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The Prosperity Gospel and the Plight of the Poor: Considering increased financial accountability for tax exempt churches

Abstract

This paper seeks to examine the tax exempt status of churches, their lack of accountability, and the potential for abuse that exists as a consequence. It seeks to answer whether, on the basis of the public policy goals underlying the tax-exempt status, requiring churches to submit annual financial disclosures could provide a constitutional and effective means for 1) providing government accountability for religious organizations in order to ensure compliance with existing tax law; and 2) providing the public with information regarding the use of church funds and thus greater agency to church donors. The paper concludes that providing these minimally intrusive disclosure requirements will do more to protect religious liberty than it would to harm it.

The Prosperity Gospel and the Plight of the Poor: Considering increased financial accountability for tax exempt churches

Jonathan Murphy

I. Introduction

A. An Unusual Convergence of Worlds

She was a twenty-two-year-old single-mother who lived in a mud hut in the Morongole Mountains of North Eastern Uganda. As a subsistence farmer who did intermittent translation work for a local non-profit, she struggled to feed her son and could barely afford to send him to school. *He* on the other hand was a famous televangelist with a world-renowned ministry based in Texas.¹ He had a personal net worth of over \$40,000,000,² which funded his lavish lifestyle.³ His wealth was predominantly made as a consequence of his organization's message⁴ which promised material prosperity and even miraculous healings to all who would give

¹ See Benny Hinn Ministries (last visited Mar. 24, 2017) <https://www.bennyhinn.org>; see also BBB Business Review, Benny Hinn Ministries (last visited Mar. 24, 2017), <http://www.bbb.org/dallas/business-reviews/charity-national/benny-hinn-ministries-in-irving-tx-90023843/complaints#> (Benny Hinn Ministries is not accredited with the Better Business Bureau and has numerous unresolved and unanswered complaints against it).

² See Benny Hinn, Celebrity Net Worth (last visited Mar. 24, 2017) <http://www.celebritynetworth.com/richest-celebrities/benny-hinn-net-worth/> (describing his net worth at \$42,000,000).

³ See Tim Challies, The False Teachers: Benny Hinn (April 23, 2014) <http://www.challies.com/articles/the-false-teachers-benny-hinn>

[Benny Hinn] has also been widely criticized for his lavish lifestyle, which includes a private jet, a multi-million-dollar mansion, and regular stays at hotels costing thousands or tens of thousands of dollars per night. This extravagance led to United States Senator Chuck Grassley announcing that the United States Senate Committee on Finance would be investigating Hinn's ministry.

⁴ *Id.* (“...In this way he has manipulated countless people to give money to his cause, believing that giving money will be key to activating their miracle. Not a single one of Hinn’s miracles has ever been verified, though many have been proven to be temporary or false.”).

financially to his ministry in faith.⁵ His name was Toufik Benedictus Hinn, but the world had come to know him as “Benny” Hinn.⁶ Her name was Lokongo Josephine.

In 2009, Benny Hinn boarded his Texas ministry’s Gulfstream jet to fly to Uganda to hold a Miracle Crusade in the capital.⁷ He hoped to draw tens of thousands of believers from across the country.⁸ In order to gain entry to his miracle crusade, Benny Hinn charged attendees 110,000 Ugandan shillings or \$50.⁹ According to the Ugandan pastor hosting him, Robert Kayanja, those who attend Benny Hinn’s conferences could expect that they would receive “economic gain” and

⁵ See Benny Hinn Ministries, *Breaking the Back of Poverty* (last visited Mar. 24, 2017) (“What kind of a future do you want? What seed are you willing to sow? What assignment are you placing on that seed? What kind of harvest are you expecting?... Be part of this unusual harvest season! What can you give today as a seed? \$1,000? \$500? \$250? \$100? Whatever it is, assign your seed. Then believe for a major impact in your life! Sow your best seed today! Giving is the key to breaking the back of poverty! Sow your best seed-gift today and begin to expect a financial breakthrough!”).

⁶ See Benny Hinn Ministries, *About Pastor Benny* (last visited Mar. 24, 2017) <https://www.bennyhinn.org/biography/>.

⁷ See Conan Busingye, *Benny Hinn arrives in Uganda for crusade* (June 6, 2009), http://www.newvision.co.ug/new_vision/news/1242728/benny-hinn-arrives-uganda-crusade; see also David Kuo, *Benny Hinn in Uganda*, HUFFINGTON POST (Feb. 18, 2008) http://www.huffingtonpost.com/david-kuo/benny-hinn-in-uganda_b_87235.html (describing the Gulfstream jet acquired by Benny Hinn through solicitations prior to his trip to Uganda); see also Mark Babineck, *Ministry Solicits to Pay for Jet*, HOUSTON CHRONICLE (Dec. 16, 2006) <http://www.chron.com/news/houston-texas/article/Ministry-solicits-to-pay-for-jet-1849427.php> (quoting Benny Hinn, “Long ago I said, ‘I will go, Lord. Send me!’ But I cannot do it without you, nor can I do all our wonderful Lord has called me to do without Dove One!”).

⁸ See William Lobdell, *The Price of Healing*, LA TIMES (July 27, 2003), <http://articles.latimes.com/2003/jul/27/magazine/tm-benny30> (His followers pack stadiums here and abroad for his free events called “Miracle Crusades.” He conducts about 24 of these each year, traveling in a leased Gulfstream jet. Attendance averages 50,000 to 60,000 people over two days, with a crusade in Kenya two years ago drawing 1.2 million worshippers, organizers say.”); see also Busingye supra note 7 (“THOUSANDS of Christians have thronged Rubaga Miracle Centre to attend a crusade by renowned evangelist Benny Hinn, who jetted into the country Friday morning. The crusade dubbed “fire conference” will end today with two sessions, at 10:00am and 7:00pm. By 8pm the crowd was estimated at 8,000.”).

⁹ See Ntegye Asiimwe, *Thou shalt not come to the Lord empty-handed*, NEW VISION (June 8, 2009) http://www.newvision.co.ug/new_vision/news/1242601/thou-shalt-lord-handed (“Those who wished to fellowship with Pastor Benny Hinn over the weekend had to pay \$50 (about sh110,000)!...In Ankole, there is a common saying that ‘œbya busha na Mulago bikahwayo’ (Even at Mulago hospital, there is no free treatment anymore). It is interesting that worshippers have to pay money to receive the Word of God.”).

“spiritual change” from their experience.¹⁰ Lokongo Josephine saw a poster¹¹ advertising Benny Hinn’s “Fire Conference” in the trading center near her village and decided that, as a person of faith, she would like to experience the wealth and healing that he was offering. She took out her first loan from the newly established bank at the district center so that she could pay to make the trip, attend the event, and donate money to Benny Hinn’s ministry. She believed in him enough to make the journey and pay the equivalent of what she would make in a uniquely prosperous four months. Regrettably, upon returning to Kaabong after the spiritual euphoria and promise of future prosperity, her already difficult economic situation worsened and with the increased burden of repaying her loan, she had to pull her son out of school entirely. Benny Hinn, on the other hand boarded his Gulfstream jet and flew to South Africa and the DRC where he held similar events before returning to the United States.¹² Upon his arrival in the United States he spoke on a television show lamenting to its host that he had only raised \$1,000,000 at the event in Uganda saying, “Most people are poor in Africa and it affected the recent crusades.”¹³

¹⁰ See Joyce Namutebi and Flavia Nakagwa, *Uganda: Expect Great Miracles at Benny Hinn’s Crusade- Kayanja*, ALL AFRICA (May 16, 2007), <http://allafrica.com/stories/200705170060.html> (describing Kayanja’s comments regarding the expectations for Benny Hinn’s 2007 Miracle Crusade in Uganda); see also Pastor: Expect great miracles at Benny Hinn crusade (May 17, 2007) <http://www.religionnewsblog.com/18284/benny-hinn-5>.

¹¹ See David Kuo, Benny Hinn in Uganda, HUFFINGTON POST (Feb. 18, 2008) http://www.huffingtonpost.com/david-kuo/benny-hinn-in-uganda_b_87235.html (showing a poster in a clinic similar to the one seen by Lokongo Josephine).

¹² See Conan Busingye, Benny Hinn Lost sh4b in Uganda, NEW VISION (July 1, 2009) http://www.newvision.co.ug/new_vision/news/1241230/benny-hinn-lost-sh4b-uganda.

¹³ *Id.*

B. An illustration of the problem

The unfortunate reality is that Lokongo Josephine's story is not uncommon. Her's is the consequence of a religious organization that has exported a domestic message popularly dubbed the "prosperity gospel" which has been shown to disparately target and harm the poor globally.¹⁴ Benny Hinn is not its only proponent. While the stark contrast of these two world's intersecting may not surprise everyone, the fact that Benny Hinn and other "prosperity gospel" ministers¹⁵ are operating their ministries as tax-exempt churches gives reason for us to pause and ask– is this what Congressional legislators had in mind when they granted tax exempt status to religious organizations? Surely not.

Though important religious freedom concerns prevent the US government from favoring or dis-favoring religious organizations like Benny Hinn Ministries, the harm that they cause should lead us to ask whether or not the original legislative purposes underlying the tax exempt status and exemption from

¹⁴ See Kareem Abdul-Jabbar, Prosperity Gospel Is War on the Poor, TIME MAGAZINE (June 8, 2015) <http://time.com/3912366/kareem-abdul-jabbar-prosperity-gospel/> ("According to a survey for TIME magazine, those who embrace the prosperity gospel tend to be African Americans, evangelicals and those less educated.") (referencing the TIME magazine survey available at <http://content.time.com/time/magazine/article/0,9171,1533448,00.html>); see also SHAYNE LEE, PROSPERITY THEOLOGY: T.D. JAKES AND THE GOSPEL OF THE ALMIGHTY DOLLAR. 57 CrossCurrents 2 at 227–236 (2007) ("Prosperity theology's answer to poverty is to teach people to build up their faith and be aware of biblical promises. Such a new worldview was appealing to the growing black middle class and especially attractive to all poverty-stricken minorities stretching for a glimmer of hope."); see also Bradley Aaron Koch, The Prosperity Gospel and Economic Prosperity: Race, Class, Giving, and Voting (2010) <https://scholarworks.iu.edu/dspace/handle/2022/8654>; see also Paivi Hasu, World Bank & Heavenly Bank in Poverty & Prosperity: The Case of Tanzanian Faith Gospel, 33 Review of African Political Economy 110, 679-692 (Dec. 13, 2006).

¹⁵ See Sarah Posner, Creflo Dollar's Gulfstream for God? Creflo Dollar's Scam Hurts Taxpayers, CNN (Mar. 16, 2015) <http://www.cnn.com/2015/03/16/opinions/posner-creflo-dollar-gulfstream/> ("Creflo Dollar's ... [p]reaching the word of faith, or "prosperity gospel," and capitalizing on lax government oversight of his church's finances has enriched Dollar and his family to the detriment of his followers and the American taxpayer.").

accountability enjoyed by churches are still justified. Furthermore, if they are still justified, what can be done without infringing on people's freedom of religion, to provide greater accountability to religious organizations in the hopes of ensuring that congregant donors are adequately informed as they give and that churches are held to current tax laws regulating lawful tax exempt conduct. Though requiring registration of churches for tax exempt status would likely violate First Amendment establishment and free exercise protections, it may be time to require more in the way of accountability from churches in order for them to remain tax-exempt.

This paper seeks to examine the tax exempt status of churches, their lack of accountability, and the potential for abuse that exists as a consequence. It seeks to answer whether, on the basis of the public policy goals underlying the tax-exempt status, requiring churches to submit annual financial disclosures could provide a constitutional and effective means for 1) providing government accountability for religious organizations in order to ensure compliance with existing tax law; and 2) providing the public with information regarding the use of church funds and thus greater agency to church donors. The paper concludes that providing these minimally intrusive disclosure requirements will do more to protect religious liberty than it would to harm it.

II. The Prosperity Gospel and the plight of the poor

The Prosperity Gospel, the fundamental message of what has been popularly dubbed "prosperity theology"¹⁶ promises that in whatever measure you give

¹⁶ See David W. Jones, 5 Errors of the Prosperity Gospel, The Gospel Coalition (June 5 2015) <https://www.thegospelcoalition.org/article/5-errors-of-the-prosperity-gospel> (quoting James Goff,

financially to the church you will receive both spiritual and material blessing back from God.¹⁷ As Benny Hinn has published on his website, “Giving is the key to breaking the back of poverty! Sow your best seed-gift today and begin to expect a financial breakthrough!”¹⁸ These ministries are often led by televangelists seeking to spread a broad net through their television shows and travel circuit.¹⁹ They have been prominently featured on Preachers of L.A.²⁰ and were the subject of John Oliver’s scorn in his recent video for promising “miracles in exchange for aggressive donations.”²¹ In the YouTube video, which drew a great deal of attention to the extravagant and predatory operations of these organizations, Oliver noted, “this is about churches who exploit people for monetary gain.”²² Describing the prosperity

Christianity Today (1990) (describing prosperity theology as treating God like “kind of ‘cosmic bellhop’ attending to the needs and desires of his creation.”).

¹⁷ Kareem Abdul-Jabbar *supra* note 14 (“Yet, that is the line — that God wants believers to be wealthy and that giving donations could improve your wealth — that some proponents of the so-called prosperity gospel have been selling.”).

¹⁸ Benny Hinn Ministries *supra* note 5.

¹⁹ Lobdell *supra* note 5 at 1 (“From his broadcast center in Orange County, Hinn's "This Is Your Day" show is one of the most-watched Christian TV programs in the world, with viewers in 190 countries. In the U.S., it runs on purchased air time more than 200 times each week on 80 stations, ministry officials say. The shows are translated into Spanish, Romanian, Norwegian, Italian, Hindi and Tamil.”).

²⁰ See Jennifer LeClaire, Is ‘Preachers of LA’ Making a Mockery of the Gospel?, Charisma News (June 23, 2014 2:00PM) <http://www.charismanews.com/culture/44401-is-preachers-of-la-making-a-mockery-of-the-gospel>

A group that calls itself Christians Against Preachers of L.A. launched a petition on change.org against the show last year, but that didn't stop the show's success. The petition complained: "Biblical prosperity is not about wealth building. This is a poor representation of the Kingdom of God. These preachers' lifestyles are NOT promoting Christ[-like] ethos but rather their cars, homes, relationships and their justification on why they want viewers to see them as having fleshly desires as everyone else does.

²¹ See Abby Ohlheiser, Comedian John Oliver takes on the prosperity gospel by becoming a televangelist, Washington Post (Aug. 17, 2015) https://www.washingtonpost.com/news/acts-of-faith/wp/2015/08/17/comedian-john-oliver-takes-on-the-prosperity-gospel-by-becoming-a-televangelist/?utm_term=.631b4f0879c5.

²² See John Oliver, Televangelists: Last Week Tonight (August 16, 2015) https://www.youtube.com/watch?time_continue=26&v=7y1xJAVZxXg (highlighting Kenneth Copland and Mike Murdock’s church fundraising for personal extravagance, and more recently Creflo Dollar’s fundraising campaign to buy a \$65 million dollar private jet).

gospel in his video, Oliver notes that it espouses the view that “wealth is a sign of God’s favor and donations will result in wealth coming back to you.”²³ The fundamental promise is that God intends for his people to prosper materially and that through their financial giving they can tap into what proponents call the “Law of Compensation.”²⁴ This theological position instructs believers to “[g]ive \$10 and receive \$1,000; give \$1,000 and receive \$100,000.”²⁵ The guarantee is that attending ministry events, making financial donations to prosperity gospel ministries, or purchasing e-store products like “anointed” prayer shawls, oils, or cloths will provide a change in spiritual position and an even more substantial financial return.²⁶ These ministries lean heavily on biblical passages such as 2 Corinthians 8:9 which reads, “For you know the grace of our Lord Jesus Christ, that though he was rich, yet for your sakes he became poor, that you through his poverty might become rich.” Rather than interpreting this in a spiritual sense or as granting a peripheral benefit of faith, granting material riches is championed as the primary mission of Jesus.²⁷ This message has received ridicule from many prominent people of faith. One well-known evangelical theologian, John Piper, described his “hatred”

²³ *Id.*

²⁴ See DAVID WAYNE JONES & RUSSELL S. WOODBRIDGE, HEALTH, WEALTH & HAPPINESS: HAS THE PROSPERITY GOSPEL OVERSHADOWED THE GOSPEL OF CHRIST? at 65 (2011).

²⁵ See *id.*; see also GLORIA COPELAND, GOD’S WILL IS PROSPERITY (2012).

²⁶ Benny Hinn Ministries, Anointed Messiah Prayer Shawl (last visited Mar. 25, 2017) <https://www.bennyhinn.org/shop/prayer-2/messiah-prayer-shawl/> (available for \$120 USD plus shipping).

²⁷ Sarah Eekhoff Zylstra, The Story Behind John Piper’s Most Famous Attack on the Prosperity Gospel (Feb. 14, 2017), <https://www.thegospelcoalition.org/article/5-errors-of-the-prosperity-gospel> (John Piper’s second most viewed YouTube video “is a 10-minute feature on why he abominates that theology.”)

for the prosperity gospel in the following terms in his most viewed YouTube sermon clip of all time,²⁸

It is not the gospel, and it's being exported from this country to Africa and Asia, selling a bill of goods to the poorest of the poor: "Believe this message, and your pigs won't die and your wife won't have miscarriages, and you'll have rings on your fingers and coats on your back." That's coming out of America—the people that ought to be giving our money and our time and our lives, instead selling them a bunch of crap called "gospel."²⁹

The number of views John Piper's YouTube video has received demonstrates the relevance of the message in America today. While the message is scorned by many people of faith, it is also beloved by many others for its promise of material prosperity in exchange for financial gifts. The prominence of these ministries in American life is further demonstrated by the fact that John Oliver's piece on these prosperity gospel churches is also one of his more-watched YouTube videos, having been seen close to 14,000,000 times since August of 2015.³⁰ One revelatory point in his video expose involves a clip of prosperity gospel preacher, Mike Murdock encouraging donors, who want to see their credit card debt wiped out, to give \$1,000 in faith on the very same credit card. He goes on to say "As you use your faith, God

²⁸ Matthias Lot, John Piper and the Prosperity Gospel, YOUTUBE (Dec. 5, 2007) available at https://www.youtube.com/watch?v=PTc_FoELt8s.

²⁹ *Id.*

³⁰ Oliver *supra* note 13.

is going to wipe out your credit card indebtedness.”³¹ Oliver laments that “all of this would be amusing if the targets of these messages were not often vulnerable people like Bonny Parker.”³² He goes on to explain that Mrs. Parker chose to forego medical treatment after being promised by Kenneth Copeland’s ministry that she would find healing if she donated enough money in faith.³³ Her story is similar to Lokongo Josephine’s who believed that her donation of money would be tied to a benefit that was never realized. She, like Lokongo Josephine, gave in faith to a church she believed in; to a church that “takes in about \$100 million a year in revenue”³⁴ and which is suspected by Congress of gaming their tax exempt status to shelter for-profit businesses.³⁵

The popularity of this message and the tax exempt status of its proponents is particularly troubling because, as John Oliver and John Piper both highlight, there is a growing abundance of research demonstrating that these ministries target and harm the poor with their message whilst enriching church leaders.³⁶ TIME

³¹ Oliver *supra* note at 6:00.

³² *Id.* at 6:50.

³³ *Id.* at 7:00 (explaining that the message of these ministries is that the more you give the better chance you have of being healed).

³⁴ Laura Strickler, Church Bylaws Show —Control Freak|| Televangelist, at http://www.cbsnews.com/stories/2008/04/21/cbsnews_investigates/main4033537.shtml.

³⁵ See Letter to Sen. Grassley from Theresa Pattara & Sean Barnett United States Senate Committee on Finance at 28 (Jan. 6, 2011) <https://www.finance.senate.gov/imo/media/doc/SFC%20Staff%20Memo%20to%20Grassley%20re%20Ministries%2001-06-11%20FINAL.pdf> (“Multiple —assumed or —doing business as names were also used. For example, we found at least 21 —assumed names registered with the State of Texas for Eagle Mountain International Church [also known as Kenneth Copeland Ministries]. These included record companies and recording studios. This raises the question of whether church status is being gamed to shield such activities of a tax-exempt entity from public scrutiny.”).

³⁶ See Bradley Aaron Koch, *The Prosperity Gospel and Economic Prosperity: Race, Class, Giving, and Voting* (2010) <https://scholarworks.iu.edu/dspace/handle/2022/8654>; see also Paivi Hasu, World Bank & Heavenly Bank in Poverty & Prosperity: The Case of Tanzanian Faith Gospel, 33 *Review of African Political Economy* 110, 679-692 (Dec. 13, 2006).

Magazine, for example, has reported that poor minorities are those most likely to contribute to and be taken advantage of by prosperity gospel ministries.³⁷ This religious buy-in for financial blessing is not unlike the lottery, where predominantly poor minorities (61%) contribute in hope of making a windfall.³⁸ The significant difference however is that unlike prosperity gospel churches, the lottery is taxed and highly regulated.³⁹ And that is the problem raised in this paper.

The purpose of highlighting Prosperity gospel ministries is to illustrate the necessity for increased governmental accountability for tax exempt churches if the legislative policy goals underlying the tax exempt status are to be accomplished. This paper is not suggesting that all prosperity gospel churches are predatory or are using funds for private inurement. Rather, the purpose of identifying prosperity gospel churches specifically is to illustrate the present inability of the government and donors to hold many churches accountable to existing tax laws regarding the way that funds are used. The risk of abuse in the form of private inurement or the operation of for-profit business enterprises exists in many other churches as well.

³⁷ See Kareem Abdul-Jabbar *supra* note 14.

³⁸ *Id.* (According to a 2011 study, “Gambling on the Lottery: Sociodemographic Correlates Across the Lifespan,” the highest rate of lottery gambling (61%) came from those in the lowest fifth of socioeconomic status, concluding that “males, blacks, Native Americans, and those who live in disadvantaged neighborhoods” were more likely to play.); *see also* Stephen Gandel, Where the Money From the \$1.5 billion Powerball Lottery Goes, *Fortune* (Jan. 13, 2016) <http://fortune.com/2016/01/13/where-the-money-from-the-1-5-billion-powerball-lottery-goes/> (“Indeed, several studies show that, in general, the bulk of lottery tickets are bought by lower-income Americans.”)

³⁹ See Stephen Gandel, Where the Money From the \$1.5 billion Powerball Lottery Goes, *Fortune* (Jan. 13, 2016) <http://fortune.com/2016/01/13/where-the-money-from-the-1-5-billion-powerball-lottery-goes/> (Of the \$1.5 billion Powerball, “over \$900 million, goes to state governments, which gets allocated to each state based on their percentage of ticket sales, for government spending. Each state decides how to spend its lottery revenue. And education is by far the most commonly chosen recipient of these funds.”)

The point in naming prosperity gospel churches specifically is that they are publically known for their use of tax exempt funds in the financing of the extravagantly lavish lifestyles of their founders.

III. The Tax-Exempt status of churches

While the overlap of Benny Hinn and Lokongo Josephines' stories may not surprise those who recognize the unfortunate existence of predatory religious organizations, their tax exempt status should give us pause. Benny Hinn's jet, his church credit cards, his travel expenses, and his housing allowance are all tax exempt under current American tax law and are not subject to normal audit procedures.⁴⁰ We must ask whether more accountability should be demanded if such exemptions are to be enjoyed.

A. Features of churches' unique tax exempt status

Churches in the United States are uniquely situated in relation to other non-profit/tax exempt organizations. Even the broader designation of "religious organization" brings more significant tax accountability than that endured by churches—namely none⁴¹. Section 501(c)(3)(c) exempts newly formed churches from applying for tax exempt status as any other newly organized nonprofit would be required.⁴² A church may simply open their doors one day and claim the tax exempt

⁴⁰ Memo to Michael D. Clark, Governance Summary at 3–4 (Sept. 10, 2008), <https://www.finance.senate.gov/imo/media/doc/Hinn%20letter%20on%20reforms.pdf>.

⁴¹ Barring extremely unique circumstances. See I.R.C. § 7611(a)(1)–(2).

⁴² See Tax Reform Act of 1969, Pub. L. No. 91–172, 83 Stat. 487, 519–23; see also Special rules with respect to section 501(c)(3) organizations, 26 U.S. Code § 508 (2006) (508(a), (c)(1)(A) "New organizations must notify Secretary that they are *applying for recognition* of section 501(c)(3) status...*Except as provided in subsection (c)*...Exceptions (1) Mandatory exceptions—Subsection [] (a) *shall not apply to— churches, their integrated auxiliaries, and conventions or associations of churches...*") (Emphasis added).

status on the next without an application,⁴³ government evaluation of their status as a church,⁴⁴ or confirmation that they are an actual non-profit organization.

Beyond not being required to apply for 501(c)(3) tax-exempt status, churches are also unique among 501(c)(3)'s in that they are relieved from filing annual informational returns with the Service.⁴⁵ This means that churches are not required to make any financial disclosures in order to maintain their tax exempt status. This is particularly troubling where one of the main concerns surrounding non-profits is that of private inurement,⁴⁶ or “the private enrichment of the officers, directors, and founders....”⁴⁷ For example,

⁴³ See Tax Guide for Churches & Religious Organizations, Internal Revenue Service, Publ. 1828 at 2 (2015) (“Churches that meet the requirements of IRC Section 501(c)(3) are automatically considered tax exempt and are not required to apply for and obtain recognition of tax-exempt status from the IRS.”).

⁴⁴ Courts may evaluate whether the “church” sincerely holds their religious beliefs, though this is rarely employed. See General Counsel Memorandum 36993 (1977)

We have concluded that the proper rule as reflected by the above cases is that in the absence of a clear showing that the beliefs or doctrines under consideration are not sincerely held by those professing or claiming them as a religion, the Service cannot question the ‘religious’ nature of those beliefs...The symbols of religion to one are anathema to another. What one may regard as charity another may scorn as foolish waste.

⁴⁵ I.R.C. § 6033(a)(2)(A)(i).

⁴⁶ See H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1111–1113, reprinted in 1984 U.S. Code Cong. & Admin. News 1445, 1801.; see also *Hearde v. Commissioner*, 421 F.2d 846 (9th Cir. 1970); *United States v. Holmes*, 614 F.2d 985 (5th Cir. 1980).

⁴⁷ See Tax Guide for Churches & Religious Organizations, Internal Revenue Service, Publ. 1828 at 5 (2015)

Churches and religious organizations, like all exempt organizations under IRC Section 501(c)(3), are prohibited from engaging in activities that result in inurement of the church’s or organization’s income or assets to insiders (such as persons having a personal and private interest in the activities of the organization). Insiders could include the minister, church board members, officers, and in certain circumstances, employees. *Examples of prohibited inurement include the payment of dividends, the payment of unreasonable compensation to insiders and transferring property to insiders for less than fair market value.* (emphasis added); see also Reka Potgeiter Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 Va. Tax Rev. 71 (1991).

[I]n an effort to enforce the inurement limitation, the Service requires exempt organizations to report on their annual information return (Form 990) the compensation (including fringe benefits and reimbursements) of officers...and key employees...Applying the inurement limitation to churches is difficult because they are exempt from the usual information reporting requirements generally applicable to exempt organizations and they enjoy special protection from audits. The situation is ripe for abuse.⁴⁸

The prospect of abuse in the absence of external accountability is particularly present where tax exempt churches operate as founder-centric organizations with minimal internal accountability in the manner that Benny Hinn and other prosperity gospel ministries often do.⁴⁹

Furthermore, according to the U.S. tax code, churches are not subject to the same auditing requirements shouldered by other non-profit tax exempt organizations. Under I.R.C. § 7611 churches are exempt from the traditional accountability of government audits barring extreme circumstances in which there would have to be a “reasonable belief” that the church is either not a church or is

⁴⁸ James J. Fishman & Stephen Schwarz, *Nonprofit Organizations Cases and Materials* 2d, University Casebook Series 502–503 (Foundation Series 2000); *see also* I.R.C. §§ 6033; 7611.

⁴⁹ Grassley Releases Review of Tax Issues Raised by Media-based Ministries (Jan. 6 2011).<http://www.grassley.senate.gov/news/news-releases/grassley-releases-review-tax-issues-raised-media-based-ministries> (“[Senator] Grassley wrote to six media-based ministries in November 2007, based on requests for review from members of the public who wrote to him because of his previous tax-exempt oversight work... Four ministries either did not provide any information or provided incomplete information.”); *see also* Memo to Michael D. Clark, Governance Summary 3 (Sept. 10, 2008), <https://www.finance.senate.gov/imo/media/doc/Hinn%20letter%20on%20reforms.pdf> (showing that Benny Hinn personally selected the organization’s board members for years demonstrating a lack of internal accountability).

carrying on unrelated business activities.⁵⁰ Even then, the audit is subject to cumbersome restrictions related to notice, time constraints, and what can be accessed.⁵¹ Churches currently enjoy the benefit of tax exempt status without entry vetting and without subsequent reporting. This creates a situation that is easily taken advantage of by unscrupulous religious leaders.

B. The policy justifications for the tax exempt status of churches

The current function of predatory prosperity gospel ministries would likely seem counter to any imagined policy objectives which might justify the tax exempt status afforded to churches; but what were the actual policy objectives of Congress in granting this preferred tax status to churches and are those objectives justified today?⁵²

In American law, one of the first recorded exclusion of churches from financial reporting and tax audits came as late as 1909 when they were uniquely excluded from a federal excise tax.⁵³ This exclusion was based on “the finding by Congress that religious corporations did not have net income in excess of charitable donations.”⁵⁴ The legislative history surrounding the Corporate Excise Tax Act of

⁵⁰ I.R.C. § 7611(a)(1)–(2).

⁵¹ *Id.* § 7611(a)(3), (b)–(f) (showing that the bulk of the code provision is dedicated to the limitations on any audit faced by a church).

⁵² *See* Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983) Section 501(c)(3) therefore must be analyzed and construed within the framework of the Internal Revenue Code and against the background of the congressional purposes. Such an examination reveals unmistakable evidence that, underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common law standards of charity -- namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.

⁵³ *See* Ch. 6, § 38, 36 Stat. 11, 112.

⁵⁴ Hoff *supra* note 8 at 5.

1909 reveals that the legislators granted the status and privileges based on two major considerations 1) churches utilize their proceeds for benevolent and charitable purposes that were found to significantly lessen the burdens of government;⁵⁵ and 2) churches could be trusted to ensure that they used their funds for “charitable” purposes rather than for private inurement.⁵⁶ Historically, the tax exempt status enjoyed by churches, and their exemption from the usual financial reporting and tax audits, was based, not on principles of religious freedom, but on their acknowledged role in society as essential public service organizations.⁵⁷

[I]t was not the religious character of churches that initially was the policy basis for the exemption from tax and from financial accountability. It was the recognition of the utility and the necessity of religious charity for public welfare at a time when neither the state nor the federal government provided poor relief out of public funds.⁵⁸

The example of Trinity Church in New York City during the 1909 Congressional session is an oft cited example of the legislator’s public policy motivations for

⁵⁵ See 44 Cong. Rec. 4150 (1909) (granted to those who are “devoted exclusively to the relief of suffering, to the alleviation of our people, and to all things which commend themselves to every charitable and just impulse.”); see, e.g. 461 U.S. 574, 614–615 FN 19 (“Congress intended . . . to offer a tax benefit to organizations . . . providing a public benefit.”); see also H.R.Rep. No. 1860, 75th Cong., 3d Sess., 19 (1938) (“[T]he Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds.”).

⁵⁶ See 44 Cong. Rec. 4150-51 (1909); see, e.g. 55 Cong. Rec. 6728 (1909) (“For every dollar that a man contributes for these public charities, educational, scientific, or otherwise, the public gets 100 per cent.”).

⁵⁷ See H.R. Rep. No. 1860, 75th Cong., 3d Sess., 19 (1938) (“The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare.”).

⁵⁸ Hoff *supra* note 8 at 6.

granting tax exempt status to churches and for shielding them from accountability measures shouldered by other tax exempt organizations. While a critical reader would question the assumptions made by the legislators, it is, nonetheless revelatory of the convictions at the time. What follows is a Congressional exchange regarding the New York church and the tax exempt status of all churches more generally:

Mr. DEPEW. I wish to make a very brief explanation in regard to Trinity Church. It is *not organized for profit*, nor in the usual acceptance of the meaning of that word does it receive any profits. It had a grant of land in the colonial period, which in the growth of New York has given it a valuable property that has a large earning power, but *no one doubts or disputes but that that property is administered with honesty and with ability, and every dollar of the income is devoted to charitable, religious, and educational purposes. There is not a single penny that goes to any individual in the way of profit or distribution of dividends.*

Mr. HALE. Let me ask the Senator from New York a question. I was waiting for his statement with reference to this Trinity corporation. I understand that it has never ceased to be a religious and benevolent association.

Mr. DEPEW. It is wholly that.

Mr. HALE. It is not doing business for profit, but *all of the avails of its business and its real estate belonging to the*

church association are distributed for benevolent purposes.

Mr. BACON. It occurred to me that in this partial levy of tax, where we are seeking to reach a certain class of wealth, we very properly except those institutions and those enterprises which have *no element of personal gain in them whatever, and which are devoted exclusively to the relief of suffering, to the alleviation of our people, and to all things which commend themselves to every charitable and just impulse.*⁵⁹

This exchange illustrates well the two original justifications for the exemption from tax and accountability measures: 1) that a church's provision of charity served the public good in a way that justified leaving them to enjoy every bit of their income and 2) that they could be trusted to not use funds for anything improper.⁶⁰ It could be argued that these justifications do not hold water today based on the significant shift in poverty alleviation from private to public programs and the understanding that churches cannot, as was seemingly presumed in the early 20th century, be blindly trusted to act lawfully.

However, around 1969 there was a shift in this reasoning. Rather than basing the unique tax exempt status of churches on their benevolent charity and purportedly innate trustworthiness, policy makers began establishing it on religious

⁵⁹ See 44 Cong. Rec. 4150 (1909) (retrieved from Hoff supra note 8 at 5) (Emphasis added);

⁶⁰ See Sharon Ottermon, Trinity Church Split on How to Manage \$2 Billion Legacy of a Queen NY Times (April 21, 2013) <http://www.nytimes.com/2013/04/25/nyregion/trinity-church-in-manhattan-is-split-on-how-to-spend-its-wealth.html> (Note additionally, that this same Trinity Church was in the news in 2013 for infighting regarding how its now \$2 billion legacy should be spent. Lawsuits were even filed calling for greater financial accountability from the church. "The church agreed with one complaint in the lawsuit: Mr. Bates's assertion that he should be entitled to see the church's financial statement.")

freedom/ separation of church and state grounds. The argument became one which focused on the notion that the power to tax was the power to destroy and any taxation or accountability would be unconstitutional entanglement which would violate the free exercise clause of the First Amendment.⁶¹ In the Tax Reform Act of 1969 the Senate pivoted in its justifications for the accountability exemptions from focusing on the necessity of their charitable practices and their innate trustworthiness to arguments based on religious freedom.⁶²

The Senate [shifted] the basis for the exemption from return filing for church-related religious organizations from absence of likelihood that such organizations would have net income in excess of the cost of providing religious and charitable services to a concern for the separation of church and state...This [was a] shift in the rationale from absence of likelihood of accumulated profit to First Amendment considerations.⁶³

This shift seemingly imbued exemptions with a more unassailable defense than the conditional assumptions that churches were always charitable with their excess and could be blindly trusted to do what was right and just. This position and its implications are explored further below.

⁶¹ See *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 674 (1970) (“We must also be sure that the end result the effect is not an excessive government entanglement with religion.”).

⁶² See Reka Potgeiter Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 *Va. Tax Rev.* 71, 84 (1991).

⁶³ *Id.* at 84.

C. Objections to the current features of the tax exempt status available to churches

While some decry the tax-exempt status of churches altogether on establishment clause grounds, the strongest objection to the current function of churches' tax exempt status concerns the lack of any legitimate accountability mechanism to enforce existing tax requirements. If, we are told that the ability of a church to accept donations tax-free rests, in part, on the way that those funds are used,⁶⁴ then there *must* be an adequate mechanism for ensuring that there is no use of funds for the unlawful purposes of private inurement or for-profit business. No such mechanism currently exists. As mentioned previously, the ability for the IRS to audit a church is severely handicapped by restrictions that do not exist for any other form of tax exempt organization.⁶⁵ This has led to a situation which, as mentioned above, is "ripe for abuse." This problem has been pointed out by many commentators.

[a] church officer who dips into the collection plate may be held accountable on Judgment Day, but what about a reckoning in this life? . . . The ability of the attorneys general of the various states or of church members to regulate the fiscal decisions of the church's cooperate

⁶⁴ See Tax Guide for Churches & Religious Organizations, Internal Revenue Service, Publ. 1828 at 5 (2015) (for example, "net earnings may not inure to the benefit of any private individual or shareholder").

⁶⁵ I.R.C. § 7611(a)(1)–(3)

directors or officers is mired in statutory limitations and constitutional questions. As a result, religious corporations are largely self-regulated.⁶⁶ Not only can the government not know whether the churches are operating lawfully, in many cases, the donors themselves have no way of knowing.⁶⁷ This complaint over a lack of accountability is strengthened by the reality that the government is giving up revenue, not only by granting tax exempt status to churches, but by granting tax deductions to their donors.⁶⁸ Once again, the motivations for the government's action can be readily understood on grounds of wanting to "encourage[] charitable giving."⁶⁹ However, one of the main expressed purposes in allowing donors a tax deduction for their charitable giving is to "aid in the accomplishment of many social goals which our federal and local governments otherwise cannot or will not accomplish."⁷⁰ This is significant because, similar to the origin of the tax exempt status for churches, the tax deduction available to donors for charitable giving is also premised on an assumption that the funds are being utilized for a societal good and not for nefarious purposes.⁷¹ Section 170 of the I.R.C. establishes that in order for a donation to be tax deductible it must be given to a

⁶⁶ Catherine M. Knight, *Must God Regulate Religious Corporations? A Proposal for Reform of the Religious Corporation Provisions of the Revised Model Nonprofit Corporation Act*, 42 EMORY L. J. 721, 721 (1993).

⁶⁷ *Id.*

⁶⁸ See J. Martin Burke & Michael K. Friel, *Taxation of Individual Income* 11d at 602 (2015) (describing charitable deductions and the tax deductions available to individuals giving to qualified recipients).

⁶⁹ *Id.* ("By assuming part of the cost of a charitable gift, the government encourages charitable giving.")

⁷⁰ *Brinley v. Commissioner*, 782 F.2d 1326 (5th Cir. 1986) (Hill, J., dissenting).

⁷¹ See J. Martin Burke & Michael K. Friel, *Taxation of Individual Income* 11d at 602 (2015).

“qualified recipient.”⁷² The “qualified recipient” standard, similarly to the §501(c)(3) restrictions, establishes strict prohibitions on both private inurement in § 170(c)(2)(C) and the use of funds for for-profit business enterprises in § 170(c)(2)(B).⁷³ “The various requirements of § 170 which must be met before an entity will qualify as an appropriate recipient of contributions reflect congressional concern that deductible contributions be limited to those which will be used for genuinely charitable purposes.”⁷⁴ Where no means of accountability exist⁷⁵ to ensure that funds are 1) not being used to enrich certain individuals and that 2) funds are being “used for genuinely charitable purposes”, the public has cause for concern. This is particularly true where there are such public demonstrations of churches where the poor are targeted and the founders are personally enriched. This is contrary to the original public policy goals of both the tax exempt status for churches and tax deductions for their donors. Where the government chooses to exempt an organization from paying taxes and further grants a deduction to a donor that would otherwise be taken from them, the government is, in effect, becoming a partner “in supporting the charitable enterprise.”⁷⁶

For example, a taxpayer in a 39.6% tax bracket who contributes \$1,000 to a [church] will, as a result of the tax deduction, only be out-of-pocket

⁷² *Id.* at 603.

⁷³ I.R.C. § 170(c)(2)(B)–(C) (describing the limitations on types of organizations to which tax deductible charitable donations can be made).

⁷⁴ Burke, *supra* note 43 at 603.

⁷⁵ *See Morey v. Riddell*, 205 F.Supp. 918 (S.D.Cal. 1962) (contributions to church held deductible under IRC 170 despite the church’s lack of a distinctive name or organizing document other than the Bible (for religious reasons), permanent headquarters, comprehensive set of records, and bank account designated as the church account).

⁷⁶ *See* Burke at 602.

\$604, i.e., the \$1,000 charitable deduction will reduce the taxpayer's liability by \$396. The other \$396 received by the [church] may be viewed as the government's contribution in the nature of foregone tax revenue.⁷⁷

For many, this is the basis for an establishment of religion/separation of church and state argument that the government ought not grant a tax exemption to churches at all. However, the argument needn't be taken to that extreme for this view of a tax deduction (as a type of "government[] contribution"⁷⁸) to illustrate the government's legitimate interest in ensuring that the funds are, minimally, not being used unlawfully. On this basis it could be argued further that the government has a legitimate interest in ensuring that the funds be used to accomplish the expressed policy objectives of the legislature.⁷⁹ As the Code currently stands the government and donors are poorly equipped to provide accountability from churches and can only hope that donations will be spent responsibly. The Lokongo Josephines and Bonnie Parkers of the world are those who consequently suffer at the hands of these organizations the most, with needless poverty in one case and untimely death in the other. Though the government may not be able to restrict the message of prosperity gospel churches because of legitimate religious freedom concerns, it can ensure that these ministries are abiding by the other statutory requirements for retaining their status as tax exempt organizations. It is the I.R.C. requirement that funds be used

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See General Counsel Memorandum 36993 (1977); see also Restatement (Second), Trusts § 377 (1959) ("[A]n organization must conform to basic principles of charity law to qualify for recognition of exemption under Code § 501(c)(3). Thus, for example, its organizational documents cannot authorize it to engage, nor can it engage, in activities that are illegal or contrary to clearly defined public policy.").

lawfully and the glaring absence of accountability mechanisms to ensure the lawful use of funds that makes the strongest case for adjusting the unique features of tax exempt status for churches, if their tax exempt status is to be saved at all.

IV. A Proffered solution and Constitutional Concerns

In 1977, Representative Charlie Wilson introduced H.R. 41, in response to a particularly egregious church scandal known historically as the Pallottine scandal.

The Pallottine scandal in Baltimore provides a ... graphic example of the type of abuse which disclosure statutes may prevent. In 1976 it was revealed that of the \$20 million raised in contributions by this Roman Catholic order less than four cents of each dollar was spent on the charitable purposes for which donations were solicited. The Pallottines' annual direct mail fund raising campaign advertised that "money donated will be used to support Pallottine missions in underdeveloped countries around the world."⁸⁰

This revelation led many legislators to acknowledge the massive hole in the I.R.C., i.e., unique accountability exemptions enjoyed by churches.⁸¹ H.R. 41, in response, was proffered as a solution with the narrow intention of requiring "the furnishing of certain information in connection with the solicitation of charitable contributions by mail."⁸² The disclosure requirements would not exclude churches and were

⁸⁰ Bruce J. Rakay, & Roger P. Sugarman, A Reconsideration of the Religious Exemption: The Need for Financial Disclosure of Religious Fund Raising and Solicitation Practices, 9 Loy. U. Chi. L. J. 863, 864 (1978).

⁸¹ *Id.* at 864 (Though it was concluded by many that, "in the absence of an exemption, insurmountable constitutional difficulties would be encountered.").

⁸² See H.R. 41, 95th Cong., 1st Sess. (1977); see also Bruce J. Rakay, & Roger P. Sugarman, A Reconsideration of the Religious Exemption: The Need for Financial Disclosure of Religious Fund

serious.⁸³ Not only would the mailings have to contain specific explanations regarding what the funds donated would be used for with proofs of how similar funds had been used in prior years, the soliciting organization would be required to provide within 30 days of a request, “pertinent financial information reasonably sufficient to verify any information included in the solicitation.”⁸⁴ This proposal never took off because churches and religious organizations formed a self-policing entity known as the Evangelical Council for Financial Accountability (ECFA).⁸⁵ While no church is required to join the ECFA it provides a system of accountability and transparency among its members that mirrors the self-policing of the legal community. However, because membership is voluntary, the churches most likely to abuse their tax exempt status and to prey upon vulnerable members of society are

Raising and Solicitation Practices, 9 Loy. U. Chi. L. J. 863, 865 (1978) (“The Wilson bill [was] the only federal proposal which, if enacted with its present provisions, would not exempt religious organizations from the disclosure requirements incumbent upon secular charities soliciting by means of the U.S. mails.”).

⁸³ *Id.* at 5 ([T]he bill:

Requires charitable organizations which solicit, by any means, the remittance of a contribution by mail to include with such solicitation: (1) the legal name and principal address of the organization; (2) the purpose of the solicitation and intended use of the contribution; (3) the obligation of the organization to furnish the information required by this Act; and (4) the percentage of all such contributions remaining for direct application to charitable purposes, after deducting total administrative costs, during the most recent complete fiscal year, or in some cases the fiscal year preceding such fiscal year.

Directs that all of the above information be transmitted, whether in writing or by radio or television, conspicuously in a non-technical, readily understandable manner. Requires that such organization furnish, upon request, such audit reports, accounts, or other information as the Postal Service may require to establish or verify the information included in the solicitations.

Requires such organizations to furnish within 30 days to anyone who has been solicited and so requests, pertinent financial information reasonably sufficient to verify any information included in the solicitation.

Sets forth the method by which such organizations with outside income may distribute administrative costs.).

⁸⁴ *Id.*

⁸⁵ *Id.* at 6.

not likely to join⁸⁶ (only one of the six, Joyce Meyer Ministries, joined the ECFA after the investigation mentioned below).⁸⁷

Senator Wilson's bill, and others like it seeking to address the gaping lack of financial accountability, have raised Constitutional concerns surrounding the First amendment. On the one hand are those who argue that the establishment clause of the First Amendment ought to be interpreted to disallow tax exempt status for churches altogether. Proponents of this position would argue that the establishment clause, should not only erase the exceptions from tax accountability enjoyed by churches, but the tax exempt status of churches should be nixed entirely.⁸⁸ The argument goes that by conferring a unique benefit on churches, which would not be available to non-religious groups, the state is engaged in the establishment of religion. This interpretation of the establishment clause requires that the government not enable the operation of churches in any way.⁸⁹ This interpretation has by-and-large been rejected by the Courts. The sentinel case on this issue is *Walz v. Tax Commission of New York* in which the Supreme Court soundly rejected the use of the establishment clause to prevent tax exemption for churches.

⁸⁶ *Id.* at 3 (“While the majority of churches and religious organizations operate with policies and procedures that make them accountable to their members, it is the small minority that don’t that are subject to scrutiny by the members and the public, including the press.”).

⁸⁷ *Id.* at 1 (Joyce Meyer Ministries also became a member of the Evangelical Council for Financial Accountability in March, 2009.).

⁸⁸ Oliver *supra* note 18.

⁸⁹ *Contra* Arthur D. Hellman, William D. Araiza, FIRST AMENDMENT LAW: FREEDOM OF EXPRESSION & FREEDOM OF RELIGION 3d (Regarding Madison and the debate surrounding the Bill of Rights “[H]e saw the amendment as designed to prohibit the Establishment of a national religion...He did not see it as requiring neutrality on the part of the government between religion and irreligion...None of the other members of Congress who spoke out during the debate expressed the slightest indication that they thought the language before them...would require that the government be absolutely neutral as between religion and irreligion.”).

There is no genuine nexus between tax exemption and establishment of religion. The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.⁹⁰

On the other extreme, there are those who argue that the establishment clause of the First Amendment, when read in tandem with the free exercise clause, requires that churches both retain their tax exempt status and be protected from the accountability mechanisms faced by other non-profits. The argument on this side goes that in order to avoid unconstitutional government entanglement with religion, churches must be left alone entirely. It is argued that churches are unique under the Constitution because of the articulated religious freedom protections clearly outlined in the First Amendment. And, as such, churches are justifiably treated differently from non-religious groups. This position has been adopted in the current Internal Revenue Code, controversially so where it exempts churches from normal accountability mechanisms, including auditing and reporting requirements.⁹¹

This paper seeks to thread the needle between each of those positions by arguing that the Constitution 1) protects the tax exempt status of churches and even some of their exemptions from levels of scrutiny endured by non-religious organizations; but 2) allows for some measure of accountability in order to ensure

⁹⁰ 397 U.S. 664, 675–76 (1970).

⁹¹ I.R.C. § 7611(a)(1)–(3).

compliance with other laws (specifically tax laws in this context). There is an abundance of case law to support this more “middle of the road” suggestion.

First, the Constitution protects the tax exempt status of churches and even some of their exclusions from the level of scrutiny endured by non-religious organizations.⁹² This is seen first, by the fact that religious freedom is distinguished from other freedoms (even freedom of speech) in the First Amendment.⁹³ The founders intended for religious freedom to be treated differently by affording it unique protection.⁹⁴ The state may neither establish a particular religion or prohibit the free exercise thereof. These protection establish, not a state which swears off religious conviction, but one that sets it apart as something worth unique protection.⁹⁵ The establishment clause means first of all that the government must not differentiate between religions, giving preference to some over others based on their beliefs. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics,

⁹² See *McGlotten v. Connally* 338 F. Supp. 448, 457-58 (D.D.C. 1972) (adopting the “position that provisions of the Internal Revenue Code that can be explained as ‘pure tax policy’ are not aid (for either statutory or constitutional purposes)”).

⁹³ See U.S. Const. art. III (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”); see also KENNETH IRA KERSCH, *FREEDOM OF SPEECH: RIGHTS AND LIBERTIES UNDER THE LAW* at 16 (2003) (“Contemporary constitutional doctrine often treats free speech rights and the right to freely exercise one’s religion as distinct and separate rights.”).

⁹⁴ See Arthur D. Hellman, William D. Araiza, *FIRST AMENDMENT LAW: FREEDOM OF EXPRESSION & FREEDOM OF RELIGION* 3d (Regarding Madison and the debate surrounding the Bill of Rights “[H]e saw the amendment as designed to prohibit the Establishment of a national religion...He did not see it as requiring neutrality on the part of the government between religion and irreligion...None of the other members of Congress who spoke out during the debate expressed the slightest indication that they thought the language before them...would require that the government be absolutely neutral as between religion and irreligion.”).

⁹⁵ *Id.*

nationalism, religion, or other matters of opinion...The articulation of the Supreme Court in foreclosing judicial inquiry into the truth or falsity of religious beliefs is equally applicable to judicial inquiry as to the content of religious beliefs.”⁹⁶

According to the Supreme Court, this remains true even where the religious beliefs espoused might seem absurd to most. The Supreme Court noted in *West Virginia Board of Education v. Barnette*, in the context of affirming the right of students to not pledge allegiance to the flag on religious grounds, that “The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if these doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When triers of fact undertake that task, they enter a forbidden domain.”⁹⁷ This is true even of prosperity gospel churches who preach a message that is not only “incredible” but abominable for the ways in which it takes advantage of the poor while enriching the preacher. The First Amendment prevents the government from giving preference to or penalizing any particular church based on what it believes, requiring a position of neutrality from the government as between religions or churches.⁹⁸ Such protection from differentiation does not exist for non-religious organizations under the First Amendment.

This protection for churches is applicable in the tax context as well. In *A. A. Allen Revivals, Inc., v. Commissioner*, the Tax Court held that they were “not free to

⁹⁶ *West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 640–642 (1943).

⁹⁷ *See Id.*

⁹⁸ *Walz*, 397 U.S. 664, 669 (1970).

distinguish between or to approve or disapprove of one form or expression of religious faith.”⁹⁹ With regard to the decision of whether or not the entity receiving the tax exemption is in fact a church, the I.R.S. is left with little discretion. “[I]n the absence of a clear showing that the beliefs or doctrines under consideration are not sincerely held by those professing or claiming them as a religion, the Service cannot question the ‘religious’ nature of those beliefs...The symbols of religion to one are anathema to another. What one may regard as charity another may scorn as foolish waste.”¹⁰⁰ As such, the I.R.S. is not intended to be in the business of evaluating or closely scrutinizing the beliefs or conduct of churches. The risk involved in taxing churches or subjecting them to the registration requirements of other non-profits is that it positions the government to intrude on their free exercise. The choice language used in *Walz v. Tax Comm’n of City of New York* explicitly decries the risk of “excessive government entanglement with religion.”¹⁰¹ The primacy of freedom of religion in America makes the risk of government intrusion/regulation untenable. “Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.”¹⁰² Furthermore, should the government be in a position to grant or deny the tax exempt status through the registration process required of other non-profits,

⁹⁹ 22 CCH Tax Ct. Mem. 1435 (1963).

¹⁰⁰ *Id.*; see also *Watson v. Jones*, 80 U.S. 679, 728 (1871) (“The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”).

¹⁰¹ 397 U.S. 664, 674 (1970).

¹⁰² See *id.*; see also John Witte, Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties* at 256 (2000) (The Court argues that such interactions will result in an unconstitutional “entanglement” between church and state.).

there would be a direct risk of preference between religions or churches and, therefore, the establishment of religion. This would present an unwarranted risk of “excessive government entanglement.”

Second, the Constitution allows for some measure of accountability in order to ensure compliance with other laws. This is seen most fundamentally in the fact that the free exercise of religion clause cannot be interpreted to be a blanket authorization for people of religious faith to violate other sections of the Constitution.¹⁰³ For example, speaking to polygamy laws, the Supreme Court notes in *Reynolds v. United States*, “[i]n holding that religious belief did not except persons from operation of the statute, the Court said: while they [laws] cannot interfere with mere religious belief and opinions, they may with practices...Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive good order.”¹⁰⁴ This furthers the suggestion above that while spiritual practices may not be criticized for their theology, they may none the less be addressed where there practices unlawfully violate “social duties or are subversive to good order.”¹⁰⁵ This same principal was again articulated by the Supreme Court in 1890. “While continuing to affirm the right to freedom of religious belief, the Court nevertheless held that legislation for the punishment of acts ‘inimical to the peace, good order and morals

¹⁰³ See Sanford Levinson & Steven Mailloux, *Interpreting Law and Literature* at 29 (1991) (“Where there is ambiguity as to the precise meaning or reach of the Constitution, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.”)

¹⁰⁴ 98 U.S. 145, 164, 166 (1878).

¹⁰⁵ See *id.*

of society' did not violate the First Amendment."¹⁰⁶ The case law establishes therefore that religious freedom, though dearly protected, is not an absolute right which is entirely untouchable by the government. "The First Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."¹⁰⁷ If this were not the case, sincere religious adherents could incorporate pedophilia into their worship ceremonies and the government would be helpless to intervene. While this is an extreme example, it illustrates that the free exercise clause doesn't free churches entirely from their duty to abide by the laws of the United States. Private individual's free exercise of religion, for example, has never been held to be violated by the obligation that individuals have to report their income to the I.R.S. for tax purposes. Similarly, the free exercise of churches is not clearly violated by the suggestion that a church's tax-relevant financial documents be made available. This is particularly true where the purpose would be the enforcement of existing law: to ensure that they are not violating the prohibitions on private inurement or for-profit business enterprise provisions of the I.R.C. Describing the difficulty of avoiding entanglement with religion, the Supreme Court in *Walz* stated,

It is always possible to shrink from a first step lest the momentum will plunge the law into pitfalls that lie in the trail ahead... The prospect of difficult questions of judgment in constitutional law should not be the

¹⁰⁶ General Counsel Memorandum 36993 (1977), quoting *Mormon Church v. United States*, 136 U.S. 1 (1890).

¹⁰⁷ *Cantwell v. Connecticut*, 310 U.S. 296, 303–4 (1940).

basis for prohibiting legislative action that is constitutionally permissible.¹⁰⁸

The position that any and all mechanisms for financial accountability from tax exempt churches must be avoided rests on a fear that even the smallest of requirements would yield to greater government intrusion in the future. But could there be a way to ensure the enforcement of existing laws for tax exempt churches while also avoiding unconstitutional intrusions on the free exercise of religion?

V. A Proposal

In 2007 a Senate inquiry into the tax exempt status of religious organizations led to requests for financial disclosures from six prosperity gospel ministries David & Joyce Meyer, Creflo & Taffi Dollar, Bishop Eddie Long, Kenneth & Gloria Copeland, Randy & Paula White, and Benny Hinn.¹⁰⁹ Sen. Chuck Grassley, the ranking member of the Committee on Finance described the inquiry saying,

I'm following up on complaints from the public and news coverage regarding certain practices at six ministries. The allegations involve governing boards that aren't independent and allow generous salaries and housing allowances and amenities such as private jets and Rolls Royces. I don't want to conclude that there's a problem, but I have an obligation to donors and the taxpayers to find out more. People who donated should have their money spent as intended and in adherence

¹⁰⁸ Walz, 397 U.S. 664, 699–700.

¹⁰⁹ See Kent Garber, *Investigating Televangelists Finances* (Feb. 15, 2008), <https://www.usnews.com/news/national/articles/2008/02/15/investigating-televangelist-finances>.

with the tax code.¹¹⁰

It was made clear that the investigation was not into church doctrine but tax compliance.¹¹¹ Though only two of the ministries fully cooperated,¹¹² the result of the call for accountability from Benny Hinn was striking.¹¹³ This meager one-time call for transparency by Congress led to significant internal institutional shifts in the way that the church spent their money and made financial decisions.¹¹⁴ For example, without additional Congressional pressure, the organizational leadership of Benny Hinn's ministry decided to require an independent board be established rather than the puppet boards he had hand-selected previously.¹¹⁵ Benny Hinn's compensation would subsequently have to be reviewed by an independent group to ensure reasonableness and his personal use of church cars, planes, and credit cards would be more closely scrutinized by the church.¹¹⁶ Though not a fundamental

¹¹⁰ See Grassley Seeks Information from Six Media-based Ministries, United States Senate Committee on Finance (Nov. 6, 2007) <https://www.finance.senate.gov/ranking-members-news/grassley-seeks-information-from-six-media-based-ministries>.

¹¹¹ See Kent Garber, Investigating Televangelist Finances, US News and World Report (Feb. 15, 2008), <https://www.usnews.com/news/national/articles/2008/02/15/investigating-televangelist-finances> ("This has nothing to do with church doctrine," he said in a statement. "This has everything to do with [whether] the tax exemption of an organization is being used according to the law; and is the money that's donated...being used for legitimate, nonprofit purposes?"); see also Grassley, Baucus Urge Four Ministries to Cooperate with Information Request, United States Senate Committee on Finance (March 12, 2008) <https://www.finance.senate.gov/release/grassley-baucus-urge-four-ministries-to-cooperate-with-information-request> ("The Committee conferred with the Senate Legal Counsel to ensure that the letter was well within the scope of the authority of the Committee and that it does not infringe upon First Amendment rights.").

¹¹² See Grassley, Baucus Urge Four Ministries to Cooperate with Information Request, United States Senate Committee on Finance (March 12, 2008) <https://www.finance.senate.gov/release/grassley-baucus-urge-four-ministries-to-cooperate-with-information-request>.

¹¹³ See generally Memo to Michael D. Clark, Governance Summary (Sept. 10, 2008), <https://www.finance.senate.gov/imo/media/doc/Hinn%20letter%20on%20reforms.pdf>.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 4.

¹¹⁶ *Id.* at 3–4.

alteration of the predatory methods of the church or its lavish (non-religious/non-charitable) expenditures, this call for some measure of transparency immediately led to internal institutional adjustment that would enable congregants and donors to be more confident regarding how their donations were being utilized.¹¹⁷ In the letter from Benny Hinn Ministries to Senator Grassley after the investigation Benny Hinn himself notes that,

Although I might not have invited this far reaching examination of our ministry I do believe it has made us...ultimately more accountable to our congregants, members, and partners. Accordingly, this exercise has caused us to look more closely at the manner in which we have conducted business and has heightened an awareness of self-reforms.¹¹⁸

This “self-reform” was also implemented by the other cooperating church, Joyce Myer Ministries, in response to the investigation.¹¹⁹ No action was taken against any of the six ministries, including the four that failed to cooperate.¹²⁰ The United States Senate Committee on Finance opted to forgo any further suggestion of increased regulation but did determine that it was necessary to restate the

¹¹⁷ *Id.* at 1-2

¹¹⁸ Letter to Senator Grassley from Benny Hinn Ministries (Sept. 9, 2008) <https://www.finance.senate.gov/imo/media/doc/Hinn%20letter%20on%20reforms.pdf>.

¹¹⁹ Letter to Sen. Grassley from Theresa Pattara & Sean Barnett United States Senate Committee on Finance at 1 (Jan. 6, 2011) <https://www.finance.senate.gov/imo/media/doc/SFC%20Staff%20Memo%20to%20Grassley%20re%20Ministries%2001-06-11%20FINAL.pdf> (“The reforms undertaken by Pastor Hinn and Joyce Meyer are extensive and are to be commended.”).

¹²⁰ Grassley Releases Review of Tax Issues Raised by Media-based Ministries, United States Senate Committee on Finance (Jan. 6, 2011) <https://www.finance.senate.gov/ranking-members-news/grassley-releases-review-of-tax-issues-raised-by-media-based-ministries> (“The challenge is to encourage good governance and best practices and so preserve confidence in the tax-exempt sector without imposing regulations that inhibit religious freedom or are functionally ineffective.”).

enduring source of their concerns.

Note that each of the six —ministries classifies itself as a —church. As a result, they did not have to file a Form 1023, Application for Recognition of Tax-Exemption, and do not have to file a Form 990, Return of Organization Exempt from Tax, with the Internal Revenue Service (IRS).¹²¹

The rest of their statement further indicated that through their own investigation they were able to determine that “there are multiple for-profit and non-profit entities related to each church... The number and types of entities, including private airports and aircraft leasing companies, raises concerns about the use of the church’s tax-exempt status to avoid taxation.”¹²² The problem was very real and yet, no action was taken to increase the level of scrutiny over church finances to levels borne by other tax exempt non-profits.

However, it is significant to point out that the mere request for information prompted significant institutional changes in the two churches that complied, and the investigation into the four churches who didn’t cooperate reinforced the concerns that initiated the study.¹²³ After this investigation, many complaints regarding churches abusing their tax exempt status poured in from the public with many focusing on church “fundraising practices, particularly those that targeted the

¹²¹ Letter to Sen. Grassley from Theresa Pattara & Sean Barnett United States Senate Committee on Finance at 1–2 (Jan. 6, 2011) <https://www.finance.senate.gov/imo/media/doc/SFC%20Staff%20Memo%20to%20Grassley%20re%20Ministries%2001-06-11%20FINAL.pdf>.

¹²² *Id.* at 2.

¹²³ *See Id.*

sick and elderly.”¹²⁴

The reality of the problem was affirmed. These organizations were likely using their tax exempt status to both prey upon vulnerable members of society for their own private inurement and were operating for-profit businesses tax-free with no way for the IRS to know under current law.¹²⁵ But the investigation not only reaffirmed the problem; it disclosed a potential solution. Simply asking for basic financial disclosure statements could have a powerful impact on institutional self-reform. And yet, no recommendation was made to make financial disclosures of the nature requested in this investigation requisite for remaining tax exempt. In 1987 Congressman Dorgan asked a question that remains relevant today and goes to the heart of this paper,

What kind of accountability is now required; what kind of information is required...is it available to allow those to whom the appeal for funds is directed to make reasonable decisions about the advisability of contributions?¹²⁶

A. A financial disclosure requirement proposal

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ Letter to Sen. Grassley from Theresa Pattara & Sean Barnett United States Senate Committee on Finance at 3 (Jan. 6, 2011) <https://www.finance.senate.gov/imo/media/doc/SFC%20Staff%20Memo%20to%20Grassley%20re%20Ministries%2001-06-11%20FINAL.pdf>; quoting Federal Tax Rules Applicable to Tax-Exempt Organizations Involving Television Ministries: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 100th Cong. 8 (1987)).

Though it has been demonstrated that there is value in allowing churches to remain tax exempt and that requiring them to apply for the status would likely violate free exercise concerns under the First Amendment, requiring minimal financial reporting appears to be a reasonable and necessary means for providing accountability. The financial reporting requirement could be satisfied by the very same annual 990 financial disclosure form used by other tax exempt non-profits which could then be made available to the public upon request. Note that it is not being suggested that the government require the registration of churches for tax exempt status, church membership in accountability organizations, intrusive financial disclosure requirements from churches, or similar auditing to other tax exempt organizations. The disclosure forms would not be evaluated to determine that the churches were charitable in their giving; only that they were not using tax exempt funds unlawfully under existing law.

B. What would this proposal accomplish?

This proposal is intended to require the least intrusive form of financial reporting in order to ensure that churches are acting in conformity with the very tax laws that confer upon them tax exempt status. This kind of productive solution to a difficult balancing of interests problem is consistent with *Walz* which allowed for “play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”¹²⁷ The

¹²⁷ *Walz*, 397 U.S. 664, 702 (1970) (“The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed

reality is that the tax exempt status of churches is bolstered rather than harmed by this minimally intrusive accountability mechanism. Where John Oliver's perspective on the abuses the tax exempt status by prosperity gospel churches leads him to decry the tax exempt status of churches altogether,¹²⁸ this proposed accountability mechanism provides churches who are not violating private inurement or for-profit-enterprise prohibitions to come forward and demonstrate that they are not abusing their tax exempt status. This is in the interest of churches in the same way that if one was implicated in a crime and possessed exculpatory evidence, they would want to disclose it. If they fail to, they may needlessly jeopardize their freedom. It is a crime to use churches as tax havens, and yet society is currently left to blindly hope that church leaders are following the law. As public opinion seems to shift away from protecting the tax-exempt status of churches and religious freedom more broadly,¹²⁹ this simple form of "walking in the light" can only further the goal of protecting religious liberty. In the words of the Apostle Peter, "Keep your conduct among the Gentiles [the world] honorable, so that when they speak against you as evildoers, they may see your good deeds and glorify God on the day of visitation."¹³⁰

governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”).

¹²⁸ See John Oliver, *Televangelists: Last Week Tonight* (August 16, 2015).

¹²⁹ See U.S. Commission on Civil Rights *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties* at 29 (2016) (taking a decidedly anti-religious freedom position on how the establishment and free exercise clause should be understood “The phrases ‘religious liberty’ and ‘religious freedom’ will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance.”).

¹³⁰ 1 Peter 2:12, ESV; *see also* 1 Peter 3:16; *see also* 2 Corinthians 8:21; *see also* Titus 2:8; *see also* Matthew 5:16.

This minimal financial disclosure would provide a way for the government and donors to ensure that there is no private inurement and that the churches are not operating for-profit business enterprises. Congregants could give more confidently knowing that their churches are operating within the law and are not using their donations improperly. In the case of prosperity gospel churches, the effect of such a requirement could mirror what occurred in Benny Hinn's ministry after Senator Grassley's inquiry. Institutional reforms could take place where churches desire to retain their tax exempt status, recognize that they will have to demonstrate that they are not using their funds unlawfully, and realize that parts of their financials will be made available to the public. While a church could still choose to pay their pastor \$4,000,000 dollars per year, its congregants/donors would have access to that information rather than, under the current model, the church can pay the pastor \$100,000 per year and give them unaccountable access to church credit cards for personal use. In this way, donors will be better informed as they give.

This modest proposal would likely be politically feasible because it both increases church accountability and preserves the tax exempt status enjoyed by churches. The credibility of churches would be bolstered through such disclosures in a way that could potentially quell some of the antagonism directed at their tax exempt status. But the churches who are prone to abuse this system, even using it to target the poor, will no longer be able to hide any unlawful conduct. This would

strike a difficult but necessary balance between protecting religious liberty and pursuing justice in our enforcement of the tax code.

VI. Conclusion

Much of the prosperity gospel ministry conduct mentioned throughout this paper runs counter to the public policy goals of Congress in conferring tax exempt status and accountability exclusions to churches. In fact, the way in which they prey upon the poor and accumulate vast sums of untaxable wealth jeopardizes the viability of the tax exempt status of churches generally. They provide a strong illustration of why, if churches are to continue to remain tax exempt, minimally intrusive accountability measures should be introduced to demonstrate their compliance with tax law regarding private inurement and for-profit business enterprises. Implementing some form of financial reporting would have the positive effect of increasing transparency for the public, enhancing the credibility of the churches, and potentially safeguarding donors from abuse by predatory institutions. To preserve the tax exempt status of churches, an accountability mechanism should be introduced which will ensure compliance with United States tax law so that the government's goals in granting the status are not undermined by organizations seeking to take advantage of the holes in the system. Benny Hinn and Kenneth Copeland's right to preach their message should be preserved, as should Bonny Parker's right to forego cancer treatment to give money to their ministries. However, if their churches are going to be tax exempt, their finances should be

available to donors and reviewable by the government to ensure that they are not engaging in illegal conduct.