Is Generating Renewable Energy a Religious Use of Property? A Question as Congregations Implement Community Solar Programs

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I. INTRODUCTION

"Community solar," a method for financing local solar energy projects, has recently gained a foothold in many states.[1] It is a promising method of promoting both renewable energy and distributed generation. Religious congregations are often uniquely able and motivated to implement these projects to realize the direct benefits of the infrastructure investment and a reduced carbon footprint, as well as the indirect benefits that derive from the concerted action of an ethically motivated community. In fact, local community solar implementation by established and well regarded institutions, as religious congregations often are, may inspire congregants and other community members to do the same, or to support public policy measures aimed at expanding renewable energy.

A potential problem arises when congregations use their tax-exempt property (such as church rooves) to host community solar projects: how does a community solar project fit within the limited uses allowed under the tax-exempt status of a religious institution?[2] If religious congregations use their tax-exempt property to generate renewable energy for off-site uses, these organizations may

1. DAVID FELDMAN ET AL., NAT'L RENEWABLE ENERGY LAB., NREL/TP-6A20-63892, SHARED SOLAR: CURRENT LANDSCAPE, MARKET POTENTIAL, AND THE IMPACT OF FEDERAL SECURITIES REGULATION, at 1, 5 (2015).

2. As discussed further *infra*, there is a great deal of overlap with "religious," "charitable," or "welfare" tax exemptions in different states, often within the same site. *See, e.g.*, CAL. STATE BD. OF EQUALIZATION, ASSESSORS' HANDBOOK SECTION 267: WELFARE, CHURCH, AND RELIGIOUS EXEMPTIONS, at 8 (2d prtg. 2015) ("The welfare exemption must be claimed for uses of the property beyond the scope of religious worship and schools, or if the property also is used regularly by a charitable organization.").

lose their tax-exempt status.[3] As explained below, religious organizations rely heavily on tax exemptions. While community solar projects are feasible and attractive for many congregations—especially for those motivated by an ethic of environmental stewardship—the benefits of such projects may not offset losing a property tax exemption. This looming threat makes developing community solar particularly daunting to congregations, and could prevent very beneficial projects from being undertaken. Different states have taken different approaches. Some exemplary states have explicitly protected property tax exemptions through legislation.[4] But the law in most jurisdictions remains uncertain,[5] and this Note recommends a clear legislative or administrative signal in these states to help assuage congregations considering community solar.

Because religious property is already exempt from taxation and congregations would not want to jeopardize their tax-exempt status by developing a community solar array, states have nothing to lose from preserving exemptions for religious and charitable properties that host community solar facilities. States usually exempt solar facilities themselves from property taxes, or they exempt underlying property from any increased taxes resulting from an increase in value from hosting a solar energy installation. Despite this, some states indicate that they will not extend their religious property tax exemptions to community solar host sites.[6] Yet preserving such exemptions is more in line with historic treatment of religious and charitable properties. Renewable energy generation might also be a protected act of religious faith as a matter of law.

In Part II, this Note details the tax treatment of religious institutions. Part III sets forth the benefits of and different models

3. *See* David J. Gau, Cal. State Bd. of Equalization, Letter to Assessors No. 2013/063: Solar Energy Systems on Nonprofit Properties (Dec. 16, 2013) [hereinafter Letter to Assessors] (stating that if any energy is generated for offsite consumption or for the profit of a third party, the religious or charitable property's tax exempt status would be partially or completely destroyed); *see also* JUSTIN BARNES ET AL., PROPERTY TAXES AND SOLAR PV SYSTEMS: POLICIES, PRACTICES, AND ISSUES 42 (2013) ("[I]t is hard to argue that an exempt use is being maintained, and revocation of the exemption would impose a significant financial impact.").

4. *See, e.g.*, VT. STAT. ANN. tit. 32, § 8701(d) (2016) (providing that "[t]he existence of a renewable energy plant . . . shall not alter the exempt status of any underlying property" for pious or charitable purposes).

5. BARNES ET AL., *supra* note 3, at 41.

6. *See, e.g.*, Letter to Assessors, *supra* note 3.

for community solar. Part IV explores the unique opportunity community solar presents for religious congregations. Part V details the tax exemption obstacle facing such projects, and selected state approaches. Part V then identifies three strategies religious congregations can deploy to ensure that solar projects remain consistent with religious uses of property for tax exemption purposes. First, congregations should eschew financial profits in community solar project structures. Second, the projects should incorporate traditional charitable activities such as youth education and economic justice. And third, congregations should clearly integrate solar projects into their religious activities. These strategies are legally untested, but have all been implemented to one degree or another by religious communities that have pursued solar projects.

II. TAX EXEMPTIONS FOR RELIGIOUS PROPERTY

No state currently levies a property tax on religious property such as houses of worship. The loss of tax exempt status could be onerous for a religious congregation. Not only would the direct cost of the tax need to be met, but often the preservation of the entire property's tax exempt status is a condition of a religious organization's bond financing.[7] Thus, a congregation that loses its property tax exemption might find itself in default. For these reasons, the loss of a tax exemption (or the material risk of such a loss) might very well preclude a religious congregation from hosting a community solar installation.

The practice of exempting churches, and in particular church land, from taxation predates American government, with deep roots in British common law.[8] These exemptions exist in tension between two competing goals of the First Amendment: (1) the Establishment Clause's bar on the government passing special benefits to religious institutions; and (2) the Free Exercise Clause's

7. Ofer Lion, *Client Alert: Solar Energy Systems on California Tax-Exempt Property*, HUNTON & WILLIAMS (Dec. 2013), https://www.hunton.com/files/News/5331d1fb-18b3-467c-87b7-b334cafcd63f/Presentation/NewsAttachment/9936b604-52b9-4246-b7cc-b442d9cb3443/Solar_Energy_Systems_on_California_Tax-Exempt_Property.pdf [https://perma.cc/96JP-7VZB] (warning that non-profits may jeopardize covenants in bonds if even a portion of their property loses its tax exemption).

8. John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 534–36 (1992).

prohibition of the government imposing special burdens on religion.[9] But the Supreme Court upheld the practice of exempting religious property from taxation in *Walz v. Commissioner*.[10] Every state and the District of Columbia exempt religious property from taxation in one way or another.[11] Congregations will often hold land not currently used for religious purposes that still remains tax-exempt under other tax provisions, such as those covering educational or charitable purposes.[12]

The merits of the religious property tax exemption are still debated. Critics argue that a tax exemption amounts to a subsidy for religious organizations paid by U.S. taxpayers,[13] which is similar to criticisms of community solar, net metering, and solar tax exemptions in that others must indirectly pay for the special tax treatment granted to a particular group. Critics also highlight examples of religious organizations abusing their tax exemptions.[14] As discussed below, community solar does not provide a strong incentive to abuse a religious tax exemption because it does not generate much money, nor does the use of a house of worship for a solar project interfere with religious use.

III. COMMUNITY SOLAR

This Part outlines the basics of community solar, its advantages, and the methods used to implement the practice. Section III.A describes the general arrangement of a community solar project. Section III.B articulates the tangible benefits of the community renewables mechanism for deploying more solar energy generation. Section III.C highlights certain intangible benefits that

9. John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 363–64 (1991).

10. Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 675 (1970).

11. Michael K. Ryan, Note, *A Requiem for Religiously Based Property Tax Exemptions*, 89 GEO. L.J. 2139, 2139–40 (2001).

12. *See* Shelley Ross Saxer, *Faith in Action: Religious Accessory Uses and Land Use Regulation*, 2008 UTAH L. REV. 593, 605 (2008).

13. Ryan, *supra* note 11, at 2170–74; *see also id.* at 2175 (questioning the supposed "good works" society receives in exchange for the subsidy); *cf. Walz*, 397 U.S. at 675.

14. Sarah A. Lindquist, *Property Tax Exemptions for the Nontraditional Church: How Do We Grant Tax Exemptions to Places of Worship and Not Amusement Parks?*, 33 FLA. ST. U. L. REV. 1149, 1152–53 (2006); *see also id.* at 1174 ("The only way to prevent abuse is to enforce—fully and completely—a public benefit approach. Only those portions of church property that are providing a public service to the community, beyond the religion itself and beyond any economic effect to the community, should be tax-exempt.").

arise from community autonomy and control of energy production. Section III.D addresses some of the arguments raised against community solar projects. And Section III.E describes the three dominant models of ownership and management for community solar projects: (1) the non-profit model, (2) the special purpose entity model, and (3) the utility sponsored model. While each model has its advantages, the best model for an interested religious congregation to implement a community solar project is the special purpose entity model, where a separate legal entity is established to operate the project.

A. Community Solar: Basic Overview

As a shared renewables energy arrangement,[15] community solar is a mechanism whereby subscribing members buy shares in a solar project (often referred to as "solar gardens") and receive portions of the energy produced and sent to them through the grid, often in the form of energy credits metered to their own electricity bills.[16] Solar is the dominant form of shared renewables, but most state policies enabling shared renewables are not exclusive to solar and may apply to other sources of renewable energy.[17] The community solar innovation has enormous potential to spur adoption of solar and other renewables.[18]

15. *See generally Shared Renewables / Community Solar*, SOLAR ENERGY INDUS. ASS'N, http://www.seia.org/policy/distributed-solar/shared-renewablescommunity-solar [https://perma.cc/769N-LBEY] (last visited Apr. 4, 2017).

16. FELDMAN ET AL., *supra* note 1, at v; *see also* Samantha Booth, *Community Solar: Reviving California's Commitment to a Bright Energy Future*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10,585, 10,585 (2013). The community solar mechanism is similar to virtual net metering or aggregate net metering, and it is often conflated with them. However, the billing mechanism of community solar is distinct in that the values of the credits are not necessarily tied to retail rates, allowing for greater flexibility. *See* INTERSTATE RENEWABLE ENERGY COUNCIL, MODEL RULES FOR SHARED RENEWABLE ENERGY PROGRAMS 5–6 (2013) [hereinafter IREC MODEL RULES].

17. JASON COUGHLIN ET AL., NAT'L RENEWABLE ENERGY LAB., A GUIDE TO COMMUNITY SOLAR: UTILITY, PRIVATE, AND NON-PROFIT PROJECT DEVELOPMENT 22 (2010) (citing Vermont's policy as an example of allowing wind, thermal, or even small hydro power). In fact, the year before the Maryland General Assembly passed legislation mandating "Community Renewable Energy Generation," it nearly enacted similar shared-renewable legislation specifically limited to energy created from poultry litter. S. 521, 2014 Leg., 431st Sess. (Md. 2014). This Note focuses on community solar, though lessons can be drawn applicable to other forms of shared renewables.

18. Booth, *supra* note 16, at 10,585.

There are twenty-five states with at least one community solar project on-line,[19] and the mechanism is popular with subscribers.[20] Currently, fourteen states and the District of Columbia have shared renewables legislation in place, and many more "are considering programs to expand consumer access to clean energy."[21] Legislation that enables community solar would authorize a shared virtual net metering framework that "enables multiple customers to link their electricity meters to the electricity production of one shared solar array."[22]

There are many ownership and management models available to community solar, as discussed in Section III.E. The best structure—especially for arrays hosted by congregations—is the formation of a separate limited liability company ("LLC") owned and paid for by community members who are then entitled to a share of the electricity generated from the project.

B. Tangible Benefits: Affordable and Clean Energy

Community solar accelerates adoption of renewable energy by making solar projects more financially attractive and practically achievable for motivated individuals and communities. The mechanism lowers the cost of "going solar" by taking advantage of economies of scale, allowing neighbors to share one large installation rather than several small ones.[23] Community solar also helps to open renewable energy participation to those without good solar access at their own residences, such as apartment renters.[24]

Better economies of scale and improved solar access provided by community solar complement each other in contributing to the

19. *Shared Renewables / Community Solar*, *supra* note 15.

20. For instance, in Minnesota the Public Utility Commission recently created project size limits when the program proved more popular than expected. Riham Feshir, *Solar Gardens Can Only Get So Big Under Agreement*, MINN. PUB. RADIO NEWS (June 26, 2015), http://www.mprnews.org/story/2015/06/26/solar-gardens-can-be-only-so-big-under-agreement [http://perma.cc/8QCC-5WRN]; *see also* Press Release, SunShare, Nation's Largest Community Solar Portfolio Sold Out (Aug. 27, 2015), https://mysunshare.com/2015/08/nations-largest-community-solar-portfolio-sold-out [http://perma.cc/N6T7-UN2S].

21. *USA Shared Energy Map*, SHARED RENEWABLES HQ, http://www.sharedrenewables.org/community-energy-projects [https://perma.cc/F5E7-73MN] (last visited Apr. 5, 2017).

22. FELDMAN ET AL., *supra* note 1, at 10.

23. JOHN FARRELL, NEW RULES PROJECT, COMMUNITY SOLAR POWER: OBSTACLES AND OPPORTUNITIES 23 (2010).

24. Booth, *supra* note 16, at 10,585–87.

social equity goals that many states and advocates hope to achieve through shared renewables.[25] Another key advantage of community solar is that it is a form of distributed generation, i.e., generation (often small-scale) at or near the point of consumption.[26] Distributed generation can play an important role in increasing the amount of renewables generated and in reducing demand for fossil fuel generation at peak demand times when energy is the most expensive and dirtiest.[27] When electricity is generated nearer to the point of consumption, less infrastructure is needed for transmission and less energy is lost during transmission.[28]

Another important benefit of community solar is its impact in reducing emissions of greenhouse gases ("GHGs") by displacing fossil fuel energy with solar energy.[29] By some estimates, for instance, California could achieve its renewable energy goals entirely through community solar.[30] The potential for community solar to "address[] climate change . . . [and] promot[e] clean energy" is so high that in July 2015, the Obama administration launched the "National Community Solar Partnership," comprised of sixty-eight cities, states, and businesses, to expand access to community solar for lower income households.[31]

Community solar also has land use benefits. There are environmental concerns when solar installations are built far away from consumers, requiring ecological disruption in

25. *Id.*

26. Deborah Behles, *From Dirty to Green: Increasing Energy Efficiency and Renewable Energy in Environmental Justice Communities*, 58 VILL. L. REV. 25, 35 (2013).

27. Booth, *supra* note 16, at 10,599; *see also* FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 779 (2016) (discussing inefficiency and overstrain on the grid at times of peak energy demand).

28. IREC MODEL RULES, *supra* note 16, at 13; *see also* Owen Comstock, *Solar Photovoltaic Output Depends on Orientation, Tilt, and Tracking*, U.S. ENERGY INFO. ADMIN. (Nov. 19, 2014), http://www.eia.gov/todayinenergy/detail.cfm?id=18871# [http://perma.cc/36T6-4AAC] (last visited Jan. 3, 2016); Booth, *supra* note 16, at 10,589 ("7% of electricity generated is lost through transmission and distribution annually.").

29. COUGHLIN ET AL., *supra* note 17, at 2.

30. Booth, *supra* note 16, at 10,587 ("[California] possesses sufficient capacity for community solar installation in populous areas to achieve its 33%> RPS goal by relying on community solar generation alone.").

31. Press Release, The White House, Fact Sheet: Administration Announces 68 Cities, States, and Businesses Are Working Together to Increase Access to Solar for All Americans (Nov. 17, 2015), https://www.whitehouse.gov/the-press-office/2015/11/17/fact-sheet-administration-announces-68-cities-states-and-businesses-are [https://perma.cc/VD4A-QQSZ].

environmentally sensitive areas.[32] Community solar is often sited on existing developed land such as parking lots, reducing the demand for more ecologically burdensome projects.[33] The local nature of distributed generation is viewed by many as one of the most valuable features of community solar.[34] Moreover, the proximity of shared renewables to their point of consumption is closely linked to certain intangible benefits discussed below.

C. Intangible Benefits: Democratization and Community Control

Some have argued that the most important benefit of community solar and other forms of distributed renewable generation is the potential to "democratize" our power supply,[35] which is accomplished in two ways.[36] First, community solar allows renewable energy access to those otherwise excluded from renewable generation by virtue of their locations far away from solar access, or lack of ownership interests in their homes.[37] The second way community solar gardens can democratize power is by directly "engaging individuals in fashioning the nature of the electricity system and as a consequence strengthening their civic lives as citizens."[38]

The decentralized control inherent to a community solar program can have many benefits. Compared with big utility companies or large-scale fossil generators, community solar programs are less complex, making them more accessible to those without specialized knowledge, and thus allowing more participation than a ratepayer could have otherwise.[39] Heightened participation at the local level also fosters greater accountability.[40]

32. Booth, *supra* note 16, at 10,590 ("This conflict highlights yet another environmental benefit of distributed solar. Because community projects are installed predominantly on preexisting structures or blighted open space, community solar generation avoids adverse environmental impacts on sensitive desert and mountain habitats associated with industrial-scale development.").

33. *Id.* at 10,589–90.

34. *Id.* at 10,589.

35. JOHN FARRELL, INST. FOR LOCAL SELF-RELIANCE, ROOFTOP REVOLUTION CHANGING EVERYTHING WITH COST-EFFECTIVE LOCAL SOLAR 18, 29 (2012).

36. STEVE HOFFMAN & ANGELA HIGH-PIPPERT, COMMUNITY SOLAR PROGRAMS AND THE DEMOCRATIZATION OF THE ENERGY SYSTEM, at 6 (2015).

37. *Id.*

38. *Id.*

39. AMORY LOVINS, SMALL IS PROFITABLE: THE HIDDEN ECONOMIC BENEFITS OF MAKING ELECTRICAL RESOURCES THE RIGHT SIZE 301 (2002).

40. *Id.*

As local stakeholders, community solar members and operators are more responsive to community needs such as facility siting, and may more easily avoid conflict, than would large energy companies.[41] Local participation "not only reduces conflicts and hence costs; it also tends to lead to sounder decisions."[42]

Religious congregations are already established in their communities, and their members are very familiar with how decisions are made. Religious congregations are locally focused, ethically driven, and not-for-profit. As discussed in Part IV, these congregations are well positioned to generate considerable value from community solar projects—in addition to having the resources necessary for some of the most important projects.

D. Arguments Against Community Solar

Community solar is not without its critics, particularly in the utility sector. The main point of contention is that even though solar subscribers produce their own energy, they still must rely on the grid as much as ordinary ratepayers.[43] The logic behind the criticism is that community solar leaves

> non-rooftop-solar customers shouldering a disproportionate amount of the costs of the system infrastructure needed to serve all customers; that is, unless rooftop solar generates benefits to all ratepayers that equal or exceed the fixed cost contributions otherwise averted by rooftop-solar ratepayers.[44]

In other words, the fixed system costs of a community solar installation are borne by the non-solar ratepayers whose usage fees support the grid, subsidizing those who switch to solar while no longer contributing to the system's maintenance.

Some claim community solar and other distributed renewables programs will lead to a "death spiral" for electric utilities.[45] Such a spiral would be caused by a "feedback loop" where increased deployment of solar causes electricity rates to rise, making solar

41. *Id.* at 300.

42. *Id.* at 301.

43. Alexander D. White, *Compromise in Colorado: Solar Net Metering and the Case for "Renewable Avoided Cost,"* 86 U. COLO. L. REV. 1095, 1119 (2015).

44. *Id.* at 1110.

45. Elisabeth Graffy & Steven Kihm, *Does Disruptive Competition Mean A Death Spiral for Electric Utilities?*, 35 ENERGY L.J. 1, 10 (2014).

more financially attractive, driving further adoption of solar, and so on.[46] Widespread implementation of solar could impose an undue burden on utility payment systems.[47] However, a recent study prepared for the Department of Energy found that any such "loop" was not likely to occur.[48] Further, because the burden on other ratepayers from distributed solar is outweighed by clean energy's benefits to society, the environment, and public infrastructure,[49] the system benefits for distributed solar generators may be an appropriate subsidy.

There are also ways to manage the burden on utility ratepayers. For instance, New York is prioritizing solar development in certain zones where the grid is most burdened by energy demand; distributed generation in those zones will theoretically benefit all ratepayers by preventing utility-wide cost increases to improve grid capacity.[50] In addition, California requires that any utility's community solar plan "must ensure ratepayer indifference—non-[shared renewables] customers cannot bear [the state's community solar program's] costs."[51] Both individual and aggregate caps in the size of community solar installations are also a common feature of many policies.[52] Minnesota has implemented such a limit after-the-fact, when its community solar program proved too popular.[53] Overall, any lost revenue or burden on a utility due to community

46. NAÏM R. DARGHOUTH ET AL., NET METERING AND MARKET FEEDBACK LOOPS: EXPLORING THE IMPACT OF RETAIL RATE DESIGN ON DISTRIBUTED PV DEPLOYMENT 2–3 (2015).

47. An undue burden on utilities would violate the "just and reasonable" doctrine, which strikes a balance between utility profits and consumer interests. *See* White, *supra* note 43, at 1134 (defining the doctrine as "necessary to ensure not only that the utility does not unduly benefit from its monopoly but also that the utility's returns are predictable enough to maintain its financial stability and allow it to continue to provide vital energy to the public"; thus, regulators "must . . . set rates which protect both: (1) the right of a public utility company and its investors to earn a rate of return reasonably sufficient to maintain the utility's financial integrity; and (2) the right of consumers to pay a rate which accurately reflects the cost of service rendered").

48. DARGHOUTH ET AL., *supra* note 46, at 20–21 ("Our analysis suggests little change in national PV deployment due to rate feedback . . . because there are, in fact, two feedback effects of relevance . . . and these two feedbacks operate in opposing directions.").

49. White, *supra* note 43, at 1130.

50. *See generally* Proceeding on Motion of the Commission as to the Policies, Requirements & Conditions for Implementing a Community Net Metering Program, Case 15-E-0082, 322 P.U.R.4th 113 (N.Y. Pub. Serv. Comm'n July 17, 2015).

51. *See* Implementation of the Green Tariff Shared Renewables (Gtsr) Program Pursuant to Decision (D.) 15-01-051., Res. E-4734, 2015 WL 5829135, at *1 (Cal. Pub. Utils. Comm'n Oct. 1, 2015).

52. COUGHLIN ET AL., *supra* note 17.

53. Feshir, *supra* note 20.

solar would be minimal, could easily managed, and is dwarfed by the benefits of accessible distributed generation.

E. Proven Community Solar Models

There are three general models for financing community solar projects: the non-profit model, the special service entity model, and the utility sponsored model.[54] Some of these models are not implemented in a truly "community solar" manner, but rather operate "behind the meter"—that is, they are funded by the community, but all the energy is consumed on-site rather than credited to other households.[55] For reasons discussed below, the most useful model for religious congregations and most other interested groups is the special purpose entity model.[56]

1. Non-Profit Model

In the non-profit model, a community solar project is funded through grants or member donations, which are tax deductible.[57] Though a solar project undertaken by a community, this model is not truly "community solar." The energy benefits do not flow to subscriber members; rather, the energy is consumed by the host organization. The "benefits" to the donors are the demonstration of environmental values and lowering costs for the non-profit they support. For a religious community, this model could be employed to fund a solar installation for consumption on-site at the house of worship or other church buildings.

Tax considerations frustrate non-profit model projects in several ways. Since most solar incentives come in the form of tax deductions or credits, an organization such as a religious non-profit, which pays little to no taxes—i.e., has a low "tax appetite"—cannot take advantage of most solar energy incentives as easily as its for-profit counterparts.[58] If participants receive energy credits

54. COUGHLIN ET AL., *supra* note 17, at 6; *see also id.* at 7 (depicting a chart with side-by-side comparisons of the different models).

55. An example is the University Park Solar project, which was set up before Maryland passed legislation enabling the virtual net metering to bill the credits to subscribers. MASS. DEP'T OF ENERGY RES., COMMUNITY SHARED SOLAR REVIEW AND RECOMMENDATIONS FOR MASSACHUSETTS MODELS 46 (2013); *see also infra* note 73 and accompanying text.

56. *See also* Telephone Interview with David Brosch, President, Univ. Park Cmty. Solar, LLC (Nov. 1, 2015) (on file with author).

57. COUGHLIN ET AL., *supra* note 17, at 27.

58. *Id.* at 4.

metered to their bills in exchange for their financial contributions, the exchanges would be quid pro quo and could not be tax-deducted entirely.[59] Because non-profit organizations have such a low tax appetite, they cannot directly take advantage of the solar Investment Tax Credit ("ITC"),[60] or accelerated depreciation of the installation.[61] However, non-profit organizations may be eligible for grants that for-profit organizations are not.[62] An example of the non-profit model is "Solar for Sakai" in Washington State, where funds were raised by donors and the project was placed on a local school.[63] But according to one commentator, the project "was relatively expensive and offers little financial value to contributors," and is ultimately "a poor model with its dependence on altruistic solar donors."[64]

The non-profit model is not ideal for congregations interested in hosting community solar for several reasons. Solar energy incentives are largely tax-based, leaving untaxed congregations with little to gain. Congregations cannot take advantage of federal and other incentives if they undertake the solar project directly. Further, the non-profit model does not truly generate "community" energy that is metered beyond the host site. In net metering regimes without a community solar element, the utility will credit the subscriber for up to the amount consumed, but will typically offer much less compensation for excess energy generated.[65] This limits the amount of energy that can generated, lowering the project's overall potential. Community involvement is also limited because any members would be donors, rather than subscriber stakeholders.

59. *Id.* at 19 (noting that other arrangements are "not strictly 'community solar'").

60. *Id.* at 28.

61. FARRELL, *supra* note 23, at 4 (noting that both a tax credit and depreciation of assets operate to incentivize investments by reducing the tax owed, rather than the up-front costs).

62. COUGHLIN ET AL., *supra* note 17, at 27.

63. FARRELL, *supra* note 23, at 17.

64. *Id.* (ranking the project lowest of all the projects graded on a letter system of A through F, with a grade of C-).

65. For example, the University Park installation, which was financed using a special purpose entity but predates Maryland's community solar policy, sells the excess energy generated, usually for somewhere between five and nine hundred dollars each year. *See* UNIV. PARK CMTY. SOLAR, LLC, ANNUAL SUMMARY OF OPERATIONS FOR YEAR 2014, at 2 (2015).

2. Special Purpose Entity Model

In the special purpose entity model, a separate for-profit business is set up to operate the community solar installation.[66] Subscribers buy an ownership share of the project, which entitles them to a portion of the energy produced. To employ this model, a religious community would set up the special purpose entity, enlist a group of subscribers, secure funding, and build the project. Energy produced from the installation and fed into the grid would then be credited to the individual subscribers.

The special purpose entity model is ultimately the best vehicle for religious congregations to use in hosting community solar installations. The model has some complications that go along with running a for-profit business, such as "raising capital . . . [and] comply[ing] with securities regulation."[67] Special purpose entities are often set up by larger, savvier organizations such as My Generation Energy, a Massachusetts company that specializes in setting up such entities for interested communities.[68] The issue of securities regulation is problematic because ownership shares must be sold to a project's subscribers. That issue is discussed more fully in Section IV.B.3.

A special purpose entity is able to take advantage of the tax incentives foregone under the non-profit model precisely because it is for-profit.[69] But a special purpose entity can present a problem inasmuch as the organization needs significant taxable income, which religious congregations generally lack, in order to benefit from tax incentives.[70] The taxable income issue may be less of a problem in light of a recent Internal Revenue Service ("IRS") letter ruling which articulated that the individual members of community solar projects may claim the federal ITC under normal circumstances.[71] Another solution is a "sale/lease back" method

66. COUGHLIN ET AL., *supra* note 17, at 12.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 13.

71. Residential Energy Efficient Property, I.R.S. Priv. Ltr. Rul. 201536017, at 3 (Sept. 4, 2015) ("Taxpayer's expenditure for the solar panels and the related equipment and installation services mentioned in this ruling constitute a 'qualified solar electric property expenditure' under § 25D(d)(2), and Taxpayer is eligible to claim an income tax credit under § 25D in an amount equal to 30% of such expenditure in Year.").

where the project is sold to an investor with a larger tax appetite and leased back to the community organization.[72]

Examples of special purpose entity projects are University Park Community Solar, LLC ("University Park Solar" or "University Park") in Maryland and the Clean Energy Collective, LLC in Colorado.[73] Both these projects were ranked highly in a survey conducted by the Institute for Local Self-Reliance.[74] The University Park model provides an important example for this Note because it is hosted by a religious congregation, the Church of the Brethren. The church not only provided the physical site, but also recruited subscriber members to buy shares of the project.

3. Utility Sponsored Model

In the utility sponsored model for community solar, the electric utility supports the up-front development of a project sited on the participants' property. The project is owned by the utility or a third party, and in exchange "customers receive a payment or credit on their electric bills that is proportional to 1) their contribution and 2) how much electricity the solar project produces."[75] A religious community could employ this model by using its house of worship as a site for the utility sponsored solar project, with individual members receiving credits for the project's energy generation.

In contrast with a special purpose entity model, the subscribers in a utility sponsored solar project do not have an ownership interest, nor do they exercise control over it. "Rather, the customer buys rights to the benefits of the energy produced by the system."[76] California is in the process of implementing such a program statewide to complement its mandate to allow special purpose entity model projects.[77] In addition to the absence of community

72. COUGHLIN ET AL., *supra* note 17, at 15 (other methods include a "flip structure" and, most commonly, self-financing when the organization has sufficient tax appetite).

73. *Id.* at 16–18.

74. FARRELL, *supra* note 23, at 17 (using six categories to evaluate projects based on their ability to: "Overcome Barriers"; "Expand Participation"; "Expand Ownership"; be "Affordable"; have an optimal "Location"; and be "Replicable"). The results gave the Clean Energy Collective a rank of A. Meanwhile, University Park Solar received a rank of A- because the project's method of avoiding securities regulations appeared difficult to replicate. However, it may be easier to replicate by other religious congregations.

75. COUGHLIN ET AL., *supra* note 17, at 8.

76. *Id.*

77. California's program consists of a "green tariff" ("GT") option and an "enhanced community renewables" ("ECR") option:

control over the project,[78] a major drawback is that ratemaking rules restrict a utility's ability to take advantage of the Investment Tax Credit, and publicly owned utilities may not take advantage of it at all.[79] For this reason, utilities have been resistant to investing in these community solar projects.[80] Because the utility sponsored model lacks the "community" element of community solar, religious communities wishing to host a solar garden would be better served by using the special purpose entity model, which allows more input and ownership of the project.

IV. UNIQUE POSITION OF RELIGIOUS CONGREGATIONS IN IMPLEMENTING COMMUNITY SOLAR

Religious congregations are uniquely able and motivated to implement community solar, and many, in fact, have been on the vanguard. Section IV.A describes the basics of "Stewardship Theology" as a religiously driven movement to preserve the environment. Section IV.B describes the unique advantages that religious congregations have in implementing community solar programs.

Most of the benefits of community solar described in Part III are amplified when the projects are implemented by close-knit, locally focused, and ethically driven organizations, such as religious congregations. Social justice missions and experience make increasing access to moderate and low-income participants a more natural undertaking for these organizations. Their willingness to take on more financially marginal projects also enhances the benefits of distributed generation. And finally, the less tangible benefits that spring from community control over important resources and economic development can be maximized by having a preexisting organization already connected to the subscriber community. Congregations may also bring in new "converts" to

> The GT option is a premium rate product that allows IOU customers to pay extra each month for solar energy generation that meets between 50% and 100% of their monthly usage. The ECR option is a "community solar" product that allows IOU customers to purchase a share of a solar development to meet their energy needs.

Implementation of the Green Tariff Shared Renewables (Gtsr) Program Pursuant to Decision (D.) 15-01-051., Res. E-4734, 2015 WL 5829135, at *2–3 (Cal. Pub. Utils. Comm'n Oct. 1, 2015).

78. LOVINS, *supra* note 39, at 300.

79. COUGHLIN ET AL., *supra* note 17, at 9.

80. *Id.*

environmental values by tapping into their senses of religious obligation.

A. Stewardship Theology

Religiously-motivated environmentalism, which this Note will refer to as "stewardship theology," is now mainstream. Pope Francis, for instance, has been a prolific speaker on the need to address climate change.[81] And the Pope's strong stance seems to have an observable effect on opinions of Catholic Americans and Americans overall.[82] The relationship between environmental concerns and Western religious traditions has historically been complex.[83] Some even blame ecological devastation on the Western Judeo-Christian ideal of dominion over nature.[84] Whether or not this characterization was overly simplistic, many religious communities have evolved their views in the face of ecological degradation.[85] In fact, past criticism may have motivated religious leadership, especially in mainline denominations, to take more pro-environment action and express more concern regarding environmental degradation.[86]

Many religious congregations are currently interested in taking more action to fight climate change.[87] Houses of worship hosted some of the first community solar projects in the country.[88] A

81. Dan Roberts, *Pope Francis Calls for Urgent Action on Climate Change in White House Speech*, THE GUARDIAN (Sept. 15, 2015), http://www.theguardian.com/world/2015/sep/23/pope-francis-climate-change-white-house-speech [http://perma.cc/U4VR-LWKF].

82. *See generally* YALE PROGRAM ON CLIMATE CHANGE COMMC'N, THE FRANCIS EFFECT: HOW POPE FRANCIS CHANGED THE CONVERSATION ABOUT GLOBAL WARMING (2015).

83. Darren E. Sherkat & Christopher G. Ellison, *Structuring the Religion-Environment Connection: Identifying Religious Influences on Environmental Concern and Activism*, 46 J. SCI. STUDY RELIGION 71 (2007).

84. Lynn White, Jr., *The Historical Roots of Our Ecologic Crisis*, 155 SCIENCE 1206 (1967) (arguing "that modern technology is at least partly to be explained as an Occidental, voluntarist realization of the Christian dogma of man's transcendence of, and rightful mastery over, nature" and that "[i]f so, Christianity bears a huge burden of guilt").

85. Willis Jenkins, *After Lynn White: Religious Ethics and Environmental Problems*, 37 J. RELIGIOUS ETHICS 283, 304 (2009).

86. Sherkat & Ellison, *supra* note 83, at 82–83.

87. *See generally Religious Statements on Climate Change*, INTERFAITH POWER & LIGHT, http://www.interfaithpowerandlight.org/resources/religious-statements-on-climate-change [http://perma.cc/2ZDQ-MLGQ] (last visited Feb. 25, 2017).

88. A notable example is University Park Solar's project located on the Church of the Brethren, which lead to another project, Greenbelt Community Solar, LLC, which "was modeled after the University Park Community Solar, LLC, and has itself spawned the Ethical Community Solar, LLC in Washington, D.C. (30.8kW solar array, also located at a place of

cottage industry has even emerged to aid these congregations interested in developing solar projects on-site.[89] The ecological motivations of these organizations are steeped in religious belief and encompass many different denominations and religious traditions.[90]

B. Unique Advantages of Religious Congregations

Religious congregations are well positioned to implement community solar. First, houses of worship themselves are often prominent buildings, with large solar generating potential relative to other buildings in the area. Second, faith-based zeal of religious communities allows them to take advantage of a wide range of projects, including those with more marginal returns, and to lend the institution's influence and goodwill to the cause of renewable energy. Third, the non-profit-seeking motives of religious congregations can render congregation-based community solar projects organized under a special purpose entity model exempt from onerous state and federal securities regulations.

1. Tangible Assets

In addition to religious communities' unique motivation to help mitigate climate change, the physical assets of these communities—i.e., the houses of worship themselves—are also uniquely suited to generate solar energy. Houses of worship are often larger than surrounding buildings, freestanding, and free from shade from nearby trees.[91] Moreover, Christian churches are often

worship)." MICH. ENERGY OFFICE, A GUIDEBOOK FOR COMMUNITY SOLAR PROGRAMS IN MICHIGAN COMMUNITIES 24 (2014); *see also* U. PARK SOLAR, http://www.universitypark solar.com [https://perma.cc/N6BR-UTWG] (last visited Apr. 11, 2017).

89. *See generally Solar Congregations and Resources*, INTERFAITH POWER & LIGHT, http://www.interfaithpowerandlight.org/resources/solar-congregations-and-resources [https://perma.cc/8XPB-Q59N] (last visited Feb. 25, 2017); *see also Non-Profit Solar*, AM. SOLAR, http://americansolar.net/non-profit-services [https://perma.cc/3TY2-XATD] (last visited Feb. 25, 2017).

90. INTERFAITH POWER & LIGHT, *supra* note 89.

91. *See, e.g.*, Kristin L. Bailey, *Insecurity for Community Solar: Three Strategies to Confront an Emerging Tension Between Renewable Energy Investment and Federal Securities Laws*, 10 J. TELECOMM. & HIGH TECH. L. 123, 130 (2012) (discussing University Park Community Solar, LLC).

intentionally oriented east to west,[92] which maximizes solar generation capacity due to the angle of the roof.[93]

The University Park project—a model for community financing—exhibits these features, and its production exceeds demand.[94] A typical church can generate more rooftop solar on-site than it needs.[95] Granted, a typical church has a smaller capacity than many of the larger solar gardens built in large fields.[96] However, as discussed in Section III.B, the location of generation close to the point of consumption is important in addition to the scale of a project.

2. Motivations of Religious Communities

The nature of religious belief and practice provides two reasons for policymakers to remove barriers to religious congregations that wish to set up community solar gardens. First, because religious organizations may be motivated by environmental concern rather than monetary benefit, they are willing to take on projects with more marginal benefits, or even risk loss.[97] The broader social missions of religious communities may also enable them to bring in lower income participants through reduced cost shares, or to direct excess generation to an affiliated charity. As noted earlier, increasing accessibility to solar as a matter of social equity has been one of the driving reasons for the implementation of community solar. And the question of just how to achieve social equity with renewable energy development has been a dilemma for state regulators and project sponsors.[98] Historically, religious congregations have been working to fight economic and social problems longer than ecological ones, and their broad ethical

92. Stephen C. McCluskey, *Orientation of Christian Churches*, *in* HANDBOOK OF ARCHAEOASTRONOMY AND ETHNOASTRONOMY 1703, 1704–05 (Clive Ruggles ed., 2015).

93. Comstock, *supra* note 28.

94. MASS. DEP'T OF ENERGY RES., *supra* note 55, at 17–19; Telephone Interview with David Brosch, *supra* note 56.

95. Telephone Interview with Charlie Gregg, Am. Solar (Nov. 13, 2015) (on file with author). Mr. Gregg is a contractor specializing in rooftop solar for churches, done in partnership with Interfaith Power & Light.

96. *Id.*

97. *Success Stories*, INTERFAITH POWER & LIGHT, http://www.interfaithpowerandlight.org/about/success-stories-2 [http://perma.cc/NP3P-CCFW] (last visited Nov. 29, 2015) (providing examples of the types of marginal projects that religious congregations have taken on).

98. Behles, *supra* note 26, at 45–47.

missions make them suited to tackle social equity as a complimentary policy goal to environmental progress.

There are other, less measurable benefits of community solar that can be maximized by the participation of ethically driven, local communities such as religious congregations. Participation in morally motivated action promotes those morals in their members.[99] Participation by congregations in putting together community solar projects may bring in those not previously concerned with renewable energy generation.[100] For instance, someone who is active in a religion but environmentally agnostic may be more likely to see environmental activism as a moral imperative after their house of worship hosts a solar array. Because of their historically expansive role in shaping their adherents' outlooks on a range of issues, religious institutions are uniquely positioned to convert (so to speak) people over to renewable energy as an ethical prerogative.[101] In fact, this is the explicit goal of many congregations' community solar projects.[102] Interfaith Power & Light, for example, is a non-profit organization set up to support religious communities in implementing renewable energy as part of their mission of stewardship.[103] The group has information for religious congregations interested in responding to

99. *See Solar Clearinghouse*, N.C. INTERFAITH POWER & LIGHT, http://www.ncipl.org/solar-clearinghouse [https://perma.cc/W37W-FLPM] (last visited Jan. 4, 2016) ("Seeing solar panels on a house of worship becomes an iconic marker to the broader community, a demonstration of the congregation's love of the Creator and creation, and it shows a commitment to change our relationship to energy. It becomes a moral statement, a rejection of our use of fossil fuels and the implications of damages that such use brings to all in our shared earth community, expressing a clear commitment that the broader human community cannot ignore.").

100. HOFFMAN & HIGH-PIPPERT, *supra* note 36, at 6.

101. Sherkat & Ellison, *supra* note 83, at 71–73. As two scholars explain:

> Christians imbued with an ethic of environmental stewardship may have access to religious resources that could facilitate pro-environmental behaviors. Many liberal and moderate Protestant denominations have made explicit statements supporting not only conservation, but even broader social changes to limit human degradation of the environment. Even the conservative Southern Baptist Convention has published materials admonishing members to be good stewards of nature. And, religious participation has been found to foster altruistic and pro-social behaviors.

Id. at 73 (internal citations omitted).

102. N.C. INTERFAITH POWER & LIGHT, FINANCING MODELS FOR CONGREGATIONAL SOLAR PHOTOVOLTAIC INSTALLATIONS, at 2 (2013) ("[I]t is important for congregations to be leaders in their communities by installing solar systems, and we are committed to helping forge this precedent-setting path forward.").

103. *About*, INTERFAITH POWER & LIGHT, http://www.interfaithpowerandlight.org/about [https://perma.cc/84SP-SR8R] (last visited Feb. 27, 2017).

climate change, including sermons for religious leaders to discuss climate change with their congregations and preach its importance.[104] The symbolic connection between stewardship theology and religious ethics is especially visible in the practice of Christian churches that arrange their solar panels in the shape of a cross.[105] Some claim that the effect of religious leaders' views on climate change have already had an observable impact on the views of adherents.[106]

3. Securities Regulation

One advantage that religious communities have in implementing community solar is avoiding state and federal securities regulation, which may otherwise pose a large obstacles for projects. Securities law—aimed at protecting investors—does not fit neatly with the community solar models, which are all relatively recent innovations. Securities registration alone is "a process that can cost hundreds of thousands of dollars,"[107] which would be prohibitive to virtually all community solar projects.

Because the basic setup of a community solar project involves selling shares or ownership interests, often in a limited liability company, the looming threat of securities liability is a major obstacle for all projects.[108] In *SEC v. W.J. Howey Co.*,[109] the Supreme Court articulated the basic four-part test to determine whether an unclassified novel "investment contract" is a regulated security.[110] A regulated investment contract is any "[(1)] contract, transaction or scheme whereby a person [(2)] invests his money in a common enterprise and is [(3)] led to expect profits [(4)] solely from the efforts of the promoter or a third party."[111] The fourth element of

104. *Climate Prayers and Sample Sermons*, INTERFAITH POWER & LIGHT, http://www.interfaithpowerandlight.org/clergy-corner/sample-sermons [https://perma.cc/CF3Y-B32V] (last visited Feb. 27, 2017).

105. *Non-Profit Solar*, *supra* note 89 (including many pictures of church solar arrays in the shape of the cross along with descriptions of the group's work).

106. YALE PROGRAM ON CLIMATE CHANGE COMMC'N, *supra* note 82.

107. FARRELL, *supra* note 23, at 33.

108. Samantha Booth, *Here Comes the Sun: How Securities Regulations Cast a Shadow on the Growth of Community Solar in the United States*, 61 UCLA L. REV. 760, 782 (2014) (noting that "[c]ommunity solar projects are schematically similar to the fruit tree arrangement" found to be a security by the Supreme Court in *Howey*, discussed *infra*).

109. *See* SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

110. Bailey, *supra* note 91, at 134.

111. *Howey*, 328 U.S. at 298–99.

this test—"solely from the efforts of the promoter or a third party"—has "since been diluted to require only that profits accrue 'primarily' or 'substantially'" rather than solely.[112]

In *Howey*, a citrus grove sold ownership interests in various land plots, some as small as 0.65 acres.[113] This is analogous to many community solar arrangements, which are sometimes even referred to as "solar farms."[114] It is possible that community solar projects can avoid classification as a security at the third prong of the test—motivation by profit—by deliberately charging a premium to subscribers above the market rate, thus removing the promise of profit.[115] Theoretically, a congregation could also avoid the fourth prong of the *Howey* test by involving all subscribers in day-to-day management of the project.[116] While not the most practical approach for most, it has been used by some community solar developers.[117] Such an approach would be more feasible in a preexisting tight-knit community and highly organized setting, such as religious congregations.[118]

Unfortunately, there is relatively little guidance for applying the *Howey* criteria to community solar projects. However, the SEC issued a no-action letter regarding CommunitySun, a community solar project organized as "condominia."[119] The letter suggests that the question of whether federal securities law covers community

112. Booth, *supra* note 108, at 781.

113. *Howey*, 328 U.S. at 295.

114. For instance, the Clean Energy Collective in Colorado provides a "model that enables individuals to directly own panels in a community shared solar farm." *See* COUGHLIN ET AL., *supra* note 17, at 71 n.23.

115. *See* Booth, *supra* note 108, at 838–39.

116. Bailey, *supra* note 91, at 142.

117. FELDMAN ET AL., *supra* note 1, at 16 n.13 ("Some developers have also claimed that their enterprise is not based solely on the efforts of a promoter or a third party because their project is administered by a democratic association of project participants."); *see also* VT. LAW SCH. ENERGY CLINIC, VERMONT GROUP NET METERING: INFORMATION & GUIDELINES FOR 150 KW (AC) COMMUNITY SOLAR PROJECTS 24 (2015) (stating that under "our model operating agreement to give LLC members direct ownership interest over panels in the Community Solar Project and direct control over the management and operations of the project, we firmly believe that the fourth prong of the *Howey* Test will not be met").

118. Frank Jossi, *For Minnesota Churches, Clean Energy Is a Higher Calling*, MIDWEST ENERGY NEWS (Aug. 29, 2014), http://midwestenergynews.com/2014/08/29/for-minnesota-churches-clean-energy-is-a-higher-calling [https://perma.cc/DRV2-5KA4] (noting the "approach of many churches has been to create 'green teams' to conduct energy audits of buildings to reduce power use, move parishes to encourage ride-sharing to Sunday services and to push recycling," and describing churches that have used the tight knit community to their advantage in installing solar energy projects).

119. CommunitySun, LLC, SEC No-Action Letter, 2011 WL 3837626 (Aug. 29, 2011).

solar organizations turns on the expectation of profit.[120] That letter characterized profits to "includes both capital appreciation from the development of the initial investment and a participation in earnings resulting from the use of the investors' funds."[121] CommunitySun successfully argued that an "owner's motivations are likely to be personal consumption of energy generated by its own property and the reduction of its carbon footprint."[122] Another important distinction was between profit and personal consumption.[123] In community solar installations hosted by congregations, the subscribers are similarly motivated, not by an expected profit, but by the use of the energy, a reduced carbon footprint, and the support of an undertaking by their religious community.

Even with the CommunitySun letter, there appears to be uncertainty as to when a community solar project is subject to federal securities regulation.[124] Excess generation must be carefully monitored and limited in order to fairly characterize any community solar project as not-for-profit.[125] However, under the CommunitySun characterization, the most important precautions organizations must take largely revolve around participants' motivations.[126] Community solar sponsors should eschew the possibility of subscribers gaining a profit from the billing mechanism and should not make representations to subscribers that could be understood to suggest profits.[127] Religious congregations that are motivated by environmental stewardship rather than by profit can successfully characterize their community

120. FELDMAN ET AL., *supra* note 1, at 14–15.

121. CommunitySun, LLC, SEC No-Action Letter (citing United Hous. Found., Inc. v. Forman, 421 U.S. 837, 852 (1975)).

122. *Id.*

123. *Id.* at 9–10.

124. *See* Melissa Miyashiro, *Access to the Sun: Envisioning the Policy Framework for Hawaii's Emerging Community Renewables Program*, HAW. B.J., Apr. 2016, at 4 (citing Bailey, *supra* note 91, at 134; FELDMAN ET AL., *supra* note 1).

125. FELDMAN ET AL., *supra* note 1, at 17 ("[T]he further a net metered arrangement departs from the PV asset primarily being used to offset the customer's consumption, the harder it becomes to argue that the energy is solely designed for personal use and not profit.").

126. *Id.* at 16 ("How a customer is compensated for a share of electricity, the documentation of the agreement, and the marketing of the product may all influence the customer's motivation and perception.").

127. *Id.* at 16–17.

solar projects this way.[128] As discussed in the previous Section, congregations that take on solar projects can and do immerse the entire project in a spirit of theologically-motivated environmental stewardship.

Even if a community solar project presents the possibility of profit to subscribers, mooting the protection discussed above, there are two major exemptions from federal securities regulation that may be helpful to community solar projects.[129] The first is the *intrastate* exemption to securities regulation when shares are offered by and to individuals within the same state.[130] Religious congregations are often locally based in one state, which would allow a project to qualify for this exemption. The intrastate exception may be automatic for nearly all full-fledged community solar projects,[131] which are already intrastate because regulations generally confine membership in such projects to a limited geographic area.[132] However, projects exempt from federal registration by virtue of the intrastate exemption are still subject to state securities regulation.[133]

The "Regulation D" exemption for small offerings provides two other methods that have been successfully used by community solar projects in the past to bypass the more onerous requirements.[134] Rule 504 of Regulation D exempts offerings of shares in a venture that are limited to $5 million within a year.[135] Rule 506 separately exempts enterprises that are limited to thirty-five investors.[136] Many

128. MICH. ENERGY OFFICE, *supra* note 88, at 24 (describing the Greenbelt Community Solar project, a spinoff of the University Park project and also located on a house of worship, where "[i]nvestors must not be looking for a quick financial return, but be patient, in for the long-term, and interested in environmental stewardship").

129. Bailey, *supra* note 91, at 140.

130. *Id.*

131. As noted, true community solar is an arrangement wherein the energy itself is distributed among subscribers, rather than those "behind-the-meter" such as the University Park project. MASS. DEP'T OF ENERGY RES., *supra* note 55, at 46.

132. For instance, the New York regulations on community distributed generation ("DG") require that "all members in a Community DG project must be located in the same service territory and New York Independent System Operator (NYISO) load zone where the sponsor's project is located." Proceeding on Motion of the Commission as to the Policies, Requirements & Conditions for Implementing a Community Net Metering Program, Case 15-E-0082, 322 P.U.R.4th 113 (N.Y. Pub. Serv. Comm'n July 17, 2015).

133. Bailey, *supra* note 91, at 140.

134. *See* FELDMAN ET AL., *supra* note 1, at 18.

135. 17 C.F.R. § 230.504(b)(2) (2017).

136. *Id.* § 230.506.

states have cognate exemptions,[137] making the same analysis useful even if federal securities regulations do not apply because of the intrastate exemption.

The community infrastructure of a religious congregation provides a great network to gather financial resources under the protection of Rule 506. One writer went as far as to find it "impossible" for a community solar project to be exempted from securities regulations by virtue of Rule 506, suggesting that taking advantage of this exemption "could only work in unique circumstances—such as if a small, preexisting community group, whose members met the sophistication requirement, chose to develop their own community solar project."[138] While that argument may not be wholly incorrect, the scenario described is not quite as unique as the commentator seems to thinks. In fact, self-starting community solar is what was done in the University Park model (located on a church) where investors were found "entirely by word of mouth, through preexisting relationships," and received substantial pro bono accounting and legal services.[139] The same thing happened at a nearby religious assembly, where sufficient investors were found in a matter of weeks while taking all necessary legal precautions.[140]

V. SOLAR ENERGY GENERATION IN THE CONTEXT OF RELIGIOUS LAND USE

This Part summarizes the law in several states to assess the risk that religious congregations will jeopardize their property's tax exempt status by hosting community solar projects. Strategies which congregations may use to prevent the loss of a tax exemption are identified, as well as a possible legal challenge. Section V.A surveys the current state of religious property tax exemption and tax exemptions for solar energy generation. Section V.B assesses the law in three groups of states: those that would likely preserve the tax exemption of religious property used to host a community

137. Michael Hainsfurther, *Summary of Blue Sky Exemptions Corresponding to Regulation D*, 38 SW. L.J. 989 (1984).

138. Booth, *supra* note 108, at 793–94.

139. *Id.* at 807.

140. *See* MICH. ENERGY OFFICE, *supra* note 88, at 24 (2014) (describing Greenbelt Community Solar, a spinoff of the University Park project, also located on a church, where adequate investors were found in several weeks through only word of mouth).

solar garden; more typical states where the law is uncertain; and California, which has indicated that congregations would lose their property tax exemption for hosting community solar installations. Section V.C outlines the possible challenge a religious congregation could raise to a tax exemption loss under the Religious Land Use and Institutionalized Persons Act. While the strategies identified should be easy for congregations to incorporate into a religious community solar project, more clarity from states regarding their respective policies on this tax question would be helpful.

A. Current Law

1. Community Solar

There are community solar projects in at least twenty-five states.[141] This Note will focus on five states: Vermont, Minnesota, New York, Maryland, and California. Vermont and Minnesota are examples of states that allow solar generation by religious communities without losing the religious property tax exemption associated with the house of worship.[142] New York and Maryland are examples of states that are in the process of implementing their community solar policies—through legislation in Maryland[143] and administrative proceedings in New York.[144] California is the state with the clearest indication that the tax exemption will be lost.[145] The California Public Utilities Commission is also in the process of implementing community solar,[146] and it is a particularly important state for solar energy proliferation as its geography and size give it great solar potential.[147] In all states examined herein, it is not entirely certain what will happen to tax exempt property that hosts

141. *Shared Renewables / Community Solar*, *supra* note 15.

142. VT. STAT. ANN. tit. 32, § 3802(17) (2016); MINN. STAT. § 272.02 subdiv. 24 (2016).

143. MD. CODE ANN., PUB. UTIL. § 7-306.1 (West 2016).

144. Proceeding on Motion of the Commission as to the Policies, Requirements & Conditions for Implementing a Community Net Metering Program, Case 15-E-0082, 322 P.U.R.4th 113 (N.Y. Pub. Serv. Comm'n July 17, 2015).

145. *See* Letter to Assessors, *supra* note 3.

146. *See* Implementation of the Green Tariff Shared Renewables (Gtsr) Program Pursuant to Decision (D.) 15-01-051., Res. E-4734, 2015 WL 5829135, at *3 (Cal. Pub. Utils. Comm'n Oct. 1, 2015).

147. GEORGE SIMONS & JOE MCCABE, CAL. ENERGY COMM'N, CEC-500-2005-072-D, CALIFORNIA SOLAR RESOURCES (2005).

community solar installations.[148] The risk of losing a property tax exemption is very onerous for a congregation interested in hosting a solar garden, and the risk would likely be prohibitive.[149] Besides the practical and direct impact on yearly costs, many congregations have entered into financial agreements which require them to maintain their tax exemptions or they will be considered in default.[150]

State laws differ somewhat and none are entirely clear as to whether religious communities risk losing tax-exempt status for hosting community solar. This uncertainty is compounded by the fact that each community solar project hosted by a religious congregation is done with different legal, financial, and management arrangements. However, the policies in all states highlight three strategies that should be helpful to preserving a given congregation's tax exemption while implementing community solar. These strategies should not be terribly burdensome. Rather, they are steps that religious congregations are particularly well-positioned and largely already motivated to implement.

2. Tax Exemptions for Solar Energy Generating Systems

There are thirty-eight states that offer property tax exemptions for solar energy in one way or another,[151] including the five states mentioned above.[152] Normally, any increase in property value that is attributable to the solar installation is exempt from taxation.[153] It follows that solar installations at a house of worship—which *itself* is exempt from property tax—should not jeopardize its tax exempt

148. *See* BARNES ET AL., *supra* note 3, at 41–43; *see also* Justin Barnes et al., *The Cost of Value: PV and Property Taxes* 6 (World Renewable Energy Forum, Conference Paper, 2012).

149. *See* Lion, *supra* note 7, at 2.

150. *Id.*

151. *Solar Tax Exemptions*, SOLAR ENERGY INDUS. ASS'N, http://www.seia.org/policy/finance-tax/solar-tax-exemptions [https://perma.cc/ADL4-QLPA] (last visited Jan. 7, 2016).

152. *See* VT. STAT. ANN. tit. 32, §§ 3802(17), 3845, 8701 (2016); MINN. STAT. § 272.02(24) (2016); N.Y. REAL PROP. TAX LAW § 487(2) (McKinney 2016); MD. CODE ANN., TAX-PROP. § 7-242 (West 2016); CAL. REV. & TAX. CODE § 73 (West 2016).

153. BARNES ET AL., *supra* note 3, at 20–23. The original wording of some statutes created ambiguity as to whether the exemption includes projects that contribute to the grid (i.e., through net metering), but the confusion has largely been resolved where it exists. *See id.* at 37 (citing CAL. STATE BD. OF EQUALIZATION, GUIDELINES FOR ACTIVE SOLAR ENERGY SYSTEMS NEW CONSTRUCTION EXCLUSION, at 3 (2012)).

status, since the value of the underlying property is, for *tax* purposes, unaffected.

First, religious property and solar installations both receive tax-exempt treatment. It makes no policy sense for solar development to undermine the religious property exemption, and it is a mischaracterization to say that a house of worship is trying to engage in tax arbitrage by combining those two uses in one location. Second, states gain nothing from discouraging congregations from hosting community solar arrays because the solar gardens would not generate tax revenue when located anywhere else. As a legal matter, congregations may also argue that if they are taxed in a way that others' properties are not, it constitutes unequal treatment under the Religious Land Use and Institutionalized Persons Act.[154]

B. State Approaches

1. Vermont and Minnesota: Where a Tax Exemption Is Likely Preserved

Vermont and Minnesota both have statutory provisions which appear to preserve a location's property tax exemption in the event it hosts a solar energy array. Vermont imposes a tax on the electricity produced at larger solar installations (those over fifty kilowatts), and the statute implementing that tax explicitly states that a property's tax-exempt status will not be altered by hosting a solar installation, even if the facility is subject to taxation.[155] Minnesota also provides such a protection: "[if] the real property upon which a solar energy generating system is located is not used primarily for solar energy production subject to the solar energy production tax . . . the real property shall be classified without regard to the system."[156] That policy is understood by Minnesota's state officials to mean that generally, "if the real property is not used primarily for solar energy production subject to the production tax merely placing a solar energy system on the property would not change its tax classification."[157] Thus, in both

154. *See infra* Section V.C.

155. VT. STAT. ANN. tit. 32, § 8701(d).

156. MINN. STAT. § 272.02 subdiv. 24.

157. E-mail from Holly Soderbeck, Revenue Tax Senior Specialist, Prop. Tax Div., Minn. Dep't of Revenue, to author (Jan. 6, 2016, 13:31 EST) (on file with author).

Vermont and Minnesota, it appears that religious property hosting a solar installation will not jeopardize its tax exempt status. Indeed, in Vermont, it appears that hosting a solar array of any size will not jeopardize a religious property's tax exemption.

In states with statutory provisions similar to those in Vermont and Minnesota, religious congregations should be able to host a solar garden without losing their property tax exemptions. However, precautions should be taken. Even in the states accommodating continued tax-exempt status, there are limits on revenue from the use of exempt property.[158] But revenue limits are somewhat flexible and the property can retain its exemption if the profits generated are minimal.[159] Religious congregations seeking to host a community solar garden should, therefore, eschew income or the possibility of financial windfalls for the organization or the adherent subscribers.

Case law is sparse and solar gardens are a novel arrangement that do not fit easily in older categories. Intuitive steps can be taken. For example, the religious organization should not have a financial stake in the level of energy produced going forward. Rather, the congregation should simply host the installation and provide moral support to the project as a furtherance of its belief in stewardship.

Refraining from owning a financial stake does not seem too difficult for a religious congregation hosting a community solar project. First, avoiding the possibility of profit may be advisable to avoid conformity with onerous securities laws.[160] Second, as discussed previously, the motivations of these organizations and communities are not financial. And even if they were, individual community solar installations often reap only marginal financial benefits for the participants, the sponsors, and the hosts.[161] There are plenty of ways for unscrupulous organizations to try to exploit religious property tax exemptions,[162] but community solar is not

158. Witte, *supra* note 9, at 400.

159. *See, e.g.*, Country Bible Church v. Cty. of Grant, No. C5-02-65, 2003 WL 21359537, at *6 (Minn. Tax Ct. June 9, 2003) (holding that a church's "Destiny Center" tanning room that generated just over $6000 and was not itself exempt was not a substantial enough use of the property or source of income to justify apportioning the exemption).

160. However, if congregations are able to use one of the small offering exemptions under Regulation D, such as was done in University Park, this is less of a concern.

161. *See* Univ. Park Cmty. Solar, LLC, *supra* note 65.

162. Lindquist, *supra* note 14, at 1152–53 (discussing a case in which a church-owned amusement park avoided over a million dollars in property taxes a year).

one of them. Preventing financial windfall is in line with the motives of religious organizations.

Vermont and Minnesota provide a model for treatment of religious organizations that use their tax-exempt property to host community solar arrays. The treatment is logically consistent in allowing overlapping tax-exempt uses. Importantly, those two states provide *clarity*. Other states, even those supportive of community solar, are far less clear about the consequences of hosting community solar for a religious property tax exemption. In Vermont and Minnesota, with only simple precautions to prevent the host organization from making profit, congregations should be able to undertake community solar projects without jeopardizing their house of worship's exemption from property taxes.

2. New York and Maryland: Where It Is Unclear Whether a Tax Exemption Will Be Lost

New York does not have very clear guidance on the question of solar generation on religious or otherwise tax-exempt property. The state is in the process of developing its community solar policy as part of the state's ambitious Reforming the Energy Vision program.[163] New York's law regarding tax exempt property is fairly typical: in order to be exempt, the property must be owned by an organization dedicated to an exempt purpose and used exclusively to carry out that purpose.[164] The term "exclusively" in this context is understood by New York courts to mean "broadly defined to connote 'principal' or 'primary' such that purposes and uses merely 'auxiliary or incidental to the main and exempt purpose and use will not defeat the exemption.'"[165] "Thus, whether property is used 'exclusively' for purposes of [meeting the exemption] is dependent upon whether the 'primary use' of the property is in furtherance of permitted purposes."[166]

Tax exempt status has also been preserved for farm lands owned by religious organizations, when the farm's produce was consumed

163. Proceeding on Motion of the Commission as to the Policies, Requirements & Conditions for Implementing a Community Net Metering Program, Case 15-E-0082, 322 P.U.R.4th 113 (N.Y. Pub. Serv. Comm'n July 17, 2015); *see also* Merrill L. Kramer, *Understanding New York's "Vision,"* PUB. UTIL. FORT., Aug. 2015, at 16.

164. N.Y. REAL PROP. TAX LAW § 420-a(1)(a) (McKinney 2016).

165. Greater Jamaica Dev. Corp. v. N.Y.C. Tax Comm'n, 25 N.Y.3d 614, 623 (2015) (internal citations omitted).

166. *Id.*

by the community, even where a "small remainder" of the goods were sold to generate revenue.[167] The same logic can be applied to solar energy metered to project participants. Like food grown in a conventional garden, energy generated from a solar garden is consumed directly by members of the community. The exemption of the property may also be protected by evidence showing that the use of solar energy is driven by religious beliefs of the congregation.[168] And if the use advances the organization's purpose, it may be exempt even if the use is profitable. For instance, in *Congregation Rabbinical College of Tartikov v. Town of Ramapo*, a property's tax exempt status was not jeopardized by a third party's profiting from its use, when in furtherance of the property's tax exempt purpose.[169] Thus, where congregations use a limited liability entity to organize a community solar project, profits going to that entity in furtherance of the congregation's purpose—for example, religiously-motivated environmentalism—should not jeopardize its tax exempt status.

One strategy congregations might use to preserve their tax exemption, therefore, is to articulate sincere and explicit religious purposes for their community solar projects. That should not be difficult for any interested congregation; however, it should be done carefully as projects move forward. Information and theology can be included in the marketing and educational materials given to prospective subscribers, or in press releases.[170] As discussed previously, there is a great deal of established theology supporting environmental stewardship and promotion of renewable energy, with many resources for potentially interested congregations.[171] However, some states' courts scrutinize religiously-motivated

167. *See, e.g.*, People *ex rel.* Watchtower Bible & Tract Soc., Inc. v. Haring, 8 N.Y.2d 350, 354 (1960).

168. *See* Maetreum of Cybele, Magna Mater, Inc. v. McCoy, 975 N.Y.S.2d 251, 254 (App. Div. 2013) (finding the use of an exempt property to provide housing to members to be in furtherance of the property's religious purpose where "testimony established" that the organization "stresses communal living among its adherents, as well as providing hospitality and charity to those in need").

169. Congregation Rabbinical Coll. of Tartikov, Inc. v. Town of Ramapo, 900 N.Y.S.2d 103, 105 (App. Div. 2010) ("A tax-exempt property will generally retain its tax-exempt status even where a non-exempt, for-profit independent contractor conducts commercial operations on the property, so long as those operations are in furtherance of the property's tax-exempt purposes.").

170. Jossi, *supra* note 118 (describing the community solar project sponsored by Bethel Lutheran in Minneapolis).

171. *See, e.g.*, *Religious Statements on Climate Change*, *supra* note 87.

environmentalism more rigorously.[172] A well-established religious reason for protecting the environment may not help preserve a tax exemption when a court applies a bright line rule that ecological stewardship is "secular."[173]

Maryland is also still in the process of implementing its community solar legislation, which passed in April 2015.[174] Maryland's property tax exemption law is similar to New York's, in that the property must be used primarily for the exempt purpose, with other uses only incidental.[175] Maryland's statute and case law are also ambiguous as to the treatment of exempt properties that host community solar installations. However, in Maryland, there is the test case of the University Park project located on the Church of the Brethren, which retains its tax exempt status in spite of its solar project.[176] This suggests that similar projects can be permissible, even those that generate revenue for a third party. In the case of University Park's installation (which predates Maryland's truly "community" solar regime), the LLC sells the electricity to the church, sells the surplus to the utility, and auctions the renewable energy credits.[177] The church does not receive rent, but rather receives only the reduced rate for electricity and has the

172. Church of Pan, Inc. v. Norberg, 507 A.2d 1359, 1363 (R.I. 1986) (finding that where an organization's recycling and other programs' primary purpose are "the preservation of the environment, any religious connotation or purpose is merely incidental to this secular purpose" and that the "organization's tenets and activities, although admirable, are primarily secular rather than religious").

173. *Id.*

174. MD. CODE ANN., PUB. UTIL. § 7-306.1 (West 2016).

175. *Id.*, TAX-PROP. § 7-204(1) (exempting property owned by an exempt organization "if the property is actually used exclusively for: [inter alia,] public religious worship"); *see also* Supervisor of Assessments v. Trustees of Bosley Methodist Church Graveyard, 443 A.2d 91 (Md. 1982) (where property was used "primarily" for exempt purposes, with only incidental or occasional use for other purposes, the statutory requirement of "exclusive" use was largely satisfied"); Ballard v. Supervisor of Assessments, 306 A.2d 506, 511 (Md. 1973) ("[P]roperty does not become constitutionally exempt merely because it is owned by a religious organization or because its use, e. g., the income therefrom, may benefit or support religious purpose.").

176. *Real Property Data Search*, MD. DEP'T OF ASSESSMENTS AND TAXATION, http://sdat.dat.maryland.gov/RealProperty/Pages/default.aspx [https://perma.cc/FWW8-CKLU] (last visited Feb. 25, 2017) (select "Prince George County" under the option marked "Select the county in which to search"; select "Street Address" under the option marked "Select the search method to proceed"; select "Next"; under "Street Number" enter "4413," and under "Street name" enter "Tuckerman"; then select "Next").

177. MASS. DEP'T OF ENERGY RES., *supra* note 55, at 17–18.

option to purchase the system.[178] However, there is no direct administrative or statutory guidance speaking to this issue, and the case law seems to cut the other way. Maryland courts do not appear to allow property to retain tax-exempt status while generating revenue for the organization even when the revenue is directed towards an exempt cause.[179] The facts of the particular project will be important as county assessors view the question of whether a tax exemption is lost as turning on "whether income is derived from that solar garden and the extent to which its presence would impact the intended use for worship."[180]

In states with policies similar to those in Maryland, the avoidance of profit may need to be even more straightforward than for states with policies similar to those in Vermont or Minnesota. The fact that the Church of the Brethren retains its exempt status despite hosting a for-profit installation indicates that the use is permitted as long as the owner of the exempt property does not generate income. Avoiding profits should not be a hurdle for religious organizations when the community's motivation is stewardship and involving their sacred spaces in good works.[181] Since the best vehicle for developing a community solar garden on a house of worship is a separate for-profit entity,[182] the congregation would simply make sure that the religious entity is not entitled to any of the potential revenue from selling renewable energy credits or excess energy generated. A house of worship should simply act as the host of the installation for the entity owned by community members.

178. COUGHLIN ET AL., *supra* note 17, at 9; *see also* MASS. DEP'T OF ENERGY RES., *supra* note 55, at 17–18; UNIV. PARK CMTY. SOLAR, LLC, *supra* note 65, at 2.

179. *See, e.g.*, Ballard v. Supervisor of Assessments of Baltimore Cty., 306 A.2d 506, 509–11 (Md. 1973) (finding no exemption when property was used partially for a commercial purpose); Supervisor of Assessments of Baltimore Cty. v. Trustees of Bosley Methodist Church Graveyard, 443 A.2d 91, 94 (Md. 1982) (finding no exemption for church property used for an ancillary purposes because "to doubt an exemption is to deny it") (internal quotation marks and alteration omitted).

180. E-mail from Dan Puma, Supervisor of Assessors, Prince George's Cty., Md., to author (Jan. 5, 2016, 09:26 EST) (on file with author).

181. N.C. INTERFAITH POWER & LIGHT, *supra* note 102, at 1.

182. *See supra* Section III.E.2.

3. California: Where a Tax Exemption Will Likely Be Lost

California passed community solar enabling legislation in 2013,[183] and the Public Service Commission began approving utility implementation plans at the end of 2015.[184] California is unique in having an established policy framework regarding when solar energy generation falls within a property's tax exempt uses.[185] Unfortunately, existing guidance from California's Board of Equalization seems to preclude nearly every community solar arrangement from tax exempt status.

California's guidance—"Solar Energy Systems on Nonprofit Properties"—states that non-profits may allow third-party for-profits to operate solar installations on exempt property, but only "if the solar energy system is used to produce electricity for the nonprofit's own use."[186] There has been no more guidance or legislation since the guidance was issued, so it should be assumed to govern the more recent adoption of community solar projects.[187]

The guidance document presents three hypothetical scenarios to illustrate the distinction between electricity produced for the non-profit's use and electricity produced for other uses.[188] In the first scenario, the non-profit host leases a portion of its property to a third party to install solar energy generation "for the benefit of the for-profit entity," and the tax exemption is lost outright.[189] In the second scenario, the non-profit leases a portion of its property to a third-party operator for the host site's direct benefit—i.e., to

183. Electricity: Green Tariff Shared Renewables Program, 2013 Cal. Legis. Serv. ch. 413 (West).

184. Implementation of the Green Tariff Shared Renewables (Gtsr) Program Pursuant to Decision (D.) 15-01-051., Res. E-4734, 2015 WL 5829135, at *3 (Cal. Pub. Utils. Comm'n Oct. 1, 2015).

185. Letter to Assessors, *supra* note 3.

186. *Id.* at 1.

187. E-mail from David Yeung, Chief, Cty.-Assessed Props. Div., Cal. State Bd. of Equalization, to author (Jan. 19, 2016, 09:32 EST) (on file with author) (noting that since California community solar legislation "does not address the property tax implications on non-profits and religious congregations that participate in such programs" then the guidance "controls until legislation is approved that supersedes it and county assessors will continue to be responsible for determining on a case-by-case basis if the property continues to be used for its exempt purpose"; and noting also that there have been no instances "that require[d] any decision from the State Board of Equalization regarding the determination of any organization's property tax exempt status for participating in these types of programs").

188. Letter to Assessors, *supra* note 3.

189. *Id.* at 2.

consume the electricity directly on-site.[190] In that scenario, the tax exemption is preserved because the property "is not being used inconsistently with the nonprofit's exempt purpose."[191]

In the third scenario, the project benefits both the host non-profit and the for-profit operator.[192] That arrangement would apply to the special purpose entity financing model for community solar projects. The host organization (here, the religious congregation) receives the benefit of using some of the electricity generated, while the lion's share is credited to the member shareholders of the community solar project (here, the congregants). The California non-profit would lose its property tax exemption because "the for-profit entity receives a material benefit, for example by selling power generated by the system to a third party."[193] It seems likely that the selling of shares in a solar project to subscribers—how special purpose entity community solar is financed—would constitute such a "material benefit."

The California guidance suggests that the loss of the exemption of the leased portion "does not, by itself, jeopardize the non-profit organization's qualification for exemption on the remaining portions of the property."[194] Some California churches, for example, have been hosting cell towers at the expense of a portion of their tax exemptions.[195] But unlike the cell phone tower arrangements, in which a host church "still comes out financially ahead" despite losing part of its property tax exemption,[196] losing the tax exemption on a portion of the property for solar energy projects may be less financially tenable. Whereas a congregation might be able to afford to pay property taxes on the small spot of land hosting a profitable cell tower, it likely cannot afford to pay additional taxes on larger portions of land that are required for community solar projects. Moreover, there is the added complication of how to value the portion of church property that is no longer exempt. For solar panels installed on a church roof, the

190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 2–3.
194. *Id.* at 3.
195. *See, e.g.*, Bob Pool, *Wireless Companies Look to Church Sites for Cell Towers*, L.A. TIMES (Dec. 15, 2012), http://articles.latimes.com/2012/dec/25/local/la-me-church-cells-20121225 [https://perma.cc/628B-5JWY].
196. *Id.*

entire structure might be considered part of a solar lease arrangement; alternatively, the project would somehow have to place a separate value on the leased roof space, which is a complex and uncertain determination.[197]

It seems unlikely that any community solar arrangement could be hosted by a non-profit organization under the existing California interpretation, where a complete tax exemption may be preserved only where the organization itself consumes the energy. The basic premise of community solar requires crediting the electricity to third-party consumers.[198] Many state policies require a minimum number of subscribers for a project; California's Enhanced Community Renewables plan actually requires at least three members to demonstrate "community interest."[199] Perhaps one can argue that consumption by individual subscribers is consumption by "the organization."[200] However, this runs into the problem of the property's use benefiting a small number of people, which will not jeopardize the property's tax exemption only when that use is "particularly necessary to the welfare of the community or is a service which the government otherwise would be compelled to provide."[201]

Promoting solar energy is a government priority, especially in California.[202] However, there is a tricky relationship between environmentally beneficial activities and traditional charitable exemptions.[203] As an example from a different tax context, IRS policy suggests it is difficult for the provision of renewable energy generation to qualify as a tax-exempt activity at a federal level even if it supports low-income households in purchasing the energy.[204]

197. BARNES ET AL., *supra* note 3, at 42–43 (identifying the evaluation of a rented roof as challenging and uncertain).

198. IREC MODEL RULES, *supra* note 16, at 8; *see also* BARNES ET AL., *supra* note 3, at 2.

199. Implementation of the Green Tariff Shared Renewables (Gtsr) Program Pursuant to Decision (D.) 15-01-051., Res. E-4734, 2015 WL 5829135, at *1 (Cal. Pub. Utils. Comm'n Oct. 1, 2015).

200. Letter to Assessors, *supra* note 3, at 2–3.

201. Clubs of Cal. for Fair Competition v. Kroger, 9 Cal. Rptr. 2d 247, 251 (App. Dep't Super. Ct. 1992).

202. CAL. CIV. CODE § 714(b) (West 2016) ("[I]t is the policy of the state to promote and encourage the use of solar energy systems.").

203. For an overview of the broader issue in a federal context, *see* EDWARD LLOYD ET AL., SABIN CTR. FOR CLIMATE CHANGE LAW, CLARIFYING IRS'S VIEW ON CLIMATE CHANGE AS A CHARITABLE PURPOSE IN ORDER TO MOBILIZE PROGRAM-RELATED INVESTMENTS FOR CLIMATE CHANGE SOLUTIONS (2015).

204. I.R.S. Priv. Ltr. Rul. 201210044 (Mar. 9, 2012).

However, states often have a more expansive view of when an environmental use is charitable for purposes of property tax exemptions, than the IRS does for the purpose of federal income taxation.[205] For instance, Massachusetts allows exemptions for land used for educational events that are open to the public to raise awareness of environmental issues.[206]

Another strategy for religious congregations—in any state, but especially states like California that are less likely to preserve a property's tax exemption—is to incorporate other charitable goals within a community solar project. A youth educational component, for example, could be implemented into a community solar initiative. A recent project located on Bethel Church in Minnesota is an instructive example. Bethel Church used a subscription drive for a community solar project as a teaching tool for the community's youth.[207] Whether or not charitable components of a community solar project will help a church preserve its tax exempt status is not certain because there is little policy or legal guidance. However, emphasizing charitable components of a community solar project will help strengthen its nexus with the religious organization's "purpose."

In California, religious organizations should be cautious about hosting a community solar garden if they wish to preserve their property tax exemption. Even though precautionary steps may be taken, hosting a community solar would likely cause a congregation to lose part or all of its property tax exemption. Because existing guidance documents suggest that California tax authorities disfavor exempting community solar projects, congregations in California (or in states with similar policies) that want to host community solar may wish to initiate a legal challenge of the kind outlined below.

205. CAL. REV. & TAX. CODE § 214.02(a) (West 2016) (exempting land that is kept to be preserved and used for educational purposes or open to the public).

206. New Eng. Forestry Found., Inc. v. Bd. of Assessors, 9 N.E.3d 310, 325 (Mass. 2014).

207. *Bethel ELCA Community Solar Garden*, MINN. CMTY. SOLAR, http://mncommunitysolar.com/causes/bethel-evangelical-lutheran-church [https://perma.cc/Y6H2-L5XU] (last visited Feb. 25, 2017).

C. Legal Challenge to Non-Tax-Exempt Classification: The Religious Land Use and Institutionalized Persons Act

In states that tax religious property for hosting solar gardens, religious congregations may have a legal claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") challenging unfavorable tax treatment.[208] RPLUIPA protects religious institutions against local laws that substantially burden religious exercise or treat religious organizations on less than equal terms.[209] The federal understanding of "religious purposes" is not as expansive as those of some states, and is mostly limited to the actual worship itself.[210] Including solar energy generation in that definition is a stretch. However, because no for-profit property would be taxed on its solar array, a relatively strong case could be made that removing a congregation's tax exemption violates the "equal terms" portion of RLUIPA.[211]

RLUIPA was passed in order to protect religious organizations from discriminatory zoning practices. Under RLUIPA, a congregation can bring legal claims under four different theories, two of which are relevant to this Note.[212] First, a congregation may argue that a zoning law or regulation imposes a substantial burden on a religious exercise. Second, a congregation could argue that it was treated on less than equal terms with a nonreligious institution.

As a threshold matter, one would need to establish that the requirements to retain a tax exemption are a "land use regulation" within the meaning of RLUIPA.[213] The Act defines the "land use regulation" as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land)."[214] Many decisions have suggested RLUIPA's application is limited only to cases of

208. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5 (2012).

209. *Id.* § 2000cc(a)–(b).

210. *See, e.g.*, Glenside Ctr., Inc. v. Abington Twp. Zoning Hearing Bd., 973 A.2d 10, 17–18 (Pa. Commw. Ct. 2009) (holding that Alcoholics Anonymous, as a lessee of a church, was not using the church for religious purposes under RLUIPA because, among other reasons, no minister was present and no religious instruction was involved).

211. 42 U.S.C. § 2000cc(b)(1).

212. There are two other prohibitions under RLUIPA: a prohibition on discrimination based on religious beliefs, and a prohibition on blanket bans of all religious land uses. *See id.* § 2000cc(b)(2)–(3).

213. *Id.* § 2000cc-5(5).

214. *Id.*

zoning and landmarking.[215] Courts, however, look to substance over form, finding for instance that environmental review constituted zoning for RLUIPA purposes.[216] Some have argued in court that RLUIPA does indeed apply to the terms of tax exemptions that limit the use of land,[217] and courts have not dismissed that argument.[218]

Under RLUIPA's substantial burden provision, no government may impose such a burden on "the religious exercise of a person residing in or confined to an institution" "even if the burden results from a rule of general applicability"[219] unless the policy furthers a "compelling government interest"[220] and is the "least restrictive means" for achieving it.[221] In order for a local policy to violate the substantial burden provision of RLUIPA, the policy must be shown to "[prevent] adherents from conducting or expressing their religious beliefs or [cause] them to forgo religious precepts."[222]

In addition to restrictions on the use of the space for actual worship, RLUIPA protection extends to property uses that are accessory ("incidental and customary").[223] These uses must be "subordinate and minor" and have "reasonable relationship with the primary use."[224] An example of an accessory use permitted under RLUIPA is overnight housing for Orthodox Jews visiting patients at a hospital.[225] By contrast, a church-maintained hiking

215. Second Baptist Church of Leechburg v. Gilpin Twp., 118 F. App'x 615, 617 (3d Cir. 2004) ("[A] government agency implements a 'land use regulation' only when it acts pursuant to a 'zoning or landmarking law' that limits the manner in which a claimant may develop or use property in which the claimant has an interest.") (quoting Prater v. City of Burnside, 289 F.3d 417, 434 (6th Cir. 2002)).

216. Fortress Bible Church v. Feiner, 694 F.3d 208, 216 (2d Cir. 2012).

217. Brief of Appellant, First Korean Church of N.Y., Inc. v. Montgomery Cty. Bd. of Assessment Appeals, 926 A.2d 543, 547 (Pa. Commw. Ct. 2006) (No. 2194 CD 2005), 2006 WL 5186804, at *20.

218. First Korean Church of N.Y., Inc. v. Montgomery Cty. Bd. of Assessment Appeals, 926 A.2d 543, 547 (Pa. Commw. Ct. 2006) (finding the tax exemption was wrongfully denied on other grounds).

219. 42 U.S.C. § 2000cc-1(a).

220. *Id.* § 2000cc-1(a)(1).

221. *Id.* § 2000cc-1(a)(2).

222. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 406 F. Supp. 2d 507, 515 (D.N.J. 2005).

223. Saxer, *supra* note 12, at 597.

224. *Id.*

225. Bikur Cholim, Inc. v. Vill. of Suffern, 664 F. Supp. 2d 267, 276–77 (S.D.N.Y. 2009).

trail was not found to be an accessory use.[226] Courts have generally emphasized history and custom in determining whether a congregation's use of property is protected under RLUIPA.[227] Since solar energy is a relatively new technology and community solar is brand new in some states, congregations challenging tax policies under RLUIPA will not likely succeed in arguing that taxing property used in a community solar array is a "substantial burden."

A law or regulation could still be found to violate RLUIPA even if the burden it imposed fell short of substantial under the "equal terms" provision of RLUIPA, which is distinct from the substantial burden prong.[228] There has not been much case law that is directly relevant to the question of property tax treatment dealt with in this Note, but there is at least a non-frivolous case to be made. To successfully argue for an equal terms violation, a religious organization must identify a "similarly situated" secular assembly.[229] A local regulation "will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to the regulatory purpose."[230]

At least one case has applied the "equal terms" principle to secular and religious properties. In *Third Church of Christ v. City of New York*, the Second Circuit upheld an injunction forcing the City of New York to grant a catering permit to a church because there was no sufficient reason to differentiate the use by the church from the use by nearby hotels, which were already allowed to host catered events.[231] Extending this logic, a congregation could argue that since it would be penalized for engaging in an activity which a secular entity is not, it is treated unequally. This argument relies

226. City of Hope v. Sadsbury Twp. Zoning Hearing Bd., 890 A.2d 1137, 1145 (Pa. Commw. Ct. 2006).

227. *See e.g.*, Saxer, *supra* note 12, at 616 (finding a use protected where the "specific act of charity at issue . . . , providing shelter or sanctuary to the needy, has been part of the Christian religious tradition since the days of the Roman Empire").

228. *See* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 762 (7th Cir. 2003). *Contra* Guru Nanak Sikh Soc'y of Yuba City v. Cty. of Sutter, 326 F. Supp. 2d 1140, 1154 (E.D. Cal. 2003) (suggesting that the "equal terms" provision in RLUIPA might be a subset of the general substantial burden prong, and therefore not operatively independent).

229. *Sutter*, 326 F. Supp. 2d at 1155.

230. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 266 (3d Cir. 2007) (emphasis removed).

231. Third Church of Christ v. City of New York, 626 F.3d 667, 670, 672 (2d Cir. 2010).

on the previously discussed position that the terms to qualify for a property tax exemption may be considered "land use regulations."

Even if a government imposes a substantial burden or unequal terms on religious use of property, it may overcome RLUIPA by demonstrating a "compelling government interest."[232] Courts are split on whether raising tax revenue generally can be a compelling enough interest to overcome RLUIPA.[233] In any event, it is unlikely that taxing community solar on religious properties would rise to the level of a compelling government interest. Solar generating equipment is normally exempt from property taxes when located on secular property, and religious institutions who cannot afford to lose their tax exemption for their properties[234] would simply avoid the risk by not hosting community solar. Because it is unlikely that any additional tax revenue would accrue to the government if religious properties were unable to retain tax exemptions for community solar, it is equally unlikely that the government has any compelling interest to tax them in the first place.

VI. CONCLUSION

There are compelling policy reasons to allow religious congregations to host community solar gardens. Because states generally do not tax property for the added value of solar generation, there is no unfair advantage to using tax-exempt property for community solar. Solar energy provides public benefits and receives tax exemptions for that reason. And religious communities might be motivated by religious conviction to implement community solar projects, which, as a general principle, is an area that deserves non-interference.

It is likely that in most states, community solar projects can be made to conform to those states' property tax exemptions, such as in the case of University Park in Maryland, and the Minnesota

232. 42 U.S.C. § 2000cc(a)(1)(A)–(B).

233. *Compare* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 368 (7th Cir. 2010) (permitting a zoning ordinance when it barred all noncommercial uses from an area in order to revitalize a town center), *with* Chabad of Nova, Inc. v. City of Cooper City, 575 F. Supp. 2d 1280, 1293 (S.D. Fla. 2008) (striking down a restriction of religious assemblies on "business" zoning grounds when certain permitted secular venues were noncommercial in nature).

234. Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002) (stating that if "revenue generation were a compelling state interest, municipalities could exclude all religious institutions from their cities").

Community Solar project on Bethel Church. However, clearer guidance from states with ambiguous laws would be helpful to organizations, which at the moment are rightfully cautious. Even without clear statutory protection for tax exempt status, congregations in several states have been able to host solar gardens on their properties without losing tax exemptions.

There are many, admittedly untested, strategies that congregations can adopt to ensure their community solar projects are consistent with tax exempt uses. Congregations can eschew profits and not charge rent for the space. They can incorporate other charitable components like economic justice and youth education to community solar projects. And they can incorporate their theological motivations regarding stewardship for the Earth into community solar. These strategies are not cumbersome and are desirable for most interested communities. Community solar is driven by the same impetus that drives other uses of religious land and its implementation naturally reflects that compatibility.