UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC.,	)	
Plaintiff,	)	
v.	)	Case No. 12-CV-818
DANIEL WERFEL, ACTING COMMISSIONER OF THE INTERNAL REVENUE SERVICE,	)	
Defendant.	)	

DEFENDANT'S OPPOSITION TO MOTION TO INTERVENE

Freedom From Religion Foundation, Inc. ("FFRF") brought this suit to obtain a declaration that the IRS has a policy of non-enforcement of the political activity restrictions of § 501(c)(3)[1] exclusively as to churches and religious organizations, and that such a policy violates the Establishment Clause of the First Amendment to the United States Constitution. FFRF does not seek enforcement of the requirements of § 501(c)(3) as to any particular entity. Nor does FFRF seek any relief which might violate or impair the constitutional rights of any other individual or entity. Nonetheless, Father Patrick Malone and Holy Cross Anglican Church ("Applicants") seek to intervene in this suit because they fear this Court will order the IRS to take some action that violates their rights. (*See* Motion to Intervene by Applicants Father Patrick Malone and Holy Cross Anglican Church, Doc. 25 (hereafter "Motion to Intervene") at 11-13.) Applicants misrepresent what *this* case is about in order to manufacture an impaired interest.

Under Federal Rule of Civil Procedure 24(a)(2), a movant is entitled to intervene in a federal court action as a matter of right if the movant, upon a timely application, "claims an

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

interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Additionally, under Rule 24(b)(2), a movant may intervene with leave of the court if the movant "has a claim or defense that shares with the main action a common question of law or fact." However, Applicants do not have any rights or other protectable interest in the subject of *this* action, and therefore they have satisfied neither the requirements for intervention as of right under Rule 24(a)(2) nor the requirements for permissive intervention under Rule 24(b)(2). Their Motion to Intervene should be denied.

ARGUMENT

I. Applicants Are Not Entitled to Intervention as of Right Pursuant to FED. R. CIV. P. 24(a)(2).

The Seventh Circuit has required that a person seeking to intervene as of right pursuant to Rule 24(a)(2) must: "(1) make a timely application, (2) have an interest relating to the subject matter of the action, (3) be at risk that that interest will be impaired by the action's disposition and (4) demonstrate a lack of adequate representation of the interest by the existing parties." *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 705 (7th Cir.2001). Furthermore, the party seeking intervention bears the burden of showing that these four elements are met. *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 773-74 (7th Cir. 2007).[2]

//

[2] According to the Seventh Circuit, the timeliness requirement, rather than imposing a precise time limit, essentially means that an intervenor must "act with dispatch," *Atlantic Mutual Ins. Co. v. Northwest Airlines, Inc.*, 24 F.3d 958, 960 (7th Cir. 1994). Intervention is unavailable to the litigant who "dragged its heels" after learning of the lawsuit. *United States v. City of Chicago*, 870 F.2d 1256, 1263 (7th Cir.1989). In this case, Applicants waited 51 days before filing their Motion to Intervene. The defendant does not take a position on whether the present motion is timely in light of the circumstances of this case.

A. Applicants Do Not Have a "Direct, Significant Legally Protectable Interest" Relating the Subject of the Action.

To intervene, an applicant must have a "direct, significant legally protectable interest" relating to the subject of the action. *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982). "The Seventh Circuit has discussed the interest requirement of Rule 24(a)(2) in connection with the standing requirement of Article III of the Constitution and indicated that a would be intervenor must have constitutional standing." *Habitat Educ. Ctr., Inc. v. Bosworth*, 221 F.R.D. 488, 492 (E.D. Wis. 2004) (citing *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996)). "Some disagreement remains among the circuits about how Article III standing rules intersect with the requirements for Rule 24 intervention." *Id*. In 2011, the Seventh Circuit explained that "Article III standing, however, does not suffice to establish the required Rule 24(a) 'interest.'" *City of Chicago v. Federal Emergency Management Agency*, 660 F.3d 980, 984-85 (7th Cir. 2011). Regardless, the "interest must be unique to the proposed intervenor." *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 659 (7th Cir. 2013).

What is clear is that an applicant for intervention must have a direct, significant, and legally protectable interest that would be subject to impairment by the litigation. *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 945-46 (7th Cir. 2000); *Habitat Educ. Ctr.*, 221 F.R.D. at 494. In this case, Applicants do not have such an interest. Though Applicants seek intervention to assert free exercise rights and to prevent the IRS from taking enforcement action against them,[3] this case is not about First Amendment free exercise rights or any specific IRS enforcement action. Rather, the question in this case is simple: whether the purported failure to

[3] Applicants do not assert that the IRS has taken any action against them in connection with any of their purportedly political activities to date.

enforce § 501(c)(3)'s political activity restrictions constitutes a violation of the Establishment Clause or an infringement of FFRF's equal protection rights.

Applicants apparently refuse to abide by the political activity restrictions upon which their tax-exempt status depends, and thus fear some hypothetical future enforcement action by the IRS. But that "interest" is not sufficiently direct because this case will not alter whether the political activity restrictions are law. If such an attenuated interest sufficed, there would be no limit on potential intervenors in cases where would-be intervenors feared that a law already on the books might someday be enforced against them. That result would directly undermine the limitation that "*disposing* of the action," and not just the litigation's object or its participants, threatens to impair an intervenor's interests. Fed. R. Civ. P. 24(a)(2) (emphasis added).

None of the pleadings nor any of the parties' briefs raise the issues Applicants assert are involved here. As a result, Applicants have failed to show any interest that is sufficiently *directly* related to the subject matter of this action to provide grounds for intervention under Fed. R. Civ. P. 24(a)(2).

B. There is No Risk that Applicants' Interests Will Be Impaired by This Action's Disposition.

Applicants' Motion to Intervene also fails because they have no interest that could plausibly be affected by the disposition of this action. To satisfy this element for intervention as of right, the disposition of the action must threaten to impair or impede an applicant's ability to protect that interest. Because Applicants would be no better or worse off regardless of the disposition of this action, they do not have an interest that might be impaired.

Though neither Father Malone nor Holy Cross Anglican Church have been mentioned in any pleading filed in this case prior to Applicants' Motion to Intervene, Applicants claim that FFRF seeks to have the IRS "punish Father Malone and the Church for Father Malone's

religious guidance on political candidates." (Motion to Intervene at 1-2.) They claim the outcome of this litigation could inhibit their ability to exercise certain First Amendment rights and the ability to carry out their respective religious missions, and so they believe that they are entitled to intervene in this litigation as of right. (Motion to Intervene at 11-13.)

However, contrary to Applicants' conclusory characterization that they have "interests in this lawsuit that *will* be impaired if FFRF succeeds," (Motion to Intervene at 12) (emphasis in original), this case will not alter the political activity restrictions of § 501(c)(3). FFRF simply does not purport to seek any relief that would actually or practically alter any third party's legal rights. Applicants do not identify any support for their contention that "the sole purpose of this lawsuit is to force the IRS to punish the Church for its religious exercise." (*Id.*) Instead, FFRF only seeks an injunction requiring the IRS to enforce the current law in accordance with FFRF's view of proper enforcement, not to create or eliminate any obligations or exceptions to the political activity restrictions of § 501(c)(3). Applicants implausibly assert that it is *this* suit that would suddenly require the IRS to prohibit Applicants from engaging in certain activity even though nothing in FFRF's suit implicates any requirements that are not already law. Furthermore, to the extent that Applicants assert that a judgment in this case would *require* unconstitutional enforcement action, Applicants are essentially arguing that this Court will issue an unconstitutional order in disposing of this case. This Court should decline to find that Applicants have identified any interests that would be impaired by the disposition of this action.

The fact that this suit, in and of itself, does not threaten to impair any of Applicants' interests is further evidenced by the fact that Applicants only cite "threats" that exist in the law irrespective of this suit. (*See* Motion to Intervene at 13-14) (citing IRS Church Tax Guide at 15; 26 C.F.R. § 1.501(c)(3)-1(a)(1), (c)(3)(i) (2009).) Applicants do not explain how *this* case could

impair their rights, and instead lean on the asserted significance of their interest to substitute for the impairment requirement. (*See* Motion to Intervene at 14-15 ("'[D]emonstrat[ing] the direct and significant nature of [the Church's] interest' often alone 'meets the impairment prong of Rule 24(a)(2)." (quoting *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 323 (7th Cir. 1995).)

However, *Reich* does not stand for the proposition that Applicants attribute to it. The district court in *Reich* had found that the proposed intervenors had failed to establish a sufficiently direct and significant interest on the grounds that they could not be named as defendants to a federal labor compliance action. *Reich*, 64 F.3d at 322. Reversing the district court, the Seventh Circuit specifically described that the interest was shown to be direct and significant by virtue of *the impairment* of interests that the proposed intervenors would suffer depending on the resolution of issues to be decided by the litigation. *Id*. The case questioned intervenors' employment status and thus implicated their ability to negotiate their contract with the defendant in that action. *Id*. Therefore, because the proposed intervenors' in *Reich* would be directly affected and potentially impaired by the resolution of the issues presented in that case, the Seventh Circuit did *not* abrogate the requirement that the litigation itself must threaten to impair a would-be intervenor's cited interest.

Moreover, impairment is a minimum requirement, and not simply a "factor" that could "weigh heavily in favor of granting intervention," as Applicants suggest. *See Ligas*, 478 F.3d at 773 ("A failure to establish any of these elements is grounds to deny the petition."). Because nothing in this suit would change the state of the law, Applicants would be no better or worse off as a result of *any* ruling that the Court would issue in determining whether to grant Plaintiff's requested relief.

Furthermore, as a practical matter, whatever attenuated interest Applicants may have in this case would not be impaired or impeded by this litigation. "The existence of 'impairment' depends on whether the decision of a legal question involved in the action would as a practical matter foreclose rights of the proposed intervenors in a subsequent proceeding." *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982). No such risk exists in this case. In addition, Applicants have multiple other forums available to seek vindication of any future injury. First, to the extent any provision of the internal revenue laws impedes or violates their constitutional rights and Applicants actually suffer an injury in fact, Applicants can file a separate suit for declaratory judgment. And should the IRS initiate a church tax audit under § 7611 due to alleged violations of the political activity restrictions of § 501(c)(3), Applicants can assert their First Amendment rights at that time (either at the administrative level or in subsequent federal court litigation), and nothing in this case would preclude them from doing so. Numerous courts have concluded that intervention is not necessary where would-be intervenors can protect their interests by asserting those interests in other available forums. *E.g.*, *Commodity Futures Trading Comm'n v. Heritage Capital Advisory Servs., Ltd.*, 736 F.2d 384, 386 (7th Cir. 1984); *SEC v. Homa*, 17 Fed. Appx. 441, 446 (7th Cir. 2001); *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). For this reason too, Applicants' Motion to Intervene should be denied.

C. Applicants' "Interests" Are Adequately Represented by the Parties Before the Court.

Finally, Applicants have failed to meet their burden of demonstrating that the defendant will not adequately represent their purported interest in this case. "Although intervention as of right requires only a 'minimal' showing of inadequate representation, when the prospective intervenor and the named party have the same goal, a presumption exists that the representation

in the suit is adequate." *Wisconsin Educ. Ass'n Council*, 705 F.3d at 659 (holding that because the State had the same goal as proposed intervenors, of defending against a constitutional challenge, the representation was adequate and intervention was prohibited).

As described above, this case only implicates whether the IRS has a policy of non-enforcement of the provisions of § 501(c)(3) as to religious organizations, and if it does, whether that policy is unconstitutional. Assuming for purposes of this analysis that Applicants do have any interest in this case (and they do not), Applicants' interest is in defeating this suit. Defeating this suit is also the government's interest in this case, and adequacy of representation is thus presumed. *Wisconsin Educ. Ass'n Council*, 705 F.3d at 659.

Beyond the presumption of adequate representation, Applicants have failed to introduce any evidence beyond conjecture that the United States would not seek to defeat this suit. Again, to the extent Applicants attempt to construe their interests as opposing some future enforcement action pursuant to the law that is currently in place, that interest is not implicated by this lawsuit. Thus, the United States' representation of the interest in defeating this lawsuit is adequate. *Id.* As a result, the Motion to Intervene should be denied.

II. Applicants Are Not Entitled to Permissive Intervention Pursuant to FED. R. CIV. P. 24(b).

Federal Rule of Civil Procedure 24(b)(2) empowers a court to allow a party to intervene on a discretionary permissive basis if that party "has a claim or defense that shares with the main action a common question of law or fact." In the Seventh Circuit, the applicant must, at a minimum, show "that there is (1) a common question of law or fact, and (2) independent jurisdiction." *Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995) (citing *Reedsburg Bank v. Apollo*, 508 F.2d 995, 1000 (7th Cir. 1975). Even if those two

requirements are met, the district court has discretion to deny permissive intervention. *Sokaogon*, 214 F.3d at 949 (citing *Keith v. Daley*, 764 F.2d 1265, 1272 (7th Cir. 1985)).

As discussed above, Applicants fail to address, let alone establish, that they have independent grounds for jurisdiction. On that basis alone, the Court should deny the request. It is clear that they lack sufficient "independent grounds for jurisdiction" in this case because they admit that they cannot hold any independent claims or defenses in their own right. (*See* Motion to Intervene at 14 ("this case . . . is not a case 'where the aspirant for intervention could file an independent suit . . .'").)

Moreover, this lawsuit does not implicate any claims or defenses held by Applicants other than those that the United States is already capable of raising. Applicants' "interest in protecting its religious exercise," (Motion to Intervene at 18), does not raise a question of law or fact in common with the issues in this case because this case has nothing to do with any IRS enforcement action, now or in the future. Instead, Applicants allege that any enforcement action that might be taken against them would be unconstitutional, raising an entirely separate and subsequent set of questions that are at best ancillary to the dispute at hand. Therefore, because Applicants lack distinct claims or defenses relating to the case to confer an independent jurisdictional basis, Applicant has failed to meet the threshold requirements for permissive intervention.

Finally, "[p]ermissive intervention under Rule 24(b) is wholly discretionary." *Sokaogon*, 214 F.3d at 949. In exercising its discretion, the court must consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(3). Allowing Applicants to intervene would unduly delay and prejudice the adjudication of the underlying case because Applicants do not need to be a party to make their legal arguments,

and any additional party "would unnecessarily encumber the litigation." *See PEST Committee v. Miller*, No. 2:08-cv-01248-RLH-GWF, 2009 WL 2524745 at *8 (D. Nev. 2009) (denying motion to intervene based on permissive intervention grounds in part because adding additional parties where the potential intervenors' interests are adequately protected would unnecessarily encumber the litigation). Furthermore, as discussed above, because Applicant's purported interests are so broad and factually unrelated to the underlying suit for declaratory judgment, allowing intervention would provide a rationale for any other person or entity claiming to exercise First Amendment rights or who are tax exempt under § 501(c)(3) to intervene, thus undermining judicial economy and creating the potential for undue delay or prejudice. Therefore, because Applicants lack a distinct, legally cognizable claim or defense held in their own right, allowing them to intervene as another party to the action undermines, rather than advances, judicial economy. Accordingly, the Court should deny Applicants' request for permissive intervention.

CONCLUSION

For all of the above reasons, the defendant respectfully requests that this Court deny

///

///

///

///

///

Applicants' Motion to Intervene.

Dated: December 19, 2013

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 the Defendant

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing DEFENDANT'S OPPOSITION TO MOTION TO INTERVENE to be served on the following counsel by electronic mail on December 19, 2013:

Richard L. Bolton	rbolton@boardmanclark.com
Counsel for Plaintiff	
Eric Christopher Rassbach	erassbach@becketfund.org
Daniel Howard Blomberg	dblomberg@becketfund.org
Counsel for Proposed Intervenors	

/s/ Richard A. Schwartz
RICHARD A. SCHWARTZ
U.S. Department of Justice