No. 26-1779

IN THE

SUPREME COURT OF THE UNITED STATES

SCOTT BESSENT, IN HIS OFFICIAL CAPACITY AS ACTING COMMISSIONER OF THE INTERNAL REVENUE SERVICE, ET AL.,

Petitioners,

v.

COVENANT TRUTH CHURCH,

Respondent.

On Writ of Certiorari

To the United States Court of Appeals

For the Fourteenth Circuit

BRIEF FOR PETITIONERS

TEAM NO. 7

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether Covenant has pre-enforcement standing to challenge the Johnson Amendment when it cannot establish a credible threat of enforcement and when the Tax Anti-Injunction Act forbids pre-enforcement tax suits.

II. Whether the Johnson Amendment violates the Establishment Clause, when the law does not explicitly discriminate against religious sects, was not founded on religious animus, and is rooted in a century of this nation's history of restrictions on tax exemptions.

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JURISDICTIONAL STATEMENT

The Fourteenth Circuit entered judgment on August 1, 2025, and the IRS filed a timely petition for a writ of certiorari, which this Court granted on November 1, 2025. The IRS contends that the district court did not have jurisdiction, but this Court has jurisdiction under 28 U.S.C. § 1254(1).

PARTIES

Petitioners, the Internal Revenue Service (the IRS) and Scott Bessent, in his official capacity as acting commissioner of the IRS, were the appellants in the court below. Respondent is Covenant Truth Church (Covenant).

CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns two constitutional provisions. The first is Article III's declaration that this Court's "judicial power" only extends to "Cases" and "Controversies." U.S. Const. art III, § 2, cl 1. The second is the First Amendment's Establishment Clause, which states that "Congress shall make no law respecting an establishment of religion." U.S. Const., amend. I, cl. 1.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Background. This case is about the government's ability to ensure the integrity and credibility of our charitable organizations by preventing them from abusing their tax-exempt status to engage in electioneering. Covenant claims that this neutral, secular restriction violates the Establishment clause and challenges it even though the government has never enforced the provision against Covenant. R. 5.

The Johnson Amendment. 26 U.S.C. § 501(c)(3) (2025) provides an income tax exemption for organizations which are "operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes," but only if those organizations comply with certain restrictions. R. 2. One of these restrictions is the "Johnson Amendment" (the Amendment), named after its legislative sponsor, then-senator Lyndon Johnson, and enacted over seventy years ago as part of the Internal Revenue Code of 1954. *Id.* The Amendment states that § 501(c)(3) organizations may "not participate in, or intervene in . . . any political campaign on behalf of . . . any candidate for public office." *Id*. Congress later retained this provision when it revised and renamed the tax code in 1986, and it has historically been uncontroversial. *Id*. The Amendment has come under fire more recently from interest groups, but Congress has rejected their proposals to repeal the Amendment in every legislative session since 2017. R. 3.

Covenant Truth Church. Covenant, the respondent in this case, is a church, and accordingly Covenant has always enjoyed tax-exempt status under § 501(c)(3). R. 5. Covenant is affiliated with The Everlight Dominion, a religion which allegedly "requires its leaders and churches to participate in political campaigns and support candidates that align with The Everlight Dominion's progressive stances." *Id*.

Pastor Gideon Vale. Covenant has grown substantially in membership in recent years due to the "charismatic" leadership of Pastor Gideon Vale (Pastor Vale), who joined Covenant in 2018. R. 4. To make the church more appealing to younger generations, Pastor Vale created a weekly podcast to "deliver sermons, provide spiritual guidance, and educate the public about The Everlight Dominion." *Id*. This podcast, alongside his weekly sermons (delivered from the pulpit with a live stream for those who cannot attend in person), are how Pastor Vale communicates with his congregation. *Id.* Vale has repeatedly used these platforms to "endorse candidates . . . [by] encourag[ing] . . . listeners to vote for candidates, donate to campaigns, and volunteer for campaigns," R.4, including in a 2024 special election to replace a retiring Wythe senator. R. 5. Vale has no plans to cease this practice. *Id.*

The IRS Letter. The IRS performs randomized audits regularly to ensure that § 501(c)(3) organizations comply with the requirements of the tax code. On May 1, 2024, Covenant received a letter from the IRS indicating that it had been selected as part of this randomized procedure. *Id.* Before anything further could happen, Covenant, jumping to the unprecedented conclusion that the IRS intended to enforce the Amendment against Covenant, filed this suit for an injunction. *Id.* As a result of Vale's pre-enforcement suit, there has yet to be an audit, the Amendment has yet to be applied, and Covenant's tax-exempt status remains unchanged. *Id*.

II. PROCEDURAL HISTORY

The District Court. On May 15, 2024, Covenant filed suit against the IRS and Scott Bessent, in his official capacity as Acting Commissioner of the IRS, in the United States District Court for the Eastern District of Wythe seeking a permanent injunction against enforcement of the Amendment. R.5. Covenant's complaint alleged that the Amendment violates the Establishment Clause of the First Amendment. The IRS filed a timely answer, denying all of Covenant's

claims. *Id*. Covenant then moved for Summary Judgement. *Id.* After full briefing and argument, the district court granted Covenant's motion, holding that "(1) Covenant Truth Church has standing to challenge the Johnson Amendment, and (2) the Johnson Amendment violates the Establishment Clause." *Id*.

The Court of Appeals. The United States Court of Appeals for the Fourteenth Circuit (the Fourteenth Circuit) affirmed the district court's order. R. 6. The Fourteenth Circuit held that Covenant had pre-enforcement standing to bring this suit because "the threat of future enforcement is substantial." R. 8. The court also held that Covenant is exempt from the Tax Anti-Injunction Act (AIA), which forbids pre-enforcement tax suits. R. 6–7. It did so on the grounds that the alternative procedures Congress provided to challenge the legality of a tax only apply when there is an "actual controversy," which is not present here because "the IRS has not yet conducted its audit and [Covenant's] tax classification remains unchanged." *Id.* Additionally, the Court found that the Amendment violated the establishment clause because it "favors some religions over others by denying tax exemptions to organizations whose religious beliefs compel them to speak on political issues." R. 9. This Court granted certiorari.

SUMMARY OF THE ARGUMENT

I.

Covenant may not bring this suit because Article III does not permit the federal courts to issue advisory opinions; it requires an actual controversy that is ripe for judicial review. Here, the issues of standing and ripeness amount to the same question: whether Covenant can show a credible threat that the IRS will enforce the Johnson Amendment against it. The answer to that question is no. Covenant cannot establish the credible threat required for pre-enforcement standing under Article III because the because the history of IRS practice, the structure of the tax code, and the

agency's future commitments all reinforce that there is no such threat. Covenant cannot sue to enjoin hypothetical conduct.

Even if Covenant could meet its burden to establish pre-enforcement standing under Article III, the AIA prohibits all pre-enforcement tax suits, including this suit to prevent the IRS from changing Covenant's tax-exempt status. The exception to the AIA for plaintiffs with no other way to challenge the legality of a tax does not apply to Covenant, which has not one, but two statutory remedies available to it in the form of a declaratory judgment action or refund suit should the IRS revoke its tax status. The Fourteenth Circuit concluded that the exception applied because these remedies are not available absent an actual controversy, but a remedy is not inadequate because it requires that the applicant have standing.

Because there is no actual controversy here, and because even if there were, the AIA would bar Covenant's claim; this Court should reverse the Fourteenth Circuit and hold that Covenant lacks standing to bring this case.

II.

The Amendment does not violate the Establishment Clause because it is consistent with both this Court's historical understanding of the Establishment Clause and this nation's historical practices. The Establishment Clause must be interpreted by reference to historical practices and understandings. And, when a law comports with either this nation's historical practices, or this Court's historical understanding, it does not violate the Establishment Clause. The Amendment does not violate the Establishment Clause because it comports with both this nation's practices, and this Court's understandings. A historical review of this Court's history reveals that facially neutral laws advancing secular governmental interests do not violate the Establishment Clause.

And a historical review of this nation reveals that Congress has been placing restrictions on the ability for non-profits to participate in politics for nearly a century.

The Amendment comports with this Court's historical understanding, because it is a facially neutral law advancing a secular governmental purpose. The Amendment is facially neutral because it does explicit discriminate amongst different religious sects, and it advances two different government purposes. It advances the government's interest in preventing non-profits from abusing their tax-exempt status to further their own members' personal interests through political means, and it prevents the government from incidentally subsidizing political campaigns.

The Fourteenth Circuit held that the Amendment is not neutral because it favors some religions over others and entangles government with religion. But a brief view of this Court's precedent reveals that because the Amendment only coincides with the tenets of Covenant, and its enforcement involves only routine regulatory interaction, neither of these arguments succeed.

Because the Amendment is supported by both this nation's historical practices, and this Court's historical understandings, this Court should reverse the Fourteenth Circuit's decision and hold that the Amendment does not violate the Establishment Clause.

ARGUMENT

The Amendment prevents non-profit organizations, including churches, from abusing their tax-exemption status to campaign for political candidates for personal gain. The Amendment protects the integrity and credibility of our charities by ensuring that they are not electioneers in disguise, and it protects the neutrality of our government by ensuring that it does not inadvertently subsidize political campaigns. It does not prevent a church from communicating with its own congregation about how their shared faith applies to politics, and the IRS has never applied the Amendment in this manner. Covenant has sued to tell the IRS not to even think about it—just in case.

This Court should reverse the Fourteenth Circuit for two reasons. First, this case is not justiciable because Covenant cannot establish the credible threat of enforcement necessary for pre-enforcement standing under Article III and because even if it could, the Tax Anti-Injunction Act (AIA) bars such pre-enforcement suits. 26 U.S.C. § 7421 (2025). Second, the Amendment does not violate the Establishment Clause because it is a facially neutral law advancing a governmental interest that is consistent with both this nation's historical practices, and this Court's historical understandings.

A *de novo* standard of review applies to both questions. *See Burnett Specialists v. Cowen*, 140 F.4th 686, 693 (5th Cir. 2025) (explaining that questions of standing are reviewed *de novo*); *Branch Ministries v. Rossotti*, 211 F.3d 137, 141 (D.C. Cir. 2000) ("We review summary judgment decisions *de novo*.").

I. COVENANT'S CLAIM IS BARRED BOTH BY THE CONSTITUTION AND BY STATUTE.

This Court lacks jurisdiction to decide Covenant's claim because "the Federal Courts established pursuant to Article III of the Constitution do not render advisory opinions." *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89–90 (1947). Because the IRS has never enforced or attempted to enforce the Amendment against Covenant, Article III requires Covenant to show a credible threat that the IRS will enforce the Amendment against it in order to establish actual injury. Covenant cannot do so because the history of IRS practice, the structure of the tax code, and the agency's future commitments all reinforce that there is no such threat.

Even if Covenant could clear all the required hurdles to establish pre-enforcement standing under Article III, this Court would still lack jurisdiction because the AIA forbids all pre-enforcement challenges to a tax. 26 U.S.C. § 7421 (2025). The AIA applies here because an injunction against revoking Covenant's tax-exempt status would necessarily prevent the IRS from

taxing Covenant. The AIA exception for plaintiffs with no other means of challenging the legality of a tax—such as a declaratory judgment action or a refund suit—does not apply to Covenant, who will have both options available if the IRS attempts to revoke its § 501(c)(3) status. *See* 26 U.S.C. § 7428 (2025); 26 U.S.C. § 7422 (2025).

The Fourteenth Circuit found these remedies inadequate because they are not available absent an "actual controversy" over Covenant's tax-exempt status. R. 6. But the Constitution asks the same thing. A remedy is not inadequate merely because it requires a plaintiff to have standing to pursue it. This Court should reject such a circular approach and find that Covenant lacks standing to bring this claim under both Article III and the AIA.

A. Covenant Lacks Article III Standing to Challenge the Amendment Because There is No Credible Threat That the IRS Will Enforce the Amendment Against Covenant.

Covenant lacks Article III standing to challenge the Amendment. There is no controversy here that is ripe for review because the IRS has not enforced, is not enforcing, and will not enforce the Amendment against conduct like that of Covenant. Article III limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const., art. III, § 2, cl. 1. The doctrines of standing and ripeness both originate from this constitutional limitation, serving to identify "those disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5, 157 (2014).[1] This Court lacks jurisdiction to decide this case because "the

[1] Here, the issues of standing (whether there is a credible threat that the IRS will enforce the Amendment against Covenant absent an injunction) and ripeness (whether Covenant will suffer penalties, in the form of taxes, for noncompliance with the Amendment absent an injunction) "boil down to the same question," *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 128 n.8 (2007). Both turn on whether the IRS will attempt to revoke Covenant's § 501(c)(3) status, resulting in the church becoming liable for taxes unless it complies. Consistent with this Court's practice in such cases, this brief uses the term "standing" throughout. *See Susan B. Anthony List*, 573 U.S. at 157 n.5.

Federal Courts established pursuant to Article III of the Constitution do not render advisory opinions." *United Pub. Workers of Am.*, 330 U.S. at 89.

The question before this Court is whether Covenant may, consistent with Article III, seek an injunction against the Amendment when the IRS has never enforced, is not attempting to enforce, and has agreed not to enforce the Amendment against conduct like that of Covenant. The answer to that question is no. Covenant cannot establish an injury-in-fact that is "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Because the IRS has never invoked the Amendment against Covenant or sought to alter its § 501(c)(3) status, there is no "actual injury" here. R. 5. Accordingly, to establish *pre-enforcement* standing under Article III, Covenant must show a "credible threat" of enforcement. *Babbit v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979), which requires showing either a history of past enforcement against like conduct or specific facts about government practices that make the threat credible. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410–12 (2013). Covenant cannot do so here for three reasons: first, the IRS has never historically enforced the Amendment against conduct like that of Covenant. Second, structural features of the tax code work to shield Covenant from any injury. Finally, and most significantly, the IRS has committed itself to an interpretation of the Amendment that does not cover Covenant's practices. Covenant cannot, consistent with the requirements of Article III, seek to enjoin the government from doing something it has never done and is not trying to do.

1. The IRS Has Never Enforced the Amendment Against a Church For Practices Like Covenant's.

Covenant cannot show that the IRS has ever enforced the Amendment against a church for speaking to its congregation in good faith about how their shared faith relates to electoral politics, as Covenant's pastor does. *See* R. 3–5. This Court has recognized "past enforcement against the

same conduct" as some of the best evidence "that the threat of enforcement is not 'chimerical.'" *Susan B. Anthony List*, 573 U.S. at 164 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). For example, in *Susan B. Anthony List*, this Court found it credible that an Ohio commission would seek to enforce a state electioneering statute against the plaintiff because the commission had already attempted to do so in a prior election cycle. *Id.* at 164. The threat to the plaintiff in *Steffel* was credible because he was specifically told to stop what he was doing or be arrested, and his comrades who did not desist were arrested for the same conduct. 415 U.S. at 455–456. By contrast, in *Clapper*, the fact that the government had never used or attempted to use the challenge statute against the specific plaintiffs or others like them "substantially undermine[d]" standing. 568 U.S. at 411.

Here, Covenant cannot show a history of past enforcement because the IRS has never enforced—or even attempted to enforce—the Amendment against conduct like that engaged in by Covenant. A glance at the odometer on this gently used provision reveals that the agency has enforced it on only one occasion. In *Branch Ministries v. Rossotti*, 211 F.3d 137, 140 (D.C. Cir. 2000), the IRS revoked a church's § 501(c)(3) status after it purchased full-page advertisements in two major newspapers four days before the 1992 presidential election. The ads, in inflammatory language, urged Christians not to vote for Bill Clinton because his positions violated the tenets of Christianity. *Id.* Each ad declared, at the bottom of the page, "tax-deductible donations for this advertisement gladly accepted." *Id.* The takeaway from *Branch Ministries* is that the IRS only enforces the Amendment when a church flagrantly abuses its tax-exempt status to purchase political advertising that is simultaneously a bald-faced solicitation for additional tax-exempt donations.

This shameless electioneering is not the same thing as Pastor Vale's sermons. Covenant's pastor delivered sermons discussing his support for certain candidates based on his sincere religious beliefs. R. 4–5. He gave these sermons at his normal times and places of sermonizing—from the pulpit and on the church podcast, the same way he always communicates with his congregation. *Id.* The IRS has never enforced the Amendment against a church based on statements about politics made to its congregants in good faith while carrying out ordinary religious activities. *See id.* at 144; *see also* Mark A. Goldfeder & Michelle K. Terry*, To Repeal or Not Repeal: The Johnson Amendment,* 48 U. Mem. L. Rev. 209, 229–33 (2017).

Further, even when the IRS at one point concluded that it could arguably enforce the Amendment against certain churches, it still did not do so: in 2004 and 2006, the agency conducted a "Political Activity Compliance Initiative," where it investigated allegations of political campaign intervention by § 501(c)(3) organizations. IRS, *2006 Political Activities Compliance Initiative* 1–2 (May 30, 2007), https://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf. Despite finding that many allegations against churches were substantiated, the IRS did not revoke—or even propose revoking—the tax status of any of them. *Id.* at 5. And there are plenty of churches who endorse candidates during their standard religious services without so much as a sideways glance from the IRS. *See, e.g.*, Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 5 Geo. J. L. & Pub. Pol'y 145, 162–63 (2007) (discussing how the church in *Branch Ministries* submitted "several hundred pages of newspaper excerpts" detailing political activity by other churches).

The IRS is so loath to apply the Amendment in the context of worship services that even when churches have attempted to intentionally violate the Amendment to generate a test case, the agency has still not enforced it. Since 2008, the Alliance Defending Freedom (ADF) has endorsed an

initiative known as "Pulpit Freedom Sunday," where thousands of pastors have coordinated to explicitly endorse candidates during church services in an acknowledged attempt to gin up standing to challenge the Amendment. Samuel D. Brunson, *Dear IRS, It Is Time to Enforce the Campaigning Prohibition. Even Against Churches*, 87 U. Colo. L. Rev. 143, 145 (2016). The ADF even encourages pastors to mail copies of their sermons to the IRS to make enforcement easier. *Id.* But the IRS has never taken the bait. *Id.*

Covenant has now abandoned these attempts to get standing the traditional way and decided to go ahead and file suit. But the context here makes clear that Covenant chose to file this pre-enforcement suit not because it fears imminent harm from IRS action, but because it wants to challenge the Amendment and knows the IRS is not going to enforce it against them. This history of the Amendment's past enforcement shows that there is no credible threat of enforcement against Covenant.

2. The IRS is Not Currently Trying to Enforce the Amendment Against Practices Like Covenant's.

The Fourteenth Circuit found a "substantial" threat of future enforcement "[b]ased on the IRS's impending audit of Covenant Truth Church." R. 8. However, review of the tax code reveals that this conclusion does not follow from the letter Covenant received. Covenant cannot show a credible threat of enforcement by pointing to specific facts about government practices or features of the challenged statute that make application credible. For example, in *Susan B. Anthony List*, the fact that the challenged statute allowed anyone (not just a prosecutor or an agency) to file a complaint and initiate a proceeding before the state commission bolstered the threat that it would be enforced against the plaintiff organization, as did the fact that such proceedings were "not a rare occurrence." 573 U.S. at 164. Here, these structural factors cut the other way. The tax code does not expose Covenant to potential injury; it swaddles it in layers of procedure.

Unlike other charitable organizations, churches are presumptively tax-exempt. 26 U.S.C. § 508(c)(1) (2025); *see also Branch Ministries*, 211 F.3d at 139 ("[A] church may simply hold itself out as tax-exempt and receive the benefits of that status without applying for advance recognition from the IRS."). Next, cumbersome statutory procedures govern all aspects of church audits pursuant to the Church Audit Procedures Act (CAPA), 26 U.S.C. § 7611 (2025). Congress enacted CAPA to ensure the separation of church and state while maintaining some ability to ensure that churches were not being used to evade taxes. Staff of the Joint Comm. on Tax'n, 98th Cong., *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984* 1139–40 (Dec. 31, 1984). It imposes burdensome procedures on any attempt to audit a church, which must be initiated by an appropriate high-level Treasury official based on individualized suspicion, § 7611(a)(2), preceded by a detailed notice explaining the applicable administrative and constitutional procedures, § 7611(a)(3)(B), constrained to a limited set of records, § 7611(b)(1), requested at least fifteen days in advance, § 7611(b)(2), and completed within two years. § 7611(c)(1). If the IRS decides that revocation is appropriate, the statute further constrains how easy it is to do so, § 7611(d)(1); if it declines to act, it cannot open a new inquiry within five years without special approval. *See* Treas. Reg. § 301.7611-1, Q&A 16 (as amended in 2002).

Finally, even if a revocation occurs, nothing prevents a church from merely holding itself out as exempt again in subsequent years. *Branch Ministries*, 211 F.3d at 142. Thus, "the impact of revocation is likely to be more symbolic than substantial." *Id.* The only possible loss might be "the advance assurance of deductibility in the event a donor should be audited," and those donors would still have an opportunity to prove that the organization meets the requirements of § 501(c)(3). *Id.* at 142–43. Moreover, revocation of the exemption "does not convert bona fide donations into taxable income by [a] church." *Id.* at 143; *see also* 26 U.S.C. § 102 (2025) ("Gross income does

not include the value of property acquired by gift . . . ."). These structural features are not like those in cases where this Court has granted pre-enforcement standing because they make enforcement less credible, not more. Reviewing how such enforcement would work, in practice, reveals that a crackdown on sincere religious activity would risk severe political blowback for little tangible benefit.

This context transforms the letter Covenant received from the IRS from an ill omen into something most reasonably interpreted as a clerical error. The letter stated that the IRS intended to conduct a "random audit." R. 5. The IRS generally has broad authority to conduct randomized audits of taxpayers without individualized suspicion. *See* 26 U.S.C. § 7601. It randomly audits other § 501(c)(3) organizations as a routine practice, R. 5, but it may not do this to churches. *See* 26 U.S.C. § 7611(a)(2). Covenant does not claim that the letter was not truly random; it does not contend that the IRS specifically targeted it for investigation, and the record does not contain facts to support that conclusion. The IRS inadvertently sent Covenant a notice which it routinely sends at random to other § 501(c)(3) organizations, but which it may not send to churches. Considering the broader statutory context and the history of agency practice, this letter does not imply impending enforcement. It implies that the IRS made a clerical mistake.

Alternatively, even if the IRS genuinely intended to audit Covenant and violated CAPA in doing so, the church would still be unable to establish standing at this stage, because the injury from a CAPA violation—and the statutory remedy—only arise in a context where the IRS issues a summons and attempts to enforce it. *See Southern Faith Ministries, Inc. v. Geithner*, 660 F. Supp. 2d 54, 56 (D. D.C. 2009). Thus, if the IRS violated CAPA here, "if and when it is served with an IRS summons, plaintiff can present its objection that the proper official did not approve the church tax inquiry. If and when its tax-exempt status is revoked, plaintiff may challenge that conclusion

in a declaratory judgment action. If and when its activities are taxed, plaintiff may initiate a refund action." *Id.* (cleaned up). But "[t]hose 'if's' are not present here and those 'when's' are not now." *Id.* Covenant lacks standing to bring this suit because there is no current credible threat of enforcement.

3. The IRS Has Agreed That It Will Not Enforce the Amendment Against Conduct Like Covenant's.

There is compelling evidence that there is no credible threat of enforcement here because the IRS has formally committed not to enforce the amendment against conduct like that of Covenant. In July 2025, the IRS agreed to a consent order setting forth how the agency understands the Amendment to apply to churches. *See* Proposed Order & Final Judgment, *Nat'l Religious Broadcasters v. Werfel*, No. 6:24-cv-00311 (E.D. Tex. Jul. 7, 2025), ECF No. 35-1 ("Consent Decree"). Specifically, the IRS will not enforce the Amendment "[w]hen a house of worship in good faith speaks to its congregation, through its customary channels of communication on matters of faith in connection with religious services, concerning electoral politics viewed through the lens of religious faith." *Id.* at 1–2.

This is the best interpretation of the plain language of the Amendment, which states that a § 501(c)(3) organization may not "participate" or "intervene" in a political campaign. According to the dictionary definitions, "participate" means "to take part in" something, and "intervene" means "to interfere with the outcome or course" of something. *Id.* at 2 (citing *Merriam-Webster's Dictionary* (2025)). Communication through normal channels between a church and its congregants does not do this, at least not "any more than does a family discussion" about candidates. *Id.* Moreover, this interpretation is consistent with the purpose of the Amendment and the history of agency enforcement, which clearly show that it applies only to prevent churches from abusing their tax status to engage in flagrant electioneering, not Pastor Vale's sermons.

Covenant's communication here, both in medium and in message, is clearly within the scope of the Consent Decree. Covenant delivers its political message from the pulpit and on a podcast, both of which are the "customary channels of communication," *id.*, between Covenant and its congregants. *See* R. 4–5. This message explains why a candidate's platform does or does not align with the teachings of a particular religion and is plainly a communication about "electoral politics viewed through the lens of religious faith." *See Id.*, Consent Decree at 2. Thus, Covenant cannot show a credible threat of future enforcement because the exact opposite is true: the IRS has committed *not* to enforce the Amendment against Covenant and churches like Covenant.

Covenant cannot acquire standing through concerns about chilling of free expression, because it alleges only an Establishment Clause violation. The Fourteenth Circuit suggested that Covenant may have standing based on a theory of viewpoint discrimination, stating that "'[t]he tax code may not discriminate invidiously . . . in such a way as to aim at the suppression of dangerous ideas.'" R. 8 (quoting *True the Vote, Inc. v. IRS*, 831 F.3d 551, 561 (D.C. Cir. 2016)). And it is true that in First Amendment cases, this Court has allowed pre-enforcement challenges based on the presumption that a statute's existence "may cause others not before the court to refrain from constitutionally protected speech or expression." *Virginia v. Am. Booksellers, Inc.*, 484 U.S. 383, 392–93 (1988). But the basis for this rule is a concern about "chilling" speech, *id.* at 397, and this concern is not present here. Covenant has not brought a claim under the Free Speech Clause, nor did it bring a claim under the Free Exercise Clause. It asserts only that the Amendment violates the Establishment Clause, and it is meaningless to speak of "chilling" an establishment of religion. Covenant cannot establish standing based on a concern about free expression when Covenant has not alleged an infringement of their free expression.

Moreover, this First Amendment standing rule only allows courts to "assume a credible threat of prosecution" when a statute facially restricts expressive activity "*in the absence of compelling contrary evidence*." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020) (emphasis added). Here, there is compelling evidence contradicting Covenant's claim that the IRS will enforce the Amendment against it. *See* Consent Decree.

Covenant has failed to establish standing under Article III because there is no credible threat of injury. The history of past enforcement shows that the IRS only enforces the Amendment to prevent churches from abusing their tax-exempt status to become vehicles for political donations, not to prevent them from speaking in good faith to their congregations. A review of the tax code shows why: enforcement in this context would be a burdensome procedural slog for little practical benefit. In fact, the IRS has already formally agreed that it will not enforce the Amendment against conduct like Covenant's. This Court should hold that Covenant lacks standing to challenge the Amendment because the IRS has not applied, is not applying, and will not apply it against Covenant.

B. Even if Covenant Could Establish Pre-enforcement Standing Under Article III, the Tax Anti-Injunction Act Bars This Suit.

Even if Covenant could clear the hurdles necessary to establish standing under Article III, it still faces an insurmountable obstacle because a statute, the Tax Anti-Injunction Act (AIA), 26 U.S.C. § 7421 (2025), denies this Court jurisdiction. The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). This ensures the government can efficiently assess and collect taxes by creating a "pay and sue" rule, where "a taxpayer must first pay an assessment before [seeking] judicial review of that assessment." *Westgate-California Corp. v. U.S.*, 496 F.2d 839, 841 (9th Cir.

1974). The AIA bars Covenant's suit because a suit to enjoin the revocation of an organization's tax-exempt status is a suit to restrain the assessment or collection of taxes from that organization.

The AIA exception for plaintiffs with no other means of challenging the legality of a tax—such as a declaratory judgment action or a refund suit—does not apply to Covenant, who has these exact alternatives available to it: if there is an actual controversy over its tax classification, it can bring an action for declaratory judgment under 26 U.S.C. § 7428. If this fails, or in the alternative, Covenant may pay any taxes that may be assessed and bring suit for a refund under 26 U.S.C. § 7422. The Fourteenth Circuit held that the exception applied, finding that these statutory procedures provide Covenant "no avenue for relief," because they "only allow an organization to challenge an actual controversy." R. 6–7. But this exception only applies to plaintiffs who, because of the AIA, cannot *ever* litigate their claim. *See South Carolina v. Regan,* 465 U.S. 367, 378–381 (1984). It does not apply to plaintiffs who, because they lack standing, cannot litigate their claim *yet*. Because Covenant would have alternative remedies available if the IRS enforced the Amendment against it, this Court should hold that the AIA bars this suit.

1. The AIA Bars Covenant's Claim Because It is a Suit to Restrain the Assessment or Collection of a Tax.

The plain language of the AIA bars Covenant's claim because it would prevent the IRS from assessing or collecting taxes on Covenant. The AIA "could scarcely be more explicit" in eliminating the courts' jurisdiction over all suits where "a primary purpose" is to prevent the IRS from assessing or collecting any tax. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736, 738 (1974) (*Bob Jones I*). This logically also applies to "activities which are intended to or may culminate in the assessment or collection of taxes." *U.S. v. Dema*, 544 F.2d 1373, 1376 (7th Cir. 1976). If the IRS must do *X* to assess or collect a tax, then a lawsuit seeking an injunction against *X* seeks to restrain the assessment or collection of that tax. Under this practical approach, would-be plaintiffs

cannot dodge the AIA's scope by asserting that their action is really about something other than taxes; what matters is its effect. *See, e.g.*, *Alexander v. Ams. United, Inc.*, 416 U.S. 752, 759 (1974) (holding that the AIA bars pre-enforcement challenges to the legality of a tax even when founded on constitutional grounds).

Here, Covenant seeks an injunction against IRS action that "may culminate in the assessment or collection of taxes." *Id.* As this Court has already recognized, an injunction that prevents the IRS from revoking an organization's tax-exempt status under § 501(c)(3) necessarily precludes it from assessing or collecting taxes on that organization. *Bob Jones I*, 416 U.S. at 732. It also seeks to restrain taxes on the organization's donors by forcing the IRS "to provide advance assurance to those donors that contributions . . . will be recognized as tax deductible," *id.* at 739, but the AIA also bars an action to restrain the assessment or collection of the taxes of another. 26 U.S.C. § 7421(a) (prohibiting such suits "by any person whether or not such person is the person against whom the tax was assessed"). Thus, the plain language of the AIA bars Covenant's suit to enjoin any change to its tax status.

2. No Exception to the AIA Applies Because Congress has Provided Covenant With Adequate Remedies.

There are two narrow judicially created exceptions to the AIA. First, a court may grant a pre-enforcement injunction against taxation when injunctive jurisdiction otherwise exists and when "it is clear that under no circumstances could the government ultimately prevail." *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962). This exception does not apply here because Covenant is certainly not guaranteed to succeed on its claim that the Amendment violates the Establishment Clause. As discussed in more detail in Section II, the Amendment does not violate the Establishment Clause because it is a neutral law with a secular purpose rooted in this nation's history. Moreover, in the only case to consider a challenge to this law based on one of the

religion clauses of the First Amendment, a United States District Court upheld the Amendment against a free exercise claim, finding that it satisfies strict scrutiny as "the least restrictive means" to advance a "compelling" government interest. *See Branch Ministries v. Rossotti*, 40 F.Supp.2d 15, 25–26 (D. D.C. 1999), *aff'd on other grounds, Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000). Neither Covenant nor the Fourteenth Circuit cites any directly on point cases holding otherwise—it is simply not possible to prove here that "under no circumstances can the government prevail." *Williams Packing*, 370 U.S. at 7. This exception requires guaranteed success on the merits; a court cannot void the statute's operation for anything less.

The exception to the AIA for plaintiffs with no other means of challenging the legality of a tax does not apply here because Covenant has other means of challenging the Amendment. This exception comes from *South Carolina v. Regan*, where this Court concluded that "Congress did not intend the AIA to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." 465 U.S. 367, 378 (1984). In *Regan*, this Court allowed the State of South Carolina (invoking this Court's original jurisdiction) to challenge a tax on its state-issued bearer bonds, making an exception to the AIA because the statutes that would normally allow a constitutional challenge to a tax did not apply. *Id.* This Court specifically discussed two remedies that would ordinarily be sufficient, but were not available: first, South Carolina could not bring a declaratory judgment action because the code section authorizing declaratory judgment suits related to taxes on government obligations did not allow a constitutional challenge. *Id.* at 378 n.17. Second, South Carolina could not challenge the tax in a refund suit because the challenged statute placed tax liability on the bondholder, not the issuer—the State could not wait to 'pay and sue,'

because there would be nothing to pay. *Id.* at 374. This exception does not apply to Covenant, who has these exact alternatives available.

First, if there is any "actual controversy" about Covenant's tax status, it may seek relief in a declaratory judgment action under 26 U.S.C. § 7428. That statute allows the United States Tax Court, the Court of Federal Claims, or the United States District Court for the District of Columbia to make a declaratory judgment "with respect to" an organization's tax classification. *See* 26 U.S.C. § 7428(a); *cf. Regan*, 465 U.S. at 378 n.17 (explaining how the equivalent statute in the context of taxes on bonds only allowed declaratory judgments as to whether a bond was "described" by the relevant tax statute, not whether the statute was constitutional). The Fourteenth Circuit held that this was not an adequate remedy because the "actual controversy" requirement in § 7428 only allows Covenant to sue if the IRS proposes a change in Covenant's tax status. R. 6–7. But the "actual controversy" requirement in § 7428 merely restates the requirements of Article III standing. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007) (explaining that identical "actual controversy" language in the Declaratory Judgment Act, 28 U.S.C. § 2201 (2025), means the type of case or controversy that is justiciable under Article III). The statutory remedy is not inadequate merely because it requires Covenant to meet the basic requirements of standing.

Should this fail, or in the alternative, Covenant has a second remedy available: pay and sue. If the IRS assesses a tax against Covenant, the church can pay the tax and then file a refund suit under 26 U.S.C. § 7422. Here, Covenant cannot file a refund suit because it has not been taxed, but this does not make the remedy inadequate. This Court's precedents firmly establish that a refund suit is an acceptable procedure for obtaining judicial review of the legality of a tax. *See Regan*, 465 U.S. at 375–76 (explicitly relying on the unavailability of refund suits to create this

exception to the AIA); *Bob Jones I*, 416 U.S. at 746 ("These review procedures offer petitioner a full, albeit delayed, opportunity to litigate the legality of . . . revocation of tax-exempt status and withdrawal of advance assurance of deductibility."); *Ams. United*, 416 U.S. at 762 ("[R]espondent will 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 [federal unemployment] taxes.").

This Court has recognized refund suits as an adequate remedy because the aim of the AIA is to require that any dispute over the legality of the tax be decided in a refund suit. *Bob Jones I*, 416 U.S. at 725. This policy protects the government's ability to efficiently collect taxes without having to constantly defend against pre-enforcement litigation. *Id.* No one denies that refund suits involve "serious problems of delay" which could potentially cause a § 501(c)(3) organization to suffer grave financial setbacks, but this Court has never found that such delay makes them inadequate as a remedy. *Id.* at 747–50. Why, then, would they be inadequate because of delay that accrues before a tax has ever been imposed? Congress is the actor best empowered and equipped to address the "policy-laden considerations" of whether to allow nonprofits to seek pre-enforcement review of a tax, and Congress has chosen not to allow them to do so. *Id.*

The AIA bars Covenant's suit to restrain a tax because Covenant has access to alternative remedies that this Court has recognized as adequate. It is irrelevant, for purposes of the AIA, to respond that these remedies are not available until an actual controversy arises. This Court's decision in *South Carolina v. Regan* only exempts from the AIA those plaintiffs whom the statute would prevent from otherwise *ever* being able to sue, 465 U.S. at 375–76; it does not exempt from the requirements of Article III those plaintiffs who the Constitution prevents from suing *yet*. Covenant has failed to establish Article III standing here because it cannot show a credible threat of enforcement when the IRS has never enforced, is not enforcing, and has committed not to

enforce the Amendment against Covenant's conduct, but this is not a reason to exempt Covenant from the AIA, and this Court should reject such circular reasoning. Instead, it should find that the AIA and Article III require the same result here: Covenant's suit is barred because there is no actual controversy here.

II. THE AMENDMENT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The Amendment does not violate the Establishment Clause because it is consistent with both this Court's historical understanding that facially neutral laws advancing secular purposes are constitutional, and this nation's historical practice of allowing Congress to place secular restrictions on non-profits. The Establishment Clause states that "Congress shall make no law respecting an establishment of religion," U.S. Const., amend. I, cl. 1. Courts must interpret the clause's command "by 'reference to historical practices and understandings.'" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022) (quoting *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 576 (2014)). A review of the historical "understandings" and "practices" here reveals two things: this Court consistently upholds facially neutral laws justified by a secular purpose; and Congress has placed secular restrictions on the political activity of nonprofits for nearly a century. The Amendment here is a secular restriction on the ability for non-profit organizations to endorse political candidates, justified by Congress's secular interest in preventing non-profits from abusing their tax-exempt status. The Amendment does not violate the Establishment Clause because it conforms to both this Court's historical understandings, and this nation's historical practices.

Disregarding these historical understandings and practices, the Fourteenth Circuit held that the Amendment violates the Establishment Clause. The Fourteenth Circuit held that the Amendment does so by barring churches from using their power to influence political campaigns, R. 9, requiring once-in-a-decade randomized audits, *id*., and interfering with the historical practice

of religious leaders being professing political views. R. 9–10. All three of these arguments fail. The Fourteenth Circuit's holding neglects this Court's historical understanding of neutrality, ignores what is required to create "excessive entanglement," and applies the historical analysis to the wrong party. Because the Amendment is supported by both this nation's historical practices and this Court's historical understandings, this Court should reverse the Fourteenth Circuit's decision and hold that the Amendment does not violate the Establishment Clause.

A. The Amendment Does Not Violate the Establishment Clause Because it is Consistent with this Court's Historical Understanding of the Establishment Clause.

The Amendment is consistent with historical understandings because an enduring principle of this Court's jurisprudence is that facially neutral laws advancing secular government interests do not violate the Establishment Clause. This Court has continually upheld such laws over the last seventy years, and it should do the same here because the Amendment is consistent with this historical understanding in both in the means it employs and the ends it pursues.

1. This Court's Historical Understanding is that Facially Neutral Laws Advancing Secular Governmental Interests Do Not Violate the Establishment Clause.

A uniting theme of this Court's Establishment Clause jurisprudence is a concern with the neutrality of a law. This Court first considered the meaning of the Establishment Clause in *Everson v. Board of Ed. of Ewing Tp.*, 330 U.S. 1 (1947). In *Everson*, the Court held that a New Jersey township did not violate the Establishment Clause when it reimbursed the parents of schoolchildren for transportation costs. *Id.* at 17. The Court explained that the Establishment Clause "requires the state to be neutral in its relations with groups of religious believers and non-believers," *id*. at 18, and the New Jersey law avoided this by "extend[ing] . . . general benefits to all." *Id*. at 16. Thus, from the very beginning, this Court has consistently analyzed Establishment Clause violations with a strong emphasis on "neutrality."

The following seventy-seven years of jurisprudence have applied this neutrality principle and found that facially neutral laws advancing secular purposes do not violate the Establishment Clause. In *McGowan v. Maryland*, 366 U.S. 420 (1961), this Court found that a Marland law outlawing work on Sundays did not violate the Establishment Clause because it was facially neutral, and its purpose was not to "use the states coercive power to aid religion." *Id*. at 453. In *Gillette v. United States,* 401 U.S. 437, 452 (1971), this Court found that a law exempting individuals from the draft did not violate the Establishment Clause because it did not facially "discriminate on the basis of religious affiliation or belief"; instead, there existed "a neutral, secular basis for the lines the government ha[d] drawn." *Id.* at 450, 452, 460. In *Bob Jones University v. United States*, 461 U.S. 574, 604 n.30 (1983) (*Bob Jones II*)*,* this Court held that the revocation of two religious universities' tax-exempt status for racially discriminatory policies did not violate the Establishment Clause—even though the universities claimed these policies were required by their religious tenets—because the government action was "founded on a neutral, secular basis." In *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 695 (1989), this Court reviewed whether § 170 of the tax code violated the Establishment Clause by disallowing Church of Scientology members from claiming payments for religious training as tax-deductible donations. The Court found that § 170 "easily pass[ed] constitutional muster" because the law "[did] not differentiate among sects," and there "was no allegation that [§ 170] was born of animus to religion." *Id*. These cases all have two things in common: they all involve Establishment Clause claims, and they and they all found no violation because the laws were facially neutral means to accomplish a secular purpose.

This Court recently reaffirmed the importance of a law's neutrality. In *Trump v. Hawaii*, 585 U.S. 667, 744 (2018), this Court reviewed a temporary ban on entrance into the United States from

several nations, most of which were majority Muslim. The temporary ban did not violate the Establishment Clause because it was "facially neutral toward religion," *id*. at 702, and "ha[d] a legitimate grounding in national security concerns." *Id*. at 706. From *Everson* to *Trump*, this Court has consistently found that neutral laws justified by a secular purpose do not violate the Establishment Clause.

2. The Amendment is Facially Neutral and Advances Secular Interests.

The Amendment is facially neutral because it does not explicitly prefer one religious sect over another. A law is facially neutral when it "makes no explicit and deliberate distinctions between different religious organizations." *Hernandez*, 490 U.S. at 695. The Amendment satisfies this rule. The Amendment denies tax-exemption status to all "corporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes" if they "participate in, or intervene in . . . any political campaign on behalf of . . . any candidate for office." 26 U.S.C. § 501(c)(3) (2025). There are no "explicit [or] deliberate distinctions between different religious organizations," *Hernandez*, 490 U.S. at 695, to be found here, either in the types of organizations covered or in the substance of the restriction. Instead, the Amendment applies equally to all organizations "operated exclusively for religious . . . purposes." 26 U.S.C. § 501(c)(3). Because the Amendment "makes no explicit and deliberate distinctions between different religious organizations", *Hernandez*, 490 U.S. at 695, the Amendment is a facially neutral.

The Amendment also advances at least two secular governmental interests. It is contained within a statute that provides a benefit, in the form of tax-exemptions, to certain non-profit organizations designated by Congress. *See* 26 U.S.C. § 501(c)(3). There are two political restrictions on political activity by non-profits in § 501(c)(3). The first is a ban on lobbying that

prohibits non-profits from "carrying on propaganda, or otherwise attempting, to influence legislation." *Id.* The second is the Amendment, which, as discussed above, restricts non-profits from "participat[ing]" or "interven[ing]" in "any political campaign on behalf of . . . any candidate for public office." *Id.* The restrictions collectively prevent tax-exempt organizations from lobbying and electioneering. These restrictions advance the government's significant interests in both preventing organizations from abusing their tax-exempt status and avoiding the effective subsidization of political campaigns.

The federal courts have recognized both these interests as legitimate. In *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 550 (1983), this Court reviewed § 501(c)(3)'s restriction on influencing legislation and explained that this restriction stems from a Congressional concern that "[tax-]exempt organizations might use tax-deductible contributions to lobby to promote the private interests of their members." This is a valid congressional because it is "[rational] for Congress to decide that tax-exempt charities . . . should not further benefit at the expense of taxpayers at large by obtaining a further subsidy for lobbying." *Id*. And in *Branch Ministries v. Rossotti*, 40 F.Supp.2d 15, 25 (D. D.C. 1999), *aff'd on other grounds, Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (holding that the Amendment survives strict scrutiny and does not violate the free exercise clause), the United States District Court for the District of Columbia found that the Amendment serves the government's "compelling interest in maintaining the integrity of the tax system and in not subsidizing partisan political activity."

This creates a serious problem for Covenant: not only is the Amendment justified by two secular interests that the courts have explicitly articulated and acknowledged as legitimate, but there is also not a single morsel of evidence suggesting the Amendment stems from religious animus. Covenant's claim fails because it fails to comport with the basic reality that the

Amendment advances important secular interests consistent with this Court's historical understanding of the Establishment Clause.

2. The Fourteenth Circuit's Arguments that the Amendment Violates *Everson*'s Neutrality Principle Are Inconsistent with This Court's Historical Understanding of the Establishment Clause.

The Fourteenth Circuit held that the Amendment "favors some religions over others" by "denying tax exemptions to organizations whose religious beliefs compel them to speak on political issues." R. 9. This holding is based on a rationale already repudiated by this Court, which has rejected analogous arguments in at least two cases. First, in *Bob Jones II*, this Court reviewed an IRS policy that revoked tax-exempt status for private universities with racially discriminatory policies rooted in the universities' sincere religious beliefs. 461 U.S. at 579. Both universities challenged the revocation, arguing that the revocation violated the Establishment Clause "by preferring religions whose tenets do not require racial discrimination over those which believe racial intermixing is forbidden." *Id*. at 604 n.30. This Court gave so little credence to that argument that it rejected it in a single footnote stating that the IRS policy did not violate the Establishment Clause because it was "founded on a neutral, secular basis" and merely happened "to coincide with the tenets of some religions." *Id.* (cleaned up).

This Court rejected the same argument a second time in *Hernandez*, holding that § 170 of the Internal Revenue Code of 1954 did not violate the Establishment Clause. 490 U.S. at 695-96. That statute "permits a taxpayer to deduct from gross income the amount of a 'charitable contribution.'" *Id.* at 683; *see* 26 U.S.C. § 170 (2025). However, the IRS did not allow members of the Church of Scientology to deduct their payments to the church for "audits" designed to increase their "spiritual awareness." *Id*. at 685-86. This was because these so-called "audits" had set prices and were viewed as a "quid pro quo" rather than a "donation" or "gift." *Id*. The church members argued that this interpretation of § 170 violated the Establishment Clause by "according

disproportionately harsh tax status to those religions that raise funds by imposing fixed costs for participation in certain religious practices." *Id*. at 695. This Court found no merit in that argument, stating that § 170 "easily passes constitutional muster . . . [because] a statute having a primarily secular effect does not violate the establishment clause merely because it happens to coincide with the tenets of some religions." *Id*. (cleaned up).

The Fourteenth Circuit's rationale here is identical to the arguments put forward by the plaintiffs in both *Bob Jones* and *Hernandez*. All three arguments boil down to this: if a secular law has a disparate impact on specific religious sects, then it violates the Establishment Clause's neutrality principle. Because this rationale has been rejected by this Court on multiple occasions, it should be rejected here.

Moreover, accepting the Fourteenth Circuit's argument would require this Court to hold that nearly all laws providing a government benefit violate the Establishment Clause, including many that it has already upheld. There are a wide variety of religious beliefs, and there are plenty of government benefits that will some, but not others. If the government subsidizes cattle farming, this denies a benefit to Hindus, who cannot engage in the practice. If the government subsidizes only schools that teach computer skills classes, this has a disparate impact on the Amish. If the government subsidizes private universities who do not implement discriminatory policies, this has a disparate impact on institutions like Bob Jones, who claim that their religion requires them to discriminate. The list could continue, but the point is clear: the Fourteenth Circuit's disparate impact argument is unsound, as well as inconsistent with this Court's precedent.

The Fourteenth Circuit's argument that the Amendment "violat[es] the first amendment's neutrality mandate" because it "entangles government with religion" by "requiring the IRS to monitor religious leaders and their churches," R. 9, is also contrary to this Court's historical

understanding of the Establishment Clause. The law is clear that "routine regulatory interaction, which involves no inquiries into religious doctrine . . . and no detailed monitoring" does not "violate the nonentanglement command." *Hernandez*, 490 U.S. at 696-97. For example, the statute in *Hernandez* required the IRS to review the "prices of . . . services and commodities, the regularity with which payments for such services and commodities are waived, and other pertinent information about the transaction." *Id*. at 696. This "threaten[ed] no excessive entanglement between church and state" because it did not require the IRS to "distinguish between 'secular' and 'religious' benefits or services." *Id*. at 696-97.

Here the alleged excessive entanglement is IRS "monitoring [of] religious leaders and their churches," R. 9, but that is objectively not what the Amendment does. Although the IRS has implemented routine randomized audits for most § 501(c)(3) organizations, R. 5, it requires individualized suspicion to audit a church under the Church Audit Procedure Act (CAPA), 26 U.S.C. § 7611. Congress enacted CAPA specifically to guard against entanglement concerns while ensuring that the IRS can still protect against abuse of the tax code. *See supra* § I. A. 2. Even if the IRS did initiate an audit of a church under CAPA's procedures, an audit would not involve the IRS making distinctions between religious and secular activities. It would only require the IRS to determine whether an activity constitutes "partcipat[ion]" or "interven[tion]" in a political campaign. 26 U.S.C. § 501(c)(3). This decision may be hard in some cases, but it is not based on religion and is therefore not relevant to an entanglement inquiry. What is relevant is whether the IRS must deal with questions of religious doctrine, which it need not do here.

These audits are not the kind of "monitoring" that violates the Establishment Clause by "producing 'a kind of continuing day-to-day relationship." *Aguilar v. Felton*, 473 U.S. 402, 414 (1985) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). In *Aguilar*, a New York law

providing funding to parochial schools required monthly inspections by state employees. *Id*. at 406-7. This was excessive entanglement because it "produce[ed] 'a kind of day to day relationship which the policy of neutrality seeks to minimize.'" *Id*. at 414 (quoting *Walz*, 397 U.S. at 674). An audit procedure that requires individualized suspicion and approval from "high-level" officials, and which can by law happen no more than once every five years, *see* 26 U.S.C. § 7611, does not produce a "day-to-day" relationship. Nor does the IRS even have the time or resources to spend trawling through the content of sermons. There is no concern about excessive entanglement here.

B. The Amendment Does Not Violate the Establishment Clause Because it is Consistent With this Nation's Historical Practice of Permitting Congress to Enact Secular Restrictions on Tax-Exemptions for Non-Profits.

For over a century, this nation has attached secular criteria to charitable organizations to prevent those organizations from abusing their tax-exempt status for personal gain. When "history shows that [a] specific practice [has been] permitted," it does not violate the Establishment Clause. *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 577 (2014). The Amendment does not violate the Establishment Clause because it is consistent with historical practice.

1. This Nation has a Well-Established Practice of Placing Secular Restrictions on Tax-Exemptions for Non-Profits.

For as long as Congress has given tax benefits to nonprofits, it has always sought to ensure that these benefits subsidize public good rather than private gain. Federal tax-exemption status for charitable organizations first appeared in the Wilson-Gorman Tariff Act of 1894. Eric C. Chafee, *Collaboration Theory: a Theory of the Charitable Tax-Exempt Nonprofit Corporation*, 49 U.C. Davis L. Rev. 1719, 1735 (2016). The 1894 act created a two-percent tax on corporate income but exempted "corporations . . . conducted solely for charitable, religious, or educational purposes." Tariff Act of 1894, ch. 349, 28 Stat. 509. Only fifteen years after Wilson-Gorman, Congress passed the Payne Aldrich Tariff Act of 1909, which similarly imposed an excise tax on corporations with

an exemption for charitable ones. Staff of J. Comm. on Tax'n, 109th Cong., *Historical Development and Present Law of the Federal Tax Exemption for Charities and Other Tax-Exempt Organizations* (JCX-29-05) 46 (April 19, 2005) ("Joint Comm. Report"). The 1909 Act also mandated that none of the organization's net income "inures to the benefit of any private . . . individual." *Id*.

Four years later, in 1913, Congress ratified the Sixteenth Amendment, granting the federal government the authority to levy an income tax. Chafee, *supra*, at 1718–19. It then immediately used this authority to pass the Revenue Act of 1913. *Id.* at 1719. This tax code exempted the same organizations, and imposed the same restrictions, as the 1909 act. Revenue Act of 1913, Pub L. No. 63-16, ch. 16, § II(G), 38 Stat. 114, 172. The Revenue Act of 1934 went even further, introducing explicit restrictions on the ability for tax-exempt organizations to influence politics, requiring that "no substantial part of the [tax-exempt organization's] activities . . . carr[ies] . . . on propaganda, or otherwise attempt[s] . . . to influence legislation." Revenue Act of 1934, Pub L. No. 73-216, ch. 277, § 23(o)(2), 48 Stat. 680, 690. The legislative history of the 1934 act shows that these innovations grew out of Congress's concern that non-profits were using their tax-exempt donations "to advance the personal interests of the giver[s]." Joint Comm. Report at 56. Review of historical practice shows that for nearly a hundred years, Congress has sought to ensure that tax-exempt organizations, including religious ones, serve the public good by preventing them from abusing their tax status for private gain.

2. The Amendment is Consistent with This Historical Practice.

The Amendment, passed without debate over seventy years ago as part of the Internal Revenue Code of 1954, R. 2, is consistent with this longstanding historical practice. The Amendment prohibits § 501(c)(3) tax-exempt corporations from "participat[ing] in, or interven[ing] in . . . any

political campaign on behalf of . . . any candidate for political office." *See* 26 U.S.C. § 510(c)(3). This is nothing new. It is a continuation of a century long Congressional effort to ensure, via secular restrictions, that non-profits do not abuse their tax-exempt status for their members' personal interests. The Amendment's ban on electioneering is a natural extension of the 1934 acts ban on lobbying. What good is it to prevent tax-exempt donations from being used to buy legislation if they can still be used to buy elections? Congress recognized this simple fact and amended the tax code as campaign spending became increasingly significant. Congress then chose to preserve the Amendment when it revised the Tax Code in the Revenue Act of 1986, and Congress has declined to consider bills to repeal the Amendment in every legislative session since 2017. R. 2, 3.

This history demonstrates that the Amendment does not violate the Establishment Clause because it is merely a continuation of established practice. Congress has always been permitted to prevent tax-exempt organizations, including churches, from abusing their privileged status for political gain.

3. The History and Tradition of Religious Leaders Professing Political Beliefs Has No Bearing on the Constitutionality of the Amendment.

The Fourteenth Circuit held that the Amendment violates the Establishment Clause because "America's history and tradition demonstrates that religious leaders routinely state that their religions obligate them to be involved in the political process." R. 9. But the Fourteenth Circuit focuses its analysis on the wrong party. In Establishment Clause cases, this Court has always reviewed the history of the *governmental action*, not the history of the injured party's religious activity. In *Town of Greece*, this Court reviewed a New York town's practice of inviting a local clergy member to "deliver an invocation" for the purposes of "invok[ing] divine guidance in town affairs." 572 U.S. at 569 The Court explained that "[t]he Court's inquiry . . . must be to determine

whether the prayer practice in the Town of Greece fits within the tradition long followed in Congress and the State legislatures," not whether it the prayer practice fit within the tradition of Christianity. *Id*. at 577 (emphasis added). *Town of Greece* based its reasoning on *Marsh v. Chambers*, 463 U.S. 783, 790 (1983), where the Court stated that "the opening of sessions of legislative and other deliberative public bodies with prayer is deeply rooted in history and tradition of this nation. Further, this Court has acknowledged the specific application of this rule to tax-exemptions. In *Walz*, this Court determined that making donations to churches tax-exempt did not violate the Establishment Clause based on "history and uninterrupted practice. 397 U.S. at 680.

These cases illustrate that historical analysis, for purposes of the Establishment Clause, is not concerned with the history of the injured parties' religious conduct; it is concerned with the history of the governmental action being challenged. Applying this analysis here means that the relevant question is not whether there is a history of religious organizations engaging in political activity. It is whether there is a history of Congress restricting religious organizations from receiving tax exemptions based on that political activity. The answer to that question is yes.

Even if this were the correct test for Establishment Clause claims, the Fourteenth Circuit's argument would still fail because the Amendment does not restrict churches from expressing their political beliefs. It prevents organizations from spending tax-exempt funds on political campaigns; it does not prevent ministers from expressing their sincere views in the context of worship services.

The Amendment is a secular restriction on the ability for non-profits to buy political campaigns at the taxpayer's expense. The Amendment applies this restriction equally to all religious organizations, whether the organizations practice Catholicism, Judaism, Buddhism, Islam, or The Everlight Dominion—they cannot simultaneously receive tax-exemptions for their charity and use their untaxed income to fund political campaigns. Nothing in the annals of this

Court's precedent, or this nation's history indicate that this violates the Establishment Clause. Because both this Court's historical understandings and this nation's historical practices demonstrate that it is permissible to restrict tax-exempt organizations' ability to abuse their tax status by means of secular restrictions, the Amendment does not violate the Establishment Clause.

CONCLUSION

This Court should reverse the Fourteenth Circuit and hold that Covenant's claims are barred by both Article III and the AIA. This claim is barred by Article III of the United States Constitution because it is a pre-enforcement claim with no credible threat of enforcement, and even *if* enforcement was likely, then the claim would be barred by the AIA, which does not permit pre-enforcement tax suits. Even if Covenant could meet its burden to establish standing, its claim would still fail on the merits. This Court should find that the Amendment does not violate the Establishment Clause because this Court's it is consistent with both this Court's historical understandings and this nation's historical practices.