

**RE: Internal Revenue Notice 2025-70, *Request for Comments on Individual Tax Credit for Qualified Contributions to Scholarship Granting Organizations***

**Idaho Family Policy Center Legal Center’s Comment in response to  
Internal Revenue Notice 2025-70**

**I. Introduction**

The family is the bedrock of society. Of the many building blocks of our society and culture, none is more foundational than the American family. “It is the power of the family that holds the Nation together, that gives America her conscience, and that serves as the cradle of our country’s soul.”<sup>1</sup> Central to the family is the rearing and education of the next generation. No two children exactly resemble each other, and neither will any two children’s childhoods and educational journeys. Parents must choose the education best for each of their children. Thus, good and prudent public policy supports parents’ efforts to nurture and educate their children in accordance with the needs of their children and the dictates of their consciences.

The recently enacted provisions of Section 25F of the Internal Revenue Code buttress the right of parents to direct their children’s education—the implementing rules must do the same. In response to the request for comment in Notice 2025-70, the Idaho Family Policy Center Legal Center (“IFPC Legal Center”) suggests two proposals for the rules. First, the statute does not clearly state that couples who are

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<sup>1</sup> Ronald Reagan, *Remarks at a Luncheon with Community Leaders in Chicago, Illinois*, Ronald Reagan Presidential Library and Museum (Sept. 30, 1988), <https://www.reaganlibrary.gov/archives/speech/remarks-luncheon-community-leaders-chicago-illinois>.

married filing jointly will be able to claim two individual tax credits under Internal Revenue Code § 25F—the rules should make this clarification. Second, the implementing rules must limit states’ discretion in approving scholarship granting organizations (SGOs) to prevent discrimination against American families of faith.

**II. The Internal Revenue Service (IRS) should not penalize marriage but should treat couples who are married filing jointly as two separate taxpayers for the purpose of receiving the Section 25 tax credit.**

Lasting marriages are the center of flourishing communities and should be encouraged as the cornerstone of the American family.<sup>2</sup> Congress has consistently recognized this reality and taken steps to reduce marriage penalties and increase marriage bonuses in the federal tax system.<sup>3</sup> But tax-related penalties that arise solely from marital status disincentivize marriage, disrupting the bedrock institution of our social structure. The interpretation of “taxpayer” for the Section 25 tax credit should be no exception to the long-standing trend away from penalizing marriage.

Section 25 does not expressly resolve whether a couple who is married filing jointly is treated as a single taxpayer or two individual taxpayers for purposes of claiming the credit.<sup>4</sup> The IRS should solidify a two-taxpayer interpretation of Section 25 by recognizing a married couple as two individual taxpayers who can each claim

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<sup>2</sup> Bradford Wilcox et al., OFF. OF FAM. ASSISTANCE, ADMIN. FOR CHILD. AND FAMS., U.S. DEP’T OF HEALTH AND HUM. SERVS. *Marriage Penalties in Means-Tested Tax and Transfer Programs: Issues and Options* (2019), OFA Rep. 2019-01, at 9–10 (discussing the relationship between marriage stability, family wellbeing, and positive community outcomes).

<sup>3</sup> Mark W. Cochran, *Back to the Future: Marriage and Divorce under the 2017 Tax Act*, 51 St. Mary’s L. J. 1, at 31–32 (2019) (“Congress has been chipping away at marriage penalties and increasing marriage bonuses virtually since the penalties first appeared.”).

<sup>4</sup> 26 U.S.C. § 25F (as added by the OBBBA).

the credit even if they file a single tax return together.<sup>5</sup> Under a two-taxpayer approach, each spouse would be independently eligible for the same \$1,700 credit rather than the married couple being constrained to a single \$1,700 credit solely because of their marital status.<sup>6</sup> The two-taxpayer interpretation would foster two positive results: avoiding marriage-based tax penalties and increasing total contributions to qualifying SGOs.

In contrast, a unitary-taxpayer interpretation substantially limits the efficacy of this new credit by disincentivizing contributions, potentially reducing the donations from married couples by as much as fifty percent. Under a unitary-taxpayer interpretation, a married couple filing jointly would be limited to a single credit, even in situations in which both spouses are willing and able to donate. While the immediate effect is the loss of a credit by a donor for their charitable contribution, a more significant consequence is the likely negative effect this would have on contributions to and the resulting availability of scholarship funds.

Although some other federal tax credits sensibly utilize a household or beneficiary-based credit framework, those credits fundamentally differ from this credit. For example, the Lifetime Learning Credit and the Child Tax Credit limit the credit to the filing unit. But “[t]he Lifetime Learning Credit may be claimed for the qualified tuition and related expenses of the students in the taxpayer’s family,”

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<sup>5</sup> The availability of this approach is supported by case law that suggests filing jointly does not automatically merge the two taxpayers into one entity for all purposes. For example, in *Dolan v. Commissioner of Internal Revenue*, 44 T.C. 420, 428 (1965), the Tax Court treated a married couple filing jointly as separate taxpayers for certain procedural purposes, such as allowing independent action by and against individual spouses.

<sup>6</sup> See 26 U.S.C. § 25F(b)(1) (providing for a \$1,700 credit).

allowing parents who are married filing jointly to claim *all* the household’s qualified tuition and related expenses, regardless of the number of children they have.<sup>7</sup> And the Child Tax Credit is claimed by parents filing jointly for *each* qualifying child.<sup>8</sup> Those credits are based on the couple’s number of children or total expenses, so applying a two-taxpayer approach to those credits would allow for double credit. But *every taxpaying donor* to a qualifying SGO is eligible to receive the Section 25 credit for their *donations*, so the forthcoming rules should not penalize those who would otherwise be able to claim the credit were it not for their marriage. Regardless of filing status, both spouses can individually donate to an SGO and should each be subject to the \$1,700 credit cap. Unlike credits that relieve the financial burden on a household or attach to a particular qualifying individual, Section 25 facilitates voluntary contributions benefitting third parties.<sup>9</sup> The “taxpayer” ambiguity can and should be resolved in a manner that does not penalize marriage.

Tax benefits encourage private action to advance the public welfare.<sup>10</sup> Section 25 is exactly that—a federal tax credit that incentivizes broad-based donor participation to allow parents to choose the best educational option for each of their children. The two-taxpayer interpretation is ideal because it construes the definition of “taxpayer” toward the new tax credit’s maximum efficacy. Treating each married spouse filing jointly as an individual taxpayer for the purposes of Section 25 will expand the donor base, strengthen SGOs, and promote the long-term viability of the

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<sup>7</sup> I.R.S. Notice 97-60, 1997-2 C.B. 310, at § 2.

<sup>8</sup> 26 USCS § 24(a).

<sup>9</sup> 26 U.S.C. § 25F(c)(3).

<sup>10</sup> *See Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983).

credit, furthering the statute’s congressional intent and promoting the flourishing of American marriages and families.

### **III. The IRS’s forthcoming regulations must not afford states the discretion to discriminate against American families of faith.**

Section 25 provides that a state must opt into the SGO program, submit a list of in-state SGOs that are “eligible” to participate in the program, and certify that the eligible SGOs are, in fact, compliant.<sup>11</sup> If not structured correctly, the certification mechanism may allow state officials to implicitly discriminate against religious SGOs or SGOs that support students attending religious schools because of subjective disagreements with their educational message.

Because many SGOs exist for the purpose of supporting students attending religious schools, exclusion of qualified organizations, absent safeguards, could exclude religious education. Such exclusion would harm parents who seek to use SGO funds for religious qualified educational expenses expressly permitted under Section 530 of the Internal Revenue Code.<sup>12</sup>

Implicit discrimination against religious schools and non-profit organizations is not merely speculative. Nor are examples of such discrimination rare.<sup>13</sup> Without

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<sup>11</sup> 26 U.S.C. § 25F(g)(1)(B).

<sup>12</sup> 26 U.S.C. § 530(b)(3)(A).

<sup>13</sup> See, e.g., *Trinity Lutheran Church v. Comer*, 582 U.S. 449, 466 (2017) (rejecting Missouri’s claim that its exclusion of a church from a neutral public-benefit program was benign and illustrating that religious discrimination often hides behind neutrality.); *Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 487-89 (2020) (finding that Montana’s exclusion of religious schools from a tax-credit scholarship program was unconstitutional and emphasizing that religious discrimination can be structural, normalized, and entrenched in legal regimes rather than explicit hostility); *Fulton v. City of Philadelphia*, 593 U.S. 522, 540-43 (2021) (ruling that Philadelphia’s discretionary enforcement regime enabled selective burdens on nonprofits—highlighting that Constitutional protections cannot be beholden to subjective determinations in the hands of a single administrator.).

objective standards or guidelines, the proposed certification mechanism would allow a governor or other state executive administrator to tacitly discriminate against religious organizations through an exercise of their discretion in approving SGOs, all while avoiding any accountability or detection.<sup>14</sup> The forthcoming rules should divest state officials of such discretion, removing the potential for rogue state actors to discriminate against religious SGOs. The rule should do this in two ways.

First, the rules should include language that prohibits discrimination against SGOs based on their religious affiliation or whether they fund scholarships for students attending religious schools. The rules should incorporate language similar to existing federal anti-religious discrimination protections, such as the Religious Land Use and Institutionalized Persons Act (RLUIPA)<sup>15</sup> and the Religious Freedom Restoration Act (RFRA).<sup>16</sup>

Second, the rules should limit the requirements that a state official may use for determining whether SGOs are qualified to participate in this tax credit to the list

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<sup>14</sup> In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020), the Supreme Court made clear that religious discrimination may be hidden in regulatory frameworks that do not explicitly discriminate against religion. More recently, in *Carson v. Makin*, 596 U.S. 767, 777 (2022), Maine attempted to reframe discrimination as targeting “religious use” rather than status. The Court again rejected this distinction as illusory, confirming that the modern discrimination against religious schools frequently operates through technical classifications that evade scrutiny. *Carson*, 596 U.S. at 789.

<sup>15</sup> 42 USC § 2000cc(a)(1) (“No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.”); (b)(2) (“No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.”).

<sup>16</sup> 42 U.S.C. § 2000bb–3(c) (“Nothing in this chapter shall be construed to authorize any government to burden any religious belief.”).

of qualifications in Section 25F(c)(5). The rule should require automatic certification of an SGO that meets these criteria.

#### **IV. Conclusion**

The family is the bedrock of American society. And, “[i]n the American concept, there is no greater right to the supervision of the education of the child than that of the parent. In no other hands could it be safer.”<sup>17</sup> Accordingly, the IFPC Legal Center asks that the Internal Revenue Service’s forthcoming proposed regulations not penalize marriage and protect the ability of parents across the nation to direct their children’s education as their children require and their consciences dictate, regardless of religious affiliation.

Sincerely,

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<sup>17</sup> *Thompson v. Engelking*, 537 P.2d 635, 647 (Idaho 1975) (quoting *Andrus v. Hill*, 249 P.2d 205, 207 (Idaho 1952)).