UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC. and TRIANGLE FFRF, Plaintiffs, v. JOHN KOSKINEN, COMMISSIONER OF THE INTERNAL REVENUE SERVICE, Defendant.	)	Case No. 12-CV-946

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Section 6033(a)(3) of the Internal Revenue Code requires certain tax-exempt organizations to file an annual information return with the IRS. The annual information return, or Form 990, is used by the IRS to monitor tax-exempt status under 26 U.S.C. § 501(c)(3).[1] Churches (and some other organizations) are statutorily exempted from the requirement to file a Form 990. Freedom From Religion Foundation, Inc. and Triangle FFRF (collectively, "plaintiff") protest the exemption for churches, arguing that it fails to respect the separation of church and state. Not so.

In fact, the exemption "tends to complement and reinforce the desired separation insulating each from the other," *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 676 (1970), by avoiding "intrusive inquiry into religious belief," *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987). In other words,

[1] All statutory references within the text refer to the Internal Revenue Code (26 U.S.C.), unless otherwise noted.

§ 6033(a)(3) balances the competing interests of the Free Exercise and the Establishment clauses of the First Amendment, and does so without violating either provision. As the Supreme Court has stated with respect to the Religion Clauses, there is a middle ground – "room for play in the joints" – within which Congress may accommodate religion "without sponsorship and without interference." *Walz*, 397 U.S. at 669. The exemption at issue here – which relieves churches (and some other organizations) from the requirement to file a Form 990 – is a constitutionally permissible accommodation of religion that fits within that middle ground.

For this reason, as explained more fully below, summary judgment should be granted in favor of the defendant, and plaintiff's claims for relief should be denied.

STATEMENT OF FACTS

The defendant's concurrently-filed Statement of Material Facts is hereby incorporated by this reference.

STATUTORY SCHEME

In general, § 501(c)(3) organizations must file an annual Form 990 or 990-PF information return. I.R.C. § 6033(a)(1); Treas. Reg. § 1.6033-2(a)(2)(i). Statutorily mandated exemptions exist for churches, their integrated auxiliaries, conventions or associations of churches, the exclusively religious activities of any religious order, and certain organizations, other than private foundations, the gross receipts of which in each taxable year are normally not more than $5,000. I.R.C. § 6033(a)(3)(A). There is also a discretionary exemption allowing the Secretary of the Treasury to relieve any organization (that is not a supporting organization) from filing an information return if the filing is not necessary to the efficient administration of the internal revenue laws. I.R.C. § 6033(a)(3)(B). Pursuant to this authority, an organization, other than a private foundation or § 509(a)(3) supporting organization, that normally has gross receipts of not

more than $50,000 is not required to file an annual information return. Rev. Proc. 2011-15, 2011-3 I.R.B. 322 (January 17, 2011).

Organizations that are exempt from filing Forms 990 because their gross receipts in each taxable year are not more than $50,000, or because the Secretary in his discretion has otherwise exempted such organizations from filing, must file an annual electronic notification, Form 990-N. I.R.C. § 6033(i); Rev. Proc. 2011-15. However, certain organizations, including churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order are not required to submit a Form 990-N. I.R.C. § 6033(a)(3)(A); Treas. Reg. § 1.6033-6(b).

LEGAL STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Factual disputes are genuine only if there is sufficient evidence for a reasonable [factfinder] to return a verdict in favor of the non-moving party on the evidence presented, and they are material only if their resolution might change the suit's outcome under the governing law." *Maniscalco v. Simon*, 712 F.3d 1139, 1143 (7th Cir. 2013) (quotation omitted). To determine whether there is a genuine dispute as to any material fact, the court must consider the materials cited in the record on the motion, Fed. R. Civ. P. 56(c)(3), and consider those facts and "all reasonable inferences in favor of the non-moving party," *Van den Bosch v. Raemisch*, 658 F.3d 778, 785 (7th Cir. 2011). But "conclusory allegations . . . should be disregarded on summary judgment." *Drake v. 3M*, 134 F.3d 878, 887 (7th Cir. 1998); *accord Zilisch v. R.J. Reynolds Tobacco Co.*, 2011 U.S. Dist. LEXIS 154501, at *2-4 (W.D. Wis. Jun. 21, 2011) (Crabb, J.).

Further, the standard for summary judgment must incorporate certain canons of constitutional construction "out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). Thus, "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012) (quoting *Hooper v. California*, 155 U.S. 648, 657, (1895)); *accord Mueller v. Thompson*, 858 F. Supp. 885, 900 (W.D. Wis. 1994) (quoting *Rust*, 500 U.S. at 190) (Crabb, J.), *vacated on other grounds sub nom Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), *vacated on other grounds sub nom Wisconsin v. Mueller*, 519 U.S. 1144 (1997).

ARGUMENT

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I, cl. 1. However, the Supreme Court has "'long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.'" *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (citation omitted); *see Cutter v. Wilkinson*, 544 U.S. 709, 719-20 (2005) (upholding Religious Land Use & Institutionalized Persons Act as a "permissible legislative accommodation of religion," even though it was not "compelled by the Free Exercise Clause"); *Gillette v. United States*, 401 U.S. 437, 450 (1971) (upholding religion-specific exemption from military draft).

With respect to exemptions that relieve religious organizations from the requirement to file annual information returns, such as the statute at issue here, the Supreme Court has acknowledged that "the provision of a substantial amount of information, much of which penetrates deeply into the internal affairs of" a religious organization may constitute a burden on

religious practice. *See Larson v. Valente*, 456 U.S. 228, 254-255 & n.29 (1982). Indeed, in *Larson*, the Supreme Court expressed no doubt regarding the constitutionality of an exemption for all religious groups from filing detailed information returns concerning the organizations' internal affairs, decision-making process, and organizational structure. The Supreme Court signaled that a denominationally neutral version of the exemption at issue in *Larson* would avoid the "kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids." *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971)); *see also id.* at 235-37 (discussing the lower courts' opinions "that the fifty per cent rule should be stricken from" the statute to render it constitutional).

To determine whether the Government's accommodation of religion is permissible under the Establishment Clause, courts generally apply the three-pronged test set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which "'remains the prevailing analytical tool for the analysis of Establishment Clause claims.'" *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012) (*en banc*) (citation omitted), *cert. denied*, 134 S. Ct. 2283 (2014). In order to comport with the Establishment Clause, (i) "the statute must have a secular legislative purpose," (ii) "its principal or primary effect must be one that neither advances nor inhibits religion," and (iii) it "must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-13 (citation omitted).

As explained more fully below, the relevant Supreme Court precedents make clear that § 6033(a)(3) is a permissible accommodation of religion and the defendant is therefore entitled to judgment as a matter of law.

I. *LARSON*, *AMOS*, AND *WALZ*: THE CONTOURS OF PERMISSIBLE ACCOMMODATION OF RELIGION.

The Supreme Court has previously opined on the constitutionality of religion-specific exemptions from state "inspection and evaluation." In *Larson v. Valente*, 456 U.S. 228 (1982), for example, the Supreme Court reviewed the constitutionality of an exemption to a Minnesota statute requiring charitable organizations to register with the state and file annual information returns that called "for the provision of a substantial amount of information, much of which penetrates deeply into the internal affairs of the registering organization." *Id*. at 254 n.29. The statute required charitable organizations to make disclosures concerning the "'[general] purposes for which contributions . . . will be used,' the '[board], group or individual having final discretion as to the distribution and use of contributions received,' '[total] receipts and total income from all sources,' the cost of 'management,' 'fund raising,' and 'public education,' and a list of '[funds] or properties transferred out of state, with explanation as to recipient and purpose.'" *Id*. (bracketed text and ellipses in original).

From 1961 until 1978, the Minnesota statute provided – similar to § 6033(a)(3) in this case – that all "religious organizations" were exempted from the registration and annual reporting requirements. However, in 1978, the "fifty per cent rule" was added to the statute. The fifty percent rule limited the scope of the exemption to "only those religious organizations that received more than half of their total contributions from members or affiliated organizations would remain exempt from the registration and reporting requirements." *Id*. at 231-32.[2]

[2] Unlike the fifty percent rule at issue in *Larson*, § 6033(a)(3) is applicable without discrimination between religions.

Three members of the Unification Church, which later joined as a plaintiff, filed suit in federal court seeking to invalidate the fifty percent rule. The Supreme Court ultimately held that the fifty percent rule was unconstitutional on the grounds that it discriminated between religions. *Id.* at 255. Close analysis of the *Larson* case makes clear, however, that the statutorily mandated exemption at issue here – which relieves churches (and some other organizations) from the requirement to file a Form 990 – is constitutionally permissible. Three important points compel this conclusion.

First, the *Larson* court expressed no doubt as to the constitutionality of Minnesota's general exemption from the registration and annual information return requirement that applied to all religious groups equally. *Id.* at 246-47, 252. In other words, the Supreme Court did not find the statute facially invalid – as FFRF urges here – on the grounds that it gave an exemption only to religious organizations. In the court below, the U.S. Court of Appeals for the Eighth Circuit held that all religious groups should qualify for the exemption if they presented evidence of their religious nature – and invalidated only the fifty percent rule. *See id.* at 237 ("Applying the Minnesota rule of severability, the Court of Appeals also held that [the general exemption for all religious groups], as a whole should not be stricken from the Act, but rather that the fifty percent rule should be stricken."). The Supreme Court likewise held the statute invalid because the exemption was not imposed evenhandedly across religious organizations of other denominations, and did not mention any other constitutional defect. Put simply, though it certainly had the opportunity, *Larson* did not invalidate Minnesota's general exemption from the registration and annual information return requirement for religious organizations, which is analogous to § 6033(a)(3).

Second, the relief ordered by the Supreme Court in *Larson* demonstrates approval of Minnesota's general exemption for all religious organizations from the registration and annual information return requirement. Notably, the Supreme Court held that Minnesota could not require the Unification Church to register and file returns under the authority of the fifty percent rule. *Id.* at 255 ("we hold that appellees cannot be compelled to register and report under the Act on the strength of [the fifty percent rule]"). Thus, the Unification Church, as a religious organization, was allowed to remain completely exempt from Minnesota's registration and annual information return requirement.

Third, the Supreme Court in *Larson* recognized that complying with Minnesota's requirements to register and file information returns "calls for the provision of a substantial amount of information, much of which penetrates deeply into the internal affairs of the registering organization," and recognized that compliance would be "burdensome and intrusive" for religious organizations. *Id*. at 254 n.29. Indeed, the Supreme Court concluded that the fifty percent rule caused "religious gerrymandering" because "the burden of compliance with the Act is certainly not *de minimis*." *Larson*, 456 U.S. at 253-255 (quotations omitted). In other words, groups that were required to register with the state of Minnesota and file annual information returns were burdened in some way. Consistent with Supreme Court precedent, Minnesota's general exemption (which relieved all religious organizations from registration and annual information return requirements) permissibly accommodated and insulated all religious organizations from that burden.

With respect to the Form 990, Congress faced the prospect of burdening churches (and certain closely-related religious groups) with the requirement to file annual information returns. Congress permissibly chose to accommodate and insulate religion. *See Cutter*, 544 U.S. at 719-

20 ("Our decisions recognize that 'there is room for play in the joints' between the Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause.") (quoting *Walz*, 397 U.S. at 669); *Amos*, 483 U.S. at 334; *Gillette*, 401 U.S. at 450 (upholding religion-specific exemption from military draft). Moreover, and consistent with *Larson*, the IRS may still require churches to verify that they are entitled to that exemption, as well as tax-exemption in general. *E.g.*, *Found. of Human Understanding v. United States*, 614 F.3d 1383, 1391 (Fed. Cir. 2010) (sustaining ruling by IRS, at conclusion of church-tax inquiry, that entity failed to establish that it qualified as a "church" within the meaning of I.R.C. § 170); *Spiritual Outreach Soc'y v. Commissioner*, 927 F.2d 335, 339 (8th Cir. 1991) (sustaining IRS decision to deny entity's renewed request to be classified as a church for federal tax purposes); *see* I.R.C. §§ 7611, 7428.

A comparison of *Amos* and *Walz* (upholding religious exemptions) illustrates the contours of permissible accommodation of religion. In *Amos*, the Supreme Court addressed whether the exemption for religious organizations from the prohibition against religious discrimination under Title VII violates the Establishment Clause. The Court upheld the exemption as a permissible accommodation, even though it was not required by the Free Exercise Clause. 483 U.S. at 336. The Court concluded that the exemption satisfied the *Lemon* test. First, it served the secular purpose of minimizing governmental interference "with the decision-making process in religions." *Id*. Second, it did not advance religion but merely removed a regulatory burden imposed thereon. *Id*. at 338. Third, it avoided excessive entanglement by "effectuat[ing] a more complete separation" of church and state. *Id*. at 339. The Court expressly rejected the complaint "that [the exemption] singles out religious entities for a benefit." *Id*. at 338. As the Court explained, "[w]here, as here, government acts with the proper

purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Id*.

In *Walz*, the Supreme Court held that exempting religious organizations from a generally applicable property tax did not violate the Establishment Clause. The Court emphasized that the tax exemption served the permissible purpose of "sparing the exercise of religion from the burden of property taxation." 397 U.S. at 673-74. The exemption, moreover, by no means sponsored religion, but "simply abstains from demanding that the church support the state." *Id*. at 675. And it "create[d] only a minimal and remote involvement between church and state and far less than taxation of churches." *Id*. at 676. Although the Court observed that the property tax exemption was also available to other nonprofit organizations, its conclusion that the exemption was a "permissible state accommodation to religion" did not depend on that fact. *Id*. at 673. As the Court explained, the Establishment Clause prohibits government "sponsorship" of "religious activity," and a property-tax exemption — unlike a "direct money subsidy" — does not run afoul of that prohibition because the "government does not transfer part of its revenue to churches." *Id.* at 675.

Similar to the exemptions in *Amos* and *Walz*, the statutorily mandated exemption at issue here – which relieves churches (and some other organizations) from the requirement to file a Form 990 – lifts a burden on religious practice by minimizing governmental surveillance and interference with a church's internal affairs. Taken together, *Larson*, *Amos*, and *Walz* demonstrate that § 6033(a)(3) is constitutionally permissible accommodation of religion under the Establishment Clause.

II. SECTION 6033(a)(3) DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE UNDER *LEMON*.

A. Section 6033(a)(3) Has a Secular Legislative Purpose.

Section 6033(a)(3), which relieves churches (and some other organizations) from the requirement to file a Form 990, has a valid secular purpose because "state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids." *Larson*, 456 U.S. at 255 (quoting *Lemon*, 403 U.S. at 620). Congress may permissibly exempt religious organizations from the burden of complying with the requirement to file information returns because such a supervisory relationship between the government and churches is "pregnant with the dangers of excessive government direction . . . of churches." *Id.* (ellipses in original). As explained below, the legislative history and historical context of § 6033(a)(3) demonstrates that the manifest purpose of the statute is to minimize the degree of governmental surveillance of churches' internal affairs. One federal court has explicitly held that the statutory scheme has a clearly secular purpose. *Lutheran Social Serv. v. United States*, 583 F. Supp. 1298, 1307 (D. Minn. 1984) (holding that § 6033(a)(3) does not violate the *Lemon* test in course of examining Treas. Reg. § 1.6033-2(g)(5)), *rev'd on other grounds*, 758 F.2d 1283 (8th Cir. 1985) (not considering the district court's application of *Lemon*).

There is a long-standing presumption that churches engage in charitable and other activities that contribute to the public welfare; as a result, churches are generally exempt from income tax. *E.g.*, *Walz*, 397 U.S. at 689 ("government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities") (Brennan, J., concurring); *Yale University v. Town of New Haven*, 42 A. 87,

91 (Conn. 1899) ("And this has been, not the exception, but the rule, from the foundation of our government. The seats of government, state or municipal, highways, parks, churches, public school houses, colleges, have never been within the range of taxation."). Thus, in 1943, when Congress for the first time required tax-exempt organizations to file annual information returns, it was hardly surprising that religious, educational, and charitable organizations were exempted from this filing requirement. Revenue Act of 1943, Pub. L. No. 78-235, 58 Stat. 26, § 117(a). The reason is simple: Congress' goal in requiring tax-exempt entities to file annual information returns was to make sure that for-profit companies were not permitted to masquerade as non-profits, placing legitimate for-profit entities at a competitive disadvantage. S. REP. No. 78-627, at 21 (1943) ("[L]arge numbers of these exempt corporations and organizations are directly competing with companies required to pay income taxes . . . These organizations were originally given this tax exemption on the theory that they were not operated for profit, and that none of their proceeds inured to the benefit of shareholders. However, many of these organizations are now engaged in operation of apartment houses, office buildings, and other businesses which directly compete with individuals and corporations required to pay taxes on income derived from like operations.").

Congress subsequently revisited the issue in the Tax Reform Act of 1969. Pub. L. No. 91-172, 83 Stat. 487 (codified, in part, as Internal Revenue Code of 1954 §§ 508, 511, 513, 6033(a), 7605). While the 1969 legislation included a number of different changes to the tax code, in passing the law Congress reaffirmed its decision to exempt churches from the annual filing requirement that applied to other tax-exempt organizations. The House version of the bill would have eliminated the exemption and required churches to file annual information returns like all other tax-exempt entities. *See* Tax Reform Act of 1969, H.R. 13270, 91st Cong. § 101(d) (as

passed by House, Aug. 7, 1969). The Senate disagreed. The Senate version of the bill included the following exemption: "churches, their integrated auxiliary organizations, and organizations and associations of churches" would not be required to file annual information returns. S. REP. NO. 91-552, at 52. According to Senator Russell B. Long of Louisiana, Chairman of the Committee on Finance:

> The Committee agreed to exempt churches from the requirement of filing annual information returns in view of the traditional separation of church and state. However, where the church is engaged in an unrelated business, it would still be required to file an unrelated business income tax return.

115 CONG. REC. 32148 (1969). The conference committee approved the Senate's version of the bill. H.R. REP. NO. 91-782, at 286 (1969).[3]

Thus, at bottom, § 6033(a)(3) has the valid secular purpose of minimizing governmental surveillance of and interference with a church's internal affairs. Congress acted with a constitutionally permissible purpose when it sought to avoid creating the "entangling church-state relationships of the kind the Religion Clauses sought to avoid." *Lemon*, 403 U.S. at 616. That judgment is entitled to deference as the Supreme Court has emphasized, even in Establishment Clause cases, "'[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes,'" and that courts must give "substantial deference" to a legislative "judgment" regarding a "tax" provision that is challenged under the Establishment Clause. *Mueller v. Allen*, 463 U.S. 388, 396 (1983) (citation omitted).

Even though an exemption from the requirement to file a Form 990 may not be constitutionally compelled, § 6033(a)(3) constitutes a permissible attempt by Congress to

---

[3] The conference committee included an additional provision that exempted the exclusively religious activities of any religious order from the annual information filing requirement. H.R. REP. No. 91-782, at 286 (1969).

accommodate religious practice in a manner that would avoid "state inspection and evaluation of the religious content of a religious organization" and "a relationship pregnant with dangers of excessive government direction . . . of churches." *Larson*, 456 U.S. at 255 (quoting *Lemon*, 403 U.S. at 620). *See also Amos*, 483 U.S. at 336. As a result, § 6033(a)(3) has a valid secular purpose and thus satisfies the first prong of the *Lemon* test.

B. Section 6033(a)(3) Does Not Have the Primary Effect of Advancing or Inhibiting Religion.

1. Section 6033(a)(3) Is Not a Subsidy of Religion.

As discussed above, the primary effect of § 6033(a)(3) is not to advance or inhibit religion, but rather to avoid ongoing government surveillance of the internal affairs of churches. Indeed, as one federal court has already concluded, "[t]he burden of filing [a Form 990] is minimal and does not inhibit those religions whose affiliated organizations are required to file, or materially advance those religions whose affiliated organizations are exempt from filing." *Lutheran Social Serv. v. United States*, 583 F. Supp. 1298, 1307-08 (D. Minn. 1984). *Id*.

It is well-established that an exemption exclusive to religious groups from regulatory requirements does have the effect of advancing or inhibiting religion.

> A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden **"**effects**"** under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence. As the Court observed in *Walz*, **"**for the men who wrote the Religion Clauses of the First Amendment the **'**establishment**'** of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."

Amos, 483 U.S. at 337 (quoting *Walz*, 397 U.S. at 668); *see Cohen v. City of Des Plaines*, 8 F.3d 484, 491 (7th Cir. 1993). In *Amos*, the Supreme Court held that an exemption from Title VII

employment regulations, applied exclusively to religious organizations, was within the bounds of "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference," *Walz*, 397 U.S. at 669, and that the exemption did not "devolve into 'an unlawful fostering of religion.'" *Amos*, 483 U.S. at 334-35 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 (1987)).

Consistent with Supreme Court precedent regarding the permissibility of religious exemptions from regulatory burdens, the U.S. Court of Appeals for the Seventh Circuit has held that an exemption exclusive to churches from otherwise generally applicable regulatory requirements, such as zoning restrictions, is constitutional, even when accommodation is not constitutionally compelled. *Cohen*, 8 F.3d at 491-92. The U.S. Court of Appeals for the Seventh Circuit distinguished *Cohen* from *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), on the grounds that exemption from a regulatory burden did not constitute a monetary subsidy to religion that would "require the general population to subsidize religious organizations." 8 F.3d at 492; *see also Charles v. Verhagen*, 220 F. Supp. 2d 955, 967-68 (W.D. Wis. 2002) (Crabb, J.).

Here, § 6033(a)(3) is an exemption from a regulatory requirement to file information returns. Section 6033(a)(3) is not a subsidy of religious organizations sponsored by the public. No public funds are spent as a result of § 6033(a)(3) nor is any tax revenue foregone by operation of the exemption. Indeed, § 6033(a)(3) only relates to information returns and the degree of state surveillance of religion. As such, the exemption merely serves to promote the separation of church and state, and to avoid unnecessary government surveillance of churches. There is no "award[] of assistance to religious organizations" in not requiring churches to file information returns. *See Texas Monthly*, 489 U.S. at 15.

In this regard, § 6033(a)(3) is similar to the "ministerial exception," or "internal-affairs doctrine," that the courts have applied to generally applicable employment laws. Like that doctrine, which minimizes governmental interference "in the internal management of churches" and "how to allocate authority over the affairs of the church," *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008), § 6033(a)(3) minimizes both governmental surveillance as well as governmental influence on internal church affairs, by declining to require churches to identify how leadership decisions are structured or the extent of resources churches devote to fundraising or programmatic-related expenses.

The conclusion that the primary effect of § 6033(a)(3) is to minimize government surveillance and entanglement between government and churches is buttressed by the availability of other avenues for enforcing the conditions of tax-exemption incumbent on churches, including church tax inquiries initiated pursuant to § 7611 or audits and examinations of individual employees of churches. Section 6033(a)(3) does not amount to a substantive benefit or differential condition of tax-exemption for churches, as the tax-exempt status of a church is subject to revocation regardless of their exemption from the requirement to file Forms 990. *See, e.g.*, *Found. of Human Understanding*, 614 F.3d at 1391; *Spiritual Outreach Soc'y*, 927 F.2d at 339; I.R.C. §§ 7611, 742. Thus, the statutory exemption from filing Forms 990 does not somehow grant churches any other immunity.

2. Section 6033(a) Does Not Convey A Message of Endorsement or Disapproval of Religion.

Courts sometimes analyze whether a law has impermissible effects under *Lemon* by reference to the "endorsement test." "Under this prong, the question is: irrespective of government's actual purpose, whether the practice under review in fact conveys a message of

endorsement or disapproval."[4] *Sherman v. Koch*, 623 F.3d 501, 517 (7th Cir. 2010) (quotation omitted). Here, as discussed above, § 6033(a)(3) does not convey a message of approval or disapproval of religious activity; instead, the exemption serves to separate government from religious activity, and therefore avoid expressing any message regarding the content of religious beliefs or activities. Thus, § 6033(a)(3) does not convey any official government message regarding religion.

3. Section 6033(a)(3) Provides Exemption to a Variety of Organizations.

Even if the Court found that the exemption under § 6033(a)(3) constituted a subsidy, which it should not, the exemption would nonetheless be constitutionally permissible because the exemption does not "burden[] nonbeneficiaries markedly" and because it is available to a wide array of nonsectarian groups in pursuit of some legitimate secular ends. *See Texas Monthly*, 489 U.S. at 15. For example, charitable organizations, educational organizations,[5] organizations for the prevention of cruelty to children or animals, fraternal beneficiary societies, and other organizations receiving less than $5,000 in gross receipts annually are statutorily exempt from the requirement to file Forms 990. Congress has determined that such groups are presumably entitled to tax-exempt status. Organizations receiving annual gross receipts less than $5,000 are presumably acting with charitable or socially beneficial intent, such organizations are not likely to be for-profit corporations masquerading as non-profit organizations, and therefore exempting them from regulatory filing requirements serves the legitimate end of avoiding unnecessary

---

[4] Although some courts identify the "endorsement test" as distinct from the *Lemon* test, the Seventh Circuit appears to include it in the "effects" prong of *Lemon*. *See Elmbrook Sch. Dist.*, 687 F.3d at 849-50; *Sherman*, 623 F.3d at 517.

[5] Organizations meeting the definition of educational organizations described in § 170(b)(1)(A)(ii).

government surveillance. Further, exercising his discretion, the Secretary of the Treasury has determined that such charitable organizations receiving less than $50,000 in gross receipts annually are also exempt from the requirement to file Forms 990 as such groups are likewise presumably entitled to tax-exempt status. Therefore, a wide array of nonsectarian groups is entitled to the exemption at issue, which furthers the secular end of minimizing government surveillance.

Thus, § 6033(a)(3) does not constitute an exclusive subsidy that has the effect of advancing or endorsing religion through government action. Section 6033(a)(3) does not have an impermissible primary effect under the second prong of *Lemon*.

C. Section 6033(a)(3) Does Not Produce Excessive Entanglement.

As discussed above, § 6033(a)(3) is an exemption designed to avoid ongoing government surveillance of churches. Section 6033(a)(3) exempts churches from the requirement to file annual information returns that include requests for information concerning the "'[general] purposes for which contributions . . . will be used,' the '[board], group or individual having final discretion as to the distribution and use of contributions received,' '[total] receipts and total income from all sources,' the cost of 'management,' 'fund raising,' and 'public education,' and a list of '[funds] or properties transferred out of state, with explanation as to recipient and purpose.'" *See Larson*, 456 U.S. at 254 n.29 (bracketed text and ellipses in original). Thus, § 6033(a)(3) operates to promote the insulation between church and state. By avoiding the "kind of state inspection and evaluation of the religious content of a religious organization . . . fraught with the sort of entanglement that the Constitution forbids," § 6033(a)(3) clearly reduces the likelihood of entanglement. Therefore, § 6033(a)(3) does not violate the entanglement prong of *Lemon*.

III. PLAINTIFF'S EQUAL PROTECTION CLAIM SHOULD BE EVALUATED UNDER THE ESTABLISHMENT CLAUSE ANALYSIS.

Plaintiff attempts to articulate two distinct claims: one under the Establishment Clause and one under the Due Process Clause for violation of equal protection rights. (Docket No. 2 ¶¶ 1, 30, 35; *id.*, Prayer for Relief, ¶ A.) The equal protection claim, however, adds nothing to the Establishment Clause claim. *See World Outreach Conf. Ctr. v. City of Chicago*, 591 F.3d 531, 534 (7th Cir. 2009); *see Lutheran Social Serv.*, 583 F. Supp. at 1306 & n.6 (applying rational basis standard in consideration of a constitutional challenge to § 6033(a)(3) on the grounds that Congress and the agencies have broad discretion in formulating classifications for tax purposes) (citing *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). Even when challenged on equal protection grounds, the Establishment Clause analysis is proper with respect to a statute such as § 6033(a)(3), which does not discriminate among religions. *Larson*, 456 U.S. at 252; *Amos*, 483 U.S. at 338-39; *accord Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004); *Larson v. Valente*, 456 U.S. 228 (1982)); *see also World Outreach Conf. Ctr.*, 591 F.3d at 534; *Conyers v. Abitz*, 416 F.3d 580, 586 (7th Cir. 2005) (holding that a plaintiff's "free-exercise claim arises under the First Amendment and gains nothing by attracting additional constitutional labels" like equal protection); *Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 354 (1st Cir. 2004). Finally, a statute that is consistent with the Establishment Clause receives only rational basis scrutiny in the equal protection analysis. *Locke*, 540 U.S. at 720 n.3; *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 638 (7th Cir. 2007).

Thus, for all the reasons set forth in sections I. and II., *supra*, plaintiff's claims fail and defendant is entitled to judgment as a matter of law.

CONCLUSION

For all of the foregoing reasons, the defendant's motion for summary judgment should be granted.

Dated: September 8, 2014

Respectfully submitted,

/s/ Richard G. Rose
RICHARD G. ROSE
District of Columbia Bar Number: 493454
U.S. Department of Justice, Tax Division
Post Office Box 7238
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 616-2032
Facsimile: (202) 514-6770
E-mail: richard.g.rose@usdoj.gov

/s/ Richard Adam Schwartz
RICHARD ADAM SCHWARTZ
California Bar Number: 267469
U.S. Department of Justice, Tax Division
Post Office Box 683
Washington, D.C. 20044
Telephone: (202) 307-6322
Fax: (202) 307-0054
E-mail: richard.a.schwartz@usdoj.gov

Counsel for Defendant

CERTIFICATE OF SERVICE

I certify that, on September 8, 2014, service of the foregoing BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT was made upon plaintiffs by filing it with the Clerk of Court using the CM/ECF system.

/s/ Richard G. Rose
RICHARD G. ROSE