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FIRST AMENDMENT LAW—THE REGULATION OF !
RELIGIOUS LOBBYISTS: A SPIRITUAL BATTLE FOR THE
SOUL OF DEMOCRACY !

*Nicholas Melvin Smith**

Governmental transparency is among the most fundamental requirements of a democracy. This belief is the backbone of codes of ethics amongst both states and the federal government. Codes of ethics universally apply to state employees, as well as those attempting to influence policy. We call these influencers lobbyists. Every state regulates the actions of lobbyists. Some states have broad, sweeping language that requires lobbyists to report a great deal of information to the state, which is then made public to voters, while other states allow for express exemptions to keep certain actions out of the public eye.

Because the federal government does not provide many guidelines or restrictions on what can be included in lobbyist regulation, the states have free reign to regulate as they please. Pennsylvania, Maryland, Iowa, and Georgia have been able to include broad exemptions to lobbyist filing and disclosure rules for those lobbying on behalf of a religious institution. Other states, like Connecticut, have made no direct mention of religious organizations in their regulations, but have changed the rules to appease or benefit religious groups. These examples raise serious concerns about favoring religious speech over non-religious speech.

This Note argues for a more uniform method of regulation on lobbying, the goal being to avoid favoring religious lobbying over non-religious lobbying. The need for a more uniform method of regulation will be

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demonstrated by addressing serious policy concerns as well as applying principles of the First Amendment regarding both the Freedom of Speech and Free Exercise of Religion.

INTRODUCTION

“[P]olitics is the allocation of governmental resources; it is who gets what, when, where, why, and how.”¹ This idea eloquently explains the need for interest groups, which are organizations made up of lobbyists. Naturally, everyone wants a bigger piece of the pie. That is, clients are willing to pay representatives to further their agenda before a governing body.² Lobbyists are these representatives, and their primary goal is to inform and convince lawmakers that their client’s position on an issue is the right one.³ This has encouraged the presence of lobbyists in the United States since its founding.⁴ Because of the rapid growth of lobbying in the modern era,⁵ every state has a lobbying law to prescribe what is and what is not lobbying, as well as who is and who is not a lobbyist.⁶

1. RONALD J. HREBENAR & BRYSON B. MORGAN, *LOBBYING IN AMERICA: A REFERENCE HANDBOOK* 1 (2009).

2. *See* 2 U.S.C. § 1602(2) (2018) (“The term ‘client’ means any person or entity that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of that person or entity.”).

3. *See id.*; *see also* *Lobbying*, BBC NEWS (Oct. 1, 2008), http://news.bbc.co.uk/2/hi/uk_news/politics/82529.stm [<https://perma.cc/DF33-MSYM>].

4. *See* HREBENAR & MORGAN, *supra* note 1, at 2.

5. *Id.* at 110.

6. *See* ALA. CODE § 36-25-1.1 (2018); ALASKA STAT. § 24.45.171 (2018); ARIZ. REV. STAT. ANN. § 41-1231 (2018); ARK. CODE ANN. § 21-8-402 (2018); CAL. GOV’T. CODE § 86300 (West 2018); COLO. REV. STAT. § 24-6-301 (2018); CONN. GEN. STAT. § 1-91 (2018); DEL. CODE ANN. tit. 29, § 5831 (2018); D.C. CODE § 1-1161.01 (2018); FLA. STAT. § 11.045 (2018); GA. CODE ANN. § 21-5-70 (2018); HAW. REV. STAT. § 97-1 (2018); IDAHO CODE § 67-6602 (2018); 25 ILL. COMP. STAT. 170/2 (2018); IND. CODE § 2-7-1-9 (2018); IOWA CODE § 68B.2 (2018); KAN. STAT. ANN. § 46-222 (2018); KY. REV. STAT. ANN. § 6.611 (West 2018); LA. STAT. ANN. § 24:51 (2018); ME. STAT. tit.3, § 312-A (2018); MD. CODE ANN. GEN. PROVIS. § 5-702 (West 2018); MASS. GEN. LAWS ch. 3, § 39 (2018); MICH. COMP. LAWS § 4.415 (2018); MINN. STAT. § 10A.01 (2018); MISS. CODE ANN. § 5-8-3 (2018); MO. REV. STAT. § 105.470 (2018); MONT. CODE ANN. § 5-7-102 (2017); NEB. REV. STAT. § 49-1433 (2018); NEV. REV. STAT. § 218H.080 (2017); N.H. REV. STAT. ANN. § 15:1 (2018); N.J. STAT. ANN. § 52:13C-20 (West 2018); N.M. STAT. ANN. § 2-11-2 (2018); N.Y. LEGIS. LAW § 1-C (McKinney 2018); N.C. GEN. STAT. § 163A-250 (2018); N.D. CENT. CODE § 54-05.1-02 (2017); OHIO REV. CODE ANN. § 101.70 (West 2018); OKLA. STAT. tit. 74, § 4249 (2018); OR. REV. STAT. § 171.725 (2018); 65 PA. CONS. STAT. § 13A03 (2018); 42 R.I. GEN. LAWS § 42-139.1-3 (2018); S.C. CODE ANN. § 2-17-10 (2018); S.D. CODIFIED LAWS § 2-12-1, -15 (2018); TENN. CODE ANN. § 3-6-301 (2018); TEX. GOV’T CODE ANN. § 305.003 (West 2018); UTAH CODE ANN. § 36-11-102 (West 2018); VT. STAT. ANN. tit. 2, § 261 (2018); VA. CODE ANN. § 2.2-419 (2018); WASH. REV. CODE § 42.17A.005 (2018); W. VA. CODE § 6B-3-1 (2018); WIS. STAT. ANN. § 13.62 (West 2018); WYO. STAT. ANN. § 28-7-101 (2018); *see also* *How States Define Lobbying and*

These laws exist not to restrict the speech of lobbyists, but to require lobbyists to file registration papers with the state and disclose the amount of money and time they spend lobbying.⁷ Further,

[L]obbying that occurs in the open is less objectionable than lobbying that occurs behind closed doors. Statements made in public by lobbyists can be scrutinized by others and challenged with competing facts and arguments. The resulting public debate is consistent with a healthy political process. In contrast, statements made by lobbyists that are hidden from public view cannot easily be probed or disputed. Consequently, inaccurate assertions may go uncontested. Lobbyist disclosure requirements reflect these concerns.⁸

These laws differ throughout the nation—so much so that nearly all of them have at least one significant difference from the others.⁹ Notable among these differences is that many states include exemptions for religious lobbyists.¹⁰ These laws vary in severity.¹¹ In South Carolina, for instance, a

“[l]obbyist” does not include . . . a person who represents any established church solely for the purpose of protecting the rights of the membership of the church or for the purpose of protecting the doctrines of the church or on matters considered to have an adverse effect upon the moral welfare of the membership of the church.¹²

Lobbyist, NCSL, <http://www.ncsl.org/research/ethics/50-state-chart-lobby-definitions.aspx> [<https://perma.cc/J28T-YVHH>] (last updated Feb. 8, 2019) [hereinafter *States Define Lobbying*]. This source includes a detailed list of state lobbying definitions and, with its built-in search bar, comparing religious exemptions is as simple as searching for the word “religious.” *Id.*

7. See *Lobbyist Regulation: Overview*, NCSL, <http://www.ncsl.org/research/ethics/lobbyist-regulation.aspx> [<https://perma.cc/DKX8-5GVX>] [hereinafter *Overview*].

8. Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J.L. & PUB. POL’Y 1, 49 (2006).

9. Compare CONN. GEN. STAT. § 1-91 (providing that registering as a lobbyist requires a person to spend three thousand dollars or more in the furtherance of lobbying in any calendar year), with OR. REV. STAT. § 171.725 (prescribing that “money or any other consideration” as a payment constitutes lobbying).

10. See, e.g., CAL. GOV’T CODE § 86300(c); 25 ILL. COMP. STAT. 170/2; IOWA CODE § 68B.2; MD. CODE ANN. GEN. PROVIS. § 5-702(b)(1)(iii); S.C. CODE ANN. § 2-17-10(13)(f) (the South Carolina law specifically exempts those representing a “church,” rather than any religious actor).

11. Compare GA. CODE ANN. § 21-5-70(5) (defining lobbyist with no exemptions for religious organizations), with MD. CODE ANN. GEN. PROVIS. § 5-702(b)(1)(iii) (“[Exemption for] representation of a bona fide religious organization . . . for the purpose of protecting the right of its members to practice the doctrine of the organization.”), and S.C. CODE ANN. § 2-17-10(13)(f) (extending protection to representatives of “any established church”).

12. S.C. CODE ANN. § 2-17-10(13)(f).

This broad exemption affords lobbyists working on behalf of a church the potential to widely abuse their ability to sway the government without the public knowing.

Ultimately, the problem is the possibility of abuse, not actual quantifiable damage done. That is not to discredit the cognizable damage that exists when a state favors religious speech over non-religious speech. Religious exemptions in lobbying laws are problematic because they allow for situations where religious groups *could* abuse their exemptions and sway politicians without disclosing their actions to the public.¹³ There is also realized harm in the fact that religious institutions are receiving a benefit not offered to similarly situated, yet non-religious, groups.¹⁴ For instance, in South Carolina, a lobbyist on behalf of a church could spend any sum of money to sway legislation—or even an election, so long as it was logically or at the very least arguably, “considered to have an adverse effect upon the moral welfare of the membership of the church.”¹⁵

Specifically, it is possible that a church’s lobbyist in South Carolina would be able to spend an undisclosed sum of money to sway the legislature from passing a law on abortion.¹⁶ It is not unheard of for a religious group to lobby against a reproductive bill.¹⁷ However, under the same law, the opportunity to spend undisclosed amounts of money would not be afforded to a lobbyist from a non-religious non-profit organization.¹⁸ In fact, under this law, it is entirely possible that this benefit would only be awarded to Christian lobbyists, as the law specifically declares an exemption for those “representing a church.”¹⁹

13. See AM. BAR ASS’N, *THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LOBBYING LAW AND PRACTICE* 8 (William V. Luneberg et al. eds., 4th ed. 2009). “Government has lost hundreds of millions of dollars which it should not have lost if there had been proper publicity given to the activities of lobbyists” prior to the passage of Federal Regulation of Lobbyists Act. *Id.*

14. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”).

15. S.C. CODE ANN. § 2-17-10(13)(f).

16. See, e.g., *Abortion and Morality: Religious and Moral Influence on the Debate*, PEW RES. CTR. (Oct. 1, 2009), <http://www.pewforum.org/2009/10/01/support-for-abortion-slips5/> [<https://perma.cc/66VA-G7YL>] (“One-third of Americans (32%) say their religious beliefs are the primary influence on their attitudes toward abortion.”).

17. See generally Zoë Robinson, *The Contraception Mandate and the Forgotten Constitutional Question*, 2014 WIS. L. REV. 749, 793–98 (2014) (examining the manner in which a religious lobbying group may challenge a contraception bill).

18. See § 2-17-10(13)(f).

19. See *id.*

The problem here is obvious: the South Carolina Ethics Code grants obvious favoritism to Christian speech over non-Christian and non-religious speech.

The ambiguous structure of religious lobbying regulations is attempting to provide broad protections for religious expression, as required by the First Amendment of the United States Constitution,²⁰ but these laws create a systemic preferential treatment towards religious speech.²¹ This creates a danger to the First Amendment as a prohibition on non-religious speech.²² This Note argues that the broad nature of religious exemptions in lobbying regulations inadvertently favors religious speech over non-religious speech, indirectly violating the Establishment Clause of the First Amendment. This notion will be demonstrated by applying precedent from the Supreme Court on similar, although not directly related, issues and arguing that this issue should be viewed in the same light.

Specifically turning to religion, several states have carved out exemptions for churches or religious organizations in their lobbying bills.²³ Instead of evaluating every ethics law and their subsequent exceptions, explicit or otherwise, this Note will group them into three categories. The first category is *problematic* religious exemptions. This includes states, like South Carolina and Maryland,²⁴ with such broad exemptions for religious bodies that they effectively grant favoritism toward religious speech over non-religious speech. One of the most prominent issues with problematic religious exemptions is the prevalence of language which exempts actors from a “bona fide religious organization.”²⁵ The Court has been reluctant to rule on what is and is not a religion and giving this deference to the states presents serious problems.²⁶

20. See *Cutter v. Wilkinson*, 544 U.S. 709, 713–14 (2005) (exploring legislative action to accommodate religious practice without violating the Establishment clause).

21. See, e.g., § 2-17-10(13)(f).

22. See *Lynch v. Donnelly*, 465 U.S. 668, 688, 690–93 (1984) (O’Connor, J., concurring) (explaining the negative message Endorsement sends to nonadherents).

23. See sources cited *supra* note 10.

24. MD. CODE ANN. GEN. PROVIS. § 5-702(b)(1)(iii) (West 2018); § 2-17-10(13)(f).

25. *States Define Lobbying*, *supra* note 6.

26. See generally *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (illustrating that defining what is and is not considered a religious organization presents a serious problem, and that laws citing bona-fide religious organization require the governing body to make this determination). Such a distinction is complex and could easily be abused. *Id.*

The next category is *permissible* laws—laws with a religious exemption that does not violate the First Amendment. These laws explicitly carve out an exemption for religious activity, but do so in a way that does not benefit or harm religious institutions.²⁷ This can be seen in the religious exemptions to the lobbying law in North Carolina, which “do not include communications or activities as part of a business, civic, religious, fraternal, personal, or commercial relationship which is not connected to legislative or executive action, or both.”²⁸ This type of exempted activity is important because it allows lawmakers and lobbyists to belong to the same groups, religious or otherwise, without running afoul of the ethics code. However, this exemption does not cover communication that attempts to affect the lawmaking process.²⁹

The last category is *optimal* laws—those that make no explicit mention of religious organizations, which are the largest grouping of states’ laws. Every state has some law defining what a lobbyist is, whether they have an enforcement body or not.³⁰ Forty-one states make no mention of religious groups in this definition of lobbyist.³¹ In broadly looking to these categories of laws, this Note will demonstrate that laws with explicit religious exemptions present serious First Amendment issues needing to be addressed.

Part I of this Note will evaluate a detailed history of the evolution of religious beliefs in the context of the way people view the divine through the lens of their own desires. It will then provide a background on several political philosophies in application to how lobbying laws are passed and

27. See, e.g., N.C. GEN. STAT. § 163A-250(a)(17) (2018).

28. *Id.*

29. See N.C. GEN. STAT. § 163A-250(a)(36).

30. *States Define Lobbying*, *supra* note 6.

31. See ALA. CODE § 36-25-1.1 (2018); ALASKA STAT. § 24.45.171 (2018); ARIZ. REV. STAT. ANN. § 41-1231 (2018); ARK. CODE ANN. § 21-8-402 (2018); COLO. REV. STAT. § 24-6-301 (2018); CONN. GEN. STAT. § 1-91 (2018); DEL. CODE ANN. tit. 29 § 5831 (2018); FLA. STAT. § 11.045 (2018); GA. CODE ANN. § 21-5-70 (2018); HAW. REV. STAT. § 97-1 (2018); IDAHO CODE § 67-6602 (2018); IND. CODE § 2-7-1-9 (2018); KAN. STAT. ANN. § 46-222 (2018); KY. REV. STAT. ANN. § 6.611 (West 2018); LA. STAT. ANN. § 24:51 (2018); ME. STAT. tit. 3, § 312-A (2018); MASS. GEN. LAWS ch. 3, § 39 (2018); MICH. COMP. LAWS § 4.415 (2018); MINN. STAT. § 10A.01 (2018); MO. REV. STAT. § 105.470 (2018); MONT. CODE ANN. § 5-7-102 (2017); NEB. REV. STAT. § 49-1433 (2018); NEV. REV. STAT. § 218H.080 (2017); N.H. REV. STAT. ANN. § 15:1 (2018); N.J. STAT. ANN. § 52:13C-20 (West 2018); N.M. STAT. ANN. § 2-11-2 (2018); N.D. CENT. CODE § 54-05.1-02 (2017); OHIO REV. CODE ANN. § 101.70 (West 2018); OKLA. STAT. tit. 74, § 4249 (2018); OR. REV. STAT. § 171.725 (2018); 65 PA. CONS. STAT. § 13A03 (2018); 42 R.I. GEN. LAWS § 42-139.1-3 (2018); S.D. CODIFIED LAWS § 2-12-1 (2018); TENN. CODE ANN. § 3-6-301 (2018); TEX. GOV’T. CODE ANN. § 305.003 (2018); VT. STAT. ANN. tit. 2, § 261 (2018); VA. CODE ANN. § 2.2-419 (2018); WASH. REV. CODE ANN. § 42.17A.005 (2018); W. VA. CODE § 6B-3-1 (2018); WIS. STAT. ANN. § 13.62 (West 2018); WYO. STAT. ANN. § 28-7-101 (2018).

why the act of lobbying is effective. It will conclude by describing some important aspects of the First Amendment, particularly the chilling effect doctrine and the overbreadth doctrine.

Part II of this Note will evaluate religious lobbying exemptions in three categories. The first category includes laws that are facially unconstitutional as a violation of the Establishment Clause; the second includes laws that do not present obvious constitutional issues but are nonetheless suboptimal; and the third includes laws that make no mention of religion.

Part III of this Note will argue for a uniform application of regulations to religious and secular lobbyists. It will argue that Connecticut has the most effective measure for allowing certain benefits to religious groups, without violating the First Amendment.

I. A HISTORY OF RELIGION, POLITICAL THEORY, AND THE FIRST ! AMENDMENT !

Organized religion has been at the forefront of American politics since its foundation, “play[ing] a vital role in virtually every major political issue in the history of the United States.”³² Religious scholars and leaders have been on each side of major issues since this country’s inception.³³ This fact is also true of state legislatures—not just the federal government.³⁴ As lobbying becomes more prevalent, the issues that arise with it—like minimal transparency—also grow.³⁵

Further, due to the proliferation of lobbyists in the modern United States, every state has passed a law to define who is a lobbyist, what lobbying is, and how to regulate it.³⁶ Since the creation of the first state ethics commission in Hawaii in 1968, forty states have established their own official ethics commissions,³⁷ Vermont being the most recent state to

32. DANIEL J. B. HOFRENNING, IN WASHINGTON BUT NOT OF IT: THE PROPHETIC POLITICS OF RELIGIOUS LOBBYING 1 (1995).

33. *See id.*

34. REPRESENTING GOD AT THE STATEHOUSE vii (Edward L. Cleary & Allen D. Hertzke eds., 2006).

35. *See* Lloyd Hitoshi Mayer, *What is This “Lobbying” That We Are So Worried About?*, 26 YALE L. & POL’Y REV. 485, 562 (2008) (arguing that businesses will spend whatever it takes to lobby the government, and that it is ineffective to publicize or tax lobbying).

36. *Overview, supra* note 7; *see also States Define Lobbying, supra* note 6.

37. Megan Comlossy, *Ethics Commissions: Representing the Public Interest*, LEGISLATIVE LAWYER 1, 2 (2011), made available at http://www.ncsl.org/documents/lsss/ethics_commissions.pdf [<https://perma.cc/PFC6-5FH2>]. Since the publication of this article, Vermont has established its own ethics commission. *See* An Act Relating to Establishing the

do so.³⁸ The remaining states have ethics committees made up of state officials.³⁹

Such “watchdog” agencies exist to provide transparency to the public and oversight to the government.⁴⁰ Typically, they do so in two distinct ways.⁴¹ The first is through a legal division.⁴² Offices of state ethics typically have an advisory legal branch, which members of the state government—or the public—can contact with questions pertaining to real situations and the application of the law.⁴³ The second way is through prosecution, and most states have a specific prosecutorial division.⁴⁴ Generally, this division reviews possible ethics violations by legislators, government officials, or lobbyists and prosecutes the violations before their state’s board.⁴⁵

The prevalence of lobbyists is apparent,⁴⁶ but religious lobbying has the proclivity to slip through the cracks. These lobbying groups tend to be unregistered, so tracking their actions is nearly impossible, and, further, only a small group of religious lobbyists have official “Political Action Committees.”⁴⁷ The involvement of evangelical Christians is important in American politics, as they make up a considerable portion of the electorate.⁴⁸ These voters traditionally vote for Republicans,⁴⁹ largely thanks to President Ronald Reagan and his efforts in the 1980s to involve

State Ethics Commission and Standards of Governmental Ethical Conduct, 2017 Vt. Acts & Resolves 79.

38. 2017 Vt. Acts & Resolves 79.

39. See Comlossy, *supra* note 37.

40. See *id.*

41. See, e.g., *Agency Units*, OFF. ST. ETHICS, <http://ct.gov/ethics/cwp/view.asp?a=3510&q=415018> [<https://perma.cc/9WQH-HPBV>] (explaining the distinct functions of the two branches of the ethics office, including the Legal and Enforcement divisions).

42. *Id.*

43. E.g., *id.*

44. E.g., *id.*

45. See, e.g., *id.*

46. See generally *Lobbying Database*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/> [<https://perma.cc/N2WE-YQ4N>] (demonstrating the constant increase in annual lobbyist expenditures).

47. See HOFRENNING, *supra* note 32, at 189.

48. See *Religious Landscape Study*, PEW RES. CTR., <http://www.pewforum.org/religious-landscape-study/> [<https://perma.cc/2V7U-B538>] (finding that evangelical Christians make up more than a quarter of voters).

49. See Michael Lipka, *U.S. Religious Groups and Their Political Leanings*, PEW RES. CTR. (Feb. 23, 2016), <http://www.pewresearch.org/fact-tank/2016/02/23/u-s-religious-groups-and-their-political-leanings/> [<https://perma.cc/6XSY-LPGB>].

evangelicals in politics.⁵⁰ The prevalence of religion in politics has certainly stuck around, and now the evangelical vote is highly sought after.⁵¹ Religious groups are increasingly complicated to regulate when it comes to lobbying because many of them are not registered lobbyists, which is forbidden under their status as a tax-exempt 501(c)(3) organization.⁵² This makes balancing their regulation with the intricacies of the tax code quite difficult and could be why many states choose to exempt them from lobbying registration.⁵³ However, this is problematic, as it inherently creates favoritism for religious affiliation or expression over the same non-religious expression.⁵⁴ States should remedy this problem by prohibiting beneficial treatment for religious groups, and this Note will provide suggestions for how to best achieve this goal.

The primary focus of ethics law is to increase transparency between the citizens of each state and their governments.⁵⁵ So then why would some states elect to muddy the waters by exempting some of the largest interest groups in the country? This is a complex question—one that requires introspection on the way society views religion and how it uses religion to interact with each other. This question also requires a discussion of the political interest lawmakers have in passing certain statutes.

50. HOFRENNING, *supra* note 32, at 36–37.

51. Brian Vines, *The Evangelical Vote: Will 94 Million Americans Sit Out This Year's Election?*, GUARDIAN (June 21, 2016, 11:29 AM), <https://www.theguardian.com/us-news/2016/jun/21/evangelical-vote-us-elections> [<https://perma.cc/XP5E-JDHD>]; see also Gregory A. Smith, *Churchgoing Republicans, Once Skeptical of Trump, Now Support Him*, PEW RES. CTR. (July 21, 2016), <http://www.pewresearch.org/fact-tank/2016/07/21/churchgoing-republicans-once-skeptical-of-trump-now-support-him/> [<https://perma.cc/SR82-9H2U>].

52. See HOFRENNING, *supra* note 32, at 189. Section 501(c)(3) is ultimately a tax-exempt status held by many religious organizations. The benefits of this tax-exempt status come with restrictions, specifically a prohibition on “influenc[ing] legislation . . . or interven[ing] in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.” I.R.C. § 501(c)(3) (2018).

53. See I.R.C. § 501(c)(3). Under this section of the tax code, an organization does not qualify for exemption if a “substantial part of [its] activit[y]” is lobbying. *Id.* Regulations could create complications in determining what is “substantial.” See also *Political Campaign Activities—Risks to Tax-Exempt Status*, NAT’L COUNCIL NONPROFITS, <https://www.councilofnonprofits.org/tools-resources/political-campaign-activities-risks-tax-exempt-status> [<https://perma.cc/4RQH-UZNY>]. “Lobbying is NOT the same as political campaign activity. Engaging in lobbying by charitable nonprofits is permitted, but expending more than an ‘insubstantial’ amount of energy or resources towards lobbying activities can be problematic.” *Id.*

54. See *Van Orden v. Perry*, 545 U.S. 677, 719 (2005) (holding that an endorsement of multiple religions is as unconstitutional as an endorsement of one single religion).

55. See Comlossy, *supra* note 37, at 1.

A. ! *What is Religion?*

Religion plays a vital role in American life.⁵⁶ A 2015 study found that approximately seventy-six percent of Americans identify as religious in one way or another.⁵⁷ The overwhelming majority of Americans—some seventy percent—belong to a Christian faith.⁵⁸ But why does the religious makeup of the country affect the political process? The answer is not as simple as discussing the foundation of the United States and the inherent religiosity of its people. The real answer lies much further back in our collective history.⁵⁹

To understand religion's influence on politics, one must understand religion. The foundations of human faith date as far back as we can trace our ancestors—all the way to the cave paintings that signify the migratory patterns of homo-sapiens.⁶⁰ Scholars contend that the placement, consistency, and substance of these cave paintings indicate that they are representative of Paleolithic humans' religious beliefs.⁶¹ One idea of the Paleolithic human religious experience suggests that they believed in a "tiered cosmos."⁶² This theory suggests that the Paleolithic humans believed that by crawling remarkably deep within caves, they could immerse themselves in a separate realm of the cosmos; one that existed deep within the earth.⁶³ They painted these caves full of images that laid out the Paleolithic view of the divine.⁶⁴ As they moved through the caves,

56. See generally *Chapter 1: Importance of Religion and Religious Beliefs*, PEW RES. CTR. (Nov. 3, 2015), <http://www.pewforum.org/2015/11/03/chapter-1-importance-of-religion-and-religious-beliefs/> [<https://perma.cc/6CFC-HXBB>] (explaining the importance of religious beliefs in American life).

57. See *Religious Landscape Study*, PEW RES. CTR. (May 12, 2015), <http://www.pewforum.org/religious-landscape-study/> [<https://perma.cc/2V7U-B538>].

58. *Id.*

59. See generally REZA ASLAN, *GOD: A HUMAN HISTORY* (2017) (explaining a detailed history of the evolution of human thought on God).

60. DAVID LEWIS-WILLIAMS, *CONCEIVING GOD: THE COGNITIVE ORIGIN AND EVOLUTION OF RELIGION* 210 (2010); see also ASLAN, *supra* note 59, at 7–16.

61. See LEWIS-WILLIAMS, *supra* note 60, at 7–16; *c.f.* Kevin Sharpe & Leslie Van Gelder, *Human Uniqueness and Upper Paleolithic 'Art': An Archaeologist's Reaction to Wentzel van Huyssteen's Gifford Lectures*, 28 AM. J. THEOLOGY & PHIL. 311 (2006) (arguing against a religious interpretation of the cave painting but noting that many scholars have argued for a religious contextual interpretation of the "art").

62. See LEWIS-WILLIAMS, *supra* note 60, at 210.

63. See ASLAN, *supra* note 59, at 8.

64. See *id.*

the paintings got more detailed.⁶⁵ Perhaps the most impressive of these early human paintings is one called “The Sorcerer.”⁶⁶

This painting was discovered in 1914, and was instantly recognized as a special symbol of cult worship.⁶⁷ The original discoverer of the cave painting, Henri Breuil, a French priest, made a tracing of the painting and published it along with his notes about the cave in 1920.⁶⁸ In his notes, he referred to the painting as the first known image of God.⁶⁹ Whether the Paleolithic humans that painted the image believed it was God is a matter up for debate, but it is at least clear that the image depicted a deeply held religious idea.⁷⁰ This idea is the interconnectedness of the world, which is something scholars have known about the Paleolithic people for some time; it is an idea they have coined as *animism*.⁷¹ This first conception of a religious belief is that everything is connected by something: a spirit, an essence, a soul—something transcendent from the body.⁷² Animism is not inherently a religion, but it is a foundational belief that, over time, evolved into organized religion.⁷³

The evolution of religion can be seen in the progress from cave paintings and burial mounds to the complex structure of early temples.⁷⁴ Göbekli Tepe is the earliest known temple in the world, dating somewhere

65. See *id.* at 8–17 (exploring how the cave paintings developed from the front of the cave into the depths).

66. *Id.* at 16.

67. *Trois Frères: Cave, Ariège, France*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/place/Trois-Freres#Article-History> [https://perma.cc/ZB5T-J4W9]; see also ASLAN, *supra* note 59, at 17.

68. ASLAN, *supra* note 59, at 9–18; see also Henri Begouen, *Un Dessin Relevé Dans la Caverne des Trois-Frères, à Montesquieu-Avantès (Ariège)* 64 *COMPTES RENDUS DES SÉANCES DE L’ACADÉMIE DES INSCRIPTIONS ET BELLES-LETTRES* 303, 305 (1920), http://www.persee.fr/doc/crai_0065-0536_1920_num_64_4_74336 [https://perma.cc/47RY-PV2Z]. The original journal is rather obscure and completely in French. The University of De Lyon in France has made it publicly available through its free online digital library.

69. See ASLAN, *supra* note 59, at 9–18; see also Begouen, *supra* note 68.

70. See generally Alberto C. Blanc, *Some Evidence for the Ideologies of Early Man, in SOCIAL LIFE OF EARLY MAN* (1961). This book attempts to reconstruct the life of early societies; particular emphasis is laid upon social behavior among primates, as well as approaches from ethnology, prehistoric archaeology, geography, genetics, human stress biology, and psychology. *Id.*

71. ASLAN, *supra* note 59, at 6–7.

72. *Id.*

73. See *id.* at 7 & n.7 (arguing that animism was the first step in the evolution of human thought on God).

74. *Id.* at 7–8.

around 9600 to 8000 BCE; it sits in modern day southeastern Turkey.⁷⁵ The pillars in the center of Göbekli Tepe are not quite pillars at all—they have arms adorned with jewelry, loincloths around their waists, and rectangular, undecorated heads.⁷⁶ These humanoid figures without faces are thought to be an abstraction of a deity.⁷⁷ This temple with the faceless gods is not close to a source of water, and there are no signs of dwelling places nearby, which indicates that the temple was traveled to, that it is, perhaps, a holy site.⁷⁸ From the Paleolithic cave painting of God to the Neolithic statues, the divine became less an amalgamation of man and beast, but more uniquely human.⁷⁹

This trend of developing a human version of the divine continued for several thousand years.⁸⁰ The use of human terms and imagery can be seen in all of the world's major religions, even nontheistic religions like Buddhism or Jainism.⁸¹

In fact, the entire history of human spirituality can be viewed as one long, interconnected, ever-evolving, and remarkably cohesive effort to make sense of the divine by giving it our emotions and our personalities, by ascribing to it our traits and our desires, by providing it with our strengths and our weaknesses, even our own bodies—in short, by making God *us*.⁸²

That is to say, our deepest ideas of the divine are conditioned by our understanding of ourselves. Through the evolution of our thought on God, we have consistently intensified our personification of our perception of the divine.⁸³

Human characteristics bestowed upon the divine are evidenced in a number of examples,⁸⁴ but are nowhere more obvious than America's

75. CLAUDIA SAGONA, *THE ARCHAEOLOGY OF PUNIC MALTA: FROM THE NEOLITHIC TO THE ROMAN PERIOD* 47 (2015).

76. ASLAN, *supra* note 59, at 55.

77. *Id.* at 55–57.

78. *Id.* at 54–55.

79. *See id.* at 57.

80. *See id.* at xiii.

81. *Id.* at xiv–xv.

82. *Id.* at xiii.

83. *Id.* at 49–107 (exploring the humanization of God throughout the evolution of religions, from ancient to modern).

84. *See* REZA ASLAN, *NO GOD BUT GOD: THE ORIGINS, EVOLUTION, AND FUTURE OF ISLAM* (2005) (exploring the evolution of religion); BRITANNICA EDUCATIONAL PUBLISHING, *MESOPOTAMIAN GODS & GODDESSES* (2014) (explaining the religious beliefs of the Mesopotamians); FRED W. CLOTHEY, *RELIGION IN INDIA: A HISTORICAL INTRODUCTION* (2006) (explaining religious traditions and beliefs in India); JOHN DAY, *YAHWEH AND THE*

most popular religion—Christianity.⁸⁵ The Christian tradition of a completely human and completely divine savior of the world is quite familiar to the modern reader.⁸⁶ However, this idea was extremely controversial to the early church.⁸⁷

Through all of religious history, humankind has consistently personified the very notion of the divine;⁸⁸ the theology of which could fill volumes. But what is apparent about this humanizing of God is that it helps to understand the convictions and beliefs of religious lobbyists.⁸⁹ These lobbyists believe they are acting out the will of the divine, which makes them much harder to negotiate with than a lobbyist who is just in it for the money. Before one can fully understand that process though, the politics of lobbying must be addressed.

B. *A Background on Political Theory and the Political Process*

Why does lobbying work? That question begs a more fundamental one—why do politicians vote the way that they do? This question,

GODS AND GODDESSES OF CANAAN (2000) (exploring the Canaanite faith and its many deities); JON MIKALSON, ANCIENT GREEK RELIGION (2005) (exploring the religious practices of the ancient Greeks); PETER HARVEY, AN INTRODUCTION TO BUDDHISM: TEACHINGS, HISTORY AND PRACTICES (1990) (reviewing the history and evolution of the Buddhist faith); JENNY ROSE, ZOROASTRIANISM: AN INTRODUCTION (2011) (explaining the Zoroastrian faith); ALFRED WIEDEMANN, RELIGION OF THE ANCIENT EGYPTIANS (1897) (taking an in-depth look at the religious practice of the ancient Egyptian civilization).

85. *Cf. John 1:14*. The author of the Gospel of John writes, “[t]he Word became flesh and made his dwelling among us. We have seen his glory, the glory of the one and only Son, who came from the Father, full of grace and truth.” *Id.* In saying this, the author is inherently claiming both the divinity and humanity of Jesus. While he is not arguing the same point as this Note, his argument is analogous to the stated claim. The Christian tradition moves ahead of all the other world’s religions in humanizing the divine by holding that God was quite literally a human at one point in time. The Christian tradition holds belief in a Trinitarian view of God, which is that God exists in three distinct bodies, while maintaining unity. The Gospel of John is among the most profound sources for this claim in the Christian tradition, as it moves significantly past the monotheistic foundations of Judaism and blazes a new trail of semi-monotheistic Trinitarian-ism. *Accord* ASLAN, *supra* note 59, at 129–46; REZA ASLAN, ZEALOT: THE LIFE AND TIMES OF JESUS OF NAZARETH 163–216 (2013).

86. *See generally* ALISTER E. MCGRATH, CHRISTIAN THEOLOGY: AN INTRODUCTION (Blackwell, 6th ed. 2017) (detailing the history of theological views of Christian scholars).

87. *See generally* JUSTO GONZÁLEZ, THE STORY OF CHRISTIANITY (1984) (including a detailed historical analysis of the history of Christianity and particularly the first Council of Nicaea); *see also* ASLAN *supra* note 59, at 141–46.

88. ASLAN, *supra* note 59, at xiv–xv.

89. *See generally* HOFRENNING, *supra* note 32 (explaining why and how religious lobbyists act differently than non-religious lobbyists).

unfortunately, does not have one simple and concise answer.⁹⁰ However, it can be answered, at least somewhat, through an understanding of a few political theories and their real-world application.⁹¹

The first important discussion in understanding the political process should be reviewing why and how government exists. John Locke is perhaps the most notable thinker to explore this realm of thought.⁹² He claimed that all men are inherently free and that the existence of the government was simply a social contract, which is a consent to forgo some freedoms in exchange for the enjoyment of stable and comfortable lives.⁹³ This is called *social contract theory*.⁹⁴ It ultimately holds that the governing body of any land is only in power by the express or tacit consent of the people.⁹⁵ That is, all power in politics ultimately originates from the governed, not the government.⁹⁶

Next, Anthony Downs theorized that if constituencies were perfectly informed, politicians would naturally assume the political stance preferred by the median voter.⁹⁷ However, he argues that the public stays uninformed, allowing politicians to deviate from this economic model.⁹⁸ This idea is an application of economic *game theory* to politics.⁹⁹ The primary purpose of game theory is to describe why humans act the way

90. See SUDHA SETTY, NATIONAL SECURITY SECRECY: COMPARATIVE EFFECTS ON DEMOCRACY AND THE RULE OF LAW 40 (2017) (explaining political realism theory and why politicians make the decisions they make).

91. See *id.* at 37–41.

92. See generally W. JULIAN KORAB-KARPOWICZ, ON THE HISTORY OF POLITICAL PHILOSOPHY: GREAT POLITICAL THINKERS FROM THUCYDIDES TO LOCKE (2012) (demonstrating the evolution of political history leading up to John Locke). John Locke was an enlightenment-era philosopher and is hailed as the father of liberalism. *Id.* His thoughts on liberal theory and classical republicanism can be seen in the writings of the founders of the United States and even in the Declaration of Independence. *Id.*

93. See Alex Tuckness, *Locke's Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (Summer 2018), <https://plato.stanford.edu/archives/sum2018/entries/locke-political/> [<https://perma.cc/8GJ2-V4YN>].

94. See *id.*; *Social Contract*, ENCYCLOPAEDIA BRITANNICA <https://www.britannica.com/topic/social-contract> [<https://perma.cc/84KK-UYKS>].

95. Tuckness, *supra* note 93.

96. See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

97. See generally Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135 (1957) (explaining political actions through the lens of economics). Anthony Downs is an economist specializing in public policy. See PATRICIA MOSS WIGFALL & BEHROOZ KALANTARI, BIOGRAPHICAL DICTIONARY OF PUBLIC ADMINISTRATION 25 (2001).

98. See Downs, *supra* note 97, at 139.

99. See *id.* at 135–39.

they do.¹⁰⁰ In application to politics, it has been used to explain democratic peace,¹⁰¹ to mitigate the Cuban Missile Crisis,¹⁰² and as a proposal to solve the issue of climate change.¹⁰³ Ultimately, it attempts to predict actions based on an equation of probabilities.¹⁰⁴

Finally, realist political theory holds that “the political process is governed by the politician’s pursuit of self-interest in order to ensure his political survival.”¹⁰⁵ Under this theory, politics can be explained simply as the constant effort by lawmakers to win reelection.¹⁰⁶ That is, if most of a legislator’s constituency is religious, the legislator will logically prefer laws that benefit religious practice.¹⁰⁷ If an interest group offers to spend an incredibly large sum of money to help the lawmaker win reelection in exchange for a vote on a piece of legislation, the lawmaker is logically going to agree.¹⁰⁸ Even scholars arguing for the legislative ability to create religious exemptions should notice the cause of concern created by legislative preference always going to majority-followed religions.¹⁰⁹

By understanding these prevailing theories of the political process, lobbying makes considerably more sense. If a lawmaker applies these three notions of political theory to their work, logically they will pass, or at the very least support, laws that their constituents agree with.¹¹⁰ By the same token, they will oppose ideas antithetical to their constituents.¹¹¹ This is where lobbying comes in, particularly because voters are not

100. See ROGER B. MYERSON, *GAME THEORY: ANALYSIS OF CONFLICT I* (1991).

101. See generally Gilat Levy & Ronny Razin, *It Takes Two: An Explanation of the Democratic Peace*, 2 J. EUR. ECON. ASS’N 1, 1–10 (2004) (explaining peace treaties using game theory).

102. Steven J. Brams, *Game Theory and the Cuban Missile Crisis*, PLUS MAG. (Jan. 1, 2001), <https://plus.maths.org/content/game-theory-and-cuban-missile-crisis> [<https://perma.cc/8W3V-QZZL>] (explaining the Cuban Missile Crisis using game theory).

103. See generally Peter John Wood, *Climate Change and Game Theory: A Mathematical Survey*, 1219 ECOLOGICAL ECON. REV. 153 (2011) (explaining climate change policies using game theory).

104. MYERSON, *supra* note 100, at 1–4.

105. SETTY, *supra* note 90.

106. See *id.* at 40–41.

107. Cf. *id.* at 40 (arguing that the interest of subordinate groups can only be furthered if they coexist with the interest of the lawmaker).

108. See *id.*

109. See Zoë Robinson, *Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion*, 20 WM. & MARY BILL RTS. J. 133, 177 (2011).

110. See *id.*

111. See *id.*

perfectly informed.¹¹² Interest groups represent the ideas of their members.¹¹³ They also could spend nearly unlimited capital in their efforts to sway legislation or public opinion.¹¹⁴ Applying these political theories to interest groups, it logically follows that politicians will act in their own interest, following the will of the governed, in an equation designed to increase the chance of political survival.¹¹⁵

C. ! *A Background on Other First Amendment Jurisprudence*

This section will evaluate some important doctrines of First Amendment jurisprudence. It will begin with a discussion of the chilling effect doctrine and follow with a discussion of the overbreadth doctrine. In doing so, it is also important to consider the Establishment Clause of the First Amendment, which prohibits the government from recognizing an official religion.¹¹⁶ Also prohibited under the First Amendment is the endorsement of a religious idea or the prevention of any religious idea,¹¹⁷ however, some jurists, like Antonin Scalia, would disagree.¹¹⁸ Ultimately, when ruling on a First Amendment question, “the Court will engage in a form of balancing analysis, and its jurisprudence suggests that the balancing will favor the government.”¹¹⁹

1. The Chilling Effect Doctrine

The chilling effect doctrine finds its roots in a dissenting opinion authored by Chief Justice Earl Warren.¹²⁰ Warren wrote, “[T]he fear of the censor by the composer of ideas acts as a substantial deterrent to the creation of new thoughts.”¹²¹ Through this idea, the Court would find

112.)See Downs, *supra* note 97, at 139.

113. See National Labor Relations Act, 29 U.S.C. § 151 (2018) (prohibiting employers from preventing their employees to unionize). Unions are among the most common interest groups and are a great example of an interest group representing its members directly.

114. See *generally* Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010) (holding that business entities can spend unlimited sums to influence elections).

115.)See SETTY, *supra* note 90, at 40–41.

116. !U.S. CONST. amend. I.

117. See *generally* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (holding that the city allowing a private party to display a cross in a public space was not an “endorsement” that would invalidate the action under the First Amendment).

118. Kathleen M. Sullivan, *Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 449, 461 (2000).

119. Zoë Robinson, *Lobbying in the Shadows: Religious Interest Groups in the Legislative Process*, 64 EMORY L.J. 1041, 1097 (2015).

120.)See Times Film Corp. v. Chicago, 365 U.S. 43, 74–75 (1961) (Warren, J., dissenting).

121.)*Id.* at 75.

ways to apply a restriction on laws that deterred, or chilled, protected expression.¹²² The chilling effect doctrine is comprised of two substantial points. First, there must be an actual chilling.¹²³ Second, if a chilling exists, then courts must apply a strict scrutiny analysis.¹²⁴ The Court has held that “where there is no concrete evidence of a chilling effect, it is for the court to evaluate the likelihood of [a] chilling effect under the circumstances, and determine *whether the risk involved is justified*.”¹²⁵ The Court has also stated that “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.”¹²⁶

The chilling effect doctrine should be the governing constitutional principle in lobbying regulations, and states should avoid chilling protected speech and religious practice. However, there is clearly a compelling governmental interest in promoting public transparency to governmental dealings,¹²⁷ as is required for a law to pass strict scrutiny.¹²⁸ The laws in question must also be narrowly tailored or the least restrictive means possible to achieve the governmental interest.¹²⁹ This Note will analyze lobbying registration laws and apply the strict scrutiny analysis and the chilling effect doctrine to them.

2. The Overbreadth Doctrine

The overbreadth doctrine regulates vagueness in laws that deal specifically with protected rights such as free speech and religious

122. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 336 (2010).

123. See *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 70–73, 78 (1976) (ruling that because a zoning ordinance did not sufficiently deter the production or sale of adult movies, no actual chilling existed).

124. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 72–73 (1981). The strict scrutiny balancing test calls for a compelling governmental interest and that the law in question must be narrowly tailored, or the least restrictive means possible of achieving the governmental interest. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”).

125. *Australia/E. U.S.A. Shipping Conference v. United States*, 537 F. Supp. 807, 811 (D.C. 1982), *vacating as moot and remanded*, No. 82-1516, 82-1683, 1986 WL 1165605 (D.D.C. Cir. Aug. 27, 1986) (emphasis added).

126. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).

127. See *supra* note 124 and accompanying text.

128. See *Grutter v. Bollinger*, 539 U.S. 306, 339–40 (2003) (holding that a school admissions policy had sufficiently overcome strict scrutiny when applying the balancing test).

129. *Id.*

expression.¹³⁰ “According to our First Amendment overbreadth doctrine, a statute is facially invalid *if it prohibits a substantial amount of protected speech.*”¹³¹ Under this doctrine, laws can be found unconstitutional if they prohibit too much protected speech.¹³² However, in direct application to lobbying disclosure rules for religious organizations, the overbreadth doctrine does not prohibit states from exerting the same regulations on religious groups that it would to non-religious groups.

This idea can be clearly seen in an opinion written by the Connecticut Citizen’s Ethics Advisory Commission, which provides that “[w]hat determines whether [an entity] . . . is lobbying is its intent in furnishing the information. If it is for the purpose of influencing legislative [or administrative] action, it is lobbying. Conversely, if it is not for the purpose of influencing legislative [or administrative] action, it is not lobbying.”¹³³ The opinion went on to state that, although the entity “is the best judge of its intent in providing information[,] . . . [i]ntent . . . can be manifested objectively in a number of ways.”¹³⁴ Under this precedent, the Connecticut Office of State Ethics (Connecticut OSE) is qualified to review protected speech in the context of a compelling governmental interest.¹³⁵ The Connecticut OSE already reviews various specific factual circumstances in their application to the Code of Ethics.¹³⁶ Other states should apply the same logic to the dealings of religious groups in the political process and require religious groups to register with their governing bodies to promote transparency for the voters.

D. ! *Intersectionality of These Ideas in Religious Lobbying*

In applying all three of these complex ideas to the practice of religious lobbying in America, the involvement of religion in the political process will make more sense. Under the argued foundation of religion, humans inherently apply our own desires to the divine;¹³⁷ that is, our desires become God’s desires.¹³⁸ Politics can be described simply as the result of

130. See generally Recent Case, *Overbreadth Doctrine*, 122 HARV. L. REV. 385, 385–88 (2008) (noting that under the overbreadth doctrine, statutes can be found “void for vagueness”).

131. !United States v. Williams, 553 U.S. 285, 292 (2008) (emphasis added).

132.)*Id.*

133. !Conn. St. Ethics Comm’n, Advisory Opinion No. 78-13 (Aug. 4, 1978).

134.)*Id.*

135.)*See id.*

136. See Conn. St. Ethics Comm’n, Advisory Opinion No. 1994-11 (1994); see also Conn. St. Ethics Comm’n, Advisory Opinion No. 2009-6 (July 23, 2009).

137.)*See supra* Section I.A.

138.)*See ASLAN, supra* note 59, at xii.

an equation—the consent of the governed coupled with their imperfect knowledge, added to the desires of interest groups with deep pockets; calculating this should give a politician an indication of the best chance for political survival (i.e., reelection).¹³⁹

This exact scenario can be seen clearly in the actions of now-Senator Richard Blumenthal when he was the Attorney General of Connecticut.¹⁴⁰ In 2009, the Bridgeport Roman Catholic Diocesan Corporation (“the Church”) filed a federal lawsuit against officials of the Connecticut OSE.¹⁴¹ The Church alleged that the method by which all lobbying in the state of Connecticut is regulated was restrictive to the point of creating a chilling effect on their constitutionally protected religious expression.¹⁴² The lawsuit was in response to an OSE investigation into the actions of the Church.¹⁴³ Particularly, the Church spent several days, and a large sum of money, to rally its members against “Raised Bill 1098” in March of 2009.¹⁴⁴ The Church alleged the proposed legislation was unconstitutional and wanted to challenge it before it ever became law.¹⁴⁵ It did just that by using its website and churches, rallying members of the Diocese, and bussing them to Hartford for a protest.¹⁴⁶ This prompted an evaluation from the OSE.¹⁴⁷

The evaluation was based on Connecticut state law that regulates lobbyists.¹⁴⁸ It was clear, based on the size of the rally, that the Church had spent enough money, in an admitted attempt to influence legislation,

139. *See supra* Sections I.A–C.

140. *See generally* Op. Att’y Gen. 2009-006 (June 30, 2009), 2009 WL 1904432 (Conn. A.G.) [hereinafter Opinion Letter] (arguing that the enforcement of the ethics code upon a religious group violated the first amendment).

141. *See generally* Complaint, Bridgeport Roman Catholic Diocesan Corp. v. Jones, No. 3:09-CV-00851, 2009 WL 4313525 (D. Conn. 2009) [hereinafter Complaint] (litigating the enforcement of the ethics code upon the Bridgeport church).

142. *See id.* ¶ 1.

143. *Id.*

144. *Id.* ¶ 2 (arguing that Raised Bill 1098 attempted to create an oversight board of laypeople to regulate the Catholic church in Connecticut); *see* Opinion Letter, *supra* note 140, at *1; *see also* An Act Modifying Corporate Laws Relating to Certain Religious Corporations, S.B. 1098, 2009 Gen. Assemb., Jan. Sess. (Conn. 2009), <http://www.cga.ct.gov/2009/TOB/S/2009SB-01098-R00-SB.htm> [<https://perma.cc/XPY3-B5M4>].

145. *See* Complaint, *supra* note 141, ¶¶ 1–2.

146. *Id.* ¶ 23; *see also* Christine Stuart, *Catholic Church Sues State Over Lobbying Provision*, CT NEWS JUNKIE (May 29, 2009, 9:20 PM), https://www.ctnewsjunkie.com/archives/entry/catholic_church_sues_state_over_lobbying_provision [<https://perma.cc/3QQG-P983>].

147. Complaint, *supra* note 141, ¶¶ 6, 37.

148. *Id.*

to require lobbyist registration under the Code of Ethics.¹⁴⁹ The Church responded with a lawsuit claiming that the lobbyist registration and disclosure requirements violated its constitutional right to free exercise under the First Amendment.¹⁵⁰ The Attorney General agreed with the Church and informed the OSE that the registration and disclosure requirements being applied were, in his opinion, constitutionally questionable.¹⁵¹ He expressed his concern by writing an opinion that seriously misapplied the First Amendment,¹⁵² and argued for an exemption to the code that would be popular, but would dilute transparency.¹⁵³ Blumenthal insisted OSE and the legislature update the definition of “expenditure” in the Connecticut Code of Ethics.¹⁵⁴

The Attorney General’s letter contended that the legislation be changed to exclude costs of transportation and communications by a group intended for its members.¹⁵⁵ The letter, which stated the Attorney General’s concerns, prompted the OSE to propose several legislative changes.¹⁵⁶ Among them is the amendment to the definition of “expenditure” under the Code of Ethics.¹⁵⁷

Ultimately, the Bridgeport case was voluntarily withdrawn because the OSE, considering the Attorney General’s letter, decided not to pursue enforcement action.¹⁵⁸ The letter issued by Attorney General Blumenthal

149. *Id.*; see CONN. GEN. STAT. § 1-94 (2018) (noting that the dollar amount to require registration was raised from \$2,000 to \$3,000 in 2016); see also An Act Amending the Code of Ethics for Lobbyists to Redefine “Expenditure” and Raise the Threshold for Lobbyist Registration, 2015 Conn. Pub. Acts. 15-15 (Reg. Sess.).

150. See generally Complaint, *supra* note 141, ¶¶ 1–2 (alleging that enforcement of the ethics code violated the church’s first amendment rights).

151. See Opinion Letter, *supra* note 140, at *3.

152. Attorney General Blumenthal argued that the existence of a chilling effect was facially intolerable, completely ignoring decades of precedent on the very issue, and the requirement for a strict scrutiny analysis. See *id.*

153. See *id.* at *4 (noting that “[t]he legislature should consider clarifying the scope of this exemption” to include the expenditure made by Bridgeport).

154. *Id.*

155. Opinion Letter, *supra* note 140, at *2; CONN. GEN. STAT. § 1-91(6)(B)–(C) (2018). Section C reflects the change the Attorney General argued for in his opinion letter. *Id.*

156. See An Act Amending the Code of Ethics for Lobbyists to Redefine “Expenditure” and Raise the Threshold for Lobbyist Registration, 2015 Conn. Pub. Acts. 15-15 (Reg. Sess.).

157. § 1-91(6).

158. Notice of Voluntary Dismissal, Bridgeport Roman Catholic Diocesan Corp. v. Jones, No. 3:09-cv-00851, 2009 (D. Conn. July 2, 2009).

created ambiguity in the enforceability of the law that must be clarified.¹⁵⁹ This ambiguity also has the potential to lead to more lawsuits.

Through this complex and legally questionable process, Blumenthal saw that the Church was using its desires, and applying them to the divine by quite literally preaching them from the pulpit.¹⁶⁰ Church members rallied, showing him their numbers and power, along with their political will.¹⁶¹ Blumenthal responded with a letter that misapplied constitutional law in a clear attempt to appease the church.¹⁶² Applying the political theory principles previously demonstrated to this action,¹⁶³ Mr. Blumenthal acted to preserve his own self-interest.¹⁶⁴ Christians make up seventy percent of Connecticut, and more specifically, Catholics make up thirty-three percent of the state.¹⁶⁵ The next year, Attorney General Blumenthal got a promotion and became United States Senator Blumenthal.¹⁶⁶ He took fifty-five percent of the votes in the state,¹⁶⁷ and carried Hartford, as well as the New York City suburb area of Connecticut where Bridgeport sits.¹⁶⁸ While no polling data on the specific religious preferences of Blumenthal voters exists from the 2010 election, a logical conclusion is that Blumenthal's 2009 opinion aided his political survival, and in this case, helped him achieve a position on a much larger stage.¹⁶⁹

Now that a definition of religion, the political process, and the law has been demonstrated in the real world of political happenings, this Note

159. See Opinion Letter, *supra* note 140, at *3 (calling a chilling effect facially intolerable and alleging that the registration and disclosure requirements in the Code of Ethics violated the church's right to religious expression).

160. See Complaint, *supra* note 141, ¶ 20.

161. See generally *id.*

162. See generally Opinion Letter, *supra* note 140 (arguing that the mere existence of chilling effect was enough to make the application of the law intolerable).

163. See *supra* Section I.C.

164. See *supra* Section I.B; see also Setty, *supra* note 90 (explaining political realism theory and why politicians make the decisions they make).

165. *Adults in Connecticut*, PEW RES. CTR., <http://www.pewforum.org/religious-landscape-study/state/connecticut/> [<https://perma.cc/4EQE-7UNG>].

166. See David M. Halbfinger, *Blumenthal Wins in Connecticut to Take Dodd's Seat*, N.Y. TIMES (Nov. 2, 2010), <http://www.nytimes.com/2010/11/03/nyregion/03ctsen.html> [<https://perma.cc/QPM3-YFTV>].

167. Katie Thomas, *Election 2010: Connecticut*, N.Y. TIMES, <https://www.nytimes.com/elections/2010/results/connecticut.html> [<https://perma.cc/NX3A-5Q58>].

168. See *Election 2010: Connecticut Senate Exit Polls*, N.Y. TIMES (2010) <https://www.nytimes.com/elections/2010/results/senate/exit-polls.html#connecticut> [<https://perma.cc/ZV8Q-WFAS>] (demonstrating that Blumenthal won in both urban and suburban areas of the state, which would include Hartford and the suburban area where Bridgeport sits).

169. See Halbfinger, *supra* note 166.

argues that the regulation of religious lobbyists in an identical way to non-religious lobbyists is the most preferential legal treatment.

II. THE THREE DIVISIONS OF LOBBYING REGULATION

Religious liberties are not compromised when religious organizations are held to the same standard as their secular counterparts regarding lobbying regulations. Equal application of the law is the most favorable way to handle the complex constitutional questions raised by the issue because it avoids the possibility of an “endorsement” challenge.¹⁷⁰ Some states have explicitly exempted certain religious lobbying activities that may be permissible under the First Amendment from their definition of “lobbying.”¹⁷¹ However, even these permissible laws¹⁷² are suboptimal.

The United States Supreme Court has created a test for evaluating establishment clause claims to determine whether the state in question has given preferential treatment to religion.¹⁷³ This test is essentially a test of endorsement,¹⁷⁴ which in this context means “an expression or demonstration of approval or support.”¹⁷⁵ The Court also equates this test with “promotion” or “favoritism.”¹⁷⁶ So, in determining the constitutionality of these lobbying laws, one should look to the primary purpose and effect of the law.¹⁷⁷ In the application of this endorsement test, an endorsement exists when a reasonable observer would infer promotion or favoritism of religious expression by the government.¹⁷⁸ The Court has also made clear that “neutral government policies that

170. *See* *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995). “Religious expression cannot violate the Establishment Clause where it . . . is . . . publicly announced and open to all on equal terms.” *Id.* at 770.

171. *See, e.g.*, N.C. GEN. STAT. § 163A-250(a)(17) (2018) (exempting religious communications not related to legislative or executive action from being considered lobbying).

172. *See generally* *Capitol Square*, 515 U.S. at 769–70 (holding that the city allowing a private party to display a cross in a public space was not an “endorsement” that would invalidate the action under the First Amendment).

173. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). “Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” *Id.* (citations omitted).

174. *Capitol Square*, 515 U.S. at 763 (noting that the test petitioners asked for is not a test of endorsement at all, and certainly is not *the* endorsement test that Court had developed).

175. *Id.*

176. *Id.*

177. *See* *Lemon*, 403 U.S. at 612–13.

178. *Capitol Square*, 515 U.S. at 763–64.

happen to benefit religion” do not equate to endorsement, and thus are not in violation of the Establishment Clause.¹⁷⁹

A. ! *Inherently Problematic Laws*

Some states have put forth laws that are facially unconstitutional.¹⁸⁰ These laws grant an express benefit to religious speech that is not granted to non-religious speech and thus would not stand up to the endorsement test.¹⁸¹ For example, the South Carolina law discussed previously is the most egregious.¹⁸² It not only exempts protected religious activity, like defending the right of its members to practice whatever doctrine they practice, but also protects against anything “considered to have an adverse effect upon the moral welfare of the membership of the church.”¹⁸³ This law is problematic for several reasons.

Most notably, it clearly favors religious speech over non-religious speech, and the text facially gives preferential treatment to those representing a church.¹⁸⁴ Under the endorsement test, this can be seen evidently as *promoting, favoring, or endorsing* religious activity.¹⁸⁵ This is problematic because non-religious organizations may also have strong moral convictions deriving from something other than religion.¹⁸⁶ If the purpose of the exemption is to allow one to defend “moral welfare,” it does so erroneously and in violation of the Establishment Clause.¹⁸⁷

While problems with the South Carolina law abound, creating an effective solution is complicated. First, the issue has never been raised to the regulatory body in South Carolina.¹⁸⁸ When asked about the issue, the director of the South Carolina Ethics Commission responded, “The SC Ethics Commission has not encountered a circumstance where an individual claimed a registration exemption for serving in a position that

179.)*Id.* at 754, 769–70.

180.)*See supra* note 10 and accompanying text.

181.)*See Lemon*, 403 U.S. at 612–13.

182.)*See* S.C. CODE ANN. § 2-17-10(13)(f) (2018).

183.)*Id.*

184.)*Id.*

185.)*See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763 (1995).

186. *See generally* STEVE CIRRONE, SECULAR MORALITY: RHETORIC AND READER (2015) (demonstrating the ability to make a moral argument without adherence to a religious doctrine).

187.)*See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

188. E-mail from Steven Hamm, Interim Chairman of the S. C. Ethics Comm’n, to Nicholas Smith (Nov. 16, 2017, 11:48 AM) (on file with author).

represents any established church.”¹⁸⁹ He went on to clarify that the provisions in the code that restrict gifts on lawmakers would still apply to them.¹⁹⁰ Thus, even lobbyists covered by this exemption would not be able to bribe legislators.¹⁹¹ Since this law has never been defined further by the ethics commission in an advisory or formal opinion, it has never been appealed to the Court, and thus has been allowed to stand because of its obscure status.¹⁹²

However, it still creates an inherent problem. Specifically, in South Carolina, lobbyists must pay an annual nonrefundable fee of one hundred dollars, and file the legislative or executive action they are rendering service to with the State Ethics Commission.¹⁹³ They must also disclose their legal name, permanent address, phone number, and a list of all legislative or executive action they expect to lobby each year.¹⁹⁴ The way the law is written gives religious lobbyists an advantage over their secular counterparts by freeing up their time and saving them one hundred dollars a year.¹⁹⁵

Further, in South Carolina, “[t]he cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation.”¹⁹⁶ In application to the law in question, the plain and ordinary meaning of a church is a Christian place of worship.¹⁹⁷ The word church does not include a synagogue, mosque, or temple,¹⁹⁸ and under South Carolinian precedent, it is improper to expand the plain meaning of the word.¹⁹⁹ While other jurisdictions may have settled this

189. *Id.*

190. *Id.*

191. *See id.*

192. *See id.*

193. S.C. CODE ANN. § 2-17-20(A) (2018).

194. § 2-17-20(B).

195. *See* § 2-17-20(A); *see also* S.C. CODE ANN. § 2-17-10(13)(f) (2018) (“[Exempting] a person who represents any established church solely for the purpose of protecting the rights of the membership . . . or . . . the doctrines of the church or on matters considered to have an adverse effect upon the moral welfare of the membership of the church [from lobbyist registration].”).

196. *Hitachi Data Sys. Corp. v. Leatherman*, 420 S.E.2d 843, 846 (S.C. 1992).

197. *Church*, ENGLISH OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/church> [<https://perma.cc/MJQ9-8DKZ>].

198. *See id.*

199. *See Hitachi Data Sys. Corp.*, 420 S.E.2d at 846. “In construing statutes, we seek to effectuate legislative intent. The cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without resort to subtle or forced

definitional issue,²⁰⁰ it has not been remedied in South Carolina. Thus, not only does the lobbying code favor religious speech over non-religious speech, it more accurately favors Christian speech over non-Christian speech. In applying the First Amendment, the Supreme Court has made clear that states cannot “pass laws which aid one religion, aid all religions, or prefer one religion over another.”²⁰¹

The ethics code in South Carolina is facially invalid under every part of the above statement.²⁰² It favors Christianity over non-Christian religions, and even if a court were to reject that contention, it still favors religious speech over non-religious speech and, for that reason, should be struck down.²⁰³ Even if this law has never been applied to an actual event, it still presents to a reasonable observer that South Carolina unconstitutionally favors religious speech over non-religious speech.²⁰⁴ It is also plausible that, since the South Carolina Ethics Commission—the only regulatory body in the state—has never heard this issue,²⁰⁵ religious lobbyists are simply falling through the cracks of enforcement. That is, religious lobbyists could be acting within the law and not drawing attention to themselves. Thus, the Commission would not have reason to evaluate the issue because it is happening outside the scope of its vision.

Further, several states include language in their lobbying codes that exempts representatives of a “bona fide” religious organization.²⁰⁶ These laws create a conundrum for regulatory bodies by making it their duty to determine what is and is not a religious organization.²⁰⁷ This task is so

construction to limit or expand its operation.” *Id.* This means that the lobbying statute should be defined with its plain and ordinary meaning. *See id.*

200. *See Islamic Soc’y of Basking Ridge v. Twp. of Bernards*, 226 F. Supp. 3d 320, 329–30, 342 (D.N.J. 2016) (holding that church can be construed to refer to non-Christian religions).

201. *Everson v. Bd. of Ed.*, 330 U.S. 1, 15 (1947).

202. *Compare id.* (holding that a law is invalid if it favors one religion over another), *with* S.C. CODE ANN. § 2-17-10(13)(f) (2018) (providing an exemption specifically for Christian organizations).

203. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (holding that laws favoring religion, or one religion over another, are unconstitutional).

204. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 764–65 (1995) (explaining that governmental action which favors religious expression is unconstitutional); *see also* S.C. CODE ANN. § 2-17-10(13)(f) (2018).

205. *See* E-mail from Steven Hamm, *supra* note 188.

206. *See, e.g.,* CAL. GOV’T. CODE § 86300(c) (West 2018); MD. CODE ANN. GEN. PROVIS. § 5-702(b)(1)(iii) (West 2018); 65 PA. CONS. STAT. § 13A06(11) (2018); UTAH CODE ANN. § 36-11-102(14)(b)(vi) (West 2018).

207. *See generally* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that a very small congregation practicing the Santeria faith with a sincerely held belief was a religion and warranted protection).

complicated that it “has been a source of great controversy for courts and commentators.”²⁰⁸ The laws requiring local boards to determine what is and what is not religious are improper because of the complex nature of determining what constitutes a religion.²⁰⁹ The test by which courts determine what constitutes a religious belief is quite complicated.²¹⁰ Effectively, courts must determine that the belief in question is “sincerely held” and that it is in the registrants’ “own scheme of things” religious.²¹¹ This necessarily subjective test could result in the regulatory body spending an inordinate amount of time determining which religious groups are in fact “bona fide.”

One alternative to this subjective test would be to use the tax status of a religious group as the justification for their lobbying exemption.²¹² However, this too presents serious concerns. For instance, one needs to look no further than John Oliver and his now-closed church, Our Lady of Perpetual Exemption.²¹³ John Oliver is a political satirist with a television program on HBO.²¹⁴ His church was located in his studio, and existed to mock televangelism.²¹⁵ This church was created—through the process of filing the correct paperwork with the Internal Revenue Service to establish a tax-exempt church—in order to “expose televangelists.”²¹⁶ According to Oliver, the entire process was “disturbingly easy.”²¹⁷ This means that any organization like Home Box Office, the network that produces Oliver’s show, could easily forgo the normal disclosure requirement by

208. *Peterson v. Wilbur Commc’ns, Inc.*, 205 F. Supp. 2d 1014, 1018 (E.D. Wis. 2002).

209. See Rhett B. Larson, *Holy Water and Human Rights: Indigenous Peoples’ Religious-Rights Claims to Water Resources*, 2 ARIZ. J. ENVTL. L. & POL’Y 81, 104 (2011) (noting that it is complicated to define religion in the context of civil rights). This idea can be similarly applied to the complicated task that regulatory bodies would have in defining what is and is not religious in the context of lobbying.

210. See *United States v. Seeger*, 380 U.S. 163, 176, 185 (1965) (explaining that religiously neutral language is important because rigid definitions would likely exclude some sincerely held religious beliefs).

211. *Id.* at 185.

212. See I.R.C. § 501(c)(3) (2018).

213. Laura Bradley, *Praise Be to John Oliver, Who Started a Church Just to Expose Televangelists*, SLATE (Aug. 17, 2015, 10:57 AM), http://www.slate.com/blogs/browbeat/2015/08/17/john_oliver_tevangelism_last_week_tonight_creates_a_church_to_hilariously.html [<https://perma.cc/P2MQ-QGAP>].

214. *Last Week Tonight with John Oliver, About*, HBO, <https://www.hbo.com/last-week-tonight-with-john-oliver> [<https://perma.cc/3XHW-FXH3>].

215. See *Last Week Tonight with John Oliver, Televangelists: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Aug. 16, 2015), <https://www.youtube.com/watch?v=7y1xJAVZxXg>.

216. *Id.*

217. *Id.*

simply starting a legally recognizable church to gain access to a relaxed standard.²¹⁸ This is clearly not in the best interest of the state or the people.

This Note proposes that states should remove religious exemptions from their laws altogether. This would increase transparency for voters, which is, after all, the purpose of lobbying codes.²¹⁹ Such action would solve the issue of determining who can and cannot use the exemption based on their religiousness, and it would also help circumvent the First Amendment issue altogether.

B. *Neutral Provisions*

Some states have religious exemptions that do not inherently create a problem with the Establishment Clause of the First Amendment, but are still unnecessary.²²⁰ For example, Utah's lobbying code provides that religious representatives are not lobbyists if they act "solely for the purpose of protecting the right to practice the religious doctrines of the church."²²¹ The law goes on to clarify that a religious actor would regain lobbyist status, and thus be required to register as a lobbyist and make disclosures, if "the individual or church makes an expenditure that confers a benefit on a public official."²²²

This language seemingly attempts to balance First Amendment concerns with lobbying regulation; however, it presents a possible endorsement issue under the *Lemon* test.²²³ To explain, one must consider lobbying that does not confer a benefit on a public official. Lobbyists often take actions that are designed to benefit only their principal.²²⁴ These strategies do not facially confer a benefit on anyone other than the

218. *See id.*

219. *See* Free Mkt. Found. v. Reisman, 573 F. Supp. 2d 952, 956 (W.D. Tex. 2008) (noting that reporting requirements exist to promote transparency in lobbying).

220. *See, e.g.*, N.C. GEN. STAT. § 163A-250 (2018) (exempting only communications not related to legislative or executive action).

221. UTAH CODE ANN. § 36-11-102(14)(b)(vi) (West 2018).

222. *See id.*

223. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–14 (1971) (holding that laws must have secular purposes or primary effects that neither advance nor inhibit religion and must not create excessive entanglement between the government and religion).

224. *See generally* Tamasin Cave & Andy Rowell, *The Truth About Lobbying: 10 Ways Big Business Controls Government*, GUARDIAN (Mar. 12, 2014, 1:45 PM), <https://www.theguardian.com/politics/2014/mar/12/lobbying-10-ways-corporations-influence-government> [<https://perma.cc/G8KL-EVEU>] (explaining the difference between lobbyists and the government in the United Kingdom).

business behind the lobbying,²²⁵ and these strategies include actions such as presenting a position to the legislature.²²⁶ This does not necessarily “benefit” the members of the legislature, but it could sway their votes on a bill that would benefit the lobbyist principal, such as a new tax that would cost the principal money. Therefore, even if Utah adds lobbying regulations for religious organizations that directly confer a benefit on a legislator or executive office, the legislature still leaves the door open for lobbying activity that is not directly covered by the law.

Further, Utah does not have a provision in its lobbying code that regulates grassroots lobbying.²²⁷ Grassroots lobbying, or indirect lobbying, is an attempt to affect legislative or executive action by swaying public opinion, or by having the public attempt to affect legislative or executive action.²²⁸ This trend of lobbying has become increasingly popular and is encompassed by most states’ lobbying regulations.²²⁹ Specifically, “[twenty-two states] explicitly define lobbying as direct and indirect communication with public officials, and [fourteen states] broadly define lobbying as any attempt to influence public officials.”²³⁰ This provides even more leeway for religious groups, as they are uniquely situated to directly communicate with their members on a regular basis.²³¹

225. See Theodor Meyer & Marianne Levine, *Walsh Moves to FPI*, POLITICO: INFLUENCE (Nov. 14, 2018, 3:17 PM), <https://www.politico.com/newsletters/politico-influence/2018/11/14/walsh-moves-to-fp1-413310> [<https://perma.cc/AP2A-H9DN>] (indicating that a lobbying coalition aims to present research to congress, presumably for the benefit of their principal).

226. See *id.* (noting that lobbyists aim to educate Congress on a subject that will save Congress the time of researching this material independently, such as information regarding quantum research and development).

227. See UTAH CODE ANN. § 36-11-102(14) (West 2018).

228. See HOFRENNING, *supra* note 32, at 54–55.

229. See Mayer, *supra* note 35, at 561; see also Edward Walker, *How Grassroots Lobbying Consultants Are Reshaping Public Participation in Policy Battles*, SCHOLARS STRATEGY NETWORK (May 2, 2014), <https://scholars.org/brief/how-grassroots-lobbying-consultants-are-reshaping-public-participation-policy-battles> [<https://perma.cc/XPQ3-Y5AA>] (noting that grassroots lobbying has become a popular tool—not just for populist groups, but for Fortune 500 companies as well).

230. JEFFREY MILYO, *MOWING DOWN THE GRASSROOTS: HOW GRASSROOTS LOBBYING DISCLOSURE SUPPRESSES POLITICAL PARTICIPATION*, INST. FOR JUST. 8 (April 2010) (emphasis omitted), https://ij.org/wp-content/uploads/2015/03/mowing_down_the_grassroots.pdf [<https://perma.cc/AS7S-SKKK>]. These states include Alaska, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Massachusetts, Maryland, Minnesota, Mississippi, North Carolina, North Dakota, New Jersey, Pennsylvania, Rhode Island, Tennessee, Virginia, Vermont, West Virginia, Wyoming. *Id.*

231. *Compare Attendance at Religious Services*, PEW RES. CTR., <http://www.pewforum.org/religious-landscape-study/attendance-at-religious-services/> [<https://perma.cc/955S-9QYZ>] (finding that approximately 69% of Americans attend a religious

They can therefore encourage their congregants to talk to their friends, write to their members of Congress, or engage in a whole host of other actions that could sway public opinion, and thus affect the lawmaking process without ever conferring a benefit on a public official.²³²

States without grassroots lobbying provisions in their codes should add such a provision to increase transparency, as this method of lobbying has become increasingly popular.²³³ However, the logical application of the endorsement doctrine still applies to states with neutral provisions, with or without grassroots provisions.²³⁴ Continuing with the Utah example, and encompassing all laws with similar language, the lobbying provision in question exists to allow religious groups to defend their constitutionally protected status.²³⁵ That is, they can only act in a way that defends their free exercise of religion.²³⁶ The nature of this law, and the application of the endorsement test, is complicated.²³⁷ On one hand, the law clearly gives religious groups a means to impact the lawmaking process without registering as lobbyists, which their secular counterparts do not receive.²³⁸ On the other hand, it is unclear how this benefit could even possibly be applied to secular organizations.²³⁹ The right to lobby, unhindered, in defense of free-exercise makes sense.

service either once a month and a few times a year), with Aaron Smith et al., *The Current State of Civic Engagement in America*, PEW RES. CTR. (Sept. 1, 2009), <http://www.pewinternet.org/2009/09/01/the-current-state-of-civic-engagement-in-america/> [https://perma.cc/NY4L-SM2P] (demonstrating that only about 12% of Americans participated in a political rally or speech in a year's time).

232. See Kelly S. Shoop, *If You Are a Good Christian You Have No Business Voting for This Candidate: Church Sponsored Political Activity in Federal Elections*, 83 WASH. U. L.Q. 1927, 1939 (noting that religious groups act to mobilize voters and sway opinion); see also, Hunter Schwarz, *How Much Influence Can a Church Have Over Its Members' Political Beliefs? A Mormon Case Study.*, WASH. POST (Feb. 26, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/02/26/how-much-influence-can-a-church-have-over-its-members-political-beliefs-a-mormon-case-study/?utm_term=.c76afc4d7929 [https://perma.cc/TDQ5-2Y4F].

233. See generally Milyo, *supra* note 230 (noting an increase in grassroots lobbying and its regulation).

234. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (noting that laws that create an “excessive government[al] entanglement with religion” are unconstitutional even if they are drafted neutrally and with a secular purpose (quoting *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 674 (1970))).

235. See, e.g., UTAH CODE ANN. § 36-11-102(14)(b)(vi) (West 2018).

236. See, e.g., *id.*

237. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 755 (1995); see also *Lemon*, 403 U.S. at 612–13.

238. See § 36-11-102(14)(b)(vi).

239. The application to non-religious counterparts is unclear because the law specifies defense of religious doctrine, which non-religious groups inherently do not have.

However, laws that give a benefit to religious groups are still not the most preferential outcome for these regulations. The ability to freely exercise one's religion is well defined and defended by the First Amendment and subsequent jurisprudence.²⁴⁰ The inclusion of these provisions in lobbying regulations only serves to further complicate the duties of the regulatory bodies.²⁴¹

For example, consider this hypothetical: if the Lieutenant Governor in Utah determined that a religious organization was spending money to do research about a proposed law, and it was sharing that research with the legislature, the Lieutenant Governor could justifiably bring an enforcement action.²⁴² Through this enforcement action, the office learns that the religious organization in question was researching the effect of a proposed bill concerning religious symbols on public land. The religious organization was simply concerned that the cross it has on display at the corner of its driveway and the public highway would be forbidden. Therefore, it decided to undergo considerable legal research into the proximity to a public road in which the state owns the land, and where precisely their property line was. If it shares this research with the legislature is it “confer[ring] a benefit on a public official?”²⁴³ That would presumably be up to the Lieutenant Governor in Utah.²⁴⁴ These actions may not be considered a benefit, but surely the legislature gains something out of it. If the religious organization has already done the groundwork to establish what the law means and how it affects roadside property, then the legislature is free from doing the same research. Thus, it has received the benefit of time and resources. However, the lobbying code is unclear as to whether this is what the legislature of Utah intended the term “benefit” to mean.²⁴⁵ The uncertainty of this law's application is concerning, particularly in consideration of the First Amendment.

The only example of a religious exemption in a lobbying code that does not fundamentally raise First Amendment concerns is that found in

240. See generally *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 544–47 (1993) (ruling on free exercise when applied to specific rituals).

241. See *supra* note 26 and accompanying text.

242. See UTAH CODE ANN. § 36-11-404 (West 2018) (assigning the duty of appointing administrative law judges and the procedures for lobbying licenses to the Lieutenant Governor to enforce lobbying regulations).

243. See § 36-11-102(14)(b)(vi).

244. See § 36-11-404.

245. See § 36-11-102. The word “benefit” is not defined in the statute, thus discerning what the legislature intended it to mean is very difficult, and possibly a matter left completely up to interpretation. See *id.*

North Carolina's lobbying code.²⁴⁶ The state's code exempts "communications or activities as part of a business, civic, religious, fraternal, personal, or commercial relationship which is not connected to legislative or executive action, or both."²⁴⁷ This law, while probably unnecessary, is broad enough to likely be permissible under any application of First Amendment jurisprudence.²⁴⁸ It is wide-ranging and allows exemptions for religious and non-religious institutions equally, and neither restricts nor favors any speech.²⁴⁹ While the logic of this provision is sound, in application, it is useless. It essentially says, lobbying does not include things that are not lobbying. The protection of the North Carolina exemption, as well as similar exemptions in other states, is already conferred in the right of association.²⁵⁰

Through all these "neutral provisions" there exists a series of unconstitutional favoritism or utter redundancies that do nothing for the state.²⁵¹ These facially neutral lobbying provisions are not the best way for states to address religious lobbying, although, they are significantly better than the facially unconstitutional provisions.²⁵²

Despite the efforts to provide the protections required by the First Amendment, these states with religious exemptions have created a disparity in the constitutional application of their laws.²⁵³ Only one court has ever observed this issue regarding lobbying, finding an Illinois lobbying statute invalid and issuing a restraining order.²⁵⁴ Upon further review, the *White* court struck down the law because its scheme of billing charged lobbyists more money than was required to sufficiently manage the regulation process.²⁵⁵ The court suggested that the legislature would amend the law, and thus, they would not need to rule on, via the

246. See N.C. GEN. STAT. § 163A-250(a)(17) (2018).

247. *Id.*

248. See *supra* Section I.C.

249. See § 163A-250(a)(17); see also *supra* Section I.C.

250. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984).

251. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

252. See *supra* Section II.A.

253. See sources cited *supra* note 10.

254. See *Am. Civil Liberties Union v. White*, No. 09 C 7706, 2009 WL 5166231, at *4–5 (N.D. Ill. Dec. 23, 2009) [hereinafter *White I*]; see also *Am. Civil Liberties Union v. White*, 692 F. Supp. 2d 986, 994 (N.D. Ill. 2010) [hereinafter *White II*] (ruling that the lobbying law in Illinois violated the First Amendment by charging lobbyists more than was required to operate the registration process). Under this ruling, the court declined to address whether the religious exemption was a violation of the First Amendment because the law was already found to be unconstitutional for less pervasive reasons. *Id.*

255. See *White I*, 2009 WL 5166231, at *4.

endorsement test, whether religious exemptions were a violation of the Establishment Clause.²⁵⁶ To date, the law still has a religious exemption.²⁵⁷ Thus, no court has ever ruled on the constitutionality of a religious exemption to a lobbying code. However, under the endorsement test, any of the laws containing religious exemptions would not likely be upheld.²⁵⁸

C. *Laws with No Mention of Religion*

Forty-one states have lobbying codes with no mention of religious activity.²⁵⁹ While those states may have some problems in their lobbying codes,²⁶⁰ these issues are outside the scope of this Note. States included in Subparts A and B of Part II should consider modeling their lobbying regulations after the states included in this Section to avoid any First Amendment violations. Specifically, states looking to provide exemptions for certain groups should look to Connecticut for guidance on how to encompass group communication and transportation in their laws.²⁶¹ Although Connecticut arrived at this solution the wrong way,²⁶² it is the best statutory solution to the issues this Note addresses.

III. REMEDYING THE LOBBYING DISPARITY

The solution that could best solve the issue of regulation for religious lobbyists would be to treat all lobbyists equally under the law. The application of this idea, however, may present complications. There are serious issues to consider regarding a facially neutral law in its application to religious lobbyists.²⁶³ These issues include not only constitutional

256. Cf. *White II*, 692 F. Supp. at 993. The court does not go into detail on how they would evaluate the claim of an establishment clause violation, but they do decline to rule on the issue in favor of “judicial economy.” See *id.*

257. See 25 ILL. COMP. STAT. 170/3 (A)(7) (2018).

258. See *Lemon v. Kurtzman*, 403 U.S. 602, 613–14 (1971) (ruling that laws creating “an excessive government entanglement with religion” should be found unconstitutional (quoting *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 674 (1970))); see also *supra* Section I.C.

259. See sources cited *supra* note 31.

260. See *supra* Section II.B (discussing neutral grassroots lobbying provisions); see also Mayer, *supra* note 35, at 561.

261. See CONN. GEN. STAT. ANN. § 1-91(6) (2018) (exempting some expenditures for all organizations rather than exempting religious activity).

262. See *supra* Section I.D (arguing that the catalyst for this legislative change in Connecticut was, at best, a clever political strategy by a senate hopeful).

263. See *supra* Sections II.A–B; see also *Washington v. Davis*, 426 U.S. 229, 241–42 (holding that discriminatory intent must be demonstrated in order for a law to be deemed facially neutral).

concerns, such as whether the suggested regulation will chill religious speech,²⁶⁴ but also the deeply complex challenge of motivating lawmakers to change an unknown, but likely strongly supported, law.²⁶⁵

First, in addressing the complexity of reworking several states' lobbying rules, it is important to emphasize that this is not a call for a federal standard on lobbying that applies across all fifty states. The federal government can treat lobbying however it desires. States have inherent knowledge of what their needs are as well as what works best in their state. That said, some uniformity in this regard would be preferential.²⁶⁶ While there are unique differences across the country's many lobbying regulations, most of them make no mention of religious activity at all.²⁶⁷ This is the ideal way to deal with religious lobbyists; regulating them identically to their secular counterparts.²⁶⁸

Critics of this idea argue that lobbying registration and disclosure create an undue burden on religious bodies, thus chilling their free speech.²⁶⁹ However, that is not the case. Under the chilling effect doctrine, there must be an actual chilling before courts will apply the strict scrutiny standard to evaluate whether the chilling is permissible.²⁷⁰ A chilling exists when the law interferes with, or prevents, engagement in protected expression.²⁷¹ Lobbying is inherently political speech, which is protected by the First Amendment.²⁷² The Court has upheld lobbying regulations as permissible.²⁷³ Therefore, claiming that regulation on religious lobbyists creates a chilling of protected speech, but that lobbying

264. *See supra* Section II.C.1.

265. *See supra* Section I.B.

266. *See Overview, supra* note 7 (explaining that each state has a unique lobbying law with key differences).

267. *See generally States Define Lobbying, supra* note 6.

268. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (holding that regulating religious and non-religious lobbyists equally would avoid a constitutional challenge under the “*Lemon Test*” or other parts of First Amendment jurisprudence); *see also supra* Section I.C.

269. Complaint, *supra* note 141, ¶ 9 (arguing that a registration and reporting requirement in the lobbying code, when applied to the church, chilled protected speech).

270. *See supra* Section I.C.

271. *See Eric Lardiere, The Justiciability and Constitutionality of Political Intelligence Gathering*, 30 U.C.L.A. L. REV. 976, 984–87 (1983) (noting that courts have applied the chilling effect doctrine to government surveillance as well as prohibitive state action when it interferes with or prohibits political engagement).

272. *E.g., Texas v. Johnson*, 491 U.S. 397, 419–20 (1989).

273. *See Regan v. Taxation with Representation*, 461 U.S. 540, 551 (1983) (holding that lobbying regulations do not violate the First Amendment).

regulations in general do not, is problematic because this favoritism creates an endorsement of religious speech.²⁷⁴

Admittedly, religious organizations would likely have the most complex issues in determining what their ordinary course of business is and what constitutes an effort to influence legislative or executive action.²⁷⁵ That is, religious organizations spend a considerable amount of time discussing social problems.²⁷⁶ There is certainly some overlap with topics of a political connotation and, thus, under the law, some difficult questions concerning what does and does not constitute lobbying.²⁷⁷ The church's argument accurately points out that the effort it would take to determine if every message to congregants was in fact lobbying would be crippling. Therefore, states should adapt their lobbying codes to exempt communication with the groups' own members, like the Connecticut Code of Ethics for Lobbyists.²⁷⁸ Connecticut's Code of Ethics exempts "any expenditure made by any club, committee, partnership, organization, business, union, association or corporation for the purpose of publishing a newsletter or other release intended primarily for its members, shareholders or employees, whether in written or electronic form or made orally during a regularly noticed meeting."²⁷⁹

If states were to adopt this type of language in their lobbying codes, while removing the explicit religious exemptions, they could equalize the playing field with regard to lobbying without creating an undue burden on religious groups.²⁸⁰ Even though a ruling based on the chilling effect

274. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995).

275. See *Complaint*, *supra* note 141, ¶¶ 8–9 (stating that there are actions that were both part of the church's moral duty and required to be reported by the State Code of Ethics).

276. *Id.* ¶ 10.

[F]rom time to time, the Diocese's religious mission compels it, the Bishop of the Diocese, and pastors within the Diocese to take stands on legislation that concerns the moral issues of the day and to urge parishioners to act on the basis of Church teachings. The Diocese communicates these messages to its parishioners through its website, in newsletters, at religious services, and through a variety of other means.

Id.

277. See *id.* ¶¶ 8–9 (noting that the Church is compelled to take moral action, which may also have a political connotation).

278. CONN. GEN. STAT. ANN. § 1-91(6) (2018) (exempting certain activities from being considered an expenditure under the lobbying code, rather than exempting certain groups).

279. *Id.*

280. See *id.* The statute allows exemptions for any group communicating with its members and for the transportation of its members. This allows religious groups—as well as non-religious groups—protection from infringement on their daily communications with members.

doctrine should determine that standard, lobbying disclosure requirements would not chill the political speech of religious groups.²⁸¹ This type of amendment would help prevent the issue even more. Doing so would provide religious groups—as well as non-religious groups—the ability to send messages to their members without it being considered a reportable expenditure under the lobbying code.²⁸² This is favorable to these groups as well as the state because it would lighten the necessity for oversight in certain aspects of weekly meetings or members-only communication. Such an application of the law ideally mitigates the chilling concerns, while maintaining a strong enough regulatory presence to provide the necessary amount of transparency to voters.

Critics would also cite the overbreadth doctrine as a claim against an ethics body's ability to apply regulations to religious organizations.²⁸³ This argument is erroneous, however, because under the "First Amendment overbreadth doctrine, a statute is facially invalid *if it prohibits a substantial amount of protected speech*. The doctrine seeks to strike a balance between competing social costs."²⁸⁴ In weighing the social costs of freedom of expression compared with government transparency, the state should weigh the actual cost of each.²⁸⁵ To illustrate, each state should evaluate the amount of protected speech their lobbying disclosure requirement would prohibit. Each state should arrive at the same conclusion: lobbying disclosures do not prohibit speech.²⁸⁶ Using Connecticut as an example, lobbying registration and disclosure are not based on the content of the speech, but rather the intent of the action.²⁸⁷

The overbreadth doctrine is not disturbed by looking to the intent of the speaker and requiring a minimal fee and a comprehensive disclosure standard.²⁸⁸ Application of the overbreadth doctrine is only triggered when a substantial amount of protected speech is prohibited.²⁸⁹ Thus, this

281. *See supra* Section I.C.1.

282. *See* § 1-91(6).

283. *E.g.*, Opinion Letter, *supra* note 140.

284. *United States v. Williams*, 553 U.S. 285, 292 (2008) (emphasis added).

285. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521 (1993) ("It must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.").

286. *See Regan v. Taxation with Representation*, 461 U.S. 540, 550–51 (1983) (holding that lobbying disclosure requirements do not violate the First Amendment).

287. *See Conn. St. Ethics Comm'n*, *supra* note 133.

288. *Williams*, 553 U.S. at 292 (explaining that a law is unconstitutional under the overbreadth doctrine when it "prohibits a substantial amount of protected speech").

289. *See id.*

argument regarding the overbreadth doctrine by critics fails the test of legal application.

Ideally, in a world where lobbyists are spending millions of dollars annually,²⁹⁰ states would have identical laws that regulate lobbying, which would avoid creating unnecessary confusion and overburdening protected speech.²⁹¹ However, because of the complexities of the American system of federalism and the individualized needs of each state, no two lobbying laws are identical.²⁹² While this creates ambiguity across the board for lobbyists seeking to lobby in more than one state, it is likely not going to be fixed by any simple solution. Lobbying codes must allow protected speech and they must balance this idea with transparency.²⁹³

It therefore follows that the ideal solution is for states to adjust their lobbying codes to include language that allows for the regulation of religious lobbyists, while maintaining their own specialized needs and refraining from overburdening protected speech.²⁹⁴ Facially neutral laws that treat religious and non-religious lobbyists equally are the ideal way to remedy this problem.²⁹⁵ Accordingly, states should amend their lobbying

290. See *Top Spenders*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/top.php?showYear=2017&indexType=s> [<https://perma.cc/RS3F-L2JZ>].

291. See Craig Holman & William Luneburg, *Lobbying and Transparency: A Comparative Analysis of Regulatory Reform*, 1 INT. GROUPS & ADVOC. 75, 75–76 (2012).

292. See *Lobbyist Registration Requirements*, NCSL (Oct. 30, 2018), <http://www.ncsl.org/research/ethics/50-state-chart-lobbyist-registration-requirements.aspx> [<https://perma.cc/A9HZ-34EG>].

293. See Charles Krauthammer, *In Defense of Lobbying*, WASH. POST (Feb. 29, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/28/AR2008022803232.html> [<https://perma.cc/T4KR-EXLZ>] (arguing that the First Amendment protects the right to lobby).

294. See CONN. GEN. STAT. ANN. § 1-91(6) (2018).

“Expenditure” does not include (A) the payment of a registrant’s fee pursuant to section 1-95, (B) any expenditure made by any club, committee, partnership, organization, business, union, association or corporation for the purpose of publishing a newsletter or other release intended primarily for its members, shareholders or employees, whether in written or electronic form or made orally during a regularly noticed meeting, (C) any expenditure made by any club, committee, partnership, organization, business, union, association or corporation for the purpose of transporting its members, shareholders or employees to or from a specific site, where such members, shareholders or employees received no other compensation or reimbursement for lobbying from such club, committee, partnership, organization, business, union, association or corporation, or (D) contributions, membership dues or other fees paid to associations, nonstock corporations or tax-exempt organizations under Section 501(c) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as from time to time amended.

Id. (citation omitted).

295. See *supra* Part II.

codes to remove any language specifically exempting religious organizations from filing on any grounds and instead adopt a more neutral policy such as the exemption in Connecticut.²⁹⁶ This type of exemption necessarily allows for protected religious expression while still providing adequate transparency for voters.

CONCLUSION

Just as the Paleolithic painters transcribed “The Sorcerer,” religious lobbyists are channeling their perception of the divine. They are acting on their beliefs, and as such, their view of God’s desires.²⁹⁷ This inherently personal part of their lives is extremely important and should be valued by society. Our protection of free speech and religious activity is crucial.²⁹⁸

However, this does not inherently forgo the need for transparency in government. Although many states have acted to create broad lobbying exemptions for religious activity in defense of the First Amendment, what these states have done is create an intrinsic violation therein.²⁹⁹ This violation can be remedied without a complete overhaul of the lobbying process. States should regulate lobbyists on an equal playing field.³⁰⁰

This equality will allow voters to have accurate information regarding who is influencing their government, and it will give religious groups enough leeway to openly practice their faiths with their own members in any way they deem fit, without running afoul the lobbying rules. Such equality will also serve as a benefit to lawmakers applying philosophies of political survival as a tool to gauge their constituents’ desires. Ultimately, a reform of lobbying regulations will allow everyone to get a piece of the political pie, but also to see how much pie their neighbor has taken for themselves.

296. See *supra* note 294 and accompanying text.

297. See ASLAN, *supra* note 59, at xii; see also *supra* Section I.A (exploring the evolution of human thought on God).

298. See U.S. CONST. amend. I.

299. See *supra* Sections II.A–B.

300. See, e.g., CONN. GEN. STAT. ANN. § 1-91(6) (2018) (exempting intra-organization communication from qualifying as a lobbying expenditure, regardless of the group).