The Johnson Amendment After *Catholic Charities*: The Return of *Larson v. Valente* Strict Scrutiny

by Christopher Cokinos[*]

The Supreme Court's decision in Larson v. Valente *established that laws creating explicit preferences among religious denominations must be analyzed under strict scrutiny for Establishment Clause violations. For more than four decades after* Larson *was handed down, the Court left many questions open as to what an explicit denominational preference was and whether* Larson *strict scrutiny was even a viable test. However, following* Catholic Charities v. Wisconsin Labor and Industrial Review Commission, *where the Supreme Court used the* Larson *strict scrutiny analysis as the core of its decision, the vitality of* Larson *is clear. With this newfound life, both the government and religious organizations are hoping to strike down the Johnson Amendment: a ban on direct political participation by 501(c)(3) organizations, including churches. This Contribution argues that such a challenge to the Johnson Amendment does not fit within the* Larson *doctrine, since, although* Larson *is rather unclear in its applicability and whether strict scrutiny is the operative test, the Johnson Amendment is not a denominational preference as contemplated by the relatively thin* Larson *body of case law.*

In August of 2024, the National Religious Broadcasters ("NRB") filed suit against the Internal Revenue Service ("IRS") in an attempt to overturn the Johnson Amendment:[1] a provision of the tax code that prohibits all 501(c)(3) tax-exempt organizations from directly engaging in "any political campaign on behalf of (or

---

[*] Christopher Cokinos is a J.D. Candidate (2027) at New York University School of Law. This Contribution is a commentary on the problem at the 2026 William B. Spong, Jr. Moot Court Tournament hosted by William & Mary Law School. One of the questions presented was whether the Johnson Amendment violates the Establishment Clause. This Contribution distills one doctrine used in that argument and presents the argument for Constitutionality under that doctrine. The views expressed herein do not necessarily represent the author's views.

[1] Complaint ¶¶ 101–43, Nat'l Religious Broads. v. Bessent, No. 6:24-cv-00311 (E.D. Tex. Aug. 28, 2024), ECF No. 1.

in opposition to) any candidate for public office."[2] As all churches are automatically tax-exempt 501(c)(3) organizations without the need for recognition by the IRS,[3] the NRB alleged in its lawsuit that the Johnson Amendment unconstitutionally restricted the free speech and free exercise rights of churches.[4] However, the parties seemed to have resolved the suit a year later, when both the NRB and IRS filed a Joint Motion for Entry of a Consent Judgment declaring that the Johnson Amendment would not be enforced against religious institutions to avoid a potential Establishment Clause issue.[5] Ultimately, the case was dismissed for lack of subject matter jurisdiction, with the possibility for future challenges left open.[6] However, the question still remains: What changed from the initial filing of the suit to the Consent Judgment that prompted both sides to recognize the potential unconstitutionality of the Johnson Amendment as applied to religious institutions under the Establishment Clause when no such challenge was originally brought?

The answer: the Supreme Court decided *Catholic Charities, Inc. v. Wisconsin Labor and Industrial Review Commission* in June of 2025, striking down a statute that required tax-exempt religious charities to use their charitable work for primarily religious purposes, defined as proselytization or only serving members of their own denomination.[7] In so doing, the Court revived a little-used Establishment Clause doctrine originating from *Larson v. Valente* in 1982.[8] In *Larson*, the Court held that laws and other governmental actions that create denominational preferences among different religions would be subject to strict scrutiny to determine

---

[2] 26 U.S.C. § 501(c)(3).
[3] 26 U.S.C. § 508(c)(1)(A).
[4] Complaint ¶¶ 101–06, 112–24, *Nat'l Religious Broads.*, No. 6:24-cv-00311, ECF No. 1. The NRB also filed a Due Process challenge for vagueness and a challenge under the Religious Freedom Restoration Act. Complaint ¶¶ 107–11, 125–36, *Nat'l Religious Broads.*, No. 6:24-cv-00311, ECF No. 1.
[5] Joint Motion for Entry of Consent Judgment ¶ 9, *Nat'l Religious Broads.*, No. 6:24-cv-00311, ECF No. 35.
[6] Order Dismissing the Case at 9, *Nat'l Religious Broads.*, No. 6:24-cv-00311, ECF No. 106.
[7] Catholic Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n, 605 U.S. 238, 241 (2025).
[8] *Id.* at 247–48.

whether an Establishment Clause violation had occurred.[9] When the Court decided *Catholic Charities* more than forty years later, it both applied *Larson* strict scrutiny and struck down a law under that analysis for the first time since *Larson* was decided.[10] This revival of the *Larson* doctrine via *Catholic Charities* invited renewed attention to the strict scrutiny framework governing denominational preferences.

Citing *Catholic Charities* and *Larson* as their principal authorities, the NRB and the IRS contended that the Johnson Amendment created an unconstitutional denominational preference by favoring religious organizations whose doctrines do not require political engagement over those whose doctrines do.[11] However, even though *Catholic Charities* gave renewed attention to *Larson* strict scrutiny, *Catholic Charities* does little to actually alter the original *Larson* doctrine, making it unlikely the NRB could win under such a theory. As such, the aspects of the *Larson* doctrine that are reasonably settled suggest that the IRS and the NRB are incorrect in claiming that the Johnson Amendment constitutes an unconstitutional denominational preference. The constitutionality specifically under *Larson* stems from the fact that the Johnson Amendment is a neutral law that applies to both secular and religious 501(c)(3) organizations; its disparate impacts on religious groups who require political involvement do not constitute denominational discrimination; and *Catholic Charities* does nothing to radically change the original *Larson* doctrine outside of reviving the *Larson* test.

First, the main reason the NRB and the IRS are incorrect is that the Johnson Amendment's prohibition on political campaigning is not a denominational preference since the Johnson Amendment applies to both secular and religious groups. The text of 26 U.S.C. § 501(c)(3) is clear and expansive in what sorts of groups can qualify for tax-exempt status as long as, among other things, they do not directly involve themselves in political activities: "Corporations, and any community chest, fund, or foundation, organized

[9] Larson v. Valente, 456 U.S. 228, 246 (1982).
[10] *Catholic Charities*, 605 U.S. at 250.
[11] Joint Motion for Entry of Consent Judgment ¶ 9, *Nat'l Religious Broads.*, No. 6:24-cv-00311, ECF No. 35.

and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . ."[12]

It is this broad applicability across both secular and religious institutions that clearly exempts the Johnson Amendment from strict scrutiny, as both *Larson* and *Catholic Charities* dealt with laws that were only applicable to religious groups. In *Larson v. Valente*, the Court struck down a Minnesota law respecting the registration and disclosure requirements of charitable organizations.[13] The principal issue with the law was that it originally contained an exemption for all religious organizations, but it was amended in 1978 to only exempt religious groups that received more than half of their total contributions from members or affiliated groups.[14] This rule only applied to religious organizations; secular groups could not apply for the exemption.[15] In deciding that this law was a denominational preference created by the government, the Court noted that the "fifty per cent rule" placed on exemptions "effectively distinguishes between well-established churches that have achieved strong but not total financial support from their members, on the one hand, and churches which are new and lacking in a constituency" on the other.[16] In noting this preferential treatment, the Court made clear the challenged law on its face "focuses precisely and solely upon religious organizations," meaning strict scrutiny needed to be applied.[17]

Similarly, in *Catholic Charities*, the Court examined a state law that exempted religious charities from paying unemployment taxes only if they were operated for religious purposes, which the Wisconsin Supreme Court interpreted to mean that the charity had to principally do "religious outreach" to qualify for the tax exemption.[18] However, Catholic Charities could not proselytize through their work, as their religious doctrine explicitly forbids

[12] 26 U.S.C. § 501(c)(3).
[13] *Larson*, 456 U.S. at 230–32, 255.
[14] *Id.* at 231–32.
[15] *Id.*
[16] *Id.* at 246, 246 n.23 (internal quotation omitted).
[17] *Id.* at 246 n.23.
[18] *Catholic Charities*, 605 U.S. at 245.

charity being used for proselytism.[19] Thus, the Court found that the differential treatment of faiths that proselytize via charity and those that do not for the purposes of tax-exempt status is an explicit denominational preference.[20]

The Court's foundational understanding of the *Larson* test does not support application of strict scrutiny to the Johnson Amendment. The Amendment itself does not make the sort of denominational preference for well-established churches that the law in *Larson* did,[21] nor is the Amendment akin to the preference in *Catholic Charities* for religious groups that use charity for religious outreach.[22] In fact, the Johnson Amendment fails to even explicitly name religious organizational spending on politics as the problem since the Johnson Amendment itself deals with all 501(c)(3) tax-exempt organizations as opposed to just the religious subsection of 501(c)(3).[23] This clearly differs from both *Catholic Charities* and *Larson*, as both of those cases dealt with benefits delineations solely applied to religious groups.[24] Based on these two cases—the cases cited by the NRB and the IRS—*Larson* strict scrutiny should not apply to the Johnson Amendment.

Second, even if religious groups were to claim that the Johnson Amendment prohibits them from practicing their faith, as is their right,[25] the effect that the Johnson Amendment would have on them in revoking their tax-exempt status would still not trigger *Larson* strict scrutiny. *Larson* itself noted that strict scrutiny does not apply to "disparate impact" cases where a facially neutral law negatively impacts some religious groups more than others.[26] Further, the Court clarified that disparate impacts are not

---

[19] *Id.* at 249.
[20] *Id.* at 250.
[21] *See Larson*, 456 U.S. at 246 n.23.
[22] *See Catholic Charities*, 605 U.S. at 245.
[23] 26 U.S.C. § 501(c)(3).
[24] *See Catholic Charities*, 605 U.S. at 245 (2025); *Larson*, 456 U.S. at 230–231.
[25] *See* U.S. v. Ballard, 322 U.S. 78, 88 (1944) (holding that the Courts cannot adjudicate the existence and nature of religious beliefs outside of the question of their sincerely held nature).
[26] *Larson*, 456 U.S. at 246 n.23; *see* McGowan v. Md., 366 U.S. 420, 442 (1961) ("However, it is equally true that the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.").

considered under the *Larson* test in the most analogous fact pattern to the Johnson challenge: *Hernandez v. C.I.R.*[27] There, the Court gave its clearest definition of the difference between explicit denominational preferences and disparate impacts on religion when analyzing the constitutionality of the tax deductibility of gifts to religious institutions.[28]

In *Hernandez*, the Church of Scientology challenged the fact that its believers were not entitled to tax deductible status under 26 U.S.C. § 170 as a result of their "fixed donation" to the church, through which they would gain access to the spiritual "auditing" process required of adherents of the faith.[29] The Church maintained that the donation and auditing process was religiously required under the "doctrine of exchange," where anytime something is paid, something must also be received, in order to prevent spiritual decline.[30] When the IRS determined that such transactions would not be tax deductible, since they fall along the lines of a quid pro quo as opposed to a gift in consideration of nothing else, the Church challenged that decision, arguing that the classification was an "unconstitutional denominational preference by according disproportionately harsh tax status to those religions that raise funds by imposing fixed costs for participation in certain religious practices."[31] The Court disagreed, however, holding that there was no explicit discrimination since § 170 applies equally to all religious institutions, unlike the provision in *Larson* which differentiated facially between different religions.[32] Since nothing in § 170 specifically called out religious groups or specified rules for which religious groups could and could not receive gifts, the provision was more akin to what *Larson* describes as a neutral law that has a disparate impact on some religions.[33] As § 170 was neutral and just happened to burden Scientologists more due to their religious doctrine, it did not constitute an explicit denominational preference.[34] Thus, the line drawn by the Court in

[27] Hernandez v. C.I.R., 490 U.S. 680, 695 (1989).
[28] *See id.*
[29] *Id.* at 683–85.
[30] *Id.* at 685.
[31] *Id.* at 695.
[32] *Id.* at 695–96.
[33] *Larson*, 456 U.S. at 246 n.23.
[34] *Hernandez*, 490 U.S. at 695–96; *see Larson*, 456 U.S. at 246 n.23.

Larson and its progeny is the difference between the government creating a religious classification and the government adopting a facially neutral rule that harms some religions more than others—the former triggers strict scrutiny, but the latter does not.

Hernandez is the most on point case for the Johnson Amendment challenge, as both are disparate impact cases which do not trigger strict scrutiny under the *Larson* doctrine.[35] In *Hernandez*, the quid pro quo exclusion of the gift tax deduction in § 170 certainly imposed a "disparate burden on . . . religious groups that rely on sales of commodities or services as a means of fund-raising," but such requirements that merely "happen[] to coincide or harmonize with the tenets of some or all religions" are not explicit denominational preferences.[36] While it is the NRB's contention that "the exercise of their religious beliefs includes teaching or instructing their congregations regarding all aspects of life, including guidance concerning the impact of faith on the choices inherent in electoral politics,"[37] the Johnson Amendment's requirements make no specific reference to religious organizations at all, merely happening to coincide with the tenets of some religions instead of specifically targeting those religions.[38] Indeed, the Johnson Amendment applies to all organizations that enjoy 501(c)(3) tax-exempt status, regardless of whether they are religious or secular,[39] whereas those statutes and interpretations found to trigger strict scrutiny specifically drew denominational lines between different religions.[40] As both § 170 in *Hernandez* and the Johnson Amendment apply to all organizations within their respective statutory schemes, and the only differential treatment derives from the disparate impact of a neutral law, the Johnson Amendment is not an explicit denominational preference

---

[35] *Hernandez*, 490 U.S. at 695–96.
[36] *Id.* at 696.
[37] Joint Motion for Entry of Consent Judgment ¶ 9, *Nat'l Religious Broads.*, No. 6:24-cv-00311, ECF No. 35.
[38] 26 U.S.C. § 501(c)(3); *See Hernandez*, 490 U.S. at 695–96 (holding that requirements that coincide with religious tenets are not Establishment Clause violations).
[39] 26 U.S.C. § 501(c)(3).
[40] *See Larson*, 456 U.S. at 246–47 (applying strict scrutiny to the fifty percent rule that applied specifically to religious organizations alone); *Catholic Charities*, 605 U.S. at 252 (applying strict scrutiny to proselytization requirement that applied specifically to religious charitable exemptions).

akin to those in *Larson* and *Catholic Charities*, and therefore does not trigger strict scrutiny.[41]

Third, a diluted *Larson* test, which seemingly provides the strongest support for the Johnson Amendment's unconstitutionality, does not apply because Johnson is facially neutral. The NRB and the IRS still had some reason to believe that the Johnson Amendment was unconstitutional under *Larson*, and the best argument for the unconstitutionality of the Johnson Amendment stems from a widespread lack of clarity about the *Larson* doctrine and its alternative form: the diluted *Larson* test. This confusion is best illustrated by the parties' abrupt change in legal theory. Before *Catholic Charities* was decided, the NRB did not bring an Establishment Clause claim against the Johnson Amendment.[42] However, following the decision in June of 2025, both the NRB and the IRS agreed that the Johnson Amendment was an unconstitutional denominational preference under both *Larson* and *Catholic Charities*.[43] The parties' sudden embrace of an initially absent Establishment Clause challenge would typically suggest a change in the doctrine. Yet, *Catholic Charities* neither announced a new doctrinal rule nor meaningfully altered the *Larson* test. Both cases dealt with a delineation created by the government for benefits that applied solely to religious groups, both were found to trigger strict scrutiny, and both were struck down.[44]

As such, the change in legal theory suggests a deeper confusion as to when and how the doctrine applies. This confusion stems from two sources: limited use of the doctrine and dilution of the doctrine. Before *Catholic Charities* was decided, *Larson* was the only Supreme Court case that had found a law to be an explicit

---

[41] *Hernandez*, 490 U.S. at 695 ("Unlike the Minnesota statute at issue in Larson . . . § 170 makes no explicit and deliberate distinctions between different religious organizations." (internal quotation omitted)).
[42] Complaint ¶¶ 101–43, *Nat'l Religious Broads.*, No. 6:24-cv-00311, ECF No. 1.
[43] Joint Motion for Entry of Consent Judgment ¶ 9, *Nat'l Religious Broads.*, No. 6:24-cv-00311, ECF No. 35.
[44] *See Larson*, 456 U.S. at 231–232, 255 (striking down the governmental differentiation between religious groups for a benefits determination); *Catholic Charities*, 605 U.S. at 252–254 (same).

denominational preference triggering strict scrutiny.[45] The resulting confusion in the legal community necessitated an answer as to when *Larson* strict scrutiny should apply, discouraging litigants like the NRB from citing to the *Larson* test prior to *Catholic Charities*.[46] However, while *Catholic Charities* gave the encouragement needed that the *Larson* doctrine is still operative, the 43-year gap between *Larson* and *Catholic Charities* also saw the Supreme Court ceasing to cite *Larson* as a standalone test where strict scrutiny can apply. This is the second problem: the dilution of the *Larson* doctrine. Starting in 1993, the Court began citing *Larson* merely for the concept that "differential treatment of two religions is itself an independent constitutional violation."[47] While technically correct, the Court failed to engage further with

---

[45] *See Larson*, 456 U.S. at 246–47; Lynch v. Donnelly, 465 U.S. 668, 687 n.13 (1984) (rejecting the application of *Larson* strict scrutiny); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339 (1987) (same); Bowen v. Kendrick, 487 U.S. 589, 598 n.5 (1988) (same); *Hernandez*, 490 U.S. at 695–96 (same); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 536 (1993) (discussing *Larson*'s requirement of neutrality without application of strict scrutiny); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994) (finding an Establishment Clause violation via *Larson* but not applying strict scrutiny); Trump v. Hawaii, 585 U.S. 667, 699, 705 (2018) (applying rational basis review for the Establishment Clause challenge); Morris Cnty. Bd. of Chosen Freeholders v. Freedom From Religion Found., 586 U.S. 1213, 1213 (2019) (denying certiorari while recognizing the case may implicate denominational preference under *Larson*); Carson v. Makin, 596 U.S. 767, 787 (2022) (finding that scrutinizing difference between status-based discrimination and use-based discrimination could implicate denominational favoritism under *Larson* but does not go as far as to apply strict scrutiny).

[46] *See, e.g.*, Jeremy Patrick-Justice, *Strict Scrutiny for Denominational Preferences:* Larson *in Retrospect*, 8 CUNY L. REV. 53, 56 (2005) (". . . the meaning and correct application of [*Larson*] are still unclear over twenty years after it was decided."); Enid Trucios-Haynes, *Religion and the Immigration and Nationality Act: Using Old Saws on New Bones*, 9 GEO. IMMIGR. L. J. 1, 44 (1995) ("The Court did not set forth any guiding criteria to find a denominational preference . . . ."); Joshua D. Zarrow, *Of Crosses and Creches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 AM. U. L. REV. 477, 489-90 (1986) ("Although the *Larson* decision appears to create a stricter establishment clause review, it further obfuscates the application of establishment clause analysis.") (footnote omitted); Nancy Blyth Hersman, Note, Lynch v. Donnelly*: Has the* Lemon *Test Soured?*, 19 LOY. L.A. L. REV. 133, 164 (1986) ("[T]here is confusion in the courts as to when to use the *Lemon* or strict scrutiny tests[.]").

[47] *Lukumi Babalu Aye*, 508 U.S. at 536.

Larson to determine how explicit differential treatment must be for *Larson* strict scrutiny to apply.

This is what I refer to as the "diluted" version of the *Larson* test, where merely stating that there is a differential treatment is enough to strike down a law without discussion of the explicit nature of the preference, disparate impacts, or strict scrutiny as the vehicle for striking down the law. Whereas the original *Larson* test explicitly requires a denominational preference that goes beyond a mere disparate impact on religion,[48] the diluted *Larson* test lacks such an explicit requirement as to when it would apply.

The diluted version was enunciated most clearly in the 1994 case *Board of Education of Kiryas Joel Village School District v. Grumet*. In *Kiryas Joel*, when dealing with the constitutionality of a Jewish religious community having its own public school district to serve special needs children, the Court determined that the school district created a benefit that "flows only to a single sect."[49] Such a benefit did not honor "neutrality as among religions," and thus violated the Establishment Clause.[50] To support this conclusion, the Court cited one case: *Larson*.[51] However, the mere recognition that *Larson* stood for neutrality among religions was all the Court found necessary to strike down the grant of power in *Kiryas Joel*—there was no mention of explicit denominational preference, disparate impacts, or the application of strict scrutiny in the opinion at all.[52] Thus, using *Larson* as the key case for the Establishment Clause issue in *Kiryas Joel* indicated that the Court was willing to use the theoretical backbone of *Larson* without using the strict scrutiny test associated with *Larson* or fully engaging with the difference between an explicit preference and a disparate impact.

Indeed, following *Kiryas Joel*, the legal community began recognizing that the case was a stark dilution of the original *Larson*

---

[48] *See Larson*, 456 U.S. at 246 n.23 (finding the statute in question was "not simply a facially neutral statute, the provision of which happen to have a 'disparate impact' upon different religious organizations").
[49] *Kiryas Joel*, 512 U.S. at 705.
[50] *Id.* at 690, 706–07.
[51] *Id.* at 706–07 (citing *Larson*, 456 U.S. at 244–46).
[52] *See id.* at 704–07.

doctrine: "*Kiryas Joel*, although not an unambiguous case, seems to indicate that a law simply favoring one religion by name creates an unconstitutional denominational preference. . . . However, the failure to clearly apply a strict scrutiny test further calls into question the continued validity of the *Larson* test."[53]

Despite the confusion caused by this departure, the Court did not take up a *Larson* Establishment Clause case again until 2018 in *Trump v. Hawaii*, when it applied rational basis review to an Executive Order by President Trump that imposed a 90-day ban on nationals from predominantly Muslim countries entering the United States.[54] The Court again used *Larson* to define "the clearest command of the Establishment Clause" as preventing denominational preferences,[55] but then declined to apply strict scrutiny under *Larson*, much to the confusion of Justices Sotomayor and Ginsburg in dissent.[56] While *Trump v. Hawaii* seems rather narrowly tailored to immigration and national security cases,[57] it did little to decrease the lack of clarity surrounding how *Larson* works in the twenty-first century. In the few years that followed *Trump v. Hawaii*, though, the Court continued to use the diluted version of *Larson* by not engaging with disparate impacts or strict scrutiny, seemingly indicating the original *Larson* strict scrutiny would be a thing of the past.[58]

It is this diluted *Larson* test that presents the greatest chance for the NRB to be successful in striking down the Johnson

---

[53] Patrick-Justice, *supra* note 46, at 86.
[54] *Trump*, 585 U.S. at 699, 704.
[55] *Id.* at 699 (quoting *Larson*, 456 U.S. at 244).
[56] *See id.* at 741 (Sotomayor, J., dissenting) ("In doing so, however, the Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review." (internal citation omitted)).
[57] *See id.* at 704 (noting that *Mandel*'s standard of review has "particular force" in admission and immigration cases).
[58] *See Morris Cnty. Bd.*, 586 U.S. at 1213 (denying certiorari for further proceedings while indicating that the denial of preservation grants to religious buildings may implicate denominational preference under *Larson*); *Carson*, 596 U.S. at 787 (finding that scrutinizing difference between status-based discrimination and use-based discrimination could implicate denominational favoritism under *Larson*).

Amendment. While it is inherently less likely due to the Consent Judgment's explicit reference to *Catholic Charities*,[59] a case which uses the original *Larson* strict scrutiny test as opposed to the diluted version,[60] there is of course the option for the diluted *Larson* analysis to apply. In theory, the success of the argument that Johnson is unconstitutional under the diluted *Larson* is more likely compared to the stricter, original *Larson* test, as Supreme Court cases that make use of the diluted version make no reference to explicit denominational preferences[61]—the requirement that is the downfall of the Consent Judgment's argument as it relates to the original *Larson* test.

Such a diluted *Larson* argument seems plausible in light of the D.C. Circuit's decision in *Branch Ministries v. Rossotti*.[62] While the court in *Branch Ministries* found that the Johnson Amendment is "viewpoint neutral" in the face of Free Exercise and Free Speech claims, it caveated that holding, saying that its ruling is based on the fact that the Church at hand "does not maintain that a withdrawal from electoral politics would violate its beliefs."[63] Put another way, if the ban on direct political involvement *would* violate religious beliefs, then there is the possibility that the Johnson Amendment would not be viewpoint neutral. And since the Court is not allowed to adjudicate the existence and nature of religious beliefs beyond exploring their sincerely held nature,[64] the Johnson Amendment would preference 501(c)(3) religious organizations that do not have religious beliefs rooted in political participation over those that do require political participation, meeting the requirements to trigger the diluted *Larson* test.

However, there is one major problem with this line of argument: the Court has only applied the *Larson* jurisprudence, in both its

---

59 Joint Motion for Entry of Consent Judgment ¶ 9, *Nat'l Religious Broads.*, No. 6:24-cv-00311, ECF No. 35.

60 *See Catholic Charities*, 605 U.S. at 249–50.

61 *See supra* note 58 and accompanying text.

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

63 *Id.* at 142, 144.

64 *See Ballard*, 322 U.S. at 86–87 ("Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean they can be made suspect before the law.").

original and diluted forms, to facial challenges.[65] As such, delving into whether political participation is a sincerely held religious belief, and whether Johnson discriminates against that belief, goes beyond the bounds of *Larson*. Otherwise, laws and governmental actions with seemingly no mention of religion could trigger strict scrutiny, under the original *Larson* test, or be struck down entirely, under the diluted test, in spite of the fact that *Larson* notes that such "disparate impact" cases should be addressed under the standard Establishment Clause test.[66] Indeed, the standard Establishment Clause test which looks to the "historical practices and understandings" of the Establishment Clause to determine a law's constitutionality is the primary path for these claims, whereas only clear, facial discrimination among religious groups is to be addressed under *Larson*.[67] As both the original and diluted forms of the *Larson* test are limited to facial challenges, the NRB would likely still fail to overturn the Johnson Amendment, which is not explicit in its targeting of religious organizations due to its broad applicability to secular groups.[68]

Even if failure for the NRB is the most likely outcome, the significance of the Joint Consent Judgment lies less in the strength of its challenge under the Establishment Clause and more in what

---

[65] *See Larson*, 456 U.S. at 246 n.23 ("Section 309.515, subd. 1(b), is not simply a facially neutral statute, the provisions of which happen to have a "disparate impact" upon different religious organizations."); *see also Lynch*, 465 U.S. at 687 n.13 (rejecting the application of *Larson* where a statute is not "discriminatory on its face"); *Church of Jesus Christ of Latter-day Saints*, 483 U.S. at 339 (same); *Hernandez*, 490 U.S. at 688 ("Because § 170 created no denominational preference on its face, Hernandez had shown no Establishment Clause violation."); *Kiryas Joel*, 512 U.S. at 701 n.5 (recognizing that the challenge to the religious school district is facial); *Catholic Charities*, 605 U.S. at 251 (" The Wisconsin Supreme Court's interpretation of § 108.02(h)(15)(2) facially differentiates among religions based on theological choices.").

[66] *See Larson*, 456 U.S. at 246 n.23; *McGowan*, 366 U.S. at 442 ("However, it is equally true that the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.").

[67] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 535–36 (2022) (overruling the *Lemon v. Kurtzman* test, 403 U.S. 602 (1971), and establishing in its place the "historical practices and understandings" test); *see Hernandez*, 490 U.S. at 695 (applying the *Lemon* test, 403 U.S. 602 (1971), after and distinct from the *Larson* strict scrutiny test).

[68] 26 U.S.C. § 501(c)(3).

it reveals about the future of *Larson*. By invoking *Larson* and *Catholic Charities*, both the government and religious organizations alike have signaled a new willingness to bring denominational preference claims under a doctrine that commentators once said likely had no real value.[69] Should these claims materialize, the Supreme Court will face further opportunities to clarify the doctrine, better define denominational preferences, and return *Larson* to its previous strength as a strict scrutiny deterrent to religious favoritism by the government.

[69] Patrick-Justice, *supra* note 46, at 121.