THE HUMBLE FORM 990: CHECKING CHARTERS IN A POST-*ESPINOZA* WORLD

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State and federal prohibitions on religiously affiliated charter schools have remained undisturbed since charter schools first emerged in the 1990s. Three recent Supreme Court cases have raised questions about that paradigm. Carson v. Makin*,* Espinoza v. Montana Department of Revenue*, and* Trinity Lutheran Church v. Comer *interpret the Free Exercise Clause as prohibiting states from denying a qualified religious entity a public benefit solely because of its religious character. At first glance, it appears that the practice of granting school charters to secular non-profits while denying such charters to religiously affiliated non-profits violates this principle, rendering these longstanding statutory prohibitions unconstitutional. This Article argues against such an interpretation. Because religious organizations are exempt from the requirement that non-profit organizations file an annual information return — the 990 — with the IRS, religiously affiliated charters would be free from the sole oversight mechanism applicable to charter schools. The 990 is a vital tool in revealing charter school fraud and self-dealing, which has become a real problem with the emergence of "sweep contracts" — arrangements in which charter school operators siphon off public funds to for-profit management companies for personal gain. Religious organizations operating charter schools would have unfettered discretion over public funds. This, in turn, would have the effect of privileging religion over non-religion and placing a governmental function in the hands of a religious organization, which violates the Establishment Clause. Because compliance with the Establishment Clause is a compelling governmental interest, such prohibitions are constitutional. Nonetheless, this Article suggests that expanding the 990 requirement to include religious organizations may be a less burdensome alternative to their continued enforcement.*

INTRODUCTION

Since the first public charter school was launched in Minnesota in 1992,[1] there has been heated debate over whether these publicly funded, privately run schools are positive forces of change in the public-school landscape. Advocates argue that charter schools are not only better alternatives to underperforming public schools, but that their entry into

[1] Stephen D. Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools From Becoming Charter Schools?*, 32 CAMBRIDGE J.L. & RELIGION 227, 237 (2017).

the public education marketplace actually encourages the improvement of traditional public schools.[2] They further argue that when schools are free from the regulations governing curricula, staffing, and budgets to which traditional public schools are subject, there is more room for innovation and creativity.[3] Opponents, on the other hand, argue that charter schools take funding away from traditional public schools, lack accountability to taxpayers and parents, and essentially privatize public schools.[4] In recent years, there has been particular criticism of public charter schools that contract with for-profit management companies.[5] Watchdog groups have found that, in particularly egregious cases, charter school operators funnel nearly all of the public funds the school receives to educate children to these management companies — who then turn a profit by running the schools cheaply.[6] Oftentimes, the management companies are run by the same people who opened the school.[7] In these cases, both the state funding the school and the children attending lose.

Charter school advocates have a simple rebuttal to this criticism: in a movement grounded in school choice, parents have the right and the duty to make informed decisions about which charter schools to send their children to. They argue that schools that contract with for-profit management companies at the expense of children can and *must* be avoided and will inevitably fail as a result as funding is dependent on pupil numbers. This argument relies on the assumption that information about charter school spending is available to the public. Under existing law, this is largely true. Because most charter schools are non-profit organizations, they are required to file annual information returns with the IRS detailing how their money was used that year, including with whom they contracted.[8] But

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[2] Zachary Jason, *The Battle Over Charter Schools,* HARV. ED. MAG. (Jan. 26, 2020), https://www.gse.harvard.edu/news/ed/17/05/battle-over-charter-schools (explaining that the school choice movement stemmed from the idea that market forces, as opposed to the government, should shape public education).

[3] *Id.* (charter schools, which were initially pitched as laboratories to develop curricula and practices for district schools, are viewed by advocates as a superior alternative to traditional public schools because of the room for experimentation that charters allow).

[4] *Id.* (charter school opponents "argued, broadly, that charters pilfer money and students from district schools, aren't held accountable, and privatize public education").

[5] Peter Greene, *How to Profit from Your Nonprofit Charter School,* FORBES (Aug. 18, 2018), https://www.forbes.com/sites/petergreene/2018/08/13/how-to-profit-from-your-non-profit-charter-school/?sh=44d704493354. These contracts, which are known as "sweep contracts," are discussed in depth in Part II, *infra*.

[6] *Id.*

[7] *Id.*

[8] Charter schools, which are generally "corporations . . . organized and operated exclusively for . . . educational purposes," are eligible for tax exempt status under federal law. 26 U.S.C. §§ 501(a), (c)(3). Unless a certain exception applies, any entity claiming exemption under that statute must "file an annual return,

what happens if states begin to allow non-profit organizations that are exempt from the filing requirement, such as religious institutions, to open charter schools? Are those schools then completely free from any oversight or accountability?

This question is not as hypothetical as it may seem at first blush. Taking their cue from recent Supreme Court decisions, certain religious groups have petitioned states for the right to open their own charter schools. These groups have argued that recent Supreme Court precedent in this area commands that where secular organizations are given the ability to open a charter school, the Free Exercise Clause requires that religious groups be given the same opportunity. [9]

But this Article contends that such an argument obscures a fundamental difference between religious groups and secular non-profits — a difference that makes religious groups particularly inapt to run charter schools, secular or religious, and provides the government a compelling interest in prohibiting them from doing so. The ultimate check on a charter school is not state regulation but parents' and interested parties' oversight of various ranking metrics and financial disclosures. However, religious organizations are exempt from the very IRS requirements that force the disclosure underpinning this oversight. By asking the states to countenance this set up, religious organizations are in essence asking the government to treat them more favorably than secular charter schools, thus establishing a new breed of charter schools that are immune from the very oversight that justifies the school choice system in the first place. Whatever the Free Exercise Clause means, it does not require that.

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Since their inception, it has been widely accepted that public charter schools cannot be religious in nature.[10] Indeed, many state and federal statutes take this a step further and prohibit charter schools from having

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stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the internal revenue laws." 26 U.S.C. § 6033(a)(1).

[9] Sarah Mervosh, *Oklahoma Approves First Religious Charter School in the U.S.*, N.Y. TIMES (June 7, 2023), https://www.nytimes.com/2023/06/05/us/oklahoma-first-religious-charter-school-in-the-us.html; Andy Smarick, *The extended case for faith-based charter schools,* THOMAS B. FORDHAM INST. (Apr. 13, 2023), https://fordhaminstitute.org/national/commentary/extended-case-faith-based-charter-schools; *Religious Charter Schools: Legally Possible and Politically Advisable?*, THE MANHATTAN INST. (Aug. 4, 2020), https://manhattan.institute/event/religious-charter-schools-legally-possible-and-politically-advisable.

[10] Sugarman, *supra* note 1, at 242 (noting that all states that currently operate charters schools require that those schools be nonsectarian). Although, as noted above, there have been recent challenges to this proposition. *See* Moriah Balingit, *Oklahoma Catholics could open the door for religious charter schools*, WASH. POST (Mar. 7, 2023), https://www.washingtonpost.com/education/2023/03/07/religious-charter-school-catholic-oklahoma/.

any *affiliation* with religious organizations, regardless of whether they implement a secular curriculum. While these prohibitions have remained undisturbed for as long as the charter laws have been in existence, three recent Supreme Court decisions have threatened to upend this framework and open the door to church-run public schools. These three cases, *Carson v. Makin*, *Espinoza v. Montana Dept. of Revenue,* and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, raise questions about whether prohibitions on nonsecular charter schools violate the Free Exercise Clause of the First Amendment.[11]

Carson v. Makin involved a challenge to a school tuition assistance program in Maine.[12] Under the program, which was enacted to ensure equal access to education for those living in rural areas, parents would designate a school of their choice for their child to attend and then the state would send payments to that school to "defray the cost of tuition" so long as that school was on an "approved" list.[13] While the schools chosen by parents could be private, the state required that all "approved" schools be nonsectarian.[14] The Supreme Court held that this "'nonsectarian' requirement for [Maine's] otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment" because it operated "to identify and exclude otherwise eligible schools on the basis of their religious experience."[15] The *Carson* decision, while significant, largely rehashed the arguments decided in *Espinoza* and *Trinity Lutheran,* the two transformative free exercise school cases of the last decade.[16]

Espinoza involved the constitutionality of a "no-aid" provision in the Montana Constitution as applied to a scholarship program for students to attend private school. In applying the provision, which barred government aid to sectarian schools, the legislature prohibited families from using the scholarships at religious schools. The Supreme Court held that this application of the "no-aid" provision was unconstitutional. Relying on *Trinity Lutheran*, the Court emphasized that under the Free Exercise Clause, a state cannot deny a qualified religious entity a public benefit solely

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[11] *See generally* Andy Smarick, *Religious Charter Schools Will Test Limits of Espinoza Decision*, EDUC. NEXT (Aug. 4, 2020), https://www.educationnext.org/religious-charter-schools-will-test-limits-epinoza-decision/; Chester E. Finn, Jr., *Is it Finally, at Long Last, Time for Religious Charter Schools?*, FORDHAM INST. (July 8, 2020), https://fordhaminstitute.org/national/commentary/it-finally-long-last-time-religious-charter-schools.

[12] *Carson v. Makin*, 142 S. Ct. 1987 (2022).

[13] *Id.* at 1990.

[14] *Id.* at 1991.

[15] *Id.* at 2002.

[16] Indeed, while this article recognizes that *Carson* is the most recent case, because *Espinoza* lays out the groundwork for that decision, this article will rely primarily on that case in its analysis of the charter school issue.

because of its religious character.[17] The Court went on to say that "[a] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[18]

Applying this logic to the religiously affiliated charter school debate would suggest that once states allow for the creation of charter schools, they cannot disqualify organizations that are otherwise eligible simply because of their religious nature. An application of this rule would have dramatic consequences. As noted, many states currently prohibit the creation of religiously affiliated charter schools, and the primary federal statute governing education funding — the Every Student Succeeds Act (ESSA), originally enacted as the Elementary and Secondary Education Act in 1965 — denies grants to any charter schools with religious affiliations. Under such a reading of *Espinoza*, these statutes would be facially unconstitutional.

Such a rote application of *Espinoza* in the charter school context is misguided. While the issues facing religious organizations that wish to create charters may appear similar to those in *Espinoza*, the obstacles surrounding oversight of religiously affiliated charter schools demonstrates that the issues are distinguishable. More specifically, because churches and religious organizations are exempt from the general requirement that non-profit organizations file annual information returns with the IRS, religiously affiliated charters are free from oversight by the primary tool used to monitor how charter schools spend federal and state taxpayer dollars. As a result, extending charter laws to include religious organizations would give them unfettered discretion over public funds and gut a key oversight mechanism: informed parents. Because such a result would put religiously affiliated charter schools in a more favored position than their secular cousins, in violation of the Establishment Clause, the prohibitions on religiously affiliated charter schools are constitutional.

This Article begins by demonstrating that a cursory application of *Espinoza* to charter schools suggests that prohibitions on religiously affiliated charters are facially unconstitutional. It then explores the consequences of such a conclusion by examining what religiously affiliated charter schools would look like in practice, and what benefits they would receive under existing laws. Such an examination illustrates that, due to the existing IRS 990-filing exemptions for churches, when a state extends charter laws to include religious organizations it is, in practice, giving those charters unfettered discretion over public funds and undermining the ability of any interested party to effectively monitor the entity's finances. After first establishing that the 990 exemption is not mandated by the Free Exercise Clause and is therefore subject to the limitations of the

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[17] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2260 (2020) (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017)).

[18] *Id.* at 2261.

Establishment Clause, this Article then argues that this latter clause is implicated in two distinct ways. First, because secular charter schools are *not* free from these oversight mechanisms and are *not* given unfettered discretion over taxpayer dollars, allowing religious organizations to open charter schools would serve to favor religion over non-religion. Such preference is impermissible under the Establishment Clause. Second, because the primary tool used for oversight of these funds would not apply to religious charter schools, they would be required to self-regulate and perform a function that is traditionally left to the IRS. This is, in effect, a delegation of a traditionally governmental power to a religious entity — a practice that is also barred by the Establishment Clause. Because compliance with the Establishment Clause is a compelling interest, state and federal governments are constitutionally permitted to prohibit religious organizations from opening charter schools.

Having demonstrated that these prohibitions are constitutional, this Article nevertheless suggests that there is a less burdensome alternative that Congress should adopt. If Congress extends the 990-filing requirement to religiously affiliated charter schools, it will both alleviate the current burden placed on religious organizations who wish to apply for charters while also ensuring that state and federal governments do not violate the Establishment Clause. Because state and federal governments should always try to minimize the burden on the free exercise of religion to the extent possible, extending the 990 requirement to religiously affiliated charter schools is the obvious solution to the problem presented by *Makin*, *Espinoza*, and *Trinity Lutheran.*

I. APPLYING *ESPINOZA* TO THE CHARTER SCHOOL CONTEXT

This Article is concerned narrowly with religiously affiliated charter schools. It operates under the assumption that the creation of explicitly religious public schools would still constitute impermissible state sponsorship of religion in violation of the Establishment Clause, although there are some groups challenging that premise.[19] While the jurisprudence around neutral state funding of religious organizations has changed considerably over the past four decades, the concept that "the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion"[20] remains unchallenged. In *Espinoza*, the Court recognized that "our history and federal constitutional precedent reflect a deep concern that state funding for religious teaching, by stirring fears of preference or in other ways, might fuel religious discord and division and thereby threaten religious freedom itself."[21] These recent cases suggest that, while the line between state and religion need not be completely

[19] *See* Balingit, *supra* note 10.
[20] Epperson v. State of Ark., 393 U.S. 97, 106 (1968).
[21] *Espinoza*, 140 S. Ct. at 2282 (2020).

separate when it comes to schooling, religious teaching in public schools is still prohibited.

Thus, by "religiously affiliated charter," this Article is referring exclusively to charter schools that are nonsectarian in their teachings but are run or sponsored by non-profit religious organizations.[22]

A. The Progression of the Supreme Court's "No-Aid" Jurisprudence

The Supreme Court's approach to school funding has shifted dramatically over the past half century. In the latter third of the twentieth century, the Court would not have entertained the question of whether states could fund schools run by religious organizations. In the first major school funding case, *Everson v. Board of Education*, the Court noted that states "cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."[23] This separationist approach dominated the late twentieth century but ultimately fell out of favor by the turn of the twenty-first century.[24]

Mitchell v. Helms, a case decided in 2000, was one of the most significant cases marking this transition. In that case, a federal program which provided aid to state and local government agencies, which in turn lent educational materials and equipment to private and public schools, was challenged under the Establishment Clause due to the religious nature of many of the beneficiary schools.[25] In holding that such a program did not violate the Establishment Clause, Justice Thomas noted, "[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."[26] A couple years later, in *Zelman v. Simmons-Harris*, the Court held that a government aid program is not subject to an Establishment Clause challenge "if it is neutral with respect to religion and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools" of their own volition.[27]

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[22] The findings of this piece apply even more forcefully to charter schools operated by religious organizations that are explicitly sectarian in nature. This piece focuses on nonsectarian schools operated by religious organizations because there has not been serious debate that the Constitution permits the state to operate sectarian schools.

[23] Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

[24] *See* Janet R. Decker & Kari A. Carr, *Church-State Entanglement at Religiously Affiliated Charter Schools*, 2015 BYU EDUC. & L.J. 77, 83–4 (2015); Benjamin Siracusa Hillman, *Is There a Place for Religious Charter Schools?*, 118 YALE L.J. 554, 574 (2008).

[25] *Mitchell v. Helms*, 530 U.S. 793, 801 (2000).

[26] *Id.* at 809.

[27] 536 U.S. 639, 640 (2002).

In the course of a decade, these cases, as well as *Bowen v. Roy*[28] and *Agostini v. Felton*[29], transformed Free Exercise and Establishment Clause jurisprudence: the inclusion of religious schools in neutral government aid programs would not violate the Establishment Clause.[30] But this view did not last long. Beginning in 2017, the Supreme Court began its march to take Free Exercise jurisprudence to the logical extreme: it would not just be *permissible* to include religious organizations in neutral government aid programs under the Establishment Clause, but instead it would be *required* as any exclusion would violate the Free Exercise Clause.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer,* the Court found its vehicle to affect this transition.[31] The facts were as follows: Trinity Lutheran, a church in Missouri that ran a preschool and daycare center, applied for a grant distributed by the Missouri Department of Natural Resources pursuant to a program that helped public and private schools, non-profit daycare centers, and other non-profit entities purchase playground equipment.[32] Because of a policy that categorically disqualified churches and other religious organizations from receiving grants, Missouri denied the application. Trinity Lutheran brought suit claiming that the Department's policy violated its rights under the Free Exercise Clause.[33] Siding with the church, the Supreme Court found that the policy was unconstitutional.[34] Writing for the majority, Chief Justice Roberts reasoned that a state cannot deny a religious entity a public benefit solely because of its religious nature.[35]

In *Espinoza v. Montana Department of Revenue,* the Court extended this idea to government-supported educational programs. In that case, the Court concluded that a "no-aid" provision of the Montana State Constitution, which barred government aid to any school controlled by a religious organization, was unconstitutional as applied to a state scholarship program.[36] In 2015, the Montana legislature established a program for students to attend private schools in order to facilitate choice in education. The program granted tax credits to any person who donated to a participating scholarship organization. Those organizations would in turn use the donations to fund scholarships for students to attend private schools.[37] Montana allotted three million dollars annually to fund the tax credits.[38] In order to make sure that the program was in accordance with the "no-

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[28] 476 U.S. 693 (1986).
[29] 521 U.S. 203 (1997).
[30] *See* Hillman, *supra* note 24, at 574.
[31] 582 U.S. 449 (2017).
[32] *Id.* at 454.
[33] *Id.* at 456.
[34] *Id.* at 467.
[35] *Id.*
[36] *Espinoza*, 140 S. Ct. at 2262-63.
[37] *Id.* at 2251.
[38] *Id.*

aid" provision, Montana promulgated Rule 1, which prohibited students from using the scholarships at religious schools.[39] Families hoping to use the scholarships for just that purpose brought suit against the state, arguing that they were being discriminated against on the basis of their religious views and the religious nature of the school they had selected.[40]

Relying on *Trinity Lutheran*, the Court held that excluding religious schools from this scholarship program because of their religious character alone violated free exercise rights.[41] The Court noted that states are not required to fund parochial schools, but as soon as a public benefit is extended to private schools, it must be available to religious schools as well: "[A] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[42] Taken together, *Trinity Lutheran* and *Espinoza* stand for the proposition that government funding cannot be denied to religious entities if they are otherwise eligible, even if those entities are schools. Given the educational focus of these decisions, it was only a matter of time before these disputes bled over into another area of government funding of education: charter schools.[43]

B. Free Exercise Clause Implications of Prohibitions on Church-Run Charter Schools

Charter schools are independently run public schools that operate under a charter negotiated with an authorizer, which is generally either a local school board or a state board of education.[44] The vast majority of charter schools are non-profit organizations, although state laws governing who may apply for a charter vary.[45] Like traditional public schools, charter schools receive money from the state based on the number of students enrolled in the school. They can also receive federal grants under the Charter Schools Program.[46] Unlike traditional public schools, however, there are very few regulations that charter schools must comply with outside of

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[39] *Id.* at 2252.

[40] *Id.*

[41] *Espinoza*, 140 S. Ct. at 2255-56.

[42] *Id*. at 2261.

[43] *See* Balingit, *supra* note 10.

[44] Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools: The Gate-Keeper Function*, 53 ADMIN. L. REV. 869, 870 (2001).

[45] Carol Burris & Darcie Cimarusti, *Chartered for Profit: The Hidden World of Charter Schools Operated for Financial Gain*, Network for Public Education (2021), https://networkforpubliceducation.org/wp-content/uploads/2021/03/Chartered-for-Profit.pdf; *Charter Schools Program*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS., https://publiccharters.org/charter-schools-program/ (last visited Oct.. 30, 2023).

[46] *See* 20 U.S.C. § 7221.

their negotiated charter.[47] As a result, these schools have significantly more autonomy to use state funds as they see fit.

Currently, the federal government and numerous states have restrictions on which organizations can apply for charters or receive funding. Most notably for this Article, many of those restrictions involve religion or religious affiliation. The primary federal education statute, the Elementary and Secondary and Education Act, reauthorized as the Every Student Succeeds Act (ESSA) in 2015, includes a significant funding program for public charter schools, known as the Charter Schools Program.[48] This Program provided $400 million to public charter schools in 2020.[49] However, to be eligible for these federal grants, a recipient must meet the ESSA's definition of "charter school." The statute requires that a charter school be a public school which, among other things, is "nonsectarian in its programs, admissions policies, employment practices, and all other operations, and is not affiliated with a sectarian school or religious institution."[50] Many states also prohibit charter schools from being run by or affiliated with a religious entity.[51] Significantly, of the ten states that have the highest number of charter schools and together account for almost seventy percent of all charter school enrollment in the United States, five expressly prohibit religiously affiliated charter schools, and four prohibit a charter school from being sectarian in its operations.[52] Colorado has no

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[47] *See generally* Alyssa Rafa et al., *50-State Comparison: Charter School Policies*, EDUC. COMM'N. OF THE STATES (Jan. 28, 2020), https://www.ecs.org/charter-school-policies/.

[48] 20 U.S.C. § 7221(a).

[49] *Charter Schools Program*, NAT'L. ALL.FOR PUB. CHARTER SCHS., https://www.publiccharters.org/our-work/federal-policy/charter-schools-program (last visited Oct. 30, 2023).

[50] 20 U.S.C. § 7221(i).

[51] Matt Barnum, *Churches Running Charter Schools? The Latest Supreme Court Decision Could Open the Door in Some States*, CHALKBEAT (July 9, 2017), https://www.chalkbeat.org/2017/7/9/21101013/churches-running-charter-schools-the-latest-supreme-court-decision-could-open-the-door-in-some-state

[52] The ten states with the most charter schools as of 2021 were California, Texas, Florida, Arizona, Michigan, New York, Ohio, Colorado, Minnesota, and Wisconsin, in that order. Jamison White, *How Many Charter Schools and Students Are There?* NAT'L ALL. FOR PUB. CHARTER SCHS., Table 1.2, https://data.publiccharters.org/digest/charter-school-data-digest/how-many-charter-schools-and-students-are-there/ (last updated Dec. 6, 2022). Of those states, New York, Minnesota, Texas, Ohio, and Michigan expressly prohibit religious organizations from running charter schools. *See Charter School Parent Guide*, N.Y. STATE BD. OF REGENTS STATE EDUC. DEP'T. (Nov. 2021), https://www.nysed.gov/sites/default/files/programs/charter-schools/parents-guide-to-charter-schools-in-nys-10-2021.pdf; MINN. STAT. ANN. § 124E.06(3)(c); 19 TEX. ADMIN. CODE § 100.1015 (West 2021); OHIO REV. CODE ANN 3314.029(A)(1)(d); MICH. COMP. LAWS ANN. § 380.502(1). Arizona, California, Florida, and Wisconsin prohibit charter schools from being sectarian in their operations. ARIZ. REV. STAT. ANN. § 15-183 (West 2021); CAL. EDUC. CODE

such prohibition, requiring only that charter schools be nonsectarian.[53] All of these states have received grants from the federal government through the Charter Schools Program.[54] As a result, religiously affiliated charter schools are nonexistent in most states.[55]

The Supreme Court's decisions in *Trinity Lutheran* and *Espinoza* open the door to constitutional challenges to these restrictions. In *Trinity Lutheran*, the Court emphasized that an otherwise eligible religious organization cannot be denied a public benefit simply because of its religious status.[56] With respect to schools in particular, the Court stated in *Espinoza* that the state need not subsidize private education, but once it does, it cannot disqualify certain schools that would otherwise be eligible simply because of their religious character.

It follows from this logic that a state need not fund schools run by independent non-profit organizations, but once it does, it cannot deny

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§ 47605 (West 2021)); FLA. STAT. ANN. § 1002.33 (West 2021); WIS. STAT. ANN. § 118.40 (West 2021). *See also* Preston Green, III*, Charter Schools and Religious Institutions: A Match Made in Heaven?*, WEST'S EDUC. LAW REP. 158, 1-17 (2001).

[53] COLO. REV. STAT. ANN. § 22-30.5-104 (West 2021).

[54] *Awards,* OFF. OF SECONDARY AND ELEMENTARY EDUC., https://oese.ed.gov/offices/office-of-discretionary-grants-support-services/charter-school-programs/state-entities/awards/ (last visited Nov. 11, 2020).

[55] Because there has been significant media attention on charter schools with religious themes, some may mistakenly assume church-run charter schools already exist and receive state funding. This is not the case. The charter schools that have come under the most attack for embracing religious themes include the Ben Gamla Charter Schools in Florida and California, Tarek ibn Ziyad Academy in Minnesota (now closed), the Hellenic Classical Charter School in Brooklyn, and Center City Charter Schools in Washington D.C., which retained many of the same students and staff as the parochial schools that they replaced after those schools closed down due to financial difficulties. All of these charter schools were technically formed under separate non-profits. Because religious entities are barred from opening charter schools themselves, if members of an established church want to open a charter school today, they must start a separate, secular non-profit through which they can apply for a grant. Schools started by these non-profit organizations are then subject to 990-filing requirements. *See* Benjamin Justice & Colin Macleod, *Does Religion Have a Place in Public Schools?*, THE ATLANTIC (Feb. 9, 2017), https://www.theatlantic.com/education/archive/2017/02/does-religion-have-a-place-in-public-schools/516189/; Janet R. Decker & Kari A. Karr, *Church-State Entanglement at Religiously Affiliated Charter Schools*, 2015 BYU EDUC. & L.J. 77 (2015); Elizabeth Green, *Greek Charter School Raises Scores – and Some Hackles*, N.Y. SUN (June 18, 2007), https://www.nysun.com/article/new-york-greek-charter-school-raises-scores-and-some; *ACLU of Minnesota v. TiZA*, ACLU MINN., http://www.aclu-mn.org/legal/casedocket/aclumnvtiza/ (last visited Nov. 13, 2020); *Nonprofit Explorer*, PROPUBLICA, https://projects.propublica.org/nonprofits/ (last visited Nov. 12, 2020).

[56] *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2024.

charters to otherwise eligible non-profits simply because of their religious status. Some might argue that *Espinoza* does not justify this conclusion because existing charter schools *are* public, and therefore there is no need to extend grants to religious organizations.[57] However, this understanding assumes the existence of public charters without considering their founders and operators. The recipient of the public benefit in the charter school context is an independent, non-profit organization. The public benefit itself is both the state grant to open a charter school and the funds that flow to the organization as a result of the grant. Because most states allow private non-profits to apply for charters,[58] this is a public benefit that religious institutions — which are considered non-profits for tax purposes — are otherwise eligible.

After *Trinity Lutheran*, *Espinoza* and *Makin*, any denial of these public benefits to organizations on the sole basis of their religious status would be considered a penalty imposed on the free exercise of religion. It might then seem rational to conclude that the Charter School Programs eligibility requirements and the various state charter laws disqualifying religiously affiliated organizations from establishing charter schools are unconstitutional. Although this Article recognizes that these restrictions impose a burden on the free exercise of religion as understood in *Trinity Lutheran* and *Espinoza*, it argues that they are nonetheless constitutional because both state and federal governments have compelling interests in keeping these restrictions.

C. The 990 Exemption: Special Privileges of Religiously Affiliated Charter Schools

Because charter schools are not subject to the same regulations as traditional public schools, they are able to experiment in ways that those traditional public schools are not. These experiments may take the form of multi-age classrooms, language immersion programs, increased parent involvement, or infusion of technology and art into everyday coursework.[59]

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[57] In his dissent in *Espinoza,* Justice Breyer raises the question of charter schools. He asks, "[h]ow would the majority's rule distinguish between those States in which support for charter schools is akin to public school funding and those in which it triggers a constitutional obligation to fund private religious schools?" *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2291 (2020). This piece argues that there is no distinction between the two scenarios because private organizations are almost always the ones applying for charters with the state. It is the ability to apply for a charter that is restricted by state and federal statutes. Because this benefit has already been extended to private organizations, it must also be extended to religious organizations. The public funding is simply triggered by acceptance of a charter application.

[58] Sugarman, *supra* note 1, at 237.

[59] *See generally*, *Successful Charter Schools*, U.S. DEP'T OF EDUC. OFF. OF INNOVATION AND IMPROVEMENT (June 2004), https://www.nysed.gov/sites/default/files/programs/charter-schools/usdoesuccessfulcharterschoolsreport.pdf.

Of course, while such autonomy can lead to innovation, the lack of accountability and regulatory oversight can also lead to the abuse of state funds. The following section is divided into two parts. The first part argues that the availability of public information is vital in the charter school space because of the lack of governmental oversight. The second part then explains how the IRS 990 requirement — the requirement that all nonprofits file an annual information return — is the tool used to ensure the availability of such information. It further explains that, because religious organizations are exempt from the 990 requirements, if such organizations were allowed to open charter schools, there would be no mechanism in place to monitor how funds are spent or to hold them accountable. Unlike all other charter schools, religiously affiliated charter schools would have unfettered discretion over government funds.

1. The Importance of Publicly Available Information in the Charter School Sector

As of 2020, forty-five states plus the District of Columbia had enacted charter school laws.[60] However, only forty-three states, two territories, and D.C. have charter schools in operation.[61] As public schools, charters receive per-pupil funding from the state and have no admissions requirements.[62] While some states allow for-profit charter schools, the vast majority of charter schools are tax-exempt non-profit organizations[63] and they are often chartered by the local school districts in which they are situated.[64] The charter approval process varies from state to state. In some states, any applicant with a coherent curriculum and an adequate business plan for the school will be granted a charter, while in others the process is substantially more difficult.[65] Once an application has been accepted, the terms of the written contract, or "charter," which will govern the school is negotiated with the school's authorizer.[66] Authorizers can dictate certain features of the school's operation in the charter, although they often do not.[67] Once the charter is negotiated, schools are allowed to be quite

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[60] Rafa et al., *supra* note 47.

[61] Nathan Barrett et al., *Charter School Data Digest 2020 Highlights*, NAT'L. ALL. FOR PUB. CHARTER SCHS. (Sept. 8, 2020), https://data.publiccharters.org/digest/charter-school-data-digest/data-digest-executive-summary/.

[62] *Church, Choice, and Charters: A New Wrinkle for Public Education?*, 122 HARV. L. REV. 1750, 1753 (2009).

[63] *Id.*

[64] Sugarman, *supra* note 1, at 239 (noting that most charter schools are chartered by local school districts and serve children in the area).

[65] *Id.* (noting that in states with '"strong' charter school laws, any applicant that meets the basic filing requirements for obtaining a charter must presumptively be granted one").

[66] Rafa et al., *supra* note 47.

[67] Sugarman, *supra* note 1, at 240 (noting that once chartered, these schools generally function like private schools, as the chartering bodies are "eager to

independent in their operations. Additionally, although these schools are typically required to have their charters reviewed and re-assessed after a set number of years, in practice the contracts for most of these schools will be renewed if enrollment is robust and there is no apparent financial mismanagement or "manifest educational failure."[68]

This independence is in large part due to the fact that charter schools are exempted from many state and local laws — including most education laws — that might "inhibit the flexible operation and management of public schools."[69] These exemptions also vary from state to state but generally have the effect of keeping school boards and state educational agencies out of the day-to-day operations of charter schools.[70] As a result, charter schools have much more discretion to shape both curriculum and school culture. Like private schools, the charter school pedagogical style and curriculum is independently determined by those who are granted the charter.[71] They may choose to have longer school days,[72] comprehensive behavioral policies, classical focuses, or dress codes, among other things. Additionally, teachers are privately hired and need not be unionized.[73]

A common critique of charter schools is that this "hands-off" model makes it difficult to monitor how the schools are spending money. Because they are independent organizations, charter schools are not required to be completely transparent with their spending even though they are

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encourage experiments."). *But see id.* at 240 n.64 ("Yet in some states, the typical terms in the charter document are sufficiently narrow that there is much less freedom from the regulations governing public schools than the charter school concept envisions.").

[68] *Id.*

[69] *Charter Schools Program: Title V, Part B of the ESEA: Non-Regulatory Guidance*, U.S. DEP'T OF EDUC., 7 (2014).

[70] In California, charter schools are exempted from most state laws with the exception of laws establishing minimum age for attendance, building standards, facilities requirements, and fiscal requirements. CAL. EDUC. CODE § 47610 (West 2020); CAL. EDUC. CODE § 47611 (West 2020); CAL. EDUC. CODE § 41365 (West 2020). In Florida, which has the most extensive requirements for charter schools, charter schools are still exempt from most of the state education code. FLA. STAT. ANN. § 1002.33 (West 2020). Arizona exempts charter schools from all statutes and rules relating to schools except for those concerning health, safety, civil rights, insurance, disabilities, academic accountability, annual report cards, statewide assessments, and financial and electronic data submission. ARIZ. REV. STAT. ANN. § 15-183 (West 2020). Texas exempts charter schools from most state and district education laws. TEX. EDUC. CODE ANN. § 12.012 (West 2020). In New York, charter schools are exempt from all state and local laws, rules, and regulations except for those concerning health and safety, civil rights, and student assessment requirements. N.Y. EDUC. LAW § 2854 (West 2020).

[71] Sugarman, *supra* note 1, at 238.

[72] Jason, *supra* note 2.

[73] Sugarman, *supra* note 1, at 238 (noting that by 2012, only seven percent of charter schools had unionized teachers).

publicly funded.[74] Meanwhile, traditional public schools not only have to conform to comprehensive laws regulating how their money is spent but are also accountable to the public via elections of school board officials and mandatory reporting requirements. Charter schools are often required to meet certain standardized testing requirements and must comply with the terms of their charters, but they are otherwise left to their own devices.[75] Additionally, although charter school authorizers are technically responsible for the fiscal oversight of the charters they manage,[76] in the 2016 Nationwide Assessment of Charter and Education Management Organizations, the Office of the Inspector General for the Department of Education found that once federal funds have been issued to charter schools, authorizers rarely oversee how those funds are used in practice. The report found that an absence of transparency was a pervasive issue in the charter school sphere.[77]

While there are many who say this discretion can lead to innovation and is vital to ensuring high quality education, others worry that this lack of oversight can lead to the abuse of public funds at the expense of children. In particular, the increasingly common practice of charter schools contracting with for-profit management companies has raised questions about the motives of certain school officials. While most states require that charter schools be non-profit organizations, many do not specify whether and with whom they may contract. As a result, charter schools may form as non-profits and then contract with external, for-profit companies to handle their accounting and management functions.[78] These contracts, which are known as "sweep contracts" in the charter school sector, involve sweeping a school's public funds into a charter-management company.[79] Anywhere from ninety-five to one-hundred percent of a school's taxpayer dollars end up in the hands of private companies that have no legal obligation to act in the interest of students or taxpayers.[80] Frequently, the same people who run the charter school run the for-profit management organization and, as a result, benefit from any profit made on the public funds siphoned to the management company.[81] Moreover, certain states

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[74] DEP'T OF EDUC. OFF. OF INSPECTOR GENERAL, NATIONWIDE ASSESSMENT OF CHARTER AND EDUCATION MANAGEMENT ORGANIZATION: FINAL AUDIT REPORT 18 (2016).

[75] Sugarman, *supra* note 1, at 248.

[76] Suzie Kim & Paul O'Neill, *A User's Guide to Fiscal Oversight: A Toolkit for Charter School Authorizers*, NAT'L. CHARTER SCH. RESOURCE CENTER (2016), https://www.highmarkschools.com/wp-content/uploads/2016/05/A-Users-Guide-To-Fiscal-Oversight-.pdf.

[77] DEP'T OF EDUC. OFF. OF INSPECTOR GENERAL, *supra* note 74, at 7.

[78] Marian Wang, *When Charter Schools Are Nonprofit in Name Only*, PROPUBLICA (Dec. 9, 2014) https://www.propublica.org/article/when-charter-schools-are-nonprofit-in-name-only.

[79] *Id.*

[80] *Id.*

[81] Greene, *supra* note 5.

have ruled that items bought with public funds, including classroom equipment, are property of the management company even after the school closes its doors due to academic failures.[82] In 2015, various charter schools in Cleveland, Ohio sued the management company they had all contracted with to perform day-to-day operations. After a number of these schools failed and were forced to close, their school boards examined how the management company was using money from the schools. Financial information revealed that the management company had spent the money it received — which initially came from the state — to purchase buildings ultimately owned by or renovated for the benefit of its own affiliates.[83] Nonetheless, the Ohio Supreme Court held that the assets of these schools, even after they had closed, were legally the property of the management company, thus legitimizing this questionable practice.[84] Of particular concern is the notion that if the for-profit management company is run by the same people who opened the charter school, the organizers can simply walk away with assets purchased using taxpayer money if their schools fail.

Although technically non-profits, this loophole has made opening charter schools in some states an attractive business opportunity. In 2014, ProPublica ran a story about a charter school in Wilmington, North Carolina that seemed to be failing while its founder, Baker Mitchell, was making millions of dollars.[85] This charter school, Douglass Academy, was one of four non-profit charter schools run by Mitchell that leased all of its equipment and property from a for-profit company Mitchell also owned. These schools also hired this for-profit management company to take over most administrative duties. Financial statements show that Mitchell earned twenty million dollars from his first two schools in six years.[86]

At the close of his 2018 *Forbes* article on the lucrative enterprise of non-profit charter schools, Peter Greene offers some advice to parents who are shopping for a charter school for their child: "[k]nowing that it's non-profit is not enough. Ask if there is a for-profit business operating the school, and if there is, think twice. If that for-profit business is operated by the same people that run the school, don't just think twice, just walk away."[87]

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[82] *Id.*

[83] Hope Acad. Broadway Campus v. White Hat Mgt., 46 N.E.3d 665, 669 (Ohio 2015).

[84] *Id.* at 668.

[85] Marian Wang*, Charter School Power Broker Turns Public Education Into Private Profits*, PROPUBLICA (Oct. 14, 2014), https://www.propublica.org/article/charter-school-power-broker-turns-public-education-into-private-profits.

[86] *Id.* (Wang notes that these figures date back to 2013, but Mitchell has opened two new schools since then).

[87] Greene, *supra* note 5.

2. The 990 Requirement and the Religious Exemption

Greene's advice raises an obvious follow-up question: *whom* do you ask? Where should a parent turn for information about a charter school's management structure? Luckily, as non-profit organizations, charter schools are required to file annual tax returns with the IRS accounting for their expenditures and activities.[88] These reports are then made available to the public. IRS Form 990, formally known as the "Return of Organization Exempt from Income Tax," requires non-profits to list information on all of its contributions, grants, income, expenditures, and, importantly, contracts.[89] While it is true that there is very little transparency over what happens to public dollars once they end up in the hands of for-profit management companies, it is at least possible to know when these contracts are entered into and how much taxpayer money is being swept into the contract. For instance, the 990s of the charter schools that were plaintiffs in the 2015 Ohio Supreme Court case, which remains open today, can be found online.[90] The 2010 990 for one of those schools, Hope Academy Broadway Campus, reveals that the for-profit management company, White Hat Management, received $4,464,018 in that year alone. And Hope Academy was only one of the schools they exploited.[91] Although it is nearly impossible to discern how White Hat used those funds, at least parents could have discovered this contractual relationship had they looked for it. In addition to inquisitive parents, the press and charity watchdogs may use this information to monitor tax exempt organizations and expose corruption when they find it.[92]

If a religiously affiliated charter school were to engage in fraud of this sort, there would be no way for the public to know. Despite being considered 501(c)(3) non-profit organizations for tax purposes, churches and other religious institutions are exempt from the IRS's annual reporting requirements.[93] In a 2013 article examining this filing exemption, John Montague noted that over 330,000 churches in the United States benefit from this exception to the financial transparency regime,[94] and there may

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[88] Terry Berkovsky, Andrew Megosh, Debra Cowen & David Daume, *Charter Schools*, EXEMPT ORGS. CONTINUING PRO. EDUC. TECH. INSTRUCTION PROGRAM FOR F.Y. 2000 (2000), https://www.irs.gov/pub/irs-tege/eotopicj00.pdf

[89] *Form 990: Return of Organization Exempt From Income Tax (2022)*, INTERNAL REVENUE SERV., https://www.irs.gov/pub/irs-pdf/f990.pdf.

[90] *Hope Academy Broadway Campus*: *Form 990 for period ending June 2010,* PROPUBLICA (2010), https://projects.propublica.org/nonprofits/display_990/341866951/2011_03_EO%2F34-1866951_990_201006.

[91] *Id.*

[92] John Montague, *The Law and Financial Transparency in Churches: Reconsidering the Form 990 Exemption*, CARDOZO L. REV. 203, 205 (2013).

[93] *Annual Exempt Organization Return: Who Must File*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/annual-exempt-organization-return-who-must-file [hereinafter *Exempt Organization Return*].

[94] Montague, *supra* note 92, at 206.

be more today. The tax code also exempts any educational organization below the college level that has a program of a general academic nature and is affiliated with or operated by a church or religious order.[95] This means that if a church were to open a charter school, not only would it be exempt from all of the state and local laws that regular charters are exempt from, but it would also be free from the one tool that offers some transparency into where taxpayer money is going.

Moreover, there are specific rules governing when and how a church may be audited, and these requirements make routine audits unlikely.[96] The IRS may begin a tax inquiry only if a high-level treasury official "reasonably believes (on the basis of facts and circumstances recorded in writing) that the church — (A) may not be exempt, by reason of its status as a church, from tax under section 501(a), or (B) may be carrying on an unrelated trade or business (within the meaning of section 513) or otherwise engaged in activities subject to taxation under this title."[97] Without an annual 990 providing the IRS with any suspicious information, it is even less likely that religious organizations will be audited.

If churches were granted charters, there would be nothing preventing a church leader from also starting a for-profit management company and sweeping public funds into those companies via private contracts. Unlike the many secular charter schools that have engaged in this practice, religious charter schools would not have to file an annual form making this information available to the public. While one necessarily hopes that religious organizations would not take advantage of the charter school system in this way, history has shown that there have been many religious organizations and leaders that have exploited their non-profit status and lack of governmental oversight.[98]

One of the most famous examples of this involved Jim Bakker, the founder of the Praise the Lord Club, known as PTL.[99] Through general religious solicitations to listeners, Bakker turned PTL into the largest religious television ministry in the country, reaching 13.5 million homes daily and raking in $129 million per year by 1979.[100] It eventually came to light that Bakker and his wife were receiving $5 million salaries despite assurances to viewers that his net worth was $15,000.[101] The Bakkers purchased $700,000 worth of real estate and luxury cars, and even used $265,000 of

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[95] *Exempt Organization Return*, *supra* note 93.

[96] 26 U.S.C § 7611(a)(1)-(2).

[97] *Id.*

[98] *See generally* Jonathan Turley, *Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation*, 29 WM. & MARY L. REV. 441 (1988); Roger Morefield & Vinita Ramaswamy, *Economics And Forensics Of Fraud And Abuse By Tax-Exempt Religious Organizations Versus The First Amendment*, 27 J. APPLIED BUS. RSCH. (Mar./Apr. 2011).

[99] Turley, *supra* note 98, at 450 n.36.

[100] *Id.* at 456.

[101] *Id.* at 457.

church funds to suppress allegations of Jim's heterosexual and homosexual affairs before they became public.[102] This abuse of church funds was not uncovered until years later when Bakker was being investigated by the Justice Department for fraud and by the IRS for tax evasion.[103] Bakker was one of about thirty different evangelists that the IRS was investigating for this kind of activity at this time.[104] In a 1987 congressional hearing on whether to extend the 990 requirement to religious organizations, discussed in greater detail below, IRS commissioner Lawrence Gibbs noted that, "[a]lthough funded by the general public through contributions, the cases under examination demonstrate a pattern of close control and incomplete or nonexistent disclosure to contributors of the actual uses made of their money."[105] Although the example of Jim Bakker is extreme, when an entity has no oversight with regards to its spending and donors have no way of ensuring that their money is being spent for the stated purpose, the opportunity for abuse is ripe. In Bakker's case, the money that was being misused was all money voluntarily given to his organization by private donors for religious purposes. In the charter school context, the stakes are even higher because religious organizations would be given the same free reign as Bakker, but this time over public funds.

II. PROHIBITIONS ON RELIGIOUSLY AFFILIATED CHARTER SCHOOLS ARE CONSTITUTIONAL

A. These Prohibitions Are Justified by Compelling Government Interests

As the Court noted in *Espinoza*, the Free Exercise Clause — which applies to the States under the Fourteenth Amendment[106] — "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status."[107] The Court has held that denying a generally available benefit solely on account of religion violates that clause and can only withstand judicial scrutiny if it is justified "by a state interest of the 'highest order.'"[108] This strict scrutiny standard for laws that burden religious exercise, first elaborated in *Sherbert v. Verner*, requires that the government assert a compelling interest

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[102] *Id.* at 456-57.

[103] Montague, *supra* note 92, at 218.

[104] *Id.* at 219 n.87.

[105] *Id.* (quoting *Federal Tax Rules Applicable to Tax-Exempt Organizations Involving Television Ministries: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 100th Cong. 250 at 37 (1987)).

[106] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[107] *Espinoza*, 140 S. Ct. at 2254 (quoting *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2019).

[108] *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2019 (quoting *McDaniel v. Paty,* 435 U.S. 618, 628 (1978) (plurality opinion) (quoting *Wisconsin v. Yoder,* 406 U.S. 205, 215, (1972)).

for the legislation being challenged as well as evidence that such legislation is narrowly tailored to achieve that interest.[109]

As explained above, there is little doubt that current state and federal prohibitions on religiously affiliated charter schools would burden religious organizations' right to free exercise today. However, this Article argues that such burdens are permissible because governmental interests in this area are substantial enough to withstand strict scrutiny. Restrictions on religiously affiliated charter schools are justified because both state and federal governments have a strong interest in complying with the Establishment Clause, or, in the alternative, in ensuring that publicly funded schools are using taxpayer money for the intended purpose of educating children.

B. Funding of Religious Charter Schools Would Violate the Establishment Clause

Trinity Lutheran, *Espinoza*, and *Makin* raised questions about what remains of the Establishment Clause. Indeed, after *Espinoza*, it was clear that neutral funding statutes that included religious organizations would not, on their face, violate the Establishment Clause. In his opinion in *Espinoza*, Chief Justice Roberts was emphatic on this point: "[w]e have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs."[110] However, the fact that the Supreme Court has rejected the notion that aid to religious schools violates the Establishment Clause does not mean all Establishment Clause concerns are moot. Significantly, it is still unconstitutional to favor religion over nonreligion, and it is still unconstitutional to delegate governmental functions to religious organizations.

This Article does not argue that state charters that allow religious nonprofits to apply for grants are facially unconstitutional. Nor does it argue that the 990 exemption is facially unconstitutional. However, the convergence of the two has the effect of sponsoring religion in violation of the Establishment Clause. It does so in two distinct ways. First, providing public funds to religiously affiliated charters who are not subject to the same oversight as secular charters or traditional public schools serves to privilege religious entities over their secular counterparts. Second, delegating complete oversight of government funds for public education to religious entities violates the Establishment Clause's nondelegation principle as articulated in *Larkin v. Grendel's Den*[111] and *Board of Education of Kiryas Joel Village School District v. Grumet.*[112]

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[109] Sherbert v. Verner, 374 U.S. 398, 403 (1963).
[110] *Espinoza*, 140 S. Ct. at 2254.
[111] 459 U.S. 116, 127 (1982).
[112] 512 U.S. 687, 706 (1994).

1. The 990 Exemption Is Not Mandated by the Free Exercise Clause

Because this Article argues that funding religiously affiliated charter schools would violate the Establishment Clause due to the practical benefits of the 990 exemption, it is necessary first to demonstrate that, as a legal matter, such an exemption *can* implicate the Establishment Clause. Establishment Clause concerns only exist when the accommodation in question is not required by the Free Exercise Clause.[113] The Supreme Court articulated this view in *Texas Monthly. v. Bullock*, a Supreme Court case in which a tax exemption granted to a religious newspaper was found unconstitutional. Writing for a plurality of the court, Justice Brennan emphasized that:

> [W]hen a government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community.[114]

Like the tax exemption in *Texas Monthly*, this Article demonstrates that the 990 exemption is not required by the Free Exercise Clause of the First Amendment, and further, that such an exemption unjustifiably provides assistance to religious organizations in violation of the Establishment Clause.

Before running through a Free Exercise analysis, it should be noted that the IRS has expressly said that "we are of the opinion that there is not a constitutional prohibition on requiring churches to file Form 990 information returns."[115] While this statement is informative, it is also important to determine whether the 990 exemption is required by the Free Exercise Clause by looking at Supreme Court jurisprudence.

When religious activity is burdened in a way that secular conduct is not, the Free Exercise Clause mandates accommodation.[116] Therefore, the first relevant question is whether requiring religious organizations to file

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[113] Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 356 (2013).

[114] Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989) (quoting Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor J., concurring in judgment)).

[115] *Federal Tax Rules Applicable to Tax-Exempt Organizations Involving Television Ministries: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 100th Cong. 250, 55 (1987).

[116] *Hobbie,* 480 U.S. 136 at 146.

Form 990 would burden the free exercise of religion. In *Texas Monthly,* the Court held that a generally applicable tax imposes no burden on religious beliefs or practice. Thus, it is unlikely that the negligible administrative requirement of filing an annual information return would be found to impose such a burden.[117]

Even if the filing requirement was deemed to burden religion in some way, an accommodation still would not be required by the Free Exercise Clause. An accommodation is not required when the burden on religion is an incidental result of a neutral and generally applicable law.[118] In this case, the 990 requirement is certainly neutral and generally applicable on its face. However, because the existence of numerous secular exemptions to an otherwise impartial law can undermine the neutrality and general applicability of that law, this is not the end of the inquiry. In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, the Third Circuit found that a policy requiring police officers to shave their beards, although neutral on its face, was subject to strict scrutiny because there were a number of secular exemptions to the "no-beard" requirement.[119] Writing for the majority, then Judge Alito noted that "when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny."[120] There are currently 990 exemptions for government affiliated 501(c)(3) non-profits as well as certain private foundations, political organizations that are committees of political parties, and foreign and domestic organizations that have filing requirements of under $50,000. If the IRS had a regime in which no non-profits were exempted from filing Form 990, that requirement would be subject to rational basis scrutiny because the law would be neutral and generally applicable. However, if a church were required to file Form 990 but those other exemptions were still in place, the law would likely be subject to strict scrutiny.

Under either scrutiny level, a claim that the 990 exemption is mandated by the Free Exercise Clause would almost certainly fail. Under strict scrutiny, the government would need to show that the governmental interest is compelling and that the law is narrowly tailored to achieve that interest.[121] Given the televangelist scandals and the evidence that non-profits were exploiting their tax status for economic gain in the latter half of the twentieth century, the government's interest in collecting the information on the Form 990 for financial accountability purposes would likely be deemed compelling.[122] And because the requirement is neither particularly intrusive nor under- or over-inclusive, it would also likely be

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[117] *Texas Monthly, Inc.*, 489 U.S. 1, at 5; Montague, *supra* note 92, at 261.

[118] Emp. Div. v. Smith*,* 494 U.S. 872, 878 (1989).

[119] 170 F.3d 359, 366 (3d Cir. 1999).

[120] *Id.*

[121] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993).

[122] Montague, *supra* note 92, at 263.

considered narrowly tailored to achieve that interest. Furthermore, because this Article is concerned narrowly with the application of the 990 exemption in the charter school context, where there are *no* secular exceptions, it is certainly not mandated by the Free Exercise Clause in that area.

Finally, simply because an exemption exists today does not mean that it is required by the constitution. As Justice Scalia noted in *Employment Division v. Smith*:

> [T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[123]

2. Funding Church-Run Charters Favors Religion over Nonreligion

Having demonstrated that the 990 exemption is not mandated by the Free Exercise Clause and is therefore subject to the limitations of the Establishment Clause, this Article now demonstrates how awarding grants to religiously affiliated charter schools would be unconstitutional. State funding of religiously affiliated charter schools that are not subject to the same oversight as their secular counterparts serves to privilege religion over nonreligion. Government preference for religion — otherwise referred to as religious favoritism — is unconstitutional.[124] This view was first expressed by the Court in *Everson v. Board of Education*, in which Justice Black wrote that laws cannot be passed which prefer one religion over another.[125] In *Epperson v. Arkansas*, the Court built on this notion and declared that "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and

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[123] 494 U.S. 872, 890 (1990).

[124] Carl H. Esbeck, *After Espinoza, What's Left of the Establishment Clause?* 21 THE FEDERALIST SOC'Y REV. 186, 188 (2020). *But see Espinoza*, 140 S. Ct. at 2264 (Thomas, J., concurring) ("Thus, the modern view, which presumes that States must remain both completely separate from and virtually silent on matters of religion to comply with the Establishment Clause, is fundamentally incorrect. Properly understood, the Establishment Clause does not prohibit States from favoring religion. They can legislate as they wish, subject only to the limitations in the State and Federal Constitutions.").

[125] 330 U.S. 1, 15 (1947).

nonreligion."[126] In 1985, the Court held that a law favoring Sunday Sabbath observers over other religious adherents or atheists violated the Establishment Clause.[127] And as recently as 2018, certain members of the Court emphasized that such neutrality is warranted because "governmental actions that favor one religion 'inevitabl[y]' foster 'the hatred, disrespect and even contempt of those who [hold] contrary beliefs' of the parties and their elders."[128] In determining what constitutes impermissible favoring of religion, Justice Harlan explained that "the Government must neither legislate to accord benefits that favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion."[129]

Given this Establishment Clause rule against legislating benefits that favor religion over nonreligion,[130] this Article now turns to religiously affiliated charter schools to determine whether there is such an endorsement of religion in that context. When a state allows religious organizations to open charter schools, it gives them a benefit beyond what their secular counterparts are receiving. The benefit here — grants of public funds with absolutely no external oversight or transparency into how those funds are spent — is exactly the kind of benefit the Supreme Court has said can violate the Establishment Clause when it is granted selectively.[131]

Because of the 990 exemptions and the lack of other tools in place to ensure fiscal accountability, churches who choose to open charter schools will have unfettered discretion over state and federal funds. Such a grant to a religiously affiliated charter school is essentially a blank check to use taxpayer money in whatever way the organization chooses. Whether that charter chooses to enter into contracts with for-profit management companies, to pay exorbitant salaries to church leaders who have some

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[126] 393 U.S. 97, 103-04 (1968).

[127] Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985).

[128] Trump v. Hawaii, 138 S. Ct. 2392, 2434 (2018) (Sotomayor, J. and Ginsburg, J., dissenting) (quoting Engel v. Vitale*,* 370 U.S. 421, 431 (1962)).

[129] Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 694, (1970) (Harlan, J., concurring).

[130] *Espinoza*, 140 S. Ct. at 2254.

[130] Esbeck, *supra* note 124, at 190; Gedicks & Tassell, *supra* note 113, at 361 (quoting Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 453 (1994) ("the Establishment Clause does not allow permissive accommodation to 'proceed beyond neutrality to favoritism. When purported accommodations have given preference to religious commitments at the expense of comparably serious secular commitments, the Court has been understandably uneasy")).

[131] *See* Larsen v. Valente, 456 U.S. 228 (1982); Richard F. Duncan*, The "Clearest Command" of the Establishment Clause: Denominational Preferences, Religious Liberty, and Public Scholarships That Classify Religions*, 55 S.D. L. REV. 390, 392 (2010) (governmental benefits (including funding benefits and benefits in the form of exemptions from governmental regulations) are selectively distributed to favored religions).

involvement with the school, or simply to retain the money for ministerial use, the fact that they can make these choices without fear of disclosure or public backlash is arguably a textbook example of preferential treatment of religious entities. Indeed, through this funding and the 990 exemption, the government "unjustifiably awards assistance" to religious organizations in a way that it does not for secular organizations.[132] As the Court noted in *Texas Monthly*, such assistance, even when it is just an accommodation, can convey a message of endorsement. Here, it is an accommodation in addition to government funding, making the argument that this is impermissible preference all the more persuasive.[133]

Some may question why religiously affiliated charter schools raise Establishment Clause concerns but churches on their own, which are still exempt from the 990 requirements, do not raise such concerns. The answer turns on the level of state involvement in each situation. The 990 exemption to churches is itself permissible because it merely lifts a requirement that otherwise would have been imposed on the church. As suggested in Justice Scalia's statement in *Employment Division v. Smith*, the state is free to create accommodations that are not required by the constitution.[134] However, the Supreme Court itself has said that accommodations can sometimes cross the line into impermissible state sponsorship.[135] As soon as the government confers an affirmative benefit, and is not simply lifting a burden, it runs the risk of impermissibly favoring religion. Churches and non-profits that do not start charter schools are not receiving an affirmative benefit because they are not receiving government funding. In the charter school context, millions of dollars of taxpayer funds are being funneled to organizations that have also been granted exemptions from federal oversight. The combination of this affirmative benefit and exemption distinguishes charters from other religious organizations and implicates the Establishment Clause.

3. Self-Regulation and the Nondelegation Rule

The funding of religiously affiliated charter schools also violates the Establishment Clause in a second way: by delegating a purely governmental function to a religious entity. Whenever governmental power is delegated to a religious entity, the Establishment Clause is violated.[136] This principle first emerged in *Larkin v. Grendel's Den*, a Supreme Court case that involved a Massachusetts statute that gave churches and schools the power to veto applications for liquor licenses within five hundred feet of their property.[137] Emphasizing that "the core rationale underlying the

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[132] Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989).

[133] *Id.*

[134] 494 U.S. 872, 890 (1990).

[135] Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 706 (1994).

[136] *Id.* at 697.

[137] 459 U.S. 116, 117 (1982).

Establishment Clause is 'preventing a fusion of government and religious functions,'" the Court held that the reasoned decision-making of a public legislative body cannot be assumed by a church. [138] In *Board of Education of Kiryas Joel Village School District v. Grumet*, a case involving a New York statute carving out a special district for practitioners of a strict form of Judaism, the Court again applied the nondelegation principle and found that the statute was unconstitutional.[139] In that case, the Court elaborated on why the fusion of government and religion in this way was impermissible. Justice Souter noted that giving a religious group the authority of self-governance was "tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires governmental impartiality toward religion."[140] Importantly, the Court noted that "[w]here 'fusion' is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority."[141]

The question becomes whether tasking religiously affiliated charter schools with the regulation of state funds in public schools is a delegation of civic authority. There is no question that such oversight, traditionally performed by the IRS, is a purely governmental function. And because the 990 exemption is not mandated by the Free Exercise Clause, as discussed below, there is no reason for religious organizations to assume this authority. Because oversight of public schools is a government function, and because this task will necessarily have to be delegated to religious organizations who form charter schools, there will inevitably be an Establishment Clause violation if religious organizations are allowed to open charter schools using public funds.

4. Compliance with the Establishment Clause Is a Compelling Interest

Whenever a religious entity's right to free exercise is burdened by a law or action, that action can only survive judicial scrutiny if the governmental interest is compelling and narrowly tailored to achieve that interest.[142] In *Widmar v. Vincent*, the Supreme Court noted that complying with a constitutional obligation, such as a state's obligations under the Establishment Clause, may be characterized as compelling.[143] Similarly, in *Locke v. Davey*, the Court suggested that antiestablishment could be a compelling interest, although the legislation at issue in that case was not seen as violating the Free Exercise Clause, so a compelling interest

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[138] *Id.* at 126 (quoting School District of Abington Township v. Schempp, 374 U.S. 203 (1963)).

[139] 512 U.S. at 690.

[140] *Id.*

[141] *Id.* at 699.

[142] Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[143] 454 U.S. 263, 271 (1981).

analysis was never fully executed.[144] As discussed above, the union of religiously affiliated charter schools and the 990 exemption has the effect of favoring religion over nonreligion and of delegating political power to a religious group in violation of the Establishment Clause. Because compliance with the Establishment Clause may be a compelling interest, and because these prohibitions narrowly address the group that could lead to a violation if given grants, the burden on free exercise in this case is justified and would survive strict scrutiny. Extending funds to religious charter schools is distinguishable from the public benefits that were extended to plaintiffs in *Trinity Lutheran* and *Espinoza* because in those cases there was no preferential treatment of religion or delegation of governmental functions to religious entities, so there was no Establishment Clause justification for exclusion.

Even without an Establishment Clause concern, states have a compelling interest in preventing corruption and ensuring that public funds flowing to charter schools are being used for the good of the student body.[145] Although the Supreme Court has never explicitly addressed whether or not these interests can justify a burden on the free exercise of religion, it has recognized that quid pro quo corruption and fraud in the public sector are strong governmental interests regardless of the evidence at hand.[146] Because public education is seen as such a fundamental part of our society, it is possible that the Court would find that preventing the embezzlement and misappropriation of public funds designated for charter schools is a compelling governmental interest. Without the requirement of an annual information return, there is no transparency into how religiously affiliated schools are spending taxpayer money, and this interest is frustrated.

III. EXTENSION OF THE 990 REQUIREMENT

A. Congress Should Extend the 990 Requirement to Church-Run Charters

What should be done when there is an inevitable challenge to the Charter Schools Program or the state statutes that prohibit religiously affiliated charters? There are two options: (1) these prohibitions can remain in place, or (2) Congress can extend the 990-filing requirement to religiously affiliated charter schools. This Article suggests that Congress legislate to eliminate the 990 exemption as applied to religiously affiliated charter schools and require these schools to file information returns like other non-profits. [147]

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[144] 540 U.S. 712, 722 (2004).

[145] *See* Buckley v. Valeo, 424 U.S. 1 (1976); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 359 (2010).

[146] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

[147] There are those who might argue that this less burdensome alternative suggests that the laws prohibiting religiously affiliated charter schools were not

1. The 990 Exemption Is Not Required by the Free Exercise Clause

As explained in full in Part III, the 990 exemption for religious organizations is not required by the Free Exercise Clause.[148] Not only does this mean that the accommodation can raise Establishment Clause concerns, but also that Congress can abandon it if it chooses.

2. There Is No Clear Legislative Rationale Behind the 990 Exemption

There might be an argument to retain the 990 exemption as applied to religiously affiliated charters if there were a well-articulated reason for this exemption in the first place. However, as the history behind the 990 form demonstrates, there is no such reason.

The requirement in Section 6033 of the Internal Revenue Code mandating non-profit organizations file an information return with the IRS arose out of a concern that non-profits were using their privileged tax status to gain an economic advantage over for-profit companies.[149] Before acting on this concern, Congress wanted more information about whether or not the practice of engaging in business operations unrelated to a non-profit's tax exempt purpose was widespread.[150] As a result, Congress passed the Revenue Act of 1943 with an amendment requiring non-profits to file Form 990 annually.[151]

The House version of the Revenue Act of 1943 exempted religious, educational, and charitable organizations from the 990-filing requirement, and the Senate added organizations for the prevention of cruelty to children or animals and government owned corporations.[152] Similarly, churches — but not religious organizations more broadly — were exempted from the Unrelated Business Income Tax.[153] The House tried to do away with these exceptions — including those applicable to churches — in 1969, but the Senate added back a 990 exemption for churches and religious organizations.[154]

Over the years, there has been considerable debate over whether to extend the 990 requirements to religious organizations. After news of embezzlement and tax evasion by certain televangelists began to emerge in

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narrowly tailored to achieve the compelling state interest of complying with the Establishment Clause. Although that is an argument worth exploring, for the purposes of this piece it is largely irrelevant because the states that are actually granting the charters did not have the power to eliminate the 990 exemption. Furthermore, the 990 exemption has been in existence for far longer than both state and federal charter school laws.

[148] *See supra* Part III.

[149] Montague*, supra* note 92, at 210.

[150] *Id.* at 212-13.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id*. at 214-15.

the 1980s, Congress held lengthy hearings on the matter.[155] Church leaders themselves disagreed over whether Congress should impose the filing requirement on religious organizations.[156] Ultimately, the requirement was not extended, and churches were left to self-regulate.[157]

Although the requirement was never extended, this history demonstrates that there is no principled rationale behind the adoption of the 990 exemption in the first place, or at least no widespread consensus around whether or not the exemption serves an important purpose. This suggests that extending the requirement to churches would not frustrate important government objectives.

3. Congress Should Minimize the Burden on Free Exercise to the Extent Possible

Because state and federal governments should always try to minimize the burden on the free exercise of religion where possible, extending the 990 requirement is the obvious solution to the problem presented by *Espinoza* and *Trinity Lutheran.* To religious organizations, filing the annual information return will likely be viewed as a lesser burden than exclusion from the charter school market entirely. Because religious entities are foreclosed from opening charter schools in their existing form, they currently have two options if they want to educate children: (1) they can either open separate, secular non-profits and then apply for charter grants through those organizations; or (2) they can open private schools. Applying for non-profit status is a cumbersome and expensive process, and it can take up to a year to get approval from the IRS.[158] It might also feel redundant to these organizations that already have tax-exempt status in their existing form. Starting a private school, on the other hand, has the obvious drawback of being costly to operate. Although private schools can and do charge tuition, many churches find that the tuition they are able to charge given the financial means of their communities is not sufficient to cover the costs of running a school.[159] Because neither of these options are particularly attractive, it is likely that most religious organizations intent on opening schools would be willing to file an annual form with the IRS if it meant having access to charter school grants.

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[155] Montague, *supra* note 92, at 218.

[156] *Id.* at 219.

[157] *Id.*

[158] *Applying for Tax Exempt Status*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/applying-for-tax-exempt-status (last visited Dec. 11, 2020); *see also* True Tamplin, *How Long Does it Take to Get a 501(c)(3) Determination Letter?*, FINANCE STRATEGIST, https://www.finance-strategists.com/tax/501c3/how-long-does-it-take-to-get-a-501c3-determination-letter/ (last updated Aug. 31, 2023).

[159] Claudio Sanchez, *To Remain Open, Catholic Schools Become Charters*, NAT'L PUB. RADIO (Sept. 16, 2008), https://www.npr.org/templates/story/story.php?storyId=94680744.

CONCLUSION

After *Trinity Lutheran*, *Espinoza*, and *Makin*, it is evident that both the federal Charter School Program's prohibition on religiously affiliated schools as well as various state laws with similar restrictions would all burden the free exercise of religion. However, unlike in *Trinity Lutheran*, *Espinoza*, and *Makin*, both state and federal governments have a compelling interest in excluding religious organizations from opening charter schools. Such an interest justifies the burden on free exercise in the charter school context.

Because religious organizations are exempt from filing Form 990, they would be given unfettered discretion over federal and state public funds. This augmented discretion both favors religious organizations over their secular counterparts and, in effect, delegates the governmental authority of regulating state funds to a religious entity. Both favoring religion over nonreligion and delegating sovereign power to religious groups are prohibited under the Establishment Clause. Therefore, in excluding religious charter schools, the government is justified by a compelling interest in complying with the Constitution. In the alternative, both federal and state governments have compelling interests in ensuring that taxpayer dollars are being used for the intended purpose of educating children.

Because the governmental interests are compelling here, the prohibitions on religious charter schools are constitutional. However, this Article suggests that because there is a way to alleviate the burden on religious organizations without sacrificing transparency and inviting fraud, this measure should be taken. Because the 990 exemption is not mandated by the Free Exercise Clause, Congress has the power to extend the filing requirement to churches and religious organizations, or, at the very least to religiously affiliated charter schools. Because statutes preventing churches from starting charter schools are not unconstitutional, and churches may nevertheless have a strong interest in starting these schools directly, extending the 990 requirement is the smartest and least harmful solution to the problem. Prohibitions on religiously affiliated charter schools are not unconstitutional, but they need not exist because there is a less burdensome way to achieve the same goal.

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