SYMBOLISM AS SAVIOR: A LOOK AT THE IMPACT OF THE IRS BAN ON POLITICAL ACTIVITY BY TAX-EXEMPT RELIGIOUS ORGANIZATIONS

I. INTRODUCTION

Since 1954, the Internal Revenue Service ("IRS") has prohibited all tax-exempt religious organizations from engaging in any amount of activity in political affairs or campaigns.[1] Because this prohibition lies in the sensitive intersection between religion and politics, there is lively debate over the constitutionality of the IRS's position. However, this debate has not proved to have any real-world effect on the prohibition, since neither the IRS nor Congress has meaningfully changed its stance in the fifty-plus year history of the prohibition. Moreover, the Supreme Court has commented on the constitutionality of the provision on several occasions. Although some members of Congress sought to reverse the IRS's treatment of political religious speech with the introduction of the Houses of Wor-

1. *See* I.R.C. § 501(c)(3) (2006) (originally enacted in 1954 and conditioning tax-exemption on not participating in political activity).

ship Political Speech Protection Act in 2002, this attempt proved to be futile when the bill was defeated in Congress by a vote of 178 to 239.[2]

This Note argues that the religious organization political activity prohibition in the Internal Revenue Code ("IRC" or the "Code") is largely symbolic and does not prevent a meaningful number of religious organizations from expressing their political views. Although symbolism is an integral part of the prohibition, it is nonetheless constitutional, and it is a needed part of tax law in order to maintain the federal government's stance of neutrality, as well as the doctrine of separation of church and state. In order to demonstrate the symbolic nature of the prohibition, I focus principally on several ways in which the IRS's proscription is circumvented, both through other tax provisions and the workings of the legal system in general. In Part II, I focus on the constitutional framework of the political activity prohibition, specifically the Establishment Clause, the Free Exercise Clause, and their engagement with tax-exemption principles. In Part III, I turn to the prohibition itself, including the history of the provision and the current state of the law. In Part IV, I consider the somewhat varied interpretation of the prohibition by both the judicial branch and the IRS. Part V focuses on several factors that undercut the political activity prohibition, including methods through which religious organizations can voice their specific political messages while remaining tax-exempt under federal income tax law. In conclusion, I argue that although it is largely undercut by different factors and mechanisms, the political prohibition is both justified and constitutional and it ultimately serves a needed role in the intersection of federal tax and constitutional jurisprudence.

II. CONSTITUTIONAL FRAMEWORK

A. Basic Constitutional Principles

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[3] These two clauses, known as the Establishment Clause and the Free Exercise Clause, may sometimes conflict with each other,[4] but their overarching goal is the same. "The general principle deducible from the First Amendment and all that has been said by the [Supreme] Court is this: that we will not tolerate either governmen-

2. *See* Houses of Worship Political Speech Protection Act, H.R. 2357, 107th Cong. (2002).

3. U.S. CONST. amend. I.

4. *See* Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, . . . either of which, if expanded to a logical extreme, would tend to clash with the other.").

tally established religion or governmental interference with religion."[5] Although the Supreme Court may sometimes seem to struggle with ways to balance the two clauses and may sometimes seem inconsistent in its application of them, the Court has explained that ultimately "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[6]

With respect to the taxation of churches and religious organizations,[7] the interplay between the two religion clauses is easy to see. While it is clear that the Establishment Clause does not necessarily forbid tax exemption for churches and religious organizations,[8] it is equally clear that a tax exemption for religious property violates the Establishment Clause if drawn too narrowly.[9] In addition, the Court has also held that a generally applicable sales tax imposed on religious organizations does not violate the Free Exercise Clause,[10] but it is not yet clear whether the general principle stops here or whether the Court will further refine its jurisprudence in this area.

1. Free Exercise Clause

"Free exercise clause cases arise out of conflict between secular laws and individuals' religious beliefs."[11] In describing the essence of the Free Exercise Clause, the Supreme Court has stated that "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such" and that the "Government may neither compel affirmation of a repugnant belief, . . . nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities."[12] The Court has also written that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers"[13] and that the state "must confine itself to secular objectives, and neither advance nor impede religious activity."[14] In order for government action to be found permissible and therefore not in violation of the Free Exercise Clause, "[t]he conduct or actions so regu-

5. *Id.* at 669.
6. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948).
7. The term "church" is used interchangeably with the term "religious organization" and is used in the generic sense as a place of worship. This is intended to reflect the fact that the term is mentioned, but not defined, in the Internal Revenue Code.
8. *See Walz*, 397 U.S. at 680.
9. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14–15 (1989).
10. *See* Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378 (1990).
11. BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS § 10.1(a), at 298 (9th ed. 2007).
12. Sherbert v. Verner, 374 U.S. 398, 402 (1963).
13. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).
14. Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 747 (1976).

lated [must] pose[] some substantial threat to public safety, peace or order."[15] "Short of such a *substantial threat*, however, the government may not investigate or review matters of ecclesiastical cognizance."[16] Thus, the government must demonstrate a compelling interest in the regulation before it can infringe upon an individual's free exercise rights.[17]

2. Establishment Clause

The main goals of the Establishment Clause are to prohibit the government from "establishing a religion, aiding a religion, or preferring one religion over another."[18] In the seminal case of *Lemon v. Kurtzman*,[19] the Court stated that the Establishment Clause was meant to protect against the evils of "sponsorship, financial support, and active involvement of the sovereign in religious activity."[20] Moreover, for a statute to be constitutional under the Establishment Clause, three tests must be considered: "the statute must have a secular legislative purpose; . . . its principal or primary effect must be one that neither advances nor inhibits religion;" and it "must not foster 'an excessive government entanglement with religion.'"[21] Thus, in essence, the standard the Court applies in these cases is one of neutrality.[22]

B. Constitutional Law's Relationship to Tax Exemption

Under the Code, tax exemption is a form of economic benefit that is provided to a wide array of organizations, including religious groups.[23] However, "[t]his type of exemption is not unconstitutional . . . even though it is extended by government to religious organizations, because the tax preference . . . is neutral with respect to religion."[24] In *Walz v. Tax Commission of the City of New York*,[25] the most decisive case dealing with tax-exemption and religious organizations, the Supreme Court addressed an Establishment Clause challenge to a state law exempting reli-

15. *Sherbert*, 374 U.S. at 403.
16. HOPKINS, *supra* note 11, § 10.1(a), at 299.
17. *Id.*
18. *Id.*
19. 403 U.S. 602 (1971).
20. *Id.* at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).
21. *Id.* at 612–13.
22. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 651–52 (2002); Steele v. Nashville Indus. Dev. Bd., 301 F.3d 401, 416 (6th Cir. 2002). *See also* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993) ("[G]overnment programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge.").
23. I.R.C. § 501(a) (2006).
24. HOPKINS, *supra* note 11, § 10.1(b), at 302.
25. 397 U.S. 664 (1970).

gious organizations from property tax and stated that government may become involved in taxation matters relating to religious organizations so long as the "policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses" is upheld.[26] While the Court recognized that either taxation or exemption of churches "occasions some degree of involvement with religion," the Court held that the "grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."[27] The Court further noted that "[t]here is no genuine nexus between tax exemption and establishment of religion."[28] "Consequently, tax exemption for religious organizations is not violative of the religion clauses, as long as it is provided in the context of neutrality."[29]

Although certain forms of tax exemption for religious organizations are constitutional, the Supreme Court has held that a tax exemption *solely* for religious organizations is violative of the Establishment Clause.[30] Thus, the Court held a state sales tax exemption for religious organizations invalid because it lacked a "secular purpose and effect."[31] Furthermore, the Court concluded that the statute at issue was violative of the crucial principle that "any subsidy afforded religious organizations be warranted by some overarching secular purpose that justifies like benefits for nonreligious groups."[32]

III. SECTION 501(C)(3): THE PROHIBITION ON POLITICAL ACTIVITY AND CAMPAIGN INTERVENTION

Although certain charitable groups, including religious organizations, have been exempt from the federal income tax since 1913, no limitation on political activity was included in the first statutes.[33] However, the "express prohibition" on campaign activity by charitable organizations was added by then-Senator Lyndon Johnson "without the benefit of hearings, testimony, or comment from affected organizations . . . during Senate floor

26. *Id.* at 669.
27. *Id.* at 674–75.
28. *Id.* at 675. *See also* Mueller v. Allen, 463 U.S. 388, 396 n.5 (1983) (stating that even if religious organizations benefit "very substantially" from tax deductions, this does not require that tax law violates the Establishment Clause).
29. HOPKINS, *supra* note 11, § 10.1(b), at 303.
30. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989).
31. *Id.* at 11.
32. *See id.* at 15 n.4. *See also* Budlong v. Graham, 414 F. Supp. 2d 1222 (N.D. Ga. 2006) (finding a state law exempting only religious books and papers from sales tax unconstitutional), *vacated*, 488 F.Supp.2d 1245 (N.D. Ga. 2006).
33. *See* Benjamin S. De Leon, Note, *Rendering a Taxing New Tide on I.R.C. § 501(c)(3): The Constitutional Implications of H.R. 2357 and Alternatives for Increased Political Freedom in Houses of Worship*, 23 REV. LITIG. 691, 695 (2004).

debate on the 1954 Internal Revenue Code."[34] Thus, because we do not have the benefit of legislative history on the political activity prohibition, it is difficult to know the true motivations behind the addition of this language. However, it is widely believed that Senator Johnson sought to add the language to insure that his challenger in the 1954 primary election, Dudley Dougherty, would not continue to receive contributions from tax-exempt organizations.[35]

Currently, § 501(c)(3) of the IRC exempts from federal income taxation any organization "operated exclusively for religious, charitable, scientific, . . . literary, or educational purposes."[36] Due solely to this status, these organizations qualify for tax exemption and are able to receive tax-deductible donations.[37] Additionally, churches are automatically exempt if they fulfill the terms of § 501(c)(3), while most other organizations must file for tax-exempt treatment and receive approval from the IRS.[38] The statutory language of § 501(c)(3) bars churches from engaging in "substantial lobbying" and also contains an absolute prohibition on "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."[39] Treasury regulations explain that "'action organizations'—those that participate or intervene . . . in any political campaign on behalf of, or in opposition to, any candidate for public office—are not operated exclusively for exempt purposes and cannot qualify for exemption under § 501(c)(3)."[40] Furthermore, the regulations provide that forbidden activities "include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate" and that the prohibition applies to "direct" and "indirect" forms of intervention in national, state, and local campaigns.[41]

For over thirty years, Congress provided almost no guidance on the scope or rationale of the campaign prohibition provision in § 501(c)(3).[42] However, as a result of amending the Code as part of the Omnibus Budget Reconciliation Act of 1987, the House of Representatives finally provided some amount of clarification on the legislative rationale for the campaign

34. Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; To What End?*, 42 B.C. L. REV. 903, 905 (2001).
35. *See id.* at 905–06.
36. I.R.C. § 501(c)(3) (2006).
37. *Id.* §§ 501(c)(3), 170. *See also* HOPKINS, *supra* note 11, § 10, at 297.
38. I.R.C. § 501(c)(1)(A) (2006).
39. *Id.* § 501(c)(3).
40. *See* Dessingue, *supra* note 34, at 906. *See also* Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 1990).
41. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 1990).
42. *See* Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 228 (1992).

prohibition.[43] In its report on the amendments, the House stated that the "prohibition on political campaign activities . . . by charities reflects [a] Congressional polic[y] that the U.S. Treasury should be neutral in political affairs."[44] Thus, Congress has supplemented the judiciary's requirement that the government remain neutral toward religious and political matters by expressly voicing its stance that neutrality should be the standard by which government operates.

IV. INTERPRETATION AND ENFORCEMENT

A. Judicial Interpretation

Some of the most common arguments waged against the prerequisites that churches and religious organizations must meet in order to qualify for tax-exempt status are Free Exercise arguments.[45] Traditionally, the Supreme Court has analyzed Free Exercise cases under the principle that facially neutral laws may indeed violate the First Amendment's religion clauses if they unduly burden the free exercise of religion.[46] The question to be determined was "whether government ha[d] placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifie[d] the burden."[47] However, in *Employment Division, Department of Human Resources of Oregon v. Smith*,[48] the Court held that the First Amendment is offended only when the object of a statute is to prohibit the exercise of religion, rather than the statute being generally applicable and having the incidental effect of inhibiting religious exercise.[49] Thus, the compelling state interest standard was effectively removed from Free Exercise analysis.[50] However, in 1994, Congress enacted the Religious Freedom Restoration Act ("RFRA") as a means to reinstate the compelling governmental interest test in order to determine if governmental burdening of religion is constitutional.[51]

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43. *See id.* at 228–29.

44. *Id. at 229* (alteration in original) (quoting Omnibus Reconciliation Act, H.R. REP. NO. 100-391 (II), pt. 2, at 1625 (1987)).

45. *See, e.g.*, Dessingue, *supra* note 34, at 919–23.

46. *See id.* at 919. *See also* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.").

47. Hernandez v. Comm'r, 490 U.S. 680, 699 (1989).

48. 494 U.S. 872 (1990).

49. *Id.* at 878.

50. *See* Dessingue, *supra* note 34, at 919–20.

51. *See id.* Although the Supreme Court found RFRA unconstitutional as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997), it still remains applicable to the federal government. *City of Boerne*, 521 U.S. at 536. *See also* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 n.1 (2006).

Although the Court has not yet ruled directly on the constitutionality of the political activity prohibition, there are several cases that help to understand how the court views the prohibition and the tax-exempt status of churches. In *Walz*, the Court held that granting tax-exempt status to a church is unquestionably constitutional,[52] and the Court in *Jimmy Swaggart Ministries v. Board of Equalization* "reinforced its view that a facially neutral, generally applicable tax law with a secular purpose that neither advances nor inhibits religion will not call the 'core values' of the [First Amendment] into question."[53]

Regardless of the fact that the interpretation and application of § 501(c)(3)'s political activity prohibition has been considered infrequently by the courts, the "most far-reaching decision"[54] is that of *Christian Echoes National Ministry, Inc. v. United States*.[55] In this case, the IRS revoked the tax-exempt status of a religious organization because it "used its publications and broadcasts to attack candidates and incumbents who were considered too liberal."[56] The court stated that the organization's "attempts to elect or defeat certain political leaders reflected Christian Echoes' objective to change the composition of the federal government."[57] In sustaining the IRS's revocation, the court held that the prohibition was constitutionally valid and that the government had an "overwhelming and compelling" interest in "keeping church and state separate and in preserving the neutrality of the Treasury Department with respect to political affairs."[58] The court was also careful to note that the political activity prohibition in § 501(c)(3) had been violated even though Christian Echoes "did not formally endorse specific candidates for office."[59] Finally, the court did not find any injury to the organization regardless of the evidence that the IRS had singled out Christian Echoes regarding the nature and substance of their political views.[60]

Some time after *Christian Echoes*, the issue again arose in the Second Circuit in *Ass'n of the Bar of the City of New York v. Commissioner*.[61] Here, the New York City Bar Association applied for recognition as a charitable organization under § 501(c)(3) of the IRC.[62] The IRS denied the

52. Walz v. Tax Comm'n, 397 U.S. 664, 675–76 (1970). *See also* notes 23–26 and accompanying text.
53. De Leon, *supra* note 33, at 700–01 (citing Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 394 (1990)).
54. Carroll, *supra* note 42, at 236.
55. 470 F.2d 849 (10th Cir. 1972).
56. *Id.* at 856.
57. *Id.*
58. Carroll, *supra* note 42, at 236.
59. *Christian Echoes*, 470 F.2d at 856.
60. *Id.* at 857–58.
61. 858 F.2d 876 (2d Cir. 1988).
62. *Id.* at 877.

application "on the ground that the procedure followed by the Association in the rating of candidates for elective judicial office [and then publicizing those ratings to voters] constituted intervention or participation in political campaigns on behalf of candidates for public office" in violation of the prohibition in § 501(c)(3).[63] Although the Tax Court reversed the IRS's decision because the rating activity was not based on partisan or political preferences and therefore did not rise to the level of campaign intervention prohibited by the Code,[64] the Second Circuit reversed because, as the court stated, the prohibition is not limited to "partisan campaigns of candidates representing recognized political parties."[65] The court held that the rating system of characterizing judicial candidates as "'approved,' 'not approved,' or 'approved as highly qualified'"[66] amounted to prohibited participation in political campaigns and rejected the association's argument that the rating system was not in violation of § 501(c)(3) because it did not constitute a "substantial part of its activities."[67] The court was careful to note that Congress intended to prohibit any degree of "'support for an individual's candidacy for public office.'"[68] In addition, much like the court in *Christian Echoes*, the Second Circuit reiterated the fact that the justification for the prohibition was to ensure the Treasury's neutrality in political affairs.[69]

Subsequent to the decision in *Ass'n of the Bar*, the Second Circuit decided a case brought by a minor-party presidential candidate seeking to have a voter education group's tax-exempt status revoked, claiming that the group violated the campaign activity prohibition when it denied her the right to participate in the primary campaign debates.[70] In "language difficult to reconcile with its *Ass'n of the Bar* holding,"[71] the court held that limiting the debate to Republican and Democratic candidates did not violate § 501(c)(3)'s campaign prohibition because the conduct occurred during the primary phase of the presidential election contest, which was meant exclusively to resolve intra-party disputes and was therefore inherently nonpartisan.[72] The court stated that the exclusion of the minor party candidate was a "logical consequence of the nature and role of primary contests in the electoral process."[73] As one scholar has noted:

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63. *Id.* at 878.
64. *See* Ass'n of the Bar v. Comm'r, 89 T.C. 599, 609–11 (1987), *rev'd*, 858 F.2d 876 (2d Cir. 1988).
65. *Ass'n of the Bar*, 858 F.2d at 880.
66. *Id.* at 877.
67. *Id.* at 881.
68. *Id.*
69. *Id.* at 879.
70. Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621, 623–24 (2d Cir. 1989).
71. Carroll, *supra* note 42, at 238.
72. *Fulani*, 882 F.2d at 630.
73. *Id.*

> Whether the court intended this ruling to signal that campaign speech and activity by charities is permissible as long as it takes place outside the context of inter-party general elections or meant only to preserve the prerogative of charitable voter education groups to confine their primary election candidate forums to candidates actually running in primaries remains unclear.[74]

In 2000, the D.C. Circuit addressed the first and only case in which the IRS has revoked the tax-exempt status of a church for engaging in political campaign activity.[75] In *Branch Ministries v. Rossotti*,[76] the court dispelled "[a]ny illusion that churches would prevail in an encounter between the protections afforded by the Free Exercise Clause and the tax code."[77] In this case, the IRS revoked the tax-exempt status of the Church at Pierce Creek after it concluded that two full-page advertisements placed in *USA Today* and *The Washington Times* urging Christians not to vote for Bill Clinton because of his positions on moral issues and requesting tax-deductible donations were in violation of the statutory restrictions on campaign intervention.[78] The church challenged the revocation on the grounds that the IRS violated its First Amendment right to free exercise of religion and that it was the victim of selective prosecution in violation of the Fifth Amendment.[79] The court rejected the selective prosecution claim on the ground that the church "failed to demonstrate that it was similarly situated to any of [the] other churches" reported to the IRS for political activities in that "[n]one of the reported activities [by the other churches] involved the placement of advertisements in newspapers with nationwide circulations opposing a candidate and soliciting tax deductible contributions to defray their cost."[80] In declaring the church's First Amendment arguments "more creative than persuasive,"[81] the court held that the only effect of the loss of the tax exemption would be a decrease in the amount of money available for religious practices and that this, in turn, is not a constitutionally significant burden.[82] The court went even as far as to state that "this burden is overstated" because the "impact of the revocation is likely to be more symbolic than substantial."[83]

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74. Carroll, *supra* note 42, at 238.
75. *See* Kara Backus, Note, *All Saints Church and the Argument for a Goal-Driven Application of Internal Revenue Service Rules for Tax-Exempt Organizations*, 17 S. CAL. INTERDISC. L.J. 301, 317 (2008).
76. 211 F.3d 137 (D.C. Cir. 2000).
77. Dessingue, *supra* note 34, at 921.
78. *Branch Ministries*, 211 F.3d at 139.
79. *Id.* at 144.
80. *Id.*
81. *Id.* at 141.
82. *Id.* at 142.
83. *Id.*

B. IRS Interpretation

While "courts have provided some guidance" on the meaning and scope of § 501(c)(3)'s bar on political activity by churches and other charitable organizations, the IRS has been left with the main task of interpreting and enforcing the provision.[84] The IRS's statements and rulings are evidence that we are left with only "vague and inconsistent standards" with which to attempt to "reconcile the statutory language with the pragmatic realities of churches' . . . behavior in pursuit of their exempt purposes."[85]

It has been widely acknowledged that a tax-exempt religious organization under § 501(c)(3) may not engage in *any* amount of speech or activity with respect to any political campaign or candidate for public office.[86] However, the IRS has also taken the contrary position and has permitted a *de minimis* amount of otherwise prohibited campaign activity by charitable organizations.[87] For example, after one religious organization published articles in its magazine attacking the candidacy of John F. Kennedy for his Catholicism, the IRS argued against revoking the tax-exempt status of the organization by stating that "political intervention inspired by deeply-held religious convictions furnishes a prime example of a situation calling for application of the *de minimis* rule."[88]

Although this particular interpretation of the prohibition does exist, the IRS has recently been more careful to define what a church can or cannot do in order to keep its tax-exempt status. The IRS has held that a church may not make statements that directly support or oppose a candidate for public office,[89] a slate of candidates, or a political party in a "sermon, church bulletin, on a church website or in an editorial in a church publication."[90] "In addition, churches may not indirectly support or oppose any candidates by characterizing candidates with anti-family or similar labels, using plus (+) and minus (-) signs, or other indications of candidates' agreement—or lack thereof—with the church's positions on particular issues."[91]

However, religious organizations may engage in activities that "focus on giving voters and candidates access to each other on an impartial basis,

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84. *See* Carroll, *supra* note 42, at 239.
85. *Id.*
86. *See, e.g.*, Ass'n of the Bar v. Comm'r, 858 F.2d 876, 881 (2d Cir. 1988); United States v. Dykema, 666 F.2d 1096, 1101 (7th Cir. 1981).
87. I.R.S. Gen. Couns. Mem. 34,071 (Mar. 11, 1969).
88. *Id.* (italics added).
89. *See* Treas. Reg. § 1.501(c)(3)(iii) (as amended in 1990).
90. Dessingue, *supra* note 34, at 907.
91. De Leon, *supra* note 33, at 702. *See also Ass'n of the Bar*, 858 F.2d at 880–82 (upholding IRS's position that discussing experience, professional ability, and character may constitute prohibited political activity).

i.e., access to and by all the candidates and not merely those favored by the organization's leaders."[92] The IRS has also held that a religious organization can provide "materials that survey all candidates in a given contest on a wide array of issues, and express neither approval nor disapproval of any individual" without violating the campaign intervention prohibition.[93] In addition, churches can "educate candidates about the issues and attempt to change their positions on those issues, and may educate voters about the issues and candidates' positions on the issues" through candidate forums, distribution of voter education materials, and the results of candidate polls or questionnaires.[94] The bottom line is that churches and religious organizations can engage in types of voter education activities without violating the political activity prohibition as long as they are unbiased in content or format.

V. Factors that Undercut the 501(c)(3) Prohibition on Political Activity

Although both the courts and the IRS have maintained that the prohibition barring religious organizations from engaging in political campaign activity is "absolute" and that any amount of political activity will justify the revocation of the organization's tax-exempt status, the prohibition is largely more symbolic than it is substantive for several reasons.

A. 501(c)(4) Dual Organizational Structure

One of the most significant factors that undercuts the political activity prohibition in § 501(c)(3) of the IRC is that churches and religious organizations can also establish a 501(c)(4) organization that still enjoys exemption from federal income tax but is not subject to the strict ban on political activity or campaign intervention.[95] Under § 501(c)(4) of the IRC, "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare" obtain tax-exempt status, along with 501(c)(3) charitable organizations, under § 501(a) of the Code.[96] The Treasury Regulations state that "[a]n organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community."[97]

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92. Ass'n of the Bar v. Comm'r, 89 T.C. 599, 616 (1987), *rev'd*, 858 F.2d 876 (2d Cir. 1988).
93. De Leon, *supra* note 33, at 703.
94. Dessingue, *supra* note 34, at 910.
95. *See generally*, Douglas H. Cook, *The Politically Active Church*, 35 Loy. U. Chi. L.J. 457, 463–65 (2004) (describing the 501(c)(4) organization and its potential for religious organizations).
96. I.R.C. § 501(c)(4)(A) (2006).
97. Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (as amended in 1990).

Although there is no exact definition of the term "social welfare" for federal law tax exemption purposes,[98] the concept has been interpreted quite broadly.[99] However, participation in political candidate campaigns is one activity that does not qualify for social welfare status under § 501(c)(4).[100] Nevertheless, this does not mean that 501(c)(4) organizations cannot engage in these activities because § 501(c)(4) does not contain an express political activity prohibition like the one in § 501(c)(3).[101] In fact, some reports maintain that a 501(c)(4) organization may devote up to forty-nine percent of its annual expenditures to political activities.[102] Although § 501(c)(4) requires that organizations be operated "*exclusively* for the promotion of social welfare,"[103] the IRS has interpreted the word "exclusively" to mean "primarily."[104] Moreover, Treasury Regulations state that "[a]n organization is operated exclusively for the promotion of social welfare if it is *primarily* engaged in promoting in some way the common good and general welfare of the people of the community."[105] Thus, this further reinforces the view that a 501(c)(4) may be allowed to devote as much as forty-nine percent of its activities to political endeavors while still being "operated exclusively for the promotion of social welfare."[106]

In fact, in one Revenue Ruling, the Treasury expressly recognized that a 501(c)(4) organization could engage in political campaign activities.[107] The ruling held:

> Although the promotion of social welfare within the meaning of section 1.501 (c) (4)–1 of the regulations does not include political campaign activities, the regulations do not impose a complete ban on such activities for section 501 (c) (4) organizations. Thus, an organization may carry on lawful political activities and remain exempt under section 501 (c) (4) as long as it is primarily engaged in activities that promote social welfare.[108]

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98. *See* HOPKINS, *supra* note 11, §13.1, at 389.
99. *See, e.g.*, Cook, *supra* note 95, at 463 (noting that organizations such as a consumer–credit counseling service, an organization that conducted an art show to promote arts in the community, and a roller–skating rink all qualified as social welfare organizations under section 501(c)(4)).
100. Treas. Reg. § 1.501(c)(4)–1 (2)(ii) (as amended in 1990).
101. *See* Cook, *supra* note 95, at 463.
102. *See id.* at 464 n.61. *See also* Greg Colvin & Miriam Galston, *Report of Task Force on Section 501(c)(4) and Politics*, 39 EXEMPT ORG. TAX REV. 432 (2003).
103. I.R.C. § 501(c)(4)(A) (2006) (emphasis added).
104. *See* Treas. Reg. § 1.501(c)(4)–1(a)(2)(i) (as amended in 1990). *See also* Cook, *supra* note 95, at 464.
105. Treas. Reg. § 1.501(c)(4)–1(a)(2)(i) (as amended in 1990) (emphasis added).
106. *Id.* at § 1.501(c)(4)–1(a)(1)(ii). *See also supra* note 100 and accompanying text; Fred Stokeld, *EO, Exempt Bond Reps Find Plenty to Talk About in San Antonio*, 39 EXEMPT ORG. TAX REV. 321, 323 (2003).
107. *See* Rev. Rul. 81-95, 1981-1 C.B. 332.
108. *Id.*

Therefore, the IRS has expressly endorsed this viewpoint.

Under this framework, a church wishing to become more active in campaigns and political activities in general can organize as a 501(c)(4) organization rather than as a 501(c)(3) organization, or it simply may establish a related 501(c)(4) organization to carry out these purposes. There is nothing in the language of § 501(c)(4) that precludes a church from qualifying, and it cannot seriously be argued that most churches and religious organizations do not promote social welfare within their respective communities.[109] In *Mutual Aid Ass'n of the Church of the Brethren v. United States*,[110] the court noted that the "social welfare" standard under § 501(c)(4) involves "charitable, educational and religious" purposes under the IRC.[111] The court even stated that for purposes of tax-exemption under § 501(c)(4), "[o]rganizations for the advancement of religion undoubtedly can work to better society."[112] Therefore, although churches traditionally qualify for tax exemption under § 501(c)(3), they should easily qualify for the same treatment under § 501(c)(4).[113]

However, the possibility of organizing as a 501(c)(4) organization is not without its drawbacks, and the biggest potential setback to organizing under § 501(c)(4) concerns the taxation of individuals' donations to the church. While donations to churches and religious organizations organized under § 501(c)(3) are deductible to donors,[114] donations to 501(c)(4) organizations are not.[115] Thus, those who donate to 501(c)(3) churches would be able to deduct their donations against their personal incomes, but those who donate to 501(c)(4) churches would not be able to do so. This, in turn, "might deter some individuals from making donations to the church."[116]

Although the tax-deductibility of donations may seem like a significant issue, several scholars have argued that this would have little to no effect on the amount of donations a church receives. First, charitable deductions are only available to those taxpayers who itemize their deductions.[117] Moreover, only about thirty percent of taxpayers itemize their deductions.[118] The deductibility of contributions is therefore irrelevant for the

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109. *See, e.g.*, Diocese of Rochester v. Planning Bd., 136 N.E.2d 827, 836–37 (N.Y. 1956) (holding that churches are "clearly in furtherance of the public morals and general welfare").
110. 759 F.2d 792 (10th Cir. 1985).
111. *Id.* at 795 (quoting People's Educ. Camp Soc'y, Inc. v. Comm'r, 331 F.2d 923, 930 (2d Cir. 1964)).
112. *Id.*
113. *See* Cook, *supra* note 95, at 470.
114. I.R.C. § 170 (2006).
115. *Id.* at § 170(c)(2).
116. *See* Cook, *supra* note 95, at 470.
117. *See* Michael Hatfield, *Ignore the Rumors—Campaigning from the Pulpit is Okay: Thinking Past the Symbolism of Section 501(c)(3)*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 125, 157 (2006).
118. *See id.*

majority of donors. In addition, it has been argued that religious conviction is likely to motivate more people to donate to churches than economic reasons.[119] "Both the Hebrew and the Christian scriptures commend, and even command, donations to the institutionalized religious body."[120] Therefore, it seems that many taxpayers would continue to make donations to their churches even if they were not tax deductible. Although organizing under § 501(c)(4) provides a way for churches to be both politically active and tax exempt, this is not the only option. An existing 501(c)(3) church or religious organization may also set up a dual structure utilizing a 501(c)(4) organization to engage in political activity, and this dual structure system has been authorized by the federal courts in two significant cases.

In *Regan v. Taxation with Representation of Washington*,[121] the Supreme Court addressed the constitutionality of § 501(c)(3)'s prohibition against substantial lobbying activities carried on by charitable organizations.[122] While the Court held that the lobbying limitations in § 501(c)(3) did not violate the group's First Amendment free speech rights, the Court was also careful to note the constitutionality of using a dual structure in which the 501(c)(4) entity could engage in lobbying.[123] The Court stated:

> It appears that TWR [Taxation with Representation] could still qualify for a tax exemption under § 501(c)(4). It also appears that TWR can obtain tax-deductible contributions for its nonlobbying activity by returning to the dual structure it used in the past, with a § 501(c)(3) organization for nonlobbying activities and a § 501(c)(4) organization for lobbying. TWR would, of course, have to ensure that the § 501(c)(3) organization did not subsidize the § 501(c)(4) organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize.[124]

In his concurrence, Justice Blackmun went as far to say that "[t]he constitutional defect that would inhere in § 501(c)(3) alone is avoided by § 501(c)(4)."[125]

In *Branch Ministries v. Rossotti*, discussed *supra*, the D.C. Circuit ratified the Supreme Court's suggestion of using such a dual structure.[126]

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119. *See* Cook, *supra* note 95, at 471.
120. *Id.*
121. 461 U.S. 540 (1983).
122. Although the prohibition on substantial lobbying activities is not the main subject of this paper, it goes hand in hand with the political activity prohibition, and the cases and secondary materials discussing it can be helpful to see how courts and scholars view the absolute campaign activities prohibition and its relationship to the structure of an organization formed under section 501(c)(3).
123. *Regan*, 461 U.S. at 544.
124. *Id.*
125. *Id.* at 552 (Blackmun, J., concurring).

That court held that a church wishing to become active in political campaigns has an "alternate means of communication" available to it through the use of a 501(c)(4) organization.[127] The Court was careful to note that

> [s]hould the Church proceed to do so, however, it must understand that the related 501(c)(4) organization must be separately incorporated; and it must maintain records that will demonstrate that tax-deductible contributions to the Church have not been used to support the political activities conducted by the 501(c)(4) organization's political action arm.[128]

Although it may be somewhat more complex and may require more planning, a church wishing to become more active in political activities and campaigns may choose to do so by organizing strictly as a 501(c)(4) entity or by adopting a dual structure utilizing both a 501(c)(3) and a 501(c)(4) entity. Furthermore, the fact that the Supreme Court and the D.C. Circuit have formally endorsed this view should suggest that the political activity prohibition in § 501(c)(3) is not as forceful or debilitating to churches' First Amendment rights as many scholars or churches have maintained. Because religious groups have this potential alternative and can be relatively assured that their activities will not be violating federal tax law, the provisions of § 501(c)(4) effectively circumvent the political campaign prohibition. Thus, § 501(c)(3)'s prohibition serves largely as a symbolic role to acknowledge and solidify the principle of separation of church and state rather than to truly preclude churches and other charitable groups from exercising their free speech rights. Because § 501(c)(3) specifically applies to religious organizations, while § 501(c)(4) applies only to public welfare groups, this effectively provides a way for the Treasury to abide by its maxim that it should be neutral in all political affairs while avoiding any colorable free speech claims by religious organizations.

B. Issue Advocacy v. Candidate Advocacy

Another aspect that undermines the absolute political activities prohibition in § 501(c)(3) has to do with issue advocacy versus candidate advocacy. This distinction can be seen within the statutory language of the section itself. Although the political activity prohibition is "absolute" and no amount of campaign intervention will be tolerated by the IRS, churches and religious organizations are still allowed to devote some of their activities to influencing legislation, as long as such lobbying does not occupy a

126. Branch Ministries v. Rossotti, 211 F.3d 137, 143 (D.C. Cir. 2000).
127. *Id.*
128. *Id.*

"substantial part" of the organization's activities.[129] Therefore, a religious organization can publicize its "opinions on public issues and attempt to influence public opinion" while still retaining its tax-exempt status.[130] Religious groups can even go as far as to "advocate specific issues and distribute materials as part of its normal activities" under § 501(c)(3).[131]

Although advocacy on certain issues is permitted under § 501(c)(3), advocacy on behalf of specific candidates is not; § 501(c)(3) specifically outlaws participating or intervening on behalf of or in opposition of any particular candidate.[132] This prohibition includes not only financial support, but also "contributions of services, publicity, advertising, and use of facilities."[133] In addition, this includes not just endorsement of candidates but also "publication or distribution of literature for or against a candidate."[134]

Although this may seem like as easy distinction to make, the difference between candidate advocacy and issue advocacy might not be as clear as it appears. For example, if a church or religious organization issues a statement urging its members to vote for a particular candidate, it clearly violates § 501(c)(3).[135] However, it can be considerably more difficult to determine whether an organization has implicitly endorsed a candidate.[136] The issue may arise when a church permits a candidate with whom the church agrees to speak in a service about his positions on campaign issues or allows a candidate to deliver a sermon without making reference to the campaign—under these circumstances, does the church implicitly endorse the candidate?[137] Although the church may not technically be violating any provision of § 501(c)(3), the IRS would likely determine the issue under a "facts and circumstances" analysis.[138] This illustrates the point that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."[139] Moreover, "[t]he reason for this is because '[d]iscussion of issues and events inevitably involves political candidates.'"[140]

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129. *See* I.R.C. § 501(c)(3) (2006). *See also* Treas. Reg. § 1.501(c)(3)–1(b)(3)(i) (1991).
130. Erik J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 577 (1999) (citing Treas. Reg. § 1.501(c)(3)–1(d)(2) (1994)).
131. *See* Ablin, *supra* note 130, at 577.
132. *See* I.R.C. § 501(c)(3) (2006).
133. Ablin, *supra* note 130, at 578.
134. *Id.*
135. *See id.*
136. *Id.*
137. *See id.*
138. *See id.* (discussing various scenarios). *See also* Rev. Rul. 78–248, 1978-1 C.B. 154.
139. Buckley v. Valeo, 424 U.S. 1, 42 (1976).
140. Ablin, *supra* note 130, at 579 (quoting Scott W. Putney, *The IRC's Prohibition of Political Campaigning by Churches and the Establishment Clause*, 64 FLA. B.J. 27, 30 (1990)).

Thus, the ability of churches and religious organizations organized under § 501(c)(3) to engage in lobbying activities as long as they do not constitute a substantial part of the organization's activities serves to further undercut the political activity prohibition. The presence of the two differing standards further illustrates the largely symbolic nature of the campaign activity prohibition as a means to achieve the government's goal of remaining neutral in political affairs. Candidate advocacy has the potential to suggest a greater amount of involvement by the government than does issue advocacy: because the government is considered to subsidize taxpayer activity when it grants tax-exempt status,[141] endorsement of a particular candidate by a tax-exempt religious organization suggests that the government has implicitly endorsed this view. Therefore, the Treasury has sought to curb this result by prohibiting all forms of candidate advocacy. Thus, it stands to reason that some degree of issue advocacy is allowed because, unlike candidate advocacy, it is does not suggest that the government is aligning itself as strongly with one particular political party.

C. Standing

Another issue that undercuts § 501(c)(3)'s campaign prohibition is the issue of standing. Because this is a hallmark issue that can bar a plaintiff's attempt to bring suit against a religious organization or the government in federal or state court, it is an issue that effectively leaves the campaign prohibition unchecked. The case most on point is *In re United States Catholic Conference*.[142] This case stems from an attempt to force the revocation of the Roman Catholic Church's tax-exempt status under § 501(c)(3) by a combination of individuals and groups supporting the right of women to obtain legal abortions.[143] The plaintiffs brought suit alleging that the Catholic Church repeatedly violated the 501(c)(3) "prohibition on campaigning in order to promote the tenet that abortion is immoral and should therefore be made unlawful."[144] The accused violations included endorsing pro-life candidates and opposing pro-choice candidates through publishing articles in the Church's bulletins, endorsing or opposing candidates from the pulpit, and urging its members to donate to pro-life campaigns.[145] After a legal battle lasting over eight years, the Second Circuit dismissed the suit on the ground that the plaintiffs lacked standing.[146] Subsequently, the Supreme Court denied certiorari.[147] Moreover,

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141. In *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544 (1983), the Court declared that tax-exemptions and tax-deductibility are a form of subsidy by the government.

142. 885 F.2d 1020 (2d Cir. 1989), *cert. denied*, 495 U.S. 918 (1990).

143. *Id.* at 1021–23. *See also* Carroll, *supra* note 42, at 238.

144. *In re U.S. Catholic Conference*, 885 F.2d at 1022.

145. *Id.*

146. *Id.* at 1031.

none of the courts along the suit's progression through the judicial system ever reached the merits of the case.[148]

In concluding that the plaintiffs did not have standing, the Second Circuit dismissed four different arguments.[149] The first argument plaintiffs advanced was based on clergy standing.[150] Those plaintiffs who were members of the clergy argued that by not enforcing the political prohibition in the Code, the government was engaging in an unconstitutional establishment of religion.[151] The court dismissed this argument by noting that the clergy plaintiffs' "primary injury of . . . discomfiture at watching the government allegedly fail to enforce the law . . . can hardly be called personalized to the clergy plaintiffs" and that their "self-perceived 'stigma'" does not amount to a sufficiently particularized injury.[152] The court quickly dismissed the second and third standing arguments, taxpayer and voter standing respectively, as misplaced.[153] Lastly, the court dismissed a competitive advocate standing[154] argument largely due to the fact that, "by their own admission [the plaintiffs chose] not to match the Church's alleged electioneering with their own."[155] Because of this seemingly insignificant factor, the plaintiffs and the Church could not be considered competitors, and therefore competitive advocate standing would be inappropriate.[156]

Much like the 501(c)(4) dual organizational structure and the allowance of issue advocacy, the issue of standing serves as a method of circumventing the political activity prohibition. Because the IRS cannot effectively police all churches and religious organizations to ensure that they are not engaging in political activities, enforcement of the provision will likely be left to third parties through the tools of litigation and, therefore, standing is of vital importance. Without standing, third parties are left powerless to bring suits in order to obtain enforcement of the prohibition. As illustrated in *U.S. Catholic Conference*, third-party standing, especially when dealing with taxation issues, is a fairly difficult requirement to establish. Without third parties being able to establish standing, the political activity prohibition will likely go unenforced. Thus, this serves as further

147. Abortion Rights Mobilization, Inc. v. U.S. Catholic Conference, 495 U.S. 918 (1990).
148. *In re U.S. Catholic Conference*, 885 F.2d at 1023.
149. *Id.* at 1024–31.
150. *Id.* at 1024.
151. *Id.*
152. *Id.* at 1025–26.
153. *Id.* at 1027–28.
154. Competitive advocate standing is characterized mainly by the requirement that "in order to establish an injury as a competitor a plaintiff must show that he personally competes in the same arena with the party to whom the government has bestowed the assertedly illegal benefit." *Id.* at 1029. The court stated that the essence of a competitive advocate argument is that "the IRS' non-enforcement of the Code creates an uneven playing field, tilted to favor the Catholic Church." *Id.*
155. *Id.*
156. *Id.*

evidence of the symbolic nature of the prohibition: it is merely a representation of the federal government's commitment to separation of church and state, not a method to strictly curtail churches' free speech rights.

VI. CONCLUSION

Ultimately, the prohibition on political activity in § 501(c)(3) is merely a symbolic way for the federal government to represent its neutrality in religious affairs and is used as a vehicle of furtherance for the doctrine of separation of church and state. Because of the many methods through which religious organizations are able to funnel their religious viewpoints and still retain tax-exempt status, the prohibition does not truly prevent them from engaging in any meaningful amount of political speech.

This is not to say that the prohibition is problem-free. On the one hand, it stands as the representation of an idea that is somewhat unfulfilled and a law that is largely unenforced. Yet, on the other hand, the constitutional implications resulting from enforcement could prove to be even more problematic than the implications of not having such a ban at all. The problem of enforcement forces the government to choose between degrees of religious political activity, thus forcing the government to make a substantive judgment of what is right or wrong. As with any law based on religion, enforcement of the ban has the potential to be more detrimental to minority religious groups, and vigorous enforcement could bring the problem of excessive entanglement in violation of the *Lemon* test. In addition, such enforcement could lead to Establishment Clause problems as well as problems of free exercise and free speech. Therefore, through the selective process of choosing its battles and revoking the tax-exempt status of only the most egregious violators, the federal government avoids these constitutional infirmities. As evidence, the Church at Pierce Creek, the organization at issue in *Branch Ministries*,[157] represents the *only* time in which the IRS has used its power under § 501(c)(3) to revoke the tax-exempt status of a religious organization.

In turn, the religious political activity prohibition is constitutional precisely because of the reasoning the government asserts—neutrality. This approach of neutrality is needed to assure that the government does not favor one religion over another or religious over secular speech. Although the Code's prohibition on political campaign activity is largely symbolic and can be easily curtailed, this does not relegate it to unconstitutional status but simply evidences the government's effort to keep the realms of religion and politics separate. Moreover, the alternative to the prohibition, simply allowing churches and religious organizations to engage in any

157. Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000).

amount of political activity, would enable many powerful groups to wield a huge amount of influence on elections, while this country has had a history of largely separating these two roles. The only other viable option would be to totally disallow churches from obtaining tax-exempt status, an option that is neither feasible nor desirable given the undisputed good that most religious organizations contribute to society. Thus, the prohibition as it is written and enforced strikes a constitutional middle ground.

Ultimately, the political prohibition in § 501(c)(3) is not only constitutional, but it is also beneficial. It serves to justify the expectations that most citizens have come to expect from the federal government: that it will not become involved in or subsidize religious speech. The current state of the law is actually quite balanced: the government could not enforce the prohibition in a Draconian way without constitutional problems, nor could the government simply acquiesce in political religious speech. Thus, there is no real alternative to the symbolism that § 501(c)(3) represents, nor need there be. The symbolic nature of the prohibition is a way to appease those who oppose political religious speech through the historic lens of separation of church and state while not necessarily resulting in a severe restriction of the free speech and free exercise rights of the religiously motivated. In the end, it must be remembered that all people are free to pursue political goals as individuals.

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