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Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC, 20224

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**RE: Religious Freedom and the Treasury Department's Proposed Regulations Relating to Church Tax Inquiries and Examinations**

Prof. Douglas Laycock  
University of Michigan Law School

Rev. Richard John Neuhaus  
President, Institute of Religion  
and Public Life

Ladies and Gentlemen:

Eunice Kennedy Shriver  
Founder and Honorary Chairman,  
Special Olympics International

The Becket Fund for Religious Liberty submits the following comments on the Treasury Department's proposed changes to Treasury Regulation § 301.7611-1 governing church tax inquiries and examinations (the "Proposed Regulations").

Sargent Shriver  
Chairman of the Board,  
Special Olympics International

Dr. Ronald B. Sobel  
Senior Rabbi, Congregation Emanu-El  
of the City of New York

The Becket Fund is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. It has successfully represented clients from a wide variety of religious traditions—including Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Sikhs, Santeros, and Zoroastrians—in lawsuits across the country and around the world. It is also one of the nation's leading law firms in cases involving the rights of religious organizations under the First Amendment and the Religious Freedom Restoration Act ("RFRA").

John M. Templeton, Jr., M.D.  
Bryn Mawr, Pennsylvania

The Becket Fund writes to emphasize Treasury's legal obligations under the First Amendment and RFRA—specifically, Treasury's obligation to minimize the burdens of IRS regulations on the religious exercise of churches. As Treasury revises the church audit approval process under I.R.C. § 7611, it should also consider the more fundamental limitations imposed on church audits by the First Amendment and RFRA. Specifically, we urge Treasury to modify the Proposed Regulations to require the IRS to expressly consider churches' rights under the First Amendment and RFRA during the church audit process.

1350 Connecticut Avenue, NW  
Suite 605  
Washington, DC 20036-1735  
Phone: 202-955-0095  
Fax: 202-955-0090  
[www.becketfund.org](http://www.becketfund.org)

## I. The First Amendment and RFRA protect the free exercise rights of churches.

The First Amendment prohibits the government from regulating the content of religious belief, interfering with churches' internal governance, and (in certain circumstances) imposing burdens on religiously motivated conduct. So, for example, courts have struck down generally applicable taxes when applied to religious speech or proselytizing,<sup>1</sup> and courts have refused to apply generally applicable employment laws that would interfere with a church's decisions about whom it will hire (and on what terms) to fulfill religious functions.<sup>2</sup> Courts have also forbidden the government from taking regulatory or adjudicative action that involves an inherently religious judgment (such as whether a church has departed from its own doctrine)<sup>3</sup> or otherwise entangles the government in intrusive monitoring of religious affairs.<sup>4</sup>

The Religious Freedom Restoration Act ("RFRA")<sup>5</sup> provides even greater protection to churches' free exercise rights than does current First Amendment doctrine. Under RFRA, the IRS is prohibited from imposing a substantial burden on religious exercise—"even if the burden results from a rule of general applicability"—unless the IRS can demonstrate that the imposition of the burden (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.<sup>6</sup> Under this standard, it is not enough for the government to show that it has a compelling interest in enforcing its norms in the general run of cases; rather, the government must demonstrate a compelling interest in applying those norms *to the specific religious practice in each case.*<sup>7</sup> RFRA also modifies otherwise applica-

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<sup>1</sup> See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (striking down, as applied to Jehovah's Witnesses, a state law that imposed a tax on the distribution of literature and solicitation of funds).

<sup>2</sup> See *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000); *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999).

<sup>3</sup> *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

<sup>4</sup> See, e.g., *Church of Scientology Flag Service Organization, Inc. v. City of Clearwater*, 2 F.3d 1514, 1535-39 (11th Cir. 1993) (striking down a city ordinance regulating the solicitation of funds by charitable organizations because, as applied to a church, the ordinance entangled the government in intrusive monitoring of the church's internal affairs).

<sup>5</sup> 42 U.S.C. §§ 2000bb to 2000bb-4.

<sup>6</sup> 42 U.S.C. § 2000bb-1(a)-(b).

<sup>7</sup> See *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (RFRA requires courts to "look[] beyond broadly formulated interests justifying the general applicability of government mandates and [instead] scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants") (rejecting the federal government's argument that its interest in uniform application of federal drug laws justified a burden on a church's practice of drinking hallucinogenic tea).

ble restrictions on judicial relief, providing access to judicial review for anyone whose free exercise of religion has been impermissibly burdened by the federal government.<sup>8</sup> Such parties may seek appropriate relief against the government either by raising RFRA as a defense to an otherwise valid enforcement action, or by pursuing an affirmative claim for injunctive or other appropriate relief.<sup>9</sup>

## **II. Attempts to enforce the tax code against churches may, in certain circumstances, violate the First Amendment or RFRA.**

While the government certainly has an important interest in unfettered enforcement of the tax laws, it is crucial for the IRS to recognize that its enforcement efforts may, in some cases, unlawfully burden the free exercise of religion. For example, depending on the facts of the particular case, each of the following actions could violate the First Amendment or RFRA:

- Imposing taxes or denying tax benefits unless a church makes changes to its ecclesiastical structure in accordance with IRS-approved notions of “good governance.”<sup>10</sup>
- Imposing penalties, or revoking tax-exempt status, based on the government’s conclusion that a church employee’s compensation exceeds the value of the religious services he provides.<sup>11</sup>
- Imposing taxes or denying tax benefits based on the government conclusion that a church’s activities, which the church believes further a religious purpose, nevertheless constitute nonexempt activity.<sup>12</sup>

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<sup>8</sup> 42 U.S.C. § 2000bb–1(c) (“A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”); 42 U.S.C. § 2000bb–3(a) (stating that RFRA “applies to all Federal law, and the implementation of that law, whether statutory or otherwise”).

<sup>9</sup> 42 U.S.C. § 2000bb–1(c).

<sup>10</sup> See, e.g., *Petruska v. Gannon University*, 462 F.3d 294, 306 (3d Cir. 2006) (“The Free Exercise Clause protects not only the individual’s right to believe and profess whatever religious doctrine one desires, but also a religious institution’s right to decide matters of . . . church governance.”) (internal citations and quotations omitted; emphasis added); *Church of Scientology Flag Service Organization, Inc. v. City of Clearwater*, 2 F.3d 1514, 1537 (11th Cir. 1993) (“[C]ivil authorities must abstain from interposing themselves in matters of church organization and governance.”).

<sup>11</sup> See 26 C.F.R. § 53.4958-4 (prohibiting excess benefit transactions). Under Treasury Regulation § 53.4958-4(b)(1)(ii), the IRS determines whether a church leader has been overcompensated by examining “the amount that would ordinarily be paid for like services by like enterprises.” In *Hernandez v. Commissioner*, the Court noted the constitutional difficulties that might arise if the government had to determine the value of religious services. 490 U.S. 680, 696-98 (1989). However, it ultimately held that these difficulties could be avoided in the tax deduction context by determining the value of religious services based on the cost of providing them. *Id.* No similar method is available in the context of compensation for church leaders; the IRS thus faces serious constitutional issues if it penalizes a church on the ground that its leaders are overpaid.

- Using the threat of adverse tax consequences to pressure churches to conform religious teachings, governance, or employment relationships to IRS desires, even if those tax consequences are never in fact imposed.<sup>13</sup>
- Requesting, reviewing, or evaluating sensitive internal church documents, regardless of how the examination concludes.<sup>14</sup>
- Imposing taxes on, or denying tax benefits to, a church or its leaders or donors, on the ground that the church's services or teachings involve prohibited political activity (such as criticism or praise of candidates for political office or advocacy for or against particular legislative proposals).<sup>15</sup>
- Applying IRS standards unevenly to different religious groups.<sup>16</sup>

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<sup>12</sup> See, e.g., *Bethel Conservative Mennonite Church v. Commissioner*, 746 F.2d 388, 391 (7th Cir. 1984) (reversing IRS denial of tax-exempt status because, contrary to the IRS's view, distribution of church funds to provide for members' medical needs constituted a religious purpose: "Religions by their very nature provide many services that benefit only the members of the individual congregation, and to say that any church which so provides these benefits must be denied tax exemption would disrupt many organized churches as we know them."); *id.* at 392 (allowing the church to supplement the administrative record, contrary to the Tax Court's ruling, because "we should scrupulously guard the free exercise of religion").

<sup>13</sup> See *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) ("A substantial burden exists [under RFRA] when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'") (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)).

<sup>14</sup> See, e.g., *United States v. Church of World Peace*, 775 F.2d 265, 266-67 (10th Cir. 1985) (refusing "on First Amendment grounds" to enforce an IRS summons requesting "a list of [church] members and names of persons for whom marriage ceremonies were performed"); *Baldwin v. Commissioner*, 648 F.2d 483 (8th Cir. 1981) (vacating an IRS discovery order seeking a church's membership list because the IRS failed to justify the order in light of the church's First Amendment rights).

<sup>15</sup> Cf. *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997) (holding that, under RFRA, a chaplain's right to fix the content of his or her own sermons trumped the military's restriction on grassroots lobbying); Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1143 (2009) ("[A] RFRA-based challenge to the prohibition [on intervening in political campaigns] has a strong chance of succeeding for some houses of worship."); *but see Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (revocation of tax exemption did not substantially burden the free exercise rights of a church that placed full-page newspaper advertisements advocating the defeat of a presidential candidate).

<sup>16</sup> *Hernandez v. Commissioner*, 490 U.S. 680, 700-703 (1989) (considering, but ultimately rejecting because of an inadequate factual record, a claim that the IRS unevenly enforced the tax code against certain religious groups); *Larson v. Valente*, 456 U.S. 228 (1982) (striking down a state charitable solicitation statute because it discriminated among religious groups by imposing heightened registration and reporting requirements on only those religious organizations that solicited more than 50% of their funds from nonmembers); *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) (striking down a state scholarship program because it discriminated among religious groups by providing funds to any religious or secular school except those the state deemed "pervasively sectarian").

In some cases, undoubtedly, the IRS's strong interest in "maintaining a sound tax system," free of "myriad exceptions flowing from a wide variety of religious beliefs," will outweigh an individual church's claim to a religious exemption under RFRA or the First Amendment.<sup>17</sup> But in other cases, RFRA or the First Amendment will mandate an exemption—even from an otherwise uniform tax law.<sup>18</sup> Moreover, in many of the examples listed above, the IRS already undertakes a nuanced, case-by-case assessment of the facts and circumstances of a religious organization; in such a case, the protections of RFRA and the First Amendment are at their apex, and the IRS's interest in uniformity is at its nadir.<sup>19</sup>

### **III. The IRS should expressly consider the free exercise rights of churches in the course of carrying out Treasury-mandated procedures.**

The procedural protections of section 7611 and the accompanying regulations provide valuable assurance that the IRS will not embark on a church tax inquiry or examination lightly or without some basis for suspecting tax law violations. But those procedural protections were enacted almost a decade before RFRA; they do not adequately codify the IRS's obligation under RFRA and the First Amendment to consider not only whether the tax laws apply to a religious group, but also whether their application raises free exercise concerns.<sup>20</sup> At no point do the current or proposed regulations require any government official to consider whether an investigation or enforcement action is consistent with the church's rights under RFRA and the First Amendment. This raises a serious risk that the IRS will never even consider RFRA or the First Amendment before commencing a potentially problematic investigation or enforcement action.

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<sup>17</sup> See *United States v. Lee*, 455 U.S. 252, 260 (1982) (rejecting a constitutional claim of a religious exemption from paying social security taxes); *Adams v. Commissioner*, 170 F.3d 173 (3d Cir. 1999) (rejecting similar RFRA claim).

<sup>18</sup> See *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (rejecting the federal government's argument that uniform application of federal drug laws justified denying a religious exemption for hallucinogenic tea):

The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rule[s] of general applicability."

<sup>19</sup> Compare *United States v. Lee*, 455 U.S. 252 (1982) (rejecting constitutional claim of religious exemption from paying social security taxes), with *Sherbert v. Verner*, 374 U.S. 398 (1963), and with *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (finding no compelling interest in denying a governmental benefit in the context of a legal scheme involving individualized assessments of whether the benefit was deserved); see also *United States v. Philadelphia Yearly Meeting of the Religious Society of Friends*, 322 F. Supp. 2d 603, 609 (E.D. Pa. 2004) ("[Under RFRA,] [t]here is an important difference between the routine assessment and collection of taxes . . . and the [IRS's] efforts to secure the payment of delinquent taxes.").

<sup>20</sup> See 42 U.S.C. § 2000bb-3(a) (stating that RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise").

Thus, we urge Treasury to modify the Proposed Regulations under section 7611 to include, as a formal part of the church audit process, a review of IRS compliance with RFRA and the First Amendment. The Becket Fund claims no expertise in tax administration, and takes no definitive position on exactly how such review should occur. However, such review is arguably already implicitly required, since section 7611 invites legal counsel's input at the beginning and conclusion of the examination process.<sup>21</sup> The requirement of counsel's approval presents an excellent opportunity for an internal review of a church's rights under RFRA and the First Amendment. Indeed, given legal counsel's ethical duty not to encourage violations of law, and given the fact that RFRA and the First Amendment can be raised as a defense in court to any IRS enforcement action, we believe that IRS legal counsel cannot sensibly advise the IRS to go forward with an examination or tax adjustment without first considering whether the action is consistent with RFRA and the First Amendment.

At a minimum, then, the regulations under section 7611 should ensure that the following conditions are met:

1. **Up-to-date notification of legal rights.** The notice sent out to churches explaining their rights at the outset of a church tax inquiry<sup>22</sup> should be updated to include their rights and remedies available not only under section 7611 and the Constitution, but also under RFRA.
2. **Early and ongoing identification and consideration of potential burdens on religious exercise.** The IRS should attempt to identify any burdens that IRS actions might impose on a church's religious exercise, and the IRS should work with churches to find ways to minimize such burdens, except to the extent they are the least restrictive means of furthering a compelling government interest. The regulations under section 7611 currently prescribe a pre-examination conference for the church and the IRS to "discuss, and attempt to resolve, concerns relating to [a proposed] examination."<sup>23</sup> This conference provides a natural venue for identifying burdens on religious exercise and finding ways to minimize them. However, the IRS should also provide churches with an opportunity to identify emerging burdens as the examination progresses.
3. **Explicit legal analysis of free exercise issues.** When undertaking the required legal review of a proposed examination or tax adjustment, the IRS should expressly consider compliance with RFRA and the First Amendment.

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<sup>21</sup> See I.R.C. § 7611(b)(2)(A), (3)(C) (requiring notice of any church examination to be forwarded to counsel for review and optional advisory objection); I.R.C. § 7611(d)(1) (requiring counsel's written approval before the IRS can revoke church status, revoke tax-exempt status, deny eligibility to receive tax-deductible contributions, or impose additional tax).

<sup>22</sup> See I.R.C. § 7611(a)(3); 26 C.F.R. § 301.7611-1, Q&A-9.

<sup>23</sup> I.R.C. § 7611(b)(3)(A)(iii); 26 C.F.R. § 301.7611-1, Q&A-9.

The regulations should require legal counsel to consider potential burdens on religious exercise when it performs its review. Appropriate review should also be required when the IRS, instead of making a tax adjustment, requires changes to church governance or religious practice or teaching as a condition of avoiding an adjustment, and when IRS actions outside the scope of section 7611 raise free exercise concerns (such as when the IRS requests information about individual church members).

4. **Clear acknowledgment that the Constitution and RFRA apply.** The regulations should make clear that any IRS official involved in a church tax inquiry or examination has a legal duty to comply with RFRA and the First Amendment, and should seek guidance from his or her superiors or from legal counsel as necessary when in doubt about how that duty applies to specific actions.

These procedural changes can and should be made at the level of regulations under section 7611 for two reasons. First, as a practical matter, without an explicit regulatory requirement to consider RFRA and the First Amendment, IRS officials will tend to avoid considering unfamiliar bodies of law. The IRS decision making process will suffer as a result.

Second, the failure of current regulations to address RFRA and the First Amendment has resulted in a number of incomplete (and in some cases arguably inaccurate) statements about how the IRS may carry out church examinations. Treasury Regulation § 301.7611-1, which provides questions and answers relating to church tax inquiries and examinations, never once mentions RFRA or the First Amendment even where those laws might be relevant. For example, Q&A-8 explains constraints on the IRS's actions when section 7611 does not apply, but does not mention constraints imposed by RFRA or the First Amendment; Q&A-17 says that a church's "exclusive remedy" for IRS violations of section 7611 is to stay a summons, despite the fact that RFRA (which was enacted after section 7611) has since provided additional judicial relief when the IRS substantially burdens religious exercise;<sup>24</sup> and Q&A-7 asserts that failure to provide the IRS with information regarding others' taxes gives the IRS reason to believe the church may not be in compliance with tax law, despite the fact that some churches have failed to provide such information not to evade taxes but as a matter of sincere religious duty.<sup>25</sup>

We recognize that not every claim of religious exercise must be accommodated, and the IRS has a strong interest in applying uniform standards without making difficult case-by-case assessments for every religious group in every case. But in many circum-

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<sup>24</sup> See 42 U.S.C. § 2000bb-1(c).

<sup>25</sup> See *United States v. Philadelphia Yearly Meeting of the Religious Society of Friends*, 322 F. Supp. 2d 603, 608-09 (E.D. Pa. 2004) (forcing a Quaker group to levy a member's wages substantially burdened the Quaker group's exercise of religion).

stances, those kinds of case-by-case assessments are exactly what RFRA requires. The potential difficulty of the task is no excuse for the IRS not to try to identify the cases where accommodation is required. Nor can the IRS simply wait to deal with these issues until a church seeks to enforce its free exercise rights in court. The IRS has an independent obligation to respect the free exercise rights of all churches—not just those sophisticated enough to retain counsel and assert RFRA and First Amendment claims in federal court.

Finally, while the Proposed Regulations at issue focus exclusively on church audits, RFRA and the First Amendment also apply to religious organizations other than churches, and to review and approval of new religious organizations' applications for exempt status. In due course, Treasury and the IRS should also address the application of RFRA and the First Amendment in these other contexts.

#### **IV. Conclusion**

We urge Treasury to take this opportunity to remedy the lack of any formal mechanism for considering RFRA or the First Amendment under section 7611. We also respectfully request that Treasury hold hearings on its proposed regulatory changes, and that those hearings include as a topic the IRS's obligations under RFRA and the First Amendment and how the church audit procedures should be modified to meet them.

Sincerely,



Luke W. Goodrich  
Deputy National Litigation Director  
The Becket Fund for Religious Liberty