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Rehabilitating the Nonprofit Arts Sector: Healthy Board Governance as a Condition to Federal Tax Exemption

By Kanome' Jones*

Americans celebrate the arts and how they increase our economic and collective well-being. Nonprofit arts and culture organizations are the primary vehicle by which individuals create art, attend events, and support millions of jobs in the industry. This has led to a perception that arts organizations have an effective framework for productivity and efficiency. Yet, the COVID-19 pandemic uncovered tumultuous relationships between artists, staff, Board members, and executive leadership within several nonprofit arts organizations.

Although Americans regularly celebrate, support, and engage with the arts, the nonprofit arts industry is fraught with disconnected leaders, disgruntled staff and artists, and ineffective work environments. This Note explores why those issues persist and what can be done. First, I argue that the failures of nonprofit arts organizations' Boards of Directors to uphold their responsibilities and manage stakeholder relationships are a key cause of the current destabilization of the nonprofit arts sector. Against that backdrop, I examine the current federal and state regulatory frameworks for tax-exempt organizations and highlight why certain mechanisms are ineffective in supporting accountability and transparency. Finally, as a solution, the Internal Revenue Service (IRS) should enumerate a category for arts and culture in the Internal Revenue Code (IRC). With this newfound designation, I then argue that the IRS should establish minimum governance standards for the boards of nonprofit arts organizations and tie those standards to an organization's ability to receive and maintain its tax-exempt status.

Because of the immense economic and respected social value of arts and culture in the United States, nonprofit arts organizations must be held to a high standard to maintain public confidence. This Note believes that creating greater standards for nonprofit arts entities to receive federal tax-exemption status will improve organizational accountability and help such organizations in the United States remain the cultural beacon we believe them to be.

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INTRODUCTION

The United States stands out for how our arts and culture serve as hubs for diverse expression that celebrate the complexity of what it means to be an American. We echo this pride in our booming mantra that the arts increase our collective well-being, strengthen our communities, and provide a “positive experience in a troubled world.”¹ Congress validates this spirit by allocating millions of dollars each year to federal, state, and local entities that support the creation of art.² American arts and culture also pour back into the economy, adding over \$1 trillion, or 4.4%, to the total value of the U.S. economy.³

1. AMERICANS FOR THE ARTS, AMERICANS SPEAK OUT ABOUT THE ARTS IN 2018: AN IN-DEPTH LOOK AT PERCEPTIONS AND ATTITUDES ABOUT THE ARTS IN AMERICA 8 (2018) [hereinafter “AFTA, IN-DEPTH LOOK”].

2. MOHJA RHOADS, NAKYUNG RHEE & RYAN STUBBS, GRANTMAKERS IN THE ARTS, PUBLIC FUNDING FOR THE ARTS 2023 9 (2023) (“In fiscal year 2023, federal, state, and local funding for the arts totaled \$2.28 billion . . .”). Compared to other countries, however, the United States consistently ranks the lowest in its per capita spending on the arts, spending about \$6 per person on “direct public spending of arts,” whereas Germany, a country with a comparable economy, spends about \$85 per person. See NATIONAL ENDOWMENT OF THE ARTS, INTERNATIONAL DATA ON GOVERNMENT SPENDING ON THE ARTS (2000). Unfortunately, U.S. spending on the arts is in danger of being even lower due to the current efforts from the Trump Administration to eliminate the National Endowment for the Arts (NEA). See generally Helen Stoilas, *Amid Layoffs and Defunding Threats, Here's How US Arts Funding is Adapting to Life Under Trump*, ART NEWSPAPER, (Sept. 3, 2025), <https://www.theartnewspaper.com/2025/09/03/amid-layoffs-and-defunding-threats-us-artsfunding-is-adapting-to-life-under-trump> [perma.cc/ZLH8-PEQA].

3. *New Data Show Economic Activity of the U.S. Arts & Cultural Sector in 2021*, NATIONAL ENDOWMENT FOR THE ARTS (Mar. 15, 2023), <https://www.arts.gov/news/press-releases/2023/new-data-show-economic-activity-us-arts-cultural-sector-2021> [perma.cc/RH3F-58D6]. See also Govind Bhutada, *Visualizing U.S. GDP by Industry in 2023*, VISUAL CAPITALIST (Nov. 28, 2023), <https://www.visualcapitalist.com/visualizing-u-s-gdp-by-industry-in-2023/>

Americans engage with and consume art in countless ways. In the public sphere, the primary method of engagement is through nonprofit arts and culture organizations.⁴ These organizations allow Americans to create and display art, attend events, and support over two million jobs in the arts industry.⁵ Given the arts' undeniable economic and social value, the prevailing assumption is that a nonprofit arts organization should have a sustainable framework for artists and staff to be productive and effective. That assumption is incorrect.

The COVID-19 pandemic unearthed the tenuous relationships between artists, staff, Board members,⁶ and executive leadership within nonprofit arts organizations. In 2020, Victory Gardens Theater, a forty-seven-year-old Tony-Award-winning theater, experienced a community and staff upheaval due to the Board of Directors' lack of transparency in hiring artistic leadership and its lack of support of the artistic community during the Black Lives Matter movement.⁷ In 2021, artists and former Museum of Modern Art employees called for the resignation of the museum's "predatory billionaire" Board members.⁸ They criticized specific Board members for failing to disclose questionable private ties to the prison system and individuals like Jeffrey Epstein.⁹ Finally, the President and CEO of Americans for the Arts, a 50-year-old prolific national arts organization, resigned after employees criticized him for leading a "management culture rooted in intimidation" and sexual harassment.¹⁰

www.visualcapitalist.com/visualizing-u-s-gdp-by-industry-in-2023/ [web.archive.org/web/20231128223551/https://www.visualcapitalist.com/visualizing-u-s-gdp-by-industry-in-2023/] (highlighting the various U.S. gross domestic product (GDP) percentages of other sectors to understand the value of the arts economy).

4. When I refer to a nonprofit arts organization in this Note, I am referring to arts and culture entities that have established themselves as 501(c)(3) organizations and for educational purposes. See I.R.C. § 501(c)(3). Examples include museums, theaters, music halls, ballet, opera, community arts, public radio stations, festivals, photography, and visual arts. Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii) (providing examples of what qualifies as "educational"). See *infra* Section II.D and notes 86–89 for a discussion of the "educational" designation.

5. AMERICANS FOR THE ARTS, ARTS & ECONOMIC PROSPERITY 6: THE ECONOMIC & SOCIAL IMPACT STUDY OF NONPROFIT ARTS & CULTURE ORGANIZATIONS & THEIR AUDIENCES 9 (2023).

6. For this Note, I will use a capital "B" to refer to the Board of Directors anytime it is used to describe the entity or when it is used as an adjective (i.e., Board member). This capitalization invokes the power that a Board of Directors has over a nonprofit and its responsibility to the organization.

7. I was employed as the Associate Producer of Victory Gardens Theater and left in June 2020. Chris Jones, *Victory Gardens Theater Will Stop Producing Its Own Shows and Has Dismissed Its Staff*, CHI. TRIB. (Sept. 10, 2022), <https://www.chicagotribune.com/2022/09/10/victory-gardens-theater-will-stop-producing-its-own-shows-and-has-dismissed-its-staff/> [perma.cc/XR5P-MC6L]. The Board of Directors of Victory Gardens Theater cited "operational realities" as the reason for relieving the staff. *Id.*

8. Strike MoMA Working Group, *Strike MoMA: Framework and Terms for Struggle*, DECOLONIAL HACKER (Mar. 23, 2021), <https://decolonialhacker.org/article/framework-and-terms-for-struggle-strike-moma> [perma.cc/59LM-NVFE] [hereinafter *Strike MoMA*].

9. Robin Pogrebin & Matthew Goldstein, *Leon Black to Step Down as MoMA Chairman*, N.Y. TIMES (Mar. 26, 2021) <https://www.nytimes.com/2021/03/26/arts/design/leon-black-moma-chairman.html> [perma.cc/DC8X-PNUR]; see Alex Greenberger, *Activist Interrupt MoMA Opening Party, Urging Museum, Trustee to Cut Alleged Ties to Private Prison*, ARTNEWS (Oct. 18, 2019) [hereinafter Greenberger, *Activist*], <https://www.artnews.com/art-news/news/moma-opening-party-larry-fink-protest-13420/> [perma.cc/6XLN-YH7H].

10. Sarah Bahr, *Leader of Americans for the Arts Retires After Workplace Complaints*, N.Y. TIMES (May 27, 2021), <https://www.nytimes.com/2021/05/27/arts/robert-lynch-afta-retires.html> [perma.cc/CF2L-8NKT].

Accordingly, these public outcries regarding the harmful leadership practices of Board members and executive nonprofit leaders have exposed a paradox: Although Americans regularly celebrate, support, and engage with the arts, the nonprofit arts industry is fraught with disconnected leaders, disgruntled staff and artists, and ineffective work environments. This Note explores why those issues persist and what can be done. First, I argue that the failures of nonprofit arts organizations' Boards of Directors to uphold their responsibilities and manage stakeholder relationships are a key cause of the current destabilization of the nonprofit arts sector. Against that backdrop, I examine the current federal and state regulatory frameworks for tax-exempt organizations and highlight why certain mechanisms are ineffective in supporting accountability and transparency. Finally, as a solution, the Internal Revenue Service (IRS) should enumerate a category for arts and culture in the Internal Revenue Code (IRC). With this newfound designation, I then argue that the IRS should establish minimum governance standards for the boards of nonprofit arts organizations and tie those standards to an organization's ability to receive and maintain its tax-exempt status.

Part I begins by establishing the framework for understanding the law of charity. It first defines charity, the nonprofit entity, and describes the purpose of a Board of Directors. Next, it provides a short background on the development of the tax-exempt sector in the United States and explains how arts organizations are uniquely situated within the industry. Part II explores federal and state law requirements for public charities and examines why specific regulations do not support healthy nonprofit governance. In Part III, I argue that three pervasive issues with nonprofit arts Boards of Directors have contributed to the decline of the sector: First, Boards fail to include their stakeholders in crucial decisions that involve the stakeholders' relationship with the organization; second, they fail to recognize when their conflicts of interests could hurt the organization's ability to fulfill its mission; and third, they fail in managing their internal accountability to the organization's staff, which leaves the organization vulnerable to mistakes with the external community. Part IV makes a case for the IRS to enumerate arts and culture in a separate category under section 501(c)(3). With new, explicit definitions for the arts sector, the IRS should establish minimum standards in governance, such as Board diversity, term limits, and five-year reviews, and connect those standards to an arts organization's ability to receive and maintain its tax-exempt status.

Because of the immense economic and respected social value of arts and culture in the United States, nonprofit arts organizations must be held to a high standard to maintain public confidence. Board leadership is crucial to ensuring this high standard is met, yet the ends often justify the means within the arts industry. The "the show must go on" mentality comes at the expense of the artists and, ultimately, the community it is trying to serve. This Note believes that creating greater standards for nonprofit arts entities to receive federal tax-exemption status will improve organizational accountability and help arts and culture in the United States remain the social beacon we believe it to be.

I. WHAT IS CHARITY? A BACKGROUND OF U.S. CHARITY LAW

Before 2021, there was no singular comprehensive source for the law of charity in the United States.¹¹ This is because the laws governing charities and nonprofits encompass multiple areas of law, such as the law of corporations and trusts, as well as tax, labor, employment, property, and constitutional law.¹² Therefore, when a text references “the law of charities” or “charity law,” it refers to the vast, entangled web of federal and state regulations around those various legal fields. With a renewed scholarly interest in charities and nonprofits,¹³ the American Law Institute in 2021 codified common law to create a Restatement that “sets forth a single law for charities.”¹⁴ This Part aims to anchor our understanding of the critical components of charity law in a few ways. First, it discusses the legal and social definitions of charity, the nonprofit entity, and the responsibilities of the Board of Directors. Next, it presents a brief overview of the development of the nonprofit sector. Finally, this Part discusses how nonprofit arts organizations are situated in the sector and would benefit from specific treatment in the IRC.

A. Defining Charity and the Nonprofit Entity

Most individuals associate charity with the general definition of providing help or relief to those in need.¹⁵ In the legal sense, however, the term charity encompasses the general meaning and the enumerated categories identified by the IRS that would allow an entity to be exempt from federal income taxation.

The statutory definition of charity encoded in the U.S. Tax Code is influenced by British law, namely the 1601 “Statute of Charitable Uses.”¹⁶ The British statute’s preamble outlined specific purposes and activities believed to benefit society,¹⁷ and the state wanted individuals to donate to these causes.¹⁸

Section 501(c) of the IRC defines the types of organizations that can receive tax-exempt status.¹⁹ An organization seeking tax exemption must have been created exclusively for one or more purposes listed in that section and principally engage in

11. RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS intro. (AM. L. INST. 2021).

12. *Id.*

13. See generally Symposium, *Restatement of the Law, Charitable Nonprofit Organizations*, 70 UCLA L. REV. 368 (2023).

14. RESTATEMENT OF THE LAW, *supra* note 11. Restatements created by the American Law Institute are persuasive authority and do not replace federal or state statutory law but often impact common and statutory law in a particular field. American Law Institute, *Frequently Asked Questions*, ALI (2024), <https://www.ali.org/about-ali/faq/> [perma.cc/PQ29-BQDP].

15. *Charity*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/charity> [perma.cc/K72J-PV6Y] (last visited Mar. 9, 2024).

16. Alan Abramsom, *Today’s Charitable Sector and Its Roots and Challenges*, STAN. SOC. INNOVATION REV. (Jun. 19, 2018), https://ssir.org/articles/entry/todays_charitable_sector_and_its_roots_and_challenges [perma.cc/M8KP-6RH2].

17. Charitable Uses Act 1601, 43 Eliz. 1 c. 4 (repealed).

18. The list of purposes did not become part of British statutory law because it was in the preamble. Nonetheless, that list shaped the “modern definition of charitable purpose” and subsequently was used by English courts to determine the validity of other purposes. Charities Act 2006, c. 50 (UK), <https://www.legislation.gov.uk/ukpga/2006/50/notes/division/4/1/1> [perma.cc/R5CX-ZY9F].

19. I.R.C. § 501(c).

activities that achieve those purposes.²⁰ Subsection (c)(3) enumerates several purposes for public charities that qualify an organization to be tax-exempt: “religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition, . . . or for the prevention of cruelty to children or animals.”²¹ Like the British statute, section 501(c)(3) does not define charity or charitable. The IRS Treasury Regulations (Regulations)²² take up that task and expand on what is considered “charitable.”²³ In addition, the Regulations state that the categories it lists are nonexclusive so as not to hamper the future decisions of courts in determining whether an entity’s work falls into a charitable purpose.²⁴

Identifying the reasons under the IRC why an entity can receive federal tax exemption is a separate task from defining the legal entity itself. David Hammack, who has written extensively on the development of American nonprofits, states that “[h]istory makes it clear that no simple definition is possible, any more than it is possible to define the ‘bundle of sticks’ that constitute ‘property rights’ in simple terms.”²⁵ Hammack highlights six characteristics of nonprofit organizations: They are (1) formal organizations operating under the relevant law,²⁶ (2) private,²⁷ (3)

20. Treas. Reg. § 1.501(c)(3)-1(b), 1(c); see *Organizational Test – Internal Revenue Code Section 501(c)(3)*, IRS, <https://www.irs.gov/charities-non-profits/charitable-organizations/organizational-test-internal-revenue-code-section-501c3> [perma.cc/F8LJ-XRZJ] (last visited Apr. 2, 2024). “To be organized” means that the charity is a corporation, trust, fund or foundation with documents (bylaws, articles of incorporation) that expressly state the charity’s exempt purpose. *Id.*

21. I.R.C. § 501(c)(3). Churches are automatically tax-exempt if they meet the definition under section 501(c)(3) and are not required to apply for official tax-exempt status, though most do so for official public recognition. *Churches, Integrated Auxiliaries, and Conventions or Associations of Churches*, IRS, <https://www.irs.gov/charities-non-profits/churches-integrated-auxiliaries-and-conventions-or-associations-of-churches> [perma.cc/KRL7-82JD] (last visited Apr. 2, 2024). This also means that churches are not required to file an annual return. *Id.*

22. Federal tax regulations, or Treasury Regulations, are the administrative arm that interprets provisions of the Internal Revenue Code. See *Tax Code, Regulations, and Official Guidance*, IRS, <https://www.irs.gov/privacy-disclosure/tax-code-regulations-and-official-guidance> [perma.cc/4X2G-QHUU] (last visited Apr. 2, 2024).

23. See Treas. Reg. § 1.501(c)(3)-1(d)(2) to view types of activities are defined as “charitable.”

24. Treas. Reg. § 1.501(c)(3)-1(d)(2).

25. David C. Hammack, *Nonprofit Organizations in American History*, 45 AM. BEHAV. SCIENTIST 1638, 1639 (2002).

26. *Id.*; see Treas. Reg. § 1.501(c)(3)-1(a)-(b). What most individuals know as a “nonprofit” refers to how the entity is incorporated under state law. *Frequently Asked Questions About Applying for Tax Exemption*, IRS, <https://www.irs.gov/charities-non-profits/frequently-asked-questions-about-applying-for-tax-exemption> [perma.cc/QW9S-6FBU] (last visited May 1, 2024). A nonprofit can be organized as a corporation, an unincorporated association, a trust, or an LLC. ELIZABETH SCHMIDT & ALLEN MADISON, *NONPROFIT LAW: THE LIFE CYCLE OF A CHARITABLE ORGANIZATION* 39 (Wolters Kluwer, ed., 3d ed. 2021). Most nonprofit organizations are organized as corporations, since most states have pretty robust state corporate statutes. *Id.*

27. Hammack, *supra* note 25. This characteristic refers to the idea that nonprofit organizations are “institutionally separate from the government.” *Id.* The Treasury Regulation makes clear that an exempt organization cannot be an “action organization,” which is an organization that is substantially engaged in political activity or attempting to influence legislation. Treas. Reg. § 1.501(c)(3)-1(c). See also *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (establishing that the government could not assume control of a charitable institution even if it is engaging in activities that are under government control).

nonprofit distributing,²⁸ (4) self-governing,²⁹ (5) voluntary,³⁰ and (6) serve some “public benefit.”³¹

Moreover, because nonprofit organizations exist to serve the public, the organization has no legal owner. Yet, historically, in churches and other entities, there has always been a practice of delegating authority to a smaller cohort of individuals to determine the formal and informal rules while remaining accountable to the greater community.³² The group responsible for managing nonprofit organizations is called the Board of Directors (or Board of Trustees).³³ The Board is a single governing body responsible for ensuring that the nonprofit organization follows all laws and conducts activities that advance its mission and exempt purposes.³⁴ The Board supervises the senior and executive leadership of the organization, makes decisions involving policies and governance, and ensures that the organization remains in fiscal health.³⁵ Finally, state corporation statutes highlight that the Board has fiduciary duties connected to the nonprofit organization including the duties of loyalty and care and, in some jurisdictions, the duty of obedience.³⁶

The above frameworks that define charity and a nonprofit entity establish the cluttered ways nonprofits have categorized themselves for decades. A nonprofit organization and its Board encompass various legal, economic, institutional, and public functions, and the evolution of the sector has created more significant ambiguities regarding these terms, creating more challenges than harmony in the

28. Hammack, *supra* note 25. This characteristic re-emphasizes the requirement listed in the IRC that a nonprofit organization cannot serve a private interest. Nonprofit organizations can “sell services, pay high salaries, and accumulate surpluses.” *Id.* The Regulation also lists examples. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii).

29. Hammack, *supra* note 25. Nonprofits must still obey relevant laws. *Id.*; Treas. Reg. § 1.501(c)(3)-1(a)-(b).

30. Hammack, *supra* note 25. Voluntary in the sense that “[p]articipation on [nonprofit] boards or in providing [a board] with support is not required by law.” *Id.*

31. *Id.* at 1640; Treas. Reg. § 1.501(c)(3)-1(a)-(b).

32. PETER DOBKIN HALL, A HISTORY OF NONPROFIT BOARDS IN THE UNITED STATES 3 (2003) (ebook).

33. Nonprofit arts organizations can have a Board of Directors, a Board of Trustees, or even both. A Board of Directors is subject to state corporation statutes. SCHMIDT & MADISON, *supra* note 26. A Board of Trustees oversees a trust, which is an entity that “irrevocably dedicates specific property to the benefit of the community, rather than to the benefit of the individual.” *Id.* at 41. For example, museums generally have both a Board of Trustees responsible for ensuring that the art and exhibits are used to further the museum’s purpose and a Board of Directors overseeing the museum’s operations. *Id.* However, “trustee” and “director” are used interchangeably. JAMES J. FISHMAN, STEPHEN SCHWARZ & LLOYD HITOSHI MAYER, NONPROFIT ORGANIZATIONS, CASES AND MATERIALS 123–24 (West Academic 6th ed. 2021).

34. SCHMIDT & MADISON, *supra* note 26, at 64.

35. *Id.*

36. *Id.* The duty of care relates to a Board’s responsibility to pay attention to the organization’s mission-driven activities and financial health. The duty of loyalty relates to the Board’s responsibility to prioritize the interests of the organization and not engage in activities where the Board would unfairly benefit. Finally, the duty of obedience requires a Board to ensure that the organization’s mission is being advanced and that any activities or decisions are not “*ultra vires*, i.e., beyond the corporation’s powers as expressed in its certificate of incorporation.” FISHMAN ET AL., *supra* note 33, at 198; *see also* Manhattan Eye, Ear and Throat Hospital v. Spitzer, 715 N.Y.S. 2d 575 (1999). Of note, a Board of Trustees is held to a higher fiduciary standard than a Board of Directors because trust law imposes rigorous duties on trustees. *See* RESTATEMENT (THIRD) OF TRUSTS § 2. (AM. L. INST. 2023); FISHMAN ET AL., *supra* note 33, at 123; SCHMIDT & MADISON, *supra* note 26, at 41.

sector.³⁷ With these animating definitions, this Note next discusses the nonprofit sector's historical development and how the government built its tax-exemption policies.

B. Historical Roots of the Charitable Sector

Understanding the foundations of charity in America sheds light on how the government supported and later attempted to regulate the sector. Charity, under the broad definition of providing help or relief to those in need,³⁸ stems from the work of the church.³⁹ In colonial America, some English colonies intertwined their interests with religious institutions.⁴⁰ For example, Massachusetts, Connecticut, and Virginia provided churches with financial support through taxation, which enabled the churches to offer religious services. In addition, these churches would also use other ministers and officials to provide formal education, care for the poor, and other social services.⁴¹ However, this relationship between churches and the colonies created a dynamic where churches acted like “government agencies more than independent organizations” and had considerable control over formal education and “reform[ing] personal behavior.”⁴²

The practice of church control began to shift during the American Revolutionary War. The newly formed Republic immediately severed ties with the Church of England and English common law precedents to develop a democratic philosophy for the American people.⁴³ The states also ceased using taxes to support churches.⁴⁴ One of the first vestiges of English law that the states discarded was the 1601 Statute of Charitable Uses.⁴⁵ This statute specifically authorized the Church of England to regulate charitable trusts.⁴⁶ With a new Constitution that guaranteed freedom of religion, many states elected to repeal the law and forgo charitable trusts.⁴⁷ Consequently, the corporation became the preferred legal entity to establish a charity as corporate law was readily entrenched in society.⁴⁸

37. Hammack, *supra* note 25, at 1640.

38. See *Charity*, *supra* note 15.

39. Peter Dobkin Hall, *A Historical Overview of Philanthropy, Voluntary Associations, and Nonprofit Organizations in the United States, 1600-2000*, in *THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK – SECTION EDITION* 32, 33 (2006).

40. *Id.* at 34.

41. *Id.* at 33.

42. Tax-supported churches could carry out the duties of the colonial government, such as levying and collecting the tax themselves. *Id.* at 34. Churches could even investigate allegations of crime in the area. Hammack, *supra* note 25, at 1642.

43. Hall, *supra* note 39, at 35.

44. *Id.*

45. Myles McGregor-Lowndes & Kerry O'Halloran, *Charity Law*, in *INTERNATIONAL ENCYCLOPEDIA OF CIVIL SOCIETY* 121, 121–22 (Springer ed., 2022) (ebook). See also *supra* discussion accompanying notes 16–18.

46. Dame Susan Glazebrook, *A Charity in All But Law: The Political Purpose Exception and the Charitable Sector*, 42 MELB. U. L. REV. 632, 633–634 (2019).

47. Hall, *supra* note 39, at 37.

48. SCHMIDT & MADISON, *supra* note 26, at 39–41. The entities that had legal status as charities were religious organizations, hospitals, and universities. Hall, *supra* note 39, at 37–38. The charitable trust was later returned when a U.S. Court of Appeals determined that the legal authority to create a charitable trust was not statutory; its roots were common law, and states could create trusts without having legislative authority. *Id.* at 37.

The Massachusetts Bay Company was the first organization to create a modern Board of Directors, with the company choosing thirteen men “for their honesty, wisdom, and expertise, to manage the colonial government.”⁴⁹ Alongside charitable trusts and nonprofits, other local organizations called “voluntary associations” developed to supplement the provision of social welfare and public services.⁵⁰ Public-serving organizations, akin to public charities today, primarily aimed to serve the public, such as schools and churches.⁵¹ Member-serving organizations were fraternities designed to help serve individuals in specific industries or support the interests of their members, such as labor, agricultural, or political associations.⁵² As voluntary associations increased, many desired legitimacy from the government, forming the seeds of the nonprofit sector. The federal government managed the evolving number of non-governmental and nonprofit organizations by creating incentives in its developing tax policy.⁵³

C. Tax-Exempt Legislation and the Modern Charitable Nonprofit

The federal government supported the evolution of the charitable sector⁵⁴ and the increasing number of voluntary associations by exempting these organizations from certain taxes.⁵⁵ Drawing from its power under the Spending Clause, Congress developed and refined tax-exemption legislation between 1894 and 1969.⁵⁶ The earliest tax-exempt legislation is in the Wilson-Gorman Tariff Act of 1894. In this Act, the government imposed a flat two percent income tax on individuals and corporations, yet explicitly stated that the tax did not apply to businesses “organized and conducted solely for charitable, religious, or educational purposes.”⁵⁷ The Supreme Court declared this Act unconstitutional because it created a direct tax on individuals, but the tax-exempt language created the template for future legislation.⁵⁸

In 1909, Congress codified that tax-exempt language into the Revenue Act of 1909 and added language prohibiting charitable organizations from using income to benefit a private individual (i.e., nonprofit).⁵⁹ The Sixteenth Amendment and the Revenue Act of 1913 preserved this language to create the modern federal income tax system.⁶⁰

49. HALL, *supra* note 32, at 4.

50. Paul Arnsberger, Mellisa Ludlum, Margaret Riley & Mark Stanton, *A History of the Tax-Exempt Sector: An SOI Perspective*, STAT. INCOME BULL. 105 (Winter 2008).

51. *Id.*

52. *Id.* Member-serving organizations today are called “social welfare organizations” because they desire to provide social benefits to the community rather than charity. Daniel Halperin, *The Tax Exemption Under Section 501(c)(4)* 2–4 (Tax Policy and Charities, Working Paper, 2014). Member-serving organizations are listed in I.R.C. § 501(c)(4).

53. Arnsberger et al., *supra* note 50, at 106.

54. For a more detailed history of the evolution of the charitable sector, *see generally* HALL, *supra* note 32.

55. Arnsberger et al., *supra* note 50, at 106.

56. *Id.* Congress “shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.” U.S. CONST. art. I, §8.

57. Arnsberger et al., *supra* note 50, at 106.

58. *Id.*; *see Pollock v. Farmers’ Loan & Tr. Co.*, 157 U.S. 429 (1895).

59. Arnsberger et al., *supra* note 50, at 106.

60. *Id.*

Concurrently, the early nineteenth century saw a surge of philanthropic activity fueled by the burgeoning national identity, increased charity work,⁶¹ and individual accumulation of substantial wealth.⁶² Andrew Carnegie, who became wealthy due to the steel industry, wrote “The Gospel of Wealth,” which instructed the new affluent class on its obligation to give “for public purposes, from which the masses reap the principal benefit.”⁶³ He and individuals like John Rockefeller established foundations, universities, and other social institutions.⁶⁴

During World War I, Congress increased income taxes on the wealthy because it feared they would no longer give to charities.⁶⁵ To balance the increase, in 1917, Congress introduced the income tax deduction for charitable donations to encourage giving and promote the belief in social responsibility.⁶⁶ As the number of nonprofit entities increased, Congress sought to balance any perceived advantages nonprofits had over for-profit entities.⁶⁷ It created an “unrelated business income tax”(UBIT), which taxed nonprofits for activities unrelated to the organization’s exempt purpose.⁶⁸ Finally, in 1954, the IRS introduced section 501(c), which outlines the entities that can receive tax exemption, solidifying the modern nonprofit organization.⁶⁹ Section 501(c)(3) is the designation for public charities, and the 501(c)(3) tax-exemption status is the *only* one under which an individual can receive a charitable deduction.⁷⁰ Today, 501(c)(3) organizations are the largest category of exempt organizations in the IRC, representing about two-thirds of all public charities.⁷¹ Subsequent revenue acts added more parameters for the charitable sector, such as limitations on lobbying, the ability for corporations to

61. Amanda B. Moniz, *Giving in America: A History of Philanthropy*, 72 HIST. NEWS 28, 30–31 (2017).

62. Rebecca W. Rimel, *Charity and Strategy: Philanthropy’s Evolving Role*, 145 PROC. AM. PHIL. SOC’Y 587, 590 (2001).

63. Andrew Carnegie, *Wealth*, 148 N. AM. REV. 653, 660 (1889).

64. Rimel, *supra* note 62. Rockefeller and Carnegie’s work essentially established the modern private foundation. Hall, *supra* note 39, at 47. The difference between public charities and private foundations relates to their funding: public charities receive funding from several sources, and private foundations typically have one large source of funding. *Public Charities*, IRS, <https://www.irs.gov/charities-non-profits/charitable-organizations/public-charities> [perma.cc/N7XG-YSTW] (last visited Apr. 2, 2024). In addition, private foundations’ primary activities are making grants to other public charities rather than operating programs. Concerned that individuals would use tax benefits like the charitable deduction to avoid income taxes, Congress created more stringent measures for private foundations, culminating in the Tax Reform Act of 1969. See Arnsberger et al., *supra* note 50, at 108, 124.

65. CONG. RSCH. SERV., R46178, THE CHARITABLE DEDUCTION FOR INDIVIDUALS: A BRIEF LEGISLATIVE HISTORY 5 (2020) [hereinafter CRS].

66. *Id.* at 6. The first charitable deduction was capped at fifteen percent of an individual’s taxable income. *Id.*

67. Arnsberger et al., *supra* note 50, at 107.

68. *Id.* To be considered an unrelated business tax, the activity must be a “trade or business” that was ‘regularly carried on’ and was not ‘substantially related’ to the organization’s exempt purpose(s), regardless of whether or not the profits from the unrelated trade or business were used solely for exempt purposes.” *Id.*

69. *Id.* at 106.

70. CRS, *supra* note 65, at 4.

71. STAFF OF JOINT COMM. ON TAX’N, HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS 2 (Comm. Print 2005).

claim the charitable deduction, and a requirement for filing out an annual form to keep its tax-exempt status.⁷²

Tax law remained relatively steady for decades. However, in 2017, Congress passed the Tax Cuts and Jobs Act (TCJA), “the largest tax overhaul since 1986.”⁷³ Two of the most considerable impacts of the TCJA on tax-exempt organizations were the increase of the standard deduction, which decreased the number of taxpayers who would itemize and deduct their charitable contributions,⁷⁴ and the 21% tax on nonprofit employers who paid anyone a salary over one million dollars.⁷⁵ Next, Congress desired to improve the IRS’s electronic, management, and enforcement systems and passed the 2019 Taxpayer First Act.⁷⁶ For charities, the Act mandated that tax-exempt organizations file their annual returns electronically.⁷⁷ The Act also required the IRS to make those returns publicly accessible as soon as practicable.⁷⁸

Since then, tax legislation has remained largely intact.⁷⁹ A nonprofit’s tax-exempt status is its lifeline, as it dictates how it receives funding.⁸⁰ Even with the stability in tax law, nonprofit arts organizations have continued to evolve and grapple with balancing their mission to the public while navigating their unique differences from other public charities.

D. Why Arts Nonprofits Are Different

Nonprofit arts organizations are uniquely situated within the sector because the nature of their services differs from those of other public charities in three critical ways.

72. Arnsberger et al., *supra* note 50, at 106. See *infra* Section II.A for a discussion about a nonprofit’s annual tax forms.

73. William G. Gale, *A Fixable Mistake: The Tax Cuts and Jobs Act*, BROOKINGS (Sept. 25, 2019), <https://www.brookings.edu/articles/a-fixable-mistake-the-tax-cuts-and-jobs-act> [perma.cc/KDE6-YPHS].

74. Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11021 (2017). In prior law, taxpayers had to itemize their deductions to claim the charitable deduction. While the TCJA increased the limit for cash charitable deduction to sixty percent, it doubled the standard deduction, providing less incentive for individuals to itemize. *How Did the TCJA Affect Incentives for Charitable Giving*, TAX POLICY CENTER, <https://www.taxpolicycenter.org/briefing-book/how-did-tcja-affect-incentives-charitable-giving> [perma.cc/9DB4-NMSP] (last visited Apr. 27, 2024).

75. *Id.* § 13602. See generally Lauren Rogal, *Executive Compensation in the Charitable Sector: Beyond the Tax Cuts and Jobs Act*, 50 SETON HALL L. REV. 449, 451 (2019); see ELIZABETH T. BORIS & JOSEPH CORDES, URBAN INSTITUTE, HOW THE TCJA’S NEW UBIT PROVISIONS WILL AFFECT NONPROFITS 8–10 (2019).

76. Taxpayer First Act, Pub. L. No. 116-25 (2019).

77. *Id.* § 3101.

78. *Id.* § 3102.

79. The most recent legislation to impact nonprofit organizations was the Coronavirus Aid, Relief, and Economic Security (CARES) Act, passed during the COVID-19 pandemic. CARES Act, Pub. L. No. 116-136 (2020). To help support charities and nonprofits during the pandemic, the CARES Act allowed individuals who took the standard deduction to claim up to \$300 for charitable cash contributions and up to \$600 for married couples. Sunita Lough, *The IRS Encourages Taxpayers to Consider Charitable Contributions*, IRS (Dec. 13, 2021), <https://www.irs.gov/about-irs/the-irs-encourages-taxpayers-to-consider-charitable-contributions> [perma.cc/BWF6-3HNY]. This benefit was only allowable for the 2020 and 2021 income tax return years. *Id.*

80. Loren Renz, *An Overview of Revenue Streams for Nonprofit Arts Organizations*, GRANTMAKERS IN THE ARTS, <https://www.giarts.org/article/overview-revenue-streams-nonprofit-arts-organizations> [perma.cc/FJ4V-ZG6Q] (last visited Mar. 16, 2024).

First, the services of a nonprofit arts organization do not have to be used by the public or require civil engagement. According to Fischer, Wilsker, and Young, who categorize nonprofit arts services as public, private, or mixed, “public services are shared by a wider group and community, often regardless of participation, while the benefits of private services accrue to identifiable individuals who pay for and use the service.”⁸¹ Thus, some arts nonprofits services can be seen as more private, because “the benefits are limited to those who use their services.”⁸² This means that the audience and community members must engage with the art to receive benefits. So, what is happening in the organization between the development of the art and the time that the community engages with it? This is where the line can become murky, and executives or Board members can quickly move into activities that could be seen to benefit them privately as opposed to thinking about the public.

Second, arts nonprofits do not necessarily engage in activities that directly impact the public welfare. They are generally organized due to an artistic vision, which may result in an outcome that does not produce a tangible public benefit.⁸³ The IRC does not mandate that a nonprofit’s work directly impacts individuals;⁸⁴ however, compared to an organization with a stated mission of serving underprivileged individuals, an arts nonprofit must ensure its engagement in more significant public concerns. Furthermore, when analyzing the makeup of the Board for a nonprofit arts organization, it generally “represents the group that shares similar artistic values and standards rather than representing economically or socially disadvantaged groups.” While the arts are critical in highlighting social issues and allowing the public to experience art, the beneficiaries of arts nonprofits are often “individuals with higher levels of education and with dominant socioeconomic status.”⁸⁵

Third, arts and culture are not explicitly enumerated charitable purposes in section 501(c)(3), which compels most organizations to file for the exempt status under “educational” purposes. This conflation of the arts as a function of education narrows the positionality of nonprofit arts organizations within the sector and creates interpretation challenges.⁸⁶ The “educational” purpose category identifies two pathways, stating that the purpose must either relate to, consisting of educating individuals to improve skills and abilities or educating the public on topics that help the individual and are valuable for the community.⁸⁷ The IRS manual states that “the promotion of the arts and of culture is generally recognized as an educational activity” and lists several examples outlined in subsequent revenue rulings.⁸⁸ This

81. Young-Joo Lee, *Nonprofit Arts Organizations’ Pursuit of Public Interests: The Role of Board Diversity*, 12 NONPROFIT POL’Y F. 563, 567–68; see also Robert L. Fischer, Amanda Wilsker, & Dennis R. Young, *Exploring the Revenue Mix of Nonprofit Organizations: Does it Relate to Publicness?* 40 NONPROFIT & VOLUNTARY SECTOR Q. 662, 663 (2011).

82. Lee, *supra* note 81, at 567.

83. *Id.* at 568.

84. *Id.*

85. *Id.* at 567.

86. See Micah J. Burch, *National Funding for the Arts and Internal Revenue Code § 501(c)(3)*, 37 FLA. ST. U. L. REV. 304, 326–331 (2010) for a detailed discussion regarding the issues with the IRS’s educational designation for nonprofit arts organizations and how that designation fails to foster diversity within the sector.

87. Treas. Reg. §§ 1.501(c)(3)-1(d)(3)(i)-(ii).

88. See Treas. Reg. §§ 1.501(c)(3)-1(d)(3)(ii). Among the examples listed in the manual include: promoting “the dramatic arts,” Rev. Rul. 64-175, 1964-1 C.B. 185; operating a nonprofit school of

belief dates back to a 1919 ruling that found that an organization providing “musical concerts of an educational character” was exempt.⁸⁹ Therefore, when an artist or arts group wants to apply for nonprofit status, they typically do so under the “educational” category.⁹⁰ In addition, the Regulations do not define what it means to be “educational” but instead state that organizations must display “a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion.”⁹¹ To apply that standard, the IRS developed a methodology test that asks institutions to provide a “factual foundation”⁹² for its information and lists factors that would determine that the method is not educational.⁹³

In applying a pure educational framework to nonprofit arts organizations, that definition narrows the options for nonprofit arts organizations to present art with more focused points of view. Particularly for historically underrepresented voices, artists should be free to craft art that is void of a balanced perspective and may create strong emotions around specific topics. Furthermore, the classification perpetuates the notion that artists performing a public service should not be compensated or receive any direct benefit from their work. Finally, having an educational classification means that, as long as a nonprofit arts organization entity pursues its education, it operates within its exempt mission. This disincentivizes the organization from maintaining an account in other areas, which masks irresponsible conduct.

These critical differences demonstrate the tenuous nature of arts nonprofits within the nonprofit sector. The public benefit of the arts combined with the private nature of its services can blur the line between the organization’s stated mission, the internal needs of employees, volunteers, and staff, and the external

contemporary dance, Rev. Rul. 65- 270, 1965-2 C.B. 160; promoting jazz festivals and jazz concerts, Rev. Rul. 65-271, 1965- 2 C.B. 161; “group harmony singing,” Rev. Rul. 66-46, 1966-1 C.B. 133; fellowship grants to students or to qualified writers and artists, Rev. Rul. 66-103, 1966-1 C.B. 134; “conducting annual festivals to provide unknown independent filmmakers with opportunities to display their films,” Rev. Rul. 75-471, 1975-2 C.B. 207; “recording and selling, primarily to educational institutions, new works of unrecognized composers,” Rev. Rul. 79-369, 1979-2 C.B. 226; and historic preservation of buildings for viewing by the general public. Rev. Rul. 75-470, 1975-2 C.B. 207.

89. Rev. Rul. 64-175, 1964-1 C.B. 185 (stating that “so-called ‘cultural’ type organizations” are charitable or educational).

90. Andrew Goldstein, *Why Performing Arts Organizations Should Not Be Non-Profits*, MEDIUM (May 16, 2016), <https://medium.com/@GoldsteinA/why-performing-arts-organizations-should-not-be-non-profits-ed6829fd62c5> [perma.cc/AX9C-VTBP]. If you are curious as to why nonprofit arts organization do not use the “literary” part of the statute, that is because “literary” purposes reference written materials and works produced by a publisher. *Qualifying as a Literary 501(c)(3)*, FOUND. GRP. (Jan. 17, 2023), <https://www.501c3.org/kb/qualifying-as-a-literary-501c3-organization/> [perma.cc/R3WE-NKV4]; see also Lee, *supra* note 81, at 568.

91. ERIKA K. LUNDER, CONG. RSCH. SERV., RL33377, 501(C)(3) ORGANIZATIONS: WHAT QUALIFIES AS “EDUCATIONAL”? 1 (2012) [hereinafter CRS, EDUCATIONAL].

92. *Id.*

93. Rev. Proc. 86-43, 1986-2 C.B. 729. The four factors that would lead the IRS to make a ruling against an organization having an educational purpose are as follows: (1) a large portion of the communications “consists of the presentation of viewpoints or positions that are unsupported by facts;” (2) “facts that purport to support the viewpoints or positions are distorted;” (3) the presentations “make substantial use of inflammatory and disparaging terms and express conclusions based more on strong emotional feelings rather than of objective evaluation;” and (4) “the presentation’s approach is not aimed at developing the audience’s understanding of the subject matter because it does not consider their background or training.” *Id.*

needs of the community it desires to serve. Therefore, in examining reform for the sector, having arts and culture as an enumerated category in the Code would help establish the sector's uniqueness and provide a pathway to impose specific regulations on those entities. Before discussing the problems plaguing nonprofit arts organizations, the following Part will examine how nonprofit organizations are regulated and the current scheme's challenges.

II. FEDERAL AND STATE REGULATION OF NONPROFIT ORGANIZATIONS

In the United States, charities are regulated by the federal government and the states.⁹⁴ For the federal government, the IRS is principally responsible for granting a charity's federal tax exemption status and has rules that regulate maintaining that status.⁹⁵ On the other hand, the states have a more complex structure with state charity officers, state attorney generals, and other administrative agencies that govern nonprofit formation, governance, and fundraising.⁹⁶ This Part will summarize the key components of how the federal and state governments regulate charities and evaluate how these regulations serve nonprofit arts organizations.

A. The Federal Regulatory Regime

The federal government primarily regulates charities through the IRS's Exemption Organization department.⁹⁷ Section 501 of the IRC outlines all the requirements for charities to receive tax exemption status and categorizes different forms or types.⁹⁸ The IRS determines a charity's eligibility by assessing whether it meets the exempt purposes outlined in the IRC.⁹⁹ After the IRS determines a charity's status, a charity that receives the tax-exemption status must follow specific duties to maintain it.¹⁰⁰ Charities' affirmative duties include making applicable

94. RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS, §§ 5.01, 5.03. (AM. L. INST. 2021).

95. *Id.* § 5.03.

96. *Id.* § 5.01.

97. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-164, TAX-EXEMPT ORGANIZATIONS: BETTER COMPLIANCE INDICATORS AND DATA, AND MORE COLLABORATION WITH STATE REGULATORS WOULD STRENGTHEN OVERSIGHT OF CHARITABLE ORGANIZATIONS 6 (2014) [hereinafter GAO].

98. 26 U.S.C. § 501.

99. See Section I.A, *supra*, for a discussion of the §501(c)(3) charity requirements; see also RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS, § 5.03(b).

100. GAO, *supra* note 97, at 4. Generally, smaller organizations file Form 1023-EZ and can receive a determination from the IRS in approximately 2-4 weeks. Lena Eisenstein, *How Long Does It Take to Get 501(c)(3) Status from the IRS?* BOARDEFFECT (Apr. 28, 2021), <https://www.boardeffect.com/blog/how-long-does-it-take-to-get-501c3-status-from-the-irs/> [perma.cc/7X8R-UQ5Z]; see also *How to Apply for 501(c)(3) Status*, IRS (Mar. 7, 2024), <https://www.irs.gov/charities-non-profits/how-to-apply-for-501c3-status> [perma.cc/A8RC-ZKFY]. For larger organizations with more complex finances and governance, it could take anywhere from three to six months or longer, as these organizations have to file the standard Form 1023. Eisenstein, *supra*. For a more comprehensive look at charities and federal tax law, see John Simon, Harvey Dale & Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK (Walter W. Powell & Richard Steinberg eds., 2006).

public disclosures,¹⁰¹ reporting any changes to the IRS,¹⁰² and providing notice to the IRS if the charity terminates.¹⁰³ In addition, the charity must not engage in political activity,¹⁰⁴ use funds for private gain,¹⁰⁵ or fail to file annual forms.¹⁰⁶ Charities are also required to pay employment taxes (Form 941), and the IRS has guidance to help charities understand different worker classifications.¹⁰⁷ Finally, charities must pay an Unrelated Business Income Tax (Form 990-T) on any income received that is not related to its purpose.¹⁰⁸ To maintain tax-exemption status for the federal government, the IRS states that most nonprofit organizations can continue to rely on the initial determination so long “there are no substantial changes in the organization’s character, purposes or methods of operation.”¹⁰⁹

The IRS also has mechanisms to ensure compliance from public charities. First, the annual filing of Form 990 is the IRS’s essential regulatory check for charities.¹¹⁰ Form 990 is a comprehensive financial audit in which charities detail their businesses and transactions for the previous year.¹¹¹ The IRS reviews this form for fraud and accuracy and asks charities to describe basic information regarding its mission, income, activities, and employee compensation.¹¹² The early 2000s saw an increasing number of scandals and abuses of power from public charities and private foundations.¹¹³ In response, the Senate Finance Committee staff asked the

101. *Exempt Organization Public Disclosure and Availability Requirements*, IRS (Aug. 19, 2024), <https://www.irs.gov/charities-non-profits/exempt-organization-public-disclosure-and-availability-requirements> [perma.cc/TF2E-YP38].

102. *Exempt Organizations - Reporting Changes to IRS*, IRS (Aug. 19, 2024), <https://www.irs.gov/charities-non-profits/exempt-organizations-reporting-changes-to-irs> [perma.cc/YU3G-RAHP].

103. *Termination of an Exempt Organization*, IRS (Oct. 18, 2024), <https://www.irs.gov/charities-non-profits/termination-of-an-exempt-organization> [perma.cc/25A6-ZF4T].

104. *Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, IRS (Aug. 20, 2024), <https://www.irs.gov/charities-non-profits/charitable-organizations/restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations> [perma.cc/N2QU-37DN].

105. *Inurement/Private Benefit: Charitable Organizations*, IRS (Nov. 26, 2024), <https://www.irs.gov/charities-non-profits/charitable-organizations/inurement-private-benefit-charitable-organizations> [perma.cc/2RFS-CAG4].

106. The penalties are steep for failing to file a return. Penalties can be \$20 each day with a maximum of \$12,000, or five percent of the organization’s gross receipts, whichever is less. *Exempt Organizations Annual Reporting Requirements - Filing Procedures: Late Filing of Annual Returns*, IRS (Jan. 25, 2024), <https://www.irs.gov/charities-non-profits/exempt-organizations-annual-reporting-requirements-filing-procedures-late-filing-of-annual-returns> [perma.cc/KNL9-RNXX]. Since the passage of the Pension Protection Act of 2006 (PPA), charities that fail to file a return for three years automatically lose their federal tax exemption status. GAO, *supra* note 97, at 11. Charities can file for reinstatement of their status. *Id.* at 11 n.24.

107. *Employment Taxes for Exempt Organizations*, IRS (Mar. 7, 2024), <https://www.irs.gov/charities-non-profits/employment-taxes-for-exempt-organizations> [perma.cc/8R4L-HZ8X].

108. See *supra* Section I.C.

109. Treas. Reg. §§ 1.501(a)-1(a)(2).

110. RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS, § 5.03, cmt. b (AM. L. INST. 2021).

111. *Annual Filing and Forms*, IRS (Mar. 7, 2024), <https://www.irs.gov/charities-non-profits/annual-filing-and-forms> [perma.cc/K7PN-UVTG]. Churches and other religious organizations are exempt from this annual filing. *Filing Requirements for Churches and Religious Organizations*, IRS (Mar. 7, 2024), <https://www.irs.gov/charities-non-profits/churches-religious-organizations/filing-requirements-for-churches-and-religious-organizations> [perma.cc/EVK6-8S3X].

112. SHMIDT & MADISON, *supra* note 26, at 569–70.

113. Roger Colinvaux, *Charity in the 21st Century: Trending Toward Decay*, 11 FLA. TAX REV. 1, 20–21 (2011) (describing how American Red Cross used donations from September 11th relief); see

Independent Sector, a large nonprofit alliance, to prepare a report that proposed recommendations on increasing the efficiency of nonprofit governance and ethics.¹¹⁴ This led to the 2008 update of Form 990,¹¹⁵ which included the ability for charities to report on governance, policies, and other internal operations.¹¹⁶ In addition, IRC section 6104(b) requires nonprofits to make Form 990 publicly available.¹¹⁷ The 2019 Taxpayer First Act mandated that all nonprofits electronically file their returns to help make the forms readily available online.¹¹⁸ By placing charities' information online, the IRS allows the public to support it in enforcing standards regarding tax-exempt entities.¹¹⁹

Second, the IRS can conduct general compliance checks by auditing an organization or receiving information from the public about a nonprofit's conduct. Generally, the IRS can receive whistleblowers and public complaints of nonprofit charities' conduct.¹²⁰ While referrals involving financial matters or terrorism claims are typically prioritized and investigated right away because of the potential to shake the public's confidence, the IRS does not necessarily prioritize "referrals resulting from a media exposé or involving a well-known organization."¹²¹ Suppose a nonprofit organization is found to be in noncompliance. In that case, the IRS can examine the organization by asking for records or sending a representative to observe it directly and then send a letter informing the organization of its findings.¹²² Generally, the IRS allows the organization to correct the infractions before taking further action.¹²³ The penalties typically include excise taxes or late fees for failure to file and, in rare instances, revoking an organization's tax-exemption status.¹²⁴ Finally, for criminal activity, the IRS can refer the matter to the

generally Jacqueline Trescott & James V. Grimaldi, *Smithsonian's Small Quits in Wake of Inquiry*, WASH. POST (Mar. 27, 2007), <https://www.washingtonpost.com/archive/national/2007/03/27/smithsonian-small-quits-in-wake-of-inquiry/da9f6fbf-e573-4984-b80c-6a04611878c2/> [perma.cc/7WWM-EV A7] (describing how a board member resigned for using museum funds for large salaries and personal trips). For a host of other examples, see the *CharityWatch Hall of Shame*, CHARITYWATCH (Aug. 24, 2018), <https://www.charitywatch.org/charity-donating-articles/charitywatch-hall-of-shame> [perma.cc/Z7LL-KCJ4].

114. Brad Wolverton, *Senators Ask for Suggestions to Shape Nonprofit Legislation*, CHRON. PHILANTHROPY (Oct. 14, 2004), <https://www.philanthropy.com/article/senators-ask-for-suggestions-to-shape-nonprofit-legislation/> [perma.cc/P7TG-PUNC].

115. GAO, *supra* note 97, at 18.

116. RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS, § 5.03, cmt. b (AM. L. INST. 2021); *Background Paper: Forms 990, Moving From the Old to the New*, IRS (Aug. 19, 2008), https://www.irs.gov/pub/irs-tege/moving_from_old_to_new.pdf [perma.cc/5FG6-BY57]. For example, the new Form 990 Section VI asked more questions about the makeup of the governing body and whether organizations had specific policies, such as a conflict-of-interest policy. *Id.* at 12–13.

117. 26 U.S.C. § 6104.

118. Jason E. Havens & Kelly L. Hellmuth, *E-Filing Now Mandatory for All Exempt Organizations*, HOLLAND & KNIGHT, <https://www.hklaw.com/en/insights/publications/2019/07/e-filing-now-mandatory-for-all-exempt-organizations> [perma.cc/DB4V-AS5Q] (last visited Mar. 13, 2024); Janna Goudarzi, *Nonprofit Filing Changes Under the Taxpayer First Act*, GRF CPAs & ADVISORS (Jul. 9, 2019), <https://www.grfcpa.com/resource/nonprofit-filing-changes-under-the-taxpayer-first-act/> [perma.cc/QL9H-CLXF].

119. SCHMIDT & MADISON, *supra* note 26, at 569.

120. GAO, *supra* note 97, at 17–19; SCHMIDT & MADISON, *supra* note 26, at 569.

121. GAO, *supra* note 97, at 19.

122. *Id.* at 21.

123. *Id.*

124. *Id.* at 16. STAFF OF JOINT COMM. ON TAXATION, JCS-02-05, OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM EXPENDITURES 222 [hereinafter JOINT COMM.].

U.S. Department of Justice's Tax Division (DOJ) for investigation. The DOJ is not involved in reviewing the charity's tax records and only has access to any sensitive taxpayer information once the case is referred to it.¹²⁵

As this Section demonstrates, the IRS's current regulatory framework provides a simple pathway to tax-exemption status. However, it does not give the public much to hold a nonprofit organization accountable. A person only needs to decide to create and operate an entity for the purposes outlined in the IRC to be granted the status. While an individual will need to satisfy requirements regarding its organizing documents, there is no evaluative standard in the IRC as to whether the practices and governance of the proposed entity are sufficient to receive the status. This can pose a challenge for nonprofit arts organizations, where many arts groups and Boards are formed due to a subjective desire to create and share art without considering how the mission translates to measurable outcomes and how it plans to achieve those goals.

Moreover, while the updates of the annual Form 990 prompted organizations to become more explicit about their governance practices, an organization merely needs to check "yes" or "no" to the IRS's questions.¹²⁶ This closed-end framework of questioning does not prompt Board members to reflect on the effectiveness of its policies and governance, which, in the arts sector, often need to be reevaluated as social understanding around creativity and expression evolve. Finally, the current framework presumes that once the tax-exemption status is received, apart from egregious behavior, the nonprofit will operate by what it says, and the status should remain. This presumption fails to emphasize the high stakes involved with organizations that operate for public benefit and does not create an incentive for these organizations to holistically review their internal practices. The federal tax-exemption status is a privileged benefit for nonprofit organizations, and the federal government should require more from those seeking it. Without more, organizations can continue to apply and receive tax-exempt benefits without analyzing healthy governance and lack the incentive to interrogate their practices.

B. The States' Regulatory Regime

State regulation of charities predates federal involvement.¹²⁷ This regulatory power hails from the states' rights to protect consumers and regulate corporations.¹²⁸ As mentioned, the corporate entity has been the most common structure for nonprofits; therefore, states treat charities as businesses not designed to profit and subject to its corporate statutes.¹²⁹

125. GAO, *supra* note 97, at 36; *see also* 26 U.S.C. § 6103(h)(2).

126. SCHMIDT & MADISON, *supra* note 26, at 576.

127. ELIZABETH MCGUIGAN, GOVERNMENT OVERREACH HURTS CHARITIES AND THOSE THEY SERVE, PHILANTHROPY ROUNDTABLE 2 (2022).

128. *Id.*

129. *Id.* *See also* FISHMAN ET. AL., *supra* note 33, at 288 ("In the early days of the income tax law, 'the statutes lumped all nonprofit organizations together and exempted them from tax as though they were fungible members of an undifferentiated mass.'").

The state attorney general is the principal official with authority to regulate charities in the United States.¹³⁰ Their authority is given through state statutes,¹³¹ and the attorney general's primary duties are supervising charity organizations and representing the public interest by enforcing Board members' fiduciary responsibilities and charities' stated purpose.¹³² The attorney general protects the beneficiaries and charitable assets by alerting the court to potential abuses; he does not defend charitable organizations.¹³³ There is no uniformity regarding what types of actions necessitate the involvement of the state attorney general; therefore, they have broad power to exercise their power and investigate any charity.¹³⁴ The regulatory duties of the state attorney general may be divided with another state agency, such as the Secretary of State or the consumer protection division.¹³⁵ This means there may not always be a dedicated staff or bureau that works to oversee the charities in the state, which further contributes to the fragmented nature of oversight and enforcement.¹³⁶

While each state has its own requirements and guidelines for its charities, general categories apply.¹³⁷ Most states require charities to register with the state attorney general's office, with varying start-up and incorporation costs.¹³⁸ In addition, some states require a separate application to receive an exemption from the state corporate income tax, even after receiving the tax exemption status from

130. RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS, § 5.01 (AM. L. INST. 2021). English common law set the stage for the development of the role of the state attorney general in charity regulation. *Id.* The Crown desired to protect charitable assets and trusts and assigned that authority to the Crown's senior lawyers and other law officers. *Id.*

131. State attorney generals still have common law authority to regulate charities if a state does not have an express statute. CINDY M. LOTT, ELIZABETH T. BORIS, KARIN KUNSTLER GOLDMAN, BELINDA J. JOHNS, MARCUS GADDY & MAURA FARRELL, URBAN INSTITUTE, STATE REGULATION AND ENFORCEMENT IN THE CHARITABLE SECTOR 10 (2016) [hereinafter STATE REGULATION AND ENFORCEMENT]. This is because fiduciary duty and governance are common law principles that form the basis for the state attorney general's regulatory responsibilities. *Id.* Roughly eighty-two percent of American jurisdictions still rely on the common law authority for enforcement. *Id.* at 12; RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS, § 5.01.

132. RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS, § 5.01. For much of the 20th century, state attorney generals had a common-law duty to protect charitable assets. *Id.* To increase the state attorney general's power outside of court action, states enacted statutes that codified the attorney general's power to regulate and required charitable trusts to register and submit annual reports to the attorney general. *Id.*

133. CAL. DEPT. OF JUST., ATTORNEY GENERAL'S GUIDE FOR CHARITIES: BEST PRACTICES FOR NONPROFITS THAT OPERATE OR FUNDRAISE IN CALIFORNIA 30 (2021); see SCHMIDT & MADISON, *supra* note 26, at 581.

134. RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS, § 5.01.

135. WAYNE WINEGARDEN, THE 50-STATE INDEX OF CHARITY REGULATIONS PHILANTHROPY ROUNDTABLE 25 (2023); STATE REGULATION AND ENFORCEMENT, *supra* note 131, at v.

136. Other methods of regulatory influence include laws promulgated by the Uniform Law Commission and Model Acts from the American Bar Association. STATE REGULATION AND ENFORCEMENT, *supra* note 131, at 13. For more information about those laws, see RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS, § 5.01, cmt. (b)(3).

137. STATE REGULATION AND ENFORCEMENT, *supra* note 131, at vi.

138. WINEGARDEN, *supra* note 135, at 16. Typically, there is a registration fee and incorporation fee. Registration fees range from nothing to as high as \$400. *Id.* at 30–31.

the IRS.¹³⁹ Finally, states also have annual filing fees for maintaining the charity,¹⁴⁰ as well as annual reports.¹⁴¹

For state oversight of its charities, the attorney general's office is principally responsible for ensuring that public funds are spent according to the charity's mission. Fundraising abuse is "the most cited focus of enforcement,"¹⁴² so charities must register fundraisers and alert the state if they use a paid solicitor or are involved with a commercial fundraiser.¹⁴³ Many state charity departments also subject their organizations to an audit, requiring some charities to have an independent CPA audit.¹⁴⁴ Finally, attorney generals can also respond to governance issues in a nonprofit organization, which typically arise when a Board of Directors displays self-serving behavior, mishandles finances, or any fraud/misappropriation of assets.¹⁴⁵ As a remedy, the attorney general can recommend that a charity restructure its Board or even remove a member.¹⁴⁶ Since the 2000s, states have emphasized the accountability of charities and sought to provide the attorney general and state charity officials with greater opportunities for enforcement outside of fundraising.¹⁴⁷ For example, California's Nonprofit Integrity Act imposed more restrictions on executive compensation, fundraising, and audit processes.¹⁴⁸

State enforcement of charities continues to evolve, yet suffers from regulatory issues that make reporting difficult. States need more effective databases of charities and their activities, especially when charities do business in multiple states.¹⁴⁹ Moreover, state regulators remain unclear about what information they can use from the IRS to aid in state prosecutions of charities conducting criminal activity.¹⁵⁰ This may be partly due to a provision that made it a criminal offense for a state official to "willfully disclose information shared by the IRS in a manner

139. *Id.* at 16–17, 19.

140. *Id.* at 19. Similar to registration fees, regular state annual filing fees can range from nothing to the thousands. *Id.* at 19, 32–33. New York ranks as the highest filing fee at \$1,525. *Id.* at 19, 33. In addition, some states have additional filing fees. *Id.* at 19, 32–33.

141. *Id.* Alaska requires filing twice a year. *Id.* Generally, the annual report that charities must submit to the IRS (Form 990) satisfies this requirement, yet many states also require supplemental periodic reports on finances, solicitation, and registration renewal. *Id.*

142. STATE REGULATION AND ENFORCEMENT, *supra* note 131, at 19. SCHMIDT & MADISON, *supra* note 26, at 581.

143. WINEGARDEN, *supra* note 135, at 21.

144. *Id.* at 23–24, 36–37.

145. STATE REGULATION AND ENFORCEMENT, *supra* note 131, at 21. In addition, generally, when a Board breaches its fiduciary duty, it is also likely violating federal tax law. SCHMIDT & MADISON, *supra* note 26, at 582. Therefore, due to the Board's behavior, the IRS can revoke the tax-exemption status or impose penalty taxes on those members who breached their duties. *Id.*

146. STATE REGULATION AND ENFORCEMENT, *supra* note 131, at 21.

147. SCHMIDT & MADISON, *supra* note 26, at 581.

148. Nonprofit Integrity Act of 2004, S.B. 1262 (2005).

149. STATE REGULATION AND ENFORCEMENT, *supra* note 131, at 25. This survey also demonstrates that the state that has a large staff dedicated to charity work are more likely to have database mechanisms. *Id.* See SCHMIDT & MADISON, *supra* note 26, at 592.

150. GAO, *supra* note 97, at 36. Before the Pension Protection Act of 2006 (PPA), the IRS could only provide state charity officials information regarding revocations, final deficiency notices, and denials for tax-exempt status. This was insufficient, as state charity regulators needed more specific information to identify which charities were engaging in fraud and the individuals who would attempt to create similar charities in different states. In 2006, the PPA increased the ability for state charity officials to receive more sensitive, confidential information about charities and taxpayers. *Id.*

unauthorized by the Internal Revenue Code.”¹⁵¹ State charity officials must sign disclosure agreements with the IRS and implement security measures to protect the data.¹⁵² However, state charity regulators often do not have the resources to ensure that all these requirements are met and, fearing criminal penalties, decide not to use IRS data in their investigations.¹⁵³

Furthermore, it is challenging for the state attorney general to enforce measures against nonprofit Board members. First, they are insulated from liability because state corporate statutes limit director liability, particularly if volunteering.¹⁵⁴ Courts are reluctant to impose heavy burdens on directors as that may prevent individuals from volunteering.¹⁵⁵ Second, the fiduciary standard for Board members is low, and courts do not impose heavy penalties even if they find a Board member in breach.¹⁵⁶ Next, only the state attorney general, not the public, has standing to challenge whether a Board has breached its fiduciary duties.¹⁵⁷ Finally, states often need more resources for enforcement as the volume of charitable organizations has significantly increased over the last decade.¹⁵⁸ Incorporating greater standards into the federal tax-exemption regime could support state enforcement by weeding out charities that do not meet minimum governance guidelines and providing states with more detailed information about a charity to help its reporting.

Federal and state regulatory methods try to ensure that public charities operate according to their stated mission.¹⁵⁹ If a charity abuses how it provides services or misuses public donations, then communities will lack faith in the nonprofit sector.¹⁶⁰ However, as discussed above, current regulations do not offer enough stringent measures for nonprofit arts organizations, which allows them to have more discretion to fill in the regulation’s meaning.¹⁶¹ This leads to more inconsistency and ambiguity in an arts sector that already has nebulous standards of achievement and outcomes. Nonprofit arts organizations need greater preliminary and continuing requirements to assess their efficiency and success. The COVID-19 pandemic unearthed ongoing harmful practices of several nonprofit arts organizations, and the next Section will delve into some specific challenges and how the current regulatory efforts failed them.

151. *Id.* at 38; I.R.C. § 6104(c).

152. GAO, *supra* note 97, at 38.

153. *Id.*

154. SCHMIDT & MADISON, *supra* note 26, at 582.

155. FISHMAN ET AL., *supra* note 33, at 138–42 (highlighting how the case *George Pepperdine Foundation v. Pepperdine*, 126 Cal. App. 2d 154 (1954), helped create the prevailing attitude that the standard of care should be lower for a nonprofit Board member). Furthermore, some states also have statutory protection for Board members who are volunteers. *See* Cal. Corp. Code § 5047.5.

156. SCHMIDT & MADISON, *supra* note 26, at 582.

157. *Id.*

158. *Id.* at 592.

159. CRS, EDUCATIONAL *supra* note 91, at 2.

160. Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 19 CORNELL J.L. & PUB. POL’Y 1, 1 (2009).

161. *See* Shauhin Talesh, *How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws*, 46 LAW & SOC’Y REV. 463, 483–86 (2012).

III. PERVASIVE ISSUES OF NONPROFIT ARTS BOARD GOVERNANCE

As previously mentioned in Section I.D, the nonprofit arts organization is unique among 501(c)(3) public charities because the direct application of its services (i.e., the art) is “limited to those who use its service” (i.e., an audience), and the art does not have to produce a tangible public benefit (i.e., food, shelter, clothing).¹⁶² This means that anyone can create, exhibit, or produce art and do so for the public, which allows for the diversity of perspectives in the sector. However, artists require funding to carry out those tasks, which leads them to form a nonprofit and seek 501(c)(3) status.¹⁶³ At formation, artists and founding Board members are often unaware of the responsibilities of running an organization, particularly one that is arts-focused and does not require a measurable economic outcome. As these arts groups evolve, the volunteer Board of Directors is criticized by the staff and community artists for being under-involved in the organization and unaware of the full responsibilities of leadership.¹⁶⁴ Board members then claim that the organization is under-resourced and needs more from funders to do the work that the artists ask.¹⁶⁵ This results in the Board and the organization’s leadership prioritizing money over art, cutting corners in operating costs, or breaching the trust of its community.¹⁶⁶ While this phenomenon exists across several industries in the nonprofit sector, arts organizations are especially vulnerable because of the subjective and immeasurable public outcomes that make it difficult for a Board to care for the organization effectively. In the following Section, this Note uses the recent conflicts of three prominent nonprofit arts organizations, Victory Gardens Theater, the Museum of Modern Arts, and American for the Arts, to illustrate how inadequate Board leadership can substantially impact the internal staff and larger artistic community.¹⁶⁷

A. Lack of Stakeholder Involvement

Nonprofit arts organizations are consistently critiqued for needing to be more in touch with their community stakeholders. Stakeholders are “any group or individual who can affect or is affected by an organization’s achievements.”¹⁶⁸ As

162. *See supra* Section I.D.

163. As a reminder, an entity exempt from taxes under section 501(c)(3) is the only category in the IRC where individuals can receive a charitable deduction. *See supra* Section I.B. Nonprofit organizations regularly highlight this incentive when pursuing individual donations.

164. *See infra* Section III.A.

165. *See infra* Section III.A.

166. This phenomenon has been called “the nonprofit starvation cycle.” *See generally* KENNARD WING & MARK A. HAGER, URB. INST., GETTING WHAT WE PAY FOR: LOW OVERHEAD LIMITS NONPROFIT EFFECTIVENESS (2004). This framework, first noted by Wing and Hager, examines how inadequate infrastructure of nonprofit organizations inhibits their public effectiveness. *Id.* Nonprofits are pressured to minimize costs and devote maximum resources to programming, and funders exacerbate this by constantly restricting what nonprofits can do with money. *Id.*

167. I chose these three institutions because of their similarities in reputation and respective impacts on the artistic community. Yet, I also wanted to highlight that these issues appear in different types of artistic nonprofits.

168. Giacomo Manetti & Simone Toccafondi, *Defining the Content of Sustainability Reports in Nonprofit Organizations: Do Stakeholders Really Matter?*, 26 J. NONPROFIT & PUB. SECTOR MKTG. 35, 36 (2014). Stakeholder theory argues that an organization’s manager has obligations to a group of stakeholders and that the development of an organization may be influenced by the way in which diverse stakeholder relationships are managed. *See generally* R. EDWARD FREEMAN, STRATEGIC

many nonprofits purport to serve specific communities, they must learn how to engage and reconcile various stakeholder interests. Engaging stakeholders in the strategic planning process and efforts to measure the organization's effectiveness improves "understanding of [nonprofit organization] governance and, therefore, the quality of governance practices."¹⁶⁹ Positive stakeholder relationships can be vital to the success and health of an organization.¹⁷⁰ Yet arts organizations, in particular, continue to be accused of engaging in shallow community-building efforts to provide numbers to funders¹⁷¹ and creating programming that is not reflective of their communities.¹⁷² These acts ultimately do more harm than good to their constituency, and, as the nonprofit's leaders, the Board is responsible for these failures.¹⁷³ The two-year conflict at Victory Gardens Theater demonstrates this pattern.

Victory Gardens Theater is a fifty-year-old, Tony-award-winning regional theater in Chicago, Illinois.¹⁷⁴ Its mission is to "nurture[] and produce[] relevant, new theater work that reflects the diverse stories of our world and contributes to the vitality of the American Theater. [Its] work inspires dialogue towards meaningful civic change and creates an inclusive theater experience that belongs to everyone."¹⁷⁵ This mission anchored Victory Gardens as the home to new playwrights and artists bursting onto the theater scene; it quickly became a place where Chicago theater artists could experiment and grow their craft.¹⁷⁶ The theater hosted a dedicated Playwrights Ensemble¹⁷⁷ and had a group of directors who regularly worked at the theater; all were permitted access to staff meetings, Board meetings, and other institutional committee meetings.¹⁷⁸ It cultivated relationships

MANAGEMENT: A STAKEHOLDER APPROACH (Pitman, ed. 1984) for more information about stakeholder theory through Freeman's approach.

169. Lore Wellens & Marc Jegers, *Effective Governance in Nonprofit Organizations: A Literature Based Multiple Stakeholder Approach*, 32 EUR. MGMT. J. 223, 224 (2014).

170. Manetti & Toccafondi, *supra* note 168, at 37.

171. Ronia Holmes, *Your Organization Sucks at 'Community' and Let Me Tell You Why*, ARTSJOURNAL BLOG (Nov. 16, 2016), <https://www.artsjournal.com/engage/2016/11/your-organization-sucks-at-community-and-let-me-tell-you-why/> [perma.cc/Z737-XHH6].

172. Tessa Crisman, *In 2020, Arts Nonprofits Have a Choice: Connect to Community or Go Under*, NONPROFIT Q. (Sept. 22, 2020), <https://nonprofitquarterly.org/in-2020-arts-nonprofits-have-a-choice-connect-to-community-or-go-under/> [perma.cc/UN53-BV64]; Michael J. Bobbitt, *Boards Are Broken, So Let's Break and Remake Them*, AM. THEATER (Jan. 5, 2021), <https://www.americantheatre.org/2021/01/05/boards-are-broken-so-lets-break-and-remake-them/> [perma.cc/RZW8-KNYD].

173. Rick Dunham, *Is Your Nonprofit's Board Doing More Harm Than Good*, DUNHAMANDCOMPANY.COM (Dec. 19, 2018), <https://www.dunhamandcompany.com/leadership/is-your-nonprofits-board-doing-more-harm-than-good/> [perma.cc/6CUF-HL8E].

174. *Mission & History*, VICTORYGARDENS.ORG, <https://victorygardens.org/mission-history/> [perma.cc/A794-YZPB] (last visited Apr. 24, 2024).

175. *Id.*

176. *Id.*

177. The Victory Gardens Playwrights Ensemble was a three-year membership in which a cohort of playwrights selected by the Artistic Director would receive a world premiere of one of their plays at the theater, a reading at the new play festival, and any developmental resources they needed. *Playwrights Ensemble*, VICTORYGARDENS.ORG, <https://victorygardens.org/playwrights-ensemble> [perma.cc/W8CD-GPQR] (last visited Apr. 24, 2024).

178. Regina Victor, *Victory Gardens Staff Statement of Solidarity Reportedly Removed by Board*, RESCRIPTED.ORG (July 6, 2022) [hereinafter Victor, *Statement of Solidarity*], <https://rescripted.org/2022/07/06/victory-staff-solidarity/> [perma.cc/26Y6-QE7E].

within the Lincoln Park neighborhood and throughout Chicago, establishing a solid presence as an advocate for diverse theater and an organizational leader within the Chicago arts community.¹⁷⁹

This perception changed when, in 2020, after Artistic Director Chay Yew¹⁸⁰ stepped down, the Board of Directors appointed Erica Daniels, the theater's current executive director, to a single position combining artistic and executive leadership positions.¹⁸¹ The staff and community protested loudly, angered at the Board's lack of transparency in the hiring process and failure to include the artistic community in that conversation.¹⁸² Before that point, in its fifty-year history, Victory Gardens only had two previous artistic directors.¹⁸³ From the staff and community's perspective, the Board betrayed them by failing to hold a national search and not allowing the community to vet a new leader, particularly during a tumultuous time for arts institutions.¹⁸⁴ Furthermore, the artistic community felt wary of Erica Daniels as the new artistic leader due to her previous connections to past incidents in the Chicago arts scene.¹⁸⁵ The betrayal reached a boiling point in June 2020 at the start of the nationwide Black Lives Matter protests. While other theaters in Chicago opened their lobbies to support protestors, providing them shelter and sustenance, Daniels and the Board refused to open its lobby.¹⁸⁶ Instead, they put large wooden slabs to cover the windows.¹⁸⁷ As a response, artists and other stakeholders gathered and wrote messages on the wooden boards in support of the Black Lives Matter movement and denounced Victory Gardens.¹⁸⁸ Ultimately, Erica Daniels resigned from both roles, stating that "[she] care[s] too much about Victory Gardens and its

179. See generally Mark Caro, *Taking Over Victory Gardens to Make 'A Theater for All'*, N.Y. TIMES (Apr. 18, 2021), <https://www.nytimes.com/2021/04/18/theater/ken-matt-martin-victory-gardens.html> [perma.cc/JSS5-6UBV].

180. The Artistic Director is a senior management role that is responsible for curating all the artistic elements of each production at the organization. The role is responsible for selecting the shows, recruiting and hiring directors and performers, assisting with setting the production calendar, and aiding the Executive Director in managing the budget. *Artistic Director: Job Description*, IESA: ARTS&CULTURE, <https://www.iesa.edu/paris/news-events/artistic-director> [perma.cc/7VJX-T9PP] (last visited Apr. 24, 2024).

181. Chris Jones, *Following Protests, Erica Daniels to Exit Victory Gardens Theater*, CHI. TRIB. (Jun. 8, 2020), <https://www.chicagotribune.com/2020/06/08/following-protests-erica-daniels-to-exit-victory-gardens-theater/> [perma.cc/QNY9-D998].

182. *Mass Resignation: A Letter from the Victory Gardens Playwrights Ensemble*, RESCRIPTED.ORG (May 22, 2020) [hereinafter *Mass Resignation*], <https://rescripted.org/2020/05/22/resignation-victory-gardens-playwrights/> [perma.cc/7G9D-ZBGN]; see Chris Jones, *Victory Gardens' Playwrights Ensemble Resigns in Protest*, CHI. TRIB. (May 22, 2020), <https://www.chicagotribune.com/2020/05/22/victory-gardens-playwrights-ensemble-resigns-in-protest/> [perma.cc/6PWQ-UAE6].

183. Deanna Isaacs, *At Victory Gardens, A Bitter Uprooting*, CHI. READER (Dec. 5, 2012), <https://chicagoreader.com/columns-opinion/at-victory-gardens-a-bitter-uprooting/> [perma.cc/4MG4-5VSJ].

184. *Mass Resignation*, *supra* note 182.

185. Regina Victor, *Victory Gardens Boards Windows Against Black Lives, Arts Community Protests Leadership*, RESCRIPTED.ORG (June 8, 2020), <https://rescripted.org/2020/06/08/victory-gardens-protests/> [perma.cc/J6DR-UMEN]. Among the concerns about having Daniels lead the theater were "rumors" that she "facilitate[d] unsafe work spaces" when she taught at Profiles Theater and when she managed Second City. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

mission to let [the controversy] continue.”¹⁸⁹ Steve Miller, the chairman of the Board, also resigned, taking “full responsibility for these flaws.”¹⁹⁰ The Board later conducted a broader national search with input from the community and hired the theater’s first Black artistic director, Ken-Matt Martin.¹⁹¹ However, the Board invoked the community’s ire again when they dismissed Martin after only one year.¹⁹²

Connecting with the stakeholders would have helped Victory Gardens stay in touch with what mattered. Its mission centered on “dialogue towards meaningful civic change” and “an inclusive theater experience that belongs to everyone.”¹⁹³ It also had a history of including stakeholders, through its Playwrights Ensemble, staff, and resident directors, in conversations that would determine the direction of the theater.¹⁹⁴ Therefore, it was reasonable to expect that the staff and artistic community wanted a voice and to be invited to the conversation regarding leadership. Instead, the Board responded by shutting down communication,¹⁹⁵ which not only cut the Board off from the voices of the community but also stripped the community stakeholders of the opportunity to learn more about the strategies and governance practices the Board was considering. Furthermore, while the Board attempted to remedy its earlier failure and conducted a more transparent search for an artistic leader, its controversial dismissal of Victory Gardens’ first Black artistic director, with no succession plan in place, further tarnished the relationship between it and the artistic stakeholders and staff.

Regarding federal and state regulations, the Board performed no action warranting involvement from the IRS or attorney general. Yet, those affirmative legal duties did not prevent the Board from causing harm to the community through its governance actions. Because the Board had lost the community’s trust, which meant that no one would work for the organization, it shifted the theater from a

189. Regina Victor, *Erica Daniels and Board President Steve Miller Resign from Victory Gardens Theater, Board Promises Transparent Leadership Search*, RESCRIPTED.ORG (June 8, 2020), <https://rescripted.org/2020/06/08/daniels-miller-resign/> [perma.cc/9AY8-CVJW].

190. *Id.*

191. Caro, *supra* note 179; Jerald Raymond Pierce, *Victory Gardens Names Ken-Matt Martin as Its New AD*, AM. THEATER (Mar. 17, 2021), <https://www.americantheatre.org/2021/03/17/victory-gardens-names-ken-matt-martin-new-ad/> [perma.cc/54LN-MYK4].

192. Mark Caro, *Rebounding From a Revolt, Victory Gardens Is Again Mired in Turmoil*, N.Y. TIMES (Aug. 1, 2022), <https://www.nytimes.com/2022/08/01/theater/victory-gardens-theater-chicago.html> [perma.cc/TQ4R-ABMZ]. Ken-Matt Martin stated in a blog post that he was dismissed for “cause,” but the Board would not tell him the reason. *For Those Doing the Work*, KEN-MATT.COM BLOG (July 19, 2022), <https://www.kenmatt.com/blog/2022/7/18/for-those-doing-the-work> [perma.cc/YVR8-H747]. Martin also alleged that the Board asked him to sign an NDA to receive a severance package, which Martin declined. *Id.* Once Martin was released, a playwright whose show was running at Victory Gardens during that time, pulled her rights to play. Caro, *supra* note 179. With no production, the Victory Gardens Board of Directors later released the entire staff. Jones, *supra* note 7; *see also* Sabrina Franza, *Victory Gardens Theater Fires 18 Workers; Staff Say They Were Trying to Unionize*, CBS NEWS (Sept. 9, 2022), <https://www.cbsnews.com/chicago/news/victory-gardens-theater-fires-18-workers-staff-say-they-were-trying-to-unionize/> [perma.cc/8MD4-STRK].

193. *Mission & History*, *supra* note 174.

194. *Playwrights Ensemble*, *supra* note 177; Victor, *supra* note 178.

195. Victor, *supra* note 178 (“The board has removed the post and blocked staff members from accessing the social media accounts. The marketing manager has also reportedly been removed from their staff [G]oogle account, drive and email.”). *See also* Isaac Gomez, *We Resign*, MEDIUM.COM (July 6, 2022), <https://isaacgomez.medium.com/we-resign-93c7b54158af> [perma.cc/JS32-D48M] (announcing the resignation of the final cohort of the Playwrights Ensemble).

public charity to a foundation.¹⁹⁶ In today's social media era, there are many avenues for nonprofit arts organizations to invite stakeholders to the conversation. As evidenced in Victory Gardens, a Board's failure to do so can have lasting negative repercussions for the organization.

B. Actual and Perceived Conflicts of Interest

The next pervasive issue with the nonprofit arts boards concerns conflicts of interest. A conflict of interest is when a Board member has a "personal interest that may influence them when making decisions."¹⁹⁷ Conflicts of interest are of great concern to a nonprofit organization because they overlap with the amount of trust that the public has in the organization. It does not matter if the conflict of interest is "actual or perceived"; if the public finds out about it, it can make it seem as if the organization is benefiting itself at the expense of the charity, leading to a loss of faith that is ultimately devastating for a nonprofit organization.¹⁹⁸ Furthermore, because Board members are volunteers, they often come into the organization with various conflicts.¹⁹⁹ Most states do not mandate having a conflict of interest policy but rather guide entities on what to include in a policy or how to manage it.²⁰⁰ IRS Form 990 only asks whether nonprofit organizations have a written conflict of interest policy.²⁰¹ Failure to have a policy does not result in any consequences. However, if a Board member is found to have a conflict that signals private benefit, the IRS can impose intermediate sanctions against the person and the organization.²⁰²

Perceived conflicts of interest can harm a nonprofit organization just as much as an actual one. The mission statement of the Museum of Modern Art (MoMA) is to "connect[] people from around the world to the art of [the] time."²⁰³ MoMA "aspire[s] to be a catalyst for experimentation, learning, and creativity, a gathering place for all, and a home for artists and their ideas."²⁰⁴ Founded in 1929, MoMA is the first museum in America to dedicate itself exclusively to modern art, and the Rockefeller family has pioneered much of its success.²⁰⁵ MoMA has attracted

196. *Board Updates*, VICTORYGARDENS.ORG (Mar. 22, 2023), <https://victorygardens.org/message-from-the-board/> [perma.cc/3RY6-CATB].

197. *Conflicts of Interests for Nonprofits*, BOARDSOURCE.ORG, <https://boardsource.org/resources/nonprofit-conflict-of-interest/> [perma.cc/2KWR-SSPQ] (last visited Apr. 24, 2024).

198. Chris MacDonald, Michael McDonald, & Wayne Norman, *Charitable Conflicts of Interest*, 39 J. BUS. ETHICS 67, 68 (2002).

199. *Id.* at 67.

200. FISHMAN ET AL., *supra* note 33, at 125; see David G. Samuels, *The New York Non-Profit Revitalization Act of 2013: Ten Things That New York Nonprofits Should Know*, NYC.GOV (Apr. 9, 2014), <https://www.nyc.gov/html/nonprofit/downloads/pdf/NFP%20Revit.%20Act%20Foundation%20Ctr%20April%209%202014.pdf> [perma.cc/V7VY-J64S].

201. See *supra* Section II.A.

202. *Conflicts of Interest*, NAT'L COUNCIL NONPROFITS, <https://www.councilofnonprofits.org/running-nonprofit/governance-leadership/conflicts-interest> [web.archive.org/web/20240121095322/https://www.councilofnonprofits.org/running-nonprofit/governance-leadership/conflicts-interest] (last visited Jan. 6, 2024).

203. *Mission Statement*, MOMA, <https://www.moma.org/about/mission-statement/> [web.archive.org/web/20240501224440/https://www.moma.org/about/mission-statement/] (last visited Apr. 20, 2024).

204. *Id.*

205. *Museum of Modern Art*, GROW ANNENBERG, <https://growannenberg.org/grants/7537/museum-of-modern-art-moma> [perma.cc/Q6AD-S7VU] (last visited Jan. 6, 2024); *Museum of*

individuals throughout the years to continue its successful tradition, such as two members of its Board of Trustees, Leon Black and Larry Fink.²⁰⁶

Leon Black, the founder of private equity firm Apollo Global Management, had been on MoMA's Board since 1997 and was known for his expansive knowledge of art and his significant contributions to MoMA, including loaning expensive artwork to be displayed at MoMA.²⁰⁷ He was appointed Chair of the Board of Trustees in 2018.²⁰⁸ However, in 2020, his prestige crumbled when an investigation revealed that he paid \$158 million to convicted sex offender Jeffrey Epstein²⁰⁹ for tax and estate services.²¹⁰ Black's relationship with Epstein dates back to 1997, as Epstein was an original trustee of the Debra and Leon Black Foundation.²¹¹ Furthermore, evidence revealed that even after Epstein's conviction in 2008, Black sent him "at least \$50 million" from 2012 to 2017 for transactions relating to consulting fees and even money to start a foundation.²¹² While a law firm performing an independent investigation ultimately found no wrongdoing from Black, his tie to Epstein prompted artists to lambast the museum and call for Black's resignation from the Board.²¹³

Larry Fink is a member of the Board of Directors for MoMA, the CEO of a company called Blackrock, and the second-largest shareholder of two prison

Modern Art, ROCKEFELLER BROTHERS FUND, <https://www.rbf.org/about/our-history/timeline/museum-modern-art> [web.archive.org/web/20250206120736/https://www.rbf.org/about/our-history/timeline/museum-modern-art] (last visited Jan. 6, 2024).

206. Adelaide Blair, *The Board of Trustees: Museum of Modern Art*, SUBSTACK (Sept. 26, 2023), <https://adelaideblair.substack.com/p/the-board-of-trustees-museum-of-modern-art> [perma.cc/H7AH-5CL3].

207. Alex Greenberger, *Leon Black Named Chairman of MoMA's Board of Trustees*, *Ronnie Heyman President*, ARTNEWS (May 29, 2018, 5:17 PM), <https://www.artnews.com/art-news/news/leon-black-named-chairman-momas-board-trustees-ronnie-heyman-president-10401/> [perma.cc/R2Y-UNE3]. The previous Board Chair had held the position since 2007. Kelly Crow, *An Art Mystery Solved: Mogul Is 'Scream' Buyer*, WALL ST. J. (July 11, 2012), <https://www.wsj.com/articles/SB10001424052702304373804577521240470769420> [perma.cc/7PQG-K5RA]; *Edward Munch's The Scream To Go On Show in New York*, BBC NEWS (Sept. 18, 2012), <https://www.bbc.com/news/entertainment-arts-19633293> [perma.cc/4YEZ-9H6S].

208. Greenberger, *supra* note 207.

209. Jeffrey Epstein was a financier convicted in 2008 of prostituting underage women. *Jeffrey Epstein: Why He Symbolized Privilege and Depravity*, N.Y. TIMES (Aug. 10, 2019), <https://www.nytimes.com/2019/08/10/nyregion/jeffrey-epstein.html> [perma.cc/5AVB-M857]. He served a controversial thirteen months in prison, and in February 2019, a federal judge ruled that Epstein's plea deal in 2008 was illegal because the government failed to notify the victims of the deal. *Id.* In July 2019, Epstein was arrested on sex trafficking charges. *Id.* He was found dead in August 2019, and his death was ruled as a suicide. *Id.*

210. Pogrebin & Goldstein, *supra* note 9. The investigation began when Black sent a letter to his Apollo employees detailing his relationship with Epstein. Hakim Bishara, *MoMA Chairman Leon Black Will Be Subpoenaed in Virgin Islands for Jeffrey Epstein Ties*, HYPERALLERGIC (Aug. 24, 2020), <https://hyperallergic.com/584125/moma-chairman-leon-black-will-be-subpoenaed-in-virgin-islands-for-jeffrey-epstein-ties/> [perma.cc/WX78-NVF2].

211. Matthew Goldstein, Steve Eder & David Enrich, *The Billionaire Who Stood by Jeffrey Epstein*, N.Y. TIMES (Oct. 13, 2020), <https://www.nytimes.com/2020/10/12/business/leon-black-jeffrey-epstein.html> [perma.cc/8LY9-K9QB].

212. *Id.* Records showed that, in 2015, Black's family foundation gave \$10 million to one of Epstein's charities. Bishara, *supra* note 210.

213. Hakim Bishara, *Over 150 Artists Call for Leon Black's Removal From MoMA's Board Over Jeffrey Epstein Financial Ties*, HYPERALLERGIC (Feb. 4, 2021), <https://hyperallergic.com/619709/artists-call-for-leon-black-removal-moma-jeffrey-epstein/> [perma.cc/VDC9-NZ58].

companies.²¹⁴ Blackrock is an investment company that holds many shares in two major American private prison corporations.²¹⁵ Artists had begun calling for Fink and MoMA to dissociate from investing in prison companies.²¹⁶ Activists gathered to protest at the museum after its re-opening party in October 2019.²¹⁷ One artist, Phil Collins, sought to oppose his involvement through an upcoming MoMA exhibition, which would have involved altering his exhibit to display text that stated, “[T]he work had been altered in solidarity with the millions being held in cages in [United States] prisons and jails.”²¹⁸ The museum declined this request, prompting Collins to withdraw from the entire exhibition.²¹⁹

The controversy around Fink, Black, and other Board members who had suspicious financial and political ties created a lot of tension among artists and the museum. Artists said they would “feel ashamed to be associated” with MoMA and would remove works in their collection if the museum allowed Black to continue as chairman.²²⁰ This culminated in a ten-week strike, during which the International Imagination of Anti-National Anti-Imperialist Feelings proclaimed to create a post-MoMA future that is controlled by the artists and community rather than billionaires: “Whether Black stays or goes, a consensus has emerged: beyond any one board member, MoMA itself is the problem.”²²¹

MoMA has had a written conflict of interest policy at least since 2009, when the IRS updated Form 990 to require disclosure.²²² Yet, it is unclear if and when Fink or Black disclosed their connections so the Board could proactively protect

214. Hakim Bishara, *Over 200 Artists and Scholars Urge MoMA and Board Member to Divest from Private Prison Companies*, HYPERALLERGIC (Oct. 10, 2019), <https://hyperallergic.com/521733/moma-private-prison-open-letter/> [perma.cc/TBM9-44ZV].

215. *Id.*

216. *Id.*

217. Greenberger, *supra* note 9.

218. Hakim Bishara, *Behind the Scenes of MoMA PS1 Exhibition, Artists Confronted Leadership Over Chairman’s Implication in Iraq War*, HYPERALLERGIC (Mar. 18, 2021) [hereinafter Bishara, *Behind the Scenes*], <https://hyperallergic.com/620499/moma-ps1-gulf-wars-exhibition-conflict/> [perma.cc/Q7LU-2896]. Here is a full description of the exhibit and Collins’ proposed suggestion:

The video work is composed of a series of single-take portraits of young Iraqis, filmed a year before the US-led invasion of their country. Collins proposed to remove, in reverse sequence and at regular intervals, each of the portraits and replace them with text slates stating that the work had been altered in solidarity with the millions being held in cages in US prisons and jails. By the end of the exhibition, all of the portraits would have disappeared, leaving only the text for the entire duration of the work.

Id.

219. *Id.*

220. Robin Pogrebin & Matthew Goldstein, *A Donor’s Ties to Epstein Are Criticized at MoMA and Dartmouth*, N.Y. TIMES (Feb. 22, 2021), <https://www.nytimes.com/2021/02/22/arts/design/leon-black-moma-jeffrey-epstein.html> [perma.cc/LY68-V7KN].

221. *Strike MoMA*, *supra* note 8. Marie-Josée Kravis was elected as the next Board Chair. Alex Greenberger, *Marie-Josée Kravis Named MoMA Board Chair, Succeeding Leon Black*, ARTNEWS (Apr. 27, 2021, 5:43 PM), <https://www.artnews.com/art-news/news/marie-josee-kravis-moma-board-chair-1234591051/> [perma.cc/WC3K-Y9XW]. However, she was also subject to controversy due to her husband’s involvement in fossil fuels through an investment firm called KKR. Karen K. Ho, *Activists Protest at MoMA on Valentine’s Day Over Donor Henry Kravis*, ARTNEWS (Feb. 14, 2024, 8:21 PM), <https://www.artnews.com/art-news/news/museum-of-modern-art-new-york-climate-change-protest-1234696378/> [perma.cc/2P8Q-J2SP].

222. Andrea Suozzo, Alec Glassford & Ash Ngu, *Museum of Modern Art*, PROPUBLICA (Apr. 24, 2024), <https://projects.propublica.org/nonprofits/organizations/131624100> [perma.cc/5M6A-VGDC].

the museum's image. In Fink's case, his connection created a conflict of interest that influenced the museum's decision not to showcase Collin's art.²²³ While initially Fink's connection may not have been seen as a conflict, the minute MoMA considered acting in a manner that contravened its mission "to be a home for artists and their ideas," the museum should have worked to protect the artist or foster dialogue with the other artists.²²⁴ Similarly, while a bit murkier, Black's conflict of interest is still untenable. Because Black has given so much to MoMA in terms of money and art, he must ensure that his personal financial relationships would not raise concerns over how he gives to the organization and helps protect its assets. Yet, by not disclosing his connection to Epstein until after his death, he revealed a conflict of interest that drove the public to perceive that Black, and by proxy the museum, benefitted from his continued relationship with Epstein.

Fink and Black's ethical lapses were devastating to MoMA's reputation. With art, it can be a challenge to determine which personal pursuits may conflict with the nonprofit's mission. Nonprofits need more standards with these policies to push a Board to disclose any activity that could potentially negatively impact the organization.

C. Lack of Accountability With No Incentive to Self-Regulate

Finally, an arts Board of Directors needs more accountability, the lack of which further erodes public trust. Defining accountability is a complex task, and even more so for nonprofit arts organizations that need help identifying consistent, reliable metrics for the public. Alnoor Ebrahim, a leading scholar on management and leadership, highlights that nonprofit organizations "face plural accountabilities that change over time."²²⁵ He defines it as "the means through which individuals and organizations are held externally to account for their actions and as the means by which they take internal responsibility for continuously shaping and scrutinizing organizational mission, goals, and performance."²²⁶ This definition highlights the broad and narrow objectives of accountability, and balancing these needs is crucial to retaining the public's trust.²²⁷ A nonprofit organization with ineffective leadership is not serving its mission when the very staff members whom it relies upon cannot safely do the work. The following illustration details the consequences when an organization fails to heed internal accountability for years.

The mission of Americans for the Arts (AFTA) is "to build recognition and support for the extraordinary and dynamic value of the arts and to lead, serve, and advance the diverse networks of organizations and individuals who cultivate the arts

223. Bishara, *supra* note 218.

224. *Mission Statement*, *supra* note 204.

225. Alnoor Ebrahim, *Making Sense of Accountability: Conceptual Perspectives for Northern and Southern Nonprofits*, 14 NONPROFIT J. MGMT. & LEADERSHIP 191, 194 (2003).

226. *Id.*

227. Lynne M. Doyle, *Nonprofit Board Accountability: A Literature Review and Critique*, 1 SPNA REV. 27, 28 (2005). In recent years, a growing trend has focused on whether a nonprofit has taken steps toward diversity, equity, and inclusion in its organization. Ann Lehman, *Need for Diversity at Nonprofits Is More Vital After Garner and Brown Cases*, CHRON. PHILANTHROPY (Dec. 19, 2014), <https://philanthropy.com/article/Need-for-Diversity-at/152045> [web.archive.org/web/20150930170801/https://www.philanthropy.com/article/Need-for-Diversity-at/152045]; Rosetta Thurman, *Nonprofits Don't Really Care About Diversity*, STAN. SOC. INNOVATION REV. (May 18, 2011).

in America.”²²⁸ Formed in 1996, AFTA has been a champion for arts and arts policy, spearheading the efforts to garner federal and private sector support by helping create entities like the National Endowment of the Arts, the Arts and Business Council, and forming local arts agencies nationwide.²²⁹ Robert Lynch joined AFTA as its President and CEO after leading the successful merger.²³⁰ Lynch is credited with growing the organization’s membership and outreach and fiercely advocating for arts policy.²³¹ AFTA is also a membership organization where individuals and organizations (both for-profit and non-profit) can access exclusive benefits.²³² Finally, roughly every five years since 1994, AFTA publishes a comprehensive national study of the arts called the Arts and Economic Prosperity Report.²³³ Therefore, AFTA, through the national organization and its vast array of subsidiary programs, serves many stakeholders: artists, educators, other companies, and all individuals invested in the long-term success of arts in America.

However, during the COVID-19 pandemic, AFTA’s leadership and structure were exposed. In a November 2020 article, Quanice Floyd criticized AFTA for its lack of transparency and accountability to its membership base, stating that it “act[s] as a gatekeeper[], hoarding power and blocking pathways for professional advancement in the field for BIPOC arts leaders.”²³⁴ Floyd (and subsequent articles) also noted that Lynch’s salary exceeded \$800,000, and, with an over \$100 million endowment, stakeholders have not seen those endowment funds invested in the arts community.²³⁵ Following that article, former staff members Jeff M. Poulin, Kate McClanahan, and Bridget Woodbury wrote an article supporting the accusations

228. *About Americans for the Arts*, AMS. FOR ARTS [hereinafter *About AFTA*], <https://www.americansforthearts.org/about-americans-for-the-arts> [perma.cc/FFP4-MFHZ] (last visited Apr. 24, 2024).

229. *Id.* In 1996, the National Assembly of Local Arts Agencies and the American Council for the Arts combined to create the present-day AFTA. *Americans for the Arts*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/marketing/encyclopedias-almanacs-transcripts-and-maps/americans-arts> [perma.cc/KK5G-6NMQ] (last visited April 24, 2024). The goal was to increase awareness around arts education in public schools and fight budget cuts of arts programs because entities were skeptical about the value of art in children’s education. *Id.*

230. He was also the Executive Director of the National Assembly of Local Arts and helped merge that organization to form AFTA. *Robert L. Lynch, President and CEO, American for the Arts, Biography*, CONGRESS.GOV, <https://www.congress.gov/116/meeting/house/108950/witnesses/HHRG-116-AP06-Bio-LynchR-20190226.pdf> [perma.cc/9DXL-BERY] (last visited Apr. 24, 2024).

231. *Id.* Lynch was leading the Biden-Harris transition team. Peggy McGlone, *Activists Call for Resignation of Arts CEO Tied to Biden Transition Team*, WASH. POST (Dec. 15, 2020), https://www.washingtonpost.com/entertainment/afta-arts-racial-reform-robert-lynch/2020/12/14/3ae8739e-3ca1-11eb-bc68-96af0daae728_story.html [perma.cc/AGL2-3PXQ].

232. *Member Benefits and Pricing*, AMS. FOR ARTS, <https://www.americansforthearts.org/membership/member-benefits-and-pricing> [perma.cc/XJR4-KPUM] (last visited Apr. 24, 2024).

233. Ruthie Fierberg, *Americans for the Arts Releases New Findings About the Arts’ Impact on U.S. Economy*, BROADWAY NEWS (Oct. 12, 2023, 6:07 PM), <https://www.broadwaynews.com/americans-for-the-arts-releases-new-findings-about-the-arts-impact-on-u-s-economy> [perma.cc/73DP-5LW7]. AFTA’s most recent Arts and Economic Prosperity Report is its sixth iteration, which covers arts data from 2022 and was released in 2023. *Id.*

234. Quanice Floyd, *The Failure of Arts Organizations to Move Toward Racial Equity*, HYPERALLERGIC (Nov. 11, 2020), <https://hyperallergic.com/600640/the-failure-of-arts-organizations-to-move-toward-racial-equity/> [perma.cc/659X-SP97].

235. *Id.* According to a 2019 tax return, Lynch earned \$922,560. Another critique was that he made \$900,000, which critics allege contributed to a payment disparity in the organization. McGlone, *supra* note 231.

against the organization.²³⁶ Then, they stated that they and other former and current staff had been suffering from years of sexual harassment.²³⁷ The article alleged that over ten staff members since 2016 had experienced “sexual harassment, workplace intimidation, retaliation, and a pervasively hostile work environment,” and specifically named CEO Robert Lynch, Chief Operating Officer (COO) Mara Walker, Senior Vice President (SVP) Marc Tobias, and Board Chair Julie Muraco as organization leaders who turned a blind eye to these reports.²³⁸ Each of those ten staff members used the organization’s internal reporting systems to document the incidents yet would suffer from retaliatory tactics, including termination.²³⁹ The article called for AFTA members to hold the Board accountable for its failed leadership, for the Board to remove the executive leadership officials, for the organization to hire an external investigator to look into the workplace claims of wrongdoing, and for the organization to hire an external auditor to look at the organization’s policies.²⁴⁰

Lynch responded to the criticisms in a December 2020 post to the website.²⁴¹ He acknowledged that AFTA needed to do more to facilitate racial and cultural equity in the organization and outlined its current and future efforts.²⁴² According to the Washington Post, Lynch initially inflated its figures regarding its Board diversity, asserting that the Board was “48 percent diverse” in 2020 when it was not.²⁴³ Lynch also called the allegations from the staff member without merit and for individuals to take his piece as “a litigant seeking a settlement.”²⁴⁴ Nevertheless, after taking an initial paid leave to allow investigations into the organization to proceed,²⁴⁵ in May 2021, Lynch officially retired from his position.²⁴⁶

236. Jeff Poulin, *It is Past Time to Hold Americans for the Arts Accountable for Its Actions*, MEDIUM (Nov. 25, 2020), <https://jeff-14644.medium.com/it-is-past-time-to-hold-americans-for-the-arts-accountable-for-its-actions-6370aecfb87e> [perma.cc/JH7T-FSLG].

237. *Id.*; McGlone, *supra* note 231.

238. Poulin, *supra* note 236.

239. *Id.* Jeff Poulin, the author of the article, detailed his experience after he was sexually harassed by a co-worker. He wrote that he filed formal complaints with human resources, and “[a]fter two years of false promises, faithless mediation, and gag orders,” he began to speak with other colleagues who were facing similar harms. *Id.* After he brought the matters to the attention of CEO Robert Lynch, he was disciplined “for being disruptive.” *Id.* Poulin then told a Board member, who said they would bring it up at the meeting. *Id.* Before the Board member had the opportunity to do so, they were informed by the Board chair that their term would not be renewed. McGlone, *supra* note 231. Once he filed complaints with the DC Office of Human Rights (DCOHR) and U.S. Equal Employment Opportunity Commission (EEOC), he was fired. Poulin, *supra* note 236.

240. Poulin, *supra* note 236.

241. Robert L. Lynch, *A Note to Our Stakeholders About Racial and Cultural Equity*, AMS. FOR ARTS (Dec. 3, 2020), <https://www.americansforthearts.org/news-room/americans-for-the-arts-news/a-note-to-our-stakeholders-about-racial-and-cultural-equity> [perma.cc/UT9F-VPS2].

242. *Id.*

243. According to the Washington Post, the specific language that AFTA used is that the figure was “forward-looking to 2021, when the board will be made up of 26 people, of which 12 will be BIPOC [Black, Indigenous, People of Color].” McGlone, *supra* note 231.

244. Lynch, *supra* note 241.

245. Lynch took a paid leave in December 2020, one month after the articles came to light. Bahr, *supra* note 10. Investigations into AFTA were completed by May 2021, but the Board did not release the findings. *Id.*

246. *Id.* While there was less official press when the other named individuals, the senior staff left the organization shortly after Lynch retired: Chief Operating Officer Mara Walker left the organization in 2022, becoming the COO of the National Breast Cancer Coalition. *Mara Walker*, NAT’L BREAST CANCER COAL., <https://www.stopbreastcancer.org/staff/mara-walker/> [perma.cc/6Z79-S8ZJ] (last

This example highlights the complex nature of plural accountability, particularly within large-scale arts organizations. AFTA's broad mission to support arts in America made it aware of its larger accountabilities to national arts policy, and it created organizations and structures to keep the conversation about the arts within the American consciousness.²⁴⁷ Where AFTA failed is its lack of awareness of internal accountability towards its staff. AFTA created internal mechanisms for its staff to report harm and harassment, which did not alleviate the issues.²⁴⁸ At that point, it becomes a failure in governance, which becomes the Board's responsibility to intervene. Yet, when the former staffer alerted the Board to the problems but it did not take action, the organization as a whole should have come under scrutiny. Poulin ultimately reported to other outside agencies regarding workplace treatment. However, those entities are not responsible for holding AFTA accountable as a public charity, which means those actions did not impact its tax-exempt status.²⁴⁹ This is potentially a reason why artists and arts workers use social media and other platforms to raise awareness of the issues, often as a last resort.²⁵⁰

D. Moving Through The Crises

The examples of Victory Gardens, American for the Arts, and MoMA are small representations of the turmoil among the arts community that erupted during COVID-19.²⁵¹ What is common among the three examples is that the issues had

visited Apr. 24, 2024). Senior Vice President Marc Ian Tobias left the organization in 2021 and currently serves as Chief Administrative Officer at Human Rights First. *Marc Ian Tobias*, LINKEDIN, <https://www.linkedin.com/in/marciantobias/> [perma.cc/5TSS-74GN] (last visited Apr. 24, 2024). In March 2024, Edgar Smith was elected as the AFTA Board Chair, replacing Julie Muraco, who served on the board for six years. Press Release, Edgar L. Smith, Jr. Elected Chair of Americans for the Arts' *Board Of Directors*, AMS. FOR ARTS (Mar. 26, 2024), <https://www.americansforthearts.org/advocate/edgar-l-smith-jr-elected-chair-of-americans-for-the-arts-board-of-directors> [perma.cc/8S3K-JQAL].

247. *About AFTA*, *supra* note 228.

248. Poulin, *supra* note 236.

249. *Id.*

250. Catherine Wagley, *More Than Ever, Art Workers Are Calling Out Their Employers and Others—Anonymously—on Social Media. Can It Make Real-World Change?*, ARTNET (Dec. 21, 2020), <https://news.artnet.com/art-world/anonymous-instagram-accounts-2020-1932998> [perma.cc/T4DN-LJ2H].

251. Unfortunately, there are numerous other nonprofit arts organizations that I could discuss, each echoing similar concerns. Here are a few others: Robin Pogrebin, *The New Museum Is World Class, but Many Find It a Tough Place to Work*, N.Y. TIMES (Oct. 5, 2020), <https://www.nytimes.com/2020/10/05/arts/the-new-museum-is-world-class-but-many-find-it-a-tough-place-to-work.html> [perma.cc/B2G6-6LPM] (highlighting workers at the New Museum who allege “unhealthy work conditions, low pay, low morale and incidents in which they say they were asked by museum leaders to act unethically”); Kerry Cardoza, *The Long Dream' and a Labor Nightmare*, CHI. READER (Mar. 3, 2021), <https://chicagoreader.com/arts-culture/the-long-dream-and-a-labor-nightmare/> [perma.cc/M9XX-BU5X] (discussing how a group of employees formed MCAccountable “to make demands for accountability and for eradicating racial justice”); Sarah Jordan, *After Last Year's Labor Battle, Will the Art Museum Come Back Stronger?*, PHILA. (Jan. 28, 2023), <https://www.phillymag.com/news/2023/01/28/art-museum-strike/> [perma.cc/XYB3-GHEJ] (detailing the strike at the Philadelphia Museum of Art, where workers unionized due to large wage discrepancies and a report that detailed years of sexual harassment, physical assault, and “problems and deficiencies at all levels of the hierarchy – from the boardroom on down”); Lorianne D'Orazio, *Remove the Board of Directors and Faculty Leadership at Joy of Motion Dance Center*, CHANGE.ORG (Jun. 17, 2020), <https://www.change.org/p/dismantling-racism-and-discrimination-at-joy-of-motion-dance-center> [perma.cc/7AFD-65SG] (calling for leadership and the Board to step down due to them creating an environment that “condone[s] deliberate discrimination; systematic racism; contempt for any opinions from faculty and

persisted well before COVID-19, and executive leadership and Board members were implicated in not addressing the issue. While some may state that problems were exacerbated during COVID and artists used the time to air out their grievances, the stillness of the pandemic allowed the bubbling issues to rise to the surface. Racial equity, healthy workplaces, and practical, transparent leadership are pathways that should have been present within nonprofit arts organizations since their mission statement often asserts to serve diverse communities and bring people together. Furthermore, the lack of ability to measure the effectiveness of how the organizations are serving their mission continues to fuel the need for more clarity among stakeholders as to how an arts organization is fueling public trust. Since organizations and their stakeholders vary from state to state, and the core of a nonprofit's status is through its tax-exempt benefits,²⁵² the federal government can aid this process by requiring more as a part of its tax-exemption process. The following Part proposes reforms for nonprofit arts organizations to help improve nonprofit governance.

IV. FEDERAL REFORMS TO CREATE A FLOOR FOR NONPROFIT ARTS GOVERNANCE

As the previous Part demonstrated, nonprofit arts organizations suffer from chronic mismanagement of stakeholder and staff relationships, suspicious actual and perceived conflicts of interest, and a lack of internal and external accountability mechanisms. While a staff member in the organization can use internal reporting methods, there still needs to be more overall accountability when reporting problems with the Board of Directors or the entity itself. Because of the unique way arts nonprofit organizations are situated in the sector, the federal government can help alleviate these issues by first enumerating the arts within the 501(c)(3) list of charitable purposes and second, conditioning the initial grant and renewal processes of the tax-exempt status to the establishment and maintenance of certain governance practices.

A. The Arts As an Enumerated Purpose

Enumerating the arts as a listed purpose for section 501(c)(3) can support nonprofit arts governance by creating a structure for measurable missions and assisting with regulations specific to the sector. To enumerate something means to “name things separately, one by one.”²⁵³ Most Americans are familiar with the term “enumerated,” relating to the federal government’s separation of powers. Because the concept of governance is broad and can easily lead to a centralization of power, the framers of the Constitution structured the federal government so that each branch had specific listed powers and could be held accountable if it took actions beyond those limits.²⁵⁴ Nonprofit arts organizations, too, can benefit from similar

staff; exceptionally poor leadership and financial mismanagement; and an overall lack of respect for the students, faculty, staff, and community”).

252. See *supra* Section II.A.

253. *Enumerate*, CAMBRIDGE ENG. DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/enumerate> [perma.cc/63K4-FESU] (last visited Jan. 7, 2024).

254. *Intro. 7.2 Separation of Powers Under the Constitution*, CONGRESS.GOV, https://constitution.congress.gov/browse/essay/intro.7-2/ALDE_00000031/ [web.archive.org/web/20240807011713/http://constitution.congress.gov/browse/essay/intro.7-2/ALDE_00000031/] (last visited Apr. 28, 2024).

specificity because art is such a broad concept, and it is essential for arts organizations to have a framework for what it means to produce, exhibit, or create art in a way that provides a public benefit. By having this specificity, Board members, in particular when creating a 501(c)(3) nonprofit organization, can give organizations a more solid understanding of the limits of a nonprofit arts organization, which can help with federal, state, and stakeholders efforts for accountability.

Another reason for enumerating the arts as a category is that it can foster a common language and identity within the country regarding the arts.²⁵⁵ Since the Federal Theater Project, there has not been a national effort to develop collective language about the arts in a way that bridges understanding regarding creating, producing, and exhibiting art.²⁵⁶ Having a common language around the arts can anchor the nonprofit arts community in a way where Board members and organizations can have grounding conversations with its staff and stakeholders about how the institution intersects with that purpose. These conversations, in turn, will enhance the value of the arts sector as a whole by helping organizations with transparency, communication, and clarity regarding their missions and purposes.

Moreover, an enumerated category can assist nonprofit arts organizations with understanding how to effectively serve the public while allowing artists and art makers to receive the proper acknowledgments. As has been mentioned, it is often difficult to measure the public benefit of a nonprofit arts organization, and it can also be challenging to balance out if there is too much private benefit to the artist in addition to serving only a limited number of people. The IRS Revenue Rulings have attempted to distinguish when a nonprofit arts organization veers too much into a private benefit by stating that an educational arts organization can engage in commercial operations if artists do not directly benefit.²⁵⁷ However, this standard needs to be more consistent in its application. For example, in Revenue Ruling 71-395, the IRS denied tax exemption to a cooperative art gallery organized to sell the art of about fifty artists.²⁵⁸ It reasoned that the gallery was used as a “vehicle for advancing [the] careers” of the artist co-op who ran the gallery and, therefore, served the private interests of its members rather than benefiting the public.²⁵⁹ The art gallery did not charge admission, and all works were available for purchase or rent from the public.²⁶⁰

255. See also Richard Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1, 5 (2016) (describing a concept called “a continuity tender,” which is “an inherited statement that members of a community repeat in order to affirm their connection to the community’s history, even though they may no longer hold the values or face the circumstances that made the statement sensible for some of their predecessors”).

256. *Federal Theater Project, 1935 to 1939*, LIBR. CONG., <https://www.loc.gov/collections/federal-theatre-project-1935-to-1939/about-this-collection/> [perma.cc/7U25-L2PU] (last visited Apr. 30, 2024); see generally Jerald Raymond Pierce, *So What Could a ‘New Federal Theatre Project’ Actually Look Like?*, AM. THEATER (Feb. 3, 2021), <https://www.americantheatre.org/2021/02/03/so-what-could-a-new-federal-theatre-project-actually-look-like/> [perma.cc/GGC3-2SB9].

257. See Rev. Rul. 64-175, 1964-1 C.B. 185; Rev. Rul. 71-395, 1971-2 C.B. 228.

258. Rev. Rul. 71-395, 1971-2 C.B. 228.

259. *Id.* See also Burch, *supra* note 86, at 329 (arguing, in the art gallery example, that the IRS may have ruled differently if it had weighed the art gallery’s purpose against the public interest in the art rather than the public interest in education).

260. Rev. Rul. 71-395, 1971-2 C.B. 228.

On the other hand, in Revenue Ruling 67-392, the IRS granted tax exemption status to an organization whose mission was to develop young artists “to the point where they can support themselves financially through their musical talents.”²⁶¹ As a part of that, the organization secured paid opportunities for them (free of charge) to “improve their professional standing.”²⁶² The IRS likened the organization’s activity to how other educational institutions have a placement service that it offers its students. The IRS, therefore, has to engage in a pseudo-balancing test regarding education and earnings that leaves artists and organizations at a disadvantage regarding what it means to benefit.²⁶³ Having a definition to help artists understand private benefits would help artists and others in the organization, especially Board members, frame what private benefit means in the arts.

The IRS has healthcare as a precedent in identifying a non-enumerated purpose and adding to the tax code to create a workable standard for that sector.²⁶⁴ Hospitals and other medical organizations had historically offered free or low-cost charitable care, which qualified them for tax exemption under the “charitable” designation.²⁶⁵ State-sponsored healthcare programs like Medicaid and private insurance meant that hospitals no longer needed to perform this function, prompting the IRS to create a new standard so that hospitals could maintain their exempt status.²⁶⁶ Specifically, it articulated that healthcare, similar to education and religion, “is deemed beneficial to the community as a whole even though the class of beneficiaries eligible to receive a direct benefit from its activities does not include all members of the community.”²⁶⁷ This standard allowed courts to determine if healthcare organizations were primarily operating “for the benefit of the community,” creating a valuable framework for everyone to evaluate their mission and eligibility for tax exemption.²⁶⁸ Furthermore, to quell concerns that hospitals still only provided minimal charitable care and made money like for-profit hospitals, Congress added section 501(r) to the tax code to provide further guidelines to this standard.²⁶⁹ While healthcare is not enumerated in the list of original charitable purposes,²⁷⁰ this treatment provides the same impact and gives guidance and prominence to specific healthcare organizations.

In this case, the IRS could perform a similar function with the arts and use its Revenue Ruling to carve out the arts as a category separate from education. The arts have a similar “community benefit” that the IRS and courts could use to establish further and possibly expand the types of arts organizations eligible for tax

261. Rev. Rul. 67-392, 1967-2 C.B. 191.

262. *Id.*

263. Burch also notes that, when it comes to evaluating tax exemption status for the scientific category, a “private benefit incidental to the furtherance of the public cause does *not* necessarily result in a finding that the scientific research is not in the public interest.” Burch, *supra* note 86, at 329.

264. SCHMIDT & MADISON, *supra* note 26, at 145.

265. *Id.*

266. *Id.*

267. Rev. Rul. 69-545, 1969-2 C.B. 117. The IRS removed the earlier requirement for hospitals to provide free or low-cost care and provided the “community benefit” standard as a way to determine exemption for hospitals. *Id.*

268. SCHMIDT & MADISON, *supra* note 26, at 149; *see generally* IHC Health Plans, Inc. v. Comm’r Internal Revenue, 325 F.3d 1188 (10th Cir. 2003) (defining a totality of the circumstances test for the “community benefit” standard).

269. SCHMIDT & MADISON, *supra* note 26, at 145–46.

270. *Id.* at 145.

exemption. This description can include certain provisions related to governance because good governance propels an organization's ability to fulfill its charitable purpose, which is the best outcome for the community. Then, the IRS could codify what it learns through the courts and add a section to the IRC that outlines specific requirements for nonprofit arts organizations.

In sum, an enumerated category for the production, exhibition, and creation of art can help nonprofit arts organizations and nonprofit governance by establishing a framework and limits for art under section 501(c)(3), creating a common language within the sector and helping to elucidate what it means for artists to benefit privately to ensure they receive proper credit. Specificity can aid accountability and regulatory efforts within the sector and contribute to the growing transparency and communication that the sector needs to continue to flourish.

B. Mandating Board Diversity Requirements

"Diverse boards are simply stronger boards."²⁷¹ This sentiment is echoed in much of the nonprofit management literature that ties diverse Boards and governance to healthy organizational outcomes.²⁷² This is especially true when looking at nonprofit arts organizations that serve specific communities or populations; for communities to trust the organization and its mission, communities must see themselves reflected in its leadership.²⁷³ In this context, diversity can be understood as "individuals who differ in terms of a characteristic on which they base their own social identity,"²⁷⁴ which includes race, gender, age, disability, socioeconomic status, cultural diversity, and more.²⁷⁵

Some states already have laws to help foster diverse perspectives among nonprofit boards. For example, New Hampshire requires charitable nonprofits to have a Board of Directors with at least five voting members "who are not of the same immediate family or related by blood or marriage."²⁷⁶ California requires public benefit nonprofits not to have more than forty-nine percent of Board members who are "interested persons," defined as anyone being compensated by

271. Alexandra Hallock, *Driving Diversity Through Board Service*, AMS. FOR ARTS ARTSBLOG (Mar. 30, 2017), <https://blog.americansforthearts.org/2019/05/15/driving-diversity-through-board-service> [perma.cc/LM6F-T8N2].

272. *Id.*; Lee, *supra* note 81, at 581; Kathleen Buse, Ruth Sessler Bernstein & Diana Bilimoria, *The Influence of Board Diversity, Board Diversity Policies and Practices, and Board Inclusion Behaviors on Nonprofit Governance Practices*, 133 J. BUS. ETHICS 179, 179 (2016); Mirae Kim & Dyana P. Mason, *Representation and Diversity, Advocacy, and Nonprofit Arts Organizations*, 47 NONPROFIT & VOLUNTARY SECTOR Q. 49, 52 (2018).

273. Jan Masoka, *A Fresh Look at Diversity and Boards*, BLUE AVOCADO (Nov. 14, 2009), <https://blueavocado.org/board-of-directors/a-fresh-look-at-diversity-and-boards/> [perma.cc/FW5G-H TAY].

274. Lee, *supra* note 81, at 564.

275. Allaya Cooks-Campbell, *What Diversity Really Means, and Why It's Crucial in the Workplace*, BETTERUP (May 24, 2023), <https://www.betterup.com/blog/what-diversity-really-means-and-why-its-crucial-in-the-workplace> [perma.cc/4MEE-TV7W]; Wyona Lynch-McWhite, *The Three Sides of Organizational Diversity*, ARTS CONSULTING GRP., (Dec. 2, 2016), <https://artsconsulting.com/arts-insights-november-2016/> [perma.cc/34RG-XK4F]; Denver Frederick, *Podcast: Problems With Board Diversity Are Getting Worse, Nonprofit Leader Says*, CHRON. PHILANTHROPY (Dec. 8, 2017), <https://www.philanthropy.com/article/podcast-problems-with-board-diversity-are-getting-worse-nonprofit-leader-says/> [web.archive.org/web/20230811215231/https://www.philanthropy.com/article/podcast-problems-with-board-diversity-are-getting-worse-nonprofit-leader-says/].

276. N.H. REV. STAT. ANN. § 292:6-a.

the organization or individuals who are related.²⁷⁷ Relatedly, New York passed recent legislation called the “Women on Corporate Boards Study,” which requires corporations to identify how many women it has on their Board of Directors and provide that information in their annual filing.²⁷⁸ These efforts among states show the increasing importance of Board member diversity. Boards with greater diversity tend to have more effective governance practices, including establishing diversity policies and practices.²⁷⁹ Furthermore, several studies have linked Board member diversity to positive governance outcomes and engagement levels in arts organizations.²⁸⁰ Nonprofit arts organizations can serve many distinct communities, and their leadership must reflect those communities to maximize positive outcomes.

The IRS does not mandate Board composition or certain governance practices for nonprofits to receive tax exemption. Yet, it recognizes that “an active and engaged Board” is “important to the success of a charity” and complying with the law.²⁸¹ It states that the IRS reviews the Board composition to see whether it “represents a broad public interest.”²⁸² However, the IRS’s supplemental manual does not define what it means to “represent a broad public interest.” Furthermore, this guide poses its recommendations as helpful considerations rather than necessary aspects of a Board. If the IRS were to enumerate the arts as a category, it could go further and connect board requirements to tax exemption.

A suggested requirement for a nonprofit arts board would be to require nonprofits to have at least two voting members with a background or experience in the art related to the organization’s mission and a minimum number of people with relevant business knowledge. Because artists who start nonprofits lack knowledge about management, and Board members who join nonprofits often lack understanding of the particular art, a requirement such as this allows nonprofits to begin with the necessary combination of business acumen and artistic experience. This also can support criticism from artists who consistently lament that Board members are disconnected from how to serve the community. While these requirements can also be considered subjective, this latitude would still allow individual nonprofit arts organizations to tailor what it means to have specific experiences to their organization’s mission. For example, Victory Gardens could have established a minimum number of playwrights on its Board since its mission involved producing new theater work. MoMA could establish a minimum number of visual artists with previous experience with exhibits. A counterargument is that nonprofit arts organizations already had this knowledge and expertise built in with advisory Boards.²⁸³ However, this suggestion is about adding the specific knowledge and expertise that an advisory Board member would provide to the fiduciary responsibility and power of the Board. To continue to create arms and

277. CAL. CORP. CODE § 5227.

278. Joseph B. Cartalfasa, *New York Enacts ‘Women on Corporate Boards Study’*, OGLETREE DEAKINS (Jan. 10, 2020), <https://ogletree.com/insights-resources/blog-posts/new-york-enacts-women-on-corporate-boards-study/> [perma.cc/RU3T-XAG2].

279. Buse et al., *supra* note 272, at 187–88.

280. Lee, *supra* note 81, at 581.

281. *Governance and Related Topics – 501(c)(3) Organizations*, IRS (last visited Apr. 27, 2024).

282. *Id.*

283. Toni Hoy, *Board of Advisors: Functions, Benefits & Selecting Members*, BOARD EFFECT (Jan. 25, 2023), <https://www.boardeffect.com/blog/board-of-advisors-vs-board-of-directors/> [perma.cc/7KFT-S8SG].

branches of things needed for a Board but not actually on the Board, in the long run, will not produce the diversity of perspective necessary for the entity that makes policy and governance decisions. Therefore, mandating Board diversity as a condition to tax exemption could help nonprofit arts organizations increase their reach to communities.

C. Board Term Limits

For arts organizations, the meaning of the arts and how they are showcased continues to evolve. However, among nonprofit arts organizations, Board membership and executive leaders can stay static, potentially leading to a loss of commitment and stagnation within the organization.²⁸⁴ A term limit is a provision that identifies the maximum amount of time a Board member can serve and includes renewal.²⁸⁵ The IRS favors term limits because it “believe[s] that static Board membership leads to unhealthy attitudes, which can cause boards to govern out of self-interest rather than community interest.”²⁸⁶ Most states require an organization to set a term limit but do not have a limit regarding consecutive terms.²⁸⁷ For example, California mandates that the Board of Directors can serve up to four years.²⁸⁸ In a 2022 Captrust survey of nonprofit organizations, at least fifty-nine percent of nonprofits had term limits for Board members.²⁸⁹ Term limits contribute to Board diversity by injecting new ideas and skills into the organization, and limits provide an easy pathway for an organization to release problematic directors.²⁹⁰ Others argue that term limits can reduce institutional knowledge and experience, and the organization must expend more resources on regular training.²⁹¹ However, similar to how the American Bar Association requires lawyers to stay knowledgeable about trends in technology,²⁹² arts organizations should be required to have mechanisms that enable them to keep up with evolving trends in the art sector. The IRS can support this, not by proscribing a term limit, as a museum may

284. *Term Limits*, BOARDSOURCE, <https://boardsource.org/resources/term-limits/> [perma.cc/8FYG-SG6F] (last visited Apr. 27, 2024); Christal M. Cherry, *Nonprofit Board Term Limits: When is it Time to Go?*, THEBOARDPRO.COM (Feb. 23, 2023), <https://www.theboardpro.com/post/nonprofit-board-term-limits-when-is-it-time-to-go> [perma.cc/9PD9-RXQ5].

285. NONPROFIT COORDINATING COMM. N.Y., WHAT LIES BENEATH: THE STATE OF NYC NONPROFIT BOARD DIVERSITY, EQUITY, AND INCLUSION 21 (2018). An example to help with understanding: “The term limit for an organization with two year terms with a two-term maximum would be four years.” *Id.*

286. Nick Price, *Best Practices for Nonprofit Board Term Limits*, BOARDEFFECT (Oct. 26, 2018), <https://www.boardeffect.com/blog/best-practices-nonprofit-board-term-limits/> [perma.cc/8CDH-3ABQ].

287. Grey McRay, *Nonprofit Board of Directors Term Length: How Long is Too Long?*, FOUND. GRP. (Dec. 27, 2022), <https://www.501c3.org/nonprofit-board-of-directors-term-length-how-long-is-too-long/> [perma.cc/5JSU-P5UM].

288. CAL. CORP. CODE § 5220.

289. JAMES STENSTROM, CAPTRUST, 2022 ENDOWMENT & FOUND. SURV. 24 (2022).

290. Linda J. Rosenthal, *Charity Board Term Limits: What's the Best Practice*, FOR PURPOSE L. GRP. (June 30, 2017), <https://www.fplglaw.com/insights/charity-board-term-limits-best-practice/> [perma.cc/RJ89-RM9V].

291. Price, *supra* note 286.

292. ABA Model Rule 1.1, Comment 8 (“[A] lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”).

need a different term limit than a theater, but by mandating that, at a minimum, nonprofit arts organizing documents should include a term limit. This would increase governance practices among nonprofit arts organizations because they would be required to think long-term about the organization. Furthermore, a term limit can be a tangible tool for stakeholders to track homogeneity and complacency within an organization and hold it accountable based on the changes.

D. Five-Year Review of Exempt Organizations

Finally, the IRS should adopt an extensive review of nonprofit arts organizations every five years so that they can advocate for why they should continue to receive tax-exempt status. Section I.A describes that an entity must apply to the IRS to obtain federal tax exemption status under section 501(c)(3). However, once the IRS determines that the entity meets its qualifications for exemption, the nonprofit is exempt and is bound to certain affirmative duties.²⁹³ Outside of an organization's annual filing, there is no "mandated, periodic procedure to review an organization's continuing qualification for exemption."²⁹⁴ The Joint Committee for the Senate noted this gap among nonprofit organizations and proposed a five-year review.²⁹⁵ It highlighted that the granted exemption status is based on information about the company at its genesis, and there is no process to account for the organization's growth and development to ensure that it continues to operate according to its stated mission.

This addition would prompt more nonprofit arts organizations to engage in strategic, long-term planning. With this addition, an organization would have to write a comprehensive narrative about its past, present, and future practices, explicitly noting how those differ from what was described in its recent annual return. Furthermore, the organization would be required to provide a summary of compensation of its management and executive leadership over the five years and identify other material changes. As the arts sector evolves, a five-year review can allow nonprofit arts organizations to stay accountable to those developments, particularly regarding equity in representation and compensation practices. Furthermore, this provides the public with more significant information regarding the changes in an arts nonprofit. For example, the staff and workers for AFTA criticized the organization for moving slowly, even after individuals had made them aware of certain practices.²⁹⁶ By having a mandated five-year review, the public is equipped with the organization's data to have more robust conversations about specific changes. It can partner with them to find long-term, sustainable solutions. A likely criticism of this five-year review is that this imposes yet another burden on charities on top of other state and federal filing requirements, and nonprofit arts organizations, mainly, are critically under-resourced. However, the benefits of federal tax exemption and public accountability are enormous, and nonprofit arts organizations are not exempt from creating healthy governance practices that contribute to the success of artists, their staff, and the community. Healthy governance consistently leads to positive outcomes, and by reviewing its practices

293. *See supra* Section II.A.

294. JOINT COMM, *supra* note 124, at 220–21.

295. *Id.* at 224.

296. *See supra* Section III.C.

twice every decade, a nonprofit arts organization can ensure that it is keeping pace with the evolving conversation around creating a healthy arts sector.

CONCLUSION

Nonprofit arts organizations are an essential part of the American arts economy. They inspire Americans to engage with art, provide jobs to artists and administrators, and serve as cultural containers for the diverse American identity. However, these institutions are plagued with dissatisfied and disgruntled workers and leaders. This Note argues that those issues persist because the Board of Directors of nonprofit arts organizations fail to listen to stakeholders, lack awareness regarding their conflicts of interest, and lack policies that allow for accountability. Nonprofit arts organizations are unique within the tax-exempt sector due to the private nature of the services, the fact that the art does not have to produce a tangible public benefit, and the absence of enumerated language in the Internal Revenue Code. This makes arts nonprofits a helpful case study to identify solutions that could help stabilize the arts sector.

First, this Note argues that the IRS should enumerate a category for creating, producing, and exhibiting art to establish limits and language for the sector. Next, I argue that the IRS should precondition the receipt of the tax-exempt status of a nonprofit arts organization meeting certain Board diversity requirements and term limits. Finally, this Note advocates for the IRS to conduct an extensive five-year review of nonprofit arts organizations to evaluate whether the entity can continue to receive tax exemption. Tax exemption is the lifeline for many arts nonprofits, and it is also a privileged benefit based on an arts organization's commitment to the public. By linking this privilege with more governance requirements, the IRS can establish a healthy standard that allows the nonprofit arts Board of Directors to create an infrastructure that supports the staff and organizational leaders and improves relationships with the stakeholders it desires to serve.

