UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC., and TRIANGLE FFRF,

Plaintiffs,

Case No. 12 CV 0946-bbc

v.

JOHN KOSKINEN, COMMISSIONER OF THE INTERNAL REVENUE SERVICE,

Defendant.

PLAINTIFFS' BRIEF OPPOSING SUMMARY JUDGMENT

I. INTRODUCTION.

The Government grants non-profit organizations tax exempt status under § 501(c)(3) of the Internal Revenue Code. To keep this benefit, however, all tax-exempt organizations must file detailed reports every year with the Internal Revenue Service - - except churches and church-affiliated organizations. The required Form 990 requires passive disclosure of information for the public's benefit and it assists the Government in verifying continued qualification for tax-exempt status. The Form 990 promotes transparency, which is a legitimate governmental interest: Where public subsidy goes, public accountability must follow.

The Government selectively exempts churches and church-affiliated organizations from the disclosure requirement imposed on other non-tax exempt organizations. While the Government admits that the Form 990 requirement is burdensome and expensive, the passive disclosure of information does not substantially burden the free exercise of religion. The information disclosure does not compel or prohibit any specific code of conduct or conscience. It simply requires the

disclosure of basic information about the reporting organization which assists the public in making informed choices. Form 990 does not, however, entangle the government in managing or dictating the affairs of churches or church-affiliated organizations.

To the extent that the Form 990 requirement is burdensome, including the time and expense to prepare the report, all tax-exempt organizations are similarly situated, including the Plaintiffs Freedrom From Religion Foundation and Triangle FFRF. The effect of the Form 990 requirement, in terms of disclosing information about the finances and operation of tax-exempt organizations, affects secular organizations just as much as churches and other church-affiliated organizations.

The Plaintiffs, therefore, are similarly situated to churches and other church-affiliated organizations which otherwise qualify for tax-exempt status under § 501(c)(3) of the Internal Revenue Code without compliance with reporting requirements. Such preferential treatment provided only to churches and religious organizations violates the Establishment Clause. Qualification for benefits under the I.R.C. cannot be preferentially provided just to churches consistent with the basic Establishment Clause requirement of neutrality. The Supreme Court has consistently refused to allow the Government to preferentially favor religion with advantages that are not generally available to similarly situated taxpayers. *Texas Monthly v. Bullock*, 489 U.S. 1 (1989).

Exempting churches and church-affiliated organizations from the disclosure requirements of Form 990 cannot be justified as an accommodation of free exercise rights. The passive disclosure requirements, in the first place, are not a substantial burden on the free exercise of religion. The rights to pray, preach, indoctrinate and worship are in no way endangered by the reporting requirements in the Form 990. The supposed affect on First Amendment rights, in the second place, is not different for churches and church-affiliated organizations than for other tax-exempt organizations engaging in speech, advocacy, education, and collective acts of conscience - - all of which must file Form 990. The supposed concerns animating the exemption of churches from

transparency requirements is perhaps even more applicable to FFRF and Triangle FFRF, which are frequent targets of hostility and hatred. In any event, "an accommodation cannot treat religions favorably when secular groups are identical with respect to the attribute selected for that accommodation." *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869 (7th Cir. 2014).

Conditions on a Government privilege, like tax-exempt status, are reasonable if neutrally available to a wide range of similarly situated beneficiaries. Public transparency, moreover, is an important public interest that can be accomplished without unreasonably burdening First Amendment rights. Passive disclosure requirements, including periodic reporting, greatly enhances and facilitates transparency while imposing only reasonable burdens that do not run afoul of the First Amendment or implicate religion in any way.

The preferential exemption of churches and church-affiliated organizations from the Form 990 disclosure requirements not only violates the principle of neutrality, but has no justification as a religious accommodation. The Form 990 exemption undisputedly excludes a limited group of organizations based solely on religious affiliation. Section 6033(a)(3), therefore, is not a benefit that is neutrally and generally available without regard to religion, as required by *Texas Monthly*. The purpose for the exclusion, moreover, is equally applicable to other expressive organizations, including FFRF, and the burden of disclosure does not uniquely affect churches and religious organizations. The exclusion of churches and religious organizations from reporting requirements is not simply "play in the joints." Thus, the exclusion is a classic "gerrymandered" preference for religion that is unconstitutional.

II. STATEMENT OF FACTS.

Annie Laurie Gaylor is a Co-President of the Freedom From Religion Foundation ("FFRF"), a membership group organized as an educational 501(c)(3) charitable non-profit that advocates for the

separation of state and church, and educates on matters of non-theism. FFRF's membership consists primarily of persons who identify as freethinkers (atheist, agnostic, or otherwise non-religious). (Gaylor Decl., ¶1.)

FFRF has more than 20,000 members, residing in every state of the United States and the District of Columbia. (Gaylor Decl., ¶2.) FFRF represents and advocates on behalf of its members throughout the United States. (Gaylor Decl., ¶3.)

The Co-Plaintiff in the above captioned matter, Triangle FFRF, known as Triangle Freethought Society, also is a non-profit membership organization that advocates and educates on matters of non-theism; Triangle FFRF is the local chapter of the Freedom From Religion Foundation and its principal area of service is located in North Carolina. (Gaylor Decl., ¶4.)

FFRF and Triangle FFRF are both tax-exempt non-profit organizations under §501(c)(3) of the Tax Code. (Gaylor Decl., ¶5.)

The Tax Code provides significant and valuable tax benefits to non-profit organizations under §501(c)(3) of the Internal Revenue Code. (Gaylor Decl., ¶6.) The major benefits of having §501(c)(3) status include: exemption from payment of federal income taxes, property taxes, state sales tax for purchases, and most significantly, eligibility to receive charitable contributions from individuals that are tax deductible under the Internal Revenue Code. (Gaylor Decl., ¶7.) As an organization recognized to be tax-exempt under §501(c)(3), however, FFRF is required to file an annual information return, Form 990, in order to maintain the privilege of tax-exempt status. (Gaylor Decl., ¶8.)

Annie Laurie Gaylor considers tax exemption to be a privilege, not a right, because when an organization goes off the tax rolls, it effectively receives a financial benefit. In exchange for this public subsidy, Form 990 requires a measure of public accountability accomplished by passive transparency. Form 990s are gathered by the federal government to facilitate transparency for the

benefit of the public. Form 990 returns are made available to the public by the IRS, as well as groups that rate charities, such as GUIDESTAR. FFRF and other non-church 501(c)(3) groups also are required to make the form available to anyone who inquires. (Gaylor Decl., ¶9.)

Churches and certain affiliated religious organizations are not required to file an annual information return in order to maintain their tax-exempt status. Churches and affiliated religious organizations are automatically exempted from having to file the annual Form 990 return. (Gaylor Decl., ¶10.)

If an organization fails to file its required Form 990 return, it is in general subject to penalties of $20 a day for each day a return is late (or if it does not provide all required information or provide correct information). FFRF currently falls in a category (as an organization whose gross receipts is over $1 million for the year) that would increase FFRF's penalty to $100 a day up to a maximum of $50,000 for such failures. More penalties could either be levied on FFRF, or Annie Laurie Gaylor as the responsible individual, if FFRF failed to return correct information by a date specified by the IRS, not to exceed $5,000. If FFRF would fail to file an annual return for three consecutive years, FFRF would automatically lose its federal tax exemption, under IRS regulations. Yet FFRF's "competition," churches and church-affiliated groups, face no such requirements or penalties for not disclosing basic financial information to the public that helps subsidize them. (Gaylor Decl., ¶11.)

FFRF and Triangle FFRF have filed, and will continue to do so in the future, the annual Form 990 information return in order to maintain their tax-exempt status. (Gaylor Decl., ¶12.) FFRF expends substantial time and resources in completing the annual information filing, including the annual expense of engaging and paying a certified public accountant to prepare and file the required Form 990. (Gaylor Decl., ¶13.) FFRF paid $1,300 to its accounting firm for preparation of last year's 2013 Form 990. The federal government recently revised Form 990s, which are now more than 34 pages in length. (Gaylor Decl., ¶14.)

Form 990 requires organizations, including FFRF, to provide information about governance, composition of governing body, information about government and management policies, and disclosure practices. (Gaylor Decl., ¶15.) Form 990 also requires organizations, including FFRF, to list their officers, directors, trustees, and key employees, as well as report compensation paid by the organization to such persons. (Gaylor Decl., ¶16.) Form 990 further requires organizations, including FFRF, to provide information regarding the organization mission, activities, and current and prior year's financial results. (Gaylor Decl., ¶17.) Form 990 additionally requires reporting of each organization's new, ongoing, and discontinued exempt purpose, achievements, and reports of revenue and expenses. (Gaylor Decl., ¶18.) Form 990 also requires organizations, including FFRF, to file financial schedules, including information about donations and whether donations are spent on programs or management and fundraising. (Gaylor Decl., ¶19.) Finally, Form 990 requires statements of revenue and functional expenses, as well as organizational balance sheets, comprising the financial statements of the organization. (Gaylor Decl., ¶20.)

Because FFRF is not a church or affiliated religious organization, it is required to file the annual Form 990 every year. (Gaylor Decl., ¶21.) The preference given under the law to churches and affiliated religious organizations is not available to FFRF, or other non-profit organizations. (Gaylor Decl., ¶22.) The preferential treatment of churches and other affiliated religious organizations directly benefits such churches and religious organizations, while discriminating against other non-profit organizations, including FFRF, solely on the basis of religious criteria. (Gaylor Decl., ¶23.) As a result, obligations are imposed on FFRF, and other secular non-profits, that are not imposed on churches or affiliated religious organizations. (Gaylor Decl., ¶24.)

The Government justifies the exemption of churches and affiliated religious organizations from the Form 990 filing requirement on the basis that such reporting constitutes "surveillance" that is inappropriate as to churches. (Gaylor Decl., ¶25.) In fact, however, the Form 990 filing does not

impose any specific regulation of opinion, point of view or conduct, much less tenets, doctrines or beliefs, but facilitates transparency by making basic information publicly available. (Gaylor Decl., ¶26.)

If concerns about "surveillance" constitute the justification for exempting churches and affiliated religious organizations from the Form 990 filing requirement, such concerns are equally or more applicable to FFRF and Triangle FFRF. (Gaylor Decl., ¶27.) The percentage of non-believers in the United States continues to grow, now reportedly in excess of 19% of the adult population, but nonetheless, non-belief remains a lightning rod for hostility. (Gaylor Decl., ¶28.)

Organizations like FFRF and Triangle FFRF, that promote the constitutional principle of separation of state and church and educate the public on matters related to non-theistic beliefs, are often targets of hostility, hatred, and threats. Similarly, those persons associated with such organization are also at risk to be targets of vitriol, stigmatization, frequent denunciation from pulpits and public office holders alike, and character assassination. (Gaylor Decl., ¶29.)

As a co-founder of FFRF in 1976, who has been an active part of FFRF since the beginning, and who became co-president in 2004, Annie Laurie Gaylor has personally observed that public reaction to requests to end Establishment Clause violations more often than not devolve into ad hominems, hostility and veiled or unveiled threats to FFRF and members who are state/church separation advocates. (Gaylor Decl., ¶30.) Many persons, in fact, are reluctant to publicly identify with groups like FFRF for fear of alienation or retribution. (Gaylor Decl., ¶31.)

Despite these associational concerns, FFRF, Triangle FFRF, and other FFRF chapters with sufficient revenue are required to file the annual Form 990 return, while churches and affiliated religious organizations which do not face the public opprobrium and bad press that atheists and nonbelievers face, are not, solely because of religious criteria. (Gaylor Decl., ¶32.)

FFRF is required to file a Form 990 information return every year simply because it is not a church or affiliated religious organization. The implication is that FFRF, as a group critical of religion, is in need of greater accountability than churches and related groups, which by virtue of their religiosity, have no requirement of transparency. (Gaylor Decl., ¶33.)

FFRF does not have the recognized attributes of a church, including a body of "believers or communicants" that assemble regularly in order to worship. FFRF works to free minds and laws from dogma and superstition, thus, unlike churches which seek to proselytize and inculcate, is subject to IRS reporting requirements. (Gaylor Decl., ¶¶34-45.)

On the other hand, the supposed concerns that underlie exempting churches from the annual Form 990 filing requirement are not unique to religious organizations. Groups like FFRF have similar concerns, but only churches and other affiliated religious organizations are exempted from the filing requirement. (Gaylor Decl., ¶46.) FFRF and various chapters over the years have had the burdens and costs of preparing the annual Form 990 every year, which churches and other affiliated religious organizations do not have. This is a significant advantage and benefit to churches that discriminates against FFRF precisely because it is not a religion-based organization. (Gaylor Decl., ¶47.)

FFRF, however knows of no legitimate facts that would support FFRF taking the Form 990 exemption for churches or affiliated religious organizations. FFRF is not a church or religious organization and it would be hypocritical to claim otherwise.

III. BACKGROUND HISTORY, AND PURPOSE OF FORM 990 EXEMPTION.

The recent article by John Montague in the Cardozo Law Review provides a useful discussion of the history, purpose, and rationale of the Form 990 exemption for churches and religious organizations. A true and correct copy of the article is attached to this Brief for the convenience of

the Court. *See* The Law And Financial Transparency In Churches: Reconsidering The Form 990 Exemption, Montague, 35 Cardozo Law Review 203 (2013).

In his article, Mr. Montague makes a variety of points, including: (1) churches and church-affiliated organizations constitute a giant exception to the financial transparency intent underlying Form 990; (2) as a group, churches have less accountability oversight than other major institutions in America today; (3) the current law mandating information returns has two chief goals, *i.e.*, enabling the I.R.S. to insure that tax-exempt entities comply with the law and providing the public with information it needs to hold non-profits accountable; (4) the purposes underlying the Form 990 apply with equal force to both churches and other tax-exempt organizations; (5) many churches lack basic forms of oversight and accountability; (6) churches themselves would benefit from increased transparency and accountability; (7) the public has a right to know what happens to taxpayer money funneled to churches; (8) removing the Form 990 exemption for churches would not violate free exercise; (9) the current exemption may violate the Establishment Clause; and (10) requiring churches to file the Form 990 would not be excessively entangling.

IV. SECTION 6033(a)(3) OF THE TAX CODE VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT IS NOT NEUTRAL AND PROVIDES A SIGNIFICANT BENEFIT EXCLUSIVELY TO CHURCHES AND OTHER RELIGIOUS ORGANIZATIONS.

Section 6033(a)(3) allows churches and church-affiliated organizations to maintain tax-exempt status without complying with the annual information disclosure requirement applicable to other tax-exempt organizations. Such discriminatory treatment has been explicitly recognized by the Supreme Court as an injury addressable by the courts. In *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1440 (2011), the Court held that the taxpayers have grounds to complain when they incur a cost or are not eligible for a benefit on account of religious criteria. The Supreme Court pointedly recognized that when it comes to religion, neutrality is the controlling principle in the Tax Code: "Those costs and benefits [preferences] can result from alleged

discrimination in the Tax Code, such as when the availability of a tax exemption is conditioned on religious affiliation." *Id.*

Government programs that allocate benefits based on distinctions among religious, and non-religious or non-believer status, are generally doomed from the start. The Sixth Circuit Court of Appeals explained this constitutional verity in *American Atheists, Inc., et. al. v. City of Detroit Downtown Development Authority*, 567 F.3d 278, 289 (6th Cir. 2009):

> The most essential hurdle that a government-aid program must clear is neutrality - - that the program allocates benefits in an evenhanded manner to a broad and diverse spectrum of beneficiaries. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114, 121 S. Ct. 2093, 150 L.Ed.2d 151 (2001). Phrased as an interrogatory: Does the program determine a recipient's eligibility for benefits in spite of, rather than because of, its religious character?
>
> Since its earliest explorations of the Establishment Clause, the [Supreme] Court has underscored neutrality as a central, though not dispositive, consideration in sizing up state-aid programs. See *Mitchell*, 530 U.S. at 809-10. What the Court has said matches what it has done. Programs that allocate benefits based on distinctions among religious, non-religious and areligious recipients are generally doomed from the start. See, e.g., *Texas monthly, Inc. v. Bullock*, 489 U.S. 1, 14-15, 109 S. Ct. 890, 103 L.Ed.2d 1 (1989) (plurality Opinion) (invalidating state sales-tax exemption 'for periodicals published or distributed by a religious faith and consisting wholly of writings promulgating the teaching of the faith'); *Larson v. Valente*, 456 U.S. 228, 246-47 and n.23, 255, 102 S. Ct. 1673, 72 L.Ed. 33 (1982) (striking down state law exempting only certain 'well-established churches' from various registration and reporting requirements); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205, 83 S. Ct. 1560, 10 L.Ed.2d 844 (1963) (invalidating programs mandating daily Bible reading in public school). Yet programs that evenhandedly allocate benefits to a broad class of groups, without regard to their religious beliefs, generally will withstand scrutiny. (Emphasis added.)

Exemption from the Form 990 disclosure that is required of most tax-exempt non-profits is not neutral and available to a broad range of groups or persons without regard to religion, thereby violating the Establishment Clause. The Supreme Court recognized this in *Texas Monthly* and has never waivered since in its holdings that neutrality is a necessary requirement of such government programs. "When the Government directs a subsidy exclusively to religious organizations that is not

required by the Free Exercise Clause and that either burdens non-beneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . it provides unjustifiable awards of assistance to religious organizations and cannot but convey a message of endorsement to slighted members of the community." *Id.* at 15, quoting *Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in Judgment).

The twin notions animating the Establishment Clause, therefore, are that the Government may not be overtly hostile to religion - - but the Government may not also favor religion over non-religion. Here, the tax exemption provided to churches and religious organizations, without the requirement of annual reporting, strikingly evidences the absence of neutrality.

Preferences provided exclusively to taxpayers on the basis of religion, moreover, have never been upheld by the Supreme Court, including in *Walz v. Tax Commission of New York City*¸ 397 U.S. 664 (1970). In *Walz,* the Court sustained a property tax exemption that "applied to religious properties no less than to real estate owned by a wide array of non-profit organizations." *Texas Monthly*, 489 U.S. at 11. The broad class of non-religious as well as religious beneficiaries was a critical factor in *Walz,* as well as in other cases decided by the Supreme Court. This factor is consistently emphasized by requiring that benefits to religious organizations also flow to a large number of non-religious groups. *Id.* "Indeed, were those benefits confined to religious organizations [in *Walz*], they could not have appeared other than as state sponsorship of religion; if that were so, we [Supreme Court] would not have hesitated to strike them down for lacking a secular purpose and effect."

In reaching its decision in *Texas Monthly*, Justice Brennan emphasized the importance in *Walz* that the property tax exemption at issue flowed to a large number of non-religious groups. "The breadth of New York's property tax exemption was essential to our [Supreme Court's] holding that it

was not aimed at establishing, sponsoring or supporting religion." *Texas Monthly*, 489 U.S. at 12. The *Walz* decision "in no way intimated that the exemption would have been valid had it applied *only* to the property of religious groups or had it lacked a permissible secular objective." *Id.* at 13, n. 2. Justice Brennan's explanation in *Texas Monthly*, moreover, reflected the Court's own long-accepted understanding of the holding in *Walz*:

> Nor is our reading of *Walz* by any means novel. Indeed, it has been the Court's accepted understanding of the holding in *Walz* for almost 20 years. In *Gillette v. United States*, 401 U. S. 437, 454 (1971), we said: 'Neutrality in matters of religion is not inconsistent with benevolence by way of exemptions from onerous duties, *Walz v. Tax Commission*, 397 U.S. at 669, so long as an exemption is tailored broadly enough that it reflects valid secular purposes.' We read *Walz* to stand for the same proposition in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U. S. 756, 793-794 (1973). 'Without intimating whether this factor alone might have controlling significance in another context in some future case,' we noted that the breadth of an exemption for religious groups is unquestionably an 'important factor' in assessing its constitutionality. *Id.* at 794. Our [Supreme Court] opinion today builds on established precedents; it does not repudiate them.

Texas Monthly, 489 U.S. at 13, n. 3.

Crucial in evaluating a benefit afforded preferentially to churches and religious organizations is whether some "overarching secular purpose justifies like benefits for non-religious groups." *Texas Monthly*, at 15, n. 4. "In any particular case, the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." *Id.* at 15, quoting *Walz*, 397 U.S. at 696.

Section 6033(a)(3) does not provide a comprehensive scheme of exemptions from the Form 990 filing requirement that is neutrally and generally available to tax-exempt organizations, *i.e.*, on a basis that would merely include religious organizations as part of a larger classification. The mandatory exceptions to the Form 990 disclosure requirement include: (1) churches, their integrated auxiliaries, and conventions or associations of churches; (2) the exclusively religious activities of any religious order; and (3) organizations with gross receipts of less than $5,000. Except for small tax

exemption organizations, therefore, the Form 990 exemption applies only to religious-based organizations, contrary to the requirement of *Texas Monthly*.

Finally, the Supreme Court rejected in *Texas Monthly* the counter-argument that a sales tax exemption removed a government-imposed burden on the free exercise of religion. According to the Court, "it is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." *Id.* at 18. In *Texas Monthly*, the payment of a sales tax did not any way offend religious beliefs or inhibit religious activity. A significant deterrence of free exercise rights, however, is necessary in order to sustain a legislative exemption as an appropriate accommodation. *Id.* at 19, n. 8.

V. SECTION 6033(a)(3) IS NOT A PERMISSIBLE ACCOMMODATION IN RESPONSE TO A SUBSTANTIAL GOVERNMENT-IMPOSED BURDEN ON FREE EXERCISE RIGHTS.

The Government unpersuasively attempts to justify the Form 990 exemption for churches and religious organizations as merely an accommodation of religion that is permissible in the case of government-imposed substantial burdens on free exercise rights. The Government's argument lacks merit, in the first place, because the factual predicate is missing: There is no evidence that the Form 990 exemption for churches relieves any substantial government burden on the free exercise of religion. The Supreme Court's decision in *Corporation Of The Presiding Bishop Of Church Of Jesus Christ Of Latter-Day Saints v. Amos*, 483 U.S. 327, 348 (1987), in particular, does not support the Government's argument. In *Amos*, the Supreme Court considered the constitutionality of an exemption from anti-discrimination hiring laws as applied to religious organizations. The Court upheld the exemption as an appropriate accommodation because of the direct effect that such regulatory laws might have on the internal operation of religious organizations. The Court

recognized in *Amos*, however, that "at some point, accommodation may devolve into an unlawful fostering of religion." *Id.* at 334-335.

The Supreme Court's decision in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), also does not give support to any claimed accommodation of religion in the present case. The *Cutter* decision, in fact, involved a facial challenge to the constitutionality of the Religious Land Use And Institutionalized Persons Act of 2000 (RLUIPA), in which the Court again acknowledged that "at some point, accommodation may devolve into an lawful fostering of religion." *Id.* at 713-14. The Court then merely concluded that RLUIPA does not, on its face, exceed the limits of permissible government accommodation of religious practices.

The rationale of *Amos* and other cases involving accommodation of religion is inapplicable to § 6033(a)(3). Civil rights laws, as involved in *Amos*, are regulatory in nature. They prescribe what conduct is prohibited, permitted or required. The application of anti-discrimination hiring rules to a church, therefore, arguably "would interfere with the conduct of religious activities." On this basis, *Amos* upheld an exemption from anti-discrimination laws. By contrast, the passive information disclosure required by Form 990 is not regulatory in nature and does not govern or dictate behavior, belief, tenets, or matters of conscience. Section 6033(a)(3), therefore, simply cannot be justified to alleviate a substantial burden on the exercise of religion. As in *Texas Monthly*, the Form 990 exemption for churches and religious organizations cannot be defended merely as a means of removing an "imposition on religious activity." *See Texas Monthly*, 489 U.S. at 15, n. 8.

The Form 990 disclosure requirement does not suffer from anything approaching the "significant" burden that would justify drawing distinctions between religious and non-religious institutions under *Texas Monthly* and *Amos*. In *Amos*, the accommodation for religious groups removed government regulation that directly interfered with the groups' ability to define and advance their religious missions. Here, in the absence of § 6033(a)(3), religious groups would not be

burdened in espousing or practicing their beliefs. Thus, § 6033(a)(3) places churches and religious organizations in the same favored position vis-à-vis non-religious institutions that the Supreme Court held violated the Establishment Clause in *Texas Monthly*.

The Government mistakenly asserts that *Amos* supports preferential exemptions to churches and church-affiliated organizations. *Amos* did not alter the constitutional command that Government "pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over non-adherents." *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 696 (opinion of Souter, J.) (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). *Amos* teaches that the Government need not grant benefits to secular groups when lifting burdens on religious ones, but it does not follow that the Government can select amongst similarly-burdened individuals and favor the religious over the non-religious. Such a broad reading of *Amos* would conflict with Supreme Court jurisprudence regarding religious accommodations. *See Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985) (striking down a law guaranteeing only religious employees the right to take off the Sabbath Day).

In the absence of a significant government-imposed burden on the free exercise of religion, the Government cannot preferentially bestow advantages exclusively on religion as an accommodation. Even a purported accommodation impermissibly advances religion if it provides a benefit to religion without providing a corresponding benefit to a large number of non-religious groups or individuals, as described in *Texas Monthly*. In fact, if Congress has truly been seeking to alleviate potential First Amendment burdens supposedly caused by information disclosure, then the Form 990 exemption should have been provided to expressive organizations generally. Instead, Congress has provided a benefit available only to churches and religious organizations on the basis of a rationale equally applicable to other tax-exempt organizations, including FFRF.

VI. THE GOVERNMENT MISREADS THE SUPREME COURT'S *LARSON V. VALENTE* DECISION.

The Government's reliance upon the Supreme Court's decision in *Larson v. Valente*, 456 U.S. 228 (1982), is misguided. The Government first claims that a "close analysis of the *Larson* case makes clear 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." (Government Brief at 7.) In fact, what the Government calls a "close analysis of the *Larson* case" actually requires belief in the utter plasticity of language and logic. For example, the Court clearly did not imply that the burden of compliance with an information disclosure requirement would constitute an impermissible burden on the free exercise of religion. The Court stated:

> It is plain that the principal effect of the fifty percent rule in § 309.515, subd. 1(b), is to impose the registration and reporting requirements of the Act on some religious organizations but not on others. It is also plain that, as the Court of Appeals noted, '[t]he benefit conferred [by exemption] constitutes a substantial advantage; the burden of compliance with the Act is certainly not *de minimis*.' 637 F.2d, at 568. We do not suggest that the burdens of compliance with the Act would be intrinsically impermissible if they were imposed evenhandedly. But this statute does not operate evenhandedly, nor was it designed to do so: The fifty percent rule of § 309.515, subd. 1(b), effects the selective legislative imposition of burdens and advantages upon particular denominations.

Id. at 253-54 (emphasis added).

The Government further notes that the *Larson* decision "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." (Government Brief at 7.) According to the Government "the Supreme Court did not find the statute facially invalid - - as FFRF urges here - - on the grounds that they gave an exemption only to religious organizations." (Government Brief at 7.) Of course, *Larson* did not involve any complaint that the reporting requirement applied only to religious organizations; in fact, no secular organization was even a party the action. The case involved a religious group that did not qualify for the church exemption

complaining that the law made an inappropriate distinction among denominations. The Supreme Court thus stated the question presented as follows:

> The principal question presented by this appeal is whether a Minnesota statute, imposing certain registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers, discriminates against such organizations in violation of the Establishment Clause of the First Amendment.

Id. at 230. In the end, the Court invalidated the law only on the grounds that the law "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents." *Id.* at 246.

The Government also states misleadingly that compliance with the information disclosure law at issue "would be 'burdensome and intrusive' for religious organizations." For this conclusion, the Government cites footnote 29 of the *Larson* decision which refers to the burden applicable to all registering organizations, whether religious or otherwise. Nonetheless, the Government goes on to state that "the Supreme Court concluded that the fifty percent rule caused 'religious gerrymandering' because 'the burden of compliance with the Act is certainly not de minimus.'" (Government Brief at 8.) For this statement, the Government cites *Larson*, 456 U.S. at 253-255, a three page spread from which two remote statements are taken and combined. The referenced burden by the Court, in fact, was not tied to gerrymandering, which the Court summarized as follows:

> In short, the fifty percent rule's capacity - - indeed, its express design - - to burden or favor selected religious denominations led the Minnesota Legislature to discuss the characteristics of various sects with a view towards 'religious gerrymandering.'

Id. at 356.

The problem in the eyes of the Supreme Court in *Larson*, therefore, was not the burden itself, but the fact that the legislature selectively targeted certain religions that were disfavored. The Supreme Court described some of the legislative profiling that occurred:

> The legislative history discloses that the legislators perceived that the language [of the Act] would bring a Roman Catholic Archdiocese within the Act, that the legislators did not want the amendment to have that effect, and that an amendment deleting the italicized clause was passed in committee for the sole purpose of exempting the Archdiocese from the provisions of the Act. . . . On the other hand, there were certain religious organizations that the legislators did not want to exempt from the Act. One State Senator explained that the fifty percent rule was 'an attempt to deal with religious organizations which are soliciting on the street and soliciting by direct mail, but who are not substantial religious institutions in . . . our state.' Another Senator said, 'what you're trying to get at here is the people that are running around airports and running around streets and soliciting people and you're trying to remove them from the exemption that normally applies to religious organizations.' Still another Senator, who apparently had mixed feelings about the proposed provision, stated, 'I'm not sure why we're so hot to regulate the Moonies anyway.

Id. at 254-55.

In short, the Supreme Court did not consider directly or indirectly the constitutionality of a preferential reporting exemption available only to religious organizations. That was not an issue in the case. Denominational preference was the issue in the case and that is what the Court decided. As the Court stated, "in short when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Id.* at 246.

On the other hand, the Supreme Court did recognize the legitimate governmental interest in requiring public disclosure, including by churches:

> Appellants assert, and we acknowledge, that the State of Minnesota has a significant interest in protecting its citizens from abusive practices in the solicitation of funds for charity, and that this interest retains importance when the solicitation is conducted by a religious organization.

Id. at 248. The Court later debunked the Government's justification for distinguishing between denomination in terms of safeguarding the public. In its discussion, the Court noted that the Government's premise "runs directly contrary to the central thesis of the entire Minnesota charitable solicitations Act - - namely, that charitable organizations soliciting contributions from the public

cannot be relied upon to regulate themselves, and that state regulation is accordingly necessary. Appellants offer nothing to suggest why religious organizations should be treated any differently in this respect." *Id.* at 250.

The Supreme Court's *Larson* decision ultimately supports FFRF's contention that preferential exemptions from the Form 990 filing requirement is patently unfair and inexplicable. On the other hand, the *Larson* decision does not at all support the Government's contention that exempting only churches and religious organizations from the Form 990 requirement is constitutional. To the contrary, the Court unequivocally stated "we [the Supreme Court] do not suggest that the burdens of compliance with the Act would be intrinsically impermissible if they were imposed evenhandedly." *Id.* at 253.

VII. COURTS HAVE CONSISTENTLY HELD THAT PASSIVE INFORMATION DISCLOSURE BY CHURCHES AND RELIGIOUS ORGANIZATIONS DOES NOT CONSTITUTE A SUBSTANTIAL BURDEN ON FREE EXERCISE RIGHTS.

As the Government acknowledges, information disclosure about churches and religious organizations is otherwise required to verify that they are entitled to tax exempt status. (Government's Brief at 9.) Such information disclosure is required to determine whether an organization qualifies as a "church" within the meaning of I.R.C. § 170. *See Foundation of Human Understanding v. United States*, 614 F.3d 1383, 1391 Fed. Cir. 2010; *Spiritual Outreach Society v. Commissioner*, 927 F.2d 335, 339 (8th Cir. 1991).

The I.R.S., in fact, considers at least fourteen criteria to determine whether an organization qualifies as a church. The I.R.S. criteria include: (1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11)

regular congregations; (12) regular religious services; (13) Sunday schools or religious instruction of the young; and (14) schools for the preparation of its ministers. In *Foundation of Human Understanding*, 614 F.3d at 1388-1389, the Court of Appeals acknowledged that courts generally have relied mainly on these fourteen criteria, and on a related associational test, in determining what constitutes a church - - and as the government concedes, these inquiries have not been deemed objectionable. *Id.*

Informational disclosures relating to tax inquiries have long been accepted as appropriate, in part, because disclosure can be avoided by refusing the privilege. The California Court of Appeals summarized the applicable principles succinctly in *International Society for Krishna Consciousness, Inc. v. State Board of Equalization*, 112 Cal. App. 3d 582, 169 Cal. Rptr. 405, 408-09 (Cal. App. 1980):

> The inquiry by the taxing authorities into the internal affairs of the Society in order to determine whether the real property at issue was exempt from taxation under the welfare exemption did not violate the free exercise of religion enjoined by the First Amendment to the United States Constitution. Free exercise of religion under the Amendment includes two concepts - - freedom to believe and freedom to act. The former is absolute, the latter is not. The inquiry here constitutes but an incidental burden on the Society's exercise of its religion, which burden the Society may avoid by not claiming the welfare exemption with respect to its real property. (*See United States v. Holmes* (5th Cir. 1980) 614 F.2d 985, 989-990.) Tax exemption is a privilege and not a right and the free exercise of religion clause of the First Amendment may not be used as a shield by a religious organization to prevent reasonable inquiry into the validity of its claim for tax exemption. (Emphasis added.)

The decision in *Lutheran Social Service of Minnesota v. United States*, 583 F. Supp. 1298, 1308 (D. Min. 1984), moreover, is particularly relevant because the Plaintiff, a religious non-profit social service agency, sought a determination that it should be exempt from filing an annual information tax return on the basis of free exercise concerns. *Lutheran Social Service* is significant because the decision came after *Larson v. Valente*, and second because the case involved exactly the Form 990 informational return at issue in this case. The court, moreover, summarily determined that

the Plaintiff was not exempt from the requirement of filing an informational tax return, nor was the requirement unconstitutional:

> The plaintiff argues that requiring it to file informational tax returns would interfere with its right to free exercise of religion. This argument is without merit. Any incidental burden on the plaintiff's free exercise of religion is minimal and is outweighed by the government's interest in collecting basic financial information on church-affiliated organizations, many of whom receive substantial amounts of public funds. In the analogous context of enforcement of I.R.S. summonses, a long line of cases establishes that requiring churches to produce their records for tax purposes does not violate the First Amendment. *e.g.*, *United States v. Coates*, 692 F.2d 629, 633-34 (9th 1982); *United States v. Grayson County State Bank*, 656 F.2d 1070, 1074-75 (5th 1981), cert. denied, 455 U.S. 920, 102 S. Ct. 1276, 71 L.Ed.2d 460 (1982); *United States v. Freedom Church*, 613 F.2d 316, 320 (1st 1979).

Addressing a church's free exercise claim in *Grayson County*, 656 F.2d at 1074-75, the Fifth Circuit also held that "allowing the I.R.S. access to information to determine the correct tax liability of the taxpayer, the church's minister, does not restrict the church's freedom to espouse religious doctrine nor to solicit members or support."

Even the I.R.S. apparently does not consider that requiring churches to file a Form 990 would violate free exercise rights. The I.R.S. stated this position in a 1987 official opinion letter on the matter. In that statement, the I.R.S. took the position that there would be no constitutional problem with requiring churches to file the Form 990. The I.R.S. stated:

> We [I.R.S.] are of the opinion that there is not a constitutional prohibition on requiring churches to file Form 990 information returns. For instance, currently religious organizations that are not churches are required to file Form 990 and churches, as well as other religious organizations, are subject to detailed examinations of their books and records. We believe both of these current law requirements are constitutional and, with respect to examinations of books and records, can be considered more intrusive than the filing of the Form 990. The only constitutional problem we would forsee in this area would be if a statute differentiated between religious denominations in filing requirements in a manner that favored one denomination over another.

See Montague, The Law And Financial Transparency In Churches: Reconsidering The Form 990 Exemption, 35 Cardozo Law Review 203, 221 n. 100 (2013). (A true and correct copy of this article is attached to this Brief as Exhibit 1.)

In short, Form 990 disclosure requirements have consistently been deemed not to unreasonably burden the free exercise rights of churches and other religious organizations.

VIII. PASSIVE PUBLIC DISCLOSURE REQUIREMENTS DO NOT UNREASONABLY BURDEN FIRST AMENDMENT RIGHTS.

Public disclosure may be a burden, but it is a reasonable burden on First Amendment rights, as courts have consistently acknowledged with regard to political campaign financing laws. As the Eighth Circuit Court of Appeals recognized in *Minnesota Citizens Concerned for Life, Inc. v. Swanson,* 640 F.3d 304, 316 (8th 2011), disclosure requirements, including periodic reporting, "greatly enhance the transparency of corporate expenditures while imposing only reasonable burdens."

The Supreme Court revisited its First Amendment jurisprudence in the recent case of *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S. Ct. 876, 175 L.Ed.2d 753 (2010), where the Court reversed its position on independent expenditures by corporations. For purposes of the present case, however, *Citizens United* is important because in Part IV of the Court's opinion it heartily confirmed the constitutionality of disclosure requirements. The Court distinguished disclosure requirements from laws which "burden the ability to speak," because they "impose no ceiling on campaign-related activities and do not prevent anyone from speaking." 130 S. Ct. at 914. The Court further found the Government's informational interest to be important. "The public has an interest in knowing who is speaking about a candidate shortly before an election . . . the informational interest alone is sufficient to justify [application of the disclosure requirement]." *Id.* at 915-16. *See* also *Iowa Right to Life Committee, Inc. v. Tooker,* 795 F. Supp.2d 852, 866-67 (S.D. Iowa 2011) (disclosure of corporation's contributions and expenditures greatly enhances

transparency while only imposing a reasonable burden; *Village of Schaumberg v. Citizens For A Better Environment*, 440 U.S. 620, 637-38 (1980) ("efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed. Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses").

The preference for disclosure and transparency, in order to avoid coercive regulation of conduct, permeates First Amendment considerations. The Supreme Court again noted the value of disclosure and transparency just this year in *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434, 1459-60, 188 L.Ed.2d 468 (2014), while also emphasizing the facility of technology to provide the public with passive information. The Court stated:

> Finally, disclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part 'justified based on a governmental interest in providing the electorate with information about the sources of election-related spending. *Citizens United*, 558 U. S., at 367, 130 S. Ct. 876, 175 L.Ed.2d 753 (quoting Buckley, *supra*, at 66, 96 S. Ct. 612, 46 L.Ed.2d 659). They may also 'deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.' *Id.*, at 67, 96 S. Ct. 612, 46 L.Ed.2d 659. Disclosure requirements may burden speech, but - - unlike the aggregate limits - - they do not impose a ceiling on speech.

Disclosure is particularly effective in providing public information, according to the Court, because "with modern technology, disclosure now offers a particularly effective means of arming the voting public with information." *McCutcheon*, 134 S. Ct. at 1460. "Today, given the Internet, disclosure offers much more robust protections against corruption." *Id.*

Similarly with respect to the disclosure provided by Form 990, passive information is readily made available to the public, but such disclosure is not deemed a substantial burden on free exercise rights, nor interference in religious governance. Transparency, even for churches and church-affiliated organizations, is not prohibited by the Free Exercise Clause of the First

Amendment. This is true of First Amendment law as currently applied by the courts, but the virtue of transparency, even as to churches, has a long and distinguished pedigree. Disclosure, in short, does not substantially burden free exercise rights by interfering in the internal management or governance of churches. Cases like *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 181 L.Ed.2d 650 (2012), and *Schleicher v. Salvation Army*, 558 F.3d 472, 475 (7th 2008), are simply not implicated by the Form 990 passive disclosure requirement.

IX. A PURPORTED ACCOMMODATION CANNOT TREAT CHURCHES MORE FAVORABLY THAN SECULAR GROUPS THAT ARE SIMILARLY SITUATED WITH RESPECT TO THE ATTRIBUTE SELECTED FOR ACCOMMODATION.

Discrimination in favor of religion with respect to the underlying rationale for accommodation is not merely tolerable "play in the joints." The Seventh Circuit Court of Appeals recently recognized exactly this controlling limitation on religious accommodation in *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869 (7th Cir. 2014). In that case, an Indiana statute allowed religious officials to solemnize marriages, but prohibited officials in secular organizations from solemnizing marriages. The Court found this to be an impermissible religious accommodation. "An accommodation cannot treat religions favorably when secular groups are identical with respect to the attribute selected for that accommodation."

The Court's holding in *Center for Inquiry* is instructive for the present case where the Government claims to have exempted churches and religious organizations from "surveillance" of the Form 990 in order to avoid intrusion into the internal affairs of churches and religious organizations. Because FFRF and Triangle FFRF are similarly situated to churches in regards to disclosure concerns, the discriminatory exemption of churches and religious organizations from disclosure requirements is plainly improper.

The Court of Appeals rejected the Government's argument in *Center for* Inquiry, that the restriction of marriage solemnization to religious groups was a permissible accommodation, as well

as the argument that such accommodations necessarily treat religious groups differently than secular groups. The Court stated:

> It is hard to avoid the district court's point that accommodations, by definition, treat the accommodated religion differently from one or more secular groups. See *Presiding Bishop v. Amos*, 483 U.S. 327, 334, 107 S. Ct. 2862, 97 L.Ed.2d 273 (1987); *Salazar v. Buono*, 559 U.S. 700, 719, 130 S. Ct. 1803, 176 L.Ed.2d 634 (2010) (plurality opinion). But this cannot be a complete answer to plaintiffs' contention that humanists are situated similarly to religions in everything except belief in a deity (and especially close to those religious that lack deities). An accommodation cannot treat religions favorably when secular groups are identical with respect to the attribute selected for that accommodation.

The Court of Appeals emphasized in *Center for Inquiry*, that "neutrality is essential to validity of an accommodation." The Court also noted that atheists are entitled to the benefit of the First Amendment's neutrality principle, under which states cannot favor or disfavor religion vis-à-vis secular belief systems. Finally, the Court concluded that non-religious groups cannot be compelled to call themselves religions in order to avoid the statutory limitation on persons who can solemnize marriages. "It is irrational to allow humanists to solemnize marriages if, and only if, they falsely declare that they are a 'religion.'"

The Seventh Circuit's concern about preferences for religion was not newly minted in *Center for Inquiry*. For example, in *River Of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 370 (7th Cir. 2010), the Court expressed concern about land use regulations that prefer churches over secular uses, despite similar underlying regulatory concerns for both. The Court stated:

> A subtler objection to the test [used by Eleventh Circuit] is that it may be too friendly to religious land uses, including limiting municipal regulation and maybe even violating the First Amendment's prohibition against establishment of religion by discriminating in favor of religious land uses. See *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005). The Supreme Court had held in *Employment Division v. Smith*, 494 U.S. 872, 878-80, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990), that the clause of the First Amendment that guarantees the free exercise of religion does not excuse churches from having to comply with nondiscriminatory regulations, such as the prohibition of drugs believed

> to be dangerous, even if the regulation interferes with church rituals or observances: 'We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.' If they were excused, this might be deemed favoritism to religion and thus violate the Establishment Clause.

In the present case, the preferential exemption of churches and religious organizations from passive disclosure requirements also is not a valid accommodation. Underlying concerns about associational intrusions are as compelling for FFRF and other secular tax-exempt organizations as they are for churches. Thus, the Form 990 exemption impermissibly discriminates against FFRF with respect to the essential concerns selected for accommodation.

Although, the disclosure requirements of Form 990 are not deemed a substantial burden that interferes with the free exercise of religion, to the extent that Form 990 disclosure is construed to burden First Amendment rights at all, then clearly FFRF, is protected by the First Amendment's expressive associational right, every bit as much as churches and religious organizations. If the Form 990 exclusion were deemed to be an intrusion into the internal structure or affairs of a church or church-affiliated organization, therefore, it would also be intrusive into the affairs of FFRF, which is similarly situated to churches and church-affiliated organizations in regard to this defining concern. The reasoning of *Center for Inquiry*, therefore, compels the conclusion that the Form 990 exemption for churches is unconstitutional.

In *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 70 (2006), the Supreme Court noted that the freedom of expressive association protects more than just a group's membership decisions. For example, according to the Court, laws may be unconstitutional that require disclosure of memberships lists for groups seeking anonymity, *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 101-102 (1982), or where imposed penalties or withheld benefits are based on membership in a disfavored group, *Healy v. James*, 408 U.S. 169, 180-84

(1972). Although such laws do not directly interfere with an organization's composition, they may make membership less attractive. That is very arguably the case with FFRF.

The significance of FFRF's associational interests has been noted by the Supreme Court in the context of membership disclosure requirements. In *National Association for The Advancement of Colored People v. Alabama*, 357 U.S. 449, 460 (1958), for example, the Supreme Court recognized that effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. The Court further noted that it is beyond debate that the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty embraced by the First Amendment. Significantly, moreover, the Court noted that "it is immaterial whether the beliefs sought to be advanced pertain to political, economic, *religious*, or cultural matters." *Id.* (Emphasis added.)

The First Amendment associational privilege, however, is not absolute. In order to invoke the privilege, including with respect to churches, the organization must demonstrate "a reasonable probability" that informational disclosure would subject church members to "threats, harassment, or reprisals from either government officials or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself." *Buckley v. Valeo*, 421 U.S. 1, 74 (1976). On this basis alone, FFRF should more reasonably be entitled to Form 990 exemption than churches and religious organizations. Certainly FFRF is at least similarly situated to churches and other religious organizations.

X. SECTION 501(C)(3) TAX EXEMPT STATUS IS A PRIVILEGE UPON WHICH THE GOVERNMENT CAN ATTACH CONDITIONS.

The Government does not contend that the requirement of filing a Form 990 actually violates the constitutional rights of churches and religious organizations. The fact that § 501(c)(3) tax exempt status is a privilege, rather than a right, moreover, is significant. The Government can attach

conditions to the receipt of such a benefit without violating the rights of a beneficiary. Here, the Government has no obligation to allow tax exempt status for some organizations, nor is the Government foreclosed from placing requirements upon such a privilege. Section 501(c)(3) tax exempt status is a privilege to which the Government can attach requirements, and if an organization, including a church or religious organization, does not want to comply with the program requirements, then the organization can simply forgo the benefit without any conditions.

The Supreme Court has consistently held that when the Government provides a subsidy it is entitled to define the parameters of the subsidized program. The Court explained this principle in *Rust v. Sullivan,* 500 U.S. 173, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991). That case involved a federal program to provide funding for family planning services. *Id.* at 178. The legislation establishing the program made clear that abortion was not an approved method of family planning. The Department of Health and Human Services promulgated regulations that required as a condition of participating in the program, that service providers not advocate for abortion (including lobbying) or provide abortion counseling within the scope of the program. *Id.* at 179-81. The service providers challenged those restrictions, arguing that they violated the "unconstitutional conditions doctrine" because the conditioned receipt of a government benefit on the relinquishment of their First Amendment right to advocate for abortion. *Id.* at 196.

The Supreme Court held in *Rust* that the unconstitutional conditions doctrine did not apply because "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized . . .The regulations do not force the grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from program activities." *Id.* at 196. Responding to the service providers' argument that the speech restrictions constituted impermissible viewpoint discrimination, the Court expounded on the concept that government may subsidize certain activities and not others:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another. A legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right. A refusal to fund protected activity, without more, cannot be equated with the imposition of a penalty on that activity. There is a basic difference between direct state inference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.

Id. at 193 (internal quotations and cites omitted).

The Supreme Court also applied this principle in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 103 S. Ct. 1997, 76 L.Ed.2d 129 (1983), which involved restrictions on lobbying. In that case, a non-profit organization challenged a federal statute prohibiting tax exemptions for organizations whose activities include a substantial amount of lobbying. *Id.* at 542 and n. 1. The organization argued that the statute violated the unconstitutional conditions doctrine because it conditioned a government benefit, a tax exemption, on the recipient giving up its right to engage in political speech. *Id.* at 545. The Supreme Court disagreed. As in *Rust*, the Court noted that the Plaintiff remained free to exercise its speech rights, lobbying, outside of the government tax exemption program. *Id.* at 544-45. The Court equated the tax exemption to a government subsidy and held that the restrictions were simply a choice by the Government not to subsidize lobbying. *Id.* at 544, 545-46. The Court made clear that the Government's decision not to subsidize the exercise of a constitutional right does not equate to a penalty on the right. *See Id.* at 546. "We [the Supreme Court] have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Id.* at 549.

Similarly, in *United States v. American Library Association, Inc.*, 539 U.S. 194, 210-12, 123 S. Ct. 2297, 156 L.Ed.2d 221 (2003), the Supreme Court rejected an argument that libraries' speech rights were violated by requiring that they restrict internet access in order to receive a federal subsidy

because "a refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."

In the present case, the unconstitutional conditions doctrine also is not implicated by requiring churches and other church-affiliated organizations to file an informational Form 990, like other tax-exempt organizations, as a condition of a church's tax exempt status. As discussed above, such a requirement does not actively regulate any conduct, tenet or belief; it merely requires the passive disclosure of information to the public regarding basic information about the organization. The information disclosure requirement, moreover, is related to the Government's policy choice to provide a tax-exemption to organizations like charities, educational institutions, philanthropic foundations - - and churches and church-affiliated organizations.

If an organization including a church or church-affiliated organization, does not want to disclose information, then the organization can forego the disclosure quid pro quo without any restriction or condition. On the other hand, if an organization desires to take advantage of the § 501(c)(3) tax exemption, and complies with the Government's passive disclosure requirements, it is significant that the Government does not impose any substantive behavioral, conduct, or regulatory restrictions concomitant with the disclosure, other than the requirement of public availability. In short, the requirement that a church or religious organization file a Form 990 information return to maintain its tax exempt status does not implicate constitutional concerns under the First Amendment.

XI. SECTION 6033(a)(3) VIOLATES THE ESTABLISHMENT CLAUSE UNDER THE *LEMON* TEST, AS WELL AS EQUAL PROTECTION RIGHTS.

In the end, § 6033(a)(3) clearly violates the Establishment Clause, under the test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Under the *Lemon* test, in order to be constitutional, a challenged statute: (1) must have a secular legislative purpose; (2) a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion. Section 6033(a)(3) fails this test.

The Form 990 exemption for churches and other religious organizations violates the Establishment Clause because, in the first place, this preference for churches is not neutral and available generally to other tax exempt organizations and does not have a secular purpose. Here, the Form 990 exemption for churches is provided only to religious organizations and it was never intended to abate any substantial government-imposed burden on religion.

The second prong of the *Lemon* test also is violated by Government action that has a principle or primary effect that advances or inhibits religion. Government action has the primary effect of advancing religion if it is sufficiently likely to be perceived as an endorsement of religion. This is an objective test asking whether a reasonable observer who is informed and familiar with a history of the Government practice at issue would perceive the practice as having a predominately non-secular effect.

The Form 990 exemption, provided preferentially to churches and religious organizations, cannot help but be perceived as an endorsement of religion. This, in fact, was the conclusion of the Supreme Court in *Texas Monthly*. The Government claims that exempting churches from the disclosure requirements of Form 990 is inherently incapable of giving the appearance of religious endorsement, but the Government's reasoning is not convincing; nor does it reflect the views of the Supreme Court, requiring that benefits for religion be neutrally and generally available on the basis of secular criteria, as articulated in *Texas Monthly*. An objective observer, including non-exempt organizations that must annually prepare and file Form 990, would undoubtedly perceive § 6033(a)(3) as an endorsement-ringing preference of religion.

The Supreme Court's holding in *Texas Monthly* ultimately represents the controlling application of the *Lemon* test to the present case: Preferential benefits to religion, that are not neutral and generally available to other taxpayers on the basis of secular criteria, violate the Establishment Clause. While all tax-exempt organizations would like to have an exclusion for the disclosure

requirements of Form 990, the reality is that only churches and religious organizations get this benefit. Section 6033(a)(3), therefore, violates the Establishment Clause in a most obvious way by conditioning benefits on religious affiliation. This case, in short, is controlled by *Texas Monthly*.

XII. CONCLUSION.

The Court should deny the Government's Motion for Summary Judgment and instead grant judgment in favor of the Plaintiffs. Section 6033(a)(3) undisputedly provides a benefit to churches and religious organizations that is based entirely on religious affiliation. The exemption from the passive disclosure requirements of Form 990 is a substantial benefit that is not neutrally and generally available without regard to religion, as required by *Texas Monthly*.

The exemption for churches and religious organizations, moreover, does not alleviate a substantial burden on free exercise rights, while the rationale for the exemption is equally applicable to the First Amendment rights of other tax-exempt organizations, including FFRF. The privilege of tax exempt status may be appropriately conditioned on the public's interest in transparency, but this requirement cannot be selectively imposed only on non-religious organizations. As a result, the preferential exemption from "sunshine" disclosure requirements for churches and other religious organizations renders § 6033(a)(3) unconstitutional.

Dated this 6th of October, 2014.

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I hereby certify that on October 6, 2014, this document was filed electronically in accordance with the ECF procedures of the United States District Court, Western District of Wisconsin, under Rule 5(d)(1), Federal Rules of Civil Procedure. All parties who are represented and have consented to service of electronically filed documents are served upon receipt of the NEF from the electronic filing system.

To the best of my knowledge, there are no parties in this case that require service by means other than electronic service using the Court's NEF. The original document on file contains a valid original signature.
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