UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC., *Plaintiff*, v. JOHN KOSKINEN, Commissioner of the Internal Revenue Service, *Defendant*.	Case No. 12-CV-0818

COMBINED BRIEF IN REPLY TO THE PARTIES' OPPOSITIONS TO PROPOSED INTERVENORS' MOTION TO INTERVENE

Plaintiff FFRF has specifically requested that this Court order Defendant Koskinen,[1] and thus the IRS, to change current enforcement practices and take specific action against specific entities (churches) for specific religious statements that such individuals and entities share with each other (sermons that touch on political candidates and issues). Proposed Intervenors Father Malone and Holy Cross Anglican Church (collectively, the "Church") are beneficiaries of the IRS's current enforcement practices and are within the specific class of entities engaging in the specific kind of religious speech that FFRF seeks to have this Court restrict. Further, while the Church believes that the IRS's current enforcement practices are necessary to respect its statutory and constitutional rights, the IRS is, by regulation, hostile to those rights and refuses to assert or defend them. Thus, as the target of the

[1] Koskinen was sworn in as Commissioner of Internal Revenue on December 23, 2013, and was thus automatically substituted for original Defendant Shulman. *See* Fed. R. Civ. P. 25(d).

burden FFRF seeks to create via its suit, and without anyone to defend its rights, the Church is entitled to, or at least should be permitted to, intervene.

I. The Church is entitled to intervene as of right.[2]

A. The Church's application to intervene is timely.

Defendant takes no position on timeliness and thus concedes that the Church's intervention is timely. By contrast, FFRF asserts that the Church's motion is untimely. But all it offers to support its assertion is (a) the fact that the case was filed about a year ago, (b) its (erroneous) perception about the precise date the Church learned of FFRF's action, and (c) its misperception that everyone must have heard about its case when it originally filed due to "widespread" media coverage.

But the touchstone of timeliness is neither the original filing date nor an existing party's misprisions of fact, but whether the proposed intervenor has been unreasonably tardy in a manner that will prejudice the existing parties. *Aurora Loan Srvs., Inc. v. Caddieth*, 442 F.3d 1018, 1027 (7th Cir. 2006). "[I]n the absence of any indication of prejudice to the [parties]," a motion to intervene "cannot be adjudged untimely as a matter of law." *Id.* This is true even where, unlike here, an intervenor "would have been prudent to have moved earlier to intervene." *Id.* (noting that "in the absence of prejudice even a six-week delay would not necessarily be untimely").

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[2] Neither party responds to the Church's request that, should this court be inclined to find that Defendant currently adequately represents the Church's interests, it defer consideration of that question until later in the case, when the Church can fully evaluate the adequacy of Defendant's representation based on the nature of his defense. *See Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers*, 101 F.3d 503, 508-509 (7th Cir. 1996); *accord Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 776 (7th Cir. 2007). They have therefore conceded this request by failing to oppose it, and the request should be granted.

Since FFRF makes no effort to show any prejudice, the Church's filing is timely as a matter of law.

Further, the timeliness arguments that FFRF does make are unavailing. Courts have allowed nineteen month delays *after learning of a lawsuit*, and eight-year delays *after the case was concluded*. Dkt. 26, Proposed Intervenors' Brief in Support of Intervention ("Br."), at 10. A 51-day preparation period is blazingly fast by comparison. *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) (noting that timeliness is determined "from the time the potential intervenors learn that their interest might be impaired").

FFRF strains to find ambiguity in Father Malone's declaration that he "first realized" on "October 18, 2013" that FFRF's suit was a "threat" to the Church's rights. Father Malone Decl. at ¶ 32. But the clock starts precisely upon realizing one's legal interests are threatened, *Reich*, 64 F.3d at 321, so there is no relevant ambiguity. Even if there was, any ambiguity must be resolved in "favor of intervention," since the Church cannot be dismissed "unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts[.]" *Id.* And here it is uncontested and, at this phase, uncontestable that Father Malone acted "promptly" to protect the Church's rights. Dkt. 27, Father Malone Decl. at ¶ 34; *Reich*, 64 F.3d at 321 (courts "must accept as true the non-conclusory allegations" of the proposed intervenor).

B. The Church has a strong interest in not having the IRS enforce bans on its religious exercise.

FFRF and Defendant both make the same mistake about the Church's interest in this litigation. FFRF frames it as the Church seeking "a determination from the

court that the IRS must exempt churches," FFRF Opp. at 3, while Defendant argues the Church can have no interest "because this case will not alter whether the political activities restrictions are law," Def's Opp. at 4. But the Church's interest here is not in the IRS's regulatory ban on religious speech; rather, it is in whether this Court will order the IRS to enforce that ban against the Church. Br. at 1-2; Father Malone Decl. ¶¶ 30-31. And that is the sole relief FFRF seeks in this case: a declaration and injunction "ordering the Defendant Shulman and the IRS" to "initiate action against churches" that do what the Church does. Compl. ¶¶ b, c. Thus, the Church clearly "has an interest" is the precise "issue[] to be reolved by th[is] litigation," *Reich*, 64 F.3d at 322, especially under the "broad definition" of interest long "embraced" by the Seventh Circuit. *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1259 (7th Cir. 1983).

Defendant claims that this eminently practical desire to avoid enforcement is a speculative fear of "some hypothetical future enforcement action." Def's Opp. at 4-5. But this ignores the sharp specificity of FFRF's requested relief. FFRF demands that this Court order Defendant to punish churches for preaching precisely the candidate-related *and* issue-related sermons that the Father Malone is led by his Anglican beliefs to preach to the Church. Br. at 7-8. Indeed, FFRF provides two examples of the kinds of church speech it wants banned—one of which the Church has already participated in (the "Pulpit Initiative"), the other of which mirrors the pro-life sermons that Father Malone gives, and both forms of speech that the Church's religious beliefs require it to carry out in the future. *Id.* So the ruling that FFRF

seeks from this Court will inevitably chill, and ultimately proscribe, the Church's speech by triggering an enforcement regime against the Church's speech.

Indeed, were FFRF to win this case but the IRS continued to leave the ban against the Church's sermons unenforced, then FFRF could legitimately argue that the IRS was failing to obey the Court's ordered relief and move for contempt sanctions. Far from "some hypothetical" interest, then, the Church has a direct and legally cognizable interest in exercising its statutory and constitutional rights without facing a FFRF-procured, court-ordered IRS investigations for doing so. That is especially so because success for FFRF in this lawsuit would necessarily chill the Church's speech. *See*, *e.g.*, *Bell v. Keating*, 697 F.3d 445, 453-55 (7th Cir. 2012) (chilled speech pursuant to government regulations creates standing to challenge regulations).

Defendant also makes a Chicken Little argument, claiming that intervention here will open the floodgates for challenges to every unenforced law on the books. This is obvious hyperbole. Defendant identifies no other law that is both openly unenforced and is subject to a lawsuit demanding, on constitutional grounds, an enforcement action. Further, it is well-settled that intervention is allowed "as a matter of right" if, as here, "an original party does not advance a ground that if upheld by the court would confer a tangible benefit on an intervenor who wants to litigate that ground." *City of Chicago v. FEMA*, 660 F.3d 980, 985 (7th Cir. 2011). Thus, for example, when a lawsuit sought to invalidate a benefit, the recipients of that benefit were allowed to intervene to protect it. *Id.* at 986 (citing *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572-73 (7th Cir. 2009)). The Church is likewise entitled to in-

tervene to protect its ability to preach unhindered by IRS enforcement, especially when it could make beneficial legal arguments that the IRS refuses to. Recognizing as much would not open legal floodgates but rather follow the legal mainstream.

C. FFRF's suit to require the IRS to enforce its bans on religious exercise may impair the Church's interest.

Defendant argues that there is no "risk of impairment" because "this case will not alter the political activity restrictions of § 501(c)(3)." Def. Opp. at 5. But this case *does* seek to alter how those restrictions are enforced, and that's precisely why the Church seeks to intervene.

Further, as FFRF points out, FFRF Opp. at 5, the Defendant is simply wrong that the Church could adequately protect its specific interest in this case via future litigation since the Tax Anti-Injunction Act generally prevents all but *post*-enforcement challenges to tax actions. *See* 26 U.S.C. § 7421(a). The Church wants to prevent FFRF's desired enforcement—and the chill it would create—before it comes. The only way to do so is to intervene in the only lawsuit that has ever sought to force the IRS to *begin* enforcement against churches.

Further, even if the Church "might have an opportunity in the future to litigate [its] claim," that is not, as Defendant claims, an "automatic bar to intervention." *City of Chicago*, 660 F.3d at 985. Rather, as noted above, the test is whether, as here, intervention "confer[s] a tangible benefit on an intervenor who wants to litigate [a] ground" that "an original party does not advance." *Id.* The Church seeks to litigate its constitutional and statutory free exercise rights to obtain the tangible

benefit of protection from the sole relief requested by FFRF, and neither original party will advance that interest. Thus, the Church clears the *City of Chicago* test.

D. The Defendant does not adequately represent the Church's interests.

The parties offer little with respect to the adequate representation factor. FFRF simply asserts, without more, that the Defendant adequately represents the Church's interests. FFRF Opp. at 1. And Defendant offers barely more to support its similar assertion.

Defendant claims that because it wants to defeat FFRF's suit, there is a presumption of adequate representation. But that is only true where "there is no conflict of interest" and the government does not have "substantive interests at variance" with the proposed intervenor's. *Solid Waste Agency*, 101 F.3d at 508. Here, the Defendant openly admits that "nothing in FFRF's suit implicates any requirements that are not already law," Def's Opp. at 5.—a complete capitulation to FFRF's view that churches should be treated just as FFRF is. Nor is this a surprise, since Defendant is charged by regulation to oppose precisely the grounds that the Church seeks to litigate here. Br. at 15-16. Thus, not only will the Defendant fail to assert a ground for relief that the Church wishes to, *City of Chicago*, 660 F.3d at 985, he has a "conflict of interest" that leaves him unwilling and unable to assert it. *Solid Waste Agency*, 101 F.3d at 508.

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The Church has a right to intervene because it timely moved to do so to protect an interest that this lawsuit directly and substantially threatens and that the Defendant is openly hostile to and will not adequately represent.

II. Alternatively, the Church should be granted permissive intervention.

Defendant's main argument against permissive intervention rests on a blatant mischaracterization of the Church's brief. Def's Opp. at 9. Defendant states that the Church "admit[s]" that it cannot show jurisdiction to support permissive intervention, and offers a misleading elision of the Church's brief in support. *Id.*[3] But the wrongly edited quotation stated only that the Church did not have an *independent claim against FFRF*. Br. at 14. It did *not* say, as Defendant states, that the Church "cannot hold any independent . . . defenses in [its] own right." Def's Opp. at 9.

Rather, the Church can and does raise defenses based on statutory and constitutional provisions that exist to protect the Church's interest in "protecting its religious exercise," and which do so in a way that the Defendant—as a government agent—cannot assert even if he wanted to (and he avowedly does not).

Further, the upshot of Defendant's argument is that "where the intervenor-aspirant has no claim against the [opposing party] yet [still has] a legally protected interest that could be impaired by the suit," Br. at 14 (quoting *Habitat Educ. Ctr., Inc. v. Bosworth*, 221 F.R.D. 488, 492-93 (E.D. Wis. 2004)), the intervenor is *categorically barred* from permissive intervention. But accepting this argument would lead to the absurd result that the "strongest case for intervention" as of right, *Bos-*

[3] Defendant not only takes the Church's statement out of context, it twists its meaning by editing the relevant sentence to cut out two-thirds of its text: "~~Indeed, this case presents the "strongest case for intervention" because it~~ is not a case "where the aspirant for intervention could file an independent suit, ~~but where the intervenor-aspirant has no claim against the [opposing party] yet [still has] a legally protected interest that could be impaired by the suit.~~" Br. at 14; Def's Opp. at 9 (strikethrough text omitted from Defendant's quotation).

worth, 221 F.R.D. at 492-93, could never be allowed permissive intervention.

FFRF, for its part, contends that the Church cannot obtain permissive intervention because that would (1) "fundamentally change the focus" of its case from the factual question of whether the IRS has a policy of non-enforcement against churches and (2) add a new, unrelated claim to the action: that § 501(c)(3) is unconstitutional. FFRF Opp. at 5. Both halves of its argument are wrong. First, while part of the case concerns the factual existence of an IRS policy of non-enforcement, most of it directly concerns the legal question of whether the policy constitutes an Establishment Clause or Equal Protection violation. *See* DOJ Opp. at 1 (FFRF "brought this suit to obtain a declaration that the IRS has a policy of non-enforcement . . . , *and* that such policy violates" the Constitution); *accord* at 8 ("this case only implicates whether the IRS has a policy of non-enforcement of . . . § 501(c)(3) as to religious organizations, *and if it does*, whether that policy is unconstitutional") (emphasis added); *see also* Compl. at ¶ 40. The resolution of that legal question directly implicates the Church's legal rights, as is made obvious by the relief FFRF requests in its complaint.

Second, the Church will not necessarily need to make a claim about § 501(c)(3)'s constitutionality. Although the Church's defense against FFRF's complaint will include its own constitutionally-protected interests, in the first instance it will argue that § 501(c)(3) should not be interpreted to apply to sermons delivered by ministers to their congregations. That is a statutory rather than a constitutional issue. And that statutory issue must necessarily be decided by this Court in order to decide FFRF's claims, not least due to the doctrine of constitutional avoidance.

Moreover, the Church's defense is based on a common question of law with FFRF's claim. Both the defense and the claim turn on whether the IRS can enforce its regulatory ban against religious speech between a pastor and a church. Because FFRF seeks to limit the Church's speech rather than expand FFRF's speech, it has necessarily implicated the Church's interests while ignoring the "special solicitude" the First Amendment gives "to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S.Ct. 694, 706 (2012). Thus, the Church's rights are inescapably wrapped up in FFRF's lawsuit, and it should be permitted to intervene to defend those rights.

CONCLUSION

For the foregoing reasons, the Church's motion to intervene should be granted.

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Respectfully submitted,

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