Area of Focus #2 TAS Will Urge the IRS to Reconsider Its Position on the Application of the Religious Freedom Restoration Act to the Social Security Requirement Under IRC § 24(h)(7), Which Has the Effect of Denying Child Tax Credit Benefits to the Amish and Certain Other Religious Groups

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Finality*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

DISCUSSION

Beginning in about the 1950s, members of certain religious groups, most notably the Amish, found their religious beliefs at odds with certain legal requirements. To ensure that an individual's freedom to exercise his or her religion is not infringed upon, the courts, Congress, and administrative agencies have fashioned certain exceptions to the legal requirements to accommodate the free exercise of religion.[2] These exceptions were created largely to address concerns raised by the Amish community.

Although there are sects within the community that differ in their interpretation of religious doctrines, the Amish community generally shares a number of fundamental religious beliefs that shape their interactions with the modern world,[3] such as a strong belief in community and humility.[4] The Old Order Amish have a long and deep adherence to their religious tenets, which focus on their "devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life."[5] Further, their religious beliefs prohibit them from accepting government benefits because they believe that God and the community

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). *See* IRC § 7803(a)(3).

2 *See Wisconsin v. Yoder*, 406 U.S. 205 (1972); IRC §§ 1402(g) and 3127; Internal Revenue Manual (IRM) 21.6.3.4.1.3, *Child and Dependent Care Credit* (Oct. 1, 2018). For taxpayers indicating a religious (*e.g.*, Amish/Mennonite) or conscience-based objection to obtaining a taxpayer identification number (TIN), refer to IRM 21.6.1.6.1, *Determining the Exemption Deduction* (Oct. 1, 2018).

3 Christopher Petrovich, *More Than Forty Amish Affiliations? Charting the Fault Lines*, Journal of Amish and Plain Anabaptist Studies, Issue 1, 120-142 (2017).

4 *The Amish and Photography*, https://www.pbs.org/wgbh/americanexperience/features/amish-photgraphy/ ("The Amish believe any physical representation of themselves (whether a photograph, a painting, or film) promotes individualism and vanity, taking away from the values of community and humility by which they govern their lives.").

5 *Wisconsin v. Yoder*, 406 U.S. 210 (1972).

should care for those in need. One consequence of observing these core beliefs is that most individuals in the Amish community refrain from accepting Social Security benefits and in some cases from obtaining a Social Security number (SSN), at least until later in life.[6]

To accommodate this deeply held belief, Congress passed Internal Revenue Code (IRC) §§ 1402(g) and 3127, which relieve qualifying religious individuals from complying with the old-age, survivors, and disability insurance obligation.[7] As the legal landscape continues to evolve, the Amish continue to encounter tension between their religious tenets—most notably their abstinence from participating in the Social Security system, including applying for SSNs—and their ability to navigate the tax system.[8]

Most recently, the Tax Cuts and Jobs Act of 2017 (TCJA) imposed a requirement that taxpayers must include an SSN for every qualifying child for whom they claim the Child Tax Credit (CTC).[9] This Area of Focus analyzes the impact of this SSN requirement and the IRS's implementation of the provision of that requirement. As we will clearly show, the IRS has put in place procedures to implement this requirement that impermissibly offer an exception to the SSN requirement to an unprotected class (parents of a child who is born and dies in the same year or in the consecutive year) while denying such an exception to a protected class (Amish parents that do not have an SSN for their children pursuant to their religious beliefs).

Taxpayers Are Now Required to Include a Social Security Number for Every Qualifying Child for Whom They Claim the Child Tax Credit, Thereby Conflicting With the Religious Beliefs of Some Individuals

The TCJA amended IRC § 24 by requiring a taxpayer who is claiming a CTC for a qualifying child to provide the child's SSN on the return.[10] Prior to this amendment, IRC § 24 only required that a taxpayer identification number (TIN) be provided, and the IRS developed a procedure that allowed Amish taxpayers to claim the CTC without placing an identifying number on the dependent line of the return.[11] The stated purpose for the TCJA amendment was to prevent taxpayers who are not eligible

6 Peter J. Ferrara, *Social Security and Taxes, in* The Amish and the State 125, 129 (Donald B. Kraybill ed., John Hopkins Press 2d ed. 2003).

7 IRC § 3101 requires a 6.2 percent tax on an employee's wages to fund old-age, survivors, and disability insurance.

8 Although the issues raised in this discussion may affect other religious groups, this piece will primarily focus on issues facing and affecting the Amish, as it is this community that has historically found themselves in conflict with the tenets of their religion and obligations imposed on them by law.

9 Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97, § 11022(a), 131 Stat. 2054, 2073-2074 (2017).

10 IRC § 24(h)(7). The IRS accepted an Individual Taxpayer Identification Number (ITIN), Social Security Number (SSN), or Adoption Taxpayer Identification Number (ATIN).

11 See IRM 21.6.3.4.1.3, *Child and Dependent Care Credit* (Oct. 1, 2017). For taxpayers indicating a religious (*e.g.*, Amish/Mennonite) or conscience-based objection to obtaining a TIN, refer to IRM 21.6.1.6.1, *Determining the Exemption Deduction* (Oct. 1, 2017). Currently, when an individual believes they should be exempt from paying employment taxes on grounds of their religious beliefs, they will file Form 4029, *Application for Exemption from Social Security and Medicare Taxes and Waiver of Benefits, with the Social Security Administration (SSA).* The form must include evidence of membership in and adherence to the tenets and teachings of the religion and a waiver of all benefits and payments under the Social Security Act. The Commissioner of Social Security must also find the following: the sect's beliefs are required; the members have practiced them for a substantial period; and the sect has been in existence since December 31, 1950. Once the Form is approved by SSA, it will then be sent to the IRS for its approval. Generally, a Form that is approved by SSA will also be approved by IRS. Historically, when claiming the dependency exemption for a dependent who does not have an SSN, an Amish taxpayer will write "Amish Form 4029" in the dependency line.

to obtain a work-eligible SSN from improperly or fraudulently claiming the CTC or the American Opportunity Tax Credit (AOTC).[12]

In 2018, the National Taxpayer Advocate asked IRS senior leadership to address the impact of the CTC SSN requirement on the Amish community, specifically requesting it implement an administrative workaround for taxpayers with religious objections to an SSN, as the IRS has done in the past. At the end of 2018, the National Taxpayer Advocate was advised the IRS had created a process that would allow Amish taxpayers to claim the CTC.[13]

On February 6, 2019, notwithstanding the IRS's December communication, the IRS issued guidance to its employees instructing the *suspension* of amended returns where the taxpayer:

- Claims the CTC, Additional Child Tax Credit, or the Credit for Other Dependent;
- Does not provide an SSN(s) for the dependent(s); and
- Identifies as Amish or Mennonite, has a Form 4029/4029 exemption, or has a religious or conscience-based objection.[14]

The IRS Wage & Investment Division (W&I) also informed TAS that the IRS would be suspending both amended and original tax year 2018 returns that meet the above criteria and would not correspond with the taxpayer during the time the return was in suspense status. On March 7, 2019, the National Taxpayer Advocate alerted Congress to this issue when she testified before the House Ways and Means Subcommittee on Oversight.[15]

On March 29, 2019, the IRS Office of Chief Counsel (Chief Counsel) issued program manager technical advice (PMTA) to an IRS executive responsible for implementing this new provision concluding "… the [IRS] need not provide administrative relief for these taxpayers."[16] The IRS has

12 H.R. Rep. No. 115-409, at 141-142 (2017). Individuals must list their SSN on a tax return, and individuals who must file a return but do not have an SSN must apply for an ITIN from the IRS. Individuals who are eligible to obtain an SSN are not eligible to receive an ITIN. IRC § 6109. Receiving an ITIN does not authorize an individual to work in the United States or receive Social Security benefits. To obtain the Child Tax Credit (CTC) in 2018, the taxpayer must list on the return as the child's identifying number an SSN that is valid for employment in the United States. *See* H.R. Rep. No. 115-466, at 230-233 (2017). The requirement to have a work-eligible SSN to claim the CTC is similar to the requirement to have a work-eligible SSN to obtain the Earned Income Tax Credit (EITC), which was added to the IRC under the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 115-97, 110 Stat. 2105 (1996). The House Report states that the requirement to provide an SSN to claim the EITC was to ensure that only individuals who were authorized to work in the United States should be able to claim the credit. H.R. Rep. No. 104-651, at 1457 (1996).

13 Email communication from Deputy Chief Counsel to National Taxpayer Advocate (Dec. 18, 2018). The IRS plans to largely continue its practice of allowing taxpayers with a religious exemption who have an approved Form 4029 on file, and did not provide an SSN for their dependents, to claim the CTC. Taxpayers who object to providing the dependent's SSN for religious reasons will receive a slightly modified Letter 3050C to confirm the taxpayer's U.S. citizenship. IRM 21.6.1.6.1(8) (Oct. 1, 2018) requires the IRS to issue letter 3050C requesting specific documentation "in paragraph 1" of that letter. The letter requests that the taxpayer submit the child's birth certificate or green card, hospital medical records documenting the birth of the child or other public record documenting the birth of the child, school records, childcare records, a letter from a government benefits provider, cancelled child support checks, or medical records or statement from a health care provider verifying the child's address.

14 SERP Alert 19A0070 (Feb. 6, 2019).

15 *The Tax Filing Season: Hearing Before the H. Subcomm. on Government Oversight of the H. Comm. on Ways and Means*, 116th Cong. 22-27 (2019) (testimony of Nina E. Olson, National Taxpayer Advocate).

16 Program Manager Technical Advice (PMTA), *Administration of the Child Tax Credit for Objectors to Social Security Numbers*, POSTS-117474-18, PMTA 2019-2 (Mar. 29, 2019) (concluding, among other things that "[i]n implementing [IRC] section 24(h)(7), the [IRS] has compelling governmental interests to ensure uniform and orderly tax administration and to prevent improper CTC claims. For the [IRS], the least restrictive, and the only, means to further those compelling interests is to require a qualifying child's eligible SSN.").

since revised its guidance to reflect this advice[17] and is disallowing the CTC where the qualifying children do not have SSNs. Under the TCJA, the maximum CTC for 2018 was $2,000 per child. Without an SSN, the taxpayer can only receive a partial $500 credit allowed for a dependent, a significant reduction of 75 percent.[18]

The National Taxpayer Advocate profoundly disagrees with Chief Counsel's conclusion that the IRS does not need to administratively accommodate taxpayers with religious or conscience-based objections to obtaining SSNs and believes the legal advice's analysis inaccurately interprets the IRS's obligation to comply with the Religious Freedom Restoration Act of 1993 (RFRA).[19] The discussion below describes the evolution of free exercise claims, how such claims are analyzed when applying RFRA*, and relevant United States Supreme Court decisions.*

The Evolution of Free Exercise of Religion Claims

Beginning in the 1960s, the U.S. Supreme Court decided several landmark free exercise of religion cases, several of which directly involved the Amish. The first landmark case on this issue was *Sherbert v. Verner.*[20] In *Sherbert*, a member of the Seventh-day Adventist Church, which forbids working on Saturday in observance of the sabbath, was fired after refusing to work on Saturdays.[21] Ms. Sherbert could not find any other work that did not require her to work on Saturday.[22] She applied for unemployment compensation, but her claim was denied because the state's law provided that a claimant is ineligible for unemployment if he or she has failed, without good cause, to accept other available work offered.[23]

The Court held that denial of Ms. Sherbert's unemployment claim represented a substantial burden upon her free exercise of religion.[24] Justice Brennan, who wrote the majority opinion, stated, "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[25] The Court next considered whether the state had a compelling interest to justify the substantial infringement on Ms. Sherbert's First Amendment right and determined the state did not.[26] Further, this opinion established what is known as the *Sherbert* Test, which requires the demonstration of a compelling interest and a narrow tailoring of a law that substantially burdens an individual's free exercise of religion.

Now is not the first time the Amish community and its deeply held religious beliefs have been at odds with a legal requirement. In the landmark Supreme Court decision *Wisconsin v. Yoder,*[27] the Amish challenged a Wisconsin compulsory school attendance law requiring children to attend school up until the age of 16 on the basis that this requirement infringed upon their First Amendment right to the free

17 IRM 3.12.3.26.17.6,(2) *TIN Requirements (EC 287)* (Apr. 15, 2019).

18 IRC § 24(h)(2), (4), and (7).

19 PMTA, *Administration of the Child Tax Credit for Objectors to Social Security Numbers*, POSTS-117474-18, PMTA 2019-2 (Mar. 29, 2019); Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993), codified at 42 U.S.C. §§ 2000bb et seq; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

20 *Sherbert v. Verner*, 374 U.S. 398 (1963).

21 *Id.* at 399 (1963).

22 *Id.*

23 *Id.* at 400 (1963).

24 *Id.* at 403 (1963).

25 *Id.* at 406 (1963).

26 *Id.* at 406-409 (1963).

27 *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

exercise of religion. (Amish children do not attend school beyond eighth grade so they can learn the ways of the Amish faith.) The U.S. Supreme Court held that Wisconsin's compulsory school attendance law was unconstitutional when applied to the Amish, because it imposed a substantial burden on the free exercise of religion and was unnecessary to serve a compelling governmental interest.[28]

In 1982, the Supreme Court stepped back from its compelling interest analysis in *Yoder* and adopted a narrower test for free exercise of religion cases. In *United States v. Lee,* an Amish farmer who employed other Amish filed a refund suit claiming a refund of employment taxes paid, arguing that payment of Social Security taxes violated his First Amendment free exercise rights because the Amish oppose contributing to and benefiting from a national social security system.[29] The U.S. Supreme Court determined that requiring Amish employers to pay Social Security taxes was an infringement on their free exercise of religion, but further held that limiting religious liberty is permissible if the state shows doing so is essential to "accomplish an overriding governmental interest," (*i.e.*, the payment of tax).[30] Having found that it would be difficult for the government to accommodate the comprehensive social security system with myriad exceptions flowing from a variety of religious beliefs and that the tax law was neutral in its general application, the Court held that this burden to the Amish religion was not unconstitutional.[31]

The holding in *Yoder* was further eroded by the U.S. Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith.*[32] There, the Court held that the "right of free exercise does not relieve [an] individual of [the] obligation to comply with [a] valid or neutral law of general applicability on [the] ground that [the] law proscribes, or requires, conduct that is contrary to his religious practice."[33] In so doing, it effectively overruled the compelling governmental interest standard of scrutiny applied in *Sherbert* and *Yoder.*[34]

Congress responded to this ruling by enacting the Religious Freedom Restoration Act in 1993. The stated purpose of the RFRA was as follows:

1. To restore the compelling interest test as set forth in *Sherbert*[35] and *Yoder*[36] and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
2. To provide a claim or defense to persons whose religious exercise is substantially burdened by government.[37]

The compelling interest test set forth in the RFRA provides:

(a) In General. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

28 *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
29 *U.S. v. Lee*, 455 U.S. 252, 257 (1982).
30 *Id*. at 257-258 (1982).
31 *Id*. at 259-260, 263 (1982).
32 494 U.S. 872 (1990).
33 *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990).
34 *Sherbert v. Verner*, 374 U.S. 398 (1963). Mary L. Topliff, Annotation, Validity, Construction, and Application of Religious Freedom Restoration Act (42 U.S.C.A. §§ 2000bb et seq.), 135 A.L.R. Fed. 121 (1996).
35 *Sherbert v. Verner*, 374 U.S. 398 (1963).
36 *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
37 42 U.S.C. 2000bb-(b)(1), (2). Pub. L. 103-141, § 2, 107 Stat. 1488 (1993).

> (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[38]

One of the most recent and significant cases where the standards set out in RFRA were applied to a federal law and a regulation was in *Burwell v. Hobby Lobby Stores, Inc.*[39] The Court adopted a three-step analysis to determine how RFRA applies:

- Step 1: Whether the complainant was covered under RFRA;
- Step 2: Whether the government action or mandate "substantially burdens" the "exercise of religion" as defined under the Act; and
- Step 3: Whether the government action or mandate is *both* (1) in furtherance of a compelling governmental interest *and* (2) the least restrictive means of furthering that compelling governmental interest.

Hobby Lobby presented an opportunity for the Court to weigh a free exercise claim against the Patient Protection and Affordable Care Act's requirement that businesses' health insurance include coverage for contraception. Three closely held corporations and their owners asserted that such a requirement violated their religious beliefs.[40] The least-restrictive-means standard is exceptionally demanding, said the Court, and it was not satisfied that the government met that standard in this case.[41] The relevant inquiry is whether an agency is able to show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion.[42] The Court held that the Secretary of Health and Human Services had previously adopted other means by which the regulation could be complied with while not substantially burdening a person's free exercise of religion.[43] Additionally, the Court determined that failing to provide this alternative means of compliance would force the companies' owners to either violate their deeply held religious beliefs or honor those beliefs and ultimately pay a financial penalty of millions of dollars, thereby substantially burdening their free exercise of religion.[44]

Applying the Religious Freedom Restoration Act to the Requirement That a Social Security Number Be Included on the Return for Each Dependent Where the Child Tax Credit Is Being Claimed

The holding in *Hobby Lobby* illustrates that the Supreme Court expects agencies to conduct an RFRA analysis when developing administrative policies and procedures. Thus, when implementing IRC § 24(h)(7)—or any statute—the IRS is obliged to consider whether implementation would run afoul of RFRA.

38 42 U.S.C. § 2000bb-1(a) and (b).

39 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

40 The three closely held companies are Hobby Lobby Stores, Inc., Mardel, and Conestoga Wood Specialties Corporation (the owners of Conestoga Wood Specialties were members of the Mennonite faith).

41 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014).

42 *Id.*

43 *Id.* at 730-731 (2014).

44 *Id.* at 682 (2014).

When applying RFRA and the holding in *Hobby Lobby*, the IRS must consider whether there is a compelling governmental interest and, if so, how to achieve that compelling governmental interest in a manner that imposes the least restrictive burden on an individual's free exercise of religion. In Chief Counsel's advice, it rightly concludes that the IRS has a compelling governmental interest to ensure uniform and orderly tax administration and to prevent improper CTC claims.

In support of its conclusion that the IRS "need not provide administrative relief for these taxpayers," Chief Counsel quotes *Hernandez v. Commissioner*, which in turn quoted *United States v. Lee*, as follows: "The tax system could not function if denominations were allowed to challenge the tax system on the ground that it operated in a manner that violates their religious belief."[45]

Both the *Hernandez* and *Lee* cases cited by Chief Counsel were decided *before* the enactment of the RFRA, which explicitly reinstated the *Sherbert* compelling governmental interest test when analyzing how a federal law restricts an individual's free exercise of religion. As noted above, in *Sherbert*, the Court held the state's denial of unemployment compensation to a Seventh-day Adventist who was fired for refusing to work on Saturday, her Sabbath, was a violation of the Free Exercise Clause of the Constitution.[46] While acknowledging that the Free Exercise Clause "is not totally free from legislative restriction,"[47] the Court reasoned:

> Here, not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[48]

The Court next considered "whether some compelling state interest enforced in the eligibility of the South Carolina [unemployment insurance] statute justifies the substantial infringement of appellant's First Amendment right."[49] The Court concluded there was none and noted:

> Significantly, South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty. When, in times of "national emergency," the textile plants are authorized by the State Commissioner of Labor to operate on Sunday, "no employee shall be required to work on Sunday … who is conscientiously opposed to Sunday work, and if any employee should refuse to work on Sunday on account of conscientious … objections, he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner." S.C. Code, § 644. No question of the disqualification of a Sunday worshipper for benefits is likely to arise, since we cannot suppose that an employer will discharge him in violation of this statute. The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by

45 *United States v. Lee*, 455 U.S. 252 at 260 (1982); *Hernandez v. Comm'r*, 490 U.S. 680, 699-700(1989).
46 *Sherbert v. Verner*, 374 U.S. 398 (1963).
47 *Id.* at 403 quoting *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961).
48 *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).
49 *Id.*

> the religious discrimination which South Carolina's general statutory scheme necessarily effects.[50]

With respect to the Amish and the SSN requirement when claiming the CTC, Chief Counsel advice states, "… the least restrictive, and the only, means to further those compelling interests is to require a qualifying child's eligible SSN,"[51] relying on the language of IRC § 24(h)(7) as justification for its narrow interpretation of the least restrictive means analysis. And yet here, as in *Sherbert*, the government is applying this statutory requirement disparately between groups of taxpayers. Specifically, despite the statutory requirement that qualifying children have SSNs for taxpayers to claim and receive the CTC and Earned Income Credit (EITC), the IRS has put in place procedures that allow parents of children who were born and died in the same or consecutive tax years to claim these credits *even if they do not have an SSN for the child*. Internal Revenue Manual (IRM) 3.12.3.26.17.6, which was updated April 15, 2019, *after* the issuance of the Chief Counsel memo, states:

> Allow the Child Tax Credit when the child's SSN is missing, and the child was **born** and **died** in the same or consecutive tax period if the taxpayers provide documentary support in the form of a copy of the birth certificate, death certificate, or hospital record …

Moreover, the IRS has provided guidance regarding these procedures to taxpayers in general, in the form of an FAQ on its website:

> My child was born and only lived 40 minutes. Can this child be my qualifying child for the earned income credit and the child tax credit?
>
> Answer
>
> Yes, if you meet the requirements, you may claim:
>
> 1. The Earned Income Credit
> 2. The Dependency Exemption and/or Child Tax Credit

Specifically, in regards to claiming the Child Tax Credit, the FAQ states the following:

> The child tax credit requires that you provide a valid SSN for your qualifying child. If you meet all of the other requirements to claim this credit and your child was born and died in 2018 and didn't have an SSN, instead of an SSN, you may enter "DIED" on column 2 of the Form 1040 and attach a copy of the child's birth certificate or a hospital record showing a live birth.[52]

Thus, despite the IRS's position that it is *required* to deny CTC claims where a child does not have an SSN for religious reasons, it has miraculously found a way—and established a procedure—to permit CTC claims where a child does not have an SSN because the child was born and died in the same or consecutive years. As sympathetic as this second group of taxpayers is, it is not a protected class under the Constitution, and the RFRA does not apply to these taxpayers' circumstances. Thus, the IRS's own established procedures and public announcements demonstrate that its implementation of

50 *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

51 PMTA, *Administration of the Child Tax Credit for Objectors to Social Security Numbers*, POSTS-117474-18, PMTA 2019-2 (Mar. 29, 2019).

52 IRS, *Frequently Asked Questions, Qualifying Child Rules 1*, https://www.irs.gov/faqs/earned-income-tax-credit/qualifying-child-rules/qualifying-child-rules-1 (last visited June 4, 2019).

IRC § 24(h)(7) is not consistent with a "valid or neutral law of general applicability." To the contrary, the IRS has carved out an exception to the law for an *unprotected class,* even as it says it is required to apply the law with no exceptions with respect to a protected class. Thus, Chief Counsel's decision seemingly stands legal reasoning on its head.

In response to our question about the justification for the discriminatory procedures described above, an official from Chief Counsel noted that the Social Security Administration will not issue an SSN to a deceased person, pointing out that the parent of a child who was born and died in the same year is unable to obtain an SSN for the deceased child, whereas religious objectors make a choice not to obtain an SSN, albeit in observance of their religious obligations.[53]

The Social Security Administration's refusal to issue SSNs to deceased individuals in certain circumstances is irrelevant in the face of the plain statutory requirement invoked by Chief Counsel to deny religious objectors the CTC.[54] *Sherbert*, as incorporated into RFRA, requires the law to be neutral and generally applicable; if an exemption is offered to one, then it must be offered to everyone.

The procedures for claiming children born and deceased in the same year or consecutive years also exposes the fallacy of Chief Counsel's claim that:

> In light of the unambiguous language of section 24(h)(7), the least restrictive, and indeed the only, means to further those compelling interests is to require a qualifying child's eligible SSN for CTC. The Service has no 'viable alternative' to implement this clear congressional mandate to require an eligible SSN for a qualifying child.[55]

This conclusion is manifestly inaccurate, as the IRS has, in fact, found a "viable alternative" where children are born and die in the same or consecutive tax years.

Moreover, since about the mid-1980s there has been, and still is, a procedure whereby the IRS processes returns from religious and conscientious objectors claiming dependent exemptions without SSNs.[56] This procedure requires the taxpayer to file with his or her return a Form 4029, *Application for Exemption from Social Security and Medicare Taxes and Waiver of Benefits*, that has been approved by the Social Security Administration. Up until the IRS issued its new guidance disallowing CTC claims where Amish or Mennonite taxpayers' children did not have SSNs, the IRS required the taxpayer to provide detailed information and documentation demonstrating the existence, age, relationship, and residence of the child before the IRS processes the return.[57] This documentation is far in excess of what is required of parents of children who were born and deceased in the same or consecutive years. Thus, the

53 Email dated May 31, 2019, on file with TAS.

54 See Program Operations Manual System (POMS), RM 10225.080, *Policy on Social Security Number (SSN) Applications on Behalf of Deceased Persons, A. Assigning an SSN after death* (Mar. 10, 2017). The statement says the following for the situation of parents who request an SSN for a deceased child when an SSN was not requested through the normal procedures: "FOs (Field Officers) should not assign an SSN merely to process a claim for benefits to a denial or to obtain an SSN for a deceased child so that the parent(s) may claim the child as an exemption. For information on claiming exemptions, please visit IRS.gov."

55 PMTA, *Administration of the Child Tax Credit for Objectors to Social Security Numbers*, POSTS-117474-18, PMTA 2019-2 (Mar. 29, 2019).

56 These procedures still apply to late-filed returns for which the dependent exemption under IRC § 151 is still available.

57 This documentation was enumerated in letter 3050C included a birth certificate, hospital medical record documenting the child's birth, or other public record documenting the child's birth, *and* school records on official letterhead, statement from a childcare provider either on company letterhead or notarized, statement from a government agency providing benefits to the child or verifying that the child is disabled, cancelled checks or statements verifying child support paid, or medical records or a written statement from the health care provider.

government cannot argue that its compelling government purpose—to combat improper or fraudulent claims of CTC—is a justification for substantially burdening the religious beliefs of Amish taxpayers when it is clearly applying a less restrictive means to another (non-religious) group of taxpayers.

CONCLUSION

Since the nation's founding, the First Amendment of the U.S. Constitution has guaranteed the free exercise of religion. This enumerated right has continually been protected by the United States Supreme Court, Congress, and governmental agencies. Congress has reinforced this foundation by enacting the RFRA. Recent Chief Counsel advice on the CTC issue impermissibly and substantially burdens the free exercise of religion under RFRA by exempting one group from the application of IRC § 24(h)(7) while refusing to exempt taxpayers who have a religious objection to obtaining SSNs. Moreover, the IRS has created and is implementing a less restrictive means to achieve its compelling governmental purpose for the former group but has declined to implement it with respect to religious objectors. These are clear violations of the RFRA and may even be a violation of the Free Exercise Clause. The IRS must either deny the CTC and EITC to parents whose children were born and deceased in the same or consecutive years—something the National Taxpayer Advocate is *not recommending*—or it must apply the exemption afforded to this group of taxpayers to the Amish and similar taxpayers as well.

FOCUS FOR FISCAL YEAR 2020

In fiscal year 2020, TAS will:

- Advocate for the IRS to reconsider its position on requiring SSNs for qualifying children of Amish and similar taxpayers who have religious objections when claiming the CTC; and
- Develop a legislative recommendation to amend IRC § 24(h)(7) to allow taxpayers to claim the CTC for qualifying children without SSNs when there is an approved Form 4029 on file.