Written Statement of

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for the Hearing Record on

"Examining a Church's Right to Free Speech"

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On behalf of Americans United for Separation of Church and State, thank you for the opportunity to submit this statement for the record of the hearing titled "Examining a Church's Right to Free Speech." Founded in 1947, Americans United is a nonpartisan advocacy and educational organization dedicated to preserving the constitutional principle of church-state separation, which is the foundation of true religious freedom for all Americans. We fight to protect the right of individuals and religious communities to practice religion—or not—as they see fit without government interference, compulsion, support, or disparagement. We have more than 120,000 members and supporters across the country.

This hearing will address the Johnson Amendment, which is a provision in the tax code that protects the integrity of tax-exempt organizations, including houses of worship, by ensuring they do not endorse or oppose political candidates. This law, which has been in place for six decades, provides a valuable safeguard that prevents political parties and candidates seeking power from using houses of worship as their tool. At the same time, faith leaders and houses of worship have the ability to fully engage in free speech activities.

Churches and Other Houses of Worship Currently Have Robust Free Speech Rights that Allow Them to Engage on Political Issues.

Churches have strong speech rights that allow them to use their prophetic voice to speak truth to power and fulfill their call to act for social justice. Houses of worship, denominational organizations, and faith leaders have always been active participants in the American political process. Passage of the Johnson Amendment six decades ago did not change that.

Under current law, tax-exempt houses of worship and the faith leaders who represent them can speak to any issue they choose, no social and political issue of the day is off limit. Pastors can speak out on political issues from the pulpit or in Bible study. They can write about issues in bulletins, in newsletters, or on a website. And, with a few boundaries that apply equally to all nonprofits, houses of worship can lobby on specific legislation. When it comes to elections, they can host candidate forums, hold voter registration drives, encourage people to vote, and help transport people to the polls.

The only limit: they cannot endorse or oppose candidates or political parties.

Under the Johnson Amendment, for example:

- A priest can address his congregation from the pulpit about his views on whether same-sex couples should be permitted to marry;
- A pastor can speak or write to a Member of Congress, expressing her church's opposition or support for a particular bill being considered;
- A church can add a page to its website that addresses its position on the country's immigration or abortion laws;
- A synagogue can march as a congregation at the March for Life or the Women's March on Washington; and

- A rabbi can testify before the House Oversight and Government Reform Committee about his position on the Johnson Amendment.

In addition, faith leaders can endorse candidates in their personal capacity or run for office themselves. For example, South Carolina pastor Mark Burns,[1] Texas-based pastor and televangelist Mike Murdock, [2] Dallas mega-church pastor Robert Jeffress,[3] and Florida pastor Paula White[4] all endorsed, and in some instances, campaigned for Donald Trump in the last election. Because these religious leaders endorsed and supported Trump in their personal capacity, rather than as pastors of their churches, they did not violate the Johnson Amendment in any way. And of course, there is no bar on faith leaders running for and serving in public office. Representative Jody Hice (R-GA), who serves on this Committee, is just one example.

Given all the ways in which houses of worship and their leaders can engage in politics and even in elections, it is clear that churches and church leaders already have robust free speech rights.

The Johnson Amendment Protects the Integrity and Independence of Houses of Worship.

The Johnson Amendment ensures that sanctuaries remain sacred and that houses of worship focus on fostering community and performing good works. Allowing churches and nonprofits to endorse and oppose political candidates, in contrast, would transform houses of worship into a tool for political parties and candidates, and split communities and congregations.

Houses of worship are spaces for members of religious communities to come together, not be divided along political lines. Indeed, they ought to be a source of connection and community, not division and discord. Permitting electioneering in churches would give partisan groups incentive to use congregations as a conduit for campaign activity and expenditures. Furthermore, changing the law would make houses of worship vulnerable to individuals and corporations who could offer large donations or to a politician promising social service contracts in exchange for taking a position on a candidate.

Repeal or Weakening of the Johnson Amendment Would Dismantle the 501(c)(3) Non-Profit Structure As We Know It.

The rules in section 501(c)(3) of the tax code that restrict tax-exempt organizations from endorsing or opposing candidates apply equally to houses of worship and secular organizations. Tax exempt charities are granted tax-free status because they serve the community and perform work for the common good—they are not granted this status so they can endorse candidates.

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[1] Candace Smith, *Meet the Pastors Who Support Donald Trump*, ABC News (Apr. 14, 2016).
[2] Kevin Cirilli, *Prominent Televangelist Says He Will Endorse Donald Trump*, Bloomberg (Feb. 14, 2016).
[3] *Pastor Robert Jeffress Explains His Support for Trump*, *NPR's All Things Considered*, (Oct. 16, 2016)..
[4] Katie Glueck, *Donald Trump's God Whisperer*, Politico (July 11, 2016).

Under the religious freedom protections provided by the First Amendment of the U.S. Constitution, Congress cannot treat houses of worship more favorably than secular organizations.[5] Any changes made by Congress to the current law, therefore, would have to apply to both religious and secular organizations. As a result, any changes Congress makes would affect all of the estimated 1.5 million organizations—both religious and secular—currently registered as 501(c)(3) organizations.[6] Changing the law would have a massive impact on charitable organizations across the country.

Repealing or weakening the Johnson Amendment would dismantle the 501(c)(3) non-profit structure as we know it. Habitat for Humanity, the YWCA, Feeding America, the Arc, and thousands of other community organizations would suddenly be under pressure to endorse and oppose political candidates**.** In addition, the reputation of 501(c)(3) organizations would be tarnished—donors will no longer see these organizations as reputable organizations that perform charitable work for the common good, but instead see them as partisan tools used by political campaigns and candidates.

Campaign operatives could also anonymously funnel unlimited campaign funds through houses of worship and other tax-exempt organizations, essentially transforming charitable organizations into political action committees (PACs). This could also result in decreasing the amount of time and resources the organizations can dedicate to good works

Moreover, changing current law would invite many organizations to pop up to serve solely as a mechanism to funnel money to political candidates.

Reserving Tax-Exempt Status to Organizations that Do Not Endorse or Oppose Candidates Does Not Violate Free Speech Rights.

Because the government can choose what it will and will not subsidize, it can, consistent with the Free Speech Clause of the First Amendment, limit 501(c)(3) tax-exempt status to organizations that refrain from endorsing or opposing candidates. And, as explained above, Congress has compelling reasons to maintain this limitation.

Section 501(c)(3) of the tax code provides preferential tax treatment to organizations that perform charitable work and serve the common good: these organizations may operate tax-free and individuals may deduct from their taxes any donation to such an organization. In return for this preferential tax treatment, organizations may "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[7]

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[5] *See Texas Monthly v. Bullock,* 489 U.S. 1, 11 (1989) (finding that benefits conferred only to religious organizations would constitute state sponsorship of religion and would lack a secular purpose necessary to be constitutional under the Establishment Clause).

[6] *How Many Nonprofit Organizations Are There in the U.S.?*, Grantspace (last visited May 3, 2017).

[7] 26 U.S.C. § 501.

In *Regan v. Taxation With Representation of Washington*,[8] the Supreme Court, in a ruling written by Justice Rehnquist, rejected arguments that the lobbying limits imposed on 501(c)(3) tax-exempt organizations violate the Free Speech Clause of the First Amendment. The Court explained that "both tax exemptions and tax deductibility [under Section 501(c)(3)] are a form of subsidy"[9] and that the government has the authority to determine what activities it does and does not subsidize. Thus, "Congress is not required by the First Amendment to subsidize lobbying."[10] In short, the Court, rejected "the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'"[11]

Indeed, the Court noted that tax-exempt organizations that wish to lobby in a substantial manner can still do so, they just have to incorporate a separate 501(c)(4) organization. Although not tax exempt, 501(c)(4)s are not restricted by limits on lobby expenditures.[12]

Relying on this Supreme Court precedent, the U.S. Court of Appeals for the District of Columbia in *Branch Ministries v. Rossotti*,[13] upheld the Johnson Amendment against claims that it violates the Free Speech Clause. In the same way that the government may choose not to subsidize certain lobbying activities, it may also choose not to subsidize partisan campaign endorsements. Thus, the court held that Congress may limit 501(c)(3) tax-exempt status to organizations that do not endorse or oppose candidates.

Some claim that *Citizens United v. FEC*,[14] undermines the rulings in *Taxation With Representation* and *Branch Ministries*. But *Citizens United* is easily distinguishable. In *Citizens United*, the Court struck down a campaign finance law banning corporations from making independent expenditures in support of candidates, even though corporations could purchase political ads by forming a PAC.[15] Citizens United, however, was not a tax-exempt organization and, thus, was not receiving a tax subsidy like the organizations in *Taxation With Representation* and *Branch Ministries.*[16] The rationale in those cases—that the government can limit the speech it subsidizes—therefore, did not apply.

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[8] 461 U.S. 540 (1983).

[9] *Id.* at 544. Subsequently, numerous courts have reiterated this understanding of preferential tax treatment as subsidy. *See, e.g.*, *Branch Ministries v. Rossotti*, 211 F.3d 137, 144-45 (D.C. Cir. 2000); *Dep't of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, 727 F.3d 415, 424 (5th Cir. 2013), *on reh'g en banc,* 760 F.3d 427 (5th Cir. 2014).

[10] *Taxation With Representation,* 461 U.S. at 540.

[11] *Id*. at 546 (internal citation omitted); *see also Cammarano v. United States*, 358 U.S. 498, 513 (denial of tax deduction did not violate speech rights because business owners were "simply being required to pay for [lobbying] activities entirely out of their own pockets").

[12] *Social Welfare Organizations*, Internal Revenue Service (last visited May 3, 2017).

[13] *Branch Ministries*, 211 F.3d at 142.

[14] 558 U.S. 310 (2010).

[15] *Id.* at 337.

[16] *See Dep't of Texas, Veterans of Foreign Wars of U.S.*, 727 F.3d at 424 (over the course of two rehearings, the Fifth Circuit thrice reiterated that *Taxation With Representation*'s subsidy doctrine had not been supplanted by *Citizens United*); *Parks v. C.I.R.*, No. 7043-07, 2015 WL 7280916, (T.C. Nov. 17, 2015) (distinguishing the conditions on the subsidies at issue in *Parks* and *Taxation With Representation* from the criminal ban on political speech at issue in *Citizens United*).

The Johnson Amendment, which insulates the taxpayer from having to fund political endorsements of non-profit organizations, does not violate the Free Speech Clause.

The Pushback Against the Johnson Amendment Has Come from a Handful of Organizations Seeking Political Power.

President Donald Trump recently pushed the Johnson Amendment into the spotlight by vowing to "get rid of and totally destroy the Johnson Amendment."[17] He has falsely boasted that repealing the current law "will be [his] greatest contribution to Christianity," because with the Johnson Amendment, Christians "don't have any religious freedom, if you think about it."[18] And it has been reported that he is likely to sign an executive order today that would limit the ability of the Internal Revenue Service to enforce it.[19]

It is noteworthy, however, that not a single major denomination has come out in favor of repealing or weakening current law. Instead, 99 religious and denominational organizations recently penned a letter urging Congress to reject efforts to repeal or weaken the law.[20] In addition, 4,500 tax-exempt organizations joined a letter urging the same.[21]

Recent polls show the American public supports the Johnson Amendment too. For example, a March 2017 Independent Sector poll shows 72% of Americans support the Johnson Amendment, including 66% of Trump voters, 78% of Clinton voters, and 77% of independent voters.[22]

Similarly, a March 2017 PRRI poll found that 71% of Americans—including 62% of Republicans and 56% of white evangelical Christians—oppose allowing churches and places of worship to endorse political candidates while retaining their tax-exempt status.[23] And a February 2017 survey conducted by the National Association of Evangelicals confirmed that 90% of evangelical leaders do not support political endorsements from the pulpit.[24] Indeed, all major religious groups in the country support the Johnson Amendment.[25]

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[17] Julie Zauzmer, *Trump Said He'll 'Totally Destroy' the Johnson Amendment. What Is It and Why Should People Care?* Wash. Post (Feb. 2, 2019).
[18] *Id.*
[19] *E.g.*, Louise Radnofsky and Ian Lovett, *Trump to Ease Restrictions on Religious Groups,* Wall Street Journal (May 3, 2017); Michael Shear, Laurie Goodstein, and Maggie Haberman, Trump Is Expected to Relax Tax Rules on Churches Taking Part in Politics, N.Y. Times (May 3, 2017).
[20] Letter to Congress from 99 Faith Organizations (April 4, 2017).
[21] Letter to Congress from 4500 Nonprofit Organizations (Apr. 5, 2017).
[22] *Poll: Americans Support the Johnson Amendment,* Independent Sector (Mar. 30, 2017).
[23] Daniel Cox and Robert Jones, *Majority of Americans Oppose Transgender Bathroom Restrictions*, PRRI (Mar. 10, 2017) (PRRI poll).
[24] *Pastors Shouldn't Endorse Politicians,* National Association of Evangelicals (Feb. 2017).
[25] PRRI poll.

Furthermore, the IRS has not investigated a single house of worship for a Johnson Amendment violation since 2009, making claims that the law is an imminent threat to the free speech of houses of worship even less credible.

The Free Speech Fairness Act (S. 264 / H.R. 781) Threatens the Independence and Integrity of 501(c)(3) Organizations.

In January 2017, Representatives Steve Scalise (R-LA) and Jody Hice (R-GA) and Senator James Lankford (R-OK) introduced the "Free Speech Fairness Act." The bill does not fully repeal current law, but significantly undermines it.

The Bill Would Allow Vast Amounts of Endorsement Activity
The bill would allow tax-exempt organizations—both houses of worship and secular nonprofits—to make statements endorsing or opposing candidates for public office so long as those statements are made in the "ordinary course" of carrying out their tax-exempt purpose and do not incur more than "de minimis incremental expenses."

Upon first glance, this appears like a narrow exemption to current law, but it would actually significantly gut current protections. In fact, a house of worship could endorse a candidate in any activity it carries out or materials it shares as long as there is ostensibly another purpose for engaging in those activities or creating those materials.

Permissible activities would include:

- While preaching to his congregation, a pastor could endorse a presidential candidate. The church could then post a video of that sermon on its website, email it to parishioners, and distribute it publicly on social media.
- A church could include a written endorsement of a candidate in every church bulletin, email, or newsletter, on its website, and in every other correspondence or document it plans to create or distribute.
- The president of major university could use its weekly newsletter to email current students and a massive alumni network to endorse a candidate.
- A rabbi could endorse a candidate during the welcoming message provided to those attending a community service event.

All of these activities could easily take place in the "ordinary course" of carrying out their tax-exempt purpose and likely would not incur more than "de minimis incremental expenses"; yet they could provide an invaluable benefit to a candidate. In addition, even with the stated limits in the bill, endorsements could invade every activity, written document, correspondence, and event held by the house of worship, ultimately dominating the house of worship's activities.

The Bill Would Open the Church to Greater—Not Less—IRS scrutiny
Opponents of the Johnson Amendment claim the current restriction on candidate endorsements is vague and open to IRS interpretation (even though the restriction is actually

quite unambiguous). This alternative proposal, however, creates even more ambiguity and invites an even greater likelihood of IRS investigations and entanglement with the church. To determine whether houses of worship are complying with the law, the IRS will have to determine both whether an endorsement occurred during the "ordinary course" of carrying out their tax-exempt purpose and whether it amounted to a "de minimis incremental expenses." Churches would have to open their books to the IRS. And the IRS will be forced to make judgments about the churches' activities. Inviting that type of scrutiny of church documents, this bill actually threatens, rather than upholds, the autonomy and independence of houses of worship.[26]

For example, to determine whether the church only made de minimus expenses, the IRS would have to inquire into how much time and money was spent on each endorsement, as well as look into the churches overall expenses. Then it would have to make a determination of whether that cost was de minimus.

The IRS would also have to make judgments as to what the organization's tax-exempt purpose was and whether each activity performed by the church fell in line with that purpose.

Conclusion

In addition to being a place to worship, pray, and praise for their congregations, churches provide a space for community, engagement, and interaction on issues important to many in the community. Opening up houses of worship to political endorsements would be detrimental to their ability to operate outside of the political fray and would run counter to the wishes of congregants. In addition, repealing or weakening the Johnson Amendment would dismantle the non-profit structure as we know it.

[26] *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).