No. 26-1779

In The

Supreme Court of the United States

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Scott Bessent, In His Official Capacity as Acting Commissioner of the Internal Revenue Service, ET AL.,

Petitioners,

v.

Covenant Truth Church,

Respondent.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

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BRIEF FOR THE RESPONDENT

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Team 16
Counsel for the Respondent

QUESTIONS PRESENTED

1. Whether Covenant Truth Church has standing under the Tax Anti-Injunction Act and Article III to challenge the Johnson Amendment; and

2. Whether the Johnson Amendment violates the Establishment Clause of the First Amendment.

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The District Court for the District of Wythe's decision can be found at docket No. 5:23-cv-7997 (D. Wythe 2025). *See* R. at 1. The Court of Appeals for the Fourteenth Circuit's decision can be found at docket No. 25-30453 (14th Cir. 2025). *See* R. at 1-16.

LIST OF PARTIES

Petitioner, and defendant-appellant below, is Scott Bessent, in his official capacity as Acting Commissioner of the Internal Revenue Service. Respondent, and plaintiff-appellee below, is Covenant Truth Church.

STATEMENT OF JURISDICTION

After the Court of Appeals for the Fourteenth Circuit issued its opinion, a petition was timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional and statutory provisions:

U.S. Const. art. III § 2 cl. 1

U.S. Const. amend. 1

I.R.C. §§ 103, 501, 7611, 7421, 7428

STATEMENT OF THE CASE

Respondent, Covenant Truth Church ("Covenant"), is a member of The Everlight Dominion, a "centuries-old" religion with a growing membership of 15,000. R. at 3. The Everlight Dominion holds progressive social values and requires its churches and leaders to live by this tenet by actively participating in political campaigns and supporting leaders that represent the religion's values. *Id.* Leaders and churches that fail to meet this requirement may be excommunicated. *Id*. Gideon Vale is the head pastor of Covenant and a devout believer in the Everlight Dominion. *Id.*

Wanting to spread his faith to more people, Pastor Vale created a podcast to share his sermons with a broader audience. R. at 4. Pastor Vale's proselytization has helped grow the church and attract younger Americans. *Id*. Committed to his faith's mandate to advocate for progressive causes and candidates Pastor Vale discusses political issues in his sermons and encourages listeners to get politically active and vote for candidates who are aligned with the religion's values. *Id.* Most recently, Pastor Vale endorsed Samuel Davis for Senator in the state of Wythe, home to Covenant. *Id*. During a sermon that was broadcast on his podcast, Pastor Vale explained how Congressman Davis' views aligned with the Everlight Dominion's values and he encouraged listeners to vote for Congressman Davis and volunteer for his campaign. R. at 5.

Covenant is a tax-exempt Section 501(c)(3) organization. *Id.* In May of 2024, the IRS informed Covenant that it would be audited to ensure compliance with the Internal Revenue Code. R. at 5. The Johnson Amendment, a 1954 amendment to the IRC restrains churches and other tax-exempt Section 501(c)(3) non-profit organizations from participating or intervening in any political campaign, including by publishing statements that support or oppose any candidate for public office. R. at 2. Organizations that do not comply may lose their tax exempt-status. *Id.* Knowing that an audit would likely uncover his public sermons endorsing Congressman Davis, Pastor Vale became concerned that the Johnson Amendment would be enforced and that Covenant

would lose its tax-exempt status simply for adhering to the doctrine of The Everlight Dominion. R. at 5. As a result, Covenant filed a lawsuit seeking a permanent injunction against the enforcement of the Johnson Amendment on the grounds that it violates the Establishment Clause of the First Amendment. R. at 5.

SUMMARY OF THE ARGUMENT

Respondent, Covenant Truth Church ("Covenant"), respectfully requests this Court to affirm the Fourteenth Circuit's ruling. This result follows from answering the two questions presented: (1) Covenant has standing to sue under both the Tax Anti-Injunction Act ("AIA") and Article III, and (2) the Johnson Amendment violates the Establishment Clause of the First Amendment.

1. Covenant's suit is permitted by the AIA, which only bars a suit when its purpose is to restrain the assessment or collection of any tax. The purpose of Covenant's suit, however, is to challenge the discriminatory treatment it endures as a result of the Johnson Amendment, which establishes a denominational preference for religions which don't mandate political advocacy. But even if this suit's purpose fell within the plain meaning of restraining the assessment or collection of a tax, the AIA's typical bar would not apply because Congress has not provided Covenant with an alternative legal avenue to challenge the constitutionality of the Johnson Amendment.

Additionally, Covenant satisfies the requirements of Article III standing and this suit can be heard by this Court. Under *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010), Covenant has alleged two injuries that are each concrete, particularized, actual or imminent, fairly traceable to the challenged action, and redressable by a favorable ruling. Covenant has alleged that the Johnson Amendment's credible enforcement is an imminent injury. Covenant has also alleged that it is presently harmed by the virtual certainty that the Internal Revenue Service's audit will

lead to reduced donations. This is a classic pocketbook injury according to *California v. Texas*, 593 U.S. 659, 669 (2021). Finally, Covenant's case is ripe and not moot.

2. Under *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Comm'n*, 605 U.S. 238, 248 (2025), a law violates the Establishment Clause when it establishes a denominational preference without being closely fitted to further a compelling governmental interest. *Catholic Charities* also makes clear that by restricting tax-exempt status to churches who do not comment on politics, thereby denying it to churches whose religions mandate political advocacy, the Johnson Amendment establishes a denominational preference based on the content of religious doctrine. This violates the Establishment Clause's fundamental principle of denominational neutrality. Because the Johnson Amendment does so without a compelling interest, it is unconstitutional under the Establishment Clause. But even if the Amendment's only coherent justification, which is to prevent the federal subsidy of partisan politics, qualified as a compelling interest, the Johnson Amendment is not closely fitted to further that interest. As such, Respondent respectfully request this court to affirm the judgement of the Fourteenth Circuit Court of Appeals.

ARGUMENT

I. COVENANT TRUTH CHURCH HAS STANDING TO SUE THE INTERNAL REVENUE SERVICE FOR DENOMINATIONAL DISCRIMINATION IN VIOLATION OF THE ESTABLISHMENT CLAUSE

"The federal courts are under an independent obligation to examine their own jurisdiction . . . ." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Therefore, an appellate court reviews questions of standing *de novo*. *Hughes v. Canadian National Railway Co.*, 105 F.4th 1060 (8th Cir. 2024), *reh'g en banc denied*, 2024 WL 3592196. This Court may reach the merits on Covenant's suit. First, Covenant's suit is not barred by the AIA. Second, Covenant satisfies the requirements of Article III standing with two distinct injuries, each of which independently establishes Article III standing.

A. Covenant Truth Church's Suit is Not Barred by the Tax Anti-Injunction Act

The Tax Anti-Injunction Act ("AIA") only bars a suit when its purpose is to "restrain[] the assessment or collection of any tax." *See* I.R.C. § 7421(a). And even if a party sues with this purpose, the AIA's bar applies only when Congress has "provided an alternative legal way to challenge the validity of a tax." *South Carolina v. Regan*, 465 U.S. 367, 373 (1984). In this case, Covenant Truth Church ("Covenant") is not suing to prevent the Internal Revenue Service ("IRS") from assessing or collecting a tax. And even if that were its purpose, Congress has not provided Covenant with an alternative legal avenue for redress. Either condition suffices to allow Covenant's suit to proceed. Both are true here.

1. Covenant Truth Church's Lawsuit is Not Covered by the Tax Anti-Injunction Act Because It Does Not Restrain the Assessment or Collection of Taxes

Covenant is not suing to restrain the IRS from assessing or collecting a tax within the meaning of the AIA. The purpose of this suit is to enjoin the Government from violating the Establishment Clause by enforcing the Johnson Amendment, R. at 5, which unconstitutionally establishes a preference for certain religions "based on the content of their religious doctrine." *Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 250 (2025). If the Government decided tomorrow to categorically eliminate 501(c)(3) organizations such that every church lost its tax-exempt status, Covenant could not bring this suit. That's because this suit challenges the differentiated status accorded to religions, like The Everlight Dominion and their churches, simply because their faiths require political advocacy. It would be strange to hold that the AIA impedes such a suit. *See New York Times Co.*, 828 F.2d 110, 115 (2d. Cir. 1987) ("Obviously, a statue cannot override a constitutional right.").

Covenant does not challenge the IRS' authority to establish and revoke tax-exempt status. *See Branch Ministries v. Rossotti*, 211 F.3d 137, 141-42 (D.C. Cir. 2000) (confirming that the IRS

has authority under Section 501(c)(3) to revoke the tax-exempt status of a church). Nor does it challenge the agency's authority to assess tax liability through audit.[1] *See Jud. Watch v. Rossotti*, 317 F.3d 401, 405 (4th Cir. 2003) (explaining that the AIA "extends beyond the mere assessment and collection of taxes to embrace other activities, such as an audit . . . that may culminate in the assessment or collection of taxes"). Rather, Covenant challenges the Johnson Amendment because "eligibility for the exemption ultimately turns on inherently religious choices[,]" such as whether to adhere to one's faith by endorsing candidates that align with the faith's values. *Cath. Charities*, 605 U.S. at 250.

This denominational preference based on religious practice has present negative effects on Covenant that persist irrespective of whether a tax will be assessed or collected. Namely, the specter of the Johnson Amendment hanging over Covenant may chill the political engagement of at least some of its clergy and congregants. Even if this particular audit does not result in revocation, that is no guarantee that the IRS will continue declining to use its authority under the Johnson Amendment to harm Covenant. As long as the Amendment exists, Covenant's leaders and members will rationally fear that their doctrinally mandated political advocacy will eventually be turned against their church. Because churches of many other religions aren't under similar doctrinal obligations, the Johnson Amendment preferences them in violation of the Establishment

[1] That said, there is little evidence in the record that the IRS followed each requirement of the Church Audit Procedures Act (CAPA), I.R.C. § 7611, which "sets out circumstances under which the IRS may initiate an investigation of a church and the procedures it is required to follow in such an investigation." *See Branch Ministries*, 211 F.3d at 139-40 (quoting I.R.C. § 7611). Those circumstances and procedures include "an appropriate high-level Treasury official reasonably believ[ing]" that a church may not be tax-exempt under Section 501(a), § 7611(a)(2)(A), and written notice, *id.* § (a)(3)(A). Although the record does not indicate that a high-level Treasury official has the requisite reasonable belief, Respondent assumes all the requirements are met.

Clause. *Cath. Charities*, 605 U.S. at 250. This suit is about that overarching preference, not any particular assessment or collection of taxes, and so it is not barred by the AIA. *See* § 7421(a)(1).

2. Article III Provides Covenant's Only Legal Avenue to Redress Its Injury

Even if this suit falls within the AIA's meaning of restraining the assessment or collection of any tax, the AIA allows the suit to proceed because there is no alternative legal avenue for redress. *See South Carolina v. Regan*, 465 U.S. at 378. This suit is Covenant's only way to mount a facial challenge to the Johnson Amendment *right now* because the IRS has not yet made an adverse determination respecting the church's tax status. And Covenant cannot simply form a Section 501(c)(4) organization through which to express its sincerely held religious beliefs. Doing so does nothing to relieve the remaining Section 501(c)(3) organization of its obligation to "[a]dher[e] to The Everlight Dominion's requirement" that each of its "churches [be] actively involved in political campaigns." R. at 4.

i. The Internal Revenue Code Provides No Avenues for Relief in the Absence of an Adverse Tax Classification

As the Fourteenth Circuit correctly noted, here, where the IRS has made no adverse determination respecting Covenant, the Internal Revenue Code ("IRC") does not provide Covenant with avenues for redress. *See* R. at 7 ("Because Appellee's classification as a Section 501(c)(3) organization is intact, IRS procedures and Section 7428 provide no avenue for relief.").

This distinguishes Covenant's suit from those in *Bob Jones University v. Simon*, 416 U.S. 725 (1974) and *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974). As the Court explained in *South Carolina v. Regan*, the suit in each case was barred by the AIA because alternative remedies were available to dispute adverse determinations *already made* by the IRS. 465 U.S. at 374-76. *Bob Jones* considered a university's suit for injunctive relief against the IRS. 416 U.S. at 725. The agency had announced that it would revoke a ruling letter declaring that

petitioner qualified for tax-exempt status "pursuant to a newly announced policy of denying tax-exempt status for private schools with racially discriminatory admissions policies." *Id*. The Court reasoned that because "petitioner will have taxable income upon withdrawal of its § 501(c)(3) status, it may . . . petition the Tax Court to review the assessment of income taxes [or] pay income taxes . . . and then bring suit for a refund." *Id.* at 746.

Americans United relied on nearly identical reasoning. There, the Court determined that an educational corporation could not challenge the revocation of its tax-exempt status for "devoting a substantial part of its activities to attempts to influence legislation" *id.* at 755, because "respondent w[ould] have a full opportunity to litigate the legality of the Service's withdrawal of respondent's § 501(c)(3) ruling letter in a refund suit following the payment of F.U.T.A. taxes," *id.* at 762.

However, in Covenant's case, the IRC provides no procedures to challenge the constitutionality of the Johnson Amendment prior to an IRS determination that it does not have tax-exempt status. *See* I.R.C. § 7428(a)(1)(A) (limiting the jurisdiction of the Tax Courts to cases of "actual controversy" involving IRS determinations of an organization's tax-exempt status). This makes Covenant's case more like the plaintiff's case in *South Carolina v. Regan*. There, the IRC "d[id] not provide plaintiff with an action in which it may contest the constitutionality of § 103(j)(1)[,]" the provision at issue. 465 U.S. at 378 n.17. Just as in *South Carolina v. Regan*, Article III provides the only avenue for recourse here because there exists no statutory procedure to contest the constitutionality of the Johnson Amendment right now. *See id.* at 379; *Z St. v. Koskinen*, 791 F.3d 24, 31 (D.C. Cir. 2015) (holding that the AIA did not bar petitioner's challenge to the IRS' allegedly unconstitutional delay in processing its Section 501(c)(3) application because it was "unable to utilize any statutory procedure to contest the [delay's] constitutionality").

In the opinion below, Judge Marshall's suggestion, in dissent, that Covenant refrain from suing until its status is revoked, at which point it could pursue remedies under Section 7428, misses the point. *See* R. at 13. Waiting for a revocation is not an alternative remedy because the purpose of Covenant's suit is to eliminate the specter that the credible enforcement of the Johnson Amendment creates. Even if the IRS audit leads to nothing this time, the perpetual threat of enforcement will always adversely affect Covenant, forcing it to choose between engaging in political advocacy or risk revocation. It is this perpetual threat that Covenant challenges. Without an adverse IRS ruling, the IRC provides no avenue to challenge it. *See* § 7428(a)(1)(A).

ii. Covenant Cannot Relieve Itself of Its Doctrinal Obligation to Engage in Political Advocacy by Creating a Section 501(c)(4) Organization

Covenant cannot avoid its obligation to engage in political advocacy by creating a Section 501(c)(4) organization, the remedy available to the church in *Branch Ministries*. *See* 211 F.3d at 143. There, the D.C. Circuit determined that the IRS could constitutionally revoke a church's tax-exempt status for placing ads in national newspapers asserting that then-presidential candidate Bill Clinton's views violated Biblical precepts. *Id.* at 140. The court relied, in part, on the existence of an alternative remedy for the church, which was to "form a related organization under section 501(c)(4)." *Id.* at 143. The 501(c)(4), in turn, would be able to form a political action committee ("PAC") "that would be free to participate in political campaigns." *Id.*; *see also* Hannah Lepow, *Speaking Up: The Challenges to Section 501(c)(3)'s Political Activities Prohibition in a Post-Citizens United World*, 3 Colum. Bus. L. Rev. 817, 827 (explaining that the Court has upheld Section 501(c)(3)'s ban on political lobbying because organizations are "free to make [their] views on legislation known through a Section 501(c)(4) affiliate without losing tax benefits"). Covenant cannot do the same. Even if it formed a related Section 501(c)(4) organization that itself created a PAC, Covenant Church, the Section 501(c)(3) organization, would be required to remain politically

active. The Everlight Dominion mandates as much from each of its churches. R. at 4. Ultimately, because alternative remedies are nonexistent, the AIA permits Covenant's suit to proceed.

B. Covenant Truth Church Satisfies the Requirements for Article III Standing

A plaintiff has Article III standing when its injury is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling."[2] *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). There are two, independent injuries with which Covenant satisfies these requirements. The first is the credible threat that the IRS will enforce the Johnson Amendment and revoke Covenant's tax-exempt status. The second is a prototypical "pocketbook injury." *California v. Texas*, 593 U.S. 659, 669 (2021). Would-be donors are likely to respond to the IRS audit by rationally redirecting their contributions away from Covenant to avoid even the small risk that such donations are retroactively determined to be non-deductible.

1. Covenant Truth Church Suffers an Injury from the Credible Threat that the Internal Revenue Service Will Enforce the Johnson Amendment

"[W]hen a deprivation of First Amendment rights is at stake, a plaintiff need not wait for the damage to occur before filing suit." Mahmoud v. Taylor, 606 U.S. 522, 526 (2025) (citing

[2] In addition to standing, mootness and ripeness are the Court's other justiciability doctrines. Together, they help ensure that federal courts don't surpass the bounds of Article III, which "limits the jurisdiction of federal courts to Cases and Controversies." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (quoting U.S. Const. art. III, § 2, cl. 1) (internal citations omitted). Only standing is at issue today. First, this case is clearly not moot because a live controversy exists. *See DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) Second, because "[t]he doctrines of standing and ripeness originate from the same Article III limitation," *SBA List*, 573 U.S. at 157 n.5 (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006) (internal quotation marks omitted), in many cases, they "boil down to the same question." *Id.* (citing *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007) (internal quotation marks omitted). That is true here. Therefore, we treat standing and ripeness as one and the same, just as they were in *SBA List*, which also concerned whether a plaintiff had standing to bring a pre-enforcement challenge to a law. *Id.* at 157 n.5 (explaining that it uses the term standing to embrace ripeness issues).

Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2018)). That's why, when bringing a pre-enforcement challenge to a statute, a party satisfies the Article III standing requirements for injury "where [1] he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, [2] but proscribed by a statute, and [3] there exists a credible threat of prosecution thereunder." *SBA List*, 573 U.S. at 158 (2018) (citing *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)) (internal quotation marks omitted). All three requirements are satisfied here.

i. Covenant Intends to Engage in Conduct Affected with a Constitutional Interest but Proscribed by Statute

No opinion below questioned that Covenant alleged an intent to engage in conduct affected with a constitutional interest. The record suggests that Covenant is actively engaging in political advocacy and that this suit was filed so that it could continue to do so. R. at. 5 ("Pastor Vale, aware of the Johnson Amendment, became concerned that the IRS would discover [Covenant's] political involvement and revoke the church's Section 501(c)(3) tax classification. As a result, Covenant Truth Church filed a lawsuit . . . ."). This resembles *SBA List*, where the Court held that petitioners satisfied this element by demonstrating "an intent to engage in substantially similar activity in the future." 573 U.S. at 160 (internal quotation marks omitted). Covenant has and will continue to adhere to the teachings of The Everlight Dominion, which mandates political advocacy, including the endorsement of political candidates. R. at 3.

Because adherence to these teachings, without reprisal from the IRS, concerns the equal status of religions under the Establishment Clause, it is "certainly affected with a constitutional interest." *SBA List*, 573 U.S. at 161 (quoting *Babbitt*, 442 U.S. at 298) (internal quotation marks omitted) (requiring only that petitioners' conduct concern political speech). The church has consistently maintained that participation in political campaigns is a core component of its religious doctrine. It has sued to vindicate its right to do so under the Establishment Clause.

ii. The Johnson Amendment Proscribes Covenant's Doctrinally Required Political Advocacy

The Johnson Amendment explicitly forbids the political participation in which Covenant is actively engaged. Specifically, the Amendment strips Covenant, and churches like it, of its tax-exempt status for participating or intervening in "any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3). Thus, the church's conduct is proscribed by the challenged law.

iii. Covenant Faces a Credible Threat of Prosecution Under the Johnson Amendment

Finally, because there is also a credible threat that the IRS will prosecute Covenant pursuant to the Johnson Amendment, the church has standing. *See SBA List*, 573 U.S. at 158. The credibility of such a threat "necessarily depends on the particular circumstances at issue." *Knife Rts., Inc. v. Vance*, 802 F.3d 377, 384 (2d. Cir. 2015). Here, because Congress insists that the Johnson Amendment remain on the books and the IRS has "not disavowed enforcement[,]" there is a credible threat of prosecution. *SBA List*, 572 U.S. at 165 (listing absence of government disavowal as evidence of a credible threat). This is true "even if," as here, "there is [little] history of past enforcement." *N.H. Right to Life Pol. Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) (citing *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). "[A]s long as the statute remains, the credible threat of future enforcement is sufficient to confer standing." *Brooklyn Branch of the NAACP v. Kosinski*, 735 F. Supp. 3d 421, 437 (S.D.N.Y. 2024) (citing *N.H. Right to Life*, 99 F.3d at 13).

"[F]or decades," Congress has had the opportunity to repeal or modify the Johnson Amendment and has refused to do so. Benjamin M. Leff, *Fixing The Johnson Amendment Without Totally Destroying It*, 6 Penn. J. L. & Pub. Aff's, 115, 118 (2020); *see also* R. at. 3 (explaining that legislation to repeal the Johnson Amendment has been introduced each year since 2017). Many of

these proposals would insulate Covenant from liability for Pastor Vale's podcast sermons, which often seek to influence voters. Leff, *supra*, at 118 (explaining that proposed legislation has "often target[ed] violations like the one that would be implicated if a minister sought to influence voters from their pulpit"). Despite Congress' myriad opportunities "to create an exception for religious organizations[,]" the Johnson Amendment retains its unaltered form, which includes churches. R. at 3. Considering the presence of some "voluble" critics, like Senator Charles Grassley, within Congress, *see* Leff, *supra*, at 120, Congress' steadfast commitment to the Johnson Amendment is telling. As far as Congress is concerned, "longstanding legal interpretations and statutory requirements" require the IRS to leverage the Amendment to deny churches the ability "to wade into politics." Congressional Freethought Caucus, 119th Cong., Letter to IRS Commissioner Billy Long, 2 (July 18, 2025), [https://perma.cc/GYB2-889Q] (expressing the caucus' members' steadfast belief that the Johnson Amendment should apply to "houses of worship[,]" otherwise they will become "conduits for undisclosed legal spending, influence campaigns, and partisan slate endorsements").

Despite congressional commitment, the IRS could disavow any intention to enforce the Johnson Amendment against churches like Covenant. It has not done so. In fact, the IRS' recent consent decree demonstrates the agency's commitment to enforcing the Johnson Amendment for such activities as Pastor Vale's weekly podcasts. *See* Joint Mot. for Entry of Consent J., *Nat'l Religious Broad. v. Long*, No. 6:24-cv-00311-JCB (E.D. Tex. July 07, 2025). The consent decree stipulates that the IRS will not enforce the Johnson Amendment against "[b]ona fide communication internal to a house of worship, between the house of worship and its congregation, in connection with religious services." *Id.* at 2-3. According to the IRS, permissible internal communication constitutes neither participating nor intervening in political campaigns within the

meaning of the Johnson Amendment. *Id.* at 3. Instead, it is equivalent to "a family discussion concerning candidates." *Id.* This view of permissible communications corresponds to the agency's common practice of refusing to investigate or enforce potential Johnson Amendment violations, but only if they occur during religious sermons. *See* Jeremy Schwartz & Jessica Priest, *Churches are breaking the law and endorsing in elections, experts say. The IRS looks the other way*, The Texas Tribune, Oct. 30, 2022, [https://perma.cc/L2UR-E287] (noting that ProPublica identified eighteen churches that violated the Johnson Amendment by endorsing candidates during sermons).

Tellingly, "the scope of [the] consent decree," which "must be discerned within its four corners," *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971), only protects internal communications, like the sermons identified by ProPublica. It does not protect Covenant's external-facing conduct, such as Pastor Vale's podcast.

Indeed, "the nineteenth-most listened to podcast nationwide," drawing "millions of downloads from across the country[,]" R. at 4, is not exactly what one pictures when imagining a "family discussion." It is certainly not "internal" to a house of worship. *See Berger v. Heckler*, 771 F.2d 1556, 1568 (2d. Cir. 2001) (citing *United States v. Atl. Refin. Co.*, 360 U.S. 19, 22-23 (1959)) (explaining that when interpreting consent decrees, courts pay deference to "the normal usage of the terms selected"). Therefore, the IRS' decree cannot be read to embrace a popular podcast with a large external audience. *See* R. at 7 n.2 (explaining that by reading the consent decree to embrace Pastor Vale's podcast, the dissent reads it "too broadly"). What's more, the consent decree's conspicuous disavowal of enforcement against internal communications, without a corresponding disavowal of enforcement of external communications like Pastor Vale's podcast, is evidence of its intent to enforce the Johnson Amendment against Covenant. *See* Antonin Scalia & Bryan A. Gardner, *Reading Law: The Interpretation of Legal Texts* 67 (2012) ("[T]he limitations of a text—

what a text chooses *not* to do—are as much a part of its purpose as its affirmative dispositions."). (emphasis in original) (internal quotation marks omitted).

Finally, in light of a clear directive from Congress and a consent decree leaving the door open to prosecuting churches for external communications, the audit is even more evidence of a credible threat of enforcement. Churches are rarely audited. Treasury Inspector General for Tax Administration, *Obstacles Exist in Detecting Noncompliance of Tax-Exempt Organizations*, Rep. No. 2021-10-013 (Feb. 17, 2021) [https://perma.cc/VR2P-MBUW] ("For FY 2019, the chance of examination for churches was about one in 5,000."). And this audit's purpose is to "ensure compliance with the Internal Revenue Code." R. at 5. Unless we believe that the IRS would risk undermining the credibility of its audit enterprise by conducting a rare audit without any intention to prosecute a clear and public violation, its threat must be taken seriously. "On these facts, the prospect of future enforcement is far from 'imaginary or speculative.'" *SBA List*, 573 U.S. at 165 (quoting *Babbitt*, 442 U.S. at 298). As such, Covenant has standing to sue.[3]

[3] Faced with a credible threat of enforcement, Covenant finds itself in a catch-22. It can either discontinue its political advocacy in violation of its religious obligation or continue and credibly risk IRS enforcement. Recognizing that parties will often face this dilemma, at least two lower courts have held that, in a pre-enforcement challenge, when "a credible threat of a policy's enforcement chills [] speech or causes self-censorship," the alleging party "may establish injury in fact." *Burnett Specialists v. Cowen*, 140 F.4th 686, 693 (5th Cir. 2025); *see also Texas State LULAC v. Elfant*, 52 F.4th 248, 256 (5th Cir. 2022) (establishing a similar test); *Henderson v. Springfield R-12 Sch. Dist.*, 116 F.4th 804, 810 (8th Cir. 2024), *vacated*, 2024 WL 4899801 (establishing a similar test). Respondents are not making a chilling effect argument because there is no evidence in the record that Covenant has self-censored. Indeed, every indication is that Covenant intends to continue dutifully adhering to The Everlight Dominion's doctrine. *See* R. at 5 (noting Covenant sued out of fear that the IRS would discover its noncompliance). It is worth noting, nevertheless, because there may come a time when evidence of chilling surfaces, in which case Covenant would also proceed under a chilling effect theory.

2. Covenant Suffers an Injury from Reduced Donations that Will Inevitably Result from the Internal Revenue Service Audit

This Court need not analyze this suit as a pre-enforcement challenge to the Johnson Amendment to recognize that Covenant suffers a concrete, particularized, and imminent injury, that is fairly traceable to the Johnson Amendment and redressable by a favorable ruling. *Monsanto*, 561 U.S. at 149. The Johnson Amendment's mere existence, combined with the impending IRS audit, create the virtual certainty that Covenant will soon suffer a "pocketbook injury," *California v. Texas*, 593 U.S. at 669, when would-be donors redirect their contributions to organizations whose tax-exempt status is not in jeopardy.

i. Redirected Contributions are Concrete, Particularized, and Imminent

"[M]onetary harm[,]" such as the loss of contributions, is quintessentially concrete. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 417 (2021). And it is particularized for the same reason that it connects to Covenant's Establishment Clause claim—other churches, with different religious beliefs, are not similarly affected. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (citing *Lujan v. Def.'s of Wildlife*, 504 U.S. 555, 564 n.1 (1992)) ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.").

Even though the record contains no evidence that donors have redirected their contributions yet, such redirection is imminent. "Although imminence is concededly a somewhat elastic concept," we know "its purpose is to ensure that the injury is certainly impending." *Lujan*, 504 U.S. at 564 n.2 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (internal quotation marks omitted). Although the precise number of donors to Covenant is unclear, The Everlight Dominion is a well-established, "centuries-old religion." R. at 3. Its devout following has recently surged, and as of 2024 The Everlight Dominion has 15,000 members and counting. R. at 4. As soon as Covenant's many donors hear of the audit, it is virtually certain that at least one donor will

redirect her contribution. That's because the purpose of the audit is to ensure compliance with the IRC, including the Johnson Amendment, R. at 5, and so, donors will rationally fear that their tax-deductible contributions may retroactively be deemed non-deductible when the IRS revokes Covenant's tax-exempt status.

ii. Redirected Contributions are Traceable and Redressable

For similar reasons, the injury is also "fairly traceable," to the Johnson Amendment. *Allen v. Wright*, 468 U.S. 737, 751 (1984). This Court has said, for the purposes of traceability, that "[w]hen third party behavior is predictable, commonsense inferences may be drawn." *Diamond Alt. Energy, LLC v. EPA*, 606 U.S. 100, 116 (2025). These include "commonsense economic principles." *Id.* (internal quotation marks omitted). Here, commonsense economic principles suggest that, in light of an IRS audit investigating Covenant's compliance, at least one would-be donor to Covenant will choose to redirect at least part of her donation to another tax-exempt organization. This commonsense conclusion does not rely "on a highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). It relies only on the obvious inference that at least one donor will make a rational decision to redirect contributions in the face of uncertainty. And because even just "[a] dollar of economic harm is still an injury-in-fact for standing purposes[,]" the Court need not speculate about the number of would-be donors who redirect their contributions. *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) (citing *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017)). It need only infer that a nominal impact will result.

Apart from vain attempts to allay its donors' fears, a loss of donations from rational donors would be entirely outside Covenant's control. This distinguishes Covenant's case from one in which a party "manufacture[s] standing merely by inflicting harm on themselves based on their

fears of hypothetical future harm." *Clapper*, 568 U.S. at 416. That would not be permissible, because "self-inflicted injuries are not fairly traceable to the Government's purported activities." *Id.* at 418. Unlike in *Clapper*, where "respondents could not establish standing based on measures they had undertaken" because of the challenged law, *id.* at 415, here, standing is conferred by actions that rational donors will take in response to the Johnson Amendment's existence and the IRS audit.

Lastly, this injury can be "redressed by a favorable decision," invalidating the Johnson Amendment on the grounds that it violates the Establishment Clause. *Lujan*, 504 U.S. at 561 (citing *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41-42 (1976)). As such, Covenant has Article III standing.

II. THE JOHNSON AMENDMENT VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT BY ESTABLISHING A DENOMINATIONAL PREFERENCE BASED ON THE CONTENT OF RELIGIOUS DOCTRINE

This Court reviews constitutional questions *de novo*. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493 (1991). Since before the Johnson Amendment was passed, "this Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no [government] can pass laws which . . . prefer one religion over another." *Larson v. Valente*, 456 U.S. 228, 246 (1982) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)) (internal quotation marks omitted). Yet, by restricting tax-exempt status to churches that remain silent on political issues, the Johnson Amendment does just that. This violates the Establishment Clause's "clearest command" *Larson*, 456 U.S. at 244, that the Government maintain "neutrality between religion and religion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

Denominational neutrality has always been "fundamental to our constitutional order" and to religious liberty. *Cath. Charities*, 605 U.S. at 254. The two religion clauses of the First

Amendment were designed to protect religious liberty in complementary ways. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 533 (2022). James Madison and the other founding fathers understood that the "prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." *Larson*, 456 U.S. at 245; *see* The Federalist No. 51, 326 (James Madison) (explaining that security for religious rights consists in competition between a multiplicity of religions). "The fullest realization of true religious liberty requires that the government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963). Without denominational neutrality, secured by the Establishment Clause, "freedom for all religion[s]," especially minority ones, cannot be guaranteed. *Larson*, 456 U.S. at 245.

This is why, "[w]hen a [federal] law establishes a denominational preference, courts must treat the law as suspect and apply strict scrutiny in adjudging its constitutionality." *Cath. Charities*, 605 U.S. at 248 (quoting *Larson*, 456 U.S. at 246) (internal quotation marks omitted). The Johnson Amendment establishes a denominational preference that disfavors religions whose doctrines mandate political advocacy by restricting tax-exempt status to churches who do not comment on political campaigns. Churches like Covenant, whose faith makes participation in political campaigns mandatory, are relegated to non-tax-exempt status. Because the Johnson Amendment does so without being narrowly tailored to further a compelling government interest, it violates the Establishment Clause. *See Cath. Charities*, 605 U.S. at 254.

A. The Johnson Amendment Violates Denominational Neutrality by Denying Tax-Exempt Status to Churches Whose Religions Require Political Advocacy

"A law that differentiates between religions along theological lines is textbook denominational discrimination." *Cath. Charities*, 605 U.S. at 248. The Johnson Amendment does exactly that. It denies tax-exempt status to churches, like Covenant, whose religions, such as The

Everlight Dominion, require their "leaders and churches to participate in political campaigns and support candidates that align with [their] stances." R. at 3. At the same time, it grants tax-exempt status to churches whose faiths impose no such duties.

This Court recently reaffirmed that differentiation "based on the content of [] religious doctrine" is a "paradigmatic form of denominational discrimination." *Cath. Charities*, 605 U.S. at 248-49. *Catholic Charities* considered a challenge by the Catholic Charities Bureau ("Bureau") to the Wisconsin Supreme Court's determination that it did not qualify for an exemption from employer payroll tax contributions exclusively available to nonprofit organizations that "operated primarily for religious purposes." *Cath. Charities*, 605 U.S. at 241 (quoting Wis. Stat. § 108.02(15)(h)2) (internal quotation marks omitted). The Wisconsin Supreme Court held that the Bureau's charitable activities are not "primarily religious" because it does not attempt to proselytize those to whom it provides services. *Cath. Charities Bureau, Inc. v. Lab. & Ind. Rev. Comm'n*, 411 Wis.2d 1, 35-38 (2024). In reaching its conclusion, the Wisconsin court discounted Catholic teaching, which forbids "ever misusing works of charity for purposes of proselytism." Directory For The Pastoral Ministry of Bishops, *"Apostolorum Successores"* ¶ 196 (2004) [https://perma.cc/2U89-NGNW]. That doctrinal limitation matters to the Establishment Clause. As this Court explained, because the Bureau's faith prevents it from meeting the Wisconsin court's interpretation of the "primarily for religious purposes" requirement, the employer tax contribution law, as applied to the Bureau, "explicitly differentiates between religions based on theological practices." *Cath. Charities*, 605 U.S. at 250.

Just like the Catholic faith prohibits proselytizing during works of charity, The Everlight Dominion requires its leaders and churches "to actively support political candidates whose values align with their faith." R. at 2. Churches like Covenant are mandated by their faith to violate the

Johnson Amendment, just as the Bureau's Catholic faith mandated noncompliance with the Wisconsin law. Just as the Wisconsin law disfavored religions whose doctrines prohibit proselytization during the provision of charity, the Johnson Amendment disfavors religions whose doctrines require political advocacy. As such it violates a precept "fundamental to our constitutional order[,] that the government maintain neutrality between religion and religion." *Cath. Charities*, 605 U.S. at 254 (quoting *Epperson*, 393 U.S. at 104) (internal quotation marks omitted).

1. The Johnson Amendment's Denominational Preference Is Not Justified by Its Secular Purpose

In rare cases, this Court has upheld laws that may appear to grant denominational preferences against Establishment Clause challenges because they have secular purposes which merely "coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). The Johnson Amendment is not such a law. That's because a law that "establishes a preference based on the content of religious doctrine," *Cath. Charities*, 605 U.S. at 248, is a "paradigmatic form of denominational discrimination," *id.* at 249, even if it has a secular purpose which harmonizes with some religions, *id.* at 252 (determining that Wisconsin's law established a denominational preference even though the state pointed to the secular justification of ensuring unemployment coverage for its citizens).

In *Everson*, the Court upheld a New Jersey statute authorizing repayment for the cost of transportation to parents of all schoolchildren, including those of Catholic schools. 330 U.S. at 16. Because the purpose of the law was to protect all school children from the "very real hazards of traffic," *id.* at 17, the Court determined the law was more aptly characterized as "public welfare legislation," *id.* at 16. The law was designed to benefit all schoolchildren, but it just so happened

to harmonize with Catholicism by providing reimbursement to the pupils of Catholic schools, as well as to public schoolchildren. *Id.* at 17-18.

While the Johnson Amendment is also motivated by the secular purpose of "preventing federal subsidy of partisan campaigning," Samuel D. Brunson, *A New Johnson Amendment: Subsidy, Core Political Speech, and Tax-Exempt Organizations*, 43 Yale L. & Pol'y Rev. 354, 370 (2025), there is a critical difference between that purpose and the public-welfare objective upheld in *Everson*. The purpose of the Johnson Amendment can only be achieved if certain religions rebuke their doctrines; the purpose of the transportation law in *Everson* forces no such concession.

The New Jersey statute in *Everson* distributed a generally available benefit based on secular criteria, imposing no conditions that forced a choice between complying with one's faith and complying with the law. *See* 330 U.S. at 3 n.1 (quoting the statute, which imposed no conditions on religious practice, but rather, merely authorized the making of "rules and contracts for the transportation" of school children). The Johnson Amendment, by contrast, conditions tax-exempt status on avoiding conduct that is mandated by the doctrine of The Everlight Dominion and similar faiths. *See* I.R.C. § 501(c)(3). The presence of a secular purpose is irrelevant. What matters to the Establishment Clause is that Covenant's theological practice is constrained, while the practice of other religions is not, just as in *Catholic Charities*. *See* 605 U.S. at 250. As such, the Johnson Amendment neither coincides nor harmonizes with the tenets of some religions. It stands in direct conflict with them.

i. This Court's Opinions Respecting the Secularity of Blue Laws are Sui Generis and Should Not Be Extended to Justify the Johnson Amendment

The Government might try to justify the Johnson Amendment's imposition of doctrinal limitations by pointing to this Court's consistent approval of blue laws against Establishment Clause challenges. *See* Ira P. Robbins, *The Obsolescence of Blue Laws in the 21st Century*, 33 Stan.

L. Rev. 289, 294-97 (2022) (collecting Supreme Court cases). Blue laws restrict the performance on Sunday of certain activities, such as labor and commerce. Neil J. Dilloff, *Never on Sunday: The Blue Laws Controversy*, 39 Md. L. Rev. 679, 679-81 (1980). Thus, they arguably establish a preference for Christianity, for which Sunday is the principal day of worship and a traditional day of rest, Christopher D. Ringwald, *A Day Apart: How Jews, Christians, and Muslims Find Faith, Freedom, and Joy on the Sabbath* 85 (2007), while disfavoring Orthodox Jews, who are already doctrinally committed to a day of rest, from Friday sunset to Saturday evening, *id*.

Nevertheless, this Court has consistently upheld blue laws because the "purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals." *McGowan*, 330 U.S. at 445. This logic should not be extended to the present case because blue laws have a status in American history and tradition that the Johnson Amendment does not.

The Establishment Clause "must be interpreted by reference to historical practices and understandings." *Kennedy*, 597 U.S. at 535 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)) (internal quotation marks omitted), and blue laws fit within the "original meaning and history" of the Establishment Clause, *id.* at 536 (quoting *Town of Greece*, 572 U.S. at 575) (internal quotation marks omitted). Indeed, the Court's decisions respecting blue laws have "f[ound] the place of Sunday Closing Laws in the First Amendment's history both enlightening and persuasive." *McGowan*, 366 U.S. at 440. However, laws conditioning tax-exempt status on refraining from political advocacy have no similar place in this Nation's history. Therefore, the Johnson Amendment's denominational preference is not justifiable.

Whereas the first English blue law was passed in 1676, Dilloff, *supra*, at 682-83, the federal government did not even consider restricting tax-exempt organizations from political activity until 1919. Congressional Research Service, RL33777, *Tax-Exempt Organizations Under Internal Revenue Code Section 501(c): Political Activity Restrictions*, 2 (2025), [https://perma.cc/UZX3-5E6S]. And it did not enact such a limitation until the Johnson Amendment was passed. *Id*. at 3. Tax-exemptions for religious organizations have existed at the state level since the founding, but no founding-era statute conditioned exemptions on refraining from political activity. *See Walz v. Tax Comm'n of New York*, 397 U.S. 664, 676-79 (1970) (collecting state statutes granting tax exemptions to religions, none of which was based on refraining from political activity).

Meanwhile, the English common law tradition of blue laws persisted through the founding. Lesley Lawrence-Ham, *Red, White, but Mostly Blue: The Validity of Modern Sunday Closing Laws Under the Establishment Clause*, 60 Vand. L. Rev. 1273, 1276-77 (2007) ("Colonial blue laws survived the American Revolution and the enactment of the First Amendment relatively unscathed."). In fact, our Constitution's ratifiers embraced blue laws as compatible with the Establishment Clause. *See id.* at 1277 ("Despite having themselves adopted constitutions that prohibited government establishment of religion, most new states reenacted their colonial Sunday restrictions . . . ."). James Madison himself, as he was "f[ighting] for the First Amendment in the Congress," introduced "A Bill for Punishing Sabbath Breakers" to Virginia legislators. *McGowan*, 366 U.S. at 438-39.

Not only do political restrictions on tax-exempt organizations not share this tradition, but history actually cuts in the opposite direction. As the Fourteenth Circuit noted, "America's history and tradition demonstrates that religious leaders routinely state that their religions obligate them to be involved in the political process." R. at 9. Because the Johnson Amendment does not arise

out of a long tradition of similar laws, it has no place in the "original meaning and history" of the Establishment Clause. *Kennedy*, 597 U.S. at 536 (citing *Town of Greece*, 572 U.S. at 575), and its denominational preference is unjustifiable.

B. The Johnson Amendment Fails Strict Scrutiny

Because the Johnson Amendment prefers denominations that do not require political advocacy over those like The Everlight Dominion, it must be treated as suspect and "invalidated unless it is justified by a compelling governmental interest" and is "closely fitted to further that interest." *Larson*, 456 U.S. at 246-47. The Johnson Amendment is not justified by a compelling interest. Even if it were, it is not narrowly tailored to further that interest.

1. The Only Coherent Justification for the Johnson Amendment Is Not Compelling Because It Was Not Considered by Congress at the Time of Its Enactment

To be compelling, "the government's asserted interest must be genuine and not merely post-hoc rationalizations." *Cornelio v. Connecticut*, 32 F.4th 160, 173 n.5 (2d. Cir. 2022) (quoting *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 265 (2d Cir. 2014)) (internal quotation marks omitted). An asserted interest is "not strong[,]" let alone compelling, when "there is no indication that the legislative body that passed the ordinance considered this justification." *Watchtower Bible & Tract Soc'y of N.Y. Inc. v. Village of Stratton*, 536 U.S. 150, 170 (2002) (Breyer, J., concurring).

Today, the Government can point to only one "coherent justification for the ban" on political engagement, which is to prevent the Government subsidization of political partisanship. Benjamin M. Leff, "*Sit Down and Count the Cost": A Framework for Constitutionally Enforcing the 501(c)(3) Campaign Intervention Ban*, 28 Va. Tax L. Rev. 673, 676 (2009). However, this justification was not considered by Congress when it passed the Johnson Amendment.

Because "Congress held no hearings on the provision, and after its passage, nobody created an explanatory legislative history," the precise reason for the Johnson Amendment's enactment is famously "lost to time, if it was ever known." Brunson, *supra*, at 364-65. The little evidence available suggests that then-Senator Lyndon B. Johnson introduced the Amendment to strike back at his political enemies. *Id.* at 365 (noting that "[t]he most commonly accepted explanation" for the Amendment's enactment "is that Senator Johnson believed that tax-exempt organization had worked with a political opponent to challenge his incumbency").[4]

Had Congress thought preventing the federal subsidy of political campaigns was an important justification for the Johnson Amendment, "it would have said so." *Watchtower*, 536 U.S. at 170 (Breyer, J., concurring). But it didn't. Brunson, *supra*, at 364-65 (explaining that though some Congress members were concerned about tax-exempt organizations' participation in politics, this never formally justified the Amendment). No member of Congress formally offered this rationalization until decades after the Johnson Amendment was enacted. *See* H.R. Rep. No. 100-391, pt. 2, at 1625 (1987) (explaining that the prohibition on campaigning by public charities "reflect[s] Congressional Policies that the U.S. Treasury should be neutral in political affairs"); *see also* Brunson, *supra*, at 367 (explaining there is good "evidence that today, Congress has a policy against the federal subsidy of campaign donations). Because these rationalizations occurred well

[4] A fuller account of history demonstrates just how inconsequential a concern today's justification for the Johnson Amendment was to Johnson himself. During the McCarthyism era, much of the money that was used to politically attack Johnson, and his ideological allies, came from anti-communist Section 501(c)(3) organizations. Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches,* 42 B.C. L. Rev. 733, 742 (2001). The Amendment was merely Johnson's way to combat the political influence of his political enemies. Larry Witham, *Texas Politics Blamed for '54 IRS Rule — LBJ Wanted to Keep Senate Seat*, Wash. Times, Aug. 27, 1998, at A4.

after the Amendment's passing, preventing federal subsidy of partisan politics is not a compelling interest attributable to the Government.

2. The Johnson Amendment Is Not Closely Fitted to Further the Government's Interest in Preventing Subsidization of Political Partisanship

Even if preventing the subsidization of political partisanship were a compelling interest attributable to the Government, the Johnson Amendment would still be unconstitutional because it is not closely fitted to this interest. *See Cath. Charities*, 605 U.S. at 254. "[A] statute is not narrowly tailored if it is either underinclusive or overinclusive in scope." *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020) (citing *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1204 (9th Cir. 2018)); *see Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 805 (2011) (suggesting that a law is not narrowly tailored when it is over- or under inclusive). The Johnson Amendment is both. Since the Johnson Amendment "is not narrowly tailored, it cannot be constitutionally applied to *anyone*, even if a more narrowly tailored statute might still capture [Covenant's] conduct." *Sisters for Life, Inc. v. Louisville-Jefferson Cnty.*, 56 F.4th 400, 407 (6th Cir. 2022) (emphasis in original) (citing *Ams. for Prosperity Found. v. Bonta*, 596 U.S. 595, 614 (2021)).

i. The Johnson Amendment Is Overinclusive Because Preventing Churches from Expressing Their Political Views Does Not Prevent Federal Subsidization of Partisan Politics

"[A]n impermissibly overinclusive restriction . . . unnecessarily circumscribes protected expression." *Am. Ass'n of Pol. Consultants, Inc. v. FCC*, 923 F.3d 159, 167 n.9 (4th Cir. 2019) (quoting *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015)) (internal quotation marks omitted). In the name of curbing the federal subsidy of partisan politics, the Johnson Amendment sweeps in unrelated expression, preventing churches "from expressing their own views on the qualifications of candidates for office" and church leaders "from expressing personal views under circumstances in which these views could be attributed to the organization." Leff, *Fixing the Johnson Amendment*,

supra, at 120.[5] In so doing, it treats all religious political expression as equivalent to campaign intervention, regardless of whether that expression results in a campaign contribution. "Surely, this is to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

Insofar as the Government seeks to prevent subsidizing political partisanship, it cannot explain why it has not modified the Amendment to target whether churches donate to political campaigns, rather than retain an overinclusive version which targets even a minister's Sunday sermon. *See Cath. Charities*, 605 U.S. at 253-54 ("To the extent the State seeks to avoid opining on employee compliance with religious teachings, it does not explain why it declined to craft an exemption limited to employees who are in fact tasked with inculcating religious doctrine."). Just as Wisconsin could not justify its categorical exclusion because it could have tailored its rule to employees who actually inculcate doctrine, *id.*, here, the Government cannot justify suppressing all religious political expression without tailoring its rule to conduct that actually subsidizes campaigns. By punishing pastors and their churches for politically valanced Sunday sermons or, in Covenant's case, for expressing sincerely held religious beliefs on podcasts, the Amendment conflates faithful political expression with campaign intervention.

This is especially problematic when, at most churches, including churches like Covenant that mandate advocacy for progressive stances, the pastor preaches about much more than politics. *See* R. at. 4 ("Pastor Vale began using his weekly podcast as a forum to deliver political messages

[5] The Johnson Amendment also prevents "political contributors from using charities to obtain a tax deduction for their political campaign contributions." Benjamin M. Leff, *Fixing the Johnson Amendment*, *supra*, at 120. The fact that the Amendment has a second function that is connected to the purpose of preventing the subsidization of political partisanship does not undermine Covenant's case. Bundling together conduct that is regulated to achieve the Government's purpose with conduct that doesn't achieve its purpose, doesn't legitimatize regulating the latter. A law is overinclusive, when "it regulates too much conduct." *Otto v. Boca Raton*, 981 F.3d 854, 879 (11th Cir. 2020) (Martin, J., dissenting).

[but] not every podcast discusses political issues."). By conflating political expression and campaign intervention, the Johnson Amendment threatens to chill sermons that are not even about politics, as pastors will fear that their entire message will be swept up by the Johnson Amendment's prohibition. This overinclusivity underscores the Establishment Clause violation, because churches whose doctrines mandate political advocacy have no choice but to risk sanction in order to remain faithful to their sincerely held beliefs. *See Cath. Charities*, 605 U.S. at 249-50.

ii. The Johnson Amendment is Underinclusive Because it Permits Issue Advocacy

Not only is the Johnson Amendment overinclusive; it is also "vastly underinclusive" with respect to the Government's asserted interest in preventing the federal subsidy of political partisanship. *See Cath. Charities*, 605 U.S. at 253. This is because a "law is underinclusive when it 'plac[es] strict limits on' certain activities while allowing other activities that 'create the same problem.'" *Bacon v. Woodward*, 104 F.4th 744, 753 (9th Cir. 2024), (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 172 (2015)) (alterations in original). By permitting churches to publicly express views on certain issues and host political candidates for speeches, the Johnson Amendment allows for the federal subsidy of politics.

Despite prohibiting Section 501(c)(3) organizations from endorsing political candidates, IRS rules stipulate that the Johnson Amendment permits "issue advocacy," which the IRS defines as publicly expressing views on specific political issues such as abortion, same-sex marriage, or school vouchers. Rev. Rul. 2007-41, 2007-1 C.B. 1421. They may even invite political candidates to come speak from their platforms—including from a church pulpit during a sermon—so long as they do not formally endorse the candidates. *Id*. Such issue advocacy can advance a candidate's electoral prospects by mobilizing sympathetic audiences, shaping voter preferences, and lending institutional legitimacy to political messages. Deserai Crow & Michael Jones, *Narratives as Tools*

for Influencing Policy Change, 46 Pol'y & Pols. 217, 219-24 (2018). Indeed, permitting a candidate to use an organization's platform to speak might do just as much, if not more, to contribute to her campaign as an endorsement. Giulia Caprini, *Does candidates' media exposure affect vote shares? Evidence from Pope breaking news*, 220 J. Pub. Econ., 1, 2 (2023).

This selective prohibition undermines the Government's claimed interest in preventing federal subsidy of partisan politics. By tolerating conduct that advances political campaigns, while prohibiting a relatively arbitrary subset of political expression, the Johnson Amendment leaves "appreciable damage to that supposedly vital interest unprohibited." *Reed*, 576 U.S. at 172 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)) (internal quotation marks omitted).

Ultimately, the Johnson Amendment is not narrowly tailored to prevent the federal subsidy of partisan politics because it is simultaneously too broad and too narrow. It proscribes core religious practice that may have no relation to political donations, while permitting activities that are functionally similar to lobbying or campaign contributions.

3. The Johnson Amendment Could Be Narrowly Tailored by Exempting Churches and Religious Entities

If it exempted churches and religious entities entirely, the Johnson Amendment would still achieve its goal of preventing the federal subsidy of partisan politics without establishing a denominational preference and vitiating the Establishment Clause's guarantee. This is further evidence that the Amendment is not closely fitted to further a compelling interest. *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000) (citing *Reno v. ACLU*, 521 U.S. 844, 874 (1997)) ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."). This revised Johnson Amendment would remain singularly focused on secular charities, which are frequently politically oriented based on little more than naked

partisanship, Baran Han et. al, *Political Ideology of Nonprofit Organizations*, 104 Soc. Sci. Q. 1207, 1220-21 (2023) (concluding that donation trends to charities correspond to voting trends), rather than sweeping in religions whose political participation flows from sincerely held religious beliefs, *see* Leff, *Fixing the Johnson Amendment, supra*, at 119**.** This approach is most in line with the principles underlying the Establishment Clause. Any other approach runs the risk that the Government will "prefer one religion over another[,]" *Everson*, 330 U.S. at 15, based on "fundamentally theological choices driven by the content of different religious doctrines," *Cath. Charities*, 605 U.S. at 252.

i. Other Proposals for Revising the Johnson Amendment Are Unworkable and Threaten the Establishment Clause's Promise of Neutrality

Legislators and commentators have proposed several revisions of the Johnson Amendment aimed at reducing the burden on religious exercise. *See* Leff, *Fixing the Johnson Amendment*, *supra*, at 128-42 (surveying proposed changes to the Johnson Amendment). While these proposals would allow a wider range of messages from the pulpit, any proposal that still applies the Johnson Amendment to religious groups will require the Government to draw lines based on the content of religious doctrine, undermining the Establishment Clause's guarantee that the Government maintain neutrality between religions. This underscores why the Government cannot justify applying the Johnson Amendment to churches.

Two leading proposals best illustrate this. First, the "de minimis incremental expenditure" approach would permit churches to engage in "no-cost political communication[,]" defined as political speech that "results in the organization incurring not more than de minimis incremental expenses." Leff, *Fixing the Johnson Amendment*, *supra*, at 131 (quoting Free Speech Fairness Act, H.R. 949, § 2(a), 116th Cong. (2019)). The theory is that this would prevent the Government from subsidizing political speech because it could only grant tax-exempt status to churches engaging in

advocacy of negligible cost. Leff, *Fixing the Johnson Amendment*, *supra*, at 132. But that approach would pressure churches, like Covenant, whose faiths require political advocacy, to conform their religious practice to a government-determined expenditure threshold. Mandated by their faith to participate in costly endeavors like political campaigns and supporting candidates, Maria Petrova, et. al., *Social Media and Political Contributions: The Impact of New Technology on Political Competition*, 67 Mgmt. Sci. 2997 (2021), churches like Covenant and their leaders would be forced to choose between adherence to their sincerely held beliefs and their churches' tax-exempt statuses.

Another leading proposal would allow charities, including churches, to speak about electoral matters "in the ordinary course of the organization's regular and customary activities." *See, e.g.*, H.R. 949, 116th Cong. (2019). The motivation behind such proposals is to allow the Johnson Amendment to prohibit official endorsements and campaign rallies, while permitting pastors to advocate for political causes during Sunday sermons or weekly church bulletins. Defining what counts as "ordinary," "regular," or "customary" is itself fraught. *See* Leff, *Fixing the Johnson Amendment*, *supra*, at 138 (quoting Edward A. Zelinsky, *Churches' Lobbying and Campaigning: A Proposed Statutory Safe Harbor for Internal Church Communications*, 69 Rutgers Univ. L. Rev. 1527, 1550 (2017)) (internal quotation marks omitted) ("[T]he definition of internal will be strained by the ways that churches regularly project their church services to the masses."). But even setting that aside, this presents a profound Establishment Clause problem. It discriminates against religions, like Covenant, which are mandated to "participate in political campaigns," *see* R. at 3, a quintessentially *external* communication. Just like drawing a line between "no cost" and costly speech would differentiate between religions based on religious

doctrine, so too would establishing a line between external and internal communications. Both are "textbook denominational discrimination." *See Cath. Charities*, 605 U.S. at 248.

C. The Johnson Amendment is Inconsistent with the Policy Interests Underlying the Establishment Clause

The Establishment Clause must be interpreted holistically, rather than based on a rigid set of principles. *See Walz*, 397 U.S. at 668 ("The purpose was to state an objective, not to write a statute."). Therefore, courts look at each case in light of whether the law in question "establishes a religion or religious faith or tends to do so[,]" rather than "take a rigid, absolutist view." *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

Viewing the Johnson Amendment in this holistic light, its history and application is not consistent with the underlying purpose of the Establishment Clause. First, the Johnson Amendment is completely inconsistent with the long tradition of using one's religious faith to interpret the surrounding world, including political issues. Considering that history, the Johnson Amendment does not prevent the politicizing of religion, but rather, promotes it. Relatedly, the Johnson Amendment's enforcement makes IRS auditors the ultimate arbiters of religious sermons.

1. The Johnson Amendment is Not in Line with Historical Practices

The Establishment Clause "must be interpreted by reference to historical practices and understandings." *Kennedy*, 597 U.S. at 535 (quoting *Town of Greece*, 572 U.S. at 576) (internal citations omitted). A complete bar on religious leaders endorsing or opposing candidates is not consistent with historical practices and understandings. R. at 9. At our country's founding, religious leaders expounded on all matters that touched their congregants' lives, and political leaders were no exception. John Witte, et al., *Religion and the American Constitutional Experiment* 9 (5th ed. 2022). Political sermons accounted for around 80% of all political literature published in the 1770s and 1780s. *Id.* These sermons were delivered not only within churches, but also in

statehouses and political assemblies. *Id.* Church leaders even offered special "election day sermons" encouraging parishioners to vote and to use religious principles to analyze political ideas. *Id*. at 39. Even critics of this practice acknowledged how common and widespread it was. In an 1800 pamphlet titled "A Solemn Address to Christians and Patriots," American lawyer Tunis Wortman asked, "[t]he pulpit and the press are at this moment engaged to effect the base designs of a political party. Is this the way to promote the interests of the church, by connecting it with party views and party operations?" Ellis Sandoz, *Political Sermons of the American Founding Era, 1730-1805, Volume 1* 1812 (2nd ed. 2013).

i. The Johnson Amendment Promotes, Rather Than Prevents, the Politicizing of Religion

Despite this rich history and tradition, this Court has repeatedly warned against "politicizing" religion. *Walz*, 397 U.S. at 695. But it is not the discussion of politics from a theological angle that "politicizes" religion, but rather, the opposite—when the Government writes statutes requiring an invasive inspection into religious doctrine in order to be enforced. This Court has warned that when the Government becomes overly involved with regulating religion in this manner, it can "engender a risk of politicizing religion." *Walz*, 397 U.S. at 695.

This is especially true when the Government imposes requirements on some religions, but not others. *Larson*, 456 U.S. at 253. In *Larson*, the court ruled that a "50% rule" imposing stricter reporting requirements on religions that received more than half of their funding from outside sources was unconstitutional. *Id.* When the Government chooses to accord a benefit to some religions, but not others, even a seemingly neutral rule will result in legislators discussing the theology and practices of specific religions that may be affected by such a law. *See Larson*, 456 at 255 (noting that legislators discussed how the 50% rule might affect specific groups, such as Moonies or Roman Catholics). A rule that embeds legislators deep into the theology and practices

of specific religious sects—and puts them in the role of determining which groups should receive or be denied a benefit based on their beliefs and practices—undermines the religious liberty that the First Amendment's religion clauses are meant to protect. *See Larson*, 456 U.S. at 255; *Kennedy*, 597 U.S. at 533.

2. The Johnson Amendment Requires IRS Auditors to Make Judgements About the Meaning of Religious Sermons

To carry out its "issue advocacy" approach, under which religious leaders are allowed to address political issues if they don't explicitly endorse or oppose a candidate, the IRS must draw a line between discussing political issues and endorsing political candidates. Rev. Rul. 2007-41, 2007-1 C.B. 1421. But that line isn't clear. For example, during the 1960 election, Ramsey Pollard, the president of the Southern Baptist Convention, preached a sermon against the election of John F. Kennedy, stating "our concern over the candidacy for the president of the United States of one who indisputably would be under pressure of his church hierarchy to weaken the wall of separation." Shaun A. Casey, *The Making of a Catholic President* 108 (2009).

When Pollard spoke about a "church hierarchy," he was referring to the Catholic Church, contrasted with his own Baptist tradition. At the time, religious opposition to Kennedy stemmed from fears that a Catholic president would be controlled by the Pope. However, a listener without the background to understand what Pollard meant by a "church hierarchy" might have interpreted Pollard's statements as "issue advocacy" rather than opposition to a specific candidate.

For minority religions, vital context like this is much less likely to be understood. While many Americans are familiar with Christianity, most Americans are unfamiliar with even the most basic tenets of minority faiths like Hinduism, Buddhism, and Islam. Stephen R. Prothero, *Religious Literacy: What Every American Needs to Know—And Doesn't* 27 (2007). People who actively participate in a religion will be more familiar with language and concepts that might be

misinterpreted by an outsider. *Id.* This creates an issue when properly distinguishing between "issue advocacy" and "political campaign intervention" would require auditors from the IRS to not just listen in on sermons, but to interpret them without the context necessary to distinguish between the two.

In fact, the IRS' own guidelines recommend this approach, stating that while issue advocacy is allowed, even on issues that divide candidates, issue advocacy that "functions as political campaign intervention" is forbidden. Rev. Rul. 2007-41, 2007-1 C.B. 1421. To distinguish between these two, "[a]ll the facts and circumstances need to be considered to determine if the advocacy is political campaign intervention." *Id*. The IRS has created a vague and unworkable standard that requires it to make the final judgement about what was *actually* meant by the words in a particular sermon. "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated." *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). Nothing could be farther from this constitutional guarantee than allowing the Government to be the final arbiter of religious meaning, and bestow benefits based on their own personal interpretation of a religious message. To do so strikes at the core of the Establishment Clause.

CONCLUSION

The AIA permits this suit to proceed, and Covenant has Article III Standing. Therefore, because the Johnson Amendment violates the Establishment Clause by establishing a denominational preference without being narrowly tailored to further a compelling governmental interest, Respondent respectfully requests the judgement of the Fourteenth Circuit Court of Appeals be affirmed.

Respectfully submitted,

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Attorneys of Record

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