Once and Future Revocation of Tax Exemption: Public Policy, Illegality, Terrorism, and Charitable Purpose

ELLEN P. APRILL*

Abstract

After describing the process for revoking exempt status, this Article considers each of four possible bases—violation of fundamental public policy, substantial illegal purpose, supporting terrorism, and redefining charitable purpose—that organization could encounter in any attempt by tax authorities to deny them section 501(c)(3) status. Discussion of each of these issues seeks to assist organizations, including grantmaking entities, and their advisors who are worried about challenges to their exemption in understanding the substance—the strengths, weaknesses, and uncertainties—of each of the possible bases.

This version updates and expands the draft of the paper posted on July 21, 2025. It goes into further detail about what revocation entails and considers the settlement in *Z Street v. Koskinen.* It expands discussion of fundamental public policy by considering inclusion on Treasurys' 2025-2026 priority guidance plan regarding the application of the doctrine to private schools. The section on substantial illegal purpose now includes examination of the Department of Education's reliance on the doctrine in promulgating regulations for the Public Service Loan Forgiveness program as well as new scholarship about it. The section on supporting terrorism adds developments as to domestic terrorism. The section on redefining charitable purpose is new. It describes the administrative law doctrines that could form the basis for challenging any attempt to define section 501(c)(3) purpose to exclude, as has been reported, any pursuit of DEI activities or efforts to curb climate change.

The article concludes with the assurance that exempt organizations have available a variety of statutory and constitutional arguments to counter attempts to deny, revoke, or suspend their exempt status.

*Senior Scholar in Residence, UCLA School of Law, Lowell Milken Center for Philanthropy and Nonprofits and John E. Anderson Professor of Tax Law Emerita, LMU Loyola Law School. The author thanks Andrew Goldblatt for his excellent research assistance.

Table of Contents

I. Introduction 278

II. The Revocation Process 279

III. Violation of Fundamental Public Policy 286

IV. Substantial Illegal Purpose 295

V. Supporting Terrorist Organizations 304

VI. Redefining Charitable Purpose 311

VII. Conclusion 321

I. Introduction

These are hard times for section 501(c)(3) organizations deemed by the current administration to be liberal or left of center. On April 15, 2025, for example, President Trump, displeased with Harvard University's refusal to agree to a long and detailed list of demands regarding its operations, faculty, admissions, and other policies, posted on Truth Social: "Perhaps Harvard should lose its Tax-Exempt Status. . .Remember, Tax-Exempt Status is totally contingent on acting in the PUBLIC INTEREST."[1] In September of 2025, Vice President Vance and Deputy Chief of Staff Stephen Miller vowed to "dismantle institutions on the left;" according to one news report, the White House was considering ways to strip left-wing organizations it views as "tied to political violence" of their tax-exempt status.[2]

If these or other threats are carried out, many of the efforts to revoke exemption are likely to involve asserting either violation of fundamental public policy under the *Bob Jones* case or the substantial illegal purpose doctrine as understood by the Internal Revenue Service (the IRS). Expanding section 501(p), which provides for suspension of tax-exempt status of terrorist

[1] *See* Maggie Haberman, *Trump Threatens Harvard's Tax Status in Billion-Dollar Pressure Campaign*, N.Y. TIMES Apr. 15, 2025, https://www.nytimes.com/2025/04/15/us/politics/trump-harvard-tax-status.html [https://perma.cc/ZUA9-FH2Z]; *see also* Julia Mueller, *Trump Floats Wider Tax-Exemption Crackdown*, THE HILL, Apr. 17, 2025, https://thehill.com/homenews/administration/5254660-trump-floats-wider-irs-tax-exemption-crackdown/ [https://perma.cc/Q8BM-P42T].

[2] Cat Zakrzewski, Michael Birnbaum & Yvonne Wingett Sanchez, *Vance Vows Retribution on Liberal Institutions After Kirk Killing*, THE WASH. POST. Sept. 15, 2025, https://www.washingtonpost.com/politics/2025/09/15/vance-charlie-kirk-podcast-episode/ [https://perma.cc/EXM4-5AQ2].

organizations, to include not only terrorist-supporting organizations but also domestic terrorist organizations may well be another approach. The Treasury and the IRS could also seek to end certain categories of charitable purposes, such as those related to environmental groups or universities that pursue diversity, equity and inclusion (DEI),[3] changes that would require both the government and affected exempt organizations to confront current administrative law jurisprudence.

This Article first describes the process for revoking exempt status, including the prohibition on executive branch intrusion in this process. It then considers each of those four possible bases—violation of fundamental public policy, substantial illegal purpose, supporting terrorism, and redefining charitable purpose. Discussion of each of these issues seeks to assist organizations, including grantmaking entities, and their advisors who are worried about challenges to their exemption in understanding the substance—the strengths, weaknesses, and uncertainties—of each of the possible bases. The article concludes with the assurance that exempt organizations have a variety of means, both procedurally and substantively, to prepare for and address any such challenge. This knowledge will, I hope, assuage the fears that many nonprofits are currently experiencing.

Developments discussed in this paper are current through December 31, 2025. Also, challenges other than the revocation of exemption, such as charges under RICO or the False Claims Act, fall beyond its scope.

II. The Revocation Process

Under the provisions of the Internal Revenue Code and established IRS procedures, no section 501(c)(3) organization can lose its exemption by executive branch or even IRS fiat, except in the rarest of situations.[4] Congress, however, has enacted a provision requiring that failure to file Form 990, Return of Organization Exempt from Income Tax, for three years results in automatic revocation of exemption.[5]

Given press reports of potential White House action, it is important to point out that section 7217 explicitly forbids "the President, the Vice President, any employee of the executive office of the President, and any employee of the executive office of the Vice President" from requesting

[3] For an overview of the many meanings of DEI, *see* Gene Takagi, *What's Up with DEI?*, NEO LAW GROUP BLOG, Mar. 25, 2025, https://nonprofitlawblog.com/whats-up-with-dei/ [https://perma.cc/N9VG-DHKC]. *See infra* notes 79–82 and accompanying text for discussion of President Trump's Executive Orders as to what he views as illegal DEI.

[4] Treasury Regulation section 601.201(*l*)(1) provides, "A ruling, except to the extent incorporated in a closing agreement, may be revoked or modified at any time in the wise administration of the taxing statutes." This language allows for revocation prior to the procedures discussed here. I was unable to find any instances applying this aspect of the regulation.

[5] *See* I.R.C. § 6033(j)(1).

"directly or indirectly, any officer or employee of the Internal Revenue Service to conduct or terminate an audit or other investigation of any particular taxpayer with respect to the tax liability of such taxpayer."[6] By cross-reference, the prohibition also applies to cabinet officials,[7] including the Secretary of the Treasury.[8]

The legislative history of the section 7217 provision makes clear that "[t]he prohibition applies to both direct requests and requests made through an intermediary."[9] Section 7217 requires that violations be reported to the Inspector General for Tax Administration.[10] Again, the legislative history of the provision clarifies: "The Chief Inspector has the authority to investigate such violations and to refer any violations to the Department of Justice for possible prosecution . . . ."[11] Willful violation of the prohibition on making such a request or the duty to report violations is criminal and results "upon conviction by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both."[12]

The legislative history of the provision explains the reasons for the addition of section 7217: "The Congress believed that the perception that it is possible that high-level Executive Branch influence over taxpayer audits and collection activity could occur has a negative influence on taxpayers' views of the tax system. Accordingly, the Congress believed that it is appropriate to prohibit such influence."[13] The FY2024 Further Consolidated Appropriations Act underscored the message of section 7217 specifically as to determinations under section 501(c). It provided that no appropriated funds "may be used by the Executive Office of the President to request . . . a determination with respect to the treatment of an organization as described in section 501(c)(3) of the Internal Revenue Code and exempt from taxation under section 501(a)

[6] I.R.C. § 7217(a), (e). As a type of legal entity, exempt organizations are treated as U.S. taxpayers and thus the provision applies to them. *See* Harvey P. Dale, *Tax Accounting for Foreign Persons*, 37 TAX L. REV. 275, 277 & n.11 (1982).

[7] *See* I.R.C. § 7217(e)(2), cross-referencing 5 U.S.C. § 5312. This subsection of section 7217 includes an exception for the Attorney General.

[8] 5 U.S.C. § 5312.

[9] STAFF OF THE JOINT COMM. ON TAX'N, 105TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN 1998 44 (1998).

[10] I.R.C. § 7217(b).

[11] STAFF OF THE JOINT COMM. ON TAX'N, *supra* note 9.

[12] I.R.C. § 7217(d).

[13] STAFF OF THE JOINT COMM. ON TAX'N, *supra* note 9. Release in May of 1993 and November of 1996 of additional recordings of President Richard Nixon related to his abuse of government power may have prompted Congress's decision to enact this legislation. *See* White House Tapes, Archival and Processing History, RICHARD NIXON PRESIDENTIAL LIBR. & MUSEUM, https://www.nixonlibrary.gov/white-house-tapes [https://perma.cc/AG6D-86BV].

of such Code from the Department of the Treasury or the Internal Revenue Service."[14]

Section 7217, however, is not self-operating. Private persons cannot invoke it. Its operation depends on government officials valuing ethical obligations under the law above personal loyalty.[15] While *Trump v. United States*,[16] the Supreme Court's decision granting the President broad immunity for conduct in the performance of official duties, may prevent the application of section 7217 against the President,[17] that case does not otherwise limit its application to others in the Executive Branch. Section 7217, however, does not halt or reverse any audit begun in violation of its terms. Audits examining violations of section 501(c)(3) requirements could be well advanced or exemption revoked while the required procedures for enforcing section 7217 take place.

Revocation of exemption culminates in the issuance of a final IRS determination letter revoking the entity's current determination letter, issued pursuant to section 508(a), stating that the entity was exempt under section 501(c)(3).[18] Section 508(a) requires that an organization seeking section 501(c)(3) status give notice that it is seeking recognition of such status.[19] It does so by filing Form 1023.[20] If review by EO Rulings and Agreements at the IRS concludes that the organization has met the organizational and operational requirements of section 501(c)(3), it will issue a determination letter to that effect. Review by the IRS after receipt of the application and prior to issuance of a determination letter can involve one or more requests to the applicant's representatives for additional information.[21] The most

[14] Further Consolidated Appropriations Act, s. 610(2), Pub. L. No. 118-47, 138 Stat. 567 (2024).

[15] *See* Dep't of Homeland Sec. v. D.V.D., 145 S. Ct. 2153 (2025) (Sotomayor, J., dissenting); D.V.D. v. Dep't of Homeland Sec., 778 F.Supp.3d 355 (D.D.C. 2025).

[16] Trump v. United States, 603 U.S. 593 (2024).

[17] *See* Bruce Brumberg, *Could Trump Force the IRS to Audit your Tax Return?*, FORBES (Feb. 21, 2025), https://www.forbes.com/sites/brucebrumberg/2025/ 02/04/can-president-trump-force-the-irs-to-audit-your-tax-return/ [https:// perma.cc/3GLU-5EBY].

[18] *See* Rev. Proc. 2026-5, 2026-1 I.R.B. 258, 289 (stating that a determination letter may be revoked or modified "by a notice to the taxpayer to whom the determination letter was issued"); *see also* EO Determination Letters Updated, Rev. Proc. 2025-5; 2025-1 I.R.B. 260.

[19] Not every section 501(c) organization is required to file for exemption, although they may choose to do so. Section 501(c)(4) organizations, for example, must file a notice of intent to operate as such, but that notice is not an application for recognition of exemption. *See* I.R.C. § 506.

[20] FORM 1023, APPLICATION FOR RECOGNITION OF EXEMPTION UNDER SECTION 501(C)(3) OF THE INTERNAL REVENUE CODE, https://www.irs.gov/pub/irs-access/f1023_accessible.pdf [https://perma.cc/6RCQ-A85Z]. Certain smaller entities, those with gross assets anticipated to be at or below $50,000, can submit the much shorter Form 1023-EZ. *See Instructions for Form 1023-EZ*, IRS (Rev. Jan. 2025), https://www.irs.gov/pub/irs-pdf/i1023ez.pdf [https://perma.cc/BE6B-JAZG].

[21] *See* Rev. Proc. 2026-5, *supra* note 18, at § 6.07(3).

recent determination letter would serve as the one reviewed in connection with any possible revocation.

Revocation involves an examination, also known as an audit, under the authority of section 7602.[22] Section 7601, among others, specifies procedures for such examinations.[23] Section 7601 gives the IRS authority to examine books and records and to call persons to determine "the correctness of any return."[24] In the case of a section 501(c)(3) organization, the return examined to start the process of revocation would be Form 990, Return of Organization Exempt from Income Tax.[25] The IRS could also initiate an examination under targeted compliance strategies for issues that it has concluded are sector-wide.[26] Thus, it is possible that the IRS would decide to undertake examinations of environmental organizations or organizations pursuing DEI.

To begin such an examination, the IRS would notify the organization that it has been selected for review, and an agent would contact the organization to schedule an appointment to explain the scope of review.[27] A confirmation letter including a request for records and documents necessary to conduct the examination would follow.[28] Any examination would allow representatives of

[22] The next paragraphs offer an overview of the audit process and applicable authorities. Any entity facing an audit should, of course, engage counsel experienced in audits of section 501(c)(3) organizations.

[23] *See also* I.R.C. §§ 7521 (procedures regarding taxpayer interviews), 7605 (time and place of interview).

[24] I.R.C. § 7602(a).

[25] FORM 990, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX, https://www.irs.gov/pub/irs-pdf/f990.pdf [https://perma.cc/4T2C-Q5XU].

[26] *See* Neo Law Group Blog, *Understanding the Risk of 501(c)(3) Revocation* (Nov. 5, 2025) (summarizing a panel titled "Challenging Revocations to Tax-Exempt Status, Court Procedure and Practice Committee at the 2025 Virtual Fall Meeting of the American Bar Association Section of Taxation), https://nonprofitlawblog.com/understanding-the-risk-of-501c3-revocation/#:~:text=Activities%20inconsistent%20with%20exempt%20purposes,purposes%20and%20applicable%20tax%20laws [https://perma.cc/R937-JHPD]. *See also* I.R.M. § 4.70.5.1.3 and § 4.70.5.1.4.

[27] *See* Neo Law Group Blog, *supra* note 26. Such an examination is likely to be a field audit, the most comprehensive type of examination, at the entity's taxpayer's place of business, rather than a more limited office/correspondence audit. *See* I.R.S., *Charity and Nonprofit Audits,* https://www.irs.gov/charities-non-profits/exempt-organizations-audit-process [https://perma.cc/B4MR-P85P]. *See also* I.R.S., *Exempt Organization Field Examination Flowchart*, https://www.irs.gov/pub/irs-tege/eo_field_examination_flow_chart.pdf [https://perma.cc/BA8H-FM5P], and I.R.M. § 4.70.12.7.1 and I.R.M. § 4.70.12.7.1.1.

[28] The IRS's request for documents is known as an IDR, for Information Document Request, which is requested on Form 4564, https://www.irs.gov/pub/irs-utl/form4564.pdf [https://perma.cc/7M3Z-2K3T]. The documents generally requested are considerable. They include organizational documents, tax returns, payroll records, board minutes, grant proposals, books and records of assets, liabilities, receipts and disbursement; auditor's report, if any; contracts with vendors, leases, insurance policies, to name just some. *See* I.R.S., *Charity and nonprofit audits:*

the entity to present its case and respond to the auditor's concerns. Such a give-and-take often involves a long series of exchanges between the auditor and representatives of the entity.[29] A field audit ends with a closing or exit conference, in which the agent will discuss the examination's findings.[30] If the organization disagrees with an agent's proposed changes, it may request a supervisory conference with the examiner's manager.[31] At the end of this process, the IRS will issue a no-change letter, negotiate a closing agreement, or propose revocation of exempt status.[32]

If the examination results in an adverse determination after such review and any follow-up, the organization will received what is known as a 30-day letter, because an organization has 30 days from the proposed revocation to respond by filing a written proteste and, if it chooses, also requesting a conference with the I.R.S. Office of Tax Appeals.[33] If the organization and the Office of Appeals cannot reach an agreement, the IRS will issue a final determination of exempt status.[34] An organization loses its exempt status upon receiving the final notice of revocation.[35]

Section 6103 requires that "return information" be kept confidential, unless otherwise authorized by statute.[36] "Return information" is defined

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Initial contract letter/document request, https://www.irs.gov/charities-non-profits/information-document-request-exempt-organizations-audit [https://perma.cc/6H62-EG8Y].

[29] *See* DOULAS M. MANCINO AND FRANCES R. HILL, TAXATION OF EXEMPT ORGANIZATIONS, ¶ 34.04 (Preparing for and Conducting the Audit) for useful advice on the audit procedure.

[30] *See* I.R.S., *Examination of Returns, Appeals Right and Claim for Refund* (Publication 556) (2013), at 4, https://www.irs.gov/pub/irs-pdf/p556.pdf [https://perma.cc/UE2E-DQ98]. *See also* I.R.M. § 4.70.14.

[31] *Id.*

[32] *See* Jeffery S. Tenenbaum, *Nonprofits Under Fire: How the IRS Can—and Cannot—Revoke Federal Tax-Exempt Status*, TENENBAUM L. GROUP PLLC, https://www.tenenbaumlegal.com/nonprofits-under-fire-how-the-irs-can-and-cannot-revoke-federal-tax-exempt-status/ [https://perma.cc/LP5E-GL8W].

[33] Rev. Proc. 2026-5, *supra* note 18, at § 9.02 and § 12.02. However, if a technical advice memorandum has addressed the basis for revocation, the I.R.S. Office of Independent Appeals lacks review authority. *See* Reg. § 301.7803-2(b)(15). The 30-day letter is Letter 525. *See* I.R.S., *Letters and notices offering an appeal opportunity,* https://www.irs.gov/appeals/letters-and-notices-offering-an-appeal-opportunity [https://perma.cc/KR3A-759N]. *See also* I.R.M. § 8.7.8.

[34] An Appeals Case Memo explains the basis for Appeal's final determination. At the urging of the Taxpayer Advocate, the Office of Appeals recently issued internal guidance that that an Appeals Case Memo should be shared with the taxpayer in response to an informal request. *See* National Taxpayer Advocate, *IRS Appeals Moves Toward Greater Transparency by Sharing Appeals Case Memorandum with Taxpayers*, NTA BLOG (Aug. 12, 2025), https://www.taxpayeradvocate.irs.gov/news/nta-blog/irs-appeals-moves-toward-greater-transparency-by-sharing/2025/08/ [https://perma.cc/9BSL-G6TP]. *See also* I.R.M. § 8.1.1.6.4(2).

[35] Rev. Proc. 2026-5, *supra* note 18, at 285.

[36] I.R.C. § 6103(a).

broadly, extending to an examination or audit.[37] If such information is knowingly or negligently disclosed, the wrongdoer is subject to fines and even imprisonment.[38]

The notice of final adverse determination is known as a 90-day letter because the organization that has exhausted its administrative remedies has 90 days to file a declaratory judgement action.[39] Within that time period, under section 7428, a revoked organization can seek a declaratory judgment under section 7428 from the United States Tax Court, the United States Court of Federal Claims, or the United States District Court for the District of Columbia regarding its status.[40] The organization can appeal any adverse declaratory judgment,[41] all the way to the Supreme Court if it chooses.[42]

This declaratory judgment provision is a special grant of jurisdiction; its declaratory relief is neither a deficiency action in the Tax Court nor a refund action in the District Court or Court of Federal Claims. An organization that has received a final adverse determination is no longer tax-exempt while it seeks declaratory relief.[43] However, small donations from individuals will continue to be deductible during this period, but donations of amounts greater than $1,000 will not.[44]

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[37] *See* I.R.C. §§ 6103(b)(4), (b)(7), (b)(8) and (h)(4). *See also* Landmark Legal Found. v. Commissioner, 267 F.3d 1132, 1135 (D.C. Cir. 2001).

[38] *See* I.R.C. § 7213A. Under section 7431, wronged entities have a civil cause of action starting at $1,000 per each unauthorized disclosure or inspection.

[39] *See* I.R.S., *Understanding Your CP3219N notice,* https://www.irs.gov/individuals/understanding-your-cp3219n-notice [https://perma.cc/FY99-NB9M].

[40] *See* I.R.C. § 7428(b)(2). Under section 7428, a court reviews the record *de novo*. *See* Freedom Path, Inc. v. IRS, 805 F. Supp. 3d 329, 343 (D.D.C. 2025). When challenging revocation under section 7428, the exempt taxpayer has the burden of proof in demonstrating that it qualifies for tax-exempt status and that the IRS determination is in error. *See* Partner in Charity, Inc. v. Commissioner, 141 T.C. 151, 162 (2012); *see also* Tax Court Rule 142(a), https://ustaxcourt.gov/files/documents/rule-142.pdf [https://perma.cc/B6AF-6M9C].

[41] I.R.C. § 7428(b)(2).

[42] For a further account of the revocation process, *see* Celia Roady, *Declaratory Judgments for 501(c)(3) Status Determinations: End of a "Harsh Regime,"* 30 TAX LAW. 765 (1977).

[43] Revocation of exempt status can be retroactive if "there has been a change in the applicable law" or "the organization omitted or misstated material information," including "an incorrect representation or attestation as to the organization's organizational documents, the organization's exempt purpose, the organization's conduct of prohibited and restricted activities," or "the organization operated in a manner materially different from that originally represented in an application for recognition of exemption." Reg. § 601.201(a)(1), (5); Rev. Proc. 2026-5, *supra* note 18, §12.03.

[44] I.R.C. § 7428(c)(2)(A). For these purposes, husband and wife will be treated as one contributor. I.R.C. § 7428(c)(2)(A). In addition, section 7428(c)(2)(B) has the effect of allowing private foundations and sponsors of donor advised funds to continue to make grants to an organization seeking declaratory judgment that prior to revocation was a public charity rather than a private foundation. The provision ensures that grantors will not have to engage in detailed oversight of such grants. It operates by cross-referencing to provisions of section 170 that figure in

In addition to the declaratory judgment option, a 2015 D.C. Circuit decision indicates that, if an organization has evidence that the IRS is considering revocation of its exempt status on First Amendment (and perhaps other Constitutional) grounds, it need not wait for a final adverse determination to seek judicial review. In *Z Street v. Koskinen*,[45] the organization alleged, based on a conversation between its lawyers and an IRS agent, that the IRS was applying more rigorous scrutiny to organizations with policies that contradicted those of President Obama regarding Israel.[46] Before its rights would otherwise be ripe for judicial review under section 7428, Z Street sued the IRS Commissioner, alleging "blatant viewpoint discrimination in violation of the First Amendment."[47]

Rejecting the IRS's argument and affirming the District Court, the D.C. Circuit found that the Anti-Injunction Act did not bar suit because Z Street had no other opportunity for review of the alleged violation. The Circuit Court quoted the opinion of the District Court: that "Z Street's First Amendment claim . . . cannot properly be characterized as a lawsuit implicating the 'assessment or collection' of taxes" because the organization "seeks only to have a 'constitutionally valid process' used when its application for [s]ection 501(c)(3) status is evaluated—nothing more and nothing less."[48] The D.C. Circuit also explained that the case involved the constitutionality of the very process being used to determine the entity's exempt status, not the determination itself. The D.C. Circuit affirmed the District Court's rejection of the government's motion to dismiss.[49]

The parties settled the litigation on February 1, 2018, when then District Court Judge Ketanji Brown Jackson approved the parties' joint motion for approval of the proposed Consent Order. The stipulated facts included the following:[50]

> The IRS acknowledges that criteria for selecting tax-exempt applications and/or tax-exempt entities for IRS review should focus on the activities of the organizations and whether they fulfill the requirements of the law, and not on the applicants' political viewpoints. . . . The Court hereby declares that it is wrong to apply the United States tax laws, including any and all tax rules, regulations, policies, procedures, and standards of review, to any tax-exempt applicant based solely on any lawful positions it espouses on any

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the provisions of section 509(a) defining the category of "private foundation" by distinguishing private foundations from other categories of section 501(c)(3) entities.

[45] Z Street v. Koskinen, 791 F.3d 24 (D.C. Cir. 2015).

[46] *Id.* at 26.

[47] *Id.* at 27.

[48] *Id.* at 28 (quoting *Z Street*, 44 F. Supp. 3d at 59, 67 (citations omitted)).

[49] *Id.* at 32.

[50] *Z Street, Government Reach Settlement in Exempt Status Suit*, 2018 TAX NOTES TODAY 3-62 (Mar. 1, 2018).

issues or its associations or perceived associations with a particular political movement, position, or viewpoint.

Much of the administration's expressed displeasure with exempt organizations perceived as liberal implicates First Amendment freedom of speech.[51] The Circuit Court opinion in and the ultimate resolution of *Z Street* provide important guidance for organizations facing revocation of their exempt status by the IRS on such grounds.

III. Violation of Fundamental Public Policy

One likely challenge to exemption, particularly for colleges and universities, would assert violation of the fundamental public policy doctrine announced in *Bob Jones University v. United States* (*Bob Jones*).[52] The Department of Treasury included in its 2025-2026 Priority Guidance Plan "guidance on the application of the fundamental public policy against racial discrimination, including consideration of recent caselaw, in determining the eligibility of private schools for recognition of tax-exempt status under §501(c)(3)."[53]

The Supreme Court in *Bob Jones* relied on fundamental public policy to deny exemption to two private religious schools with official policies that discriminated on the basis of race. Bob Jones University forbade interracial dating. Goldsboro Christian School "maintained a racially discriminatory admissions policy based on its interpretation of the Bible."[54] In *Bob* Jones, the Court reviewed a 1971 revenue ruling. There the IRS determined that racially segregated private schools are not exempt under section 501(c)(3).[55] Basing its decision on the "national policy to discourage racial discrimination in education," the IRS had ruled that "a [private] school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in sections 170 and 501(c)(3) of the Code."[56] After a complex procedural history that I will not reiterate here,[57] the case was argued

[51] *See, e.g.*, Rebecca Beitsch & Brett Samuels, *White House Threats Against Liberal Groups Test Free Speech Protections*, THE HILL (Sept. 19, 2025), https://thehill.com/homenews/administration/5511329-trump-targets-left-leaning-groups/ [https://perma.cc/73MB-AU8Z].

[52] Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

[53] Department of the Treasury, 2025-2026 Priority Guidance Plan (Sept. 30, 2025), https://www.irs.gov/pub/irs-counsel/2025-2026-initial-pgp.pdf?utm_source=substack&utm_medium=email [https://perma.cc/D6XG-3H5E].

[54] *Id.* at 583.

[55] *Id.* at 579 (citing Rev. Rul. 71-447, 1971-2 C.B. 230).

[56] *Id.* (quoting Rev. Rul. 71-447, 1971-2 C.B. 230).

[57] *See* Olati Johnson, *The Story of Bob Jones University v. United States: Race, Religion, and Congress' Extraordinary Acquiescence,* in WILLAM N. ESKRIDGE JR., STATUTORY INTERPRETATION STORIES Ch. 5 (Philip P. Frickey & Elizabeth Garrett, eds., 2011).

before the Supreme Court in October 1982. In its 1983 decision, the Supreme Court confirmed the loss of exemption, but on a different ground. It held that racial discrimination in education violated a "most fundamental public policy" and that, as a result, the schools were not eligible for tax-exempt status under section 501(c)(3).[58]

In reaching its decision, the majority wrote that, since the 1954 Supreme Court decision of *Brown v. Board of Education*,[59] "every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education."[60] The opinion also cautioned that "a declaration that a given institution is not 'charitable' should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy."[61] Nonetheless, the *Bob Jones* opinion left the criteria as to what constitutes a fundamental public policy uncertain.[62]

The priority guidance plan suggests that the administration will interpret fundamental public policy based on the Supreme Court's 2023 decision, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (*SFFA*).[63] The American Alliance for Equal Rights (AAER) did so on April 1, 2025 when it filed a complaint with the IRS against the Gates Foundation for its minority scholarship program, against Creative Capital for a program supporting minority artists, and against the Lagrant Foundations for a program supporting minorities in the field of advertising, marketing, and public relations.[64] The complaints asserted that these programs violated

[58] Johnson, *supra* note 57, at 593. For the most part, although not exclusively, the IRS has applied the fundamental public policy doctrine only to racial discrimination in private schools. *See* Alex Zhang, *Antidiscrimination and Tax Exemption*, 107 CORNELL L. REV. 1381 (2022).

[59] Brown v. Board of Education, 347 U.S. 483 (1954).

[60] *Bob Jones*, 461 U.S. at 593.

[61] *Id.* at 598. In a piece published on March 24, 2025, James Taranto urged the administration rely on *SFFA* to declare university DEI programs are illegal rather than, as the priority guidance plan suggest, in violation of the fundamental public policy doctrine, which he describes as "a messy bit of jurisprudence." *See* James Taranto, *From Bob Jones to Columbia University and DEI,* WALL ST. J. (March 24, 2025), https://www.wsj.com/opinion/from-bob-jones-to-columbia-university-trump-can-use-irs-to-solidify-his-civil-rights-record-eccdd0d8?mod=e2li [https://perma.cc/X7TK-6UDN].

[62] *See, e.g.*, David A. Brennen, *The Power of the Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society*, 33 U.C. DAVIS L. REV. 389 (2000).

[63] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023). As with AAER, Edward Blum is president of SFFA. *See* About, STUDENTS FOR FAIR ADMISSIONS, https://studentsforfairadmissions.org/about/ [https://perma.cc/4U78-78RD].

[64] *See* Press Release, AAER, American Alliance for Equal Rights Files Request to IRS to Examine Racial Practices at Three Tax-Exempt Foundations: Gates Foundation, Lagrant Foundation and Creative Capital Foundation (Apr. 1, 2025), https://americanallianceforequalrights.org/american-alliance-for-equal-rights-files-request-

fundamental public policy doctrine. Although the complaint targets these three organizations,[65] its analysis provides a useful framework for evaluating any alleged violation of the fundamental public policy doctrine.

AAER based its arguments on recent developments in both the Supreme Court and the Executive Branch. In particular, it referenced the Supreme Court's 2023 decision, *SFFA.*[66] *SFFA* adjusted judicial understanding of permitted affirmative action in college admissions. Justice Powell's 1978 majority opinion in *Regents of the University of California v. Bakke* had identified the benefits of a diverse student body as a constitutionally permitted goal.[67] As the Court recognized in *SFFA*, this concurring opinion came to "serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies."[68] Both *Grutter v. Bollinger*[69] in 2003 and *Fisher v. University of Texas*[70] in 2013 found that the use of race as a factor in university admissions satisfied strict scrutiny and were thus constitutional. In both cases, such use did not violate the Equal Protection Clause because the use was narrowly tailored and served a compelling governmental interest. *SFFA* nonetheless struck down similarly structured programs at Harvard University and the University of North Carolina.

Citing *Grutter*,[71] *SFFA* announced what, in my view and those of others, amounts to a new standard for affirmative action in university admissions. As

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to-irs-to-examine-racial-practices-at-three-tax-exempt-foundations-gates-foundation-lagrant-foundation-and-creative-capital-foundation/ [https://perma.cc/DH4B-SA3M].

[65] Such a complaint is no more than a request for the IRS to investigate. The IRS is under no obligation to do so. As reported by Neo Law Group Blog, *supra* note 26, the IRS in 2024 closed 1,955 examinations of which 202 were targeted examination, 566 were data driven (often flagged from Form 990 data, and 1,212 the result of referrals., claims, or other casework. On April 11, 2025, 10 days after the filing of the complaint, the Gates Foundation announced expansion of its scholarships "to all Pell Grant-eligible students" and thus beyond members of racial minorities. Press Release, Gates Found., Gates Foundation Statement on Scholarship Program (Apr. 11, 2025), https://www.gatesfoundation.org/ideas/media-center/press-releases/2025/04/scholarship-program [https://perma.cc/HTD9-LTR2]. The statement explained that the scholarship program had been under reconsideration since September 2024, which, of course, is shortly before President Trump's election. *See* Alex Daniels, *Faced with Anti-DEI Complaint, Gates Foundation Opens Scholarship to White Students*, Chronicle of Philanthropy (Apr. 14, 2025), https://www.philanthropy.com/article/gates-foundation-alters-scholarship-programs-meant-for-black-brown-and-indigenous-students. The article speculates that "the foundation could be using income as a loose proxy for race. More than half of Black and Native American students receive Pell grants, while less than one-third of white students are awarded a grant." *Id.*

[66] *SFFA*, 600 U.S. 181 (2023).

[67] *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-14 (1978).

[68] *SFFA*, 600 U.S. at 208 (quoting Grutter v. Bollinger, 539 U.S. 306, 323 (2003)).

[69] Grutter v. Bollinger, 539 U.S. 306 (2003).

[70] Fisher v. University of Texas at Austin, 570 U.S. 297 (2013).

[71] In his *SFFA* concurrence, however, Justice Thomas wrote that the Court's opinion "makes clear that *Grutter* is, for all intents and purposes, overruled." *SFFA*, 600 U.S. at 287 (Thomas, J., concurring). Justice Sotomayor in dissent stated that the Court's decision "is designed to render

Bryn Hines has written, the case "functionally overturned decades of precedent permitting schools to consider race in college admissions."[72] *SFFA* held that the race-conscious admission programs of Harvard University and the University of North Carolina violated the Due Process Clause and Title VI of the Civil Rights Act of 1964. The Court concluded that these schools' use of race , unlike that in *Grutter* and *Fisher*, failed to satisfy strict scrutiny review. It found that these programs were "imprecise" and "overbroad," that they used race as a negative, that they reinforced racial stereotypes, and, perhaps most importantly, they "lack[ed] a 'logical end point.'"[73] The decision, however, permitted universities to assess an applicant's discussion of "how race affected his or her life, be it through discrimination, inspiration, or otherwise" on an individualized basis.[74]

This requirement of individualized consideration revised the long-held understanding of affirmative action in college admissions. Those on the right read the case more broadly. A set of FAQs from Stanford Law School's Center for Racial Justice explains, "*SFFA* applies solely to affirmative action in college admissions and does not directly impact DEI programs and initiatives. . . . However, the *SFFA* decision has emboldened various groups and individuals to bring claims challenging the legality of DEI programs and initiatives across various sectors, including those in public corporations, private businesses, foundations, and other nonprofits."[75] Such is exactly what AAER did in its complaint.[76]

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strict scrutiny 'fatal in fact.'" *Id.* at 367 (Sotomayor, J., dissenting) (quoting *Grutter*, 539 U.S. at 326).

[72] Bryn Hines, *Will Students for Fair Admissions End Affirmative Action?*, THE REGUL. REV. (Feb. 22, 2024), https://www.theregreview.org/2024/02/22/hines-will-students-for-fair-admissions-end-affirmative-action/#:~:text=The%20decision's%20critics%20assert%20that,of%20race-conscious%20admissions%20programs [https://perma.cc/ZU2J-PYZP]; *see also* David A. Brennen, *The Chilling Effect of SFFA v. UNC/Harvard on Race-Based Affirmation by Tax-Exempt Charities*, 29 FLA. TAX REV. 226 (2025); Wendy B. Scott, *The Unfinished Business of Desegregation: Race Conscious College Admissions*, 32 WM. & MARY BILL RTS. J. 321 (2023); Jim Jump, *Ethical College Admissions: A Very Disappointing Decision*, INSIDE HIGHER ED (July 17, 2023), https://www.insidehighered.com/opinion/views/2023/07/17/critique-supreme-court-ruling-affirmative-action-opinion [https://perma.cc/HTF9-NYLQ].

[73] *SFFA*, 600 U.S. at 216, 221 (quoting *Grutter*, 539 U.S. at 342).

[74] *Id.* at 230.

[75] *See* Stanford Center for Racial Justice, *Students for Fair Admissions FAQ*, STANFORD LAW SCHOOL (Dec. 12, 2023), at 5, https://law.stanford.edu/wp-content/uploads/2024/02/SFFA-v-Harvard-FAQ_SCRJ.pdf [https://perma.cc/J6HT-VN3T].

[76] I note that Harvard immediately took actions to comply with the decision in *SFFA*. *See Weighing the Future of Harvard Admissions*, THE HARVARD GAZETTE (Oct. 3, 2023), https://news.harvard.edu/gazette/story/2023/10/weighing-the-future-of-harvard-admissions/#:~:text=In%20late%20June%2C%20the%20Supreme,edited%20for%20clarity%20 and%20length [https://perma.cc/LQD5-6C8C].

Unlike AAER, I view a new interpretation limited to college admissions, even from the Supreme Court, as not meeting the standard of *Bob Jones* for establishing a longstanding and firm judicial policy as to discrimination generally. Others, however, will undoubtedly argue that *SFFA* did not announce new law but simply applied *Grutter* and *Fisher*. Moreover, *SFFA* includes broad statements such as this: "Eliminating racial discrimination means eliminating all of it. Accordingly, the Court has held that the Equal Protection Clause applies 'without regard to any differences of race, of color, or of nationality'" and is "'universal in [its] application.'"[77] Thus, this argument continues, a proper understanding of the case goes beyond its narrow holding and satisfies the *Bob Jones* requirement of longstanding judicial policy, forbidding racial discrimination in education, regardless of its form.

Bob Jones, however, requires more than reliance on a single and recent Supreme Court decision. The *Bob Jones* court looked to consistent Supreme Court decisions, legislation and executive orders since the 1954 decision in *Brown v. Board.* The AAER submission does not point to any recent legislation,[78] but it does point to Executive Orders issued by President Trump since his 2025 inauguration. It first cites Executive Order No. 14148, Initial Recissions of Harmful Executive Orders and Actions,[79] which rescinded preexisting executive orders that federal agencies had used to justify racial classifications under the guise of "equity." It next cites Executive Order No. 14151, Ending Radical and Wasteful Government DEI Programs and Preferencing,[80] which directed federal agencies to terminate "all discriminatory programs, including illegal DEI and 'diversity, equity, inclusion, and accessibility' (DEIA)" policies.[81] Finally the complaint cites Executive Order No. 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, which, in addition to the statements quoted

[77] *SFFA*, 600 U.S. at 206 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)). The Court also wrote in *SFFA* that "'a core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.'" *Id. at* 260 *(*quoting *Grutter*, 539 U.S. at 341-42).

[78] Legislation cited in *Bob Jones* includes Titles IV and VI of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and Title VIII of the Civil Rights Act of 1968. *See Bob Jones*, 461 U.S. at 595.

[79] *See* Exec. Order No. 14148, Initial Rescissions of Harmful Executive Orders and Actions, 90 Fed. Reg. 8,237 (Jan. 28, 2025).

[80] *See* Exec. Order No. 14151, Ending Radical and Wasteful Government DEI Programs and Preferencing, 90 Fed. Reg. 8,339 (Jan. 29, 2025). The Executive Order does not define DEI. *See also See* Alex Daniels, '*Strategic Ambiguity' of Trump DEI Orders Raises Big Questions About What's Legal*, CHRON. PHILANTHROPY (Apr. 4, 2025), https://www.philanthropy.com/article/strategic-ambiguity-of-trump-dei-orders-raises-big-questions-about-whats-legal [https://perma.cc/7W7W-ZZQE].

[81] AAER, *supra* note 64.

earlier, characterized "race- and sex-based preferences" as "dangerous, demeaning, and immoral" as well as violating "the civil-rights laws of this Nation."[82] The AAER submission concludes that, "Taken together, there can be no doubt that '[t]he Executive Branch has consistently placed its support behind eradication of racial discrimination' in all its forms."[83]

To me, such new and recent developments from the Executive Branch, even more clearly than the Supreme Court's new interpretation of affirmative action in college admissions in *SFFA*, fail the tests for establishing fundamental public policy. As the AAER submission itself acknowledges, President Trump's executive orders altered the policy of the preceding administration, which had been in effect until January 2025, just a few weeks earlier, as well as those of administrations that preceded his first term. Such recent changes in executive branch policy cannot suddenly create a fundamental public policy. If such were the case, exempt organizations would face constant whipsaw, gaining and losing qualification for exempt status as administrations and their policies change.

We might also see assertions that antisemitism, viewed in isolation and not simply as one aspect of discrimination, violates fundamental public policy. Not only has President Trump threatened revocation of Harvard's exemption on the grounds of antisemitism,[84] but the Department of Education's Office of Civil Rights also announced an investigation of 60 universities for antisemitic discrimination and harassment.[85] As Americans in the 21st century, we might well assume that the United States government has a longstanding record opposing domestic antisemitism. The record of the federal government in this regard, however, does not support this conclusion.

Until the last half dozen years, federal government action regarding antisemitism has focused on antisemitism outside of the United States, even, at times, supporting rather than opposing it. Embrace of domestic antisemitism, rather than its opposition, helped to fuelf the Immigration Act of 1924 and the Displaced Persons Act of 1948.[86] Title VII of the Civil Rights

[82] *See* Exec. Order No. 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, 90 Fed. Reg. 8633 (Jan. 21, 2025).

[83] AAER, *supra* note 64 (quoting *Bob Jones,* 461 U.S. at 594).

[84] *See supra* note 1 and accompanying text.

[85] *See* U.S. Department of Education*, Press Release, U.S. Department of Education's Office for Civil Rights Sends Letters to 60 Universities Under Investigation for Antisemitic Discrimination and Harassment* (Mar. 10, 2025), https://www.ed.gov/about/news/press-release/us-department-of-educations-office-civil-rights-sends-letters-60-universities-under-investigation-antisemitic-discrimination-and-harassment [https://perma.cc/LQ4Y-YWTK].

[86] One recent study explains that "while religion was never explicitly mentioned as a criterion in the Acts for restriction, it is therefore clear that the quotas and the motivations behind them were in part based on racial and religious intolerance." Jeff Chan, *Changing the pace of the melting pot: The effects of immigration restrictions on immigrant assimilation*, 52 J. OF COMP. ECON. 733, 737 (2024).

Act of 1964 does prohibit employment discrimination on the basis of "race, color, religion, sex, and national origin," and antisemitism in the workplace played a role in consideration of the legislation.[87] In the years following the Civil Rights Act, attention turned to antisemitism abroad. In 1980, Congress unanimously passed legislation to establish the United States Holocaust Memorial Museum, which, of course, emphasizes the Holocaust and other genocides abroad.[88] More than a decade after the opening of the Holocaust Memorial Museum, Congress passed the Global Anti-Semitism Review Act in 2004 in order to help combat a perceived increase in antisemitism abroad.[89]

More recently, executive action has turned attention to domestic antisemitism. In 2019, during his first term, President Trump issued an executive order, On Combating Antisemitism, which announced: "It shall be the policy of the executive branch to enforce Title VI against prohibited forms of discrimination rooted in anti-Semitism as vigorously as against all other forms of discrimination prohibited by Title VI."[90] In September of 2022, President Biden convened "the first-ever United We Stand Summit" in order "to bring communities from across the country together to combat hate in all its forms—including the persistent scourge of antisemitism—that has long

[87] 42 U.S.C. § 2000(e)-2(a)(1). Hearings on the bill in 1954 included references to antisemitism in the workplace and statements from a number of Jewish organizations, including the Jewish Community Council of Greater Washington, representing some three dozen Jewish organization, the Anti-Defamation Leage, and the Central Conference of American Rabbis. *See Hearing on S. 692, A Bill to Prohibit Discrimination in Employment Because of Race, Color, Religion, National Original, or Ancestry*, 83rd Cong, 2nd Sess., Subcommittee on Civil Rights, Committee on Labor and Public Welfare, U.S. Senate (1954). The Supreme Court in 1987 addressed the relationship of antisemitism to Title VI in *Shaare Tefilla v. Cobb*, 481 U.S. 615 (1987), discussed *infra* in Part IV.

[88] *See* United States Holocaust Memorial Museum, last accessed April 17, 2026, https://www.ushmm.org/information/exhibitions/museum-exhibitions [https://perma.cc/6FT4-GLQZ]. Its website also offers teaching material on antisemitism and racism. *See* United States Holocaust Memorial Museum, Teaching Material on Antisemitism and Racism, last accessed April 17, 2026, https://www.ushmm.org/teach/teaching-materials/antisemitism-racism [https://perma.cc/FXM2-A5X6].

[89] P.L. 108-332, 118 Stat. 1281. This legislation established the position of the Special Envoy to Monitor and Combat Antisemitism in the Department of State as well as requiring regular reports on antisemitism around the world. *Id.*

[90] Executive Order 13899, On Combating Anti-Semitism, 84 Fed. Reg. 68770 (Feb. 16, 2019). The application of this provision of Title VI to Harvard's situation is discussed *infra* notes 149–151 and accompanying text.

plagued our Nation."[91] In May of 2023, President Biden announced "The U.S. National Strategy To Counter Antisemitism."[92]

From the beginning of his second term, President Trump has issued executive orders regarding domestic antisemitism. On January 29, 2025, he issued an executive order titled "Additional Measures to Combat Anti-Semitism."[93] It called for heads of each executive office or agency, but particularly the Attorney General, the Secretary of Education, the Secretary of State, and the Secretary of Homeland Security, to inventory alleged antisemitic violations of civil rights as well as to make recommendations for institutions of higher education to familiarize themselves with impermissible activities by "alien students and staff."[94]

A variety of executive agencies have since taken actions in response to the President's call to address antisemitism.[95] The Justice Department announced in February 2025 the establishment of a task force to combat antisemitism, including representatives from the Department of Education and the Department of Health and Human Services, "to root out anti-Semitic harassment in schools and college campuses."[96]

Despite such recent actions, the history of federal government action regarding antisemitism does not in my view establish the existence of a fundamental public policy regarding domestic antisemitism under *Bob Jones*.

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[91] The White House, Introduction, The U.S. National Strategy to Counter Antisemitism (May 2023), https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/05/U.S.-National-Strategy-to-Counter-Antisemitism.pdf [https://perma.cc/F7LC-FMLL] [hereinafter U.S. National Strategy].

[92] U.S. National Strategy, *supra*, note 91.

[93] *Additional Measures to Combat Anti-Semitism*, The White House: Presidential Actions (Jan. 29, 2025). https://www.whitehouse.gov/presidential-actions/2025/ 01/additional-measures-to-combat-anti-semitism/ [https://perma.cc/2Y6K-X932] [hereinafter, *Additional Measures*].

[94] *Additional Measures*, *supra* note 93.

[95] These actions have largely relied on alleged violations of Title VI. Violation of Title VI as a basis for revocation is discussed *infra* notes 149-159 and accompanying text. Here I note that a finding of violation of Title VI is subject to a number of procedural requirements, including notice, hearing, and judicial review. *See* 42 U.S.C.§ 2000d-1 and §2000d-2. Title VI also mandates that any funding denial be limited to the particular program found to be in noncompliance. *See* 42 U.S.C. § 2000d-1. These executive actions have been criticized for failure to follow these procedural requirements. *See* Harvard Complaint for Declaratory and Injunctive Relief, Complaint for Declaratory and Injunctive Relief, https://www.harvard.edu/research-funding/wp-content/uploads/sites/16/2025/04/Harvard-Funding-Freeze-Order-Complaint.pdf [https://perma.cc/65JY-Q5JA]. *See also* Katherine Mangan and Jaspar Smith, *It's Punishment for the Sake of Punishment*, CHRON. OF HIGHER ED. (Apr. 28, 2025), https://www.chronicle.com/article/its-punishment-for-the-sake-of-punishment [https:// perma.cc/X8UZ-29NR]; Nikolas Bowie and Benjamin Eidelson, *Opinion: Harvard's moment of truth*, BOSTON GLOBE (Apr. 4, 2025).

[96] *See* Justice Department, Press Release, *Justice Department Announced Formation of Task Force to Combat Anti-Semitism* (Feb. 3, 2025), https://www.justice.gov/opa/pr/justice-department-announces-formation-task-force-combat-anti-semitism [https://perma.cc/C79B-AERS].

Federal government actions to counter domestic antisemitism have largely occurred only in the last half dozen years and have taken place almost exclusively in the executive branch. In short, although perhaps surprising, federal government action regarding domestic antisemitism does not satisfy the *Bob Jones* requirement for fundamental public policy of longstanding positions from all three branches of government. More likely, I think, would be characterizing exempt organizations, particularly universities, as demonstrating a substantial illegal purpose because of antisemitism.[97]

Before leaving the discussion of *Bob Jones,* I wish to emphasize that *Bob Jones* requires us to distinguish between "public policy" and "fundamental public policy." *Bob Jones* acknowledged that under the longstanding law of trusts, "the purpose of a charitable trust may not be illegal or violate established public policy."[98] The Court, however, based its decision on fundamental public policy, not ordinary public policy or the law of trusts. As Professor Johnny Rex Buckles has observed, "[T]he majority in *Bob Jones* carefully declined to decide whether Congress intended to incorporate into the Code any elements of the common law of trusts 'other than the requirements of public benefit and valid public purpose.'"[99] Indeed, because of the difficulty of balancing public policy with support for "unorthodox private behavior," Justice Powell, in his important *Bob Jones* concurrence, would have eliminated any determination of fundamental public policy except where expressly ratified by Congress:[100]

> I am unwilling to join any suggestion that the Internal Revenue Service is invested with authority to decide which public policies are sufficiently "fundamental" to require denial of tax exemptions. Its business is to administer laws designed to produce revenue for the Government, not to promote "public policy."

[97] The next part of this piece will consider how the IRS, relying on *Bob Jones*, has often linked substantial illegal activity and violation of public policy as a basis for revocation.

[98] *Bob Jones*, 461 U.S. at 591.

[99] Johnny Rex Buckles, *Reforming the Public Policy Doctrine,* 53 KAN. L. REV. 397, 437 (2004) (quoting *Bob Jones,* 461 U.S. at 588 n. 12). The *Bob Jones* opinion includes this puzzling footnote: "In view of our conclusion that racially discriminatory private schools violate fundamental public policy and cannot be deemed to confer a benefit on the public, we need not decide whether an organization providing a public benefit and otherwise meeting the requirements of section 501(c)(3) could nevertheless be denied tax-exempt status if certain of its activities violated a law or public policy." *Bob Jones,* 461 U.S. at 596, n. 21. This statement contradicts the very holding of the case, that denial of exemption requires violation of a fundamental public policy, not violation of an ordinary or even an established public policy.

[100] *Bob Jones*, 461 U.S. at 610-11 (Powell, J. concurring). Any newly issued Treasury guidance will need to grapple with these statements in *Bob Jones*.

Chief Justice Burger's opinion for the Court responded to this concern by stating that the Court's opinion should not be read as granting the IRS the authority to determine which public policies are "fundamental."[101]

Public policy includes all actions and decisions by governmental bodies to address societal issues. As *Bob Jones* teaches, fundamental public policy involves core values. A new presidential administration is free to establish new public policy. Nevertheless, new public policy does not create a fundamental public policy under *Bob Jones.*[102] Any assertion that violation of ordinary public policy can serve as the basis for revocation of exempt status misunderstands and misapplies *Bob Jones*.

IV. Substantial Illegal Purpose

The IRS has long asserted the authority to deny or revoke exemption under section 501(c)(3) organizations for organizations that evidence a substantial illegal purpose.[103] In her carefully researched history and critique of the illegality doctrine, Lauren Libby traces its origins to the Kennedy administration's effort to police right-wing groups[104] and finds its foundations as a tax doctrine in a series of General Counsel Memoranda issued primarily in the 1970's.[105] These efforts culminated in the publication

[101] *Bob Jones,* 461 U.S. at 598 n.23.

[102] This paragraph repeats language from a letter to the editor I wrote with three colleagues. *See* Ellen P. Aprill, Brian Galle, Philip Hackney & Lloyd Hitoshi Mayer, *Harvard Does Have Options if It Loses Tax-Exempt Status*, 187 TAX NOTES FED. (TA) 1519, 1520 (May 26, 2025).

[103] Milan N. Ball, *The Illegality Doctrine and 501(c)(3) Organizations*, CONG. RSCH. SRV. (Aug. 14, 2024) https://www.congress.gov/crs-product/IF12739 [https://perma.cc/FB5Q-7NMD]. This Part draws on *Comments from Professors of Taxation and Nonprofit Law*, Comment on Department of Education Proposed Regulations, FR Doc. No. 2025-15665 (June 2025), https://www.regulations. gov/comment/ED-2025-OPE-0016-8696 [https://perma.cc/C9RK-GN88].

[104] Lauren Libby, *Tax-Exemption and the Shadow of the Law*, 112 IOWA L. REV. (forthcoming 2026), (manuscript at 26-31), https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=5824182 [https://perma.cc/PQ72-NSYF]. She further observes that "neither § 501(c)(3) nor any other law directly prohibited the conduct at issue—racial discrimination in private schools." *Id.* at 50. *See also* Richard Schmalbeck, *Bob Jones and the Public Policy Doctrine, 40 Years Later,* at 29 (final version of a paper presented at the 2018 Major Conference of the NYU National Center on Philanthropy and Law) https://ncpl.law.nyu.edu/wp-content/uploads/2024/09/Schmalbeck-July-2024EOTRBib-FInal-.pdf [https:// perma.cc/LV3C-KJWK] (observing that Bob Jones policies against inter-racial dating and marriage were not illegal during the years at issue). As of the date of *Bob Jones*, 16 states had statutes making interracial relationships illegal under civil law. *Id.* The Supreme Court held discrimination in private schools to be illegal in *Runyon v. McCrary*, 427 U.s. 160 (1976).

[105] Libby, *supra* note 104, at 34-35.

of Revenue Ruling 75-384,[106] a ruling that precedes *Bob Jones* by almost decade.

As the only published ruling on this doctrine, Revenue Ruling 75-384 is often cited to explain the substantial illegal purpose doctrine. In it, a group specifically identified as an antiwar protest organization "formed to promote world peace and disarmament by nonviolent direct action"—proper exempt purposes—had as its primary activity antiwar demonstrations "in which demonstrators are urged to commit violations of local ordinances and breaches of public order."[107] The ruling concludes that the organization did not qualify for exemption under section 501(c)(3) because "[i]ts activities demonstrate an illegal purpose which is inconsistent with charitable ends."[108]

The ruling relies on the behavior being "criminal," emphasizing the intentional nature and frequency of the disruptive acts. The ruling, however, describes the activities as no more than "violations of local ordinances and breaches of public order." It does not trouble to indicate whether these violations constitute only misdemeanors or rise to the level of felonies. It does not assert that the organization's members had, in fact, been arrested or convicted of the asserted violations. It states that "demonstrators are urged to commit acts of civil disobedience," using the passive voice that so conveniently obscures the actor. Who urged the demonstrators? Officers of the organization verbally? Official statements from the entity? Nowhere does the ruling mention, much less attempt to balance, the alleged criminal activities against nonviolent activities the group undertook in nonviolent ways to pursue world peace and disarmament in order to clarify the meaning of "substantial." All of these questions beg for answers.

Revenue Ruling 75-384 rests its conclusion on the grounds that the organization's pervasive criminal activities rise to the level of substantial illegal purpose.[109] A 1994 Continuing Professional Education (CPE) text sets forth

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[106] Rev. Rul. 75-384, 1975-2 C.B. 204. Other authorities could deny or revoke exemption for substantial illegal purpose or activities but based on somewhat different reasoning. Applicable regulations specify that a section 501(c)(3) organization cannot have more than an insubstantial part of its activities that is not in furtherance of an exempt purpose. Treas. Reg. § 1.501(c)(3)-1(c)(1). In addition, the Supreme Court announced in *Better Business Bureau of Washington, D.C., Inc. v. United States*, 326 U.S. 279, 283 (1945), that "the presence of a single non-educational purpose, if substantial in nature, will destroy the exemption."

[107] Rev. Rul. 75-384.

[108] Rev. Rul. 75-384. The ruling also denies the organization section 501(c)(4) status, stating: "Illegal activities, which violate the minimum standards of acceptable conduct necessary to the common good and the general welfare of the people in a community" fail to promote social welfare as required by section 501(c)(4). *Id.* The IRS here appropriates for itself the role as arbiter of the standards of acceptable conduct for society.

[109] *See* G.C.M. 37111 (May 4, 1977) (recommending an additional requirement that an activity should be judicially determined to be illegal before revocation of exemption on the basis of illegal activity).

the relationship between exempt purpose and illegal activities: If an organization's purposes are legal, "the substantiality of the illegal activities will determine whether the exempt status is jeopardized. An organization will not qualify for exempt status if it engages in substantial illegal activity."[110] Moreover, "substantiality must be considered *quantitatively* as well as *qualitatively*. The quantitative test focuses on the time and attention the organization gives to the illegal activity. . . .The qualitative test focuses on the seriousness of the illegality involved."[111] This CPE text emphasizes criminal activities. For example, discussing several instances of fraud, it stated the seemingly obvious, that "the government has an interest in not subsidizing criminal activity," and pointed to robbing banks and planned violence as examples.[112] The text, however, also includes discussion of civil illegality, such as antitrust violations and the False Claims Act as bases for applying the illegality doctrine.[113] A General Counsel Memorandum from 1971, to which the CPE cites several times, differentiates civil and criminal activity as to the quantity required to trigger the doctrine: "A great many violations of local pollutions regulations relating to a sizable percentage of an organizations would be required to disqualify it from 501(c)(3) exemption," but "if only .01% of its activities were directed to robbing banks, it would not be exempt."[114]

Relatively few judicial decisions deny or revoke exemptions based on the grounds of substantial illegal purpose. The cases revoking exemption on this basis generally involve criminal activity. For example, the Tax Court in *Church of Scientology of California v. Commissioner* concluded that the organization's pervasive illegal activities, reflected in several felony convictions, constituted an illegal purpose.[115] *Mysteryboy Inc. v. Commissioner* appeared to have assumed that the organization's activities included sexual

[110] Jean Wright & Jay Rotz, *Illegality and Public Policy Considerations*, Exempt Organizations Continuing Professional Education Technical Instruction Program 5, I.R.S. (1994), https://www.irs.gov/pub/irs-tege/eotopicl94.pdf [https://perma.cc/ W43L-U3G2].

[111] Wright & Rotz, *supra* note 87 (emphasis in original).

[112] Wright & Rotz, *supra* note 87, at 3.

[113] *Id.*

[114] G.C.M. 34631 (Oct. 4, 1971).

[115] *See* Church of Scientology of Cal. v. Commissioner, 83 T.C. 381 (1984). The Ninth Circuit upheld revocation of exemption, but on different grounds, namely inurement (excessive benefit to insiders). *See* Church of Scientology of Cal. v. Commissioner, 823 F.2d 1310 (9th Cir. 1987). The Church of Scientology has since regained tax-exempt status in a settlement with the IRS. *See* Rev. Rul. 93-73, 1993-2 C.B. 75.

exploitation of minors.[116] *Green v. Connally* considered hypotheticals involving schools for thieves or terrorists.[117]

Revocations or denials of exemption for substantial illegal purpose, however, do not always specify whether the illegality is criminal or civil. In a recent case, *Iowaska Church of Healing v. U.S.*,[118] the church was denied exemption on the grounds of substantial illegal purpose because its religious practice involved consumption of a tea containing the hallucinogenic drug dimethyltryptamine (DMT). The D.C. Circuit Court opinion explains, DMT "is a drug that is regulated by the federal government under the Controlled Substances Act."[119] The opinion also notes that exceptions are available for religious use, but the church had not received such an exception.[120]

The Circuit Court opinion, like the opinion below, holds that the use of DMT is illegal based on its regulation by the federal government.[121] Nowhere, however, did the Court of Appeals, the District Court, or the IRS specifically identify the church's intended use as criminally illegal.[122] In fact, possession of DMT carries penalties that range from one year in prison for the first offense to a minimum fine of $5,000 and up to three years in prison for a third or subsequent conviction.[123] The IRS, the District Court, and the Court of Appeals may have assumed the criminality of the drug's use. I believe that these authorities are all best understood as basing their decisions on criminal illegal activity, but the failure to so state leaves them open to a

[116] Mysteryboy Inc. v. Commissioner, 99 T.C.M. (CCH) 1057, 2010 T.C.M. (RIA) ¶2010-13. The case is troubling. However repugnant is the sexual exploitation of minors, the opinion emphasized the past criminal conviction of its leader for the sexual exploitation of a minor under laws that the group stated it would work to change. As Libby writes, *supra* note 104, manuscript at 54, "Unlike earlier cases that focused on completed unlawful conduct, *Mysteryboy* treated the mere promotion or normalization of illegal activity as inherently nonexempt."

[117] Green v. Connally, 330 F. Supp. 1150, 1160 (D.D.C. 1971), *aff'd per curiam*, Coit v. Green, 404 U.S. 997 (1971).

[118] Iowaska Church of Healing v. United States, 105 F.4th 402 (D.C. Cir. 2024), *aff'g*, 2023 WL 2733774 (D.D.C. Mar. 31, 2023).

[119] *Id.* at 406.

[120] *Id.* at 407-09.

[121] *Id.* at 407.

[122] *See* P.L.R. 2021-38-010 (Sept. 24, 2021); *see also* James Stratton, *IRS Defends Denial of Des Moines Church's Tax-Free Status over Use of Psychedelic Drug*, KCCI DES MOINES (Jan. 7, 2022), https://www.kcci.com/article/irs-des-moines-churchs-tax-free-status-over-use-of-psychedelic-drug-ayahuasca/38687033 [https://perma.cc/3TZ5-HCKB].

[123] Rebecca Pirius, *Ayahuasca and DMT: Laws and Penalties for Possession*, CRIM. DEF. LAW. (Sept. 16, 2024), https://www.criminaldefenselawyer.com/resources/ayahuasca-and-dmt-laws-and-penalties-for-possession.html#:~:text=Is%20Ayahuasca%20Legal?-,Is%20DMT%20Legal?,goes%20up%20to%20three%20years [https://perma.cc/4GZT-PMCX] (citing 21 U.S.C. §§ 812, 844).

broader interpretation that the substantial illegality doctrine applies to civil illegality as well.

As was the case in *Iowaska Church of Healing*, a number of private letter rulings have denied or revoked the exemption because of activities that involved the use of drugs listed on the Controlled Substance Act, including cannabis.[124] These rulings apply the substantial illegal purpose doctrine without specifying that the illegal activity was criminal.

Like *Iowaska Church of Healing*, they assert as a basis for their decision that "an organization may be denied tax-exempt status if its purposes or activities are illegal or otherwise contrary to public policy," citing *Bob Jones*.[125] But that citation errs. As discussed earlier,[126] that statement in *Bob Jones* described longstanding trust law, not the requirement of fundamental public policy for denial of exemption that the case announced. As Libby explains, "The Court in *Bob Jones* invoked [fundamental] public policy "to distinguish that case from illegality, not to embrace the two," but that later courts have erroneously read the case as embracing illegality."[127] Similarly, a 1989 G.C.M. advised,[128] "In determining whether the [organization] *violates the law or* clear federal public policy we are guided by the Supreme Court in *Bob Jones*. . . . '[A] declaration that a given institution is not "charitable" should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy.'"

Neither the IRS nor the courts have been consistent in their application and understanding of the concept of substantial illegal purpose. As the recent congressional research document concluded, "The reach of the illegality doctrine is uncertain due to limited illegality doctrine jurisprudence and IRS materials delineating the types and level of illegal activities that could constitute grounds for denial of 501(c)(3) status."[129]

Recently finalized regulations from the Department of Education regarding the employer qualification for participation in the Public Service Loan Forgiveness (PSLF) program illustrate how easily the illegality doctrine can be expanded. The final regulations identify "the illegality doctrine utilized by the . . . IRS" as the "basis for the Department to promulgate" its proposed changes.[130] The Notice of Proposed Regulations for these

[124] *See, e.g.*, P.L.R. 2023-36-025 (Sept. 8, 2023), P.L.R. 2023-39-037 (Sept. 29, 2023).

[125] *Iowaska Church of Healing*, 105 F.4th at 407.

[126] *See supra* notes 74-101 and accompanying text.

[127] Libby, *supra* note 104, manuscript at 45.

[128] G.C.M. 39800 (Oct. 25, 1989) (emphasis added) (quoting *Bob Jones*, 461 U.S. at 592).

[129] Ball, *supra* note 103.

[130] U.S. Department of Education, Office of Postsecondary Education, Final Regulations, *William D. Ford Direct Loan (Direct Loan) Program*, 90 Fed. Reg. 40154, 40156 (Aug. 1848966, 48967 (Oct. 31, 2025).

regulations described the tax illegality doctrine as a "tested approach,"[131] a description that overstates of the uncertain status of the tax doctrine.

The final PSLF regulations describe their purpose as protecting taxpayers from granting subsidies to organizations "that undermine national security and American values through criminal activity."[132] Nonetheless, determination of criminal illegality under these regulations requires a finding by the Secretary by only a "preponderance of the evidence."[133] The PSLF regulations, moreover, define illegal activities broadly. They include aiding and abetting any violations of federal immigration laws;[134] supporting terrorism; engaging in the chemical and surgical castration or mutilation of children in violation of federal or state laws; engaging in the trafficking of children to states for the purpose of emancipation from their lawful parents in violation of federal or state law; and engaging in a pattern of aiding and abetting any illegal discrimination.[135]

The categories of aiding and abetting violations of immigration and discrimination laws raise particular concern. The Department of Education dismissed comments expressing concern that disqualification based on "aiding and abetting" would open the door to subjective interpretation. It responded, that the "term 'aiding and abetting' carries a settled legal meaning: intentional participation in unlawful activity" and "does not cover lawful support or incidental association."[136] The concept of illegal aiding and abetting, however, goes far beyond the tax understanding of substantial illegality. The IRS has never based a finding of substantial illegal purpose on aiding and abetting rather than directly engaging in illegal activity.[137] As the

[131] U.S. Department of Education, Office of Postsecondary Education, Notice of Proposed Rulemaking, *William D. Ford Direct Loan (Direct Loan) Program*, 90 Fed. Reg. 40154, 40156 (Aug. 18, 2025).

[132] Final Regulations, *supra* note 130, at 48966.

[133] *Id.*

[134] The Department of Education rejected comments calling for more specificity as to the meaning of "other Federal immigration laws." Final Regulations, *supra* note 130, at 48491-48982.

[135] Final Regulations, *supra* note 130, at 49001.The Department of Education rejected comments calling for a more precise definition of illegal discrimination than "any Federal discrimination law. *Id.* at 48981.

[136] Final Regulations, *supra* note 130, at 48980. The regulations promise that the Department of Education "will carefully examine the balance of the evidence to determine both whether certain unlawful activities occurred and whether there is 'objective criteria" [sic] that the organization sought to further these unlawful activities." *Id.* It will, however, make these crucial determinations based on the "preponderance of the evidence," not even by "clear and convincing evidence, much less "beyond a reasonable doubt."

[137] The author searched both the category for private letter rulings in both Westlaw and Lexis using the following search: "501(c)(3) and illegal purpose and aiding within 5 of abetting." Only one private letter ruling so much as mentioned aiding and abetting and did so only in connection with donors overstating the valuation of automobiles donated to the section 501(c)(3) organization. *See* P.L.R. 200243057 (October 25, 2002).

Professors of Taxation and Nonprofit Law commented on the Proposed Regulations, this concept of illegal aiding and abetting as an "invented" one, "unprecedented in the tax law."[138]

These PSLF regulations also deem "engaging in a pattern for violating state laws" as a substantial illegal activity. Violations of state law are defined to include "(i) trespassing; (ii) disorderly conduct; (iii) public nuisance; (iv) vandalism; or (v) obstruction of highways."[139] That is, these PSLF regulations closely track Revenue Ruling 75-384. But, even as broadly as the PSLF regulations reach, they do not go as far as Revenue Rule 75-384. For purposes of the PSLF regulations, such activities violate the illegal purpose doctrine only if there is "a final, non-default judgment by a State court" as to one of the listed offenses.[140] That even the expansive PSLF regulations drew back from Revenue Ruling 75-384 underscores the need to reconsider, clarify, and limit that revenue ruling.

As noted earlier,[141] in a series of executive orders, the current administration has taken the view that pursuing diversity, equity, and inclusion (DEI) constitutes illegal discrimination. The Priority Guidance Plan, however, characterizes DEI as violating fundamental public policy under recent case law. As also explained earlier,[142] I do not think that recent case law could constitute a fundamental public policy under *Bob Jones*. If Treasury and the IRS come to agree with this position on their own or because of a court decision to that effect, the malleability of the substantial illegal purpose doctrine could well offer it an alternative home. Charities with substantial DEI purposes or activities need to be prepared for possible IRS challenges under the substantial illegal purpose doctrine as to their continued qualification for exempt status.

Organizations committed to DEI, particularly those with deep pockets, may be willing to challenge the administration's position that DEI is illegal as a charitable purpose. Any such challenge would need to look to Professor Roger Colinvaux's thorough and thoughtful examination of that issue.[143] He details the long history of nonprofit organizations engaging in remedial discrimination,[144] the scope of the First Amendment's guarantee of freedom of association,[145] and the history of Section 1981.[146] He explains how "private remedial action" "is simply private mission-driven associational activity and

[138] *See* Comments from Professors of Taxation and Nonprofit Law, *supra* note 103.

[139] Final Regulations, *supra* note 130, at 49001.

[140] *Id.*

[141] *See supra* notes 79–82 and accompanying text.

[142] *See supra* notes 79–82 and accompanying text.

[143] *See* Roger Colinvaux, *The Legality of Charitable Remedial Discrimination*, 135 YALE L.J. 549 (2025).

[144] *Id.* at 567-573.

[145] *Id.* at 573-578.

[146] *Id.* at 588-592.

is not measured against a legal baseline barring discrimination."[147] He concludes that "until and unless Congress acts, private remediation action remains legal and . . . is not contrary to fundamental public policy."[148]

Whether antisemitism constitutes illegal discrimination has already arisen as an issue. The administration's attacks on Harvard University and other institutions of higher learning, including UCLA, have centered on denying Title VI funding.[149] Whether antisemitism constitutes discrimination under Title VI is a sensitive issue. Congress limited Title VI's ban on discrimination in federally funded programs to 'race, color, [and] national origin."[150] That is, unlike Title VII's ban on employment discrimination, Title VI does not include explicit protection against discrimination based on religion.[151]

A recent article by Professors Benjamin Eidelson and Deborah Hellman examined the applicability of Title VI to antisemitism and anti-Zionism.[152] As they explain, the leading Supreme Court case on anti-Jewish discrimination under civil rights laws, *Shaare Tefilla Congregation v. Cobb*,[153] arose in a private action under the Civil Rights Act of 1866. It involved a synagogue that had its building defaced with Nazi slogans and iconography. The Supreme Court concluded that "the kind of group protected by the statute was an "identifiable class[] . . . [that faces discrimination] solely because of their ancestry or ethnic characteristics.'[154] Professors Eidelson and Hellman observe, "The handful of lower courts that have faced the question of *Shaare Tefila's* applicability in the Title VI context have treated it as controlling there as well.[155] Based on this body of law, the authors describe the relevant protected characteristic under Title VI as "racial Jewishness" or "Jewish ancestry."[156] They conclude, albeit with caveats, that Title VI does not apply to alleged discrimination of Jewish students based on their religion. Others have taken a different position. Stephen Sachs, for example, has argued that "made a condition of full participation in university life, anti-

[147] *Id.* at 621.

[148] *Id.* at 622.

[149] *See* Alan Blinder and Michael C. Bender, *Trump Wants U.C.L.A. to Pay $1 Billion to Restore Its Research Funding*, New York Times (Aug. 8, 2025), https://www.nytimes.com/2025/08/08/us/trump-ucla-research-funding-deal.html [https://perma.cc/8X9H-ETUH].

[150] Compare 42 U.S.C. § 2000e-2 and § 2000d.

[151] Moreover, treating Jews as a race itself raises the specter of antisemitism. *See Are Jews a Race, My Jewish Learning: Antisemitism and Bigotry*, https://www.myjewishlearning.com/article/are-jews-a-race/ [https://perma.cc/Q4VV-PEMA].

[152] Benjamin Eidelson & Deborah Hellman, *Antisemitism, Anti-Zionism, and Title VI: A Guide for the Perplexed*, 139 HARV. L. REV. FORUM 1 (2025). They themselves describe some of their conclusions as tentative.

[153] Shaare TefillaTefila Congregation v. Cobb, 481 U.S. 615 (1987).

[154] *Id.* at 617 (citing Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987)).

[155] Eidelson & Hellman, *supra* note 152, at 4.

[156] Eidelson & Hellman, *supra* note 152, at 6.

Zionism is a form of national-origin discrimination" in that it "creates a hostile environment for Israelis forced to abjure their national origin or Jews forced to abjure their nationhood."[157]

Whatever the legal merits of the argument that antisemitism does not violate Title VI, it will be a difficult one for universities and colleges to embrace. They will not wish to be seen as defending antisemitism. Harvard recently prevailed in the District Court in its lawsuit against the administration for violating Title VI in terminating grants for scientific and medical research.[158] Many pages of the opinion detail Harvard's efforts to fight antisemitism on campus. A footnote, however, makes clear that Harvard accepted the position that Title VI applies to antisemitism. This footnote 24 of the opinion reads: "The parties do not dispute that Title VI protects Jewish students from harassment."[159] Universities facing attempted revocation on the grounds that antisemitism constitutes illegal discrimination under Title VI will face an especially delicate task.

As the final PSLF regulations demonstrate, the illegality doctrine has no inherent limitations. To quote Libby once again, "Today, its reach is expansive: it can be triggered whenever an organization's purposes or activities violate federal, state, or even local law—whether or not those laws bear any relation to taxation, and even if they have never been enforced against the organization."[160] The doctrine's malleability is likely to make it a powerful tool in any attempt to revoke exempt status. Given the uncertainty that surrounds it, I urge the IRS to reconsider the doctrine and issue official guidance in the form of regulations adopted only after notice-and-comment. Such guidance should clarify when illegal activity is properly attributed to an exempt organization, how serious the violations must be to apply the doctrine, how frequent and pervasive the violations must be, how illegality is established, and the degree of both criminal and civil illegality required to trigger the doctrine. For state and local law violations such as those in Revenue Ruling 75-384, the IRS would be well-advised to adopt the PSLF

[157] Stephen E. Sachs, *Zionism and Title VI,* 139 HARV. L. REV. FORUM 50, 54 (2025).

[158] Memorandum and Order, President & Fellows of Harvard Coll. v. U.S. Dep't of Health & Human Servs., No. 25-cv-11048 (D. Mass. Sept. 3, 2025), https://www.harvard.edu/federal-lawsuits/wp-content/uploads/sites/17/2025/09/gov.uscourts.mad_.283718.238.0_1.pdf [https://perma.cc/2JDA-QW9V]. The Trump administration appealed this decision on Dec. 18, 2025. *See* Notice of Appeal, President and Fellows of Harvard College v. U.S. Dept. of Justice, Case No. 1:25-CV-11048-ADB (Dec. 18, 2025), https://storage.courtlistener.com/recap/gov.uscourts.mad.283718/gov.uscourts.mad.283718.250.0.pdf [https://perma.cc/5BBE-H89S].

[159] Memorandum and Order, *supra* note 158, at 61 n.24. The footnote continues: "'Discrimination based on actual or perceived Israeli identity is of course discrimination based on national origin.' *Kestenbaum v. President & Fellows of Harvard Coll.*, 743 F. Supp. 3d 297, 307 (D. Mass. 2024)."

[160] Libby, *supra* note 104, manuscript at 56

regulations' requirement of a final judicial judgment, at least for violations of state law if not more generally.

Libby rejects this solution: "No procedural refinement can sanitize that result, because the constitutional injury lies not in how the determination is made, but in the state's claimed authority to make it at all."[161] She criticizes the doctrine for being untethered to any provision of section 501(c) or even to any issues connected to the tax system. To her, the doctrine is "an interpretive device that looks familiar at first glance but in fact operates as something far more sweeping; a freestanding veto over charitable status untethered from either statutory ambiguity or revenue protection."[162] She calls for judicial repudiation of the illegality doctrine.[163]

Organizations that are denied or lose exemption under the doctrine of substantial illegal purpose can argue for a change along the lines she outlines. They can challenge application of the illegality doctrine in a section 7428 declaratory judgment action, based on constitutional grounds such as a void-for-vagueness as well as on the grounds of a lack of a clear statutory tether.[164]

V. Supporting Terrorist Organizations

In the 118th Congress, H.R. 9495 which passed the House but was not considered in the Senate, included a new section 501(p)(8) of the Code.[165] Proposed section 501(p)(8) would give the Secretary of the Treasury authority to suspend an organization's exemption by designating it as a "terrorist supporting organization." Under H.R. 9495, by cross-reference to paragraph 2 of the current section 501(p) and the provisions to which paragraph 2 in turn cross-references, an organization can be designated a

[161] Libby, *supra* note 104, manuscript at 64.

[162] Libby, *supra* note 104, manuscript at 59

[163] Libby, *supra* note 104, manuscript at 57. I suspect, however, that even if the illegality doctrine were eliminated as such, the concept would continue to operate as an interpretation of section 501(c)(3)'s "exclusively" requirement, interpreted by the Supreme Court in *Better Business Bureau, supra* note 106, as requiring that a section 502(c)(3) organization exhibit no substantial nonexempt purpose. The IRS and courts frequently rely on this decision. *See* Ellen P. Aprill, *2025 Erwin N. Griswold Lecture before the American College of Tax Counsel: Memorial Hermann: Rejecting Pro-Taxpayer Regulations under Loper Bright*, 79 TAX LAW. 253 (2025), for further discussion of *Better Business Bureau.*

[164] *See infra* notes 141–152 and accompanying text for discussion as to how *Loper Bright v. Raimondo,* 603 U.S. 639 (2024), curtails the discretionary authority of administrative agencies to interpret ambiguous or silent statutory text.

[165] *See* H.R. 9495, 118th Cong. § 4 (2024). A slightly revised version of this legislation was included in the Committee of Ways and Means, The One Big Beautiful Bill. *See* H.R. REP. NO. 119-106, pt. 2, at 1810-14 (2025). However, because it was not included in H.R. 1 as passed by the House, see H.R. 1, 119th Cong. (2025), I discuss here H.R. 9495, which did pass one chamber of Congress.

terrorist supporting organization because it supports one of the foreign terrorist organizations designated as such by the Secretary of State.

This legislation has been reintroduced in the 119th Congress.[166] Whether it will come to a vote in the House or, if so, survive a filibuster in the Senate is uncertain.[167] However, if it did, it could well spur the administration's efforts to suspend exemption for organizations that pursue activities of which the administration disapproves, such as universities that have taken or permitted expression of pro-Palestinian positions that include—or are perceived as including—support for Hamas. Moreover, as discussed further below,[168] any new version of section 501(p)(8) might well introduce the categories of domestic terrorist organization and supporting domestic terrorist organizations.

Under H.R. 9495, the Secretary of Treasury would designate a terrorist-supporting organization. The decision to make this designation is solely within the discretion of the Secretary. The Secretary can designate that an organization provided material support or resources to a terrorist organization or a terrorist supporting organization so long as the support took place *within the 3 years preceding the date of designation*.[169] Nothing in the bill details the kind of evidence on which the Secretary is to rely in making the needed determination. However, the notice to the entity of such suspension is to describe the material support or resources at issue "to the extent consistent with national security and law enforcement interests."[170] No provision

[166] Representative David Kustoff recently introduced H.R. 6800 in the House and Senator John Cornyn introduced S. 3554 in the Senate. These pieces of legislation reintroduce § 501(p)(8). *See* H.R. 6800—A bill to amend the Internal Revenue Code of 1986 to terminate the tax-exempt status of terrorist supporting organizations, CONGRESS.GOV, https://www.congress.gov/bill/119th-congress/house-bill/6800; S. 3554—A bill to amend the Internal Revenue Code of 1986 to terminate the tax-exempt status of terrorist supporting organizations, CONGRESS.GOV, https://www. congress.gov/bill/119th-congress/senate-bill/3554/text [https://perma.cc/G2KR-6DYD]. Like the provision included in early versions of H.R. 1, it largely tracks H.R. 9495, with some additional provisions as to procedures related to national security concerns. *See* text of bill introduced by Rep. Kustoff, https://kustoff.house.gov/sites/evo-subsites/kustoff.house.gov/files/evo-media-document/kustof_ 044_xml.pdf [https://perma.cc/27KS-EA4S].

[167] H.R. 9495 passed the House on a vote of 219-184. Fifteen House Democrats voted for it. Office of the Clerk, United States House of Representatives, Roll Call 477, Bill No. H.R. 9495 (Nov. 21, 2024), https://clerk.house.gov/Votes/2024477 [https://perma.cc/J8WB-K2MA]. H.R. 9495 included provisions protecting hostages from tax penalties, which might explain some of the votes. Other members of the House may have felt unwilling to vote for a bill that their constituents might see as support for terrorism. How Democratic Senators would vote if such legislation were to be introduced again is, of course, uncertain.

[168] *See* notes 187–202, *infra*, and accompanying text.

[169] H.R. 9495, *supra* note 167, at § 4(a).

[170] H.R. 9495, *supra* note 167, at § 4(a).

requires consultation with any other cabinet department, unlike some provisions of current section 501(p).[171]

Unlike the current section 501(p), however, H.R. 9495 does provide designated organizations with certain procedural protections. It allows the designated organization with the opportunity to cure within 90 days of the date the notice was sent.[172] Proposed section 501(p)(8) also provides for review by the I.R.S. Office of Tax Appeals and review by the District Courts of any final determination of designation as a terrorist-supporting organization. Suspension of exemption, however, continues throughout any appeals process. In contrast to some of the provisions to which the current section 501(p) applies, however, proposed section 501(p)(8) does not call for review of designation as a terrorist-supporting organization 5 years after the initial designation.[173]

Section 501(p)(8) in H.R. 9495 defines "material support or resources" by reference to 18 U.S.C. section 2339B.[174] It in turn quotes and cross-references to 18 U.S.C. section 2339A.[175] Through these cross-references, "material support or resources" is defined to include training, expert advice, or assistance.[176] Section 2339A further explains that "training" means "instruction or teaching designed to impart a specific skill" and "expert advice" means "advice or assistance derived from scientific, technical or other specialized knowledge."[177]

In *Holder v. Humanitarian Law Project*,[178] the Supreme Court held that section 2339B, as applied in the case, did not violate the Constitution by criminalizing the provision of training and expert advice to organizations designated as foreign terrorist organizations, even when the advice was offered solely for their peaceful purposes.[179] The Court found that the provision was not unconstitutionally vague or inconsistent with the First Amendment's guarantees of freedom of speech and freedom of association.[180] It rejected the

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[171] *See* Ellen P. Aprill, *Comparison of Procedures in Current Section 501(p) and H.R. 6408* (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4876779 [https://perma.cc/EJ59-MY7K]. H.R. 6409 was the number assigned to this legislation in an earlier Congress. Its provisions are identical to those in H.R. 9495. That paper also details the operation of current section 501(p). Under the current law, the Secretary of the Treasury has no discretion but must suspend the exemption of any entity named a terrorist organization by the Secretary of State under several statutory provisions. *Id.*

[172] H.R. 9495, *supra* note 167, at § 4(a) (emphasis added).

[173] *See* Aprill, *supra* note 171.

[174] H.R. 9495, *supra* note 167, at § 4(a).

[175] 18 U.S.C. § 2339B.

[176] 18 U.S.C. § 2339B(g)(4).

[177] 18 U.S.C .§ 2339A(b)(2)-(3).

[178] Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

[179] *Id.* at 36.

[180] *Id.* at 21, 35-36, 39.

petitioners' argument that the statute should require proof that any defendant's proposed activity, including activity that consists of speech, was intended to further the foreign terrorist organization's illegal activities.[181] The Court concluded that knowledge of the organization's connection to terrorism sufficed to satisfy the statute's requirement of "knowingly" providing material support.[182]

In addressing the petitioners' First Amendment arguments, the Court in *Humanitarian Law Project* cited language in the statute: "Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control."[183] It distinguished the speech of petitioners at issue from the independent advocacy identified in the statute.

David Cole, who was counsel for Humanitarian Law Project, has explained that "the majority repeatedly emphasized that the material support law prohibited only speech coordinated with or directed to 'foreign terrorists organizations,' not independent advocacy, implying that a ban on independent advocacy might be viewed differently."[184] But, he continues, the Court did not so hold, but "merely interpreted the law not to prohibit independent advocacy."[185] I note that the statutory language quoted by the Court regarding independent actors limits only criminal prosecution for providing personnel, not the definition of other kinds of material support incorporated by reference into proposed section 501(p)(8).

To me, section 501(p)(8) as proposed in H.R. 9495 poses a substantial risk of extending the reach of forbidden material support to include independent advocacy. If this proposed section 501(p)(8) did become law, it is possible that the Secretary of Treasury would decide that universities that acted (or failed to act) in ways the administration considers antisemitic would run afoul of this statute. The reasoning would be that permitting pro-Palestinian protestors to express support for Hamas in ways that limited access for Jewish students or ended in violence could render those universities

[181] *Id.* at 36.

[182] 18 U.S.C. § 2339B(a)(1).

[183] *Humanitarian Law Project*, 561 U.S. at 13 (citing 18 U.S.C. § 2339B(h)). That subsection, however, is limited to "personnel" and to criminal prosecution for providing personnel. Prior to the language quoted by the Supreme Court, the subsection reads: "No person may be prosecuted under this section in connection with the term 'personnel' unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization." 18 U.S.C. § 2339B(h).

[184] David Cole, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 165 (2012).

[185] Cole, *supra* note 184.

terrorist-supporting organizations, calling for suspension of exemption under section 501(p)(8).

I find it particularly significant that, unlike section 2339B, proposed section 501(p)(8) has no "knowingly" requirement. As a coalition of 354 organizations wrote when H.R. 9495 was under consideration in the House, the provision "creates a high risk of politicized and discriminatory enforcement."[186]

Moreover, a new version of H.R. 9495 might expand its coverage to domestic terrorist organizations. On September 22, President Trump issued an Executive Order "Designating Antifa as a Domestic Terrorist Organization."[187] In announcing this designation, the Executive Order stated that Antifa "is a militarist, anarchist enterprise that explicitly calls for the overthrow of the United States Government, law enforcement authorities, and our system of law."[188] The President called upon all executive departments and agencies to "utilize all applicable authorities to investigate, disrupt, and dismantle any and all illegal operations" by or connected to Antifa.[189]

President Trump followed this Executive Order with a memorandum issued on September 25, 2025, establishing a National Joint Terrorism Task Force.[190] Its directives include one to the IRS Commissioner to "take action to ensure that no tax-exempt entities are directly or indirectly financing political violence or domestic terrorism."[191] The memorandum identifies a list of "common threads" associated with domestic terrorism that reach far beyond any threat of violence: "anti-Americanism, anti-capitalism, and anti-Christianity; support for the overthrow of the United States Government; extremism on migration, race, and gender; and hostility towards those who hold traditional American views on family, religion, and morality."[192] Again, the directives in the memorandum raise serious First Amendment concerns.[193]

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[186] *See* Civil Society Letter to House Opposing H.R. 9495 (Sept. 20, 2024), https://www.aclu.org/documents/civil-society-letter-to-congress-opposing-hr-9495 [https://perma.cc/4QR4-C9G4].

[187] Exec. Order, 90 Fed. Reg. 46,317 (Sept. 22, 2025).

[188] Exec. Order, *supra* note 187.

[189] Exec. Order, *supra* note 187.

[190] Presidential Memorandum on Countering Domestic Terrorism and Organized Political Violence, 90 Fed. Reg. 47,225 (Sept. 25, 2025).

[191] Presidential Memorandum, *supra* note 190, at § 2(j). This directive continues, "In addition, where applicable, the Commissioner shall ensure that the Internal Revenue Service refers such organizations, and the employees and offers of such organizations, to the Department of Justice for investigation and possible prosecution." *Id.*

[192] Presidential Memorandum, *supra* note 190, at § 1.

[193] Out of somewhat similar concerns, Senator Tom Cotton recently introduced the Nonprofit Governance Integrity Act, https://www.cotton.senate.gov/imo/media/doc/

Further, President Trump has designated Antifa a "domestic terrorist organization," although Antifa is not an entity but a loosely organized movement.[194] A statutory provision within the federal criminal code defines "domestic terrorism,"[195] but no current statutory provision authorizes the designation of a domestic terrorist organization.[196] Nonetheless, in a leaked memo of December 4, 2025,[197] Attorney General Bondi defined domestic terrorism broadly. According to the memo, "particularly dangerous are those acts committed by violent extremist groups that threaten both citizens' safety and our country's ability to self-govern. These domestic terrorists use violence or the threat of violence to advance political and social agendas."[198] The Bondi memo directs "federal law enforcement and federal prosecutors should consider any applicable tax crimes in cases in which extremist groups are suspected of defrauding the Internal Revenue Service."[199] According to an alert from a Washington, D.C. law firm, the Attorney General's

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nonprofit_bill.pdf. This legislation would revoke the exemption of any exempt organization except churches if any member of its governing board is a citizen of China, Russia, Iran, North Korea, or Cuba; Senator Cotton explained, "Nonprofits should be completely free from malign foreign influence." Press Release, *Cotton Introduces Bill to Ban Certain Foreign Nationals from Nonprofit Boards* (Sept. 17, 2025), Tom Cotton for Arkansas, https://www.cotton.senate.gov/news/press-releases/cotton-introduces-bill-to-ban-certain-foreign-nationals-from-nonprofit-boards [https://perma.cc/CS8K-AMTU]. In addition, Senator Bob Scott of Florida has introduced a bill to end the tax-exempt status of Council on American-Islamic Relations. *See* S. 3479, No Tax Exemption for Terror Act (Dec. 16, 2025), https://www.congress.gov/bill/119th-congress/senate-bill/3479/text [https://perma.cc/52PS-LTLB].

[194] Odette Yousef, *Trump Has Designated 'Antifa' a Terrorist Group. Here Are the Questions That Raises*, NPR (Sept. 22, 2025), https://www.npr.org/2025/09/19/nx-s1-5545764/trump-says-he-plans-to-designate-antifa-as-a-terrorist-organization [https://perma.cc/Q6TN-U5US]; Charlie Savage, *Can Trump Actually Designate Antifa a Terrorist Group? Here Are the Facts*, N.Y. TIMES (Sept. 18, 2025), https://www.nytimes.com/2025/09/18/us/politics/trump-antifa-terrorist-group.html [https://perma.cc/FR4N-RXC6].

[195] 18 U.S.C. § 2331(5) (defining "domestic terrorism" as activities that "(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.").

[196] *See* Yousef, *supra* note 194.

[197] Attorney General Bondi, Memo on Countering Domestic Violence and Organized Political Violence (Dec. 4, 2025), *available for download at* Ken Klippenstein, *FBI Making List of American "Extremists," Leaked Memo Reveals*, Dec. 6, 2025, KENKLIPPENSTEIN.COM, https://www.kenklippenstein.com/p/leak-fbi-list-of-extremists-is-coming [https://perma.cc/BF2H-DY9F] [hereinafter Bondi Memo].

[198] Bondi Memo, *supra* note 197. The memo goes on to describe this agenda in the same language as in the President's memo establishing the Joint Terrorism Task Force.

[199] Bondi Memo, *supra* note 197.

Memorandum marks "a dramatic expansion of federal law enforcement's efforts to identify, investigate, and prosecute what DOJ views as acts of domestic terrorism."[200] The memo cautioned, "Tax-exempt organizations and their donors likely will be a continued focus of these enforcement efforts."[201]

A revised section 501(p)(8), moreover, might give the Treasury Secretary the ability to designate both domestic terrorist organizations and organizations that support them. Any such expansion, however, would have to confront the Supreme Court's distinction in *Humanitarian Law Project* between domestic and foreign organizations. Although the Court there found that criminalizing the provision of training and expert advice to organizations designated as foreign terrorist organizations did not violate the First Amendment, it cautioned, "We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations."[202] Once again, First Amendment jurisprudence is likely to be crucial to challenging loss of exemption. Nevertheless, even if a new section 501(p)(8) did not reach speech, it could nonetheless extend to organizations supporting a new category of domestic terrorist organizations that provide more tangible forms of material support.

Any designation by the Secretary of the Treasury to designate domestic terrorist-supporting organizations would not constitute an IRS "audit or other investigation" within the prohibition of executive branch influence under section 7217. Thus, the President and other members of the executive branch could pressure the Treasury Secretary to make such designations. For all these reasons, I see enactment of section 501(p)(8), especially if revised to define and include "domestic terrorist organizations," as a particular danger to the continued tax exemption of many organizations.

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[200] Arnold & Porter, *DOJ Issues Sweeping New Domestic Terrorism Directive: What the Attorney General's December 4 Memorandum Means to You* (Dec. 8, 2025), https://www.arnoldporter.com/en/perspectives/blogs/enforcement-edge/2025/12/doj-issues-sweeping-new-domestic-terrorism-directive [https://perma.cc/ 9HXU-HS27]. A *Washington Post* article noted similar warnings: "Critics warn that the plan signals an impending crackdown on political dissent under the banner of counterterrorism—one that could land large numbers of liberal activists on government watch lists and chill Americans' First Amendment right to protest the administration's policies." Eva Dou, Joesph Menn, and Will Oremus, *Broad Crackdown on Left-Wing Groups Emerges,* WASH. POST (Dec. 18, 2025). *See also* Brian Schwartz, Richard Rubin, and Joel Schectman, *Trump Team Plans IRS Overhaul to Enable Pursuit of Left-Leaning Groups,* WALL ST. J. (Oct. 15, 2025), https://www.wsj.com/politics/policy/trump-irs-investigations-left-leaning-groups-democratic-donors-612a095e?mod=author_content_page_1_pos_19 [https://perma.cc/5A3P-548V].

[201] Arnold & Porter, *supra* note 200.

[202] *Humanitarian Law Project,* 561 U.S. at 39.

VI. Redefining Charitable Purpose

According to a number of media reports in April, the IRS has been considering issuing various sub-regulatory guidance to revoke the exemptions of certain categories of entities now treated as charitable under section 501(c)(3). These reports described the possible issuance of a revenue procedure revoking the exemption for entities pursuing DEI or climate change.[203] Any such attempts, however, would confront current judicial understanding of the Administrative Procedure Act (APA).[204] Moreover, regulations regarding section 501(c)(3) purposes, whether old or new, are now vulnerable under *Loper Bright v. Raimondo*.[205] Thus, not only do many groups promoting a vision of civil society at odds with the administration's view face a battle, but they do so on uncertain and shifting substantive as well as procedural grounds.

These applicable administrative law doctrines encompass both procedural and substantive aspects. As a matter of procedure, a series of court cases have invalidated sub-regulatory guidance, such as revenue procedures and notices, that fail to follow the requirements of the APA, including notice-and-comment. Substantively, the overturning of the *Chevron* doctrine in *Loper Bright* puts in doubt the validity of properly promulgated regulations, whether old or new, that interpret silence or ambiguity in the relevant statutory text.

Revising the section 501(c)(3) regulations defining educational purposes to exclude DEI would offer Treasury and the IRS a third way, in addition to violation of fundamental public policy and substantial illegal purpose, to take aim at schools that pursue DEI. As discussed earlier, James Taranto has urged

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[203] Todd Gillespie & Janet Lorin, *Treasury Proposals Take Aim at Hundreds of Colleges' Tax Status*, BLOOMBERG LAW (June 11, 2025), https://news.bloomberglaw. com/tax-insights-and-commentary/treasury-proposals-take-aim-at-hundreds-of-colleges-tax-status [https://perma.cc/A367-XCA3]; Elizabeth Rembert, Amanda Albright & Simone Foxman, *Colleges Face Major Tax Blow in Trump's Proposed IRS Rules on Race*, BLOOMBERG (June 18, 2025), https://www.bloomberg.com/ news/articles/2025-06-18/colleges-face-existential-threat-in-proposed-irs-rules-on-race?srnd=undefined&sref=DzrYYPu0&embedded-checkout=true [https://perma. cc/G4DV-5BL9]; Jennifer A. Dlouhy & Akshat Rathi, *Trump Officials Weigh Earth Day Move Against Green Groups*, BLOOMBERG (Apr. 17, 2025), https://www.bloomberg.com/news/articles/2025-04-18/trump-officials-weigh-earth-day-move-against-green-groups?embedded-checkout=true [https://perma. cc/JF34-UMMN]; Valerie Volcovici & Virginia Furness, *Climate Non-profits Anticipate Fight with Trump Over Tax Status*, REUTERS (Apr. 21, 2025), https://www.reuters.com/sustainability/cop/climate-non-profits-anticipate-fight-with-trump-over-tax-status-2025-04-21/ [https://perma.cc/HW2J-LGP2].

[204] *See generally* Ellen P. Aprill, *Administrative Law Meets Section 501(c)(3) Charitable Purpose*, 77 TAX LAW. 213 (2024); Brian Galle and Stephan Shay, *Admin Law and the Crisis of Tax Administration,* 101 N.C. L. REV. 1645 (2023). *See also* Aprill, *supra* note 163.

[205] Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

the administration to clarify that Revenue Ruling 71-447, the ruling at issue in *Bob* Jones, to clarify that a " 'racially nondiscriminatory policy' must renounce illegal DEI measures to protect students, including Jewish students, from illegal discriminatory harassment."[206] He recommended as well that President Trump "direct the IRS to update its regulation defining an 'educational institution under Section 501(c)(3) to exclude any organization that advocates or condones racism (including antisemitism), terrorism or any other unlawful activity."[207] I anticipate that such a revised regulatory definition of "educational" might also look to language in the recent compact the administration announced under which signatories would gain priority access to federal funding.[208] Signatories to the compact agree, among many other requirements, "to revising governance structures as necessary to create such an environment, including but not limited to transforming or abolishing institutional units that purposefully punish, belittle, and even spark violence against conservative ideas" as well as ensuring a "broad spectrum of viewpoints not just in the university as a whole, but within every field, department, school, and teaching unit."[209] Clarifying Revenue Ruling 71-447 would raise procedural issues regarding sub-regulatory guidance discussed below, while revising a regulation would need to confront the substantive implications of *Loper Bright*.

The history of environmental groups provide a good—and especially relevant—example of the potential impact of recent judicial decisions regarding sub-regulatory guidance and procedures required under the APA. Prior to the 1970s, such organizations had to base their claims for exemption on grounds such as public education, scientific research, or alleviating the burdens of government. Revenue Ruling 67-292,[210] for example, concluded that an organization formed to purchase and maintain land as a sanctuary for wild birds and animals qualified for exemption because it was open to the public for educational purposes in ways similar to a museum or zoo. In Revenue Ruling 70-79[211] the IRS concluded that an organization created to assist local governments in solving such issues as "water and air pollution, waste disposal, water supply, and transportation" qualified as exempt because it lessened the burdens of government, a purpose included within the

[206] *See* Taranto, *supra* note 61.

[207] *See* Taranto, *supra* note 61.

[208] *See* Michael Bender, *Trump Administration Asks College to Sign 'Compact" to Get Funding Preference,* N.Y. Times (Oct. 3, 2025), https://www.nytimes.com/ 2025/10/02/us/politics/trump-college-funding.html [https://perma.cc/4YNJ-K8WT].

[209] Compact for Excellence in Higher Education, *available at* https://www.washingtonexaminer.com/wp-content/uploads/2025/10/Compact-for-Academic-Excellence-in-Higher-Education-10.1.pdf [https://perma.cc/8TQQ-YK6C]. *See also* Bender, *supra* note 208.

[210] Rev. Rul. 67-292, 1967-2 C.B. 184.

[211] Rev. Rul. 70-79, 1970-1 C.B. 127.

meaning of charitable under Treasury Regulation section 1.501(d)(3)-1(d)(2), and because it was educational within the meaning of Treasury Regulation section 1.501(c)(3)-1(c)(3).

Revenue Ruling 72-560,[212] however, began a transition in exemption standards for environmental organizations. It concluded that an organization formed to educate the public about environmental deterioration caused by solid waste pollution qualified for exemption under section 501(c)(3). According to an IRS CPE Text on environmental preservation that reviewed this ruling, "though part of the rationale hinged on educating the public on environmental problems and solutions, it was also considered charitable based on preventing environmental deterioration. This was an early recognition of environmental preservation as a rationale separate from government assistance, education, or community recreation."[213]

Revenue Ruling 76-204 completed the transition.[214] It found a conservation organization to be eligible for section 501(c)(3) status based on its pursuit of environmental protection. "It is generally recognized that efforts to preserve and protect the natural environment for the benefit of the public serve a charitable purpose."[215] In support, the ruling cited the Restatement (Second) of Trusts and several state cases dating back to the mid-1800s. In doing so, it harkened back to the language of the regulations, referring to "the broad outlines of charity as developed by judicial decisions."[216]

Should the IRS seek to end qualification for exemption of such organizations, as has been reported, it is unlikely to ultimately succeed in doing so through a new revenue ruling or series of revenue rulings. Under current judicial interpretation of the APA as applied to sub-regulatory tax guidance, any changes to what qualifies as a charitable purpose would have to confront judicial opinions requiring that any guidance with the force of law adhere to the APA requirements for legislative rules. Section 553 of the APA requires that, in general, agencies adopting binding rules give notice of the rule as proposed.[217] After the required notice, "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the

[212] Rev. Rul. 72-56, 1972-2 C.B. 248.

[213] Sadie Copeland & James Bloom, *Environmental Preservation Issues*, in 1994 Exempt Organizations CPE Text 1 (IRS 1994), https://www.irs.gov/pub/irs-tege/eotopicb94.pdf [https://perma.cc/7TQV-RHKE].

[214] Rev. Rul. 76-204, 1976-1 C.B. 152.

[215] *Id.*

[216] *Id.*

[217] 5 U.S.C. § 553(c). The paper will refer to these provisions as "A.P.A." with a section citation.

agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."[218]

More precisely, APA section 553 requires these procedures, including public notice-and-comment, for what are known as legislative rules.[219] Legislative rules are understood as regulations that have the force of law and impose duties and obligations on the parties affected.[220] Legislative rules stand in contrast to interpretive rules, which do not bind the public but instead give an agency's view of matters within its jurisdiction. Interpretive rules do not require notice-and-comment.

The application of these APA requirements, of course, depends on the meaning of "force of law," an issue about which no consensus exists.[221] Suggested articulations of its meaning include whether the rule in question "create[s] by its own force, a legally binding standard of conduct"[222] or "[w]hether the rule is necessary to provide legislative basis for an enforcement action or conferral of benefits."[223] Under such tests, courts have concluded that sub-regulatory tax guidance requires the full panoply of APA procedures, in particular notice-and-comment. That is, courts need not accept and have not accepted the IRS characterization or the procedures it chooses in issuing sub-regulatory guidance.

Because it involved a sub-regulatory requirement applicable to tax-exempt entities, *Bullock v. IRS* presents a particularly applicable precedent.[224] In *Bullock*, the governor of Montana, challenged Revenue Procedure 2018-38.[225] That revenue procedure eliminated the requirement that noncharitable section 501(c) organizations file Schedule B with the IRS listing names of and addresses of major donors with the IRS as part of their Form 990 Annual Information Return.[226] Under Treasury regulations, "[a] Revenue

[218] A.P.A. § 553(c).

[219] The APA does not itself use the term "legislative," but such is the term generally used for substantive rules having "the force and effect of law." *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979).

[220] *See* Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 480 (2013).

[221] *See* Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239.

[222] Hickman, *supra* note 220, at 479 (quoting Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 543 (1977)).

[223] Hickman, *supra* note 220, at 481 (referencing Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993)).

[224] Bullock v. IRS, 401 F. Supp. 3d 1144 (D. Mont. 2019).

[225] Rev. Proc. 2018-38, 2018-31 I.R.B. 280.

[226] The court determined that the State of Montana had standing to challenge the absence of notice-and-comment procedures in issuing this guidance because of its reliance on the IRS determination of exempt status pursuant to information sharing between the federal and the state governments under §§ 6103 and 6104. *Bullock*, 401 F. Supp. 3d at 1150-54. Because of this unusual basis for standing, the case does not offer a general model for challenging IRS guidance shortly after issuance.

Procedure is a statement of procedure that affects the rights or duties of taxpayers or other members of the public under the Code and related statutes or information that, *although not necessarily affecting the rights and duties of the public*, should be a matter of public knowledge."[227]

The IRS argued that the revenue procedure was an interpretive rule. The court rejected this argument. It treated Revenue Procedure 2018-38 as a legislative rule under the APA. As the court explained, "[t]he APA requires federal agencies to follow the notice-and-comment rulemaking procedures before it creates or amends legislative rules."[228] The court found the revenue procedure to be a rule with the force of law under the APA because it "effectively amends the previous rule that required tax-exempt organizations to file substantial-contributor information."[229] As a result, said the court, the IRS had to follow notice-and-comment rulemaking procedures in order to change the substantial donor disclosure requirement for noncharitable section 501(c) organizations. The IRS did so soon after the case was decided.[230]

Several court decisions have also applied this administrative law doctrine to another form of sub-regulatory guidance, IRS tax shelter notices. These cases further underscore that sub-regulatory tax guidance can create a legislative rule requiring notice-and-comment. They involve section 6707A(c)(1), which established a reporting scheme designed for tax shelters. This scheme requires information reporting for both "reportable" and "listed" transactions.[231] Until recently, the IRS identified such transactions by publishing notices. According to the IRS Primer, a "notice is a public pronouncement that may contain guidance that involves substantive interpretations of the Internal Revenue Code or other provisions of the law. For example, notices can be used to relate what regulations will say in situations where the regulations may not be published in the immediate future."[232]

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[227] Reg. § 601.601(d)(2)(i)(b) (emphasis added). The Internal Revenue Manual (I.R.M.) has the same definition as this regulation. *See* I.R.M. 32.2.2.3.2.

[228] *Bullock*, 401 F. Supp. 3d. at 1158.

[229] *Id.*

[230] *See* Guidance under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 84 Fed. Reg. 47,447 (proposed Sept. 10, 2019) (to be codified at 26 C.F.R. pt. 1); T.D. 9898, 85 Fed. Reg. 31,959 (May 28, 2020).

[231] A reportable transaction is one determined to have a potential for tax avoidance or evasion. *See* I.R.C. § 6707A(c)(1). A listed transaction is one "which is the same as, or substantially similar to," a transaction identified as a reportable transaction. I.R.C. § 6707A(c)(1).

[232] *Understanding IRS Guidance—A Brief Primer*, I.R.S. (May 29, 2025), https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer [https://perma.cc/R5JS-ZR8L]. I.R.M. section 32.2.2.3.3. has a longer definition: After including the first sentence quoted above from the IRS Primer, it continues: "Notices may be used in circumstances in which a revenue ruling or revenue procedure would not be appropriate. In addition, notices

In a series of cases, courts have found these tax shelter notices to have the force of law because they imposed new reporting and record-keeping requirements, as well as exposure to financial penalties and sanctions. As a result, they had to be reissued with notice-and-comment. *Green Valley Investors v. Commissioner*[233] and *Green Rock v. IRS*[234] both determined that Notice 2017-10, which identified certain syndicated conservation transactions as listed transactions, constituted a legislative rule requiring notice-and-comment. *CIC Services LLC v. IRS* followed the same approach as to Notice 2016-66, which addressed certain micro-captive insurance companies,[235] and *Mann Construction v. United States* for Notice 2007-83, regarding employee benefit trusts that owned cash-value life insurance policies.[236] In reaction to these cases, the IRS and Treasury acted quickly to issue proposed regulations. The regulations regarding syndicated conservation easements were proposed in 2022 and finalized in 2024;[237] those regarding micro-captive insurance company transactions were proposed in 2023 and finalized in 2025.[238] These cases and the IRS's response to them underscore that these administrative law developments apply to tax law.

Revoking qualification for exemption based on a new revenue ruling or revenue procedure would have the force of law because it would have the effect of denying organizations both the rights and duties that follow from section 501(c)(3) status, such as most prominently the right to be exempt from federal income tax. Exempt status imposes duties as well, including the obligation to file Form 990 as a public document. Should the IRS, in fact, issue a revenue procedure or revenue procedure revoking qualification for section 501(c)(3) status for specific categories of organization, judicial challenges would surely follow, including under section 7428, discussed above.[239]

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may be used to solicit public comments on issues under consideration, in connection with non-regulatory guidance, such as a proposed revenue ruling. A notice also can be used to relate what regulations will say in situations in which the regulations may not be published in the immediate future."

[233] Green Valley Inv., LLC v. Comm'r, 159 T.C. 80 (2022).

[234] Green Rock, LLC v. IRS, 654 F. Supp. 3d 1249 (N.D. Ala. 2023), *aff'd*, 104 F.4th 220 (11th Cir. 2024).

[235] CIC Services LLC v. IRS, 592 F. Supp. 3d 677 (E.D. Tenn. 2022).

[236] Mann Construction v. U.S., 27 F.4th 1138 (6th Cir. 2022).

[237] *See* Treas. Reg. § 1.6011-9; T.D. 10007, 89 Fed. Reg. 81,341 (Oct. 8, 2024); Notice of Proposed Rulemaking, 87 Fed. Reg. 75,185 (Dec. 8, 2022).

[238] *See* Treas. Reg. § 1.6011-10; T.D. 10029, 90 Fed. Reg. 3,534 (Jan. 14, 2025); Notice of Proposed Rulemaking, 88 Fed. Reg. 21,547 (Apr. 11, 2023). The Sixth Circuit vacated Notice 2007-83 in *Mann Constr., Inc. v. United States*; as a result, and unlike the response to similar notices, its position has not been codified in regulations.

[239] See supra notes 41-44 and accompanying text.

Even if the IRS decides instead to promulgate new guidance as to what constitutes charitable purposes as a regulation with notice-and-comment, that choice will not end the agencies' responsibilities under current procedural rules of administrative law. Another series of tax cases has made clear that, in issuing a final regulation, the Treasury and the IRS must detail their response to all significant comments.[240] Should a new regulation be adopted, challenges on those grounds from organizations that lose their exemption would also surely follow.

Moreover, the validity of any regulations defining charitable purpose, whether orld or new, is far from assured after *Loper Bright*. The Supreme Court in *Loper Bright*, of course, overruled the *Chevron* doctrine, which afforded deference to reasonable agency interpretations of ambiguous statutes. Instead, based on the text of the APA and Supreme Court constitutional decisions reaching back to *Marbury v. Madison*, the Court in *Loper Bright* assigned to courts, not administrative agencies, the responsibility "to say what the law is."[241] According to *Loper Bright*, courts understand that such statutes, "no matter how impenetrable," have a "single, best meaning."[242] That is, a court can and should determine the "best reading" that controls statutory interpretation of ambiguous provisions.

Loper Bright, however, also acknowledged that in many statutory provisions, Congress delegates discretionary authority to administrative agencies in many statutory provisions. The Court wrote, "In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes."[243] *Loper Bright* sheds little light on the requirements for delegating such discretionary interpretive authority to an administrative agency. As Thomas Merrill, a leading administrative law scholar, has written of this aspect of *Loper Bright*: "What remains highly uncertain is just how broad or narrow the Court will tailor the category of delegations to agencies to interpret."[244]

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[240] *See* Hewitt v. Commissioner, 21 F.4th 1336 (11th Cir. 2021); Oakbrook Land Holdings, LLC v. Commissioner, 28 F.4th 700 (6th Cir. 2022); Altera Corp. v. Commissioner, 926 F.3d 1061 (9th Cir. 2019), *reh'g denied*, 941 F.3d 1200 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2837 (2020). Although these cases differ as to their understanding as to what constitutes a significant comment and thus whether a final regulation did in fact address all significant comments, they agree on the need to do so.

[241] *Loper Bright*, 603 U.S. at 385 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[242] *Id.* at 400.

[243] *Id.* at 390.

[244] Thomas W. Merrill, *The Demise of Deference—and the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227, 244 (2024). He writes in the same paragraph: "But exactly where the Court will come down on what constitutes a delegation to interpret will have to be worked out in the future." *Id.*

Section 501(c) nowhere gives the Secretary specific authority to promulgate regulations, not even the authority to recognize new exempt purposes as society changes.[245] In the case of section 501(c)(3), applicable regulations address this gap and permit new section 501(c)(3) purposes by expansively defining "charitable," one of the purposes listed in section 501(c)(3): "The term *charitable* is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of *charity* as developed by judicial decisions."[246] As the Joint Committee on Taxation has explained:[247]

> [T]here are two approaches to the meaning of the term charitable—the legal sense and the ordinary and popular sense. The legal sense is derived from the law of charitable trusts and is broader than the ordinary sense of the term, which generally means the relief of the poor and distressed. Since 1959, Treasury regulations have defined the term "charitable" in the legal sense . . . . This definition is broad, encompassing several ideas that would not generally be considered as charitable in the ordinary sense.

The regulation also gives examples of the term "charitable." Importantly, they include "to eliminate prejudice and discrimination" and "to defend human and civil rights secured by law."[248] If challenged, the continuing validity of these regulatory examples is vulnerable under *Loper Bright.*

The regulations defining both charitable and educational purpose rely on the general authority of section 7805(a), which gives the Secretary authority "to prescribe all needful rules and regulations for the enforcement of this title." Whether the very broad, indeed unlimited language, of section 7805(a) meets the standards of *Loper Bright* for delegated administrative authority has been a matter of disagreement among scholars of tax and administrative law. Some, including myself, think that section 7805 is not a sufficiently explicit

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[245] *See* RESTATEMENT OF CHARITABLE NONPROFIT ORGANIZATIONS § 1.01 cmt. d (A.L.I. 2021) (emphasizing that the definition includes not only longstanding specific purposes, such as relief of poverty and promotion of health, but also "other purposes that are beneficial to the community." It remarks that the Restatement (Third) of Trusts, "draws from common-law precedents by incorporating the important concept that charitable purposes evolve over time to reflect the varying conditions, characters, interests, and needs of society and different communities. . . . There is a clear intent underlying charities law that the list of valid charitable purposes, and thus the potential beneficiaries of charities, will evolve over time."); *see also* RESTATEMENT (THIRD) OF TRUSTS § 28 (A.L.I. 2003).

[246] Reg. § 1.501(c)(3)-1(d)(2).

[247] STAFF OF THE JOINT COMM. ON TAX'N, 109TH CONG., HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS 16–17 (2005).

[248] Reg. § 1.501(c)(3)-1(d)(2).

delegation.[249] Others, including leading scholars of administrative law, believe that not only broad explicit delegations but also even implicit ones, may survive *Loper Bright*.[250] A recent appellate decision, *Memorial Hermann Accountable Care Organization v. Commissioner*,[251] ignored a section 501(c)(4) regulation promulgated pursuant to the authority of section 78051(a) without so much as discussing the issue of delegated authority. It wrote that, under *Loper Bright,* "Importantly, we no longer are required to provide '*Chevron* deference' to the Treasury's interpretation of § 501(c)(4)."[252]

If, as I deem more likely than not, section 7805(a) fails to meet the *Loper Bright* standard for agency delegation, courts will be free to ignore the current regulations in their entirety and determine for themselves what they see as the best meaning of the statutory language. Key purposes listed in section 501(c)(3) are religious, charitable, scientific, and educational.[253] All of these

[249] *See* Ellen P. Aprill, *Unpacking the Most Important Paragraph in* Loper Bright, YALE J. ON REGUL.: NOTICE & COMMENT (Jan. 15, 2025), https://www.yalejreg.com/nc/unpacking-the-most-important-paragraph-in-loper-bright-by-ellen-p-aprill/ [https://perma.cc/M5BG-3K4R]; Reuven S. Avi-Yonah, *Tax Delegations after* Loper Bright, 116 TAX NOTES INT'L (TA) 97 (Oct. 7, 2024); Mitchell M. Gans, *Has the Supreme Court Already Resolved How* Loper Bright *Applies to Section 7805 Regulations?*, 187 TAX NOTES FED. (TA) 1069 (May 12, 2025); Amandeep S. Grewal, *Tax Regulations after* Loper Bright, 2024 MICH. ST. L. REV. 1083 (2024). *See generally* Kristin E. Hickman & Amy J. Wildermuth, *Harmonizing Delegation and Deference After* Loper Bright, 100 N.Y.U. L. REV. 1924 (2025).

[250] Merrill, *supra* note 169, at 264-65; *see also* Adrian Vermeule, *Implied Delegations after Loper*, YALE J. ON REGUL.: NOTICE & COMMENT (July 9, 2024), https://www.yalejreg.com/nc/implied-delegations-after-loper-by-adrian-vermeule/ [https://perma.cc/48FJ-MNSG]; Cass R. Sunstein, *Our* Marbury*:* Loper Bright *and the Administrative State*, 74 DUKE L.J. 1893, 1092-95 (2025). Cary Coglianese & Daniel E. Walters, *The Great Unsettling: Administrative Governance After* Loper Bright, 77 ADMIN. L. REV. 1 (2025), explores a possible middle ground. They ask, "has the *Loper Bright* Court allowed for part of that delegated authority to permit agencies to make reasonable judgments about how to act in the face of statutory silences or even ambiguities—essentially, *Chevron* in *Loper Bright* garb?" Coglianese & Walters, *supra* note 175, at 16.

[251] 120 F.4th 215 (5th Cir. 2024).

[252] *Id.* at 219. Although not involving an exemption issue, the Eighth Circuit, on the authority of *Loper Bright*, recently reversed the Tax Court's controversial decision in 3M Company v. Commissioner. The Tax Court had relied on *Chevron* to uphold an IRS section 482 regulation that subjected over $23 million of 3M's Brazilian royalties to U.S. taxation. The Court of Appeals rejected the regulation under *Loper Bright*. *See* 3M Co. v. Commissioner, 154 F.4th 574, 576 (8th Cir. 2025).

[253] Others listed, of course, are testing for public safety, literary, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals. The absence of health as an exempt purpose is noteworthy; both the Third Restatement of Trusts and the Restatement of Charitable Nonprofit Organizations include it. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 (A.L.I. 2003); RESTATEMENT OF CHARITABLE NONPROFIT ORGANIZATIONS § 1.01 cmt. d (A.L.I. 2021). Because of its absence in section 501(c)(3), hospitals were for many years required to provide charity care. *See* Rev. Rul. 56-185, 1956-1 C.B. 202. Whether or not

broad categories include ambiguities,[254] but none is more ambiguous than the term "charitable." As the Joint Committee quoted above explained, "charitable" has both a broad legal meaning and a narrower popular meaning. In fact, section 501(c)(3) regulations promulgated in 1956 adopted the narrow popular meaning of charitable as relief of the poor.[255] "Following an extensive study by the IRS,"[256] these proposed regulations were withdrawn in 1959, and new proposed regulations were issued adopting the more expansive legal meaning.[257] Our current understanding of permissible section 501(c)(3) purposes relies on these 1959 regulations, which have a broad interpretation of "charitable." Their judicial rejection would upend section 501(c)(3) as we know it, for both the government and exempt organizations.

A court reviewing a challenged regulation is free, under *Loper Bright*, to substitute its own judgment and not that of the regulation's as to the meaning of the statutory language. Results of such judicial review will be difficult to predict or anticipate. Moreover, under this approach to statutory interpretation, we can expect frequent disagreements over the appropriate interpretation of statutory language. Consider, for example, what different reviewing courts might conclude in reviewing a new or old regulation as to fundamental public policy, racial discrimination in education, or substantial illegal purpose, none of which clearly reflects statutory text. As Cass Sunstein has written, "It seems safe to predict under *Loper Bright*, ideological differences within courts of appeals will increase in cases involving agency interpretations of law. Those differences, compressed by *Chevron*, will decompress."[258]

Under *Loper Bright*, courts may uphold agency interpretations even in the absence of explicit delegations of authority. *Loper Bright* recognizes the persuasive power of at least some of the factors enumerated in *Skidmore v. Swift*.[259] Citing *Skidmore*, the Court in *Loper Bright* observed that the "interpretations and opinions" of the relevant agency, "made in pursuance of official duty" and "based upon . . . specialized experience," "constitute[d] a

authorized under the regulations, Rev. Rul. 69-545, 1969-2 C.B. 117, adopted the community benefit standard. Congress has since codified the community benefit standard in I.R.C. § 501(r).

[254] *See* Richard L. Schmalbeck, *Treasury Regulations Defining "Charity": If Only*, at 40 (2015) (final version of a paper presented at the 2015 Major Conference of the NYU National Center on Philanthropy and Law), https://ncpl.law.nyu.edu/wp-content/uploads/2016/08/Tab-B-Schmalbeck-paper.pdf [https://perma.cc/U6N5-G3MP].

[255] Prop. Reg. § 1.501(c)(3)-1(d), 21 Fed. Reg. 460 (Jan. 21, 1956).

[256] *The Concept of Charity*, I.R.S. 4, https://www.irs.gov/pub/irs-tege/eotopicb80.pdf [https://perma.cc/QN7H-J7LY].

[257] Prop. Reg. § 1.501(c)(3)-1(d), 24 Fed. Reg. 1,421 (Feb. 26, 1959).

[258] *See* Sunstein, *supra* note 249, at 1912.

[259] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

body of experience and informed judgment to which courts and litigants [could] properly resort for guidance," even on legal questions."[260]

Skidmore itself refers not only to "a body of experience and informed judgment," but also "thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements."[261] Even if courts accept *Loper Bright*'s invitation to consider those factors,[262] the fate of the current section 501(c)(3) regulations remains uncertain. Their history fails to satisfy any of these criteria. We know nothing of the kind of consideration or reasoning that led to their adoption. Although later pronouncements have long relied on these 1959 regulations, those from 1924 to 1959 used the narrow, popular definition of "charity" as the relief of poverty, rather than the broader legal one.[263] Any new regulations that change these 1959 regulations would also be vulnerable because of inconsistency with the current, longstanding regulations and all the guidance that has relied on them over the past 65 years.

Understandably, the reaction of tax-exempt organizations has focused on the substance of recent administration pronouncements. Developments in administrative law have received little attention. But these developments further destabilize the ground on which our understanding of exemption under section 501(c)(3) rests. At the same time, they offer grounds for challenging changes to them. Responses to threats of revocation must take them into account; their possible impact cannot be ignored.

VII. Conclusion

Tax-exempt organizations that differ from the administration as to the nature of civil society, the role of nonprofit tax-exempt organizations within civil society, and the law applicable to such organizations can expect challenges or, at least, intimations of challenges during the remainder of President Trump's second term. As described in this article, they have available a variety of statutory and constitutional arguments to counter attempts to deny, revoke, or suspend their exempt status. Section 4728 and the precedent of *Z Street* give judicial fora in which to air their disagreements. To the extent changes in applicable tax guidance take the form of proposed regulations, they can offer their views in comments. As happened when the

[260] *Loper Bright,* 603 U.S. at 388 (quoting *Skidmore*, 323 U.S. at 139-140 (citations omitted)).

[261] *Skidmore*, 323 U.S. at 140.

[262] "[T]he Court in *Loper Bright* offered only a few limited references regarding *Skidmore* as a doctrine, with little guidance regarding what judicial review under *Skidmore* ought to look like." Kristin E. Hickman, *Anticipating a New Modern* Skidmore *Doctrine*, 74 DUKE L.J. ONLINE 111, 111 (2025).

[263] *See* Schmalbeck, *supra* note 254, at 4.

Senate was considering H.R. 9495,[264] they can mount a campaign opposing new legislation. They can work together in other ways, including joining together in litigation. Nonprofit umbrella groups,[265] large nonprofits with available resources, and nonprofit law firms with constitutional law expertise will play an important role in shaping responses to these threats. In short, organizations that are singled out for examination are not powerless. More generally, understanding not only the limits and vulnerabilities of these doctrines but also the many available responses to potential challenges can help mitigate the widespread anxiety in the nonprofit sector.

[264] For example, a coalition of 354 organizations campaigned against H.R. 9495 when it was under consideration in the House. *See supra* note 186 and accompanying text.

[265] *See, e.g.,* Jessica Mendieta, *Nonprofit Advocacy in 2025*, National Council of Nonprofits, Dec. 16, 2025, https://www.councilofnonprofits.org/articles/nonprofit-advocacy-2025 [https://perma.cc/5RZF-Z9NX].