501(a), (c)(4) (2012).

<sup>70</sup> *Compare id.* § 501(c)(3) (prohibiting propaganda and lobbying that constitutes more than a substantial part of the group's activity and categorically banning participation or intervention in political campaigns), *with id.* § 501(c)(4) (providing no limits on political activity provided that the organization exclusively promotes social welfare).

<sup>71</sup> *See id.* § 170(a)(1), (c)(2) (exempting charitable contributions to "corporation[s], trust[s], or community chest[s], fund[s], or foundation[s] . . . organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes," but making no mention of 501(c)(4) social welfare organizations).

<sup>72</sup> *Gift Planning: Supporting the Sierra Club Family*, SIERRA CLUB, <http://vault.sierraclub.org/giftplanning/family/default.aspx> [<http://perma.cc/N7RJ-RYDH>] [hereinafter *Supporting the Sierra Club*].

brothers’ Americans for Prosperity on the right.<sup>75</sup> And as the *Branch Ministries* court recognized, federal campaign finance law permits 501(c)(4)s to operate PAC arms that may engage directly in federal elections by making contributions to candidates and by soliciting contributions for that purpose.<sup>76</sup> As a result, all but one of the aforementioned organizations operates PACs.<sup>77</sup> By contrast, 501(c)(3)s may not operate PACs.<sup>78</sup> But this does not prevent 501(c)(4)s—even those connected to PACs—from affiliating with 501(c)(3)s.<sup>79</sup> Accordingly, each of the aforementioned groups also affiliates with 501(c)(3)s.<sup>80</sup>

## B. Hobby Lobby’s *Deferential Burden Analysis*

The Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*, which held the ACA’s contraceptive mandate invalid under RFRA,<sup>81</sup> suggests that courts reviewing requests for religious exemptions from facially neutral laws should accord greater deference to objecting entities than the *Branch Ministries* court did.

In *Hobby Lobby*, two closely held for-profit corporations that objected to abortion on religious grounds—Hobby Lobby and Conestoga Wood—sought exemptions from the ACA’s contraceptive mandate and argued that providing their employees with health insurance that covered four contraceptive devices facilitated the destruction of embryos.<sup>82</sup> Justice Alito, writing for the majority, refused to inquire into the causal relationship between employer subsidization of contraceptive devices and the destruction of embryos.<sup>83</sup> Doing so, he argued, would require courts to analyze the reasonableness of a religious belief, something “federal courts have no business addressing,” and would “[a]rrogat[e] the authority to

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<sup>73</sup> *Mission Statements*, NARAL PRO-CHOICE AM., <http://www.prochoiceamerica.org/about-us/mission-statements.html> [<http://perma.cc/LA98-R658>] (last visited Aug. 28, 2015).

<sup>74</sup> *Ring of Freedom: Give Now*, NAT’L RIFLE ASS’N, <https://www.nra.org/rof/give.aspx> [<http://perma.cc/A2DW-TDCH>] [hereinafter *Ring of Freedom*].

<sup>75</sup> *Donate Today*, AMS. FOR PROSPERITY, [http://americansforprosperity.org/donate\\_today](http://americansforprosperity.org/donate_today) [<http://perma.cc/7Q93-N75Q>]. Americans for Prosperity and its affiliates have been tied to the energy magnates David H. and Charles G. Koch. Carl Hulse & Ashley Parker, *Koch Group, Spending Freely, Hones Attack on Government*, N.Y. TIMES, Mar. 21, 2014, at A1.

<sup>76</sup> 26 C.F.R. § 1.527-6(f) (2015); HOLLY SCHADLER, ALLIANCE FOR JUSTICE, THE CONNECTION: STRATEGIES FOR CREATING AND OPERATING 501(C)(3)S, 501(C)(4)S, AND POLITICAL ORGANIZATIONS 59 (3d ed. 2012), [http://bolderadvocacy.org/wp-content/uploads/2012/10/The\\_Connection\\_paywall.pdf](http://bolderadvocacy.org/wp-content/uploads/2012/10/The_Connection_paywall.pdf) [<http://perma.cc/HDH3-B3B4>]; see also 2 U.S.C. § 432 (2012) (recodified at 52 U.S.C. § 30102) (listing requirements for establishing political committees).

<sup>77</sup> See *About PFV*, NRA-PVF, <https://www.nrapvf.org/about-pvf/> [<http://perma.cc/BNC7-FV3F>]; *Mission Statements*, *supra* note 73 (NARAL Pro Choice America PAC); *Sierra Club: 2016 PAC Summary Data*, OPENSECRETS.ORG, <http://www.opensecrets.org/pacs/lookup2.php?strID=C00135368> [<http://perma.cc/L4ZA-NCJX>].

<sup>78</sup> 26 C.F.R. § 1.527-6(g); SCHADLER, *supra* note 76, at 71 n.1.

<sup>79</sup> See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983) (finding an organization may utilize a 501(c)(3) status for nonpolitical activities and its 501(c)(4) affiliate for lobbying and political expenditures).

<sup>80</sup> See *AFPF Legal Status*, AMS. FOR PROSPERITY, <http://americansforprosperity.org/legal> [<http://perma.cc/3NKH-K95J>]; *Mission Statements*, *supra* note 73 (NARAL Pro-Choice America Foundation); *Ring of Freedom*, *supra* note 74 (NRA Foundation); *Supporting the Sierra Club*, *supra* note 72 (Sierra Club Foundation).

<sup>81</sup> 134 S. Ct. 2751, 2785 (2014).

<sup>82</sup> *Hobby Lobby*, 134 S. Ct. at 2764–66.

<sup>83</sup> *Id.* at 2777–79.

provide a binding national answer to [a] religious and philosophical question.”<sup>84</sup> After deferring to the companies’ characterization of the relationship between the law and their religious beliefs, the Court had little difficulty identifying a substantial burden, since failure to comply with the contraceptive mandate would saddle the companies with heavy tax penalties.<sup>85</sup>

If applied to Branch Ministries’ political activity, this rationale would suggest that the electioneering prohibition imposes a substantial burden. The *Branch Ministries* court focused its inquiry on the nonprofit’s political speech itself, rather than what the organization sought to accomplish with its political activity. Although the court acknowledged that the ads Branch Ministries placed “reflected its religious convictions on certain questions of morality,” the court held that the electioneering prohibition did not constitute a substantial burden because engagement in electoral politics did not itself amount to a tenet of the organization’s faith.<sup>86</sup> In essence, the *Branch Ministries* court determined the causal relationship between the advocacy in which the nonprofit engaged and the political ends the organization sought too tenuous for the electioneering prohibition to amount to a substantial burden on its free exercise of religion.

Like the owners of Hobby Lobby and Conestoga Wood, who believed that paying for ACA-compliant health insurance would make them complicit in the termination of pregnancies, Branch Ministries believed that complying with the electioneering prohibition would make the organization complicit in the election of a President who would adopt policies contrary to its religious beliefs. The effect of a single religious organization’s campaign advocacy on the outcome of an election—let alone the policies lawmakers adopt subsequent to the election—may be remote indeed. But, as Justice Ginsburg argued in her *Hobby Lobby* dissent, the provision of ACA-compliant health insurance also had a purely theoretical effect on the destruction of embryos.<sup>87</sup> The contraceptive mandate only required Hobby Lobby and Conestoga Wood to provide health insurance plans that an employee or dependent could independently utilize to secure free contraceptives.<sup>88</sup> “Any decision to use contraceptives made by a woman covered under Hobby Lobby’s or Conestoga’s plan,” Justice Ginsburg reasoned, “will not be propelled by the Government, it will be the woman’s autonomous choice, informed by the physician she consults.”<sup>89</sup> Similarly, an officeholder’s policy choices remain several steps removed from an outside spender, even if those choices embody or undermine values core to the spender’s beliefs. By prohibiting inquiry into the attenuation between a government policy and religious exercise, *Hobby Lobby* explicitly rejected the type of causation inquiry that Justice Ginsburg favored and in which the *Branch Ministries* court engaged.<sup>90</sup>

Subsequent litigation concerning the ACA’s contraceptive mandate has showcased appellate courts struggling with the Supreme Court’s rejection of causation analysis as part of the substantial-burden inquiry. As it implemented the contraceptive mandate, the Obama Administration issued rules to accommodate religious nonprofits’ objections to the law.<sup>91</sup> The Supreme Court resolved the matter in *Hobby Lobby* by urging the federal government to extend the same accommodation to closely held for-profit corporations with religious objections,<sup>92</sup> and the regulations have been updated accordingly.<sup>93</sup> The

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<sup>84</sup> *Id.* at 2778.

<sup>85</sup> *Id.* at 2776–77.

<sup>86</sup> *Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C. Cir. 2000).

<sup>87</sup> *See Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 2777–78 (majority opinion).

<sup>91</sup> 78 Fed. Reg. 39870, 39892–97 (July 2, 2013) (codified as amended at 26 C.F.R. § 58.9815-2713A (2015), 29 C.F.R. § 2590.715-2713A (2015), 45 C.F.R. § 147.131 (2015)).

<sup>92</sup> *Hobby Lobby*, 134 S. Ct. at 2781–82.

accommodation requires insurance providers to independently cover employees' contraceptive costs when religious entities notify them of their objection to the mandate.<sup>94</sup> But nonprofits have also challenged this accommodation under RFRA. Although the accommodation severs any financial link between objecting entities and contraceptive use, religious objectors have argued that even notifying insurance providers of their wish to opt out of the contraceptive mandate violates their beliefs by triggering the insurance company's obligation to provide contraceptive coverage.<sup>95</sup> Courts of appeals have split over the viability of such claims.<sup>96</sup>

The Eighth Circuit held that RFRA's substantial-burden prong is satisfied so long as religious objectors can demonstrate "a sincere religious belief" that compliance with the law "makes them spiritually or morally complicit" in conduct to which they object and noncompliance will result in significant penalties.<sup>97</sup> Religious groups wishing to engage in electioneering activity would have little difficulty demonstrating a sincere belief that failure to engage in the electoral process makes them complicit in the election of policymakers who do not share their religious values.

The other circuits that have examined RFRA claims against the accommodation have resisted the implication that *Hobby Lobby* recast the substantial-burden prong as a sincerity test. The Eleventh Circuit, for example, rejected the notion that RFRA "reduc[es] the role of federal courts to 'rubber stamps' that automatically recognize a substantial burden whenever a religious adherent asserts there is one."<sup>98</sup> And whereas the *Hobby Lobby* plaintiffs objected to paying for health insurance that includes contraceptive coverage, the Eleventh Circuit emphasized that religious nonprofits have no objection to the act of notifying their insurance providers of their religious beliefs.<sup>99</sup> Rather, their objection is based upon "the

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<sup>93</sup> 26 C.F.R. § 58.9815-2713A(a)(2)(ii); 29 C.F.R. § 2590.715-2713A(a)(2)(ii); 45 C.F.R. § 147.131(b)(2)(ii).

<sup>94</sup> 26 C.F.R. § 58.9815-2713A(b)(2), (c)(2); 29 C.F.R. § 2590.715-2713A(b)(2), (c)(2); 45 C.F.R. § 147.131(c)(2).

<sup>95</sup> *E.g.*, *Eternal Word Television Network, Inc. v. Sec'y U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1136 (11th Cir. 2016).

<sup>96</sup> *Compare id.* at 1151 (finding no substantial burden); *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738, 749 (6th Cir. 2015), *vacated on other grounds*, --- S. Ct. --- 2016 WL 932712 (May 23, 2016) (mem.) (same), *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 219 (2d Cir. 2015), *vacated on other grounds*, --- S. Ct. --- 2016 WL 816249 (May 23, 2016) (mem.) (same), *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1187 (10th Cir. 2015), *vacated on other grounds*, 136 S. Ct. 1557 (2016) (per curiam) (same), *Wheaton Coll. v. Burwell*, 791 F.3d 792, 797 (7th Cir. 2015) (same), *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015), *vacated on other grounds*, 136 S. Ct. 1557 (2016) (per curiam) (same), *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 611–12 (7th Cir. 2015), *vacated on other grounds*, --- S. Ct. --- 2015 WL 2842460 (May 16, 2016) (mem.) (same); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 439–42 (3d Cir. 2015), *vacated on other grounds sub nom.*, *Geneva Coll. v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam) (same), *and Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 237 (D.C. Cir. 2014), *vacated on other grounds sub nom.*, *Priests for Life v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam) (same), *with Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 937 (8th Cir. 2015), *vacated on other grounds*, --- S. Ct. --- 2016 WL 2842448 (May 16, 2016) (mem.) (finding a substantial burden); *see also* Marty Lederman, *Update on the Contraception Coverage Regulations and Litigation*, BALKINIZATION, <http://balkin.blogspot.com/2015/07/update-on-contraception-coverage.html> [<http://perma.cc/NQX3-MRAN>] (last visited Nov. 8, 2015).

<sup>97</sup> *Sharpe Holdings*, 801 F.3d at 942.

<sup>98</sup> *Eternal Word*, 818 F.3d at 1145.

<sup>99</sup> *Id.* at 1148.

significance they attribute” to the act of notification—namely that it prompts the insurance providers to cover beneficiaries’ contraceptive needs.<sup>100</sup>

But this distinction strongly resembles the causal inquiry advocated in *Hobby Lobby*’s principal dissent and explicitly rejected by the majority. The employers in *Hobby Lobby* did not have a religious objection to providing their employees with health insurance. They objected to their employees’ potential decision to use that health insurance to access contraception. But the Supreme Court refused to deny the substantiality of the burden on the basis of the intervening third party. In the accommodation cases, the employers have no religious objection to notifying their insurance providers of their beliefs. Rather, they object to triggering the insurance company’s obligation to provide coverage that can be used to access contraception. The main factual difference between *Hobby Lobby* and the accommodation cases is an additional link in the causal chain. It is difficult to understand why two degrees of separation would permit courts to inquire into attenuation in their substantial-burden analysis where one degree of separation does not.

Only time will tell whether RFRA’s substantial-burden prong will amount to something more searching than a sincerity test. The Supreme Court granted certiorari to review several of the contraceptive-mandate accommodation cases, but a shorthanded Court<sup>101</sup> declined to resolve the circuit split and remanded the cases to the lower courts with instructions to identify a new accommodation that would better address religious objectors’ concerns.<sup>102</sup> But even if the Supreme Court resists the Eighth Circuit’s characterization of the substantial-burden prong as merely a sincerity test, the contraceptive-mandate accommodation cases demonstrate that the facile distinction that the *Branch Ministries* court made between the action in which the organization wished to engage (electioneering) and the ends it sought (among other things, reduced access to abortion and contraceptives) does not cohere with *Hobby Lobby*’s substantial-burden inquiry.

### C. *Alternative Outlets for Political Speech Do Not Lessen the Burden*

The alternative method identified by the *Branch Ministries* court for religious organizations to engage in political activity by forming an affiliated 501(c)(4) and PAC cannot save the electioneering prohibition from invalidation under RFRA. Under the electioneering prohibition, religious organizations wishing to engage in political activity find themselves similarly situated to corporations and labor unions prior to *Citizens United v. FEC*, which overturned the ban on corporate and union independent expenditures in federal elections.<sup>103</sup> Prior to *Citizens United*, federal law barred corporations and labor unions from spending general treasury funds in national elections.<sup>104</sup> But those entities could (and still can) create PACs funded by voluntary contributions from employees, stockholders, or members for the purposes of making contributions and independent expenditures in national elections.<sup>105</sup>

In *Citizens United*, the Supreme Court held that this alternative means of engaging in the political process did not alleviate the First Amendment injury caused by the corporate-expenditure ban. First, the Court reasoned that corporations and their connected PACs are separate entities and that a PAC’s speech

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<sup>100</sup> *Id.*

<sup>101</sup> Justice Antonin Scalia died on February 13, 2016 while the court’s decision in the contraceptive-mandate accommodation case was still pending. Adam Liptak, *Justices Seem Divided on Requirements for Birth Control Coverage*, N.Y. TIMES, Mar. 24, 2016, at A14.

<sup>102</sup> See *Zubik v. Burwell*, 136 S. Ct. 1557, 1561 (2016) (per curiam).

<sup>103</sup> *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

<sup>104</sup> 2 U.S.C. § 441b (2012) (recodified at 52 U.S.C. § 30118), *invalidated* by *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>105</sup> *Id.* § 441b(b)(2).

cannot serve as a proxy for corporate speech.<sup>106</sup> Second, the Court stated that “PACs are burdensome alternatives . . . [that] are expensive to administer and subject to extensive regulations.”<sup>107</sup> Among other things, the Court identified the requirements that PACs regularly disclose the donations they receive and contributions and expenditures they give as features that make the vehicle an onerous alternative to direct political activity.<sup>108</sup> *Citizens United* relieved corporations and labor unions of this encumbrance, freeing them to directly spend money from their general treasuries in federal elections.<sup>109</sup>

Like corporations prior to *Citizens United*, religious organizations cannot make independent expenditures in elections due to the electioneering prohibition. As *Branch Ministries* suggests, however, such entities may form 501(c)(4)s with affiliated PACs to engage in political activity.<sup>110</sup> But *Citizens United*’s rejection of the idea that PACs constitute a separate avenue for corporate political speech applies with equal or greater force to the proposed vehicle for religious speech. To engage in the full panoply of political activity, a religious organization must operate not one, but two entities. If operating a PAC is a burdensome alternative to directly making independent expenditures, then operating a 501(c)(4) and PAC is even more burdensome.<sup>111</sup> And just as the PAC exception to the corporate-expenditure ban in *Citizens United* did not allow corporations to speak,<sup>112</sup> the ability for religious organizations to form 501(c)(4)s with affiliated PACs does not remove the burden on free exercise of religion imposed by the electioneering prohibition.

If the electioneering prohibition remains legal in the aftermath of *Hobby Lobby* and *Citizens United*, a claim for a RFRA exemption to the prohibition is likely to advance past the substantial burden stage of the test.

### III. THE ELECTIONEERING PROHIBITION ENSURES SEPARATION BETWEEN CHURCH AND STATE

Although the electioneering prohibition substantially burdens the free exercise of religion, RFRA permits facially neutral laws that encroach on religious practice if they are the least restrictive means of serving a compelling state interest.<sup>113</sup> While the electioneering prohibition may provide salutary benefits

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<sup>106</sup> *Citizens United*, 558 U.S. at 337.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 338–39.

<sup>109</sup> *Id.* at 365; see also *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam) (extending *Citizens United* to invalidate Montana’s corporate independent expenditure ban).

<sup>110</sup> 211 F.3d 137, 143–44 (D.C. Cir. 2000).

<sup>111</sup> See *Branch Ministries*, 211 F.3d at 143–44.

<sup>112</sup> *Citizens United*, 558 U.S. at 337.

<sup>113</sup> 42 U.S.C. § 2000bb-1(b) (2012). *Hobby Lobby* contains ambiguous analysis of the RFRA test, with the majority arguing that the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5, modified RFRA by requiring accommodation of religion “to the maximum extent permitted.” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761–62 (2014) (quoting 42 U.S.C. § 2000cc-3(g) (2012)). The majority made this argument, however, to rebut the principal dissent’s suggestion that the Free Exercise Clause case law prior to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which RFRA restored, denied Free Exercise Clause protection to corporations. *Hobby Lobby*, 134 S. Ct. at 2772 (“It is simply not possible to read these provisions as restricting the concept of the ‘exercise of religion’ to those practices specifically addressed in our pre-*Smith* decisions.”). This line of reasoning has potentially broad consequences if divorce of RFRA from prior First Amendment jurisprudence requires some sort of scrutiny even more robust than traditional strict scrutiny. This Note, however, assumes that RFRA demands a level of judicial review no more searching than that required in *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (requiring government action that substantially burdens religious practice to be justified by a compelling state interest).

for American democracy by limiting the corrupting influence of undisclosed spending in elections and government subsidization of partisan politics, Section III.A argues that these interests cannot insulate the law from invalidation under RFRA's strict scrutiny test. Section III.B, however, argues that the electioneering prohibition *can* be justified as the least restrictive means of preventing undue entanglement between government and religion. Paradoxically, greater accommodation of religious dissent necessitates more invasive government intrusion in religious entities' affairs. Rather than argue that the electioneering prohibition serves an important role in American democracy in spite of its impact on religious freedom, supporters should emphasize the critical way in which it promotes religious practice by keeping the spheres of government and religion separate.

#### A. Unavailable Government Interests

The electioneering prohibition is not narrowly tailored to the government's interest in combating corruption or its interest in preventing taxpayer subsidization of partisan political activity.

##### 1. Anticorruption Rationale

*Citizens United* forecloses an argument that the electioneering prohibition can be justified as a prophylaxis against the corrupting influence of unlimited, undisclosed spending in elections. As discussed, religious organizations operating under the electioneering prohibition find themselves similarly situated to corporations and labor unions prior to the landmark campaign finance decision.<sup>114</sup> Just as *Citizens United* undercuts the argument that alternative vehicles for engaging in politics minimize the burden that the electioneering prohibition imposes on religious practice, the decision likely precludes justifying the provision on the grounds that it combats the corrupting influence of money in politics. The *Citizens United* Court held that the ban on corporate and union independent expenditures could not be justified as furthering the government's compelling interest in preventing corruption or the appearance thereof.<sup>115</sup> The Court reasoned that independent political spending, in contrast to direct contributions from individuals and groups to candidates, carries less risk of corruption.<sup>116</sup> The Court elaborated that categorical bans on spending go "well beyond the Government's interest"<sup>117</sup> and constitute an "asymmetrical" remedy.<sup>118</sup> Instead, the Court held disclosure to be "a less restrictive alternative" to an outright ban that provides critical information to voters and promotes accountability.<sup>119</sup>

The 501(c)(3) electioneering prohibition, like the corporate- and union-independent expenditure ban, categorically bars political spending by an entity. Though RFRA protects religious practice, rather than freedom of speech, any law that substantially burdens the free exercise of religion must also be narrowly tailored to serve a compelling state interest.<sup>120</sup> If the anticorruption rationale could not rescue the corporate independent expenditure ban from a free speech challenge, then it likely cannot provide safe harbor for the electioneering prohibition under RFRA's strict scrutiny test. As with the corporate-expenditure ban, the electioneering prohibition goes beyond restricting the direct flow of money to political candidates that the Court has deemed corruptive.<sup>121</sup> Any risk of corruption posed by 501(c)(3) campaign spending also appears minimal when one considers the amount of unrestricted and undisclosed

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<sup>114</sup> See *supra* Section II.C.

<sup>115</sup> See *Citizens United*, 558 U.S. at 357.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 361.

<sup>119</sup> *Id.* at 369–71.

<sup>120</sup> 42 U.S.C. § 2000bb(b)(1) (2012); see also *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

<sup>121</sup> See *supra* note 36 and accompanying text.

spending by social welfare organizations in the wake of *Citizens United*.<sup>122</sup> Tax-exempt 501(c)(4)s spent over \$257 million on independent expenditures in the 2012 presidential and congressional elections alone,<sup>123</sup> and undisclosed spending accounted for over 30 percent of the money spent by outside groups.<sup>124</sup> With unregulated money already playing such a large role in elections, the electioneering prohibition surely cannot be justified by whatever additional corrupting consequences it holds at bay. Just as disclosure constituted a less restrictive alternative to the corporate-expenditure ban, increasing reporting requirements for politically active 501(c)(3)s would infringe on the free exercise of religion to a lesser degree than an outright ban on partisan political activity by religious organizations.

One might argue that houses of worship pose a special risk as conduits of political spending because of the rules that govern their formation. For example, houses of worship, unlike other 501(c)(3) organizations, need not file with the IRS to begin receiving tax benefits.<sup>125</sup> Without the electioneering prohibition, individuals interested in spending and soliciting unlimited amounts of money in elections could declare themselves a house of worship without any determination by the IRS that the organization qualifies for tax-exempt status. But 501(c)(4) social welfare organizations can also self-declare their proper classification and begin receiving tax benefits without IRS scrutiny.<sup>126</sup> To the extent that this exemption from the notice requirements that apply to other 501(c)(3) organizations poses additional corruption risks, requiring houses of worship that wish to engage in electioneering activity to file with the IRS would constitute a less restrictive means of furthering the government's goals. The special rules governing the formation of houses of worship for taxation purposes do not justify an outright ban on electioneering activity.

## 2. Government Subsidization of Partisan Political Activity

While both the district and appellate courts in *Branch Ministries* upheld the electioneering prohibition on the ground that it did not substantially burden free exercise of religion,<sup>127</sup> the trial court also stated that the provision constituted the least restrictive means of pursuing the compelling interest in preventing government subsidization of partisan political activity.<sup>128</sup> In an earlier case upholding the electioneering prohibition against a challenge under the Free Exercise Clause,<sup>129</sup> the Tenth Circuit characterized tax-exempt status as a “matter[] of legislative grace.”<sup>130</sup> The conditions set forth in § 501(c)(3), the court stated, “stem from the Congressional policy that the United States Treasury should be neutral in political affairs and that substantial activities directed to attempts to influence legislation or affect a political campaign should not be subsidized.”<sup>131</sup> Whether in response to a RFRA or Free Exercise

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<sup>122</sup> Cf. *Citizens United*, 588 U.S. at 360 (“[I]ndependent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate.”).

<sup>123</sup> *Outside Spending*, OPENSECRETS.ORG,

[https://www.opensecrets.org/outsidespending/fes\\_summ.php?cycle=2012](https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2012) [<http://perma.cc/7NZG-9HY5>].

<sup>124</sup> *Outside Spending by Disclosure, Excluding Party Committees*, OPENSECRETS.ORG,

<http://www.opensecrets.org/outsidespending/disclosure.php> [<http://perma.cc/4KGU-EWEZ>].

<sup>125</sup> 26 C.F.R. § 1.508-1(a)(3)(a) (2015); see also IRS, *supra* note 53, at 3.

<sup>126</sup> See IRS, IRS PUB. 557, TAX-EXEMPT STATUS FOR YOUR ORGANIZATION 47–48 (2015),

<http://www.irs.gov/pub/irs-pdf/p557.pdf> [<http://perma.cc/3BP3-KY2V>].

<sup>127</sup> *Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C. Cir. 2000); *Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15, 25 (D.D.C. 1999).

<sup>128</sup> *Branch Ministries, Inc.*, 40 F. Supp. 2d at 25–26.

<sup>129</sup> U.S. CONST. amend. I, cl. 2.

<sup>130</sup> *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 854 (10th Cir. 1972).

<sup>131</sup> *Id.* (emphasis omitted).

Clause challenge, both courts found that the electioneering prohibition could survive strict scrutiny because of the compelling need for the federal government to remain neutral in partisan political fights.

To the extent the electioneering prohibition could be supported by a political neutrality rationale before *Citizens United* fueled an explosion of outside spending,<sup>132</sup> that justification cannot save the electioneering prohibition today. One might distinguish 501(c)(3) organizations from the 501(c)(4) organizations newly involved in electoral politics because donors to the former but not the latter can receive tax deductions for contributions.<sup>133</sup> But the Supreme Court has treated tax-exempt status as a form of subsidy. Upholding the IRS's revocation of tax-exempt status to segregated private schools,<sup>134</sup> the Court in *Bob Jones University v. United States* reasoned that "taxpayers can be said to be indirect and vicarious 'donors' " to tax-exempt organizations.<sup>135</sup> Just as taxpayers provided indirect support for the college's discriminatory policies before the IRS took corrective action, the government currently subsidizes the political activity of 501(c)(4) social welfare organizations by according them tax-exempt status. Also, in *Regan v. Taxation with Representation of Washington*, which upheld § 501(c)(3)'s restriction on lobbying activity, the Court made no distinction between tax exemptions and deductions, characterizing both as forms as government subsidy.<sup>136</sup>

Beyond 501(c)(4) organizations, political organizations—which include political parties, candidate committees, super PACs, traditional PACs, and state issue advocacy organizations<sup>137</sup>—all qualify as tax-exempt organizations under § 527 of the tax code.<sup>138</sup> Historically, political organizations did not receive a tax exemption. Until 1975, the Code offered no formal tax benefits to groups engaged in political activity, but the IRS treated contributions to such groups as nontaxable gifts.<sup>139</sup> Congress enacted § 527 in response to the IRS decision in 1973 to begin taxing political groups.<sup>140</sup>

Congress's choice to grant tax-exempt status to political organizations came with a significant price tag. For the subset of these organizations that engages in federal electoral activity, receipts totaled over \$8.8 billion in 2012 alone.<sup>141</sup> If the federal government taxed the revenue raised by such groups from donations in the same manner that it taxes for-profit corporations (assuming no deductions, credits, or other means of reducing tax liability), the IRS would collect an additional \$3 billion in revenue.<sup>142</sup> This figure does not even take into account the receipts of 527s engaged in state and local politics, which do not file with the Federal Election Commission.<sup>143</sup> In short, by extending tax-exempt status to social

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<sup>132</sup> See *supra* notes 122–124 and accompanying text.

<sup>133</sup> See I.R.C. § 170(a)(1), (c) (2012).

<sup>134</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

<sup>135</sup> *Id.* at 591.

<sup>136</sup> 461 U.S. 540, 544 (1983).

<sup>137</sup> See I.R.C. § 527(e)(1)–(2); Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1648 (2012).

<sup>138</sup> I.R.C. § 527(a).

<sup>139</sup> ERIKA LUNDER, CONG. RESEARCH SERV., RL 33377, TAX-EXEMPT ORGANIZATIONS: POLITICAL ACTIVITY RESTRICTIONS AND DISCLOSURE REQUIREMENTS 17 (2007)

<sup>140</sup> *Id.* at 17–18.

<sup>141</sup> FEC, 2012 COMMITTEE SUMMARY,

[http://fec.gov/data/CommitteeSummary.do?format=csv&election\\_yr=2012](http://fec.gov/data/CommitteeSummary.do?format=csv&election_yr=2012) [<http://perma.cc/NJ6X-5GA3>] (sum of entries in column labeled "tot\_rec").

<sup>142</sup> This calculation is based on application of tax brackets described in I.R.C. § 11(b) to total receipts of each political organization that filed with the Federal Election Commission during the 2012 election cycle.

<sup>143</sup> See Political Committee Status, 72 Fed. Reg. 5,595, 5,598 (Feb. 7, 2007) (to be codified at 11 C.F.R. pt. 100) ("[V]irtually all political committees are 527 organizations. It does not necessarily follow that all 527 organizations are or should be registered as political committees. . . . By definition, 527 organizations

welfare and political organizations, the federal government forgoes a significant amount of revenue. While a less direct benefit than a tax deduction, a tax exemption certainly constitutes a form of subsidy. Given the substantial indirect government benefits that redound to other types of organizations besides 501(c)(3)s engaged in partisan political activity, the federal government cannot justify an outright ban on political speech based on a supposed preference to keep taxpayer dollars out of politics.

### B. *Maintaining the Wall Between Church and State*

When the Tenth Circuit upheld the electioneering prohibition under the Free Exercise Clause,<sup>144</sup> it stated that the policy serves the “overwhelming and compelling Governmental interest . . . of guarantying that the wall separating church and state remain[s] high and firm.”<sup>145</sup> The court did not explain how removing the prohibition would undermine the Establishment Clause, and its treatment of the issue seems conclusory. But a closer examination of the Tenth Circuit’s rationale offers a fruitful defense of the electioneering prohibition.

By arguing that the electioneering prohibition serves the government’s compelling interest in maintaining a strong separation between church and state, this Note does not make the stronger claim that the electioneering prohibition is constitutionally required. The Supreme Court’s jurisprudence confirms that government accommodation of religious practice does not, by itself, offend First Amendment principles.<sup>146</sup> And minimal levels of political activity by houses of worship—such as a religious leader endorsing a candidate from the pulpit—would not raise Establishment Clause concerns. But more extensive political involvement—such as funding independent expenditures—could prompt more invasive government efforts to police the activities of tax-subsidized religious groups. Conceivably, RFRA may permit the government to guard against Establishment Clause violations by drawing a bright line preventing the religious groups it subsidizes from engaging in activity likely to lead to intrusive oversight.<sup>147</sup> By prohibiting activities by tax-subsidized groups that carry a demonstrated risk of entangling the government in the internal affairs of religious entities, the electioneering prohibition furthers the government’s compelling interest in reinforcing the wall separating church and state.

*Lemon v. Kurtzman* provides the reigning test for identifying an Establishment Clause violation and therefore provides a useful framework for identifying entanglement threats posed by permitting

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may engage in a host of State, local, and non-electoral activity well outside the Commission's jurisdiction.”).

<sup>144</sup> U.S. CONST. amend. I, cl. 2.

<sup>145</sup> *Christian Echoes Nat’l Ministry, Inc. v. United States*, 470 F.2d 849, 857 (10th Cir. 1972).

<sup>146</sup> *E.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 719–20 (2005) (upholding RLUIPA); *Corp. of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Amos*, 483 U.S. 327, 338, 340 (1987) (upholding Title VII of the Civil Rights Act of 1964’s religious exemption); *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 144–45 (1987) (“This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.”).

<sup>147</sup> The Court has acknowledged that “[a]t some point, accommodation may devolve into an ‘unlawful fostering of religion.’” *Amos*, 483 U.S. at 334–35 (quoting *Hobbie*, 480 U.S. at 145). In addition, the Court has noted that facially valid religious exemptions may be challenged under the Establishment Clause on an as-applied basis when they impose significant burdens on third parties. *Cutter*, 544 U.S. at 725–26. Without question, Congress has a compelling interest in preventing core Establishment Clause violations. I contend further that this interest extends to providing prophylactic protection by preempting as-applied challenges that would emerge when a law is deemed likely to lead to entanglement between government and religion or government endorsement of religion.

political activity by religious organizations.<sup>148</sup> For a statute to be valid under the Establishment Clause it (1) must have a secular legislative purpose, (2) must not have the primary effect of advancing or inhibiting religion, and (3) must not lead to excessive entanglement between government and religion.<sup>149</sup>

Exempting religious organizations from the electioneering prohibition would not run afoul of the secular purpose requirement. The Supreme Court has recognized the desire to “alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions” as a permissible legislative purpose.<sup>150</sup> In this vein, an exemption from the electioneering prohibition would not have the advancement of religion as its primary effect, because it merely eliminates a government-imposed obstacle to religious groups furthering their goals through the political process.

Nor would a religious exemption from the electioneering prohibition have the primary effect of enhancing or inhibiting religion. In *Amos*, the Court clarified that a law does not fail the “primary effect” prong of the *Lemon* test “simply because it *allows* churches to advance religion, which is their very purpose.”<sup>151</sup> Rather, for a law to have the primary effect of advancing religion, “the *government itself* [must] advance[] religion through its own activities and influence.”<sup>152</sup> While permitting religious organizations to electioneer undoubtedly would enhance the ability of such entities to further their religious missions, any fruits of religious organizations’ political activity would be the product of the groups’ efforts, not the government’s designs. The facial validity of the electioneering prohibition under the *Lemon* test’s first two prongs underscores that, in many contexts, the government can and should grant religious exemptions when the accommodations create no perceivable risk of Establishment Clause violations.

Lifting the electioneering prohibition, however, *could* lead to an excessive entanglement between government and religion. While an exemption from the electioneering prohibition would not inevitably lead to such entanglement, it would create a risk sufficient to justify the prohibition as a prophylactic measure without violating RFRA. In *Lemon*, the Court held that state financial assistance of private parochial schools created an excessive entanglement between government and religion and violated the Establishment Clause.<sup>153</sup> Because the programs invalidated in *Lemon* as a condition for aid required subsidized teachers to refrain from teaching religious content, the Supreme Court found that the law required “comprehensive, discriminating, and continuing state surveillance” to ensure adherence to the conditions. This created an “excessive and enduring entanglement between state and church.”<sup>154</sup>

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<sup>148</sup> Some scholars and jurists believe *Lemon v. Kurtzman* and its progeny distorted the original meaning of the Establishment Clause. See *supra* note 30. Nevertheless, the *Lemon* test “remains the prevailing analytical tool for the analysis of Establishment Clause claims.” *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012) (quoting *Books v. City of Elkhart*, 235 F.3d 292, 301 (7th Cir. 2000)). For recent examples of applications of the *Lemon* test by appellate courts, see, *Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 237–45 (2d Cir. 2014); *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 101–02 (4th Cir. 2013); *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1082–84 (9th Cir. 2012); *Satawa v. Macomb Cty. Rd. Comm’n*, 689 F.3d 506, 526–28 (6th Cir. 2012). The analysis that follows will likely prove unpersuasive and unsatisfying for those who reject the *Lemon* test entirely, but this Note assumes the continuing viability of the *Lemon* framework.

<sup>149</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

<sup>150</sup> *Amos*, 483 U.S. at 335.

<sup>151</sup> *Id.* at 337.

<sup>152</sup> *Id.*

<sup>153</sup> 403 U.S. at 613–14.

<sup>154</sup> *Lemon*, 403 U.S. at 618–22.

Similarly, lifting the electioneering prohibition would likely prompt more invasive IRS involvement in the day-to-day activities of religious organizations that engage in substantial amounts of political activity. While 501(c)(3)s cannot electioneer, they can lobby elected officials and government agencies under current law, so long as the activity does not constitute a “substantial part” of their efforts.<sup>155</sup> To determine whether organizations have devoted a substantial amount of their activities to lobbying, the IRS engages in a subjective, fact-intensive, case-by-case inquiry that assesses the amount of time devoted to lobbying, the amount of money the organization spends on the activity, the importance of lobbying to the organization’s purpose, and the continuity of its lobbying efforts.<sup>156</sup> This test ensures that 501(c)(3)s serve the purposes contemplated by the statute<sup>157</sup> and do not function merely as vehicles for untaxed political advocacy.

If 501(c)(3)s could electioneer, the IRS would undoubtedly monitor their activities to ensure that they do not become mere conduits for electoral political activity at the expense of their designed purposes. Under the substantial part test or something akin to it, the IRS would have to separate the activities of religious organizations into the “political” on the one hand, and the “religious” on the other. Those determinations would involve invasive inquiries into religious doctrine by a government entity. Moreover, when oversight raises red flags, continued enjoyment of tax benefits would require religious organizations to deviate from the activities they deem conducive to their missions and instead conduct themselves in a fashion that the government considers consonant with its own conception of religious practice.

The controversy surrounding IRS efforts to monitor the activities of politically engaged nonprofits in the aftermath of *Citizens United* provides a clear illustration of the invasive oversight that the electioneering prohibition averts. In an effort beginning in 2010 to identify groups abusing nonprofit status by primarily engaging in partisan political activity, the IRS requested information about the activities of nearly 300 politically active groups.<sup>158</sup> Documents disclosed during a subsequent investigation of the IRS’s conduct reveal that the agency requested detailed information about the qualifications of group leaders to educate the public about particular issues and organizational priorities.<sup>159</sup> The IRS also requested copies of materials disseminated to the public and used for legislative advocacy purposes.<sup>160</sup> While a Treasury Department investigation of IRS oversight found the effort tainted by potentially partisan criteria for selecting inquiry targets,<sup>161</sup> the investigation revealed the degree of intrusion that nonprofits could expect if the IRS policed their political activity.

If forced to distinguish organizations’ religious activities from political activities, the IRS would be compelled to probe into matters of religious doctrine and make judgment calls as to whether activity reflects adherence to religious conviction or a political agenda. Consider how the IRS would evaluate the following hypothetical examples:

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<sup>155</sup> I.R.C. § 501(c)(3) (2012).

<sup>156</sup> LUNDER, *supra* note 139, at 6–7; *Measuring Lobbying: Substantial Part Test*, IRS, <http://www.irs.gov/Charities-&-Non-Profits/Measuring-Lobbying:-Substantial-Part-Test> [<http://perma.cc/APA8-RTKS>].

<sup>157</sup> I.R.C. § 501(c)(3) (2012) (“[501(c)(3)s are] organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . .”).

<sup>158</sup> Juliet Eilperin, *Report Details IRS Scrutiny*, WASH. POST, May 13, 2013, at A1.

<sup>159</sup> Jonathan Weisman, *I.R.S. Scrutiny Went Beyond the Political*, N.Y. TIMES, July 5, 2013, at A1.

<sup>160</sup> *Id.*

<sup>161</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2013-10-053, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 5–10 (2013), <http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf> [<http://perma.cc/5DDC-KZBS>].

Illustration A: In 2005, the Twenty-Fifth General Synod of the United Church of Christ (UCC) passed a resolution opposing cuts to social safety-net programs based on the Bible’s teachings about poverty and urged opposition to such budget cuts.<sup>162</sup> Based on this resolution, a UCC pastor publishes an article in the church bulletin urging congregants to vote against the local congressman who supported the House leadership’s 2015 budget containing deep cuts to social safety-net program funding.<sup>163</sup>

Illustration B: In 2015, the Orthodox Union (OU), the largest umbrella organization for Orthodox Jewish congregations in America,<sup>164</sup> adopted a resolution expressing its views on negotiations between the United States and Iran on nuclear proliferation.<sup>165</sup> Citing “grave[] concern[s]” over the threat of a nuclear Iran to Israel, the resolution emphasized its belief that “no deal is better than a bad deal” that would allow Iran to develop nuclear capability.<sup>166</sup> Two months before the 2016 election, the Orthodox Union publishes a voter guide rating members of Congress based on their positions on the negotiations.

Would the IRS classify the conduct in each illustration as religious or political? The UCC resolution references scripture, while the OU resolution does not. But Israel undeniably plays a central role in the Jewish faith.<sup>167</sup> Would the IRS promulgate a rule requiring religious textual references in organizational advocacy for the agency to deem the conduct religious rather than political? Is the OU resolution better understood as a manifestation of faith or as a political expression of Jewish nationalism?<sup>168</sup> Both? Each illustration involves action by religious organizations in furtherance of a resolution passed by a religious movement. Would the IRS classify political activity related to such resolutions as per se religious?

Evaluation of religious groups’ activities would also likely replicate prolonged efforts by the Federal Election Commission and courts to define political activity in the campaign finance context. The UCC pastor’s letter contained an express appeal to vote against an incumbent, whereas the OU congregation’s voter guide contained no such direct appeal. But given the OU’s strong stance on the threat of Iran to Israel, congregants would likely interpret the voter guide as urging them to vote for members of Congress with high ratings. Would the IRS classify only direct appeals to vote for or against candidates as political advocacy?<sup>169</sup> Or adopting a more deferential position, it might classify all advocacy as religious except the kind “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>170</sup> Either rule would constitute a government agency’s judgment that

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<sup>162</sup> TWENTY-FIFTH GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, TO ADVANCE THE CAUSE OF THE MOST DISADVANTAGED IN THE BUDGETARY AND APPROPRIATIONS PROCESS (2005), <http://uccfiles.com/synod/resolutions/TO-ADVANCE-THE-CAUSE-OF-THE-MOST-DISADVANTAGED-IN-THE-BUDGETARY-AND-APPROPRIATION-PROCESS.pdf> [<http://perma.cc/FFK6-R6SR>].

<sup>163</sup> Jonathan Weisman, *Republicans Propose Budget with Deep Cuts*, N.Y. TIMES, Mar. 18, 2015, at A16.

<sup>164</sup> *About the OU Advocacy Center*, ORTHODOX UNION ADVOCACY CENTER, <http://advocacy.ou.org/about/> [<http://perma.cc/DVD8-H2Q6>].

<sup>165</sup> *OU Policy Resolution: The Iranian Threat*, ORTHODOX UNION ADVOCACY CENTER (Feb. 6, 2015, 12:19 PM), <http://advocacy.ou.org/2015/ou-policy-resolution-iranian-threat/> [<http://perma.cc/92RR-N83H>].

<sup>166</sup> *Id.*

<sup>167</sup> *See, e.g., Psalms* 137:5–6 (“If I forget you, O Jerusalem, let my right hand wither; let my tongue stick to my palate if I cease to think of you, If I do not keep Jerusalem in memory even at my happiest hour.”).

<sup>168</sup> *See, e.g.,* Jacob Klatzkin, *Judaism Is Nationalism*, in ARTHUR HERTZBERG, *THE ZIONIST IDEA* 316, 316–18 (Atheneum 1970) (1959).

<sup>169</sup> *Cf. Buckley v. Valeo*, 424 U.S. 1, 44 & n.52 (1976).

<sup>170</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007).

certain types of communication are more political than religious in nature, even when a religious organization believes that such activity is central to its faith mission.

In other contexts, religious organizations have recognized the threat that such entanglement poses to their own goals. The Union for Reform Judaism, the largest Jewish denomination in North America<sup>171</sup> and a staunch proponent of separation of church and state,<sup>172</sup> has repeatedly opposed government sources of funding that could benefit its own congregations.<sup>173</sup> It has done so partially as a matter of principle, seeking to legitimize its opposition to legislation that it believes violates the Establishment Clause.<sup>174</sup> But it also asserts its self-interest, arguing, “if we are now to be treated the same as [secular organizations], then all the rules, regulations, audits, monitoring, entanglement and interference that religion uniquely has been spared will now accompany government money.”<sup>175</sup> Rabbi David Saperstein, former Director of the Religious Action Center of Reform Judaism, opposed government funding of religious social service programs, saying, “[w]ith government money comes government rules, regulation, audits, monitoring, interference and control.”<sup>176</sup>

These observations do not necessarily demonstrate that permitting religious organizations to electioneer would invariably lead to entanglement whenever such entities decided to participate in the electoral process. Unlike the subsidies struck down in *Lemon* that conditioned aid on restrictions that required government monitoring,<sup>177</sup> increased government involvement in religious groups’ affairs is not an indispensable feature of lifting the electioneering prohibition. When evaluating religious entities’ electioneering activity, the amount of IRS scrutiny would likely depend on the amount of political work done by the organizations and the degree to which such work appears to predominate as the organization’s purpose. Absent the electioneering prohibition, the government could wait for as-applied challenges to emerge to sort out when unrestricted political activity by religious groups leads to excessive entanglement. But since a clear potential for such outcomes seems likely, RFRA’s compelling interest prong leaves latitude for the government to act prophylactically to prevent such situations before they arise.

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<sup>171</sup> *History*, UNION FOR REFORM JUDAISM, <http://urj.org/about/union/history/> [<http://perma.cc/SSX6-J6S6>].

<sup>172</sup> 48th Gen. Assembly of the Union for Am. Hebrew Congregations, *Separation of Church and State*, UNION FOR REFORM JUDAISM (1965), [http://urj.org/about/union/governance/reso/?syspage=article&item\\_id=2254](http://urj.org/about/union/governance/reso/?syspage=article&item_id=2254) [<http://perma.cc/CW6N-JBGF>].

<sup>173</sup> E.g., *Energy Efficiency Bills: Hearing on S. 717, S. 1084, S. 1191, S. 1199, S. 1200, S. 1205, S. 1206, S. 1209, and S. 1213 Before Subcomm. on Energy of the S. Comm. on Energy and Natural Res.*, 113th Cong. 88–89 (2013) (statement of Rabbi David Saperstein, Director and Counsel, Religious Action Center of Reform Judaism); *Constitutional Role of Faith-Based Organizations in Competitions for Federal Social Service Funds: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 107th Cong. 27–32 (2001) [hereinafter *Faith-Based Organizations*] (statement of Rabbi David N. Saperstein, Director, Religious Action Center of Reform Judaism); Letter from Robert Heller, Chair, Union for Reform Judaism Bd. of Trustees and Rabbi David Saperstein, Dir., Religious Action Ctr. of Reform Judaism to Rabbis, Presidents, and Temple Admr’s (Oct. 20, 2004) [hereinafter Letter from Robert Heller], <http://synagoguestrategies.com/wp-content/uploads/2015/03/URJ-2004-DHS-Funding-Security-memo-03072015.pdf> [<http://perma.cc/9ULY-7L5D>].

<sup>174</sup> Letter from Robert Heller, *supra* note 173, at 2 (“If we abandon that position and say that such direct support is Constitutional, then we are going down the road to parochialism and government funded religions, which have been a disaster in so many nations.”).

<sup>175</sup> *Id.*

<sup>176</sup> *Faith-Based Organizations*, *supra* note 173, at 28.

<sup>177</sup> 403 U.S. 602, 619–21 (1971).

The electioneering prohibition is narrowly tailored to the compelling interest in preventing entanglement between government and religion. There is simply no noninvasive means for the government to permit religious organizations to electioneer while also ensuring that political activity does not overtake the religious activity that the government wished to incentivize by granting tax-exempt status.

#### CONCLUSION

Despite prior affirmation of the legality of the 501(c)(3) electioneering prohibition by courts of appeals, recent Supreme Court decisions raise new threats to the provision. *Burwell v. Hobby Lobby Stores, Inc.* articulates a significantly more deferential interpretation of RFRA’s “substantial burden” prong, prohibiting courts from inquiring into the degree of attenuation between a government policy and religious belief. This interpretation of RFRA would make it very difficult for the government to deny a religious organization’s request for an exemption from the electioneering prohibition on the grounds that it does not substantially burden the free exercise of religion.

The rationale of *Citizens United v. FEC* prevents the government from asserting its desire to prevent political corruption or subsidization of partisan political activity as a compelling state interest justifying the electioneering prohibition. *Citizens United* rejected the anticorruption rationale as a justification for the ban on corporate or union independent expenditures, suggesting that the interest cannot preserve the similarly structured electioneering prohibition. Further, the proliferation of nonprofit political activity as a result of *Citizens United*—coupled with the tax benefits that political organizations have long enjoyed—undermines any suggestion that the electioneering prohibition has the prevention of government subsidy of partisan political activity as its chief purpose.

The electioneering prohibition can, however, survive RFRA review because of its key role in preventing entanglement between government and religion. The provision holds at bay intrusive IRS inquiry of religious organizational activity that would accompany engagement in partisan politics. Because the electioneering prohibition is narrowly tailored to the compelling state interest in ensuring separation between church and state, the tax code provision can and should survive RFRA review despite the sweeping changes ushered in by *Hobby Lobby* and *Citizens United*.

**Word Count:** 12,750