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Applying the First Amendment to the Internal Revenue Code: Minnesota Voters Alliance and the Tax Law's Regulation of Nonprofit Organizations' Political Speech

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ARTICLES

APPLYING THE FIRST AMENDMENT TO THE INTERNAL REVENUE CODE: *MINNESOTA VOTERS ALLIANCE* AND THE TAX LAW'S REGULATION OF NONPROFIT ORGANIZATIONS' POLITICAL SPEECH

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INTRODUCTION

In *Minnesota Voters Alliance v. Mansky*,[1] the U.S. Supreme Court struck on First Amendment grounds Minnesota's "political apparel ban."[2] This law prohibits individuals from wearing "political badges, political buttons, or other political insignia . . . at or about [any] polling place."[3] The Minnesota statute, the Court held, unreasonably restricts constitutionally protected expression at the polls.[4] The statute's "expansive"[5] term *political* is "unmoored,"[6] proscribing in "indeterminate"[7] fashion not just buttons and clothing mentioning the candidates, parties, and ballot questions being voted upon, but also forbidding apparel referring to issues and groups extrinsic to the election.[8] As it lacks "objective, workable standards,"[9] the Court held,

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[1] Minn. Voters All. v. Mansky, 138 S. Ct. 1876 (2018).

[2] *Minn. Voters All.*, 138 S. Ct. at 1882, 1883, 1885.

[3] MINN. STAT. § 211B.11(1) (2019), *invalidated by* Minn. Voters All. v. Mansky, 138 S. Ct. 1876 (2018).

[4] *See Minn. Voters All.*, 138 S. Ct at 1891–92.

[5] *Id.* at 1888.

[6] *Id.*

[7] *Id.* at 1889.

[8] *See id.*

[9] *Id.* at 1891.

the Minnesota law banning "political" apparel in polling places violates the First Amendment in light of "the potential for erratic application."[10]

Minnesota Voters Alliance thus confirmed the ability of voters to wear political clothes and buttons to the polls as long as such clothes and buttons do not mention candidates, political parties, or ballot questions at issue in the current election.[11]

On its face, *Minnesota Voters Alliance* is about which t-shirts, hats, and buttons voters can wear at the polls. However, the Court's First Amendment analysis in *Minnesota Voters Alliance* extends beyond apparel at polling places. That decision impacts the ongoing debate about the Johnson Amendment,[12] the now controversial provision of the Internal Revenue Code ("Code") that forbids organizations listed in section 501(c)(3)[13] from intervening in political campaigns. *Minnesota Voters Alliance* also affects the proper construction of section 501(c)(3)'s ban on lobbying by tax-exempt entities[14] as well as other provisions of the tax law taxing and precluding campaign intervention by tax-exempt organizations.[15]

Minnesota Voters Alliance requires that these provisions of the tax law[16] be construed to comply with the First Amendment mandate that restrictions on speech be reasonable, objective, workable and determinate. After *Minnesota Voters Alliance*, the Johnson Amendment should be interpreted as only proscribing 501(c)(3) entities from expressly endorsing or opposing particular candidates,

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[10] *Id.* at 1890.

[11] *See id.* at 1891.

[12] For background on the Johnson Amendment, see EDWARD A. ZELINSKY, TAXING THE CHURCH: RELIGION, EXEMPTIONS, ENTANGLEMENT, AND THE CONSTITUTION 188–91 (2017) [hereinafter ZELINSKY, TAXING THE CHURCH], and Edward A. Zelinsky, *Churches' Lobbying and Campaigning: A Proposed Statutory Safe Harbor for Internal Church Communications*, 69 RUTGERS U. L. REV. 1527, 1528, 1531 (2017) [hereinafter Zelinsky, *Safe Harbor*]. *See also* Ellen P. Aprill, *Amending the Johnson Amendment in the Age of Cheap Speech*, 2018 U. ILL. L. REV. ONLINE 1, 1.

[13] *See* I.R.C. § 501(c)(3) (2012); ZELINSKY, TAXING THE CHURCH, *supra* note 12, at 188.

[14] For background on § 501(c)(3)'s ban on lobbying, see ZELINSKY, TAXING THE CHURCH, *supra* note 12, at 191, and Zelinsky, *Safe Harbor*, *supra* note 12, at 1529, 1532.

[15] *See* I.R.C. § 527(f)(1) (2012); Treas. Reg. § 1.501(c)(4)–1 (as amended in 1990).

[16] The First Amendment standard of determinacy articulated in *Minnesota Voters Alliance* also impacts the proper understanding of § 162(e) of the Code, which denies for-profit trades and businesses an income tax deduction for outlays "incurred in connection with" lobbying and political campaigning. I.R.C. § 162(e)(1) (2012); Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1891 (2018). This Article focuses upon the implications of *Minnesota Voters Alliance* for nonprofit entities, both to keep the length of the Article manageable and also because the greatest contemporary controversy is about the political activities of nonprofit organizations, churches in particular.

political parties, or ballot questions or from engaging in the "functional equivalent" of such express advocacy.[17] Under this test, tax-exempt entities would not be precluded from engaging in more general issue advocacy.

The other provisions of the tax law preventing tax-exempt entities from participating in political campaigns and taxing such participation should be construed in the same way. These other features of the tax law should be understood as precluding and taxing only express advocacy of, or opposition to, particular candidates, parties, or ballot questions, or as prohibiting and taxing the functional equivalent of such explicit expression.

In light of *Minnesota Voters Alliance*, the 501(c)(3) lobbying ban should be interpreted similarly, as only prohibiting tax-exempt entities from explicitly supporting or opposing pending legislative proposals or from undertaking the functional equivalent of such explicit advocacy about pending legislation. The 501(c)(3) lobbying ban should not prevent tax-exempt entities from discussing public policy questions more generally, even though such questions can be formulated as legislative proposals. Section 4911 of the Code already propounds for certain electing exempt organizations such a First Amendment-compliant standard.[18]

As currently understood by the IRS and the Treasury, the Code's restrictions on the political expression of tax-exempt entities sweep too broadly and too vaguely to satisfy these constitutional standards. According to the IRS's current administrative interpretation of the Johnson Amendment, that provision of the Code proscribes "issue advocacy that functions as political campaign intervention."[19] This expansive test is, like the Minnesota apparel statute struck in *Minnesota Voters Alliance*, unmoored and indeterminate and is, thus, unreasonable for First Amendment purposes. To establish objective, workable standards in light of *Minnesota Voters Alliance*, the IRS's construction of the Johnson Amendment should prohibit only explicit

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[17] *Cf.* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469–70 (2007) ("[A] court should find that an ad is the 'functional equivalent' of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.").

[18] *See* I.R.C. § 4911 (2012). As I discuss *infra*, some tax-exempt organizations may elect the safe harbor provided by I.R.C. § 501(h) for lobbying expenditures. Section 501(h), in conjunction with § 4911, provides rules about lobbying more consonant with *Minnesota Voters Alliance*. *See* I.R.C. §§ 501(h), 4911(a)–(b); *Minn. Voters All.*, 138 S. Ct. at 1891. This Article argues that, as a matter of First Amendment law, these more determinant rules should, by administrative action or by modification of the Code, be extended to all tax-exempt entities, not just those which can and do make the § 501(h) safe harbor election.

[19] Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1424.

endorsements of, or opposition to, candidates, parties, and ballot issues involved in the current election and the functional equivalent of such express endorsement or opposition. Under this more carefully tailored construction of the Johnson Amendment, nonprofit organizations, churches in particular, would no longer risk the loss of tax-exempt status by engaging in issue advocacy that falls short of overt support for, or opposition to, specific candidates, political parties, or ballot questions.

Similarly, *Minnesota Voters Alliance* requires the reformation of the Treasury regulation that interprets the statutory ban preventing 501(c)(3) organizations from "[a]dvocat[ing] the adoption or rejection of legislation."[20] Virtually any issue of public concern can result in legislation.[21] Under *Minnesota Voters Alliance*, this expansive test should also, as a constitutional matter, be limited to the championing of, or opposition to, particular proposals currently pending before legislative bodies or slated for a popular vote. Under this more precise construction of the Code's general prohibition on lobbying by nonprofit organizations,[22] such organizations, including churches, would not risk the forfeiture of tax-exempt status through their statements on public policy as long as such statements do not endorse or object to particular legislation that has been introduced in a lawmaking body or that is subject to an impending vote by the electorate.

Part I of this Article explores the Court's decision in *Minnesota Voters Alliance*, which establishes that, under the banner of reasonability, the First Amendment requires "objective, workable standards" when political expression is regulated by the government.[23] Restrictions on voter apparel that mentions candidates, parties, and ballot questions satisfy this standard of reasonability; broader restrictions on "political" clothing do not.[24]

Parts II, III, and IV explore, in light of *Minnesota Voters Alliance*, the provisions of the Code that regulate the political expression of tax-exempt institutions. Part II examines Revenue Ruling 2007-41 in which the IRS contends that, depending upon the "facts and circumstances" of particular instances, "issue advocacy" can

[20] Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii)(b) (as amended in 2017).

[21] *See* JOHN V. SULLIVAN, HOW OUR LAWS ARE MADE, H.R. Doc. No. 110-49, at 4 (2007).

[22] As noted in Section IV.B, *infra*, the more narrowly-tailored prohibition on tax-exempt lobbying implemented by §§ 501(h) and 4911 is more First Amendment compliant.

[23] *Minn. Voters All.*, 138 S. Ct. at 1891.

[24] *Id.* at 1888 (citing Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 808–09 (1985)).

constitute forbidden campaign intervention for purposes of section 501(c)(3).[25] The Court's analysis in *Minnesota Voters Alliance* implies that Revenue Ruling 2007-41, like the Minnesota apparel statute, sweeps too broadly and too imprecisely.[26] Indeed, Revenue Ruling 2007-41 unconstitutionally condemns as forbidden campaigning an ill-defined set of statements that address issues of public policy even if no candidate, party, or ballot question is explicitly endorsed or opposed.

Part III discusses the tax imposed by section 527(f)[27] on civic organizations, labor unions, business associations, and other tax-exempt institutions when they attempt to "influence" elections.[28] This Part also discusses the Treasury regulation that holds that organizations tax-exempt under section 501(c)(4)[29] cannot intervene in political campaigns.[30] *Minnesota Voters Alliance* indicates that these provisions, as currently understood, are overly broad, often nebulous restrictions on political expression, too indeterminate to pass First Amendment scrutiny.[31]

Part IV confronts the Code's ban on lobbying by 501(c)(3) organizations. *Minnesota Voters Alliance* indicates that this ban must also be construed more carefully to prohibit only express support for, or opposition to, particular bills pending before legislative bodies or scheduled for a popular vote. An organization's tax-exempt status should not be forfeited by statements about public policies that could be implemented by legislation since virtually any position on any public policy can be implemented by state, local or federal legislation. Section IV.B highlights the Code's disparate treatment of tax-exempt organizations which can and do elect the lobbying safe harbor provided by sections 501(h) and 4911 and the treatment of tax-exempt entities which cannot or do not make that election. The former, by virtue of the safe harbor election, are subject to restrictions that are more consonant with the First Amendment standards of *Minnesota Voters Alliance* than are the latter.

Having established that these provisions of the tax law are today understood too capaciously to pass First Amendment scrutiny, Part V

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[25] Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1421, 1424.

[26] *See Minn. Voters All.*, 138 S. Ct. at 1891 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989)).

[27] I.R.C. § 527(f) (2012).

[28] *See* § 527(f)(1).

[29] I.R.C. § 501(c)(4) (2012).

[30] *See* Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (as amended in 1990).

[31] *See Minn. Voters All.*, 138 S. Ct. at 1888 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 808–09 (1985)).

of this Article addresses the administrative understanding of these provisions which would satisfy the test of *Minnesota Voters Alliance* that restrictions on political expression be reasonable, objective, and determinant. The particular implementation of that principle in *Minnesota Voters Alliance* does not work well in these other settings, that is, the Johnson Amendment, the section 527(f) tax on political participation, the Treasury regulation forbidding campaign intervention by civic leagues, and section 501(c)(3)'s general lobbying ban. Under *Minnesota Voters Alliance*, states can forbid individuals from wearing to the polls buttons or clothes that mention candidates, parties, or ballot issues involved in the current election.[32] This "no mention" test works well for voting place apparel because voting is a discrete activity which occurs briefly at a particular point in time.[33] In this setting, forbidding the names of candidates, parties, or ballot issues is a targeted rule easily administrable at a specific point in time, to wit, an election day presence at the polls.

But this "no mention" test does not work well in other settings that extend over long periods. The stricture against naming candidates, parties, and ballot questions is overly broad in other contexts and can interfere with much generalized political discussion. Our political culture today is a "permanent campaign."[34] Except for public officials who are term-limited or who have formally renounced re-election, all public officials are continually running for re-election around the calendar. If the no-mention-of-a-candidate rule applied to the Johnson Amendment, 501(c)(3) organizations could never utter the name of any elected official since all officials are today continuously running for re-election. Thus, a rule against using the name of any candidate, despite its appeal in the context of apparel at the polls, would be overly broad in the context of the Johnson Amendment and would forbid much speech which is not campaign intervention.

In lieu of the "no mention" test, I propose that, for purposes of applying *Minnesota Voters Alliance* to the Johnson Amendment, the applicable test should be the standard articulated by Chief Justice Roberts in *FEC v. Wisconsin Right to Life, Inc.*[35] Under this test, the Johnson Amendment would be understood as precluding the express

[32] *See Minn. Voters All.*, 138 S. Ct. at 1891.

[33] *See* Charles Stewart III, *Waiting to Vote in 2012*, 28 J.L. & POL. 439, 450 (2013) (finding that in 2008 and 2012 two-thirds of voters waited ten minutes or less to vote).

[34] *See, e.g.*, Hugh Heclo, *Campaigning and Governing: A Conspectus*, *in* THE PERMANENT CAMPAIGN AND ITS FUTURE 1, 26 (Norman J. Ornstein & Thomas E. Mann eds., 2000).

[35] *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469 (2007).

advocacy of specific candidates, parties, or ballot questions and "the functional equivalent of express advocacy."[36] Tax-exempt entities and their personnel could mention public officials but could not articulate explicit support for, or opposition to, such officials' re-election.[37] For these purposes, the functional equivalence of express advocacy would be defined restrictively as the Chief Justice did in *Wisconsin Right to Life*, namely, a statement "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[38]

Likewise, the tax imposed by section 527(f) on the political activity of tax-exempt institutions and the 501(c)(4) regulations that prevent civic leagues from engaging in campaigning should only tax and preclude explicit endorsements of and opposition to particular candidates, parties, and ballot questions and the functional equivalent of such explicit support or opposition. Again, *functional equivalence* should be construed narrowly as the Chief Justice did in *Wisconsin Right to Life*, that is, as "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,"[39] party, or ballot question.

Similarly, section 501(c)(3)'s general lobbying ban should be understood to permit discussion of any public policy issue that could result in legislation. To comply with the First Amendment reasonability test of *Minnesota Voters Alliance*,[40] the 501(c)(3) lobbying ban should only prevent express advocacy for or against specific pending legislation or "the functional equivalent of such express advocacy."[41] This change could be accomplished administratively or legislatively, extending in either fashion the more precise standards of sections 501(h) and 4911 to all 501(c)(3) entities.[42]

This Article then places *Minnesota Voters Alliance* in the context of *Regan v. Taxation with Representation*,[43] which upheld against

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[36] *Id.*

[37] *Cf. id.*

[38] *Id.*

[39] *Id.*

[40] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1888 (2018) ("[T]he State must draw a reasonable line. . . . [T]he State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out." (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 808–09 (1985)).

[41] *Wis. Right to Life, Inc.*, 551 U.S. at 482.

[42] *See* I.R.C. § 501(h) (2012 & Supp. V 2018); I.R.C. § 4911 (2012).

[43] Regan v. Taxation with Representation, 461 U.S. 540 (1983).

constitutional challenge section 501(c)(3)'s ban on lobbying.[44] The *Taxation with Representation* Court did not confront the content of this ban; it merely held that such a ban is constitutional.[45] *Minnesota Voters Alliance* similarly implies that the 501(c)(3) lobbying ban, properly construed, is constitutional. But *Minnesota Voters Alliance* indicates that such constitutionality depends upon the lobbying ban being formulated reasonably, workably, and objectively.[46]

Consequently, an institution should lose its tax-exempt status under the Johnson Amendment for campaigning only if such institution explicitly endorses or opposes a candidate, political party, or ballot issue or engages in expression that cannot reasonably be understood as other than such an endorsement or opposition. Similarly, an entity should forfeit its tax-exempt status for lobbying only if the entity supports or calls for defeat of a particular legislative proposal currently pending before a public lawmaking body or before the electorate. In this way, *Taxation with Representation* is compatible with *Minnesota Voters Alliance*: tax-exempt organizations can be proscribed from lobbying and campaigning as long as such prohibited lobbying and campaigning is defined reasonably for First Amendment purposes.[47]

Part VII addresses three potential rejoinders to my argument including an alternative, more restricted reading of *Minnesota Voters Alliance* as a case just about clothing. This Part also addresses the limited support that the Chief Justice's position enjoyed from the Court in *Wisconsin Right to Life*. Finally, Part VII addresses the argument that the Code-based prohibitions on tax-exempt organizations' campaigning and lobbying are in practice not aggressively enforced by the IRS.

The Code need not be amended to fashion these statutory provisions to comply with *Minnesota Voters Alliance,* though modifying the language of the Code is one way that the Code's restrictions on the political speech of tax-exempt entities could be brought into compliance with the First Amendment. Alternatively, such compliance could be achieved administratively by revoking the portions of Revenue Ruling 2007-41 pertaining to issue advocacy

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[44] *See id.* at 546, 550.

[45] *See id.* at 549–50. *But see id.* at 553–54 (Blackmun, J., concurring) (noting that 501(c)(3) organizations may lobby through a 501(c)(4) affiliate, but then cautioning that restricting 501(c)(4) affiliates' speech may render § 501(c)(3)'s ban constitutionally infirm).

[46] *See Minn. Voters All.*, 138 S. Ct. at 1891.

[47] *See id.* at 1888 (citing *Cornelius*, 473 U.S. at 808–09); *Taxation with Representation*, 461 U.S. at 550.

under the Johnson Amendment and by amending the regulations under section 501(c)(3) to clarify that forbidden lobbying occurs only when a tax-exempt entity explicitly supports or calls for defeat of a particular legislative proposal pending before a public lawmaking body or before the electorate. Similarly, the IRS can modify Revenue Ruling 2004-6 to bring it into compliance with the First Amendment standard of determinacy announced in *Minnesota Voters Alliance*. Likewise, the Treasury can by regulation clarify that, for purposes of sections 527 and 501(c)(4),[48] campaign intervention means explicit endorsement of, or opposition to, a candidate, not more generalized discussion of issues and legislation. The Treasury would thereby interpret those Code-based restrictions on political activity in a manner that, contrary to current law, satisfies the First Amendment signposts of reasonability and determinacy articulated in *Minnesota Voters Alliance*.

I. *MINNESOTA VOTERS ALLIANCE V. MANSKY*

The American polling station was once a rowdy place.[49] Like other states of the union, Minnesota adopted a law designed to create an orderly environment in which voters cast their ballots.[50] The Minnesota statute creates a zone within which campaigning, including the "display [of] campaign material," may not occur.[51] This campaign-free zone includes the polling place itself and extends to the area "within 100 feet of the building in which a polling place is situated."[52]

Minnesota's statute also proscribes any person from "provid[ing] political badges, political buttons, or other political insignia to be worn at or about the polling place on the day of a primary or election."[53] These two provisions of the Minnesota law were not challenged in *Minnesota Voters Alliance*.[54]

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[48] As noted *infra,* Congress has in the past blocked the Treasury from promulgating regulations under § 501(c)(4). *See infra* note 236 and accompanying text. It remains to be seen whether the current, 116th Congress will do so as well.

[49] *See Minn. Voters All.*, 138 S. Ct. at 1882–83; *see also* Doe v. Reed, 561 U.S. 186, 224–27 (2010) (Scalia, J., concurring) (describing traditional voting practices including *viva voce* voting).

[50] *See* MINN. STAT. § 211B.11(1) (2019), *invalidated by* Minn. Voters All. v. Mansky, 138 S. Ct. 1876 (2018); *Minn. Voters All.*, 138 S. Ct. at 1882–83.

[51] § 211B.11(1).

[52] *Id.*

[53] *Id.*

[54] *See Minn. Voters All.*, 138 S. Ct. at 1883.

The remaining portion of the Minnesota statute establishing polling place decorum was challenged and ultimately struck as unconstitutional:[55] "A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day."[56]

Those challenging this law did not seek to wear into the polls buttons or other insignia supporting or opposing candidates, political parties, or ballot questions involved in the current election.[57] Rather, they wanted to display buttons and clothing reflecting more generalized political themes and affiliations. One individual "planned to wear a 'Tea Party Patriots' shirt" into the polls.[58] Other voters, protesting Minnesota's lack of a voter identification law, sought to display buttons "with the words 'Please I. D. Me,' a picture of an eye, and a telephone number and web address for" an organization supporting voter identification laws.[59] One of the plaintiffs wore the "['Please I. D. Me'] button and a T-shirt with the words 'Don't Tread on Me' and the Tea Party Patriots logo."[60] "One individual was asked to cover up his Tea Party shirt" in order to vote.[61] Another was allowed to vote only "after an election judge recorded" his name and address for potential referral for sanctions under the Minnesota statute forbidding "political" apparel at polling places in the North Star State.[62]

When the case reached the U.S. Supreme Court, the Court classified a polling place as a "nonpublic forum."[63] In such a forum, governments may enact speech regulation that is "reasonable in light of the purpose served by the forum"[64] as long as such regulation is "not an effort to suppress expression merely because public officials oppose the speaker's view."[65]

Minnesota's law flunked this First Amendment test of reasonability. While states can regulate polling place apparel "so

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[55] *See id.* at 1885.

[56] § 211B.11(1).

[57] *See Minn. Voters All.*, 138 S. Ct. at 1884.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 1886.

[64] *Id.* at 1885 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

[65] *Minn. Voters All.*, 138 S. Ct. at 1885 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)).

that voters may focus on the important decisions immediately at hand[,] . . . the State must draw a reasonable line"[66] between permitted and proscribed apparel: "[T]he unmoored use of the term 'political' in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota's restriction to fail even this forgiving test."[67] According to the Court, the Minnesota statute "does not define the term 'political.' And the word can be expansive."[68]

As an example, the Court observed that "a button or T-shirt merely imploring others to 'Vote!'" could run afoul of the Minnesota prohibition on political apparel in the polling place.[69] The use of the term "campaign material" in the first part of the Minnesota statute makes clear that "political" apparel is a "broader" category that goes beyond campaign-related clothing and buttons.[70]

The Court indicated that a more carefully tailored statute regulating polling place apparel passes the constitutionally mandated test of reasonability.[71] Central to this discussion of the Minnesota statute was a state-issued "Election Day Policy," which reflected the state's understanding of the statute.[72] The Court approved as "clear enough" for First Amendment purposes three examples of forbidden apparel cited in that policy: "[I]tems displaying the name of a political party, items displaying the name of a candidate, and items demonstrating 'support of or opposition to a ballot question.'"[73]

However, the Court ruled, the Minnesota statute goes beyond these reasonable restrictions to ban at polling places apparel of an "indeterminate" nature.[74] As construed by Minnesota in its Policy statement, the apparel statute prevents a voter from wearing at the polls any clothing or buttons that address "any subject on which a political candidate or party has taken a stance."[75] The Court expressed its disapproval:

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[66] *Minn. Voters All.*, 138 S. Ct. at 1888.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 1889.
[71] *See id.* at 1891.
[72] *See id.* at 1884.
[73] *Id.* at 1889.
[74] *Id.* at 1891.
[75] *Id.* at 1881.

> A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable. Candidates for statewide and federal office and major political parties can be expected to take positions on a wide array of subjects of local and national import. Would a "Support Our Troops" shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a "#MeToo" shirt, referencing the movement to increase awareness of sexual harassment and assault? At oral argument, the State indicated that the ban would cover such an item if a candidate had "brought up" the topic.[76]

Minnesota's policy guide interpreting the political apparel statute also construed the statute's ban on political clothing as prohibiting "any item 'promoting a group with recognizable political views.'"[77] This, the Court sardonically observed, "makes matters worse."[78] This understanding of "political" apparel could proscribe at the polls clothing and buttons for "the American Civil Liberties Union, the AARP, the World Wildlife Fund, and Ben & Jerry's, [which] all have stated positions on matters of public concern."[79] Indeed, under this interpretation of the Minnesota statute, the statute might forbid a Boy Scout troop leader from wearing his uniform when he votes, as the Boy Scouts have views on matters of public concern.[80] The Minnesota political apparel ban is, thus, "an indeterminate prohibition"[81] that invites "erratic application"[82] because it lacks "objective, workable standards."[83]

The Court made clear that a more precise statute regulating polling place apparel could pass the First Amendment test of reasonability if it "proscrib[es] displays (including apparel) in more lucid terms."[84] Thus, for example, a state may protect polling place decorum by outlawing a button or shirt "relating to a candidate,

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[76] *Id.* at 1889–90 (internal citations deleted).
[77] *Id.* at 1890.
[78] *Id.*
[79] *Id.*
[80] *See id.*
[81] *Id.* at 1891.
[82] *Id.* at 1890.
[83] *Id.* at 1891.
[84] *Id.*

measure, or political party appearing on the ballot."[85] By such targeted prohibitions, a state can create a polling place "removed from the clamor and din of electioneering."[86] But Minnesota's statute is not "a law capable of reasoned application"[87] and, thus, like the public school prohibition on anti-war arm bands invalidated in *Tinker*,[88] runs afoul of the First Amendment because of "the potential for erratic application."[89] "[A]n indeterminate prohibition carries with it '[t]he opportunity for abuse.'"[90]

II. REVENUE RULING 2007-41 AND ISSUE ADVOCACY

In Revenue Ruling 2007-41, the IRS describes its understanding of the reach of the Johnson Amendment, the provision of the Code that prevents organizations tax-exempt under section 501(c)(3) from "participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[91]

Revenue Ruling 2007-41 is an administrative interpretation of the Johnson Amendment analogous to Minnesota's Election Day Policy statement,[92] which construes the Minnesota political apparel law, and has the same infirmities as does that statement. What the Court said about the Minnesota statute and the policy statement interpreting that statute also applies to the Johnson Amendment and Revenue Ruling 2007-41. Just as the Minnesota political apparel statute improperly bans as "political" clothing and buttons that advance generalized themes and groups without endorsing or opposing particular candidates, parties, and ballot questions,[93] Revenue Ruling 2007-41 categorizes as proscribed campaign

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[85] *Id.* (quoting TEX. ELEC. CODE ANN. § 61.010(a) (West 2019)).

[86] *Minn. Voters All.*, 138 S. Ct. at 1892.

[87] *Id.* While Justice Sotomayor, joined by Justice Breyer, dissented in *Minnesota Voters Alliance*, she did not address the substantive merits of the Minnesota statute under the First Amendment. *See generally id.* at 1893–97 (Sotomayor, J., dissenting). Rather, Justice Sotomayor's disagreement with the Court was procedural in nature. *See id.* at 1893. She would have certified the case to the Minnesota Supreme Court, thereby affording that court the opportunity to construe Minnesota's political apparel statute. *See id.*

[88] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

[89] *Minn. Voters All.*, 138 S. Ct. at 1890.

[90] *Id.* at 1891 (quoting Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 576 (1987)).

[91] Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1424; *see also* I.R.C. § 501(c)(3) (2012).

[92] *Compare Minn. Voters All.*, 138 S. Ct. at 1884 (describing the Election Day Policy), *with* Rev. Rul. 2007-41, 2007-1 C.B. at 1424 (interpreting the Johnson Amendment).

[93] *See id.* at 1882.

intervention "issue advocacy" that does not mention any candidate, political party, or ballot question.[94]

In particular, Revenue Ruling 2007-41 cautions that

> section 501(c)(3) organizations must avoid any issue advocacy that functions as political campaign intervention. Even if a statement does not expressly tell an audience to vote for or against a specific candidate, an organization delivering the statement is at risk of violating the political campaign intervention prohibition if there is any message favoring or opposing a candidate. . . . All the facts and circumstances need to be considered to determine if the advocacy is political campaign intervention.[95]

According to Revenue Ruling 2007-41, among the "facts and circumstances" indicating whether issue advocacy is forbidden campaign activity "favoring or opposing a candidate" is "[w]hether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office."[96]

Revenue Ruling 2007-41 identifies mitigating factors that tend to save a particular instance of issue advocacy from being classified as forbidden campaign intervention.[97] For example, issue advocacy is less likely to be deemed prohibited campaign intervention if "the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election."[98] However, at the end of the day, according to Revenue Ruling 2007-41, it is a matter of "facts and circumstances"[99] whether issue advocacy is forbidden campaign intervention that costs a 501(c)(3) organization its tax-exempt its status[100]—with all of the uncertainties inherent in any "facts and circumstances" test.

The vague rule of Revenue Ruling 2007-41 that issue advocacy may constitute forbidden campaign intervention depending on the "facts and circumstances" violates the First Amendment standard of reasonability laid out in *Minnesota Voters Alliance*. Like Minnesota's

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94 Rev. Rul. 2007-41, 2007-1 C.B. at 1424.
95 *Id.*
96 *Id.*
97 *See id.*
98 *Id.*
99 *Id.*
100 *Id.* at 1423.

ban on political apparel at polling places, Revenue Ruling 2007-41's concept of "issue advocacy" is unmoored, proscribing in indeterminate fashion statements about issues of public policy.[101] Under Revenue Ruling 2007-41, a statement may be deemed to be forbidden campaign intervention even when that statement does not refer to any candidate, political party, or ballot question.[102] Revenue Ruling 2007-41 lacks objective, workable standards when it declares that, depending on the "facts and circumstances," a tax-exempt organization's pronouncement on a public policy issue may violate the Johnson Amendment's ban on political campaigning—even if such pronouncement does not mention any candidate, political party, or ballot question at issue in a pending election.[103]

Consider, for example, a minister who wants to deliver a sermon for or against removing statues of Robert E. Lee. Could that sermon be considered forbidden campaign intervention under the issue advocacy standard of Revenue Ruling 2007-41? It depends. The uncertainties of Revenue Ruling 2007-41's "facts and circumstances" test could have a chilling effect on this minister's decision to speak. Suppose that the minister guesses wrong and gives a sermon for or against Lee statues while candidates for office in the community are advancing similar arguments. In this case, the minister's sermon could retrospectively be deemed campaign intervention "favoring or opposing a candidate" for purposes of the Johnson Amendment.[104] If so, her church would lose its tax-exempt status under section 501(c)(3) because the topic of her sermon is characterized "as an issue distinguishing candidates for a given office."[105]

Under *Minnesota Voters Alliance,* a voter has a First Amendment right to wear to the polls a t-shirt supporting or opposing the removal of Robert E. Lee statues so long as no candidate, party, or ballot question is mentioned.[106] It is, thus, troubling for Revenue Ruling 2007-41 to indicate that, depending upon particular "facts and circumstances," the minister's sermon about Lee statues might cost her church its tax-exempt status for political campaigning, even if the minister's sermon mentions no candidate, party or ballot question.

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[101] *Cf.* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1888 (2018).

[102] *See* Rev. Rul. 2007-41, 2007-1 C.B. at 1424.

[103] *See id.*; *cf. Minn. Voters All.*, 138 S. Ct. at 1891 (noting that election judges' discretion must be guided by "objective, workable standards" to prevent bias in determining what constitutes forbidden political activity).

[104] Rev. Rul. 2007-41, 2007-1 C.B. at 1424.

[105] *Id.* at 1421, 1424.

[106] *See Minn. Voters All.*, 138 S. Ct. at 1891.

Minnesota Voters Alliance holds that regulatory restrictions on political expression must be "objective" and "workable."[107] Prohibitions on polling place apparel meet this First Amendment test if they prevent the display of the names of candidates, parties, and ballot issues involved in the current election.[108] More generalized prohibitions on "political" clothing and buttons do not meet this test of determinacy.[109] By analogy, the Johnson Amendment can, consistent with the norms of the First Amendment, prohibit 501(c)(3) organizations from endorsing or opposing candidates, parties, and ballot questions. But the Johnson Amendment cannot preclude broader issue advocacy by tax-exempt organizations when such advocacy leaves unmentioned candidates, parties, and ballot issues.[110] Insofar as Revenue Ruling 2007-41 understands the Johnson Amendment as banning broader issue advocacy, that revenue ruling fails to give adequate notice as to what speech is or is not proscribed by section 501(c)(3). Revenue Ruling 2007-41 is, thus, constitutionally infirm in light of *Minnesota Voters Alliance.*

Consider another example that highlights the unconstitutional indeterminacy of Revenue Ruling 2007-41's restrictions on issue advocacy. Suppose that a 501(c)(3) organization is located in a major metropolitan area in which multiple campaigns are occurring for different seats in the Congress and in the state legislature. Different candidates in different races will raise different issues to advance their particular candidacies. Revenue Ruling 2007-41's restriction on issue advocacy implies that this tax-exempt institution and its personnel must monitor all of these electoral contests and must refrain from discussing any issue that distinguishes the candidates in any one of these races.[111] Confronted with this daunting task, this 501(c)(3) entity may prudently protect its tax-exempt status by eschewing all issues of public concern to avoid political campaigning for purposes of the Johnson Amendment. This blanket silencing of general political speech is the outcome that the First Amendment test of *Minnesota Voters Alliance* prevents.

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[107] *Id.*

[108] *See, e.g.*, *id.*

[109] *See id.* at 1888 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 808–09 (1985)).

[110] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1424–25.

[111] *See id.* at 1424.

III. THE CAMPAIGN INTERVENTION OF OTHER TAX-EXEMPT ENTITIES

While the Johnson Amendment of section 501(c)(3) is the best known of the Code's restrictions on the political activities of tax-exempt organizations, the federal tax law also governs the political activities of other tax-exempt entities including civic organizations,[112] labor unions,[113] and business leagues.[114] Section 527(f) of the Code subjects to corporate taxation the political expenditures of these and similar entities, which are tax-exempt under section 501.[115] Specifically, section 527(f) taxes at the corporate income tax rate the lesser of the "exempt function" expenditures of such an entity or such an entity's net investment income.[116]

For purposes of this tax, section 527(e)(2) defines a taxable exempt function as

> the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.[117]

Suppose, for example, that in 2018 a labor union tax-exempt under section 501(c)(5) has net investment income from dividends of $1,000 and spends $500 "to influence" a state legislative election. In light of the current federal corporate income tax of twenty-one percent,[118] this union owes the section 527(f) tax in the amount of $105.[119]

Just as *Minnesota Voters Alliance* indicates that the Johnson Amendment must be construed objectively and workably to comply with the First Amendment, that decision also indicates that section 527 must also be understood to comport with the First Amendment requirement of reasonable determinacy.

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[112] I.R.C. § 501(c)(4) (2012).
[113] § 501(c)(5).
[114] § 501(c)(6).
[115] *See* I.R.C. § 527(f)(1) (2012).
[116] *See* § 527(f)(1)
[117] § 527(e)(2).
[118] I.R.C. § 11(b) (2012 & Supp. V 2018).
[119] $500 × 21% = $105.

However, like Revenue Ruling 2007-41, Revenue Ruling 2004-6[120] unconstitutionally construes "influence" for section 527 purposes in imprecise, overly broad terms. Revenue Ruling 2004-6 contends that, depending upon the "facts and circumstances," issue advocacy by a business league, labor union or civic organization may constitute taxable "exempt function" activity under section 527 even if no candidate is explicitly supported or opposed.[121] In three of the six examples in Revenue Ruling 2004-6, the IRS concludes that issue advocacy is a taxable expenditure under section 527(f) even though in none of these examples is a candidate endorsed or rejected.[122] Per *Minnesota Voters Alliance,* such a vague "facts and circumstances" restriction on the speech of nonprofit entities is unconstitutional.

Consider, for example, situation three of Revenue Ruling 2004-6. In that example, an entity exempt from a tax under section 501(c)(4) runs a full-page newspaper ad "shortly before an election."[123] The ad supports a federal allocation to build a hospital and mentions that the state's U.S. senator twice voted for such funding.[124] The senator is running for re-election. The ad does not explicitly endorse the senator or urge her re-election.[125] Revenue Ruling 2004-6 concludes that this advertisement is an "exempt function," which triggers the tax imposed by section 527(f) as an attempt to influence an election.[126]

This conclusion contradicts the teaching of *Minnesota Voters Alliance.* No statement in this newspaper ad urges voters to re-elect (or vote against) the senator. The ruling apparently deems this ad to be campaign intervention because it mentions the senator and occurs too close to election time. But how close is too close? Six months? Six weeks? Six days? If this 501(c)(4) organization guesses wrong under the "facts and circumstances" test of Revenue Ruling 2004-6, the organization owes the section 527(f) penalty tax for expressing its views on a matter of public concern.[127]

While it may be plausible to view this ad as an attempt "to influence" the election, that is not the only possible interpretation of the ad. The thrust of the ad is that federal funding for hospitals is

[120] Rev. Rul. 2004-6, 2004-1 C.B. 328.
[121] *See id.* at 330.
[122] *See id.* at 331.
[123] *Id.*
[124] *See id.*
[125] *See id.*
[126] *Id.*
[127] *See id.*

desirable. That is a legitimate comment on public policy.

Situation four of Revenue Ruling 2004-6 is similar and is similarly troublesome for First Amendment purposes in light of *Minnesota Voters Alliance*. In that example, an organization tax exempt under section 501(c)(4) runs radio ads favoring increased state funding for public education.[128] These ads run "shortly before an election" in which an incumbent governor seeks to return to office.[129] The governor had earlier vetoed an income tax increase designed to augment spending on public schools.[130] The ad tells listeners to contact the governor but neither endorses nor opposes the governor or his opponent.[131] The IRS concludes that these radio ads are "exempt function" outlays triggering the tax imposed by section 527(f)—even though listeners are not asked to vote against (or for) the governor.[132]

This example again implicates the uncertainty of timing under a "facts and circumstances" test: How close to the election is too close? Moreover, this pro-expenditure ad does not inform the listener of the governor's record or her current position on school funding.[133] The implicit premise of this example is that some listeners will know of the governor's veto and will understand the ad as urging a vote against the governor.[134] An equally plausible interpretation of the ad is that it means what it says: please call the governor and tell her you favor public school funding.

Finally, situation six of Revenue Ruling 2004-6 involves a 501(c)(4) organization that opposes the death penalty.[135] The governor of the state is running for re-election and supports the death penalty.[136] "[S]hortly before" the election, this organization runs a television advertisement opposing the death penalty.[137] The advertisement does not mention the governor's opponent and does not urge a vote against the governor.[138] The advertisement notes the governor's support for the death penalty and asks viewers to contact the

[128] *See id.*
[129] *Id.*
[130] *See id.*
[131] *See id.*
[132] *Id.*
[133] *See id.*
[134] *See id.*
[135] *Id.* at 332.
[136] *See id.*
[137] *Id.*
[138] *See id.*

governor to oppose the death penalty.[139] The IRS again concludes that this radio ad is an "exempt function" expenditure triggering taxation under section 527(f).[140]

This situation is a stronger example for the IRS's position than is situation four since in this example the anti-death penalty ad tells the viewer that the governor favors capital punishment.[141] But, again, on its face, the advertisement only asks the viewer to contact the governor to oppose capital punishment.[142] Is this ad too close to the election or so explicit as to constitute campaign intervention against the governor? *Minnesota Voters Alliance* requires a more workable, more objective test under the First Amendment.[143]

In all three of these examples, according to the IRS, an organization's issue advocacy results in a taxable "exempt function" expenditure under section 527(f) even though no candidate for office is expressly endorsed or opposed.[144] *Minnesota Voters Alliance* stands in contrast to the IRS's position in these examples under section 527(f) of the Code.[145] In all three of these situations, a tax-exempt organization articulates neither explicit opposition to nor express support for a political candidate.[146] Everything the Court found wrong with the Minnesota voting apparel statute is wrong with these examples. The IRS's understanding of an "exempt function" expenditure that attempts to "influence" an election is indeterminate, reaching beyond explicit endorsements of, or opposition to, candidates to tax more generalized discussions of political issues. Under *Minnesota Voters Alliance*, Revenue Ruling 2004-6's "facts and circumstances" understanding of what constitutes an attempt to "influence" an election is insufficiently "objective" or "workable" for First Amendment purposes.[147]

Consider another hypothetical under section 527(f) of the Code. Suppose that a union prints and distributes a brochure denouncing

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[139] *See id.*

[140] *Id.*

[141] *See id.*

[142] *See id.*

[143] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1891 (2018).

[144] *See* Rev. Rul. 2004-6, 2004-1 C.B. at 331–32.

[145] *Compare Minn. Voters All.*, 138 S. Ct. at 1888 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 808–09 (1985)) ("[T]he State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out."), *with* Rev. Rul. 2004-6, 2004-1 C.B. at 331–32 (demonstrating that the IRS sometimes will and sometimes will not find an "exempt function" without express support or opposition).

[146] *See* Rev. Rul. 2004-6, 2004-1 C.B. at 331.

[147] *See Minn. Voters All.*, 138 S. Ct. at 1891.

the U.S. Supreme Court's recent decision in *Janus v. American Federation of State, County & Municipal Employees, Council 31*.[148] Has the union thereby engaged in a taxable exempt function for purposes of the section 527 tax? It depends. If the union has no net investment income, it will not, in practice, care since zero net investment income produces no tax under section 527(f) of the Code.[149] But, as a constitutional matter, it is problematic after *Minnesota Voters Alliance* to declare that discussion of issues of public concern (like *Janus*) might trigger the "exempt function" tax depending upon the factual circumstances in which the discussion occurs.

Such generalized issue advocacy might also cost an organization its tax-exempt status under section 501(c)(4). Treasury Regulation section 1.501(c)(4)-1[150] states that a civic league must promote "social welfare."[151] The regulation further provides that "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."[152]

This regulatory standard is also unconstitutionally indeterminate under *Minnesota Voters Alliance*. "[I]ndirect . . . intervention" in a political race goes beyond support for, or opposition to, a candidate and might, depending upon the facts and circumstances, encompass general issue advocacy that "indirect[ly]" supports or opposes a candidate.[153]

Minnesota Voters Alliance indicates that when political speech is regulated, it must be regulated reasonably, in an objective, workable fashion. In light of *Minnesota Voters Alliance*, Revenue Ruling 2004-6, interpreting section 527(f) of the Code, and Treasury Regulation section 1.501(c)(4)-1, interpreting section 501(c)(4) of the Code, are overly broad and indeterminate. These imprecise measures accordingly must be reformed to give tax-exempt organizations better notice of the political activity that can trigger taxation or loss of tax-exempt status.

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[148] Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).
[149] *See* I.R.C. § 527(f)(1)(A) (2012).
[150] *See* Treas. Reg. § 1.501(c)(4)-1 (as amended in 1990).
[151] *Id.* § 1.501(c)(4)-1(a)(1)(ii).
[152] *Id.* § 1.501(c)(4)-1(a)(2)(ii).
[153] *See id.*

IV. THE CODE'S BAN ON TAX-EXEMPT ENTITIES' LOBBYING

A. The General Ban on 501(c)(3) Organizations' Lobbying

Just as the bans on general issue advocacy established by Revenue Rulings 2007-41 and 2004-6 unconstitutionally restrict political speech under *Minnesota Voters Alliance*, the Treasury regulation implementing section 501(c)(3)'s prohibition on lobbying is "unmoored" and "indeterminate" for First Amendment purposes. As a statutory matter, section 501(c)(3) of the Code provides that "no substantial part of the activities" of an organization tax exempt under section 501(c)(3) may consist of "carrying on propaganda, or otherwise attempting, to influence legislation."[154] This statutory prohibition on "influenc[ing] legislation" is often characterized as a ban on "lobbying" by 501(c)(3) entities.[155]

The Treasury regulation interpreting section 501(c)(3)'s lobbying ban states that a tax-exempt organization offends this ban if the organization

> (a) Contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or (b) Advocates the adoption or rejection of legislation.[156]

This expansive regulation runs afoul of *Minnesota Voters Alliance* and the First Amendment standard of reasonability that *Minnesota Voters Alliance* promulgates for regulating political speech.[157] Just as the undefined term *political* is indeterminate in the context of the Minnesota voter apparel statute, the undefined term *legislation* is indeterminate in the context of section 501(c)(3).[158] Every issue of public policy can result in legislation. Hence, the unmoored term *legislation* proscribes in this context most discussions of public concerns since such concerns can be framed as legislation. Also overbroad is the statutory term *substantial*, which provides no real guidance as to the quantity of speech that causes the loss of an

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[154] I.R.C. § 501(c)(3) (2012).

[155] *See* §§ 501(c)(3), 4911(a)(1); Regan v. Taxation with Representation, 461 U.S. 540, 543 (1983) (articulating § 501(c)(3)'s ban on using tax-deductible contributions toward activities that influence legislation as a "prohibition against substantial lobbying").

[156] Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii)(a)–(b) (as amended in 2017).

[157] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1888 (2018) (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 808–09 (1985)).

[158] *See id.* at 1889.

institution's tax-exempt status under section 501(c)(3).

To see the unworkable nature of the undefined terms *legislation* and *substantial* and their unreasonably broad impact on political speech, consider again the minister who contemplates delivering a sermon for or against the removal of statues of Robert E. Lee. This sermon might be the minister's only statement ever touching on a matter of public controversy. If so, this sermon can plausibly be considered an insubstantial part of the church's activities.

But, suppose that the minister regularly discusses from the pulpit issues of public interest such as abortion, same sex marriage, and immigration. Consequently, section 501(c)(3) and the regulations implementing that section's ban on lobbying require two, fact-based inquiries:[159] First, is the minister's proposed sermon about Lee statues, along with her other public policy pronouncements, a "substantial part" of the church's activities? Second, if they are, do the Lee homily and these other pronouncements "[a]dvocate[] the adoption or rejection of legislation[?]"[160]

As I discuss in Section IV.B of this Article, Congress itself acknowledged the indeterminacy of these tests when, under sections 501(h) and 4911,[161] Congress gave many 501(c)(3) organizations the option to elect an objective safe harbor for lobbying expenditures.[162] However, important 501(c)(3) entities, including churches and their auxiliaries, cannot elect this safe harbor.[163]

Thus, tax-exempt entities confront the question of what constitutes advocacy for or against "legislation" for purposes of section 501(c)(3). Since any issue of public policy can be framed as legislation, any statement on a matter of public concern can be construed as a comment for or against "legislation."

Consider again a sermon supporting the retention or removal of

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[159] See Mysteryboy Inc. v. Comm'r, No. 21011-08X, 2010 Tax Ct. Memo LEXIS 14, at *42 (T.C. Jan. 26, 2010).

[160] *See* § 1.501(c)(3)-1(c)(3)(ii)(b); *see also Mysteryboy*, 2010 Tax Ct. Memo LEXIS 14, at *42 ("Under section 1.501(c)(3)-1(c)(3)(ii) . . . , an organization is an action organization if a substantial part of its activities is attempting to influence legislation by propaganda or otherwise. . . . [A]n organization is to be regarded as attempting to influence legislation if the organization (1) contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation or (2) advocates the adoption or rejection of legislation.").

[161] *See* I.R.C. § 501(h) (2012 & Supp. V 2018); I.R.C. § 4911 (2012). For more background on these provisions of the Code, see ZELINSKY, TAXING THE CHURCH, *supra* note, 12, at 191, and Zelinsky, *Safe Harbor*, *supra* note 12 at 1532.

[162] *See* §§ 501(h)(1)(A), 4911(c).

[163] *See* § 501(h)(5)(A)–(B).

Lee statues. City councils can by ordinance confirm their respective communities' Lee statue or can mandate the statue's removal.[164] Similarly, both state[165] and federal[166] legislation can address the subject of Lee statues. Thus, this sermon is plausibly characterized as advocating or opposing legislation—even if no particular ordinance is mentioned in the sermon or is pending in the community in which the church is located. To urge the removal or retention of a Lee statue is to advocate "legislation," unless that term is qualified to make it more objective and workable.

Likewise, suppose that the president of a tax-exempt hospital devotes considerable effort discussing the dangers of opioid abuse. This, too, is a matter of public concern that can result in legislation.[167]

In short, for purposes of section 501(c)(3)'s general ban on tax-exempt organizations' lobbying, it is often unclear when an organization's comments constitute lobbying for legislation as most topics of public concern can be addressed through legislation. It is, moreover, ambiguous when lobbying is "substantial."[168] It is, thus, uncertain when public comments by a 501(c)(3) entity and its personnel will jeopardize that entity's tax-exempt status due to statutorily forbidden lobbying. That uncertainty runs afoul of the First Amendment teaching of *Minnesota Voters Alliance* that, to be reasonable, restrictions on political speech must be workable, objective, and determinate.[169]

B. The Safe Harbor Lobbying Ban of Sections 501(h) and 4911

In recognition of the uncertainties surrounding the section 501(c)(3) ban on lobbying, Congress provided in sections 501(h) and 4911 a statutory safe harbor that many (but not all) 501(c)(3) organizations may elect.[170] Though this safe harbor was enacted as part of the Tax Reform Act of 1976,[171] this safe harbor addresses the

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[164] *See* NEW ORLEANS, LA. CODE OF ORDINANCES § 146-611(b) (2014).

[165] *See* H.B. 1099, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); *see also* N.C. GEN. STAT. § 100-2.1 (2018) ("[A] monument, memorial, or work of art owned by the State may not be removed, relocated, or altered in any way without the approval of the North Carolina Historical Commission.").

[166] *See* Robert E. Lee Statue Removal Act, H.R. 3779, 115th Cong. § 2 (1st Sess. 2017).

[167] *See* Combating Opioid Abuse for Care in Hospitals Act of 2018, H.R. 5774, 115th Cong. (2d Sess. 2018).

[168] *See* § 501(c)(3).

[169] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1891 (2018).

[170] *See* I.R.C. § 501(h)(1)–(5) (2012 & Supp. V 2018); I.R.C. § 4911(a) (2012).

[171] *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1307, 90 Stat. 825, 1720 (1976) (codified

First Amendment concerns that *Minnesota Voters Alliance* articulated four decades later. Central to this elective safe harbor are the statutory terms *legislation*, *action*, and *influencing legislation*.[172] For these purposes, *legislation* is defined to include "action with respect to Acts, bills, resolutions, or similar items by the Congress, any State legislature, any local council, or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure."[173]

For purposes of this safe harbor, the statutory term *action* is "limited to the introduction, amendment, enactment, defeat, or repeal of Acts, bills, resolution, or similar items."[174] *Influencing legislation*, a/k/a lobbying, is then defined as "any attempt to influence any legislation through [either] an attempt to affect the opinions of the general public or any segment thereof . . . [or] communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation."[175]

For purposes of the lobbying safe harbor created by sections 501(h) and 4911, the statutory term *influencing legislation* excludes, among other activities, the internal communications of an organization with "its bona fide members"[176] unless such communication "directly encourage[s]" such members either to themselves lobby any legislator, legislative employee, government official or government employee,[177] or to "urge" nonmembers to engage in such lobbying.[178]

This detailed definition of legislation and forbidden (and permitted) lobbying replaces for electing entities the unmoored, expansive term *legislation* as used in section 501(c)(3). Consider again the president of a tax-exempt hospital who speaks about the dangers of opioid abuse. As long as she does not advocate a particular bill pending before a legislative body or the electorate, these comments are not efforts to "influence legislation"—if the hospital has made the safe harbor lobbying election of section 501(h).[179] Under that safe harbor, general discussion of public policy issues is

as amended at I.R.C. § 501(h)).

[172] *See* § 4911(a)(1)–(2).

[173] § 4911(e)(2).

[174] § 4911(e)(3).

[175] § 4911(d)(1)(A)–(B).

[176] § 4911(d)(2)(D).

[177] § 4911(d)(3)(A).

[178] § 4911(d)(3)(B).

[179] *See* I.R.C. § 501(h) (2012 & Supp. V 2018); § 4911(d)(1)(A)–(B).

excluded from the definition of forbidden lobbying even if such issues could (as most do) result in the adoption of legislation.[180] Even if this hospital president does advocate "action" with respect to particular legislation, her comments will not jeopardize her institution's tax-exempt status under section 501(c)(3) unless the hospital's overall lobbying activities trigger the dollar levels established by sections 501(h) and 4911—but, again, only if the hospital has made the safe harbor election for its lobbying activities.[181] If not, these comments by the hospital president potentially run afoul of the expansive and unmoored lobbying ban of section 501(c)(3).

Contrast this with the minister's discussion of Lee statues. Because the church cannot elect the safe harbor of section 501(h),[182] this minister cannot be sure whether or not her sermon is forbidden lobbying or whether, combined with her other statements, her sermon is "substantial."[183] Unlike section 4911, section 501(c)(3) contains no protection for communications within the church.[184] This minister and her church, in contrast to the hospital that makes the section 501(h) election, are subject to the indeterminacy which, per *Minnesota Voters Alliance*, violates the First Amendment tests of workability and objectivity.

V. IMPLEMENTING *MINNESOTA VOTERS ALLIANCE*: EXPRESS ADVOCACY AND FUNCTIONAL EQUIVALENCE

Per *Minnesota Voters Alliance*, the First Amendment test of reasonability requires that restrictions on political expression be objective, workable, and determinant.[185] However, the particular rule used to implement that test in *Minnesota Voters Alliance* does not work well in other settings, namely, the Johnson Amendment, the section 527(f) tax on political campaign intervention, and the regulatory prohibition on campaigning by civic leagues. Rather than the "no mention" rule *Minnesota Voters Alliance* approves for voting place apparel prohibitions, I argue in this Part that, in the context of the Code's bans on campaigning by tax-exempt entities, the First Amendment requirement of reasonability is best implemented through Chief Justice Roberts' test articulated in *FEC v. Wisconsin*

[180] *See* § 4911(d)(1)(A)–(B).
[181] *See* § 501(h); 4911(c)(2).
[182] *See* § 501(h)(5).
[183] *See* § 501(c)(3).
[184] *See* § 501(h)(5).
[185] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1891 (2018).

Right to Life, Inc.: Only express advocacy of candidates, parties, or ballot questions, or the "functional equivalent" of such express advocacy should run afoul of the tax law.[186] Functional equivalence should be construed narrowly,[187] as the Chief Justice indicated, to include only speech "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate[,]" party or ballot question.[188]

In the context of section 501(c)(3)'s lobbying ban, I suggest that the statutory standards of section 4911 be applied to all tax-exempt entities, not just to those that make the safe harbor election under section 501(h). These changes could be implemented administratively or by congressional modification of the Code.[189]

Under *Minnesota Voters Alliance*, a state may maintain polling place decorum by forbidding at the polls clothing or buttons that mention candidates, parties, or ballot questions involved in the current election.[190] This "no mention" test works well for voting place apparel because voting is a discrete activity that occurs briefly at a particular point in time.[191] It is easy to ascertain who is a candidate in the current election, the parties that have fielded candidates, and any ballot issues being decided. Consequently, at the polls, forbidding the names of candidates, parties, or ballot questions is a workable and objective rule, easily administrable at the specific point in time of a particular election.

However, this "no mention" test does not transfer well to other settings that occur over extended periods. A rule against naming candidates, parties, and ballot questions is overly broad in these other contexts and can interfere with much generalized political discussion.

Our political culture today is a "permanent campaign."[192] Except for public officials who are term-limited or who have formally renounced re-election, all public officials are continually running for re-election around the calendar.[193] If the no-mention-of-a-candidate rule applied under the Johnson Amendment, 501(c)(3) organizations could never articulate the name of any elected officials since today all

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[186] FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469–70 (2007).

[187] *See id.*

[188] *Id.* at 470.

[189] *See* Benjamin J. Cohen & Catherine A. Harrington, *Is the Internal Revenue Service Bound by Its Own Regulations and Rulings?*, 51 TAX LAWYER 675, 675 (1998).

[190] *See Minn. Voters All.*, 138 S. Ct. at 1891.

[191] *See* Stewart, *supra* note 33, at 450.

[192] *See, e.g.*, Heclo, *supra* note 34, at 1.

[193] *See, e.g.*, *id.* at 17.

officials are continuously candidates. Such an overly broad restriction would forbid much speech that is not campaign intervention.

Suppose, for example, that a church informs its parishioners that the local congresswoman will be holding an informational session for current and prospective social security recipients. Under a rule forbidding a 501(c)(3) entity from mentioning the name of a candidate, the Johnson Amendment would forbid this statement unless the congresswoman had announced that this is her last term in office.[194] If the congresswoman is running for re-election (as most representatives interminably are), this church would violate the Johnson Amendment under a test forbidding a church or other tax-exempt institution from uttering the name of a candidate.[195] Members of Congress are today continuously candidates.

Consider again the minister who wants to deliver a sermon for or against retaining statues of Robert E. Lee. If a community is voting on an ordinance on this subject, it is workable to declare that no buttons or clothing may be worn at the polls mentioning this topic.[196] But, per *Minnesota Voters Alliance*, it violates the First Amendment to leave the minister in a legal limbo, not knowing whether or not, under a facts-and-circumstances test, her sermon could retroactively be deemed campaign intervention or lobbying, which would cost her church its tax-exempt status because candidates for office had discussed this issue.[197]

The best way to implement *Minnesota Voters Alliance* in the contexts of the Johnson Amendment and of sections 527(f) and 501(c)(4) is the test articulated by Chief Justice Roberts in *FEC v. Wisconsin Right to Life, Inc.*[198] Under that test, tax-exempt organizations' political speech would be prohibited or taxed as forbidden campaigning only if such speech were express advocacy of a candidate, political party or ballot question or were the "functional equivalent" of such express advocacy.[199]

The Chief Justice formulated this test against the background of *Buckley v. Valeo*[200] and *McConnell v. FEC*.[201] In its review of section

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194 *See* ZELINSKY, TAXING THE CHURCH, s*upra* note 12, at 188–89.
195 *See id.*
196 *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1888, 1891 (2018).
197 *See id.* at 1888–89.
198 *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469–70 (2007).
199 *Id.*
200 Buckley v. Valeo, 424 U.S. 1 (1976).
201 McConnell v. FEC, 540 U.S. 90 (2003); *see Wis. Right to Life, Inc.*, 551 U.S. at 456–57

608(e)(1)[202] of the Federal Election Campaign Act of 1971, the *Buckley* Court subjected to First Amendment scrutiny that section's limits on "any expenditure . . . relative to a clearly identified candidate."[203] The statutory phrase *relative to*, the *Buckley* Court observed, "fails to clearly mark the boundary between permissible and impermissible speech."[204] To avoid unconstitutional vagueness, that phrase must "be read to mean 'advocating the election or defeat of' a candidate."[205] But, the Court continued, even "this construction" of the phrase *relative to* does not "eliminate[] the problem of unconstitutional vagueness altogether."[206] "For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."[207] Thus, "in order to preserve the provision against invalidation on vagueness grounds, § 608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."[208]

Even as so "narrowly and explicitly" construed to avoid unconstitutional vagueness,[209] the Court held that the expenditure limits established by § 608(e)(1) fail First Amendment muster because such limits burden an individual's ability to communicate her views.[210] For our purposes, *Buckley* implemented the distinction between "express" support for candidates and other political speech in an important footnote that gave rise to what derisively became known as the "magic words"[211] of that opinion: "This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"[212]

The *Buckley* Court also subjected to First Amendment vagueness analysis the Act's requirement that individuals disclose their expenditures "for the purpose of . . . influencing" the process of

(first quoting *McConnell*, 540 U.S. at 206; and then quoting *Buckley*, 424 U.S. at 42).

202 18 U.S.C. § 608 (Supp. V 1975) (repealed 1976).

203 *Buckley*, 424 U.S. at 39.

204 *Id.* at 41.

205 *Id.* at 42.

206 *Id.*

207 *Id.*

208 *Id.* at 44.

209 *Id.*

210 *See id.* at 52.

211 *See, e.g.*, McConnell v. FEC, 540 U.S. 90, 127 (2003).

212 *Buckley*, 424 U.S. at 44 n.52.

electing federal officers.[213] In this setting, the Court "encounter[ed] line-drawing problems of the sort"[214] arising in the context of § 608(e)(1) and that section's prohibition of expenditures "relative to" federal candidacies.[215] Like the phrase *relative to*, the term *for the purpose of influencing* "shares the same potential for encompassing both issue discussion and advocacy of a political result."[216] To insure that the definition of "expenditure" (and its attendant disclosure requirement) "is not impermissibly broad,"[217] the *Buckley* Court opined, "[W]e construe 'expenditure' . . . in the same way we construed the terms of § 608(e)—to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[218] "As [so] narrowed,"[219] the expenditure disclosure requirement was held constitutional.[220]

Twenty-seven years after *Buckley*, the Court revisited and found wanting that opinion's distinction between express advocacy and more generalized issue advocacy.[221] In *McConnell v. FEC*, a five-Justice majority declared that "[w]hile the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects."[222]

Advertisements could "avoid the use of [*Buckley*'s] magic words"[223] but still effectively "advocate the election or defeat of clearly identified federal candidates."[224] This observation led the *McConnell* Court to uphold expenditure restrictions imposed by the Bipartisan Campaign Reform Act of 2002:

> Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence

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213 2 U.S.C. § 431(e) (1976) (current version at 52 U.S.C. § 30101(8) (2012)); *Buckley*, 424 U.S. at 63.

214 *Buckley*, 424 U.S. at 78–79.

215 *Id.*

216 *Id.* at 79.

217 *Id.* at 80.

218 *Id.*

219 *Id.*

220 *See id.* at 80–81, 84.

221 *See* McConnell v. FEC, 540 U.S. 93, 126 (2003).

222 *Id.* at 114, 196.

223 *Id.* at 127.

224 *Id.* at 126.

> or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad. . . . Indeed, the unmistakable lesson from the record in this litigation, as all three judges on the District Court agreed, is that Buckley's magic-words requirement is functionally meaningless.[225]

Chief Justice Roberts's opinion in *FEC v. Wisconsin Right to Life, Inc.*[226] subsequently breathed new life into *Buckley*'s distinction between express advocacy and more general issue advertising.[227] *Wisconsin Right to Life* upheld as-applied restrictions on corporate political expenditures only if such restrictions are limited to express advocacy of specific candidates or parties, and to "the functional equivalent of express advocacy."[228] The First Amendment requires that such equivalence be construed narrowly: "[A]n ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[229]

Minnesota Voters Alliance reinforces the distinction (asserted in *Buckley*, discounted in *McConnell*, revived in *Wisconsin Right to Life*) between express advocacy and more generalized issue advocacy.[230] *McConnell*'s dismissal of "magic words" ignores the First Amendment values of *Minnesota Voters Alliance*:[231] "magic words" of express advocacy are objective, workable, and determinate. "Magic words" notify the speaker what he may and may not say. "Magic words" of express advocacy cabin the discretion of those enforcing restrictions on political speech.

Of course, skilled rhetoricians will try to skirt the limits of the magic words of express advocacy. For example, to avoid a no-mention-of-a-candidate rule, a voter in 2016 might have worn to the

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[225] *Id.* at 193 (first citing Buckley v. Valeo, 424 U.S. 1, 45 (1976); then citing McConnell v. FEC, 251 F. Supp. 2d 176, 303–04 (D.C. Dist. 2003) (opinion of Henderson, J.); *id.* at 534 (opinion of Kollar-Kotelly, J.); *id.* at 875–79 (opinion of Leon, J.)).

[226] *See Wis. Right to Life, Inc.*, 551 U.S. 449, 455 (2007).

[227] *See id.* at 478–79.

[228] *Id.*

[229] *Id.* at 469–470. Ultimately, *Citizens United v. FEC*, 558 U.S. 310 (2010), held that expenditure restrictions cannot apply to corporations and labor unions as such. *See id.* at 372 (citing *McConnell*, 540 U.S. at 341).

[230] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1888, 1891 (2018).

[231] *Compare McConnell*, 540 U.S. at 217 (citing *Buckley*, 424 U.S. at 45, 46, 48) (holding that the clear and objective "magic words" described in *Buckley* were unconstitutional and violated the First Amendment), *with Minn. Voters All.*, 138 S. Ct. at 1891 (finding that when regulating speech at polling places, a state must "employ a more discernible approach" than the open-ended regulations promulgated by Minnesota).

polls a T-shirt that read, "It takes a village," or, "You're fired." Or a minister may have used either of these phrases from the pulpit.

Chief Justice Roberts addressed this problem by defining "the functional equivalent of express advocacy" narrowly, as speech "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[232] This circumscribed rule does not eliminate all potential borderline problems, determining what phrases are functionally equivalent to express advocacy. However, applied to tax-exempt entities, the Chief Justice's narrow formulation of functional equivalence protects the exercise of First Amendment rights as *Minnesota Voters Alliance* mandates.

No legislation is required to incorporate into the tax law the standards of *Wisconsin Right to Life*.[233] As to the Johnson Amendment, the IRS can revise Revenue Ruling 2007-41 to replace that ruling's current discussion of issue advocacy with a more determinate standard.[234] Section 501(c)(3) status should be lost under the Johnson Amendment only by explicit support of, or opposition to, particular candidates, parties, or ballot questions or by expression that can only be reasonably understood as the functional equivalent of such overt advocacy.

Likewise, the IRS should delete from Revenue Ruling 2004-6 the three examples, discussed above,[235] under which the section 527(f) tax is triggered by the mere mention of an elected official near election time. Instead, the tax should be levied only if a tax-exempt organization explicitly endorses or opposes a candidate for public office, a political party, or a ballot question or if such an organization engages in speech that can only be understood as the functional equivalent of such express support or opposition. Finally, the Treasury regulation under section 501(c)(4) should be revised to indicate that tax-exempt status as a civic league is only forfeited for political campaigning if such campaigning takes the form of express advocacy or its functional equivalent.[236]

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[232] *Wis. Right to Life, Inc.*, 551 U.S. at 469–70.

[233] *See generally id.* (demonstrating that the Court can apply this standard on their own instead of waiting for a new standard to be legislated).

[234] *See* Cohen & Harrington, *supra* note 189, at 675.

[235] *See supra* text accompanying notes 72–80.

[236] On November 29, 2013, the Treasury proposed regulations under § 501(c)(4). *See* Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Policy Activities, 78 Fed. Reg. 71,535 (Nov. 19, 2013). Congress subsequently blocked the promulgation of these regulations. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 127, 129 Stat. 2242 (2015). Whether the 116th Congress will permit the Treasury to proceed with these or other regulations remains to be seen.

In the absence of (or in lieu of) such administrative implementation of the First Amendment standards of *Minnesota Voters Alliance*, Congress could amend the relevant Code provisions—sections 501(c)(3), 501(c)(4), 527(f)—to incorporate the Chief Justice's test from *Wisconsin Right to Life*.[237]

For those who would deride this approach as revivifying the "magic words" of express advocacy, I would agree with the premise but not the conclusion: *Minnesota Voters Alliance* and its First Amendment test of reasonability highlight the benefits of magic words. Magic words are determinate, objective, and workable.

To bring the lobbying ban of section 501(c)(3) into congruence with the First Amendment standards of *Minnesota Voters Alliance,* the IRS or the Treasury could, by revenue ruling or regulation, incorporate into section 501(c)(3) the First Amendment-compliant definitions of section 4911.[238] As an alternative to such administrative action, Congress could amend the Code to apply to section 501(c)(3) the definitions ("legislation," "action," "influencing legislation") of section 4911.[239] Either way, those more determinate definitions would apply to all 501(c)(3) organizations, not just to those organizations that can and do make the safe harbor lobbying election under section 501(h). Thus, for example, as long as specific legislation is not endorsed, a sermon about Lee statues (or any other similarly controversial issue of public concern) would be protected as either internal communications among the church's members or as commentary, which does not constitute forbidden lobbying with respect to particular pending legislation.

VI. *REGAN V. TAXATION WITH REPRESENTATION*

Defenders of Revenue Rulings 2004-6 and 2007-41 and the current regulations under sections 501(c)(3) and 501(c)(4) might invoke *Regan v. Taxation with Representation*. The nonprofit corporation Taxation with Representation (TWR) challenged the constitutionality of the section 501(c)(3) lobbying ban.[240] The U.S. Supreme Court unanimously upheld it.[241]

In contesting the 501(c)(3) lobbying ban, TWR argued that the ban

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[237] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1891 (2018); *Wis. Right to Life*, 551 U.S. at 469–70.

[238] *See* I.R.C. §§ 501(c)(3), 4911(d)(1), (e)(2)–(3) (2012); *Minn. Voters All.*, 138 S. Ct. at 1891.

[239] *See* §§ 501(c)(3), § 4911(d)(1), (e)(2)–(3).

[240] Regan v. Taxation with Representation, 461 U.S. 540, 542 (1983).

[241] *See id*. at 540, 550.

was an "unconstitutional condition."[242] The Court agreed with TWR "that the government may not deny a benefit to a person because he exercises a constitutional right."[243] However, withholding tax-exempt status from TWR under section 501(c)(3) because of forbidden lobbying, the Court held, does not deny a government-bestowed benefit.[244] Rather, section 501(c)(3)'s prohibition of lobbying is "merely" the "refus[al] to pay for the lobbying out of public moneys"[245] in the form of tax-deductible contributions to tax-exempt entities: "Congress has simply chosen not to pay for TWR's lobbying."[246]

Taxation with Representation, thus, upheld against First Amendment challenge the section 501(c)(3) ban on lobbying.[247] A plausible reading of that decision is that it also sustains, under the First Amendment, the Code's other provisions relative to tax-exempt organizations' political speech, namely, the Johnson Amendment's ban on campaigning,[248] the section 527(f) tax on political activity,[249] and the regulatory prohibition on campaigning by 501(c)(4) civic leagues.[250] These provisions also reflect a congressional choice not to pay for campaigning through tax-exemption or through the charitable contribution deduction.

However, this reading of *Taxation with Representation* does not challenge my argument. I do not contend that *Minnesota Voters Alliance* invalidates the provisions of the tax law regulating and taxing the political speech of tax-exempt entities. *Minnesota Voters Alliance* does indicate that, under the First Amendment, these provisions must be construed reasonably to provide "objective"[251] and "workable"[252] standards to identify in determinate fashion forbidden lobbying and campaign intervention.

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[242] *Id.* at 545 (citing Speiser v. Randall, 357 U.S. 513, 518 (1958)).

[243] *Taxation with Representation*, 461 U.S. at 545 (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

[244] *See Taxation with Representation*, 461 U.S. at 545.

[245] *Id.*

[246] *Id.* at 546.

[247] *See id.* at 550, 551.

[248] *See generally id.* ("Congress has simply chosen not to pay for TWR's lobbying."); Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence.*, 58 GEO. WASH. L. REV. 308, 346–47 (1990) (discussing the Johnson Amendment).

[249] *See Taxation with Representation*, 461 U.S. at 546; Chisolm, *supra* note 248, at 330 n.105.

[250] *See Taxation with Representation*, 361 U.S. at 546; Chisolm, *supra* note 248, at 328–29. Professor Chisholm disagreed with this reading of *Taxation with Representation*. *Id.* at 322 ("*Taxation with Representation* does not settle the question of whether the section 501(c)(3) prohibition on campaign participation is an unconstitutional condition.").

[251] Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1891 (2018).

[252] *Id.*

The content of the 501(c)(3) ban on lobbying was not at issue in *Taxation with Representation*.[253] TWR did not claim that the section 501(c)(3) concepts of substantiality and legislation had to be construed narrowly to pass First Amendment scrutiny.[254] Rather, TWR argued that section 501(c)(3)'s lobbying ban should be struck altogether.[255] The Supreme Court rejected this claim.[256] The Court did not rule on the First Amendment need to construe the "expansive"[257] statutory concept of "legislation" since TWR did not assert the need for determinacy.[258] TWR wanted the lobbying ban invalidated altogether.[259]

Taxation with Representation can, thus, be reconciled with *Minnesota Voters Alliance*. *Minnesota Voters Alliance* approved "objective" and "workable" restrictions on political expression at the polls while striking as unconstitutionally unreasonable "unmoored," "indeterminate" prohibitions on such expression.[260] Under this approach to the First Amendment, the Johnson Amendment, the section 501(c)(3) ban on lobbying, the section 527(f) tax, and the regulatory ban on section 501(c)(4) campaigning must be construed to provide fair notice of what behavior is (and is not) permitted under those provisions. Consistent with the First Amendment, the Johnson Amendment can prevent 501(c)(3) entities from endorsing or opposing specific candidates, parties, and ballot questions.[261] But the Johnson Amendment can do no more than this. In particular, the Johnson Amendment cannot proscribe a tax-exempt entity's "issue advocacy" if the entity does not expressly support or reject particular candidates, parties, or ballot issues, or does not engage in expression, which is the functional equivalent of such explicit advocacy.

Likewise, section 501(c)(3)'s ban on lobbying can, per *Taxation with Representation*, prevent a tax-exempt entity from endorsing specific legislation pending before a legislative body or slated for a popular vote.[262] However, under *Minnesota Voters Alliance*, the section

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[253] *See Taxation with Representation*, 361 U.S. at 551.
[254] *See id.* at 543–44.
[255] *See id.* at 543–44, 47 (citing Harris v. McRae, 448 U.S. 297, 322 (1980)).
[256] *See Taxation with Representation*, 361 U.S. at 551.
[257] *Minn. Voters All.*, 138 S. Ct. at 1888.
[258] *See Taxation with Representation*, 461 U.S. at 542.
[259] *See id.* at 543–44.
[260] *See Minn. Voters All.*, 138 S. Ct. at 1888–89, 1891.
[261] ZELINSKY, TAXING THE CHURCH, *supra* note 12, at 188.
[262] *Cf. Taxation with Representation*, 461 U.S. at 548 ("Congress could, for example, grant funds to an organization dedicated to combating teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state

501(c)(3) lobbying ban cannot go beyond this to preclude all pronouncements on public policy because public policy can always be framed as proposed legislation.

Professor Steven Heyman supports the Court's decision in *Taxation With Representation* upholding the section 501(c)(3) lobbying ban.[263] However, he argues that the Court was wrong in that case to approve the statutory ability of veterans' groups to lobby while retaining their tax-exemptions under section 501(c)(19).[264] Granting tax-exempt veterans' organizations permission to lobby while denying such permission to section 501(c)(3) entities, he contends, "unjustifiably discriminat[es] between citizens in the political realm" in a manner that "clearly violate[s] equal protection."[265]

If Congress were to agree with Professor Heyman and deny tax-exempt veterans' groups the license to lobby, the holding of *Minnesota Voters Alliance* would apply to any such denial.[266] Hence, a statutory lobbying ban could not preclude tax-exempt veterans' groups from engaging in general discussion of public concerns. Under the First Amendment, such a ban could prohibit explicit support for, or opposition to, proposals pending before a legislative body or scheduled for popular vote. Such a ban under section 501(c)(19) could also preclude tax-exempt veterans' organizations from engaging in the "functional equivalent" of such express advocacy, as Chief Justice Roberts narrowly defined such equivalence in *Wisconsin Right to Life*.[267] However, a statutory ban on lobbying by tax-exempt veterans' groups, like the prohibition on lobbying by section 501(c)(3) organizations, could not preclude more generalized discussion of political issues.

VII. THREE REJOINDERS

A. It's Just About Clothing

A potential rejoinder to my analysis is that *Minnesota Voters Alliance* is just about clothing at the polls. Polling place apparel was the particular factual context in which *Minnesota Voters Alliance* was

legislatures.").

[263] *See* Steven J. Heyman, *State-Supported Speech*, 1999 WIS. L REV. 1119, 1158, 1159.

[264] *See id.* at 1159.

[265] *Id.* at 1160.

[266] *See Minn. Voters All.*, 138 S. Ct. at 1891.

[267] *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469–70 (2007).

decided.[268] While there is much dicta in that decision,[269] the argument runs, the actual holding of *Minnesota Voters Alliance* is limited to clothing at voting places.[270]

This rejoinder seeks to dismiss as dicta the broad articulation of First Amendment principles endorsed by seven Justices in *Minnesota Voters Alliance*. However, *Minnesota Voters Alliance* did not restrict these principles to the subject of clothing. Rather, that decision states First Amendment themes of general applicability, to wit, the First Amendment requires that governmentally-imposed restrictions on political speech be objective, workable, and determinate.[271]

The best reading of *Minnesota Voters Alliance* is that it is not just a clothing case; the Court spoke in broader terms.[272] Much of the Court's observations are technically *dicta*, but there is a reason courts pronounce *dicta.*

B. The Court's Limited Endorsement of the Chief Justice's Wisconsin Right to Life *Test*

Another potential rejoinder would note that Chief Justice Roberts's test in *Wisconsin Right to Life*, which I would incorporate into the tax law to comply with *Minnesota Voters Alliance*, was only endorsed by the Chief Justice and Justice Alito.[273] The other three justices who voted for the outcome sought by the Chief Justice in *Wisconsin Right to Life* did so on different grounds.[274]

This criticism highlights the heavily normative nature of my argument. I urge that the test endorsed by the Chief Justice—explicit advocacy or the functional equivalent of explicit advocacy—is the best way to make the tax law consistent with the First Amendment standards of *Minnesota Voters Alliance*. Even the four Justices who dissented in *Wisconsin Right to Life* should, after *Minnesota Voters Alliance*, find persuasive in the tax context the test fashioned by the Chief Justice. That test assures that the tax law restrictions imposed on the political speech of tax-exempt institutions will be workable, objective, and determinate.

Thus, to comply with the First Amendment standards of *Minnesota*

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[268] *See Minn. Voters All.*, 138 S. Ct. at 1882.

[269] *See id.* at 1890–91.

[270] *Id.*

[271] *See id.* at 1891.

[272] *See id.* at 1891 (quoting Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 576 (1987)) (citing Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981)).

[273] *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 455 (2007).

[274] *See id.* at 483, 504 (Scalia, J., concurring).

Voters Alliance, the Johnson Amendment and the anti-campaigning regulation under section 501(c)(4) should just bar explicit advocacy and expression that can only be understood as the functional equivalent of such express advocacy. Similarly, the section 527(f) tax should just be triggered under these circumstances, namely, when a tax-exempt entity explicitly speaks for or against a candidate, party, or ballot issue or engages in speech that can only be reasonably understood as the equivalent of such explicit advocacy. Under this tightened standard, a tax-exempt institution could engage in more general issue advocacy without fear of losing its exempt status or being subject to taxation.

In contrast to my call to incorporate into the tax law Chief Justice Roberts's test from *Wisconsin Right to Life*, Professor Miriam Galston "conclude[s] that it would be inappropriate to import the campaign finance First Amendment standards developed by *Citizens United* and *Wisconsin Right to Life* into tax law First Amendment jurisprudence."[275] Professor Galston wrote in 2011, before the Court decided *Minnesota Voters Alliance.* However, her argument could be updated to suggest that the standards of *Minnesota Voters Alliance* extend more broadly than clothing but still do not apply to the Code.

However, nothing in *Minnesota Voters Alliance* suggests that restrictions on political speech must be workable, objective, and determinate everywhere but the Code.[276] There is today much interesting debate, both in the academy[277] and in the judiciary,[278] about whether or not tax law is fundamentally different from other areas of the law. For now, my claim is straightforward: nothing in *Minnesota Voters Alliance* indicates that the tax law should be exempted from that decision's First Amendment standard that restrictions on political speech must be workable, objective, and determinate.

Moreover, as a normative matter, there is no compelling reason why those First Amendment standards should not cover the tax law. The strongest indication that the tax law can restrict taxpayer's

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[275] Miriam Galston, *When Statutory Regimes Collide: Will* Citizens United *and* Wisconsin Right to Life *Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867, 873–74 (2011).

[276] *See Minn. Voters All.*, 138 S. Ct. at 1891.

[277] *See, e.g.*, Daniel J. Hemel, *The President's Power to Tax*, 102 CORNELL L. REV. 633, 654–55 (2017) ("[A]nother example of tax exceptionalism.") (emphasis removed).

[278] *See, e.g.*, Summa Holdings, Inc. v. Comm'r, 848 F.3d 779, 784 (6th Cir. 2017) ("If this case dealt with any other title of the United States Code, we would stop there, end the suspense, and rule for [the taxpayers].").

political expression is *Taxation with Representation*, which upheld against constitutional challenge the 501(c)(3) lobbying ban.[279] But *Minnesota Voters Alliance* leaves that ban and *Taxation with Representation* intact: Congress can forbid 501(c)(3) entities from lobbying, but such forbidden lobbying must be defined in a workable and determinate manner along the lines of section 4911. More general discussion of public policy should not be classified as prohibited lobbying because the policy discussed could lead to legislation.

C. The IRS Does Not in Practice Enforce These Prohibitions

Yet, another rejoinder would characterize as remote the practical threat to tax-exempt organizations from the restrictions of sections 501(c)(3), 501(c)(4), and 527(f). There is in practice, the rejoinder would go, little IRS enforcement effort aimed at the campaigning and lobbying of tax-exempt entities.

To the extent that reported case law indicates the level of IRS enforcement activity, it is plausible to characterize the IRS's efforts in this area as minimal, despite all of the controversy about these provisions. There is little case law in which the IRS pursues tax-exempt entities for forbidden lobbying or campaigning.[280]

However, *Minnesota Voters Alliance* indicates that the relevant concern is not the IRS's practical enforcement policies, but "the potential for erratic application"[281] of an indeterminate law. Minnesota's ban on political apparel is unconstitutional because it is not "capable of reasoned application."[282] Such "an indeterminate prohibition carries with it '[t]he opportunity for abuse.'"[283]

This is equally true of the Code's prohibitions on tax-exempt entities' lobbying and campaigning. Like the Minnesota apparel law, these equally indeterminate features of the tax statute create "the potential for erratic application."[284] From this vantage, the reasonability requirement of the First Amendment is violated when statutory vagueness creates "[t]he opportunity for abuse."[285] Even if

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[279] *See* Regan v. Taxation with Representation, 461 U.S. 540, 550, 551 (1983).

[280] The leading cases in this area still remain *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000), and *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972). These are discussed in ZELINSKY, TAXING THE CHURCH, *supra* note 12, at 190–91.

[281] *Minn. Voters All.*, 138 S. Ct. at 1890.

[282] *Id.* at 1892.

[283] *Id.* at 1891 (quoting *Jews for Jesus*, 482 U.S. at 576).

[284] *Minn. Voters All.*, 138 S. Ct. at 1890.

[285] *Id.* at 1891 (quoting *Jews for Jesus*, 482 U.S. at 576).

the IRS (or Minnesota's election judges) in practice forbear from such abuse, the law that gives them such "opportunity" is unreasonable for First Amendment purposes.

CONCLUSION

The church-state entanglement issues raised by the Johnson Amendment and by the 501(c)(3) lobbying ban are best addressed by amending the Code to protect from all scrutiny the internal communications of churches, synagogues, temples, mosques, and all other religious congregations.[286] In contrast, the First Amendment problems discussed in this Article do not require legislation, though they could be addressed that way.

Minnesota Voters Alliance highlighted the First Amendment imperative that governmental regulation of political speech be objective, and workable, unlike current law, which regulates a nonprofit organization's political expression in an overly broad and impermissibly vague manner. After *Minnesota Voters Alliance*, the Johnson Amendment should be interpreted as only proscribing 501(c)(3) entities from expressly endorsing or opposing particular candidates, political parties, or ballot questions or from engaging in the "functional equivalent" of such express advocacy. Under this test, tax-exempt entities would not be precluded from engaging in more general issue advocacy. Likewise, in light of *Minnesota Voters Alliance*, sections 501(c)(4) and 527(e) of the Code should be construed as precluding and taxing only express advocacy of, or opposition to, particular candidates, parties, or ballot questions or as prohibiting and taxing only the "functional equivalent" of such explicit expression. Such functional equivalence should be understood narrowly as Chief Justice Roberts defined it in *Wisconsin Right to Life*, namely, a statement "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," party, or ballot question.[287]

In light of *Minnesota Voters Alliance*, the 501(c)(3) lobbying ban should be understood similarly, as only prohibiting tax-exempt entities from explicitly supporting or opposing pending legislative proposals or from undertaking the functional equivalent of such explicit advocacy about pending legislation. The 501(c)(3) lobbying

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[286] *See* ZELINSKY, TAXING THE CHURCH, *supra* note 12, at 202; Zelinsky, *Safe Harbor*, *supra* note 12, at 1545; Edward A. Zelinsky, *Continuing the Debate on the Johnson Amendment*, EXEMPT ORG. TAX REV., Mar. 4, 2019, at 289, 293.

[287] FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 470 (2007).

ban should not prevent tax-exempt entities from discussing public policy questions more generally, even though such questions can be formulated as legislation.

The Code would thereby continue to regulate the political expression of tax-exempt institutions but in ways which, unlike current law, are consistent with the First Amendment norms of reasonability, workability, objectivity, and determinacy articulated in *Minnesota Voters Alliance*.