Ryan A. Kriegshauser
ryan@knlawgroup.com
Telephone: (913) 303-0639

MEMORANDUM

DATE: March 31, 2025

TO: The United State House of Representatives Committee on the Judiciary

FROM: Ryan A. Kriegshauser, Partner - Kriegshauser Ney Law Group

RE: God's Storehouse Topeka Church ("GSH") and the Weaponization of the Internal Revenue Service ("IRS")

I. SUMMARY

This matter involves the weaponization of the IRS by an anti-religious interest group. The IRS began its church examination of GSH after its Pastor, Rick Kloos, won his election to the Kansas Senate by defeating long-time Kansas Senate Minority Leader, Anthony Hensley. However, prior to the election, on September 24, 2020, the Freedom from Religion Foundation ("FFRF") filed a complaint with the IRS[1] alleging electioneering violations by the Kloos campaign. The FFRF posted a copy of its complaint on its website. Although the complaint is no longer linked on the FFRF website,[2] a copy is posted on www.soundthealarm.church.[3] The complaint enclosed screenshots of Pastor Kloos's campaign signs and erroneously stated that Pastor Kloos planned to hold a campaign event at another local church. The IRS has not produced this complaint or acknowledged its existence. Instead, the IRS has engaged in a years-long examination of GSH, involving litigation in Kansas[4] and Colorado,[5] including an appeal to the Tenth Circuit.[6] This litigation was started after GSH repeatedly cooperated with the IRS examination into its status as a church and provided numerous documents to the IRS throughout the examination despite the examination's obviously political impetus.

The litigation at issue involves the IRS administratively circumventing the requirements of the Church Audit Procedure Act ("CAPA"), 26 U.S.C. § 7611, by using third-party

[1] *See* "FFRF reports to IRS Kansas senatorial candidate's religious politicking," Freedom from Religion Foundation Website (Sep. 24, 2020) *available at* https://ffrf.org/news/news-releases/item/37917-ffrf-reports-to-irs-kansas-senatorial-candidate-s-religious-politicking?utm_source=SocialMedia&utm_medium=Twitter&utm_campaign=IRSKloosSeptember242020&utm_content=PR (last accessed Feb. 18, 2022).
[2] *See* "Page not Found" Freedom from Religion Foundation Website (Sep. 24, 2020) *available at* https://ffrf.org/uploads/luploads/legal/GodsStorehouseandAPlaceCalledThereChurchKS.pdf (last accessed Feb. 18, 2022).
[3] *Available at* https://soundthealarm.church/documents/FILE_0001.pdf (last accessed March 27, 2025).
[4] *God's Storehouse Topeka Church v. United States*, Case No. 22-MC-00046 (D. Col. 2022).
[5] *God's Storehouse Topeka Church v. United States*, Case No. 22-CV-04014 (D. Kan. 2022).
[6] *God's Storehouse Topeka Church v. United States*, 98 F.4th 990 (10th Cir. 2024).

summonses under 26 U.S.C. § 7609 and not requiring approval from an "appropriate high-level Treasury official" as required by CAPA and defined in 26 U.S.C. § 7611(h)(7). At a minimum, this excessively aggressive and immediately hostile examination at the behest of the FFRF constitutes weaponization of the federal agency by an anti-religious interest group. The Colorado litigation is still pending, and the Court has not ruled on a Motion for Limited Discovery into the relationship between the IRS and the FFRF, which has been pending for over two years. In all, this is a case-study on why CAPA must be amended and the close relationship between the FFRF and the IRS should be investigated.

II. FACTUAL BACKGROUND

A. GSH and the Klooses.

Rick and Pennie Kloos planted GSH in 2009. Alongside a small team of founding members, they envisioned a church that could transform the City of Topeka through radical, Christian generosity. GSH operates as a Bible-believing, Christian church with a congregation that regularly worships together. But the most impactful way GSH shares the good news of Jesus Christ to the Topeka community is through its thrift store. GSH elected to self-declare its status as a church and did not receive an IRS determination letter affirming its church status.

GHS operates a thrift store to further the biblical commandment to love thy neighbor. GHS's landing and home page[7] of its website prominently states: "God's Storehouse is a church that operates a thrift store . . . Our vision is to love God and love people; by doing so we hope to make a lasting impact in the community in which we serve." Through the thrift store, GSH partners with local churches and nonprofit organizations to provide free furniture, clothing, and household goods to people experiencing significant financial hardships or other challenging life situations. GSH also accepts donated goods and sells them at a reduced cost so that they can be recycled back into the community. Within the thrift store, GSH has a dedicated space to further its religious purposes and demonstrate Christian hospitality. In this space, GSH welcomes the local community and sells coffee and baked goods at cost to encourage people to join for fellowship, prayer, and encouragement.

The thrift store ministry is an outgrowth of GSH's core mission as a church: to spread the hope and love of Jesus Christ by meeting the physical needs of people in Topeka. This mission is consistent with Jesus's call in Matthew 25 to care for the sick, the poor, the disabled, and those in need because "whatever you did for one of the least of these . . . you did for me." Matthew 25:40 (NIV). This mission is also consistent with Christian churches and parachurch organizations throughout history and today. For example, the Salvation Army and many other tax-exempt churches and parachurch organizations engage in thrift store ministries.

Before planting GSH, Pastors Rick and Pennie Kloos served in pastoral ministry for decades. For many of their years as pastors, they engaged in bi-vocational ministry and worked other jobs alongside their pastoral positions. In 2019, Pastor Rick sensed a call to a more public role and launched a campaign for the Kansas Senate. In the midst of a closely contested race to unseat one of Kansas's longest-serving legislators, the Kloos campaign purchased yard signs

[7] *See* https://www.gshtopeka.org/ (last accessed Feb. 21, 2022).

identifying Rick Kloos as the "Founder of God's Storehouse." Pastor Rick's opponent gave an interview to the local newspaper, alleging that the signs violated the Tax Code.[8] The same week, the Freedom from Religion Foundation filed a similar complaint with the IRS.

B. The Examination.

On February 24, 2021, the IRS assigned Agent Kesroy Henry to investigate whether GSH engaged in impermissible political campaign intervention and whether a church tax inquiry was warranted. Agent Henry reviewed GSH's IRS records and the church website, as well as the aforementioned newspaper article that covered Pastor Rick's campaign and discussed the yard signs.

Based on this evidence, Agent Henry determined that a church tax inquiry was warranted and sought approval from Sunita Lough, who was then the Commissioner of the Tax Exempt and Government Entities ("TEGE") division. Agent Henry issued a Notice of Church Tax Inquiry ("NCTI") to GSH on June 23, 2021. The notice described four IRS concerns: (1) that GSH was operating as a thrift store rather than as a church, (2) that GSH may have engaged in prohibited political campaign intervention in 2020, (3) that GSH may be liable for unrelated business income tax ("UBIT") from operating a coffee shop in 2019 and 2020, and (4) that GSH may be liable for Form 941 employment taxes for wages paid to Pastors Rick and Pennie Kloos in 2019 and 2020. Sunita Lough signed the NCTI, affirming her reasonable belief that GSH may no longer be tax-exempt as a church and that GSH may be liable for tax. The NCTI directed GSH to respond to the IRS's four concerns and stated that the Service would close their inquiry if GSH's response was satisfactory.

GSH responded in writing to the concerns raised in the NCTI and proactively submitted supplemental documents. Among other materials, GSH provided letters from its insurer and banker at Kaw Valley Bank, attesting to the church's status as a church and importance in the community.

Just six days after GSH's response, Agent Henry sought approval to begin a church tax examination. On September 1, 2021, TEGE Commissioner Sunita Lough approved the examination, and Agent Henry issued a Notice of Church Tax Examination ("NCTE") on September 7, 2021. The NCTE identified the same four concerns as the NCTI.

GSH requested a pre-examination conference with Agent Henry and his manager, Viris Williams, in October 2021. Prior to the conference, GSH provided Agent Henry with a 12-page letter addressing in detail the IRS's four concerns, in particular the religious qualifications and activities of GSH as a church under federal tax law, supporting information for Pastor Rick and Pennie's clergy status, the application of UBIT to GSH's coffee sales, and relevant IRS guidance clarifying that the prohibition on political campaign activity does not apply to an individual's use of an organizational name for identification purposes. Once again, GSH also provided

[8] *See* Bahl, Andrew, "'I've Never Seen Anything like this': Kansas Senate Candidate under Fire for Mixing Religion, Politics," *Topeka Capital-Journal* (Sep. 25, 2020) *available at* https://www.cjonline.com/story/news/politics/state/2020/09/25/lsquoirsquove-never-seen-anything-like-thisrsquo-kansas-senate-candidate-under-fire-for-mixing-relig/114879660/ (last visited March 27, 2025).

approximately 30 pages of supplemental documents to provide evidence of its church status and all relevant federal tax laws.

Despite GSH's proactive efforts to resolve the IRS's concerns, the IRS determined that neither the conference nor GSH's responsive documents resolved any of their four concerns and issued an Information Document Request ("IDR") to GSH just five days after the conference. Agent Henry's IDR sought 18 categories of documents, including "Bank statements, i.e. checking, savings, PayPal, and investments, for the period of January 01, 2019 to December 31, 2020."

GSH objected to the IRS's assertion that it had a reasonable belief that GSH may not be a church and that GSH may have engaged in political campaign intervention. GSH also objected to the validity of the church inquiry and examination because the TEGE Commissioner is not an appropriate high-level Treasury official under the plain text of either § 7611(h)(7) or Treas. Reg. § 301.7611-1, Q&A-1.

Nevertheless, continuing its good faith effort to resolve the examination, GSH timely provided approximately 100 pages of additional responsive documents to Agent Henry. Notably, GSH provided all financial statements related to the sale of coffee and baked goods to enable the IRS to make a determination on UBIT liability. But GSH declined to provide its bank statements because the IRS's request was overly broad and did not satisfy the limitations imposed by 26 U.S.C. § 7611(b)(1), which specifies that the IRS may review books and records "only to the extent necessary" to determine liability under 26 U.S.C. § 7611(b)(1)(A) or (B).

Agent Henry declined to narrow his request for bank statements or satisfactorily describe how bank statements were necessary to address the IRS's four enumerated concerns.

C. The IRS Circumvents GSH's CAPA Objections through Third-Party Summonses.

Because GSH declined to provide its bank records unless and until the IRS complied with § 7611(b)(1), Agent Henry sought those same records through another means. On February 8, 2022, Agent Henry issued an exceedingly broad administrative summons to Kaw Valley Bank, seeking GSH's monthly bank statements among 14 enumerated categories of bank records. GSH filed in United States District Court for the District of Kansas to prevent compliance of the summons and enforce CAPA. This case was ultimately appealed to the Tenth Circuit. After the Tenth Circuit sided with the IRS by finding a third-party summons was not subject to CAPA and without reaching the arguments on the approval process, GSH allowed Kaw Valley Bank to release the records. However, the examination has continued despite this production.

In addition, rather than using the information voluntarily provided to allay its concerns, the IRS has issued another exceedingly broad summons to FISERV for GSH's financial information. GSH brought an action in the United States District Court for the District of Colorado to Quash the Summons under 26 U.S.C. § 7609(h). However, in this case, GSH requested limited discovery into the relationship between the FFRF and the IRS. After more than two years, this request has not been granted or denied and the case is still pending.

III. ISSUES WITH CAPA AS WRITTEN

A. CAPA Generally.

Congress has authorized the IRS to examine any relevant books, paper, records, or other data "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . ., or collecting any such liability." *United States v. Clarke*, 573 U.S. 248, 250 (2014) (*quoting* 26 U.S.C. § 7602(a)).

26 U.S.C. § 7602 grants the IRS authority to conduct examinations for these specific purposes and to issue summonses in furtherance of them. In particular, the IRS may summon the person liable for the tax or "any person having possession, custody, or care of books" of the person liable for the tax or otherwise deemed proper. 26 U.S.C. § 7602(a)(2). A summons issued to a person other than the taxpayer is known as a third-party summons and is subject to additional procedural requirements under 26 U.S.C. § 7609. 26 U.S.C. § 7609 further limits the IRS's authority to issue summonses to third parties in order to protect the rights of the taxpayers being examined.

Courts assess whether a summons was properly issued using four factors laid out in *United States v. Powell*, asking (1) whether the investigation is conducted pursuant to a legitimate purpose, (2) whether the inquiry may be relevant to that purpose, (3) whether the information sought is already within the IRS's possession, and (4) whether the IRS has followed all required administrative steps. 379 U.S. 48, 57-58 (1964).

Ordinarily, the administrative steps required under *Powell* are not onerous, and the IRS may meet its burden through a simple affidavit from the investigating agent. *See, e.g.*, *Clarke*, 573 U.S. at 254. However, both the type of summons and the type of examination at issue in this case impose a higher administrative burden on the IRS. Section 7609 requires the IRS to provide advance notice to taxpayers before serving a summons on a third party. And Section 7611 establishes heightened requirements that the IRS must complete *before beginning* an inquiry or examination of an organization claiming to be a church. *See* Prop. Reg. § 301.7611, REG-112756-09 (Aug. 5, 2009) (noting that § 7611 was enacted to impose special requirements "before the IRS could commence an investigation or inquiry into a church's tax liabilities."). Congress enacted these safeguards through the Church Audit Procedures Act, codified at 26 U.S.C. § 7611.

Congress enacted these requirements after *Powell* to explicitly curb the IRS's broad investigatory powers in the context of church tax audits. *See* Church Audit Procedures Act: Hearing Before the Subcomm. on Oversight of the I.R.S. of the S. Comm. On Finance, 98th Cong. 2 (1983) ("Hearing") (testimony of Rep. Mickey Edwards).[9] The IRS has agreed with these purposes and noted that the detailed statutory requirements in § 7611 should "reduce

[9] *Available at* https://www.finance.senate.gov/imo/media/doc/HRG98-481.pdf, pp. 13-25 (last accessed March 27, 2025).

misunderstandings between churches and the IRS and allow for a more stable and cooperative examination process."[10]

26 U.S.C. § 7611(a)(2) requires an appropriate high-level Treasury official to form a "reasonable belief" in the applicable investigative purposes prior to initiating a church tax inquiry or examination. This approval ensures that the "First Amendment rights of churches are not trampled in the government's zeal to collect revenue." *Hearing* at 2 (Statement of Sen. Grassley).[11]

B. CAPA Requires Amendment to Address the IRS' Reorganization in the 1990s.

IRS audits of organizations that are, or claim to be, churches proceed in two phases: first, a church tax inquiry and, second, a church tax examination. Under § 7611, the IRS may begin the inquiry phase only if an "appropriate high-level Treasury official" reasonably believes on the basis of facts and circumstances recorded in writing that the church (1) may not be exempt from tax as a church or (2) may be carrying on an unrelated trade or business or is otherwise engaged in activities subject to taxation. 26 U.S.C. § 7611(a)(2). The IRS may proceed to a church tax examination only if it fulfills the church tax inquiry administrative requirements and provides additional notice and conference opportunities to the church. *See* 26 U.S.C.§ 7611(b).

Congress defined an appropriate high-level Treasury official as "the Secretary of the Treasury or any delegate of the Secretary whose rank is no lower than that of a principal Internal Revenue officer for an internal revenue region." 26 U.S.C. § 7611(h)(7). The Treasury Regulations define this official as "the appropriate Regional Commissioner (or higher Treasury official)[.]" Treas. Reg. § 301.7611-1, Q&A-1. At the time of drafting, the statute and the regulations were clear that Regional Commissioners ***and higher officials*** could make this reasonable belief determination. *See United States v. Bible Study Time, Inc.*, 295 F. Supp. 3d 606, 621 (D.S.C. 2018) ("It is undisputed Section 7611(h)(7)'s reference . . . describes the now-abolished position of Regional Commissioner.") (emphasis added). And, at the time of enactment, four IRS positions satisfied the statutory requirements: the Secretary of the Treasury, the Commissioner of the Internal Revenue Service, a Deputy Commissioner, or a Regional Commissioner, who served as a principal Internal Revenue officer for an internal revenue region. *United States v. Living Word Christian Ctr.*, 08-37 ADM/JJK, 2008 U.S. Dist. LEXIS 106639, at *13-15, (D. Minn. Nov. 18, 2008), *adopted by, United States v. Living Word Christian Ctr.*, 08-37 ADM/JJK, 2009 U.S. Dist. LEXIS 6902 (D. Minn. Jan. 30, 2009).

Both the statute and regulations reflect Congress's intent to navigate the "inherent tension in church-state relations" by appointing a sufficiently high-level position to ensure a "heightened political and policy sensitivity for balancing the need for vigorous enforcement of our tax laws and the avoidance of excessive government intrusion into a church's exercise of religious freedom." *United States v. Living Word Christian Ctr.*, 08-37 ADM/JJK, 2008 U.S. Dist. LEXIS 106639 at *34-35, (D. Minn. Nov. 18, 2008), *adopted by, United States v. Living Word Christian*

[10] *See* 1985 EO CPE Text: P. Deficit Reduction Act of 1984: Church Audit Procedures at 1, available at https://www.irs.gov/pub/irs-tege/eotopicp85.pdf (last accessed March 27, 2025).
[11] *See, Supra*, Note 9.

Ctr., 08-37 ADM/JJK, 2009 U.S. Dist. LEXIS 6902 (D. Minn. Jan. 30, 2009). Both are also consistent with Congress's desire to provide appropriate and sufficient notice to churches prior to beginning a church tax inquiry or examination. *See* Hearing at 2.[12] Assurance that an appropriate high-level Treasury official has approved the examination protects churches from "capricious meddling" by IRS personnel. *Id.*

However, the IRS eliminated the Regional Commissioner position in 1998 following a congressionally mandated reorganization. *See* Internal Revenue Service Restructuring and Reform Act of 1998. At the time of the reorganization, Congress did not amend the definition of an appropriate high-level Treasury official in 26 U.S.C. § 7611(h)(7), and Treasury has not updated the regulations, which remain in effect pursuant to a savings provision in the Internal Revenue Service Restructuring and Reform Act of 1998 and a subsequent Delegation Order. *See* Pub. L. No. 105-206, § 1001(b) and Deleg. Order 193. In 2009, the IRS published proposed regulations designating the Director, Exempt Organizations as the appropriate official. *See* Amendments to the Regulations Regarding Questions and Answers Relating to Church Tax Inquiries and Examinations, 74 Fed. Reg. 39003, 39004 (Aug. 5, 2009). This delegation was uniformly criticized, and the IRS has never withdrawn or published the regulations. *See* J. Michael Martin, *Why Congress Adopted the Church Audit Procedures Act and What Must Be Done Now to Restore the Law for Churches and the IRS*, 29 Akron Tax Journal 1, 16-17 (2014) (collecting comments on the proposed regulations). The IRS has included updating regulations designating an appropriate high-level Treasury official under § 7611 on its annual Priority Guidance Plan for 14 consecutive years. However, nothing has been done by Congress or the IRS to fix CAPA.

The IRS delegated the authority to make the reasonable belief determination under § 7611 to the TEGE Commissioner on June 23, 2020, via Delegation Order 7-3. *See* IRM 1.2.2.8.3 (6-23-2020). However, the TEGE Commissioner is not permitted to authorize church tax inquiries or examinations under a plain reading of § 7611 or its implementing regulations. When Congress passed the Internal Revenue Service Restructuring and Reform Act of 1998, it required the IRS to shift from a "national, regional, and district structure" to one based on "organizational units serving particular groups of taxpayers." Pub. L. 105-206, § 1001(a)(2), (3), 112 Stat. 685, 689 (1998). In doing so, the Service eliminated the Regional Commissioner position entirely. However, Congress did not amend the statutory definition of an "appropriate high-level Treasury official" in 26 U.S.C. § 7611(h)(7). In addition, the Department of Treasury has not finalized amended regulations to codify its own interpretation of the statute following the reorganization. *See* Amendments to the Regulations Regarding Questions and Answers Relating to Church Tax Inquiries and Examinations, 74 Fed. Reg. 39003 (Aug. 5, 2009). So now—25 years after the Regional Commissioner position was eliminated—both the original statute and the regulation remain in effect.

In order to remain compliant with the express statutory language of CAPA as currently written, the IRS must either require the Secretary of the Treasury to approve all church tax examinations or redelegate the approval authority to an official holding a rank "no lower than that of a principal Internal Revenue officer for an internal revenue region." 26 U.S.C. § 7611(h)(7). But any attempt to analogize the old IRS organizational chart to the current version

[12] *See, Supra,* Note 9.

is "akin to fitting square pegs into round holes." Benjamin W. Akins, *A Broken Vesper: Questioning the Relevancy and Workability of the Church Audit Procedures Act*, 44 Seton Hall Legis. J. 1, 19 (2020). Accordingly, CAPA must be amended to address this issue.

C. The IRS Continues to Approve Church Inquiries and Examinations at the Lowest Level Possible, Contrary to CAPA.

After the IRS received the letter from the FFRF, Sunita Lough authorized the GSH church tax inquiry and church tax examination in her capacity as TEGE Commissioner. But the TEGE Commissioner is not delegated the authority to authorize church tax inquiries or examinations by either § 7611 or its implementing regulations.

Section 7611 provides that the proper "appropriate high-level Treasury official" to authorize church tax inquiries is the "Secretary of the Treasury or any delegate of the Secretary whose rank is no lower than that of a principal Internal Revenue officer for an internal revenue region" 26 U.S.C. § 7611(h)(7). The Treasury Regulations define this "delegate of the Secretary" as the "appropriate Regional Commissioner (or higher Treasury official)." Treas. Reg. § 301.7611-1, Q&A-1. Taken together, the statute and regulations authorize (1) the Secretary of the Treasury, (2) Regional Commissioners, or (3) any delegate of the Secretary whose rank is higher than a Regional Commissioner to authorize church tax inquiries and examinations under § 7611.

CAPA sets a floor for the proper official; the appropriate delegate must rank *no lower* than the principal officer for an internal revenue region. At the time, this statutory reference to the principal revenue officer for an internal revenue region clearly referred to Regional Commissioners, who exercised authority over geographic regions. *See Living Word*, 2008 U.S. Dist. LEXIS 106639 at *14; *see also Hearing* at 8 (referring to the Regional Commissioner when discussing the reasonable belief requirement).

Prior to the 1998 Reorganization, Regional Commissioners reported to the Commissioner of the IRS. *Living Word*, 2008 U.S. Dist. LEXIS 106639 at *35-36. Deputy Commissioners also held a rank higher than Regional Commissioners. Thus, at the time, Deputy Commissioners and the Commissioner of the IRS would have satisfied the statutory definition of "any delegate of the Secretary whose rank is no lower than" a Regional Commissioner. *Id.*

Plainly, the TEGE Commissioner is not the Secretary of the Treasury. The TEGE Commissioner is also not "a principal Internal Revenue officer for an internal revenue region." § *See* 26 U.S.C. 7611(h)(7). Nor, is the TEGE Commissioner the Commissioner or Deputy Commissioner of the IRS. Thus, the TEGE Commissioner's approval of the GSH audit does not establish compliance § 7611(a)(2) or Treas. Reg. § 301.7611-1, Q&A-1. The Tenth Circuit never reached this question because it allowed the IRS to avoid § 7611 entirely through the use of third-party summonses. However, this is not the first time the IRS has used a lower level bureaucrat to approve a church examination.

In 2008, Living Word Christian Church successfully challenged the validity of a church tax inquiry authorized by Director of Exempt Organizations, Examinations ("DEOE"), arguing

that the DEOE did not hold a rank comparable to a Regional Commissioner. The magistrate judge, whose reasoning was later adopted by the district court, concluded that:

> Congress clearly wanted the decision to investigate a church to be approved by a high-level Executive Branch official. The broad responsibilities and experience of an official with such a high-profile position would make it likely that she has a heightened political and policy sensitivity for balancing the need for vigorous enforcement of our tax laws and the avoidance of excessive government intrusion into a church's exercise of religious freedom. *Living Word*, 2008 U.S. Dist. LEXIS 106639 at *35.

The *Living Word* Court concluded that the DEOE lacked these qualities and was unlike a Regional Commissioner because the DEOE lacked "broad authority over the wide array of IRS functions and all taxpayer-types within a region[.]" *Id.* at *38.

The *Living Word* Court also correctly observed that the IRS's reinterpretation of a delegate of the Secretary of the Treasury "no lower than that of a principal Internal Revenue officer for an internal revenue region" is entitled to nothing more than *Skidmore* deference because it lacks the formality of notice-and-comment rulemaking and involves an agency administering its own statute. *Living Word*, 2009 U.S. Dist. LEXIS 6902 at *5.

Following *Living Word*, the IRS issued proposed regulations in 2009 naming the Director of Exempt Organizations ("DEO") as an appropriate high-level Treasury Official for the purposes of § 7611(a)(2). Once again, churches, scholars, and practitioners roundly criticized this interpretation of the statute and called the Service's attention to the ways the DEO differed from a Regional Commissioner. *See, e.g.*, Martin, *supra* at 16-17. For example, commenters noted that the DEO, unlike the Regional Commissioner, was directly involved in EO enforcement, and therefore, the delegation contravened congressional intent to provide a "bulwark against unnecessary audit" through review by disinterested officials.[13]

In the GSH matter, the IRS could have sought approval from a high-level Treasury Official holding a position that clearly complies with the statute and with the unambiguously expressed intent of Congress. Either the Secretary of the Treasury, the Commissioner of the Internal Revenue Service, or a Deputy Commissioner could have authorized this church tax inquiry and examination. Instead, the IRS has elected to interpret and reinterpret the statute through a series of informal delegations. *See generally* Martin, *supra* at 16-19. These delegations force churches to litigate whether various positions within the Service are comparable to a Regional Commissioner and, thus, whether the IRS has complied with the § 7611 administrative requirements that protect churches' constitutional rights. This should not be allowed and CAPA should be amended to prevent this behavior by the IRS.

D. Congress should Establish the CAPA Approval Authority no Lower than that of a Deputy Commissioner of the IRS.

[13] See Marcus Owens Comment (Oct. 13, 2009) ("Owens") at https://www.taxnotes.com/research/federal/other-documents/public-comments-on-regulations/attorney-makes-recommendation-regarding-irs-inquiries-of-churches/wjmp (last accessed March 27, 2025).

Like the IRS's prior delegations to the DEOE and the DEO, the delegation to the TEGE Commissioner does not comply with the statute because the TEGE Commissioner does not hold a rank "no lower than that of a principal Internal Revenue officer for an internal revenue region." 26 U.S.C. § 7611(h)(7). No court of appeals has ruled on this issue, and the two district courts to consider which IRS official meets these statutory criteria have failed to adequately consider congressional intent to protect the First Amendment rights of churches. *See Living Word,* 2009 U.S. Dist. LEXIS 6902 (2009); *United States v. Bible Study Time, Inc.*, 295 F. Supp. 3d 606 (D.S.C. 2018).

Although the *Living Word* Court determined that the TEGE Commissioner is the "logical counterpart" to a former Regional Commissioner, this reinterpretation of the statute is inconsistent with agency history, does not reflect agency expertise, was not promulgated via formal notice and comment rulemaking, and is ultimately unpersuasive.[14]

The IRS's selection of the TEGE Commissioner reflects neither consistency, formality, or expertise. Since its reorganization in 1998, the IRS has ping-ponged the responsibility to authorize church tax inquiries under § 7611 among various positions within the Tax Exempt and Government Entities division, including the Director of Exempt Organizations Examinations, the Director of Exempt Organizations, and now the TEGE Commissioner. As the *Living Word* court observed, these delegations "lack[] the formality of notice-and-comment rulemaking" and, even in 2008, the magistrate judge noted that "the IRS's deliberate choice to avoid subjecting this interpretation to formal rulemaking causes this Court some concern . . . [t]he public deliberation that would occur as a result of formal rulemaking would be an important part of identifying the types of First Amendment concerns that motivated the enactment of CAPA in the first place." *Living Word,* 2008 U.S. Dist. LEXIS 106639 at *29-30.

When the IRS *did* subject its delegation to notice-and-comment rulemaking via the 2009 proposed regulations, scholars, practitioners, and churches *did* identify grave First Amendment concerns. The IRS has yet to respond to those concerns or to formalize its interpretation through final regulations. In addition, "deciding who should be designated as the high-level Treasury official . . . does not require the IRS's technical tax expertise." *Living Word*, 2008 U.S. Dist. LEXIS 106639 at *30. Additionally, the formalized definition of the appropriate official conflicts with the IRS' informal delegation. Treas. Reg. § 301.7611-1, Q&A-1. The regulation states the appropriate official is "the appropriate Regional Commissioner (or higher Treasury official)." *Id*. The TEGE Commissioner is not a Regional Commissioner because that position is eliminated. Therefore, the TEGE Commissioner must be a higher-level Treasury official than a Regional Commissioner based on the IRS' current regulation. Accordingly, the IRS' current delegation is informal but conflicts with its formal regulation.

Given that the IRS's reauthorization lacks consistency and formality and does not implicate technical tax expertise, the question here is whether the IRS's selection of the TEGE Commissioner is otherwise persuasive. But the TEGE Commissioner's role is fundamentally unlike that of a Regional Commissioner, and the IRS's selection is inconsistent with congressional intent.

[14] The district court in *United States v. Bible Study Time, Inc.*, 295 F. Supp. 3d 606, 627 (D.S.C. 2018) reached a similar conclusion, holding that the TEGE Commissioner held a rank comparable to the Regional Commissioner.

First, the TEGE Commissioner and Regional Commissioner differ in rank and responsibilities. According to the IRM, the TEGE Commissioner "lead[s] long-term strategies that are consistent with the mission and strategic goals of the Internal Revenue Service and the mission of TEGE. These strategies involve planning, managing, directing, and executing nationwide activities for TEGE." IRM 1.1.23.1 (09-30-2021). The TEGE Commissioner reports to the Deputy Commissioner for Services and Enforcement, who then reports to the Commissioner of the Internal Revenue Service. *Id.*

Regional Commissioners reported directly to the Commissioner of the IRS and "had broad authority over all taxpayers in the region and over an array of IRS functions including examinations, collections, data processing, resources management, and criminal investigations." *Living Word*, 2008 U.S. Dist. LEXIS 106639 at *35-36; *see also Living Word*, 2009 U.S. Dist. LEXIS 6902 at *7.

The *Bible Study Times* Court determined that the TEGE Commissioner held a comparable rank to a Regional Commissioner because, pre-reorganization, four Regional Commissioners each supervised a geographic region, while post-reorganization, Division Commissioners each supervise taxpayer divisions. 295 F. Supp. 3d 606, 624 (D.S.C. 2018). However, this analysis minimizes the breadth and scope of responsibility that Regional Commissioners held. The TEGE Commissioner lacks comparable breadth of experience and the perspective that this breadth offered.

Second, and critically, the TEGE Commissioner and Regional Commissioners differ in terms of their role in EO enforcement: Regional Commissioners were not responsible for EO enforcement and thus could maintain the objectivity and independence contemplated by Congress when it enacted CAPA. The selection of the Regional Commissioner was an intentional, necessary check on the IRS to prevent "churches' constitutional protections from being pushed aside by overzealous IRS agents." Owens, *supra*. Regional Commissioners were "sufficiently detached from charitable sector enforcement efforts to weigh the needs of such enforcement against First Amendment concerns dispassionately." *Id.*

Unlike Regional Commissioners, the TEGE Commissioner does not have the necessary distance to weigh the First Amendment rights of churches against the desires of the EO division to enforce the Tax Code. Instead, the TEGE Commissioner supervises the DEO and other officials responsible for enforcing compliance in the charitable sector, and there is an inherent conflict of interest in the TEGE Commissioner's roles as enforcer and as a watchdog of churches' constitutional rights. Tasking the TEGE Commissioner with both enforcing compliance for tax-exempt organizations and acting as a watchdog for their constitutional rights puts them in an impossible, contradictory position. *Id.*

Instead of delegating the reasonable belief determination to the TEGE Commissioner, the IRS could have sought approval for this church tax inquiry and examination from the Secretary of the Treasury, the Commissioner of the Internal Revenue Service, or the Deputy Commissioner for Services and Enforcement. Each selection would have strictly complied with the statute and

would have obviated the need for additional litigation to assure churches like GSH that their constitutional rights are intact.

E. CAPA Must be Amended because Courts Continue to Allow the Erosion of CAPA by Third-Party Summonses.

The IRS, the courts in these cases, and GSH all agree: the IRS initiated a church tax inquiry and examination of GSH and summonsed GSH's financial records from Kaw Valley Bank to examine GSH's status as a church and any potential tax liability. But, although the IRS stated that "the protections in § 7611 apply when the IRS undertakes a church tax inquiry or church tax examination," the Tenth Circuit argued that compliance with the statutory procedures for beginning a church audit and examination are inapplicable to third-party summonses issued during that inquiry or examination. Instead, the IRS argued that third-party summonses governed by § 7609 exist entirely outside of the § 7611 scheme. The Tenth Circuit Agreed. Accordingly, courts have now interpreted CAPA to excuse the IRS from its duty to fulfill the procedural requirements for a valid investigation of a church at the outset.

Though the Supreme Court in *Powell* directed the IRS to follow the "administrative steps required by the Code," the Tenth Circuit found that these administrative steps do not include the procedures of § 7611(a)-(b) so long as the IRS summons a church's records from a third party and not from the church itself. But the IRS should not be permitted to do indirectly what it cannot do directly. CAPA should ensure that the IRS complies with the procedures for beginning a church examination when evaluating the validity of a summons. This includes summonses directed at churches and their financial institutions when such summonses are issued as a part of the investigation of a church for the purposes of a church tax examination. The exception of third-party summons from the definition of "church records" found in § 7611(h)(4)(B)(i) cannot have been intended by Congress to prevent a court from evaluating whether the IRS's underlying investigation of the church is proper and compliant with § 7611(a) under *Powell*. Yet, the Tenth Circuit's divorce of §§ 7611 and 7609 provide precisely this effect.

Under § 7611(a), the underlying inquiry or examination is not legitimate unless the IRS has obtained approval of an appropriate, high-level Treasury official. This is a required administrative step and protects churches from unnecessary scrutiny. Crucially, the statute accords this protection to churches *before* the IRS launches its inquiry or examination. *See* Hearing (statement of Sen. Charles Grassley).[15] Once the IRS has begun its review of church financials and other documents, the IRS may not unring the bell.

Here, once the IRS has obtained GSH's financials from Kaw Valley Bank, it has rung the bell and summonsed the church's financial records pursuant to an improper, invalid inquiry and examination. The IRS may not decide on a church's tax-exempt status or assess unrelated business income tax on the basis of documents obtained through a third-party summons. Treas. Reg. § 301.7611-1, Q&A 5; Gov. Br. at 48. However, § 7611 was designed to protect churches from undue scrutiny because of their status under the Constitution—not just from unfounded tax assessments post-hoc. *See* Hearing at 13 (statement of Rep. Mickey Edwards).[16] GSH effectively

[15] *See, Supra*, Note 9.
[16] *See, Supra*, Note 9.

lost the protections of § 7611 when it had to defend itself throughout an unauthorized, invalid investigation through third-party summonses.

Few courts have examined whether the IRS must comply with § 7611's procedural requirements in order to satisfy the "administrative steps" factor in *Powell*. Fewer still have examined whether the IRS must meet this burden in the context of third-party summonses.

In *United States v. Church of Scientology of Boston*, the First Circuit stated that the "IRS cannot even begin its investigation until it 'reasonably believes' the church has the relevant liability" because § 7611 requires a showing beyond what is required under *Powell*. 933 F.2d 1074, 1077 (1st Cir. 1991) (holding that the IRS must prove that the church's summonsed documents are necessary, not merely relevant).

In *United States v. C.E. Hobbs Found. for Religious Training & Educ., Inc.*, 7 F.3d 169, 171 (9th Cir. 1993), the Ninth Circuit affirmed that the IRS must meet the procedural requirements of § 7611(a) before initiating a church tax inquiry. These procedural requirements "are the heart of the statute, in that they afford religious institutions extensive safeguards from having to defend an audit at all." *Id.* The *Hobbs* Court then examined whether the IRS must prove that documents summonsed from third parties are necessary under § 7611(b), or merely relevant. *Id.* at 173. It did not directly address the threshold requirements of § 7611(a) when evaluating the IRS's burden in enforcing third-party summonses issued during church tax examinations.

Only two district courts have squarely considered whether the IRS must meet the requirements of § 7611(a) by obtaining the approval of an appropriate, high-level Treasury official before issuing summonses to third parties during a church tax examination.

First, when the *Bible Study Time* court evaluated the proper role of § 7611 in third-party summonses, it created a loophole that permits the IRS to circumvent CAPA's protections. *Bible Study Time, Inc. v. United States*, 240 F. Supp. 3d 409 (D.S.C. 2017). The *Bible Study Time* plaintiffs predicted that if the IRS is not required to meet the requirements of § 7611(a) prior to issuing third-party summonses in an investigation of a church, the IRS may perform an end-run around CAPA's requirements.[17] But the court did not fully address this argument. So, under the court's reasoning in *Bible Study Time*, just like in this case, the IRS may summons financial records from third parties as soon as churches raise constitutional or procedural concerns. This makes a mockery of CAPA and its intended protections for churches' constitutional rights. The only other case to address this precise issue is the companion to this case before the Colorado district court, involving another third-party summons issued during the IRS's church tax examination of GSH. *God's Storehouse Topeka Church v. United States*, No. 22-mc-00046-

[17] In a brief before the South Carolina district court, Bible Study Time argued that "[i]t is exceedingly unlikely a commercial bank would of its own volition defy an IRS summons. Accordingly, the government's interpretation of the statutes would effectively vitiate the protections of § 7611 and would allow the government to defy that statute's safeguards with near impunity by beginning a church tax inquiry, and then when met with resistance pursuant to the church's assertion of § 7611's protections, doing an end run by issuing summonses to the churches' banks with no regard to § 7611's requirements." *See* Resp. to Gov. Motion to Dismiss at 7, *Bible Study Time, Inc. v. United States*, 240 F. Supp. 3d 409 (D.S.C. 2017). The South Carolina district court did not directly address this argument and now, six years later, the IRS has done just that.

PAB, 2023 WL 2824525 (D. Colo. Feb. 22, 2023). There, a district court judge has yet to rule on the magistrate judge's report and recommendation.

Taken together, these cases document a slow erosion of churches' rights under CAPA. While the earlier circuit court decisions noted that the IRS must establish the reasonable belief of a high-level Treasury official before beginning *any* investigation, *Bible Study Time* removed that protection for churches. As Professor Benjamin Akins observes, under this regime, CAPA is "an unworkable statute." Benjamin W. Akins, *A Broken Vesper: Questioning the Relevancy and Workability of the Church Audit Procedures Act*, 44 Seton Hall Legis. J. 1, 26 (2020). Congress should amend CAPA to force the IRS to obtain the approval of an appropriate, high-level Treasury official as originally intended.

IV. CONCLUSION

Given the weaponization of the IRS against GSH by the FFRF and potential abuse in the future with the erosion of CAPA, the House Judiciary Committee should take the following actions: (1) recommend Congress amend CAPA to prevent low-level approval of church examinations and inquiries as well as prevent third-party subpoena abuse to circumvent CAPA and its protections;[18] and (2) investigate the close relationship between the FFRF and the IRS to determine how this weaponization against GSH was allowed to occur. We stand by to provide additional information as needed. Please feel free to contact us.

Very Respectfully,

Ryan A. Kriegshauser, Partner
Kriegshauser Ney Law Group

Enc: (1) Suggested amendments to CAPA and comments associated with potential amendments.

[18] Submitted herewith are suggested amendments to CAPA and comments associated with potential amendments.