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21ST CENTURY CHURCHES AND FEDERAL TAX LAW

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Federal tax treatment matters to churches, the term the IRS uses for all types of religious congregations, including synagogues, mosques, and temples. The federal tax provisions most significant for churches and certain entities closely related to them, however, are not those that the public and commentators often assume. Exemption from income tax and the ability of donors to deduct contributions, the benefits that receive the most public attention, in fact provide surprisingly little benefit either to churches in the aggregate or to most individual churches. Their status as organizations tax-exempt under section 501(c)(3) of the Internal Revenue Code, moreover, imposes a variety of burdens on them. The burdens include limitations on lobbying and the prohibition on any intervention in campaigns for public office.

At the same time, churches enjoy special tax benefits not afforded to other section 501(c)(3) organizations, not even other kinds of tax-exempt religious organizations. These special benefits make church status appealing. Such benefits include exemption from filing with the IRS Form 990, an annual information return that, with the exception of the names and addresses of major donors, is also publicly available. In addition, the IRS cannot begin any audit of a church unless it complies with several procedures. Further, unlike other section 501(c)(3) organizations, churches are not required to file an application for recognition of exemption, although many choose to do so.

These advantages limit oversight of churches by the IRS, the media, and the public. They create an incentive for religious organizations that share some traits commonly found in churches to seek status as a church. Two recent IRS grants of church or association of churches status have attracted sharp criticism from the media and members of Congress. At the same time, a number of developments, such as loss of membership,

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expansion of virtual worship, and recent Supreme Court Free Exercise jurisprudence, have created new challenges for churches and their tax treatment.

In response to all these developments, this article recommends changes to the longstanding IRS approaches for defining "church" and certain church-affiliated entities. These changes would substitute a definition for church developed by courts and limit the definition for conventions or associations of churches to those of a single denomination. The definitional changes will clarify the distinction between non-church religious organizations and churches. Updating the understanding of "church" to reflect the twenty-first century realities of virtual participation and the increasing diversity of faith communities will also improve IRS oversight.

This article also recommends that the GAO undertake a renewed study of campaign intervention by section 501(c)(3) organizations generally. This study will clarify whether all section 501(c)(3) organizations, including churches, are in fact violating this prohibition in ways that go beyond sporadic, minor, and usually inadvertent footfalls.

In the authors' view the recommended changes would benefit churches and the public because they take into account both current realities and current concerns. In so doing, they would not only give churches welcome guidance but also increase public trust that churches are not abusing the special privileges they enjoy under federal tax law.

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I. INTRODUCTION

Churches play a large and important, although perhaps diminishing, role in American society. They are estimated to number more than 300,000.[1] The report from Giving USA for 2022 found that contributions to religion[2] amounted to almost $143.5 billion in 2022, some 27% of charitable giving, far more than any other category.[3] At the same time, churches currently face several challenges. The share of giving going to religious organizations, including churches, as adjusted for inflation is declining,[4] as is church membership.[5] Other twenty-first century challenges relate to their treatment under federal tax law, including how

1. *See generally* Simon G. Brauer, *How Many Congregations Are There? Updating a Survey-Based Estimate*, 56 J. SCI. STUDY RELIGION 438 (2017) (collecting and developing estimates of the number of congregations); *Fast Facts about American Religion*, HARTFORD INST. FOR RELIGION RSCH., http://hirr.hartsem.edu/research/fastfacts/fast_facts.html (last visited Jan. 25, 2024) [https://perma.cc/5S5B-F6UU] (estimating pre-pandemic that there were roughly 350,000 religious congregations in the United States); NAT'L CONGREGATIONS STUDY, CONGREGATIONS IN 21ST CENTURY AMERICA 50 (2021) (estimating that there are more than 300,000 congregations in the United States); NCSS PROJECT TEAM, URB. INST., NONPROFIT SECTOR IN BRIEF 2019 (2020) (gives estimated number at 345,000, based on American Church Lists, https://www.dataaxleusa.com/lists/church-list/ (last visited Jan. 25, 2024) [https://perma.cc/Z8XF-Q2MM]).

2. Giving USA defines religion as "congregations, missions, religious media, and other related organizations." IUPUI LILLY FAM. SCH. OF PHILANTHROPY, GIVING USA: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2022 170 (hereinafter GIVING USA 2022 REPORT). Although Giving USA considers its definition to be narrow, *id.*, it is broader than the tax definition of "church," which is discussed *infra* Section III.A.

3. GIVING USA 2022 REPORT, *supra* note 2, at 32. Human services organizations represent the next largest category, at 14% of total giving. *Id.* In addition to relying on federal tax figures, Giving USA includes giving by donors who do not claim a charitable contribution deduction in its calculations by using "high quality survey data." *Id.* at 312.

4. *Id.* at 56. "Giving to religious organizations has been declining as a share of total giving to recipient organizations since the five-year period beginning in 1983, when it represented 58 percent of the total." *Id.* at 66.

5. Jeffrey M. Jones, *U.S. Church Membership Falls Below Majority for First Time*, GALLUP NEWS (Mar. 29, 2021), https://news.gallup.com/poll/341963/church-membership-falls-below-majority-first-time.aspx [https://perma.cc/N3SZ-SXBL].

federal tax law should define "church" given pandemic-driven entirely virtual services and the blurring of the line between religious congregations and other religious organizations.

Under the Internal Revenue Code, churches enjoy various tax benefits.[6] Like other section 501(c)(3) organizations,[7] they do not pay tax on their income, unless they have unrelated business taxable income.[8] Again, like other section 501(c)(3) organizations, contributions to them are deductible from income, gift, and estate tax.[9] They have many unique tax benefits as well. Churches, unlike most other section 501(c)(3) organizations, do not have to apply for exemption.[10] They do not have to file Form 990, the annual Return of Organization Exempt from Income Tax; as a result, they do not have to disclose publicly the compensation of officers, directors, and key employees, as well as other financial information.[11] And they cannot be examined for compliance with the federal tax laws unless the IRS follows special procedures.[12]

Especially in recent years, both what qualifies as a church and whether churches should enjoy these benefits have become increasingly controversial.[13] On one hand, some question tax benefits for churches, arguing that they function primarily as a kind of social club, offering mutual benefit for their members rather than public benefit for society at large.[14] On the other hand, a number of developments—expanded reliance on virtual services, exemption applications from multi-denominational conventions of churches, use in worship of drugs not legal under federal law, recent Supreme Court jurisprudence, and reduced oversight—have put pressure on the IRS definition of church.[15] Some controversies suggest that the current tax definition may be too broad, and others that it may be too narrow.

This article reviews the tax benefits as well as the related burdens afforded churches. It does so to understand and identify current controversies regarding

6. We use the term "church" because that is the language of the Internal Revenue Code. *See, e.g.*, I.R.C. §§ 170(b)(1)(A)(i), 508(c)(1)(A), 7611. The Internal Revenue Service therefore uses the term "church" to refer to all houses of worship and religious congregations, including temples, synagogues, and mosques. *See* IRS, TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 1 (2015), https://www.irs.gov/pub/irs-pdf/p1828.pdf. [https://perma.cc/Q2HD-QMKT].

7. Unless otherwise noted, section references are to the Internal Revenue Code (26 U.S.C.). Section 501(c)(3) exempts entities formed for "religious, charitable, scientific, testing for public safety, literary, or educational purposes" as well as entities to foster certain amateur sports and prevention of cruelty to children or animals. I.R.C. § 501(c)(3).

8. *See infra* note 39 and accompanying text.

9. *See infra* notes 18, 26, 27 and accompanying text.

10. *See infra* notes 55–56 and accompanying text.

11. *See infra* note 61 and accompanying text.

12. *See infra* notes 62–65 and accompanying text.

13. *See infra* Section III.C.

14. *See* ROB REICH, JUST GIVING: WHY PHILANTHROPY IS FAILING DEMOCRACY AND HOW IT CAN DO BETTER 117 (Princeton University Press 2018); Robert Repino, *Churches Shouldn't Automatically Get Tax Exemptions*, SOJOURNERS (Apr. 14, 2022), https://sojo.net/articles/churches-shouldnt-automatically-get-tax-exemptions [https://perma.cc/L2VR-R6TS]; Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 U. VA. L. REV. 1393, 1433–34 (1988). These normative arguments, however, are not our focus.

15. *See infra* Part IV.

tax treatment of churches. To be clear, this piece does not examine or question the constitutional or policy basis for the benefits afforded churches.[16] It aims instead to understand the consequences of those benefits, many of which are widely misunderstood, as well as current pressure points in the tax treatment of churches. It argues that both the continued availability of these benefits and the emergence of these pressure points support two important definitional changes as well as increased government attention to one area that may be particularly responsible for creating this pressure.

More specifically, we recommend that the IRS embrace the definition of church toward which courts are already moving, replacing the outdated and potentially overly rigid 14-factor test with an associational test that better accommodates houses of worship for all faiths. We further recommend that Congress narrow the definition of convention or association of churches to limit it to churches of a single denomination, rejecting the extension of that definition by the IRS to include multi-denominational bodies. The IRS based that extension on no more than congressional silence and without consideration of how that expansion risks opening the door for a much broader range of religious organizations to claim tax benefits primarily designed for churches. Finally, we recommend that GAO follow up on its 2020 study of campaign finance regulation by conducting a study of referrals to the IRS of alleged violations of the political campaign intervention prohibition by all section 501(c)(3) organizations (and not limited to churches). The purpose of this follow-up study would be to determine if the IRS findings of more than ten years ago that almost all such violations are minor and inadvertent continue to apply, despite very limited IRS enforcement of the prohibition in recent years and anecdotal media reports of violations. If those findings still apply, that would indicate that there is limited risk of politically active organizations seeking church status to engage in such activities despite the very low IRS oversight of churches.

Part I of this article explains the tax benefits enjoyed by churches and certain church-affiliated entities. These benefits include both the benefits they share with other exempt organizations under section 501(c)(3) and the benefits that are uniquely available to them. It is the latter benefits that make these definitional issues particularly important. Part II examines the current, uncertain definition of church, as well as the current definitions for integrated auxiliaries of churches

16. For in-depth discussions of these topics, see Samuel D. Brunson & Philip T. Hackney, *A More Capacious Concept of Church*, 56 LOY. L.A. L. REV. 1135 (2023); Dominic Rota, *And on the Seventh Day, God Codified the Religious Tax-Exemption: Reshaping the Modern Code Framework to Achieve Statutory Harmony with Other Charitable Organizations and Prevent Abuse*, 5 CONCORDIA L. REV. 56 (2020); Edward A. Zelinsky, *Applying the First Amendment to the Internal Revenue Code:* Minnesota Voters Alliance *and the Tax Law's Regulation of Nonprofit Organizations' Political Speech*, 83 ALB. L. REV. (2020); J. Michael Martin, *Should the Government be in the Business of Taxing Churches?*, 29 REGENT U. L. REV. 309 (2017); Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971 (1999); Kenneth C. Halcom, *Taxing God*, 38 MCGEORGE L. REV. 729 (2007); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L., ETHICS & PUB. POL'Y 591 (1990); Stephen Schwarz, *Limiting Religious Tax Exemptions: When Should the Church Render Unto Caesar?*, 29 U. FLA. L. REV. 50 (1976); Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 (1969); Christine Roemhildt Moore, Comment, *Religious Tax Exemption and the "Charitable Scrutiny" Test*, 15 REGENT U. L. REV. 295 (2002).

and for a convention or association of churches. Part III highlights recent developments that have increased the pressure on these definitions, including the growing use of virtual participation by religious organizations and recent successful efforts by previously non-church religious organizations to be reclassified into one of these more favored categories. Part IV describes the severe practical limitations on the ability of the IRS to police these definitions, some of which apply to all exempt organizations and others of which are unique to churches. Part V draws on the previous discussion to argue for the recommended definitional and oversight changes. Part VI concludes.

II. TAX BENEFITS AND BURDENS FOR CHURCHES

A. Tax Benefits Shared with Other Section 501(c)(3) Organizations

Churches are among the organizations exempt from income tax under section 501(c)(3) of the Internal Revenue Code.[17] They also are included among the organizations donations to which are deductible for those taxpayers who itemize their income tax deductions.[18] Critics object to churches having these tax benefits. Both, they argue, represent subsidies by the federal government to the extent of income tax foregone. Not only do critics charge that churches fail to provide public benefit entitling them to exempt status, but these critics also object to the federal government and other taxpayers subsidizing some taxpayers' religion. After all, critics remind us, direct subsidy of religion would violate the First Amendment.[19]

Contrary to the belief of these critics and public opinion generally,[20] churches as a group benefit surprisingly little from either of these categories of benefits. Even before the expansion of the standard deduction as part of the 2017 tax legislation known as the Tax Cuts and Jobs Act (TCJA),[21] most donors to churches took the standard deduction.[22] Thus these donors neither gained a tax benefit from their contributions nor imposed any cost on the U.S. Treasury and other taxpayers. As a result of the TCJA change, the number of itemizers in tax

17. *See* I.R.C. § 501(a), (c)(3).

18. *See id.* § 170(b)(1)(A)(i), (c)(2).

19. This paragraph summarizes the "con" arguments from *Should Churches (Including Mosques, Synagogues, etc.) Remain Tax-Exempt?*, PROCON.ORG (Jan. 24, 2023), https://churchesandtaxes.procon.org/ [https://perma.cc/JZ6A-NRCP]; *see also* sources cited *supra* notes 14–16. *But see* Carson v. Makin, 596 U.S. 767, 781 (2022) ("[A] neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause."); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2254 (2020) (Establishment Clause permits including students attending religious schools in state scholarship program, particularly given independent choice of scholarship recipients to attend such schools).

20. *See* Jared Walczak, *What if We Taxed Churches*, TAX FOUND. (Sept. 9, 2021), https://taxfoundation.org/church-taxes/ [https://perma.cc/2ULE-KMD7].

21. Pub. L. No. 115-97, § 11021, 131 Stat. 2054, 2072–73 (amending I.R.C. § 63(c)(7)).

22. *See* Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 844–47 (2001).

year 2018 dropped to less than 12%[23] and the number of donors to churches who itemize has undoubtedly dropped as well.[24] In short, the itemized deduction for contributions to churches benefits only a few church donors in the aggregate.[25]

Contributions to churches, like those to other section 501(c)(3) organizations, are also deductible for purposes of the gift tax[26] and estate tax.[27] These benefits are particularly important to the very wealthy. The very wealthy often cannot take advantage of the deductibility of such donations for income tax purposes because the tax law includes limits on deductibility based on adjusted gross income,[28] and for the very wealthy, wealth far exceeds their income.[29] They nonetheless benefit from deductibility for purposes of the gift and estate tax.[30]

Also contrary to public perception,[31] the exemption from income tax provided by section 501(c)(3) saves churches little in most cases and in the aggregate. It thus imposes little burden on other taxpayers. Detailing the consequences if churches lost tax exemption best illustrates this point. If churches had no tax exemption and church revenue were considered income, their deductible expenses would likely result in little taxable income for most churches.[32] Even if not offset by expenses, the amounts churches receive as contributions, on which churches heavily rely, are unlikely to be considered income. In *Branch Ministries v. Commissioner*,[33] the U.S. Court of Appeals for the District of Columbia upheld revocation of a church's exemption for violating the political campaign intervention prohibition and stated that, if churches lost tax exemptions, contributions would constitute gifts under section 102 and thus would be excluded from

23. *SOI Tax Stats—Tax Stats-at-a-Glance*, IRS, https://www.irs.gov/statistics/soi-tax-stats-tax-stats-at-a-glance (last visited Jan. 25, 2024) [https://perma.cc/9RQM-PGSL]. Prior to TCJA, some 30% of taxpayers itemized. *See* Scott Eastman, *How Many Taxpayers Itemize under Current Law?*, TAX FOUND. (Sept. 12, 2019), https://taxfoundation.org/standard-deduction-itemized-deductions-current-law-2019/ [https://perma.cc/CF4T-26JZ]. For 2024, the standard deduction is $14,600 for individuals and $29,200 for married taxpayers filing jointly. *See* Rev. Proc. 2023-34, § 3.15(1).

24. In 2020 and 2021, non-itemizers could take up to a $300 ($600 for a married couple filing jointly for 2021) charitable deduction for cash gifts in addition to the standard deduction. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2204, 134 Stat. 281, 345 (2020) (amending I.R.C. § 62(a)(22), (f)); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 § 212, 134 Stat. 1182, 3067–68 (2020) (amending I.R.C. § 170(p)).

25. Those who do benefit from itemizing may well make large gifts, of course, and some congregations benefit enormously from deductible gifts. For example, Temple Emanu-El of New York received a $10,000,000 gift from a former president in 2021. *See New York City's Temple Emanu-El Receives an Additional $10 Million from John H. Streicker for Outreach to Young Jews, Unaffiliated Families, and Seekers*, CONGREGATION EMANU-EL OF THE CITY OF NEW YORK 1 (2021), https://www.emanuelnyc.org/wp-content/uploads/2021/09/Streicker-Release-9.5-FINAL.pdf [https://perma.cc/Z4NM-BMX6].

26. I.R.C. § 2522(a)(2).

27. *Id.* § 2055(a)(2).

28. *Id.* § 170(b).

29. *See* Eric M. Zolt, *Cross-Border Philanthropy: A U.S. Perspective*, *in* THE ROUTLEDGE HANDBOOK OF TAXATION AND PHILANTHROPY 415, 430–33 (Henry Peter & Giedre Lideikyte Huber eds., 2021).

30. *See id.*

31. *See* Walczak, *supra* note 20.

32. *Id.*

33. Branch Ministries v. Comm'r, 211 F.3d 137 (D.C. Cir. 2000). *See also infra* note 90 and accompanying text.

income.[34] That is, most church revenue would translate into little, if any, gross income, even in the absence of tax exemption.

If churches were no longer tax-exempt, certain church investment and rental income, which is generally free from income tax currently, would become taxable.[35] On average, these amounts are small, although they could be large in individual cases. A recent study found that "[o]ne-fourth of congregations reported receiving money from passive income: investments, reserves, or long-term gifts such as endowments or bequests" but did not provide any figures for the amount of this income.[36] The Church of Jesus Christ of Latter-day Saints, for example, has an investment fund, The Ensign Peak Fund, that has amassed an astonishing $100 billion.[37] In addition, according to the recent study, 62% of congregations receive income from rental of their facilities, but even when combined with program fees and sales, such revenue comprised only 7% of those congregations' income.[38] But again, for some individual churches, this amount could be significant.

Churches, like other section 501(c) exempt organizations, are already subject to tax on their unrelated business taxable income. In general, under these rules, exempt organizations must pay tax on the net income from any trade or business that is regularly carried on and not substantially related to the entity's exempt purpose.[39] Moreover, churches are not exempt from making their Forms 990-T, the tax returns for such income, public.[40] If churches lost tax exemption, they would no longer be required to make such information public. Of the Forms 990-T from churches that we were able to locate, the largest amount of taxable income by far was the 2018 and 2019 Forms 990-T of Ensign Peak Advisors,

34. "As the IRS explicitly represented in its brief and reiterated at oral argument, the revocation of the exemption does not convert bona fide donations into income taxable to the Church." *Branch Ministries*, 211 F.3d at 143; *see* I.R.C. § 102. Nonetheless, should a church lose its exemption and become a taxable corporation, whether contributions to it would qualify as gifts may not be as straightforward as the case assumes. The gift tax regulations, for example, state that generally a gift to a corporation is a gift to its shareholders to the extent of their proportionate interests, but "there may be an exception to this rule, such as a transfer made by an individual to a charitable, public, political or similar organization[s] which may constitute a gift to the organization as a single entity, depending upon the facts and circumstances in the particular case." Treas. Reg. § 25.2511-1(h) (1971). A nonexempt entity that retains its status under state law as a nonprofit corporation without shareholders would seem to qualify for this exception, but it is not certain.

35. *See* I.R.C. § 61(a).

36. DAVID P. KING, BRAD R. FULTON, CHRISTOPHER W. MUNN & JAMIE L. GOODWIN, LAKE INST. ON FAITH AND GIVING & IND. UNIV. LILLY FAM. SCH. OF PHILANTHROPY, NATIONAL STUDY OF CONGREGATIONS' ECONOMIC PRACTICES 16 (2019).

37. *See Whistleblower: Mormon Church Investment Fund Stockpiled Money, Masqueraded as a Charity*, CBS NEWS (May 14, 2023, 7:00 PM), https://www.cbsnews.com/news/mormon-church-ensign-peak-whistleblower-david-nielsen-allegations-60-minutes-2023-05-14/ [https://perma.cc/LPF6-VFL7]; Ian Lovett & Rachael Levy, *The Mormon Church Amassed $100 Billion. It Was the Best-Kept Secret in the Investment World*, WALL ST. J., https://www.wsj.com/articles/the-mormon-church-amassed-100-billion-it-was-the-best-kept-secret-in-the-investment-world-11581138011 (Feb. 8, 2020, 5:07 PM) [https://perma.cc/QWX3-5L8U].

38. KING ET AL., *supra* note 3636, at 15.

39. I.R.C. §§ 511–14.

40. *Id.* § 6104(d)(1)(A)(ii).

Inc., the investment fund of the Church of Jesus Christ of Latter-day Saints,[41] noted above. A special rule of the unrelated business taxable income imposes tax on certain debt-financed income,[42] and such was the source of Ensign Peak Advisors' unrelated business taxable income—$40,720,063 in 2018 and $21,178,155 in 2019.[43]

Churches, like other section 501(c)(3) organizations, do not pay tax under the Federal Unemployment Tax Act (FUTA).[44] FUTA currently imposes a federal tax on employers of 6% on the first $7,000 of an employee's wages but lowers the net federal tax to .6% if a state has an unemployment compensation program that follows federal requirements.[45] It was passed during the Great Depression.[46] As the IRS has explained, this tax "is part of federal and state program . . . enacted to encourage states to provide payment to workers who have lost their jobs."[47] The history of FUTA coverage is one of expansion over time, with section 501(c)(3) organizations one of the few remaining exemptions.[48]

Although not the focus of this piece, it is important to note that under state tax law as well as federal tax law, churches are among the organizations both exempt from income tax and to which donations are deductible for those taxpayers who itemize deductions if a state provides a charitable contribution deduction.[49] In addition, most states exempt section 501(c)(3) organizations from sales

41. Andrea Suozzo, Alec Glassford, Ash Ngu & Brandon Roberts, *Ensign Peak Advisors, Inc.: Form 990-T for Period Ending December 2019*, PROPUBLICA, https://projects.propublica.org/nonprofits/display_990/841432969/12_2019_prefixes_82-86%2F841432969_201812_990T_2019121216952211 (last visited Jan. 25, 2024) [https://perma.cc/G3YK-6Z8D]; Andrea Suozzo, Alec Glassford, Ash Ngu & Brandon Roberts, *Ensign Peak Advisors, Inc.: Form 990-T for Period Ending December 2018*, PROPUBLICA, https://projects.propublica.org/nonprofits/display_990/841432969/download990pdf_09_2021_prefixes_81-93%2F841432969_201912_990T_2021092218968613 (last visited Jan. 25, 2024) [https://perma.cc/8ZUC-DX4D]. Copies of these returns and other Forms 990-T referred to *infra* note 43 are available through ProPublica's Nonprofit Explorer database. Andrea Suozzo, Alec Glassford, Ash Ngu & Brandon Roberts, *Non-Profit Explorer*, PROPUBLICA, https://projects.propublica.org/nonprofits/ (last visited Jan. 25, 2024) [https://perma.cc/48F6-5SKT].

42. I.R.C. § 514.

43. *See* sources cited *supra* note 41. Other churches with Forms 990-T that we were able to locate reported only small amounts of taxable income. For example, Central Synagogue of New York reported a bit more than $8,100 in unrelated business taxable income as a result of an investment in a partnership on its 2020 Form 990-T, and St. Anne's Episcopal Church of Atlanta $3,500 in unrelated business taxable income from sales of goods on its 2019 Form 990-T. *See* Andrea Suozzo, Alec Glassford, Ash Ngu & Brandon Roberts, *Central Synagogue: Form 990-T for Period Ending May 2021*, PROPUBLICA, https://projects.propublica.org/nonprofits/display_990/131628161/download990pdf_04_2022_prefixes_01-14%2F131628161_202105_990T_2022041519865200 (last visited Jan. 25, 2024) [https://perma.cc/87AV-DRQA]; Andrea Suozzo, Alec Glassford, Ash Ngu & Brandon Roberts, *St. Anne's Episcopal Church, Inc.: Form 990-T for Period Ending December 2019*, PROPUBLICA, https://projects.propublica.org/nonprofits/display_990/586010151/download990pdf_09_2021_prefixes_52-64%2F586010151_201912_990T_2021093019069033 (last visited Jan. 25, 2024) [https://perma.cc/3C98-TQ3U].

44. I.R.C. § 3306(c)(8).

45. *See* JULIE M. WHITTAKER, CONG. RSCH. SERV., UNEMPLOYMENT COMPENSATION: THE FUNDAMENTAL OF THE FEDERAL UNEMPLOYMENT TAX (FUTA) 5 (2016).

46. RICHARD R. HAMMAR, 2023 CHURCH & CLERGY TAX GUIDE 586 (2023).

47. *See Exempt Organizations: What Are Employment Taxes*, IRS, https://www.irs.gov/charities-non-profits/exempt-organizations-what-are-employment-taxes (June 5, 2023) [https://perma.cc/4FPC-7ZTC].

48. *See* St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 775 (1981) (describing this history); HAMMAR, *supra* note 46, at 586.

49. *See* HAMMAR, *supra* note 46, at 593 (discussing state income tax exemption); U.S. LEGACY INCOME TRUSTS, STATE AND LOCAL TAX TREATMENT OF CHARITABLE CONTRIBUTIONS 1 (2023).

tax.[50] Most importantly, section 501(c)(3) organizations, including churches, are generally exempt from property tax for property they own and use for their charitable, religious, and similar purposes.[51] This benefit likely represents the largest tax subsidy for churches, both in the aggregate and particularly in individual cases, such as churches in expensive areas in and around major cities. Quantifying this benefit is difficult. A study of Manatee County in Florida estimated that property tax exemption of its churches would add $8.5 million to the tax revenue of the county annually, some 1.1% of the county's total budget.[52] Walczak reported that local governments currently raise $560 billion in property taxes and that taxing houses of worship would increase collections by about 2%, a large absolute amount but relatively insignificant compared to total property tax collections.[53]

In short, churches share several federal tax benefits with other section 501(c)(3) organizations.[54] The most salient of those benefits, exemption from income tax and deductibility of contributions, however, benefit churches far less than many believe. Instead, state tax benefits, particularly property tax exemption, are likely the most important to churches.

B. Special Tax Benefits for Churches

Churches also have various special benefits under federal tax law. They are free of several demanding filing requirements. Most organizations seeking section 501(c)(3) status must file an application for exemption with the IRS and receive a determination letter from the IRS recognizing such status.[55] Churches do not have to obtain an IRS determination letter,[56] although many choose to do so.[57] Almost all tax-exempt organizations must file an annual information return on some version of the Form 990.[58] The Form 990, as filed by larger section 501(c)(3) organizations, makes publicly available financial details of an

50. *See* HAMMAR, *supra* note 46, at 617–28; Mark J. Cowan, *Nonprofits and the Sales and Use Tax*, 9 FLA. TAX REV. 1077, 1094–96 (2010); John L. Mikesell, *State Retail Sales Tax Treatment of Nonprofits*, 64 STATE TAX NOTES, 721 (2009); *50-State Chart of Nonprofit State Tax Exemptions*, HARBOR COMPLIANCE, https://www.harborcompliance.com/information/nonprofit-income-sales-use-tax-exemptions-by-state (last visited Jan. 25, 2024) [https://perma.cc/9B6Y-XTP9].

51. *See generally* PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD (Evelyn Brody ed., 2002).

52. Ryan Cragun, *Amid Calls to #TaxTheChurches—What and How Much Do U.S. Religious Organizations Not Pay the Taxman?*, CONVERSATION (Aug. 12, 2021, 8:26 AM), https://theconversation.com/amid-calls-to-taxthechurches-what-and-how-much-do-us-religious-organizations-not-pay-the-taxman-164988 [https://perma.cc/2SYY-3U36].

53. Walczak, *supra* note 20.

54. Churches also share many non-tax benefits with other section 501(c)(3) organizations. *See* Memorandum from Erika Lunder, Legis. Att'y, Cong. Rsch. Serv., to Roger Colinvaux, Joint Comm. on Taxation (Feb. 16, 2005), *in* STAFF OF THE JOINT COMMITTEE ON TAX'N (JCT), HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS 195, 195 (2005).

55. I.R.C. § 508(a).

56. *Id.* § 508(c). This exception, as well as others discussed *infra*, also applies as well to conventions and associations of churches and integrated auxiliaries of churches.

57. *See infra* note 229 and accompanying text.

58. *See* I.R.C. § 6033(a).

organization's operations, including the compensation of officers, directors, and top employees.[59] A section 501(c)(3) organization must also file as part of its Form 990 a schedule of its top donors with names, addresses, and amounts, although the donors' names and addresses are not publicly available.[60] Organizations must make disclosures regarding the extent of their lobbying activities as part of their Form 990 submission. Churches are not required to file any version of the Form 990.[61]

Moreover, the IRS must follow special procedures before undertaking any tax inquiry or examination of the church under the Church Audit Act, codified at section 7611.[62] There must be "an appropriate high-level Treasury official" who "reasonably believes (on the basis of facts and circumstances recorded in writing)" that the church is not entitled to exemption as such or is carrying on activities subject to tax under the unrelated business income tax.[63] A church must also receive written notice before any inquiry[64] and subsequent notices as well. Section 7611 also sets time limits on examinations and inquiries as well as other special protective procedures.[65]

In general, section 501(c)(3) charities must at some point demonstrate that they are not private foundations, a subset of section 501(c)(3) entities that generally receive funding from an individual, a family, or a single corporation and usually make grants to charities engaged in operations rather than engaging directly in charitable activities themselves.[66] Private foundations face a number of burdensome excise taxes[67] and have less generous limits regarding charitable contribution deductions.[68] Churches, however, are automatically classified as not private foundations,[69] along with hospitals, certain educational organizations, and certain medical research entities.[70]

Churches also have special rules regarding unemployment taxes. As noted earlier, no section 501(c)(3) organization pays federal unemployment tax.[71] Most section 501(c)(3) organizations, however, are subject to state unemployment taxes.[72] Churches are not,[73] although some churches chose voluntarily to

59. *Id.* § 6104(d)(1).

60. *Id.* §§ 6033(b)(5), 6104(b), (d)(3)(A).

61. *Id.*§ 6033(a)(2)(A).

62. *Id.* § 7611.

63. *Id.* § 7611(a)(2). The identification of the appropriate high-level Treasury official is discussed *infra* Section V.B.

64. I.R.C. § 7611(a)(3).

65. *Id.*§ 7611(b)–(f).

66. *See id.* § 509(a).

67. *See Private Foundation Excise Taxes*, IRS, https://www.irs.gov/charities-non-profits/private-foundations/private-foundation-excise-taxes (June 5, 2023) [https://perma.cc/977Y-99HV].

68. *See* I.R.C. §§ 170(b)(1)(B), (b)(1)(D), (e)(1)(B)(ii).

69. *Id.* §§ 170(b)(1)(A)(i), 509(a)(1).

70. *Id.* §§ 170(b)(1)(A)(ii), (iii), 509(a)(1). Most other section 501(c)(3) organizations have to satisfy at least one of several public support tests to avoid private foundation status. *See id.* §§ 170(b)(1)(A)(iv), (vi), 509(a)(1), (2).

71. *See generally* HAMMAR, *supra* note 46 and accompanying text.

72. I.R.C. § 3306(c)(8).

73. HAMMAR, *supra* note 46, at 586.

reimburse states for unemployment benefits provided to church employees.[74] A state unemployment plan that excludes coverage of churches and related entities nonetheless satisfies federal requirements.[75] Thus, churches are free of the burden of state taxes to fund unemployment; at the same time, their employees are not eligible for unemployment benefits.[76]

Special tax rules also apply to church pension plans. They are generally exempt from requirements as to participation, vesting, funding, and ERISA-required reporting and disclosure, although they can elect to be treated as a non-church plan.[77] The definition of church for these purposes is generally the same as the definition for other Internal Revenue Code purposes. However, a plan not established by a church can be treated as a church plan if it is maintained by an organization with the principal purpose of funding or administering a retirement plan for employees of a church.[78] The 2023-2024 Treasury and IRS Priority Guidance Plan includes promulgating regulations on the definition of a church plan under section 414(e).[79]

Other scholarly work has discussed in detail the policy and constitutional considerations that may have led legislatures to grant churches both the tax benefits they share with other charitable organizations and those uniquely available to churches and certain church-affiliated entities.[80] Briefly, these considerations tend to focus on the special need for churches to be mostly beyond the state's authority because of their role as vehicles for individuals to practice, promulgate, and share their specific faith.[81] This need also arises because of a desire of

74. *See Are Churches Exempt from Unemployment Insurance?*, CLERGY FINANCIAL RESOURCES, https://www.clergyfinancial.com/are-churches-exempt-from-unemployment-insurance (last visited Jan. 25, 2024) [https://perma.cc/G87K-5RQY].

75. I.R.C. § 3309(b)(1).

76. In response to the COVID-19 pandemic, Congress enacted the Pandemic Unemployment Assistance Program through the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2102, 134 Stat. 281, 313–17 (2020). It provided temporary unemployment benefits for individuals not eligible for regular unemployment compensation, including church employees. *Id.*

77. *See* I.R.C. §§ 410(c)(1)(B) (participation exemption), 411(e)(1)(B) (vesting exemption), 412(e)(2)(D) (funding exemption), 414(e) (church plan definition); 29 U.S.C. §§ 1002(33) (church plan definition for Employment Retirement Income Security Act of 1974 (ERISA) purposes), 1003(b)(2) (ERISA exemption); *see generally* IRS, ISSUE SNAPSHOT: QUALIFICATION REQUIREMENTS FOR NON-ELECTING CHURCHES UNDER IRC SECTION 401(A); Tara Schulstad Sciscoe, *Church Retirement Plans*, ICE MILLER LLP, https://www.icemiller.com/MediaLibraries/icemiller.com/IceMiller/PDFs/publications/Church-Retirement-Plans-(w-002-8456).pdf (last visited Jan. 25, 2024) [https://perma.cc/BC6Q-LWB4].

78. I.R.C. § 414(e)(3); 29 U.S.C. § 1002(33).

79. LILY BATCHELDER, DANNY WERFEL & WILLIAM M. PAUL, TREASURY AND IRS 2023-2024 PRIORITY GUIDANCE PLAN 5 (Sept. 29, 2023). This listing of benefits does not include non-tax ones, or ones that primarily benefit employees of churches as opposed to churches directly, such as the exclusion from gross income of the rental value of parsonages for ministers. *See* I.R.C. § 107; Letter from Daniel R. Mellema, Treasurer/CFO, Focus on the Family, to IRS 4 (May 31, 2016) (listing other benefits enjoyed by churches, including exemption from mandatory coverage requirements for contraceptives and exemptions from various state laws).

80. *See* Lloyd Hitoshi Mayer & Zachary B. Pohlman, *What Is Caesar's, What Is God's: Fundamental Public Policy for Churches*, 44 HARV. J.L. & PUB. POL'Y 145, 184–95 (2021) (summarizing the constitutional and policy arguments for the tax benefits provided to churches).

81. *See, e.g.*, *id.* at 209–14 (developing this argument). *But see* NINA J. CRIMM & LAURENCE H. WINER, POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS 72–103 (2011) (arguing that

legislatures to protect First Amendment values by limiting restrictions on religious exercise and regulatory entanglement with churches, even when it is unclear if the First Amendment's free exercise and establishment clauses require such special treatment.[82]

C. Burdens of Tax Exemption

At the same time that tax exemption provides churches with many benefits, this exemption also imposes a number of burdens on churches that they would no longer bear if they lost tax exemption. As noted above, churches with unrelated business income of $1,000 or more must file Form 990-T, and that return is public; reported amounts of churches' taxable income would not be public if they were no longer tax-exempt.[83] And more importantly, churches are subject to the various limitations imposed by Congress as a condition on tax exemption under section 501(c)(3).

More specifically, churches, like other section 501(c)(3) organizations, are subject to the prohibition on intervention in "any campaign on behalf of (or in opposition to) any candidate for public office."[84] This prohibition applies not only direct intervention—explicitly endorsing or opposing specific candidates—but also indirect intervention,[85] such as communications that indicate support or opposition without such specific language.[86] It is not uncommon for some churches to violate this prohibition, perhaps because of misunderstanding of indirect intervention[87] or as a result of a belief that the prohibition is inconsistent with the First Amendment's Free Exercise of Religion clause or applicable statutes, particularly the Religious Freedom Restoration Act.[88]

historically tax benefits for churches and other religious organizations were based on their charitable activities, not their religious ones).

82. *See, e.g.*, CRIMM & WINER, *supra* note 81, at 41 (concluding that Congress provided special federal tax benefits for churches "chiefly based on promoting the doctrine of separation of church and state—the notion that government should refrain for the most part from intruding into the internal affairs of such religious institutions"); EDWARD A. ZELINSKY, TAXING THE CHURCH: RELIGION, EXEMPTIONS, ENTANGLEMENT, AND THE CONSTITUTION xvi (2017) ("Congress and the state legislatures generally exempt churches and religious institutions from the taxes with the greatest possibilities of enforcement-related entanglement.").

83. *See supra* notes 39–40 and accompanying text.

84. I.R.C. § 501(c)(3).

85. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (1960).

86. *See* IRS, *supra* note 6, at 7–18 (providing examples).

87. *See, e.g.*, Jeremy Schwartz & Jessica Priest, *Churches are Breaking the Law and Endorsing in Elections, Experts Say. The IRS Looks the Other Way*, TEX. TRIB. (Oct. 30, 2022, 5:00 AM), https://www.texastribune.org/2022/10/30/johnson-amendment-elections-irs/ [https://perma.cc/J6PZ-M4HA]. In the interests of full disclosure, note that the authors were among the experts consulted for preparation of this story and a follow up story. *Id. See* Jessica Priest & Jeremy Schwartz, *These 20 Churches Supported Political Candidates. Experts Say They Violated Federal Law.*, TEX. TRIB. (Nov. 7, 2022, 5:00 AM), https://www.texastribune.org/2022/11/07/churches-list-violations-johnson-amendment/ [https://perma.cc/726L-Z4Z9]. *See also* Jack Jenkins, *With Turning Point Faith, Pastors Use Politics as Church-Growth Strategy*, WASH. POST (June 12, 2023, 2:26 PM), https://www.washingtonpost.com/religion/2023/06/12/with-turning-point-faith-pastors-use-politics-church-growth-strategy/ [https://perma.cc/7MB9-H5RL].

88. *See* U.S. CONST. amend. I; 42 U.S.C. § 2000bb–2000bb(a)-4.

The language of the Internal Revenue Code and regulations does not include any de minimis exceptions regarding the campaign intervention prohibition; any violation could, in theory, result in revocation of exemption.[89] However, the IRS seldom imposes penalties for small violations, and in recent years, IRS enforcement appears to have been minimal.[90] Substantial violations, however, can result in revocation of exemption. In *Branch Ministries v. Rossotti*, the U.S. Court of Appeals for the District of Columbia Circuit upheld revocation of exemption for a church that, four days before the 1992 presidential election, ran advertisements in two newspapers urging Christians not to vote for then-candidate Bill Clinton because his positions on such issues as abortion and homosexuality violated Biblical precepts.[91] The ads also sought deductible contributions.[92] Should churches no longer qualify as tax-exempt, they could engage in campaign intervention without limit except as prohibited by applicable election laws, although such expenses would not be deductible.[93]

Also, like other section 501(c)(3) organizations, churches are limited in the amount of lobbying in which they can engage. In the language of the Internal Revenue Code, an organization is exempt under section 501(c)(3) so long as "no substantial part" of its activities consist of "carrying on propaganda, or otherwise attempting, to influence legislation."[94] There is no clear guidance from the IRS or the courts as to what is substantial. A 1955 case held that devoting less than 5 percent of an organization's time and effort to lobbying was insubstantial; a case in 1974 found activities in the 16–20% range to be substantial.[95] Other cases have used a subjective balancing test involving all the facts and circumstances in which relevant factors include percentage of an organization's budget and employee time spent on lobbying, the continuous or intermittent legislative involvement, the nature of the organization, and its aims.[96] Once more, should churches cease to be tax-exempt, they could lobby without limits, although, as with campaign intervention, such expenses would generally not be deductible in calculating taxable income.[97]

89. *See* I.R.C. § 501(c)(3); Treas. Reg. § 1.501(c)(3)–1(c)(3)(iii) (1960).

90. *See infra* Section V.C.

91. 211 F.3d 137, 145 (D.C. Cir. 2000).

92. *Id.* at 140.

93. *See* I.R.C. § 162(e).

94. *Id.* § 501(c)(3). Churches are not eligible to elect to instead be subject to a more specific expenditure limit on lobbying, which election is available to other I.R.C. § 501(c)(3) organizations under I.R.C. § 501(h); this lack of eligibility was the result of a request from several church groups concerned that if Congress made churches eligible that would suggest Congress thought that the imposition of lobbying limits on churches was consistent with the First Amendment, a position which these groups thought was incorrect. *See* James H. Nix, *Limitations on the Lobbying of Section 501(c)(3) Organizations–A Choice for the Public Charities*, 81 W. VA. L. REV. 407, 415–16 (1979).

95. *See* Seasongood v. Comm'r, 227 F.2d 907, 912 (6th Cir. 1955); Haswell v. United States, 500 F.2d 1133, 1146 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975). Other kinds of section 501(c)(3) organizations can elect to be subject to a sliding dollar on lobbying expenses, based on their budget, but churches do not have this option. I.R.C. § 501(h)(5)(A)–(B).

96. For application of a balancing test, see Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 855–56 (10th Cir. 1972).

97. *See* I.R.C. § 162(e).

Churches are also subject to a set of provisions known as intermediate sanctions.[98] Congress enacted these provisions to supplement the long-standing prohibition in section 501(c)(3) itself on activities that result in "inurement" of the organization's net earnings to such insiders as founders, directors, and officers.[99] Because the only available sanction for inurement violations was revocation of the entity's exemption, the IRS rarely found such a violation and only for extreme violations.[100] Intermediate sanctions provide a less severe penalty, and one aimed at those who take advantage of the entity.[101] Under intermediate sanctions, certain insiders of existing section 501(c)(3) and section 501(c)(4) organizations who receive benefits in excess of the consideration they provide the exempt organization are now subject to monetary penalties in the form of an excise tax.[102] Excess benefits include more than reasonable compensation.[103] In addition, an excise tax also applies to organization managers who approve of such transactions in some circumstances.[104] Moreover, if violations of intermediate sanctions are large, frequent, and extensive, the organization's exemption can still be revoked on the grounds of inurement.[105] Employees of churches have indeed been subject to these provisions, and a church's exemption revoked based on such violations.[106] Were churches no longer tax-exempt, their insiders would not face such excise taxes (although compensation would be deductible in determining taxable income only if reasonable[107]).

D. Conclusion

In summary, to an extent that the public probably does not realize, tax exemption imposes regulatory requirements on churches, although fewer than other section 501(c)(3) organizations face. Such regulatory limits on churches would disappear if churches were no longer tax-exempt. At the same time, as noted earlier, special provisions applicable to churches, such as the Church Audit Act, may make it harder for the IRS to discover violations of those rules to which churches are subject, whether they be campaign intervention or unreasonable benefits to insiders.

98. *Id.* § 4958.

99. Douglas M. Mancino, *New "Intermediate Sanctions" May Cause Public Charities to Change the Way They Do Business*, 85 J. TAX'N 368, 368 (1996).

100. *Id.*

101. *Id.*

102. I.R.C. §§ 4958(a)(1), (b), (c)(1).

103. Treas. Reg. § 53.4958-4(a)(1) (2002).

104. I.R.C. § 4958(a)(2).

105. *See* Treas. Reg. § 1.501(c)(3)-1(f) (2017).

106. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 19-21-014 (Dec. 7, 2018) (revocation; pursuant to church inquiry; too heavily redacted to determine facts); I.R.S. Priv. Ltr. Rul. 21-49-013 (Dec. 7, 2018) (revocation; pursuant to church inquiry; all congregants members of same family; all funds received returned to family members as compensation or reimbursement of personal expenses); I.R.S. Tech. Adv. Mem. 04-35-021 (May 5, 2004) (long list of excess benefits to founder and family members).

107. *See* I.R.C. § 162(a)(1).

III. DEFINITIONS OF CHURCH AND CHURCH-AFFILIATED ENTITIES

A. Qualifying as a Church

Part I reviewed the tax rules applicable to churches. Neither the Internal Revenue Code nor Treasury regulations, however, define "church."[108] Both the IRS publication *Tax Exempt Status for Your Organization* and the instructions to Form 1023, the Application for Exemption under section 501(c)(3), explain, "because beliefs and practices vary widely, there is no single definition of the word church for tax purposes. The IRS considers the facts and circumstances of each organization applying for church status."[109] However, the IRS has long relied on a 14-factor test: (1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) a complete organization of ordained ministers ministering to their congregations; (8) ordained ministers selected after completing prescribed courses of study; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday Schools for the religious instruction of the young; and (14) schools for the preparation of its members.[110] The IRS view is that no single factor should be given controlling weight.[111]

This list of these factors, however, appears in no official guidance, such as a regulation or revenue ruling. Then-Commissioner of Internal Revenue, Jerome Kurtz, presented a similar list of factors at a 1978 tax conference.[112] The IRS reproduced that list in internal training materials later that year.[113] A 1981 General Counsel Memorandum discussed these criteria, stating that the IRS first used these criteria in connection with determining whether the Salvation Army qualified as a church.[114] The 1959 revenue ruling finding that the Salvation Army did

108. For previous discussions of the definition and its history, see Schwarz, *supra* note 16, at 64–67; Lidiya Mishchenko, *In Defense of Churches: Can the IRS Limit Tax Abuse by "Church Impostors,"* 84 GEO. WASH. L. REV. 1361, 1367–69 (2016); Sharon L. Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 PEPP. L. REV. 313, 339–45 (1980); Charles M. Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 FORDHAM L. REV. 885, 885 (1977); Mason Powell, Note, Ecclesia Semper Reformanda Est: *Radical Reformation and the IRS*, 101 KY. L.J. 207, 207 (2012).

109. *Tax-Exempt Status for Your Organization*, IRS, https://www.irs.gov/pub/irs-pdf/p557.pdf (last visited Jan. 25, 2024) [https://perma.cc/6W8X-XU5U]. *Instructions for Form 1023*, IRS, https://www.irs.gov/pub/irs-pdf/i1023.pdf (last visited Jan. 25, 2024) [https://perma.cc/MS7T-ZBLK].

110. *See* "*Churches" Defined*, IRS, https://www.irs.gov/charities-non-profits/churches-religious-organizations/churches-defined (last visited Jan. 25, 2024) [https://perma.cc/F883-RJ65]; IRS, REVIEW OF TECHNICAL DEVELOPMENTS § I.A.1 (1978).

111. *See* "*Churches" Defined*, *supra* note 110; REVIEW OF TECHNICAL DEVELOPMENTS, *supra* note 110, at § I.A.1.

112. Remarks of IRS Commissioner Jerome Kurtz, PLI Seventh Biennial Conference on Tax Planning (Jan. 9, 1978), *reprinted in* FED. TAXES (P-H) ¶ 54,820 (1978). In his remarks, Commissioner Kurtz was careful to note that "few if any religious organizations—conventional or unconventional—could satisfy all [14] of these criteria. For that reason we do not give controlling weight to any single factor." *Id. See also* Spiritual Outreach Soc'y v. Comm'r, 927 F.2d 335, 338 (8th Cir. 1991) (citing and quoting Commissioner Kurtz).

113. REVIEW OF TECHNICAL DEVELOPMENTS, *supra* note 110, at § I.A.1.

114. IRS Gen. Couns. Mem. 38,699 (Apr. 23, 1981).

so, however, stated the conclusion without any discussion of these factors.[115] The General Counsel Memorandum recommended that the criteria be included in the Internal Revenue Manual and so they were for many years, although they no longer appear there.[116] Currently, Schedule A of Form 1023, the special schedule required of churches that apply for recognition of exemption under section 501(c)(3), asks questions that parallel a majority of the 14 factors.[117]

But organizations with some or most of these factors may still not qualify as a church under current law. In the important 1961 case, *De La Salle Institute v. United States*, a federal district court agreed with the IRS that a Catholic religious order dedicated to teaching in Catholic schools did not qualify as a church, an integral part of a church, or a convention or association of churches for purposes of the then existing exemption from the unrelated business income tax because the institutions operated and staffed by the order were primarily schools that operated chapels only as "mere adjuncts of such schools."[118] The court also noted "a university is not a church, even though it may have a chapel and a required religion course three hours a week."[119] Several other federal courts have upheld denial of church status for similar reasons when considering religious organizations that engaged primarily in secular functions.[120]

More recently, some courts have applied an "associational test" that emphasizes regular religious services and other gatherings of congregants, the interaction of which with the *De La Salle Institute* line of cases is unclear.[121] For example, the U.S. Tax Court initially rejected the IRS position that the Foundation of Human Understanding was not a church for purposes of section 170(b)(1)(A)(i).[122] The Tax Court concluded that a "far from incidental" activity of the religious organization was providing "regular religious services for established congregations that are served by an organized ministry" despite the significant publishing and broadcast activities of the organization.[123]

But 30 years later, the U.S. Court of Federal Claims and the Federal Circuit reached the opposite conclusion while still applying the associational test. More

115. Rev. Rul. 59-129, 1959-1 C.B. 58.

116. According to a 1999 Congressional Research Service Report, the list was published in the Internal Revenue Manual in 1982. CONG. RES. SERV., SPECIAL PROVISIONS FOR RELIGION IN THE TAX CODE 1-2 n.1 (1999). The list had been found in section 7.26.2 of the Internal Revenue Manual, but a transmittal dated Dec. 23, 2019, obsoleted IRM 7.26.2, stating that the material had been converted to a Technical Resource Guide, available at the non-public EO Knowledge Networks Sharepoint site. *See* IRM 7.26.2.1 (Dec. 13, 2019).

117. *Instructions for Form 1023*, *supra* note 109.

118. 195 F. Supp. 891, 902 (N.D. Cal. 1961); *see also* Rev. Rul. 56-262, 1956-1 C.B. 131 (ruling that an organization will not qualify as a church or association of churches under section 170(b)(1)(A)(i) even if it conducts religious services if its principal purpose or function is not that of a church or association of churches).

119. *De La Salle*, 195 F. Supp. at 902.

120. Found. of Hum. Understanding v. United States, 88 Fed. Cl. 203, 221–22 (2009) (collecting cases). These courts agreed with the *De La Salle Institute* court's reasoning on this point, though some of these other courts did not accept the general reasoning of *De La Salle Institute* that "church" should be defined using "the common meaning and usage of the term." *Id.* at 218–19 (collecting and agreeing with cases criticizing *De La Salle Institute* on this point).

121. *Id.* at 221 (collecting cases), 232–34 (describing test).

122. Found. of Hum. Understanding v. Comm'r, 88 T.C. 1341, 1355 (1987).

123. *Id.* at 1359–61.

specifically, both the Court of Federal Claims and the Federal Circuit in *Foundation of Human Understanding v. United States*[124] agreed with other courts that "a regular congregation" and "regular religious services" are the most important factors in determining church status.[125] In its opinion, the Federal Circuit shared concerns expressed by the trial court that the 14 factors favor "some forms of religious expression over others" in a manner troubling under the Constitution.[126] Furthermore, both the trial and appellate courts in *Foundation of Human Understanding* relied primarily on an "associational test," which defined a church "as an organization that includes a body of believers who assemble regularly for communal worship,"[127] with assembling meaning an in-person gathering.[128]

Both courts then concluded that the Foundation of Human Understanding, in its then-current form, failed this associational test.[129] The trial court found that relatively few and sporadic in-person services during the relevant period were "merely incidental to the Foundation's primary purposes" and so were "insufficient" to qualify the Foundation as a church, and the appellate court concluded the record was sufficient to support this finding.[130] The organization's argument that it assembled to worship regularly as a "virtual congregation" by "listening to sermons broadcast over the radio and the Internet at set times" did not suffice: "[t]he fact that all the listeners simultaneously received the foundation's message over the radio or the Internet does not mean that those members associated with each other and worshipped communally."[131] The Foundation of Human Understanding therefore lost its special status as a church.

Thus, the IRS continues to rely on the 14-factor test while courts weigh "association" in particular. This divergence between the IRS and the courts creates complication and uncertainty. And this complication and uncertainty is becoming particularly acute because of the growth of virtual church participation, as detailed below.[132]

124. 614 F.3d 1383, 1391 (Fed. Cir. 2010); *Found. of Hum. Understanding*, 88 Fed. Cl. at 234. The Foundation of Human Understanding initially sought to qualify as a church under section 170(b)(1)(A)(i) to avoid private foundation status. *See Found. of Hum. Understanding*, 614 F.3d at 1386.

125. *Found. of Hum. Understanding*, 614 F.3d at 1389.

126. *Id.* at 1387 (quoting Found. of Hum. Understanding v. United States, 88 Fed. Cl. 203, 220 (2009)). In its opinion, the Federal Circuit had quoted *Spiritual Outreach v. Comm'r*, 927 F.2d 335, 339 (8th Cir. 1991): "We are mindful of [the plaintiff's] claim that the criteria discriminate unfairly against rural, newly-formed churches which lack the monetary resources held by other churches."

127. 614 F.3d at 1387, 1389.

128. *Id.* at 1390; *Found. of Hum. Understanding*, 88 Fed. Cl. at 232.

129. 614 F.3d at 1391; 88 Fed. Cl. at 234.

130. 614 F.3d at 1390.

131. *Id.* at 1391.

132. *See infra* Part IV.A.

B. Integrated Auxiliaries and Conventions or Associations of Churches

A number of tax provisions apply not only to churches but also to "integrated auxiliaries and conventions or associations of churches."[133] In particular, section 6033(a)(3) exempts from mandatory filing of an annual return not only churches but also "their integrated auxiliaries, and conventions or associations of churches."[134] However, the special protections provided by Section 7611 extend only to churches and conventions or associations of churches, not to integrated auxiliaries.[135] Tax law guidance includes a set of detailed regulations regarding the definition of integrated auxiliaries under section 6033 as detailed below, but there is no similar guidance as to the definition of conventions or associations of churches.

In general, under applicable section 6033 regulations, to qualify as an integrated auxiliary of a church or of a convention or association of churches, an entity must meet three sets of tests.[136] First, it must be described as a section 501(c)(3) entity and as a public charity rather than a private foundation under section 509(a).[137] Second, it must be affiliated with a church or convention or association of churches.[138] Third, it must receive support primarily from internal church sources as opposed to public or government sources.[139] The regulations expand on the second and third requirements. Affiliation can be demonstrated by the organization being covered by a group exemption letter or evidence of operation, supervision, or control by a church or a convention or association of churches. Affiliation can also be shown through satisfying a facts and circumstances test, which includes such factors as language in enabling instruments or bylaws, authority, corporate name indicating an institutional relationship, and distribution of assets upon dissolution.[140] Internal support is defined by what is not permitted. An entity fails the requirement of internal support only if it both offers admissions, services, or goods to the general public more than incidentally and receives more than 50% of support from a combination of government sources, public solicitations of contributions, and receipts from sale of goods, services, etc.[141] Some commonly encountered groups, such as men's and

133. *See, e.g.*, I.R.C. § 414(e) (definition of church plan); *id.* § 508(c)(1)(A) (exception for application requirement); *id.* § 3309(b)(1) (permitted exclusion from state unemployment coverage); *see* HAMMAR, *supra* note 46, at 521–22 (listing Internal Revenue Code sections that treat conventions or associations of churches in the same manner as churches).

134. I.R.C. § 6033(a)(3).

135. *Id.* § 7611(h)(1); *see Restrictions on Church Inquiries and Examinations*, IRS, https://www.irs.gov/charities-non-profits/churches-religious-organizations/restrictions-on-church-inquiries-and-examinations (last visited Jan. 25, 2024) [https://perma.cc/3PP2-VYJS].

136. For criticism of these regulations and historical background on integrated auxiliaries, see generally Edward McGlynn Gaffney, Jr., *Government Definition of Religion: The Rise and Fall of the IRS Regulations on an "Integrated Auxiliary of a Church*," 25 VAL. L. REV. 203 (1991).

137. Treas. Reg. § 1.6033-2(h)(1) (1971).

138. *Id.*

139. *Id.*; *see also* Rev. Proc. 96-10, 1996-1 C.B. 557.

140. Treas. Reg. § 1.6033-2(h)(2), (3) (1971).

141. *Id.* § 1.6033-2(h)(4).

women's organizations, seminaries, mission societies, and youth groups need not meet the internal support requirement to qualify as an integrated auxiliary.[142]

In contrast, while several current Code provisions refer to a "convention or association of churches," neither current regulations nor revenue rulings provide a comprehensive definition of that phrase. Nonetheless, the phrase has a long history in tax law. The Internal Revenue Code of 1939 included it as part of a list of entities exempt from a federal excise tax on admissions to events.[143] Regulations promulgated in 1953 under this section defined convention or association of churches as "a union of churches of the same denomination organized on a regional or other basis, or a union of churches of different denominations which meet and act in concert to further a particular religious purpose."[144]

In 1950, Congress added the phrase "convention or association of churches" to the Internal Revenue Code in order to exempt such entities as well as churches from the unrelated business income tax.[145] Legislative history indicates that Congress included the phrase to ensure such exemption for non-hierarchical—that is, congregational—churches as well as hierarchical ones.[146] This legislative history did not address multi-denominational associations.

A Senate Committee Report issued in connection with consideration of the Pension Protection Act of 2006 confirmed the earlier legislative history:[147] "[t]he term 'convention or association of churches' was added to the code to ensure that hierarchical churches and congregational churches would not be treated dissimilarly for federal income tax purposes merely because of their organizational and governance structures."[148] The Senate Finance Committee had learned that some congregational church organizations had both churches and individuals as members and others only churches.[149] The Committee feared that "an organization with the characteristics of a convention or association of churches including having a substantial number of churches as members, might fail to be regarded as convention or association of churches merely because it includes individuals in its membership."[150] To prevent such a result, the Pension Protection Act added the following definition of "Convention or Association of Churches" to the list of definitions in section 7701: "[f]or the purposes of this title, any organization

142. *Id.* § 1.6033-2(h)(5).

143. Internal Revenue Code of 1939, Pub. L. No. 76-1, § 1701(a), 53 Stat. 1, 190.

144. Treas. Reg. § 101.15(b)(2)(ii) (1953). Congress repealed this excise tax and thus the regulations under it in 1965. Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, § 301, 79 Stat. 136, 145.

145. Revenue Act of 1950, ch. 994, 64 Stat. 906, 948.

146. *Revenue Revisions of 1950: Hearings on H.R. 8920 Before the S. Comm. on Fin.*, 81st Cong. 216 (1950) (statement of A.B. Culberston, Vice President, Baptist Found. of Tex.); *see* Whelan, *supra* note 108, at 903 n.80 ("By exempting 'conventions and associations of churches' as well as 'churches' from the unrelated business income tax in 1950, Congress provided equal tax treatment for congregational and hierarchical churches."). The UBIT exemption for these entities was repealed in the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, 536–37.

147. S. REP. NO. 109-336, at 134 (2006).

148. *Id.*

149. *Id.*

150. *Id.*

which is otherwise a convention or association of churches shall not fail to so qualify merely because the membership of such organization includes individuals as well as churches or because individuals have voting rights in such organization."[151] This recent statutory addition addresses one particular issue regarding the meaning of "convention or association of churches," but failed to give Congress's general sense of the phrase's meaning.

In 1969, Congress had added "convention or association of churches" to the list of entities in section 170(b)(1)(A)(i) eligible for the largest contribution limit.[152] Revenue Ruling 1974-224 concluded that an organization with membership comprised of churches of various denominations qualified as an association of churches within the meaning of that section.[153] The membership of the organization described in the ruling included Catholic and Protestant churches of various denominations. It was created "to act as the coordinating agency for its members churches for the purposes of developing the spirit of Christian fellowship and cooperative mission among the denominations and churches in a particular geographical area and to promote through cooperative effort, the spiritual, moral, social and civic welfare of the area."[154]

The revenue ruling described the activities of the organization as including "provision of clergyman at hospitals and college campuses, pastoral counseling, coordinated religious educational programs and facilities, and coordinated efforts to aid the poor."[155] At the time of this ruling, the 14-factor test applied. The ruling does not discuss these factors in recognizing the entity's exception.[156] It is unlikely that the association itself could have satisfied many of the factors, given that the organization consisted of churches of various denominations. The entity did not have a single creed or form of worship, ecclesiastical government, or a formal code of worship. Yet the organization qualified for exemption as a convention or association of churches.[157] The 1974 revenue ruling, based only on a lack of legislative history to the contrary, recognized multi-denominational associations of churches.

Today, the Form 1023 application asks conventions and associations of churches to fill out the same Schedule A, which includes 17 questions, as do individual churches; these questions echo most of the 14 factors.[158] They include questions as to a formal code of doctrine, ordination of clergy, and the conduct

151. Pension Protection Act of 2006, Pub. L. No. 109-280, § 1222, 120 Stat. 780, 1089–90 (2006) (codified at I.R.C. § 7701(o)).

152. *See* Tax Reform Act of 1969, Pub. L. No. 91-172, § 201(a)(1)(B), 83 Stat. 487, 550.

153. Rev. Rul. 74-224, 1974-1 C.B. 61.

154. *Id*. The revenue ruling observes, "[a]lthough the term 'convention or association of churches' has a historical meaning generally referring to a cooperative undertaking by churches of the same denomination, nothing in the legislative or religious history of the term prevents its application to a cooperative undertaking of churches of differing denominations." *Id.* The ruling did not look to the regulations promulgated under the 1939 Code for guidance.

155. *Id.*

156. *See id.*

157. *Id.*

158. *See supra* note 117 and accompanying text.

of sacerdotal functions.[159] An association made up of various denominations would likely face difficulty answering these questions as needed based on only the entity itself. As Revenue Ruling 1974-224 implies without explicitly stating, satisfaction of these factors by the entity applying for exemption must derive from its individual church members, rather than directly from the association or convention itself.

Thus, under current law, hierarchical churches, congregational churches, and multi-denominational churches can join together to qualify as a convention or association of churches. Individuals also can be members of such entities.

C. Conclusion

The definition of "church" is in flux, with both the IRS and the courts struggling with the basic issue of what is the appropriate test to determine if a tax-exempt religious organization enjoys that special and especially beneficial status. And while the definition of integrated auxiliary is detailed, the lack of a clear definition of a convention or association of churches is problematic, especially since they enjoy the same special tax benefits as churches. These two definitional issues—for church and for convention or association of churches—are of concern because they are the gateway to these special tax benefits. Moreover, that concern is magnified by pressures being placed on these definitions by several recent developments, as detailed in the next Part.

IV. GROWING PRESSURES ON THE DEFINITIONS OF CHURCH AND CHURCH-AFFILIATED ENTITIES

A. Virtual Meetings

Development of online platforms has placed pressure on the notion of association as articulated in *Foundation of Human Understanding*.[160] A 2013 article observed that technology, especially as it evolved, could, in fact, permit a church to form electronically "that would allow its members or congregants the opportunity to connect and participate in communal worship, which is the issue at the heart of courts' concerns and is addressed by the associational test."[161] The article emphasized that *The Foundation of Human Understanding* courts "were concerned that the ministries failed to connect individuals," not that it was impossible for virtual churches to do so.[162]

159. *Id.*

160. *See supra* notes 124–26 and accompanying text.

161. Jacob E. Dean, "*Do You Have That New Church App for Your iPhone?"—Making the Case for a Clearer and Broader Definition of Church Under the Internal Revenue Code*, 46 CREIGHTON L. REV. 173, 204 (2013). The question of whether an organization that operates virtually can meet tests for exemption is not limited to churches. It arises as well with schools and social clubs. *See* AM. BAR ASS'N SECTION OF TAX'N, RECOMMENDATIONS FOR THE 2022-2023 DEPARTMENT OF THE TREASURY AND INTERNAL REVENUE SERVICE PRIORITY GUIDANCE PLAN 6 (2023).

162. Dean, *supra* note 161, at 205. As the author noted:

Experience both during and after the height of the pandemic underscores the need to adapt the understanding of "association" given current technology. In response to COVID-19, religious congregations assembled virtually, on many platforms. The ability to see other congregants and the degree of participation by those attending virtually varied widely. Some online experiences involved only passively watching a service on television or a streaming service. Others allowed for involvement and participation by those online, such as through breakout groups, classes, and other small group experiences. In August 2020, the Pew Research Center reported that in the past month, 12% of all U.S. adults (1/3 of regular worshippers) had attended religious services in person, and 33% (nearly 3/4 of regular worshippers) had watched religious services online or on TV.[163] At New York's Central Synagogue in New York, 600,000-plus viewers watched the September 2021 services for Yom Kippur, the Jewish Day of Atonement; at the same time, that synagogue also had established an online community, called The Neighborhood, which included block parties or Facebook groups, to provide community for online participants.[164] The Pew Research Center reported that 26% of U.S. adults reported having attended a religious service in September 2021, and as of March 2022 that number was only 27%.[165] "Over the same period, the share of American who say they have streamed religious services on line or watched them on TV in the past month declined from 36% in July 2020 to 28% in September 2021 and is now 30%."[166] Also, in February 2022, Religion News Service reported that, as the pandemic eased, only a few churches could be expected to choose to be fully virtual; many congregations are expected to

> Courts cannot force people to interact with each other in an electronic church any more than they can in a 14,000 person mega church or the twenty-five member neighborhood church. The most important thing that a church must provide in its communal worship is the *opportunity* for individuals to interact and connect with one another . . . .

Id. at 204–05.

163. *Attending and Watching Religious Services in the Age of Coronavirus*, PEW RSCH. CTR. (Aug. 7, 2020), https://www.pewforum.org/2020/08/07/attending-and-watching-religious-services-in-the-age-of-the-coronavirus/ [https://perma.cc/KF5R-USF4]. The Report did not discuss whether online participants had opportunities beyond being passive spectators.

164. Ron Wolfson & Steven Windmueller, *The Rise of the Online Synagogue*, TABLET (Apr. 6, 2022), https://www.tabletmag.com/sections/community/articles/rise-of-online-synagogue [https://perma.cc/GVC6-L74R]. *See Staying Connected with Your Central Family in 2021*, CENT. SYNAGOGUE (Jan. 27, 2021), https://www.centralsynagogue.org/news/staying-connected-with-your-central-family-in-2021 [https://perma.cc/QVL3-CW5K]. Wolfson and Windmueller also report that the rabbis they interviewed were confident that their congregations could "create meaningful relational engagement between these [online] participants and the congregation so that they do, in fact, see themselves as belonging to the synagogue and welcomed as members." Wolfson & Windmueller, *supra*.

165. Justin Nortey, *More Houses of Worship Are Returning to Normal Operations, But In-Person Attendance Is Unchanged Since Fall*, PEW RSCH. CTR. (Mar. 22, 2022), https://www.pewresearch.org/fact-tank/2022/03/22/more-houses-of-worship-are-returning-to-normal-operations-but-in-person-attendance-is-unchanged-since-fall/ [https://perma.cc/PJ63-S3TM].

166. *Id.*

adopt a hybrid model.[167] Its report noted that entirely virtual churches would face challenges in involving those online as more than spectators.[168]

Any new congregations adopting a hybrid model that includes regular and substantial in-person worship will have no difficulty meeting either the 14-factor or any "association" requirement. At the same time, online options are likely to continue. We note that recommendations to churches facing declining membership include online efforts and establishing activities for groups with shared interests apart from religious doctrine.[169]

As indicated by the Religion News Service report, we expect that there will be relatively few churches operating entirely online.[170] Any fully virtual church, however, will need to demonstrate that virtual participants are more than spectators to have a chance of satisfying the associational test. How they will do so undoubtedly will vary. Small group worship, virtual breakout sessions, classes, discussion groups, and in-person gatherings of those who attend virtually from afar but in proximity to each other are all possibilities.[171] In short, the associational test can and should adapt to current technology. Experience during the COVID-19 pandemic has demonstrated its feasibility.

At the same time, the associational test itself is problematic in at least two ways. The Court of Appeals in *Foundation of Human Understanding* summarized the associational test as defining "a church as an organization that includes a body of believers who assemble regularly for communal worship."[172] Not all religions necessarily involve, or are organized around, or prioritize communal worship.[173] For example, some branches of Buddhism do not prioritize regular

167. Diana Kruzman, *Houses of Worship Grapple with the Future of Their Online Services*, RELIGION NEWS SERV. (Feb. 14, 2022), https://religionnews.com/2022/02/14/houses-of-worship-grapple-with-the-future-of-their-online-services/ [https://perma.cc/CFL2-4WZ2].

168. *Id*.

169. *See, e.g.*, Kristine Ensor, *11 Powerful Strategies to Grow Your Church*, DONORBOX BLOG (Aug. 25, 2022), https://donorbox.org/nonprofit-blog/how-to-grow-your-church [https://perma.cc/CNU9-U5FH]; *Church Membership Continues to Decline But There Are Solutions*, NEWSWIRES (May 23, 2021, 7:00 AM), https://www.einnews.com/pr_news/541813688/church-membership-continues-to-decline-during-pandemic-but-there-are-solutions [https://perma.cc/TEU4-4CQX]; SYNAGOGUE STUD. INST., 2020 FACT SURVEY OF REFORM AND CONSERVATIVE SYNAGOGUES 7 (2022).

170. For an example of a completely online church, see *VR MMO Church*, https://www.vrchurch.org/ (last visited Jan. 25, 2024) [https://perma.cc/9PU9-SW6A].

171. The use of small virtual groups to create community is not limited to fully virtual churches. For example, Lakewood Church is one of the largest of our country's megachurches with some 45,000 attendees per week on average. Sarah Smith, *Texas Has 210 Megachurches. These Are the Top 5 in the Houston Area, Ranked by Attendance*, HOUS. CHRON. (Dec. 5, 2022, 8:11 AM), https://www.houstonchronicle.com/news/houston-texas/religion/article/houston-megachurches-lakewood-ranked-17583834.php [https://perma.cc/SU9T-Q8PB]. Such numbers, with attendees relying on screens to view a service, also make association difficult. As one way to establish community, Lakewood Church offers a variety of life groups, including fully virtual ones. *LifeGroups*, LAKEWOOD CHURCH, https://lakewood.churchcenter.com/groups/lifegroups?enrollment=open_signup%2Crequest_to_join&filter=enrollment (last visited Jan. 25, 2024) [https://perma.cc/2AUK-L4P4].

172. 614 F.3d 1383, 1387 (Fed. Cir. 2010).

173. For example, Scientology is known for its reliance on individual auditing, in which a person becomes aware of an immortal spiritual being within through a one-to-one encounter between a participant and a Church official. *See* Hernandez v. Comm'r, 490 U.S. 680, 684–85 (1989). In a 1993 settlement of an ongoing dispute, the IRS recognized the mother church and branch churches Scientology as eligible for church status under the I.R.C. *See* Allan J. Samansky, *Deductibility of Contributions to Religious Institutions*, 24 VA. TAX REV. 65, 67–

in-person gatherings.[174] But Buddhism and other non-Western religious faiths have tended to adapt their practices in the United States to mirror Protestant Christian norms, especially with respect to holding regular, usually weekly, gatherings.[175] Thus, as a practical matter, it is likely that reliance on the associational test will not result in differential treatment based on religious faith, and almost certainly less differential treatment than could result under the 14-factor test.

Under *Foundation of Human Understanding*, individual belief and worship would not suffice. An individual praying at home would not constitute a church; as Judge Tannenwald put it, in pithy albeit dated language, religious purpose "may be accomplished individually and privately in the sense that oral manifestation is not necessary, but it may not be accomplished in physical solitude. A man may, of course, pray alone, but, in such a case, though his house may be a castle, it is not a church."[176] Houses of worship enable individuals to stand in relationship not only with the divine but with each other, as the associational test emphasizes. To paraphrase an old joke: Anne and Bob are walking down the street when they run into Casey. Casey asks, "Where are you going?" Anne and Bob both respond that they are headed to church. "I see why Anne goes to church," says Casey, "she believes in God. But, Bob does not, so why are you going?" "Ah," says Bob, "Anne goes to talk to God, but I go to talk to Anne."

Having at least some believers among church membership may be necessary for an organization to qualify for church status; a gathering of non-believers could well be little more than a social club.[177] Yet, it may well be the case that not all church members are believers, and even those who consider themselves believers likely do not accept every position of their church. Testing for belief is impossible (and likely unconstitutional), although testing for sincerity of belief is possible, if sometimes difficult, and likely constitutional.[178]

Both the Court of Federal Claims and the Federal Circuit in *Foundation of Human Understanding v. United States*,[179] agreed with other courts that "a regular congregation" and "regular religious services" are the most important factors in determining church status.[180] Thus, these cases developed an "associational

68 (2004). According to the Scientology website, however, Scientology includes belief in a Supreme Being and its churches conduct regular Sunday services, which include group auditing. *See Beliefs & Practices*, SCIENTOLOGY, https://www.scientology.org/what-is-scientology/scientology-religious-ceremonies/scientology-sunday-service.html (last visited Jan. 25, 2024) [https://perma.cc/SQ4Q-B385]. Thus, its practices meet the traditional understanding of regular, communal worship.

174. *See* Scott Mitchell, *Buddhist Practice in Europe, and North America*, *in* THE OXFORD HANDBOOK OF BUDDHIST PRACTICE 93, 98–99 (Kevin Trainor & Paula Arai eds., 2022).

175. *See* Wendy Cadge, *De Facto Congregationalism and the Religious Organizations of Post-1965 Immigrants in the United States: A Revised Approach*, 76 J. AM. ACAD. RELIGION 344, 345, 356–57 (2008); Mitchell, *supra* note 174, at 94–95, 98–100; *see also* MARK CHAVES, CONGREGATIONS IN AMERICA 3 (2004) ("Christianity, Judaism, and Islam, of course, promote congregational religion, but even religious traditions which elsewhere are not organized congregationally tend to take this form in the United States.").

176. Chapman v. Comm'r, 48 T.C. 358, 367 (1967) (Tannenwald, J., concurring).

177. *See supra* note 14 and accompanying text.

178. *See* Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1253–54 (2017); Peter J. Riga, *Religion, Sincerity, and Free Exercise*, 25 CATH. LAW. 246, 258–61 (1980).

179. 614 F.3d 1383, 1389 (Fed. Cir. 2010); 88 Fed. Cl. 203, 220 (Fed. Cl. 2009).

180. 614 F.3d at 1389.

test" to define a church "as an organization that includes a body of believers who assemble regularly for communal worship."[181] We believe that "body of believers," "assembly," "communal," and "worship" all need reconsideration in light of today's realities. We attempt to do so in Part V, Recommendations.

B. Religious Organizations

The line between being a church and being a non-church religious organization is not always clear. Many religious organizations conduct worship services, scripture studies, and similar activities for their staffs, beneficiaries, or others. The line between being a convention or association or churches and other religious organizations is also not always clear, given that many religious organizations work with houses of worship that share common beliefs or denominational ties. The additional tax advantages enjoyed by churches and conventions or associations of churches create an incentive for religious organizations that are in these gray areas to seek one of these preferred statuses. Reflecting this incentive, the watchdog organization MinistryWatch in 2019 identified a dozen or so religious organizations that have successfully sought reclassification as a church or convention or association of churches.[182]

Focus on the Family, for example, recently obtained reclassification as a church.[183] As stated in its 2016 letter requesting that status, the organization's mission is to "cooperate with the Holy Spirit in sharing the Gospel of Jesus Christ with as many people as possible by nurturing and defending the God-ordained institution of the family and promoting biblical truths worldwide."[184] Focus on the Family emphasized in its initial request that a denial would have an adverse impact because it would deny the organization important legal exemptions only available to churches and church organizations, including relating to employee benefit plans, contraceptive coverage for employees, unemployment insurance, and state laws.[185]

The IRS appeared skeptical of the organization's claim to be a church based on the IRS' initial questions.[186] But both in its original submission and in a subsequent letter responding to the questions from the IRS, the organization emphasized that its "primary purpose or function" was as a church, and that it satisfied all or most of the 14 criteria the IRS usually considers to determine if an

181. *Id.* at 1387, 1389.

182. Warren Cole Smith, *When a Church Is Not a Church*, MINISTRYWATCH (Dec. 19, 2019), https://ministrywatch.com/when-a-church-is-not-a-church/ [https://perma.cc/9QDW-U72C]; *see also* Sarah Pulliam Bailey, *Major Evangelical Nonprofits Are Trying a New Strategy with the IRS that Allows Them to Hide Their Salaries*, WASH. POST (Jan. 17, 2020), https://www.washingtonpost.com/religion/2020/01/17/major-evangelical-nonprofits-are-trying-new-strategy-with-irs-that-allows-them-hide-their-salaries/ [https://perma.cc/SM4V-5U3G].

183. Miranda Blue, *Here's How Focus on the Family Convinced the IRS to Call It a Church*, RIGHT WING WATCH (Apr. 17, 2018, 9:30 AM), https://www.rightwingwatch.org/post/heres-how-focus-on-the-family-convinced-the-irs-to-call-it-a-church/ [https://perma.cc/EY7A-HCDC].

184. Letter from Daniel R. Mellema, *supra* note 79.

185. *Id*. at 4.

186. *See* Letter from Grant Herring, Exempt Orgs. Specialist, IRS, to Focus on the Family (Aug. 1, 2016).

organization is a church.[187] While emphasizing the in-person gatherings at its campus, the organization also noted that it has a listening audience of roughly 5.5 million that it viewed in part as "an extension of its congregation"[188] and that "a primary function of any church in the modern era" is to use media, including the Internet, to spread its message.[189] The organization also argued that some aspects of the IRS' questions raised serious First Amendment concerns.[190] Ultimately the IRS granted recognition of church status.[191]

As another recent example, in 2020 the Family Research Council (FRC) successfully obtained reclassification as an association of churches.[192] As stated in its initial submission to the IRS, the organization "supports and works in partnership with local churches with commonly held Christian beliefs to assist them in articulating and advancing a family- and church-center worldview."[193] In contrast to its response to Focus on the Family, the IRS does not appear to have asked any questions regarding the request before granting it several months later.[194]

But press coverage of the ruling[195] led 40 members of Congress to write a letter to the Secretary of the Treasury and the IRS Commissioner expressing concern about the ruling.[196] The members of Congress wrote, "[a]ll section 501(c)(3) organizations, including churches, 'must not devote a substantial part of their activities to attempting to influence legislation, political activity, or public policy.'"[197] They cited the IRS Publication, Church and Clergy Guide, for that statement. Yet, the statement appears nowhere in that guide.[198] Nor should it. The quoted sentence misstates the law. Section 501(c)(3) organizations cannot engage at all in political campaign intervention.[199] They can engage in various other kinds of political activity. As the members of Congress noted, they can influence legislation so long as that activity is not substantial.[200] Moreover, section 501(c)(3) organizations do not face limits on attempts to influence public

187. *Id*.; Letter from Stuart Mendelsohn, Partner, Holland & Knight LLP, to Grant Herring, IRS (Sept. 8, 2016).

188. Letter from Stuart Mendelsohn, *supra* note 187, at 8.

189. *Id.* at 13.

190. *See, e.g.*, *id.* at 12 ("Respectfully, the ecclesiastical judgment at the heart of your statement is the epitome of the type the Establishment Clause precludes government from making.").

191. Letter from Jeffery I. Cooper, Director, Exempt Organizations, Rulings and Agreements, IRS to Focus on the Family (Sept. 27, 2016).

192. Andrea Suozzo, *Right-Wing Think Tank Family Research Council Is Now a Church in Eyes of the IRS*, PROPUBLICA (July 11, 2022, 5:00 AM), https://www.propublica.org/article/family-research-council-irs-church-status [https://perma.cc/6EXF-RKCA].

193. Supporting Statement from Family Research Council to I.R.S. 1 (Mar. 2, 2020).

194. *See* Letter from Stephen A. Martin, Director, Exempt Organizations, Rulings and Agreements, IRS, to Family Research Council (Jul. 9, 2020).

195. *See, e.g.*, Suozzo, *supra* note 192.

196. Letter from Susan K. DelBene et al., Members of Congress to Janet Yellen, Secretary of the Treasury & Charles P. Rettig, Commissioner, I.R.S. 1 (Aug. 1, 2022) [hereinafter Congressional Letter on FRC].

197. *Id.* at 2.

198. *See* TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS, *supra* note 6, at 4.

199. *See supra* note 84 and accompanying text.

200. *See supra* note 94 and accompanying text.

policy more generally. Indeed, the Church and Clergy Guide specifically states, "[l]ike other Section 501(c)(3) organizations, some churches take positions on public policy issues, including issues that divide candidates."[201]

The letter from members of Congress continues, "[t]he FRC is primarily a political advocacy organization that is 'committed to advancing faith, family, and freedom in public policy and the culture from a biblical worldview.' Recently, the FRC filed amicus briefs supporting the overturning of *Roe v. Wade*, advocated for legislation that would ban gender-affirming surgery, and sought religious exemptions to civil rights laws."[202] Nothing in that list violates law regarding political advocacy applicable to section 501(c)(3) status. Section 501(c)(3) organizations can file amicus briefs supporting their beliefs; they can engage in lobbying within limits;[203] and they can seek exemptions to laws.

The congressional letter also asserts that "FRC claiming to be a church strains credulity: they do not hold religious services, do not have a congregation or affiliated congregations, and do not possess many of the other attributes of churches listed by the IRS."[204] But Revenue Ruling 74-224 requires the conclusion that an association or convention of churches, including a multidenominational one, can satisfy these requirements by looking through to the activities of its members.[205] Thus, under current law, the congressional letter regarding FRC is mistaken in its conclusion. We do not think it is mistaken in some of its concerns, however, and thus make a recommendation regarding the definition of conventions and associations of churches below.

Both the recent favorable rulings and the past successful denials of status as a church or a convention or association of churches indicate the uncertainty of the existing definitions. Such uncertainty poses challenges for both the IRS and for religious organizations in exemption applications. In particular, it is uncertain how substantial regular religious services must be as compared to a religious organization's overall activities to qualify for church status. As for conventions or associations of churches, the limited authority indicates that any cooperative undertaking of churches, whether from the same or different denominations, can

201. TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS, *supra* note 6, at 9. The Church and Clergy Guide goes on to list factors as to when issue advocacy crosses the line into forbidden campaign intervention. *Id.*

202. Congressional Letter on FRC, *supra* note 196, at 2 (footnotes omitted).

203. Family Research Council's 2019 Form 990, for a year prior to its classification as an association of churches, indicates that it had elected the section 501(h) limit on lobbying, an election involving a dollar limit based on an organization's budget for lobbying activities. *Family Research Council, Form 990, Schedule C* at 2, PROPUBLICA (2019), https://projects.propublica.org/nonprofits/display_990/521792772/09_2020_prefixes_47-52%2F521792772_201906_990_2020092917338478 [https://perma.cc/S3WG-5GZ8]. As an association of churches, however, FRC could not make this election; it would be subject to the "no substantial part" limit of section 501(c)(3) itself. *See supra* note 94 and accompanying text. It would, however, no longer be required to file Forms 990 specifying its lobbying activities. *See IRS Form 990, Schedule C (Political Campaign and Lobbying Activities)* at 2, IRS (2022), https://www.irs.gov/pub/irs-pdf/f990sc.pdf [https://perma.cc/CC55-B8VE].

204. Congressional Letter on FRC, *supra* note 196, at 2.

205. Rev. Rul. 74-224, 1974-1 C.B. 61. In addition, according to its application, FRC itself satisfies several requirements for qualifying as a church: it has regularly scheduled religious services, a place of worship, and a church charter. Supporting Statement, *supra* note 193, at 11–16.

qualify for this categorization, at least if the activities of the churches taken in cooperation are religious in nature.[206]

C. Illegal Drugs

Another recent development does not relate directly to definitional issues, but instead highlights a reason why an organization might seek to be viewed as a church for federal tax and other purposes. The longstanding position of the IRS, endorsed by the Supreme Court in *Bob Jones University v. United States*, is that engaging in substantial illegal activity is grounds for denial of tax-exempt status under both section 501(c)(3) and section 501(c)(4).[207] The IRS has applied this position to churches and other religious organizations.[208] But recently the IRS has shown some inconsistency when it comes to this position and the use of illegal drugs as a sacrament.

In 2015, the IRS granted the application of the First Church of Cannabis in Indianapolis for recognition of exemption under section 501(c)(3) as a church.[209] It is unclear what exactly the church represented to the IRS regarding its intention with respect to marijuana, although its name alone should have alerted the IRS that the church contemplated use of that illegal (under federal and relevant state law) drug. The church ultimately chose to forgo providing cannabis to attendees in the face of warnings of arrests from the local prosecutor and police chief.[210] The church subsequently lost a case asserting that enforcement of Indiana laws making marijuana illegal would violate the state's religious freedom restoration act.[211]

In contrast, in 2021 the IRS denied the application of another church that intended to include the use of cannabis in its services.[212] In doing so, the IRS

206. *See supra* note 154 and accompanying text.

207. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 590–91 (1983); Rev. Rul. 75-384, 1975-2 C.B. 204; Jean Wright & Jay H. Rotz, *Illegality and Public Policy Considerations*, *in* EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATIONAL TECHNICAL INSTRUCTION PROGRAM FY 1994 1, 5 (1993); IRS, *Activities That are Illegal or Contrary to Public Policy*, *in* EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATIONAL TECHNICAL INSTRUCTION PROGRAM FY 1985 109, 110 (1984).

208. *See, e.g.*, Church of Scientology v. Comm'r, 83 T.C. 381, 501–09 (1984), *aff'd on other grounds*, 823 F.2d 1310 (9th Cir. 1987); Synanon Church v. United States, 579 F. Supp. 967, 971–72 (D.D.C. 1984), *aff'd*, 820 F.2d 421 (D.C. Cir. 1987); Wright & Rotz, *supra* note 207, at 18; IRS, *supra* note 207, at 116–18.

209. John Tuohy, *First Church of Cannabis Wins IRS Nonprofit Status*, INDIANAPOLIS STAR (June 2, 2015, 3:35 PM), https://www.indystar.com/story/news/2015/06/02/first-church-cannabis-wins-irs-nonprofit-status/28357541/ [https://perma.cc/P8SG-FGXJ].

210. *See* Mark Alesia, *No Pot at First Church of Cannabis' First Service*, INDIANAPOLIS STAR (June 29, 2015, 5:02 PM), https://www.usatoday.com/story/news/politics/2015/06/29/first-church--cannabis/29477997/ [https://perma.cc/8QYA-NTSK].

211. *See* Vic Ryckaert, *Why Indiana Court Dismissed Church of Cannabis RFRA Case to Allow Marijuana as a Sacrament*, INDIANAPOLIS STAR (Jan. 3, 2019, 3:30 PM), https://www.indystar.com/story/news/2019/01/03/appeals-court-snuffs-first-church-cannabis-lawsuit/2471250002/ [https://perma.cc/4THC-XW8N]. Mark Alesia, *Judge Dismisses Cannabis Church's Case that Cited RFRA to Defend Pot as a Sacrament*, INDIANAPOLIS STAR (July 8, 2018, 2:33 PM), https://www.indystar.com/story/news/2018/07/07/first-church-cannabis-loses-lawsuit-marion-circuit-court/764407002/# [https://perma.cc/MRR6-LNGP].

212. Letter from Stephen A. Martin, Director, Exempt Organizations Rulings and Agreements, IRS, to Applicant (Dec. 16, 2021).

relied on the fact that cannabis remains a controlled substance so federal law prohibits distribution and possession.[213] It then noted " [t]he consumption of cannabis, while not obligatory, is still a substantial part of your exempt activity and worship services" and so concluded "[b]ecause you engage in activities that contravene federal law, you serve a substantial nonexempt purpose."[214]

In 2020, the IRS had also denied the application of the Iowaska Church of Healing in Iowa.[215] The Church planned to use in its religious ceremonies a plant-based psychedelic drug, Ayahuasca, that contains the drug DMT.[216] Relying on the fact that the distribution and use of DMT is illegal under federal law, the IRS concluded the Church was organized and operated to further a substantial illegal (and therefore nonexempt) purpose.[217] The IRS also concluded the Church did not qualify as a church because it failed the associational test.[218] The Church is currently challenging the IRS' denial in court, although it has already lost the initial round of litigation in federal district court.[219]

It is unclear why the IRS granted the first application and denied the two later applications. The grant may have been a mistake, although if so the IRS does not appear to have tried to correct it; the First Church of Cannabis still enjoys tax-exempt status according to the IRS' own Tax Exempt Organization Search tool.[220] Or it may be that the First Church of Cannabis represented it would use cannabis only if it was able to defend that use under the applicable federal and state religious freedom restoration acts (thereby rendering that use legal), a goal that it ultimately failed to achieve under state law. Regardless of the reasons for this different treatment, the Iowaska Church of Healing litigation could lead to a decision giving churches more leeway in this area, perhaps based on the Free Exercise of Religion Clause cases described in the next section. Such a decision could, in turn, lead to more organizations seeking church status under federal tax law.[221]

213. *Id*. at 4.

214. *Id*.

215. *See* Letter from IRS Independent Office of Appeals, to Applicant (June 28, 2021); James Stratton, *IRS Defends Denial of Des Moines Church's Tax-Free Status over Use of Psychedelic Drug*, KCCI DES MOINES, https://www.kcci.com/article/irs-des-moines-churchs-tax-free-status-over-use-of-psychedelic-drug-ayahuasca/38687033# (Jan. 7, 2022, 12:16 PM) [https://perma.cc/P9XW-FJB8].

216. Letter from IRS Independent Office of Appeals, *supra* note 215, at 2–4.

217. *Id.* at 8–9.

218. *Id.* at 9–10.

219. Iowaska Church of Healing v. United States, No. 21-02475, 2023 WL 2733774, at *7 (D.D.C. Mar. 31, 2023), *appeal filed* (D.C. Cir. Mar. 31, 2023), *appeal docketed sub nom.*, Iowaska Church of Healing v. Werfel, No. 23-5122 (D.C. Cir. May 31, 2023).

220. A search for "cannabis" results in 253 tax-exempt organizations, but only one, The First Church of Cannabis, with "church" in its name (and none with "synagogue" or "temple" or "mosque" in its name). *Tax Exempt Organization Search*, IRS, https://apps.irs.gov/app/eos/ (last visited Jan. 25, 2024) [https://perma.cc/VUW6-5FZR] (search by organization name for cannabis).

221. *See* Michael Casey, *Psychedelic Churches in US Pushing Boundaries of Religion*, AP NEWS (Feb. 2, 2023, 12:47 PM), https://apnews.com/article/psychedelic-churches-ayahuasca-5101fe47fe9a6e28de686272ed96ff46 [https://perma.cc/W3B5-PZZ7].

D. Supreme Court's Broader Free Exercise/Narrower Establishment Clause Jurisprudence

Recent Supreme Court decisions indicate the Court is both broadening the protection provided by the Free Exercise of Religion Clause of the First Amendment and narrowing the limitations imposed by the Establishment Clause of that same amendment.[222] For example, the Court in just the past two years has ruled in favor of a public high school coach praying with students,[223] students participating in a state student-aid program using that aid to attend schools providing religious instructions,[224] and a religious foster care services agency that refused to certify same-sex couples as foster parents.[225] In each case, the Court held that the state could not prohibit the activity at issue under the Free Exercise of Religion Clause and, in the first two cases, did not violate the Establishment Clause by permitting that activity (the Establishment Clause was not at issue in the third case).

Do these cases have any ramifications for the federal tax definitions of churches and church-affiliated entities? At a minimum, they indicate the courts may be relatively open to finding that otherwise illegal church activity is protected by federal and state religious freedom restorations acts if religiously motivated, an argument that the Iowaska Church of Healing is making under the federal act[226] (but an argument that failed for the First Church of Cannabis under Indiana's act[227]). These cases may also indicate the courts will be increasingly reluctant to uphold IRS denials of favored church and church-affiliated statuses more broadly. Such reluctance is particularly likely if a purported church can demonstrate its structure and activities are based on sincerely held religious beliefs, even if they do not match "traditional" views of what qualifies as a church. Indeed, the decision by some courts to focus more on an associational test for church status as opposed to the IRS-favored 14-factor test may already reflect a rejection of the traditional view of what is a church.[228]

222. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 514 (2022); *see also* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

223. *Kennedy*, 597 U.S. at 543–44.

224. Carson v. Makin, 596 U.S. 767, 786–87 (2022).

225. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021). The Supreme Court also ruled in favor of a religious organization that sought to have a "Christian flag" flown on a flagpole in front of a city hall based on the Free Speech Clause of the First Amendment and in favor of a death-row inmate who sought to have his pastor lay hands on him in the execution chamber based on the federal Religious Land Use and Institutionalized Persons Act. *See* Shurtleff v. City of Boston, 596 U.S. 243, 248–49 (2022); Ramirez v. Collier, 595 U.S. 411, 418 (2022).

226. Iowaska Church of Healing v. United States, No. 21-02475, 2023 WL 2733774, at *1 (D.D.C. Mar. 31, 2023), *appeal docketed sub nom.*, Iowaska Church of Healing v. Werfel, No. 23-5122 (D.C. Cir. May 31, 2023). The Supreme Court indicated an openness to this argument in a different dispute involving a church and an otherwise illegal substance. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (applying RFRA and affirming the grant of a preliminary injunction enjoining the federal government from enforcing a ban on the use of hoasco, a tea containing a hallucinogen, by a religious sect in religious ceremonies).

227. *See* Ryckaert, *supra* note 211 and accompanying text.

228. Found. of Hum. Understanding v. United States, 88 Fed. Cl. 203, 233 (2009).

E. Conclusion

These developments—the increasing role of virtual participation, the successful applications for favored church or church-affiliated status by previously non-church religious organizations, attempts to leverage church status to protect the use of illegal drugs in religious services, and an expanded view of protected religious activity by the Supreme Court—all put pressure on the longstanding definitions used by the IRS for churches and church-affiliated entities. Yet before we address how the IRS and the courts should revise these definitions given these pressures, we need to address another key issue. That issue is the shrinking capacity of the IRS to fairly and consistently apply any definitions adopted.

V. REDUCED IRS OVERSIGHT OF CHURCHES AND CHURCH-AFFILIATED ENTITIES

A. Applications and the Form 1023-EZ

Even though churches, their integrated auxiliaries, and conventions or associations of churches are not required to file with the IRS for recognition of exemption under section 501(c)(3), according to the IRS, many still do.[229] Even given that many, maybe most, of these organizations are listed as tax-exempt with the IRS under group exemption rulings,[230] at least some, perhaps many, of the more than 300,000 congregations in the United States have sought an IRS ruling directly.[231] Churches seek an IRS ruling for a variety of reasons.[232] For some, application may be the result of a misunderstanding regarding what Congress or the IRS has required. For others, seeking a determination of exempt status may reflect desire for the official IRS determination letter to facilitate obtaining state and local tax exemptions or other legal benefits. For many, a determination letter serves the purpose of reassuring church leaders, members, and donors of the organization's federal tax status. For most churches, the application process likely is relatively straightforward, in that their purposes and

229. *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 (last visited Jan. 25, 2024) [https://perma.cc/9RSU-42GA] ("Nevertheless, many churches do seek IRS recognition of tax-exempt status because that recognition provides reliance to church leaders, members and contributors that a church is recognized as exempt from taxation and is eligible to receive tax-deductible contributions.").

230. *See* AMERICAN BAR ASSOCIATION SECTION OF TAXATION, COMMENTS ON NOTICE 2020-36, PROPOSED REVISION OF REV. PROC. 80-27, 4 (2020) (estimating 120,000 churches are exempt under group exemptions). A group exemption ruling recognizes exemption for a group of "subordinate organizations" that are affiliated with and operate under the general supervision or control of a "central organization." Rev. Proc. 80-27, 1980-1 C.B. 677 (1980). Perhaps the group exemption ruling covering the most subordinate organizations is the one issued to the U.S. Conference of Catholic Bishops as the central organization for Catholic religious, charitable, and educational organizations in the United States. *See* U.S. CONF. OF CATH. BISHOPS OFF. OF GEN. COUNS., THE USCCB GROUP RULING: FREQUENTLY ASKED QUESTIONS 1 (2020).

231. *See generally* sources cited *supra* note 1.

232. *See, e.g.*, *Must Churches File for 501(c)(3) Tax Exemption?*, CLERGY FIN. RES., https://www.clergyfinancial.com/must-churches-file-form-for-501c3-tax-exemption/ (last visited Jan. 25, 2024) [https://perma.cc/T4KQ-U7KK] (listing reasons why churches may file an IRS application for recognition of exemption).

activities easily satisfy the requirements of section 501(c)(3). The IRS very rarely denies any application for exemption, although it more commonly refuses to grant one because the application is incomplete, is withdrawn, or for other reasons.[233] Should a church face the latter situation, it can simply claim section 501(c)(3) status, since the application is not required in the first place.

There also is some evidence that churches have used the Form 1023-EZ to receive a favorable determination letter under section 501(c)(3), even though the Form 1023-EZ instructions clearly state that the form is not available for churches.[234] Based on a 2017 review of organizations granted recognition of exemption based on a Form 1023-EZ application, Professor Terri Helge identified hundreds of organizations that appeared to be churches that had successfully used the form.[235] The current, 2018 version of the Form 1023-EZ allows churches to say they are not seeking church status (and so may be eligible to use the Form 1023-EZ), but it is unclear how many churches are choosing not to apply for the status when using the Form 1023-EZ.[236]

These data indicate that purported churches that file an IRS application are highly likely to receive a favorable IRS ruling on both their tax-exempt status under section 501(c)(3) and their claimed church status. And if the IRS questions an application filed by a purported church, the organization can withdraw the application and still claim exemption and church status until the IRS chooses to examine that status. But examining that status is not an easy task, as the next section details.

There is one potential counter-pressure. The IRS is currently reexamining the standards for group exemptions and, while it does so, has suspended accepting new requests for group exemption letters.[237] Some denominations rely on a group exemption for both their church and non-church subordinate organizations.[238] The IRS may modify the requirements for group exemption in a way that encourages churches to seek formal recognition of exemption through this mechanism while ensuring sufficient oversight from parent, religious entities. If

233. IRS, 2022 DATA BOOK 28 (2023) (of 131,669 closed applications for recognition of exemption under section 501(c)(3) in fiscal year 2022, the IRS approved 115,506, denied 59, and classified 16,104 closures as other, meaning "applications withdrawn by organizations, applications that did not include the required information, incomplete applications, IRS correction disposals, and others").

234. IRS, *Instructions for Form 1023-EZ* 10, 15 (2023), https://www.irs.gov/pub/irs-pdf/i1023ez.pdf [https://perma.cc/P282-Z229].

235. Terri Lynn Helge, *Hundreds of Churches Appear to Receive Exemption Determinations Using Form 1023-EZ*, NONPROFIT L. PROF BLOG (Feb. 22, 2017), https://lawprofessors.typepad.com/nonprofit/2017/02/hundreds-of-churches-appear-to-receive-exemption-determinations-using-form-1023-ez.html [https://perma.cc/QQK7-4GN3].

236. *Instructions for Form 1023-EZ*, *supra* note 234, at 10.

237. *See* IRS, *I.R.S. Notice 2020-36*, https://www.irs.gov/pub/irs-drop/n-20-36.pdf [https://perma.cc/4HBH-DF9E] (proposed updated procedures for group exemptions); IRS, *Group Exemption Resources*, https://www.irs.gov/charities-non-profits/group-exemption-resources (last visited Jan. 25, 2024) [https://perma.cc/ZB7T-N4KC] (non-acceptance of requests for group exemption letters from June 17, 2020 until the IRS finalizes the updated procedures). The 2022-2023 Treasury and IRS Priority Guidance Plan, *supra* note 79, at 7, includes finalizing these procedures.

238. *See* ABA Comments on Notice 2020-36, *supra* note 230, at 4–7; U.S. CONF. CATHOLIC BISHOPS OFF. GEN. COUNS., *supra* note 230, at 4.

it does, that change might lead to these parent entities providing better oversight of qualification for exemption by many, if not most, churches and church-affiliated entities. But even if this change occurs, it would not prevent purported churches that are not part of larger religious bodies with group exemptions from either applying individually for IRS recognition—a relatively easy process to navigate, as already noted—or simply claiming tax-exempt status under section 501(c)(3) and church status without applying.

B. Inquiries, Examinations, and the Still Pending Section 7611 Regulations

The current very low IRS examination rate for tax-exempt organizations is well known.[239] For churches, the rate likely is even lower for several reasons.[240] These include the exemption for churches, integrated auxiliaries of churches, and conventions or associations of churches from having to file the Form 990 series annual information return, the special procedural protections provided by section 7611 for churches and conventions or associations of churches, and continuing confusion over which IRS officials are sufficiently senior to sign off on church inquiries under that section.[241]

On the last point, section 7611 requires that "an appropriate high-level Treasury official" reasonably believe that a purported church has a federal tax issue relating to exemption or an unrelated trade or business for the IRS to begin a church inquiry.[242] The statute defines an appropriate high-level Treasury official as "the Secretary of the Treasury or any delegate of the Secretary whose rank is no lower than that of a principal Internal Revenue officer for an internal revenue region,"[243] and regulations issued under the statute clarify this definition by providing it means "the appropriate Regional Commissioner (or higher Treasury official)."[244] The problem is that Congress eliminated the regional organization of the IRS in 1998 and, with it, the Regional Commissioner position.[245] The IRS initially substituted the Director of Exempt Organizations, Examinations, but a federal district court held in 2009 that the individual was not a senior enough

239. IRS, *supra* note 233, at tbl. 2, n.8 (over 1.75 million returns filed by tax-exempt organizations, including Forms 990, 990-EZ, 990-N, 990-PF, 990-T, 4720, 5227, and 8872 in both fiscal years 2021 and 2022); *id.* at tbl. 21 (1,343 Forms 990, 990-EZ, and 990-N, 170 Forms 990-PF, 1041-A, 1120-POL, and 5227, 668 Forms 990-T, and 292 Forms 4720 examined in fiscal year 2021); TREASURY INSPECTOR GEN. FOR TAX ADMIN., OBSTACLES EXIST IN DETECTING NONCOMPLIANCE OF TAX-EXEMPT ORGANIZATIONS 6 (2021) [hereinafter TIGTA] (in fiscal year 2019, the chance of the IRS examining an exempt organization was one in 742).

240. *See* TIGTA, *supra* note 239, at 7 (in fiscal year 2019, the chance of the IRS examining a church was one in 5,000).

241. *See* I.R.C. §§ 6033(a)(3)(A)(i), 7611(a), (b), (h)(1). The special procedural protections do not apply to integrated auxiliaries of churches. *See supra* note 134 and accompanying text.

242. *Id.* § 7611(a)(1)–(2).

243. *Id.* § 7611(h)(7).

244. Treas. Reg. § 301.7611-1, A-1 (1985). The statute also provides certain specific roles for "the appropriate regional counsel of the Internal Revenue Service." I.R.C. § 7611(b)(2)(A), (d)(1)(B) (flush language).

245. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1001(a)(2), 112 Stat. 685, 689 (1998); *see also* United States v. Living Word Christian Ctr., No. 08-mc-37, 2008 WL 5456381, at *5–6 (D. Minn. Nov. 18, 2008), *aff'd*, 2009 WL 250049, at *1 (D. Minn. Jan. 30, 2009) (U.S. magistrate judge report & recommendation describing this history).

official for these purposes.[246] Although the Treasury Department then proposed regulations to address this issue that would have replaced "appropriate Regional Commissioner" with "Director, Exempt Organizations," it has yet to finalize those regulations, and several commentators questioned whether the Director, Exempt Organizations is sufficiently senior.[247] However, there are indications that the IRS is close to resolving this issue based on a 2018 federal district court decision. In that case, the court found that the Tax Exempt and Government Entities Division (TEGE) Commissioner was an appropriate high-level Treasury official under section 7611, but the Director, Exempt Organizations was not.[248] In the wake of that decision, the IRS revised a delegation order and then the Internal Revenue Manual to make the TEGE Commissioner and the Deputy Commissioner for Services and Enforcement (to whom the TEGE Commissioner reports) the officials responsible for beginning church tax inquiries and church examinations.[249]

Nevertheless, even if the IRS resolves this confusion, both the protections of section 7611 and the overall low examination rate almost certainly mean that the inquiry and examination rate for purported churches will remain very low. It is true that even without annual information returns, the IRS can access certain information about churches through other filings, specifically compensation information reported on payroll tax returns that may indicate private inurement, which in turn might support launching a church tax inquiry.[250] But how commonly it does so, given these other barriers to launching a significant number of church inquiries, is unclear.

C. Lack of Political Campaign Intervention Enforcement

In the 2000s, the IRS launched the Political Activities Compliance Initiative (PACI) to more systematically address alleged violations of the political campaign intervention prohibition in sections 501(c)(3) and 170(c)(2).[251] This

246. 2009 WL 250049, at *13.

247. *See* Prop. Treas. Reg. § 301.7611-1, A-1, 74 Fed. Reg. 39003, 39007 (Aug. 5, 2009); Letter from Erik Stanley, Senior Legal Counsel, All. Def. Fund, to IRS (Nov. 2, 2009); Letter from Colby M. May, Dir. & Senior Counsel and Christopher T. Baker, Counsel, Am. Ctr. for L. and Just., to IRS (Nov. 3, 2009) (on file with author); *Comments from Alexandra Eaker & Ashley Kerins, IRS Rank & Church Tax Inquiries: An Analysis of Proposed Treasury Regulations Under § 7611*, STATE BAR OF CAL. TAX'N SECTION, WASH. D.C. DELEGATION, https://downloads.regulations.gov/IRS-2009-0018-0029/attachment_1.pdf (last visited Jan. 25, 2024) [https://perma.cc/UN2X-GG4N]; Letter from Marcus S. Owens, Caplin & Drysdale, to IRS (Oct. 13, 2009). Finalizing the § 7611 regulations is an item on the TREASURY AND IRS 2023-2024 PRIORITY GUIDANCE PLAN, *supra* note 79.

248. United States v. Bible Study Time, Inc., 295 F. Supp. 3d 606, 627, 630 (D.S.C. 2018); *see also* God's Storehouse Topeka Church v. United States, No. 22-4014, 2023 WL 2624318, at *6 (D. Kan. Mar. 24, 2023) (agreeing with the holding in *Bible Study Time, Inc.*, that the TEGE Commissioner is an appropriate high-level Treasury official under section 7611).

249. *See* IRM 4.75.39.1.1(6)–(7) (Mar. 24, 2022); I.R.S. Deleg. Order 7-3 (Rev. 2), IRM 1.2.2.8.3 (June 23, 2020); IRM 1.1.23.2(1) (Sept. 30, 2021) ("The Commissioner, TE/GE, is the highest ranking executive in the division and reports to the Deputy Commissioner, Services and Enforcement.").

250. If a payroll tax return indicates an employment tax issue, since 2018 the IRS has also applied the section 7611 requirements to such inquiries. *See* IRM 4.23.2.2.3.2 (2018); HAMMAR, *supra* note 46.

251. *See* IRS, FINAL REPORT, PROJECT 302: POLITICAL ACTIVITIES COMPLIANCE INITIATIVE (2005) [hereinafter IRS 2004 PACI REPORT] (reporting on the 2004 PACI project); IRS, POLITICAL ACTIVITIES COMPLIANCE

initiative included scrutiny of alleged violations by churches, with 47 church cases (out of 110 total cases) in 2004 and 44 church cases (out of 100) in 2006.[252] For example, for 2004 the IRS found 12 instances (out of 19 investigated) where a church official made a statement during normal services that constituted political campaign intervention.[253] In addition to the above numbers, in 2006, the IRS also reviewed state campaign finance databases for possible campaign donations to candidates by section 501(c)(3) organizations, and found 87 by churches.[254] The IRS relied almost exclusively on warning letters to correct violations.[255] It apparently made this choice because it found that almost all of the violations were one-time, nonrecurring violations or were taken in good faith reliance on counsel or otherwise were anomalous.[256] In addition, the organizations corrected to the extent possible, including taking steps to prevent future violations.[257]

That said, since the IRS quietly ended PACI more than 15 years ago, there have been few indications that it is actively enforcing the political campaign intervention prohibition against churches.[258] In 2020, the GAO reported that during fiscal years 2010 through 2017, the IRS conducted and closed only 226 examinations relating to political campaign intervention, with 205 examinations involving section 501(c)(3) organizations or an average of less than 26 per year.[259] The GAO did not report on how many of the examinations involved churches. It did indicate that at least some examinations may have involved churches in that they were closed because they could not be completed within the two-year period required by section 7611(c)(1)(A).[260] It has yet to be seen whether the combination of heightened partisanship and the apparent fact that churches, likely driven in part by the pandemic, increasingly post their services on the Internet, through YouTube, Facebook, or other platforms, will lead to increased IRS audit activity in this area. For example, a 2022 ProPublica and Texas

INITIATIVE EXECUTIVE SUMMARY (2006) [hereinafter IRS 2004 PACI SUMMARY] (further reporting on the 2004 PACI project); IRS, 2006 POLITICAL ACTIVITIES COMPLIANCE INITIATIVE (2007) [hereinafter IRS 2006 PACI REPORT] (reporting on the 2006 PACI project).

252. *See* IRS 2004 PACI REPORT, *supra* note 251, at 9; IRS 2006 PACI REPORT, *supra* note 251, at 3.

253. IRS 2004 PACI REPORT, *supra* note 251, at 16. For 2006, the IRS investigated thirteen allegations of such statements but did not report how many were confirmed. IRS 2006 PACI REPORT, *supra* note 251, at 4.

254. IRS 2006 PACI REPORT, *supra* note 251, at 6. The IRS determined one of these cases did not merit examination. *Id.* at 7 n.2.

255. *See* IRS 2004 PACI REPORT, *supra* note 251, at 18.

256. *See id.*

257. *Id. See generally* Samuel D. Brunson, *Dear IRS, It Is Time to Enforce the Campaigning Prohibition, Even Against Churches*, 87 U. COLO. L. REV. 143, 160–61 (2016); Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMEND. L. REV. 1, 9–12 (2007).

258. The last public document issued relating to PACI appears to have been a 2008 memo describing plans for the 2008 iteration, but there were no further reports regarding that iteration. *See* Letter from Lois G. Lerner, Dir., Exempt Orgs. to Marsha Ramirez, Dir., Examinations, Rob Choi, Dir., Rulings & Agreements & Bobby Zarin, Dir., Customer Educ. Outreach (Apr. 17, 2008).

259. REPORT FROM REBECCA GAMBLER, DIR., HOMELAND SEC. AND JUST., U.S. GOV'T ACCOUNTABILITY OFF. TO AMY KLOBUCHAR, RANKING MEMBER, U.S. SENATE COMM. ON RULES AND ADMIN. 40 (Feb. 3, 2020) [hereinafter 2020 GAO Report].

260. *Id.* at 42.

Tribune investigation into church political involvement in Texas found posted videos for 20 instances of apparent political campaign intervention.[261]

Even given the apparently relatively low level of enforcement, the prohibition likely has a deterrent effect on many, if not most, congregations. For example, the IRS discovered during the PACI project that church officials appeared to understand that federal tax law prohibited endorsing candidates and sought to comply with that prohibition.[262] Some failed in that effort, however, because they did not realize the breadth of the prohibition.[263] In addition, church leaders who would like to avoid politics so as not to alienate a significant portion of their congregations likely find the prohibition a helpful tool for responding to any members, candidates, political parties, or others who try to gain the church's political support. But the lack of significant IRS enforcement of the prohibition, especially against churches, provides another incentive for trying to obtain church status for those religious organizations that want to push against or violate the prohibition.

D. Conclusion

Oversight of churches and church-affiliated entitles by the IRS is limited by several factors. These factors include often apparently cursory IRS review of the voluntary (for churches and church-affiliated entities) applications for recognition of exemption, the low overall examination rate for exempt organizations, and the even lower examination rate for churches and conventions or association of churches (likely in part because of the section 7611 protections), and the sporadic IRS review of and usually minimal penalties imposed for political campaign intervention. As a result, there is a risk that unscrupulous individuals might seek and receive church status for organizations they control to engage in activities barred or limited by section 501(c)(3), including political campaign intervention, while enjoying the benefits of that tax classification. That risk is compounded by the definitional issues already highlighted, which may make it difficult for the IRS to adequately police the ability of such individuals to claim that status for their groups.

VI. RECOMMENDATIONS

A. Adopting the Associational Test

We believe that that the IRS should abandon the 14-factor list for defining a "church" on which it has long relied. These factors are unreliable, outdated, and often have limited relevance for religious traditions other than Christian ones. As noted by the trial court in *Foundation for Human Understanding v. United States*, the 14-factor test raises concerns if it represented "a mechanical

261. Priest & Schwartz, *supra* note 87.
262. IRS 2004 PACI REPORT, *supra* note 251, at 16.
263. *Id.*

application of rigid criteria to a diverse set of religious organizations."[264] Sharing these concerns, the appellate court, in affirming the trial court's decision, embraced the associational test, which it phrased as requiring that "to be considered a church . . . a religious organization must create . . . the opportunity for members to develop a fellowship by worshipping together."[265]

In determining qualification for church status, the IRS has itself looked to the associational test as articulated by the courts along with the 14-factor test.[266] In the letter ruling denying church status to Iowaska Church of Healing, for example, the IRS acknowledged, "[t]here is a high degree of consensus among courts that what carries most weight in distinguishing a church from other religious organizations is its associational role" and stated, "your members do not come together regularly to practice your religion. Three to four members at a time gather for weekend ceremonies does not meet the associational test."[267]

We urge that the IRS to follow the courts and rely on a reformulated associational test based on case law. We also urge it to issue several revenue rulings illustrating application of this test in various scenarios. The varied nature of religions in American life makes crafting a detailed set of regulations difficult if not impossible to achieve. Nonetheless, revenue rulings announcing this revised standard and illustrating common practices will do much to provide guidance. In particular, they would give churches and their advisors an official source on which to rely.

Before the IRS issues such revenue rulings, however, the associational test needs revision to accommodate the realities of today's religious life in the United States regarding body of belief and communal worship. The IRS internal training article "Defining 'Church"—The Concept of a Congregation" seems to us particularly helpful in reformulating the associational test.[268] This text ties the associational test to the presence of a "congregation." It observes,

> Determining whether a congregation exists . . . requires considering the form in which members associate. The concept of a congregation does not require that members meet regularly for prescribed religious services. For example, churches in some religions do not hold group services, but serve as quiet refuges where members come for individual reflection and prayer. Their membership can constitute a congregation for purposes of the Internal Revenue code just as surely as a membership that assembles at least weekly for group services led by a minister. However, the concept implies

264. 88 Fed. Cl. 203, 220 (2009).

265. Found. of Hum. Understanding v. United States, 614 F.3d 1383, 1389 (Fed. Cir. 2010).

266. Letter from IRS Independent Office of Appeals, *supra* note 215, at 9–10.

267. *Id.* Other recent examples applying both the 14-factor and associational test are I.R.S. Priv. Ltr. Rul. 19-21-014, *supra* note 106, at 23 (failure to demonstrate worship by a congregation), I.R.S. Priv. Ltr. Rul. 21-49-013, *supra* note 106, at 23.

268. *See generally* ROBERT LOUTHIAN & THOMAS MILLER, EXEMPT ORGS. CONTINUING PRO. EDUC. TECH. INSTRUCTION PROGRAM, DEFINING "CHURCH"—THE CONCEPT OF A CONGREGATION (1994).

> that the membership, whatever the size, have some religious bond and some element of continuity.[269]

Building on these observations, we suggest that qualification as a church require an entity organized to accomplish religious purposes or shared beliefs that offers affiliation to members and gives those affiliated with it the opportunity to interact with each other during community worship or through other offerings, whether in person or virtually. We suggest, in particular, that revenue rulings develop that concept with examples of both hybrid and entirely virtual churches. Adopting this test for qualification as a church would also require changes to the schedule for churches that forms part of the Form 1023, application for exemption.

The trial court in *Foundation of Human Understanding*, which applied both the 14-factor test and the associational test, emphasized "regular religious services" along with "a regular congregation" as the most important of the traditional 14 factors.[270] These factors relate closely to the notion of association. The CPE text discussed above instead contemplates a congregation that does not offer group services. We believe, however, that a church needs to offer its members rituals and practices to address, connect to, or communicate with a power beyond the individual, corporeal self, and to connect and communicate with each other.[271] Such activities distinguish churches from religious organizations that are not churches (and from non-religious organizations that host gatherings of individuals). We would define "worship" in this broad way and require a church to offer regular opportunities for worship based on established rituals. For many, perhaps most, churches such worship will take the form of group services, although, as discussed above, we would not require such a form of worship. A change of this extent to IRS practice calls for grandfathering, transition rules, and notice. Individual churches that qualify for exemption under the 14-factor test would almost certainly qualify under the associational test. Moreover, we do not recommend ending the exemption for individual churches from filing an exemption application. Thus, we would grandfather for all existing churches (other than conventions or associations) that have applied for and received a determination of exemption as a church.

Transition rules for changes to the IRS requirements for exemption as a church, however, pose an unusual challenge. The current standards do not exist in any revenue ruling that could be obsoleted or even in a provision of the Internal Revenue Manual that can be changed.[272] Changes to the standards for church exemption, however, will require changes to Schedule A of Form 1023. Thus, we recommend that, should the IRS agree with our recommendation, it follows here the procedures followed for the 2008 redesigned Form 990. As the IRS

269. *Id*. at 5. The quoted paragraph also observes "Usually in addition to individual practices, members participate in mutual ceremonies, observance, and celebration important to their religion." *Id.*

270. Found. of Hum. Understanding v. United States, 88 Fed. Cl. 203, 220 (2009).

271. Such a determination should not, and likely constitutionally cannot, include any resolution by the government of disputes regarding the specifics of religious doctrine and practice. *See generally* Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837 (2008); Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493 (2013).

272. *See supra* note 116.

explained in its summary of the Form 990 redesign process,[273] there it released for public comment a draft of both the form and the instructions. It finalized the documents only after reviewing the comments received.

The IRS also provided transition rules by phasing-in the requirement to file the new form. Required use of the new form phased in over three years, depending on the gross receipts of the organization.[274] Organizations needing to file the new Form 990 in the first year of effectiveness and to include Schedule H, Hospital, or Schedule K, Supplement Information on Tax Exempt Bonds, were required to complete only one part of these schedules in 2008 because the IRS recognized that both schedules required "significantly more reporting."[275]

The IRS could follow similar procedures for a new Form 1023 Schedule A—releasing a draft form and applicable instructions for notice and comment as well as giving a transition period before requiring use of the new schedule. In addition, issuance of the revenue rulings recommended above would also give notice of the changes in criteria. The IRS might also issue the revenue rulings as proposed and ask for comments on them.[276]

B. Limiting Conventions or Associations of Churches to a Single Denomination

Tax law has recognized multi-denominational conventions and associations for many decades. Regulations under the 1939 Internal Revenue Code, as well as a 1974 revenue ruling, have done so.[277] We, however, believe that multi-denominational conventions and associations of churches are problematic, with member churches rather than the convention or association itself satisfying the requirements for qualifying as a church. The activities and purposes of multi-denominational conventions and associations themselves are too easily limited to those of religious organizations more generally without the special elements that distinguish churches, in particular the importance of creating a congregation, as discussed above. The reasons why Congress grants unique tax benefits to churches also are arguably strongest when each beneficiary promotes the particular faith associated with a single denomination, as opposed to more general religious goals.[278]

Thus, we suggest that only associations and conventions of churches made up of a single denomination be treated as churches with all the benefits that categorization carries. The regulation under the 1939 Code that included a union of churches of different denominations did so specifically for the narrow purpose of exemption from an excise tax on admissions, not to qualify the association or

273. SIRS, BACKGROUND PAPER: SUMMARY OF FORM 990 REDESIGN PROCESS (2008).

274. *Id.* at 1.

275. *Id.* at 4–5.

276. Treas. Reg. § 601.601(d)(2)(v)(f) (2023) states, "[c]omments and suggestions from taxpayers or taxpayer groups on Revenue Rulings being prepared for publication in the Bulletin may be solicited, if justified by special circumstances." 26 C.F.R. § 601.601(d)(2)(v)(f) (2023). This change would be so justified.

277. *See supra* Section III.B.

278. *See supra* notes 80–82 and accompanying text.

convention for the full panoply of benefits we currently afford entities treated as churches. When Congress in 1950 adopted the phrase in connection with the unrelated business income tax regime and again when Congress in 2006 added language regarding associations and conventions to section 7701, the legislative history expressed the purpose of treating congregational and hierarchical churches in the same way.[279] This stated purpose assumed that conventions and associations of churches consisted of a single denomination. Even Revenue Ruling 74-224, which recognized a multi-denominational association, acknowledged that the phrase had a "historical meaning generally referring to a cooperative undertaking by churches of the same denomination."[280]

For all these reasons, we believe multi-denomination conventions and associations should be treated as religious organizations, still eligible for all the benefits shared by section 501(c)(3) organizations but not the special benefits enjoyed by churches. Adopting our recommendation would represent a substantial policy change; the IRS has long accepted multi-denomination associations. Such a major change in policy should be one that is considered by and enacted by Congress and not through a new IRS revenue ruling.

Congressional consideration would also allow and likely encourage broad public input, which would be particularly important for two reasons. First, Congress would need to consider how "denomination" should be defined to encompass religious traditions that may not typically use that term. For example, Buddhism is often instead divided into philosophical schools.[281] Second, Congress would need to consider whether existing, multi-denominational conventions or associations of churches, including those that did not apply for exemption, should lose that status after a transitional period, or should retain that status indefinitely under a grandfather provision.

Congress, of course, has the power to determine effective dates and transition rules for changes to the Internal Revenue Code. Section 3101 of The Taxpayer First Act of 2019 (TFA),[282] for example, required exempt organizations to file a number of information and other returns electronically. The legislation provided that these changes become effective to taxable years beginning after the date of enactment of the Act, with authority for the Secretary to delay the effective date for small organizations (as defined in the Act), Form 990-T, and for any application of the new provisions that would cause an undue burden for up to any taxable year beginning on and after a date two years after enactment.[283] We would recommend at a minimum a similar approach to the change in the definition of "convention or association of churches" to enable entities that had been expecting to apply for exemption as a convention or association of churches or not to apply at all to prepare an exemption application as a religious organization.

279. *See supra* notes 144–47 and accompanying text.
280. Rev. Rul. 74-224, *supra* note 153.
281. *See* Mitchell, *supra* note 174, at 99.
282. Pub. L. No. 116-25, § 3101, 133 Stat. 981, 1015 (2019) (codified as 26 U.S.C. § 6033(n)).
283. *Id*.

Whether to grandfather current multi-denomination associations of churches is a more difficult issue, and one we think Congress should only decide after seeking appropriate public input. Existing multi-denominational associations have relied on longstanding IRS understanding of the term. They have been entitled to all the benefits uniquely afforded churches. But without a requirement that such organizations transition to being a tax-exempt religious organization, new multi-denominational associations of churches would have far fewer benefits and greater burdens than old ones, a state of affairs that strikes us as undesirable.

If Congress does decide on a transitional rule approach instead of a grandfather approach, multi-denominational conventions or associations of churches that have never filed for exemption would need to do so. Those that have filed for and received exemption, we suggest, would be allowed to change classification by filing a Form 990 with an explanation on Schedule O. In both sets of cases, a requirement of such filings no later than tax years beginning on or after two years after the effective seems appropriate. Submitting a Form 990 would also be appropriate.

C. Compliance with Conditions on Section 501(c)(3) Status

We do not believe this refined definition of church, or the narrowed definition of convention or association of churches, should lead to any changes in the applicability of the conditions placed on organizations, including churches, that are tax-exempt under section 501(c)(3). Instead, the IRS should be clear and consistent in its application of these conditions to churches and church-affiliated entities. For example, while the IRS was correct in its recent position that engaging in drug activity that is illegal under federal law demonstrates a disqualifying, substantial non-exempt purpose, it incorrectly recognized the exemption of the First Church of Cannabis (unless that church represented it would only use cannabis if it had secured rulings that doing so would not be illegal). We also do not believe the Supreme Court's recent greater solicitude for Free Exercise of Religion clause claims changes this conclusion.

This conflict is most prominent with respect to the prohibition on political campaign intervention. As noted earlier, churches today frequently post their services on social media, exposing violations of the prohibition, as the Texas Tribune/Politico articles demonstrated.[284] Reporters regularly ask both of the authors of this piece why the IRS does not enforce the campaign intervention prohibition, particularly vis a vis churches.[285] Although, unlike other violations of tax law, these violations do not involve large amounts of lost revenue, we believe that failure to enforce this prohibition undermines respect for the rule of law in tax more generally.

We also believe, however, that education and research regarding this prohibition should precede any increased enforcement. As both authors concluded

284. *See supra* note 87 and accompanying text.
285. *See, e.g., id.*

after reviewing the material provided by the Texas Tribune/Politico recordings of church sermons, many religious leaders understand direct violations—endorsing or opposing a candidate—but do not understand indirect violations also violate the prohibition. Similarly, the 2020 GAO Report pointed to the need for additional guidance regarding the prohibition, particularly guidance aimed at smaller nonprofits themselves.[286]

We also recommend renewed investigations of violations of the campaign intervention prohibition, investigations including but not limited to churches. That is, we do not believe that enforcement efforts should focus on churches, especially since the impression that their violations are more visible or salient may be driven by what media outlets perceive to be of interest to the public. A better approach would be a renewed PACI that systematically considers potential violations by all section 501(c)(3) organizations. The IRS's last iteration of PACI took place more than 15 years ago.[287] Since then, social media, in particular, has changed the operations of section 501(c)(3) organizations generally, not just churches.

We further urge that the IRS not be the agency to conduct this new PACI. The repercussions of the Tea Party dispute about the IRS investigation of certain organizations applying for section 501(c)(4) status continue to reverberate both at the IRS and with the agency's critics.[288] As the 2020 GAO Report "Campaign Finance: Federal Framework, Agency Roles and Responsibilities, and Perspectives," wrote in connection with IRS enforcement, "according to some sources, in recent years IRS has conducted more limited enforcement on tax-exempt organizations that engage in political campaign intervention because of prior questions about how IRS was selecting and reviewing certain organizations' exempt status based on the organization's name, among other things."[289]

We recommend that the GAO follow up on its 2020 Report and conduct essentially a new PACI, albeit one that does not involve actual examinations of section 501(c)(3) organizations but instead only gathers information about possible violations of the political campaign intervention prohibition.[290] We have no doubt that the GAO has the authority to do so, upon request of a congressional committee or subcommittee or simply on the initiative of the Comptroller General.[291] Moreover, the GAO has authority to obtain access to a wide range of

286. 2020 GAO Report, *supra* note 259, at 44–45. Many churches are small.

287. *See supra* note 252 and accompanying text.

288. *See* Jennifer Mueller, *Defending Nuance in an Era of Tea Party Politics: An Argument for the Continued Use of Standards to Evaluate the Campaign Activities of 501(c)(4) Organizations*, 22 GEO. MASON L. REV. 103, 116–19 (2014); Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 99 CORNELL L. REV. ONLINE 41, 42–44 (2013); Heath C. DeJean, Comment, *High-Stakes Word Search: Ensuring Fair and Effective IRS Centralization in Tax Exemption*, 75 LA. L. REV. 259, 280–83 (2014).

289. 2020 GAO Report *supra* note 259, at 45–46.

290. This review could also include the IRS considering possible violations during the exemption application process. *See, e.g.*, Jamison Shipman, *The Challenge of Determining When to Deny Exemption Applications*, 178 TAX NOTES FED. 955, 963–68 (2023) (reviewing IRS initial denial based on campaign intervention and ultimate grant of exemption under section 501(c)(3) to Christians Engaged).

291. 31 U.S.C. § 717(b) authorizes the Comptroller General to evaluate the results of a program or activity the Government carries out under existing law "(1) on the initiative of the Comptroller General; (2) when either

agency records and information[292] and thus could obtain the types of referrals on which the PACI relied.

Our specific recommendation is that the GAO should, on one hand, narrow and, on the other hand, expand its 2020 Report. The 2020 GAO Report did not focus solely on the section 501(c)(3) campaign intervention prohibition. That topic was only a small part of the report. Its discussion included FEC enforcement of campaign finance rules and IRS enforcement of section 501(c)(4) and section 527 requirements.[293] We call for the GAO to narrow its focus to violations of the section 501(c)(3) campaign intervention prohibition, with a report that includes the information reviewed and disclosed in PACI reports. The PACI reviewed all *allegations* referred to the IRS of campaign intervention by section 501(c)(3) organizations,[294] while the 2020 GAO Report only reviewed IRS *examinations* related to campaign intervention.[295] Unlike the PACI Reports, the GAO Report also did not detail the number of churches evaluated, as noted earlier.[296] A new PACI conducted by the GAO should review all referrals and include data on the number of churches involved. Like the 2006 PACI, it should also examine state campaign finance databases.

Such an examination by a respected Congressional agency could reassure both critics and defenders of the IRS generally and the Exempt Organizations division in particular. Moreover, it is important that any findings of such an investigation include follow-up in ways that the PACI did not, such as specific content of additional educational material or revenue rulings.[297] That said, GAO would lack the ability to impose any penalties on organizations found to have violated the prohibition, but given that the IRS determined a warning was appropriate in almost all of the examinations it conducted under the original PACI, that limitation should not be problematic. The GAO monitors agencies' progress

House of Congress orders an evaluation; or (3) when a committee of Congress with jurisdiction over the program or activity requests the evaluation."

292. 31 U.S.C. § 716 gives the Comptroller authority "to obtain such agency records as the Comptroller General requires to discharge the duties of the Comptroller General (including audit, evaluation, and investigative duties) . . . ." GAO's Agency Protocols details the kinds of records to which the GAO has right of access. GAO, GAO'S AGENCY PROTOCOLS 21–22 (Jan. 23, 2019).

293. *See generally* 2020 GAO Report, *supra* note 259.

294. The IRS 2004 PACI SUMMARY describes the expedited procedures used as well as the three categories of PACI cases: pre-existing cases; referrals awaiting classification, and pending cases at the time the PACI began. IRS 2004 PACI SUMMARY, *supra* note 251, at 2, 4. The IRS 2006 PACI REPORT explains that the 2006 PACI "utilized expedited, limited-scope examinations." IRS 2006 PACI REPORT, *supra* note 251, at 2.

295. *See* 2020 GAO Report, *supra* note 259, at 4.

296. *Id.* at 1–5.

297. Given these recommendations, we do not recommend altering any aspect of the section 7611 procedural protections enjoyed by churches and conventions or associations of churches. *But see* Julia M. Camp, John J. Masselli & Amy J.N. Yurko, *Religion Versus Politics: An Age-Old Question with Continued Importance to the U.S. Nonprofit Classification System*, 21 ATA J. LEG. RES. 1, at 34 (2022) (recommending modifications to section 7611 given issues raised by church violations of the political campaign intervention prohibition). We do urge the IRS to finalize the section 7611 regulations, an action that has appeared on the Priority Guidance Plan for a number of years but has not yet occurred.

in implementing its recommendations,[298] and it could refer particularly egregious cases to the IRS for follow-up.

D. Conclusion

We believe that the changes we recommend are attainable. That is, we have not proposed changes, such as requiring churches and conventions or associations of churches as redefined to apply for exemption or to file even a modified annual Form 990, that would we do not consider achievable (and which may or may not be desirable).[299] In our view the changes would benefit churches and their affiliated entities as well as the public. They would take into account both current realities and current concerns. In so doing, they are likely to increase public trust in the operation of churches.

VII. FINAL THOUGHTS

Several factors likely drive the desire of many religious organizations to seek classification or reclassification as churches, integrated auxiliaries of churches, or conventions or associations of churches. These factors are the longstanding, highly favorable, and sometimes unique tax benefits that come with these statuses, the stretching of the already vague definitions of church and church-affiliated entities in the face of well-lawyered requests for reclassification and changes wrought by the pandemic, and decreasing IRS oversight, especially for churches and church-affiliated entities. The danger posed by this trend is that some organizations seeking these favored statuses may be doing so to hide questionable behavior, whether private inurement, private benefit, or political campaign intervention, or to reduce scrutiny of prohibited behavior such as illegal drug use. If this abuse of church status occurs, and if and when that bad behavior comes to light, that may lead to increased public pressure to reexamine the tax favoring of churches and church-affiliated entities more broadly.

We have designed our definitional recommendations and our enforcement recommendation with respect to political campaign intervention to address these pressures while at the same time recognizing the longstanding congressional desire to favor churches and certain church-affiliated entities. We believe these changes will help relieve the growing pressure on the definitions of church and convention or association of churches by clarifying them for both religious organizations and the IRS and updating them to reflect the twenty-first century realities of virtual participation and the increasing diversity of faith communities. And our recommendation for GAO to review IRS handling of political campaign intervention allegation referrals will bring welcome objective consideration of

298. *See* GAO, *supra* note 292, at 18. Moreover, "[a]gencies also have a responsibility to monitor and maintain accurate records on the status of recommendations" and must submit a written statement of the actions it has taken or plans to take in response to GAO recommendations to the Congressional committees with jurisdiction over the program. *Id.* at 18–19.

299. Past proposals along these lines have not had any noticeable legislative traction. *See, e.g.*, Schwarz, *supra* note 16, at 102–03 (recommending requiring churches to file some type of financial disclosure).

whether all section 501(c)(3) organizations, including churches, are in fact violating this prohibition in any significant way that goes beyond sporadic, minor, and usually inadvertent footfalls. The GAO's conclusions, in turn, will inform further consideration of the definitions and, if needed, of the special benefits that churches and church-affiliated entities enjoy under federal tax law.