UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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

REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The sole issue before this Court is a legal one: does the statutorily mandated exemption at issue here – which relieves churches (and some other organizations) from the requirement to file a Form 990 – pass the three-pronged test for constitutionality set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)? The answer is yes.

The Supreme Court long ago concluded that, with respect to the Religion Clauses, there is a middle ground – "room for play in the joints" – within which Congress may accommodate religion "without sponsorship and without interference." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970)). Indeed, Congress "agreed to exempt churches from the requirement of filing annual information returns in view of the traditional separation of church and state," 115 CONG. REC. 32148 (1969), to avoid creating the "entangling church-state relationships of the kind the Religion Clauses sought to avoid." *Lemon*, 403 U.S. at 616. Most importantly, Congress relieved churches from the requirement to file a Form 990 for reasons that are manifested in the very statute that governs tax exemption. Specifically, Congress determined

that such information returns are unnecessary to verify whether churches are "organized and operated exclusively for religious, charitable . . . or educational purposes." I.R.C. § 501(c)(3).

Freedom From Religion Foundation, Inc. and Triangle FFRF (collectively, "plaintiff") have filed a lengthy opposition brief that ultimately fails to refute defendant's central contentions: the exemption at issue here is constitutionally permissible because Congress has discretion in determining how to strike a balance between the Religion Clauses, notwithstanding plaintiff's avowed policy preferences.

ARGUMENT

First, by enacting § 6033(a)(3),[1] Congress exercised its discretion to insulate churches from government surveillance. ***Second***, § 6033(a)(3) does not run afoul of the *Lemon* test because it minimizes governmental interference with the decision-making processes of religious organizations, insulates religion from government surveillance, and neither advances nor inhibits religious exercise.

I. CONGRESS MAY PERMISSIBLY ACCOMMODATE RELIGION BEYOND THE REQUIREMENTS OF THE FREE EXERCISE CLAUSE.

Plaintiff argues that religious accommodation is only permissible when the accommodation affects so-called religious conduct and, according to plaintiff, "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." (*See* Docket No. 35, Plaintiffs' Brief Opposing Summary Judgment ("Pl. Br.") at 14.) That suggestion is a red herring. No court has ever required an effect on religious conduct as part of any test for evaluating the permissibility of

[1] All statutory references in the text are to 26 U.S.C. unless otherwise noted.

an accommodation. Moreover, this position is at odds with plaintiff's later assertion that it is per se impermissible for a statute to condition ***any*** benefit exclusively on the basis of religion. (*See* Pl. Br. at 31.) In any event, the limits of permissible accommodation are not "coextensive with the non-interference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673; *accord Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter–Day Saints v. Amos*, 483 U.S. 327, 334 (1987). Nor is there any requirement that government must alleviate a "substantial" burden to constitute a permissible accommodation. (*See* Pl. Br. at 13.) Indeed, "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335.

The U.S. Court of Appeals for the Seventh Circuit has held that an exemption exclusive to religious organizations from ***purely regulatory requirements***, without reference to whether religious conduct would be affected, is nonetheless constitutional. *Cohen v. City of Des Plaines*, 8 F.3d 484, 492-93 (7th Cir. 1993) (upholding zoning ordinance accommodating religious groups by alleviating administrative burden of obtaining a special use permit); *see also Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000) (same); *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988) (rejecting the argument that an exemption for a religious organization is valid only if the organization engages in religious conduct). The government need not even remove any burden on free exercise for "a *de minimis* advancement of or benefit to religion" to be constitutional under the *Lemon* test. *See Van Zandt v. Thompson*, 839 F.2d 1215, 1223-24 (7th Cir. 1988) (upholding provision of a prayer room in state legislature despite the lack of any burden on legislators inhibiting legislators' free exercise of religion).

In *Cohen*, which plaintiff ignores, the court specifically held that a church-specific exemption from a generally applicable zoning ordinance was constitutional because the legislature had acted with the intention of "minimizing governmental meddling in religious affairs." *Cohen*, 8 F.3d at 491. Similarly, the zoning ordinance did not have an effect which devolved into a "fostering" or "advancement" of religion by the city because "the *government itself*" had not advanced religion. *Id*. at 491-92. Nor did the court find the exclusivity of the availability of the benefit to be fatal to the zoning ordinance because the exemption from a regulatory requirement was qualitatively different from an affirmative form of aid that might devolve into fostering or advancement of religion. *Id*. ("[a] law is not unconstitutional simply because it allows churches to advance religion." (quoting *Amos*, 483 U.S. at 377) (bracketed text in original)).

II. SECTION 6033(a)(3) DOES NOT VIOLATE THE *LEMON* TEST.

Plaintiff fails to fully analyze § 6033(a)(3) within the *Lemon* framework, relegating this discussion to the final two pages of its brief. Not surprisingly, plaintiff then offers little more than the unsupported assertion that § 6033(a)(3) constitutes a non-neutral "preference." (Pl. Br. at 31.) As set forth below, plaintiff failed to refute defendant's contention that § 6033(a)(3) satisfies the three-prong *Lemon* test.

A. Secular Legislative Purpose

Congress permissibly exempted churches from the regulatory burden imposed by § 6033(a)(3) because it determined that the government need not monitor churches' internal functions to ensure that churches do not masquerade as non-profit companies, *i.e.*, that churches were, in fact, "organized and operated exclusively for religious, charitable, . . . or educational purposes." I.R.C. § 501(c)(3); *accord Amos*, 483 U.S. at 335. (*See also* Docket No. 28, Brief in

Support of Defendant's Motion for Summary Judgment ("Def. Br.") at 12.) Congress specifically stated that the insulation would serve the "traditional separation of church and state," 115 CONG. REC. 32148 (1969), further evincing Congress's intention to avoid government supervision of religious organizations. Thus, § 6033(a)(3) "tends to complement and reinforce the desired separation insulating each from the other," *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 676 (1970), by avoiding "intrusive inquiry into religious belief," *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987). Indeed, the Establishment Clause is served by separating church and state; "[t]he objective is to prevent, as far as possible, the intrusion of either into the precincts of the other." *Lemon*, 403 U.S. at 614.

Because one wholly independent prong of the *Lemon* test is to avoid relationships requiring "comprehensive, discriminating, and continuing state surveillance," *Lemon*, 403 U.S. at 619, programs involving "detailed monitoring and close administrative contact" have been held unconstitutional on that basis. *See Aguilar v. Felton*, 473 U.S. 402, 413-14 (1985). In this case, § 6033(a)(3) minimizes the need for government agents to make "numerous judgments" concerning "matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations," thereby avoiding "the dangers of political divisiveness along religious lines." *See id.* Thus, regardless of whether or not § 6033(a)(3) constitutes an accommodation, § 6033(a)(3) serves the valid purpose of minimizing governmental entanglement with religion.

In addition, the Supreme Court has observed that requiring churches to file information returns like a Form 990 could constitute a constitutionally cognizable burden, as those forms "call[] for the provision of a substantial amount of information, much of which penetrates deeply

into the internal affairs of the registering organization." *Larson*, 456 U.S. at 254 n.29. The provision of such information was considered "burdensome and intrusive" by the Supreme Court, which noted that the burden of complying with an annual information return filing requirement "is certainly not *de minimis*." *Id.* at 253-255 (quotations omitted). Thus, regardless of whether or not the burden of providing information regarding a church's internal affairs is substantial enough to require accommodation under the Free Exercise clause, all that matters in this case is that Congress may permissibly accommodate a burden beyond the requirements of the Free Exercise Clause without violating the Establishment Clause. *See Cohen*, 8 F.3d at 491. In response, plaintiff focuses on dicta from select cases where the government constitutionally imposed certain burdens on churches' right to free exercise, and argues that such dicta requires Congress to impose the annual filing requirement on churches. (*See* Pl. Br. at 13-16, 20.) But this argument fails because Congress may exercise its discretion within the "room for play" between the Religion Clauses in determining the extent of the contacts between church and state.

Plaintiff also concludes, without evidence, that "an objective observer . . . would undoubtedly perceive § 6033(a)(3) as an endorsement-ringing preference of religion." (Pl. Br. at 31.) However, plaintiff does not explain why an objective observer, familiar with the history of the relationship between church and state and the constitutional law that evolved to avoid or minimize contacts between the two, would believe that § 6033(a)(3) conveys a message of endorsement. *See McCreary County v. ACLU*, 545 U.S. 844, 862 (2005) ("The eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act."). Indeed, within the context of the entire tax code, § 6033(a)(3) evinces no more than a reasonable presumption that churches are eligible for tax-exempt status – *i.e.*, they are

"organized and operated exclusively for religious . . . purposes," *see* I.R.C. § 501(c)(3) – without resort to an information return that divulges information regarding their internal affairs for verification purposes. To be sure, the message conveyed would not be one of approval of religion, but rather a simple acknowledgment of the role that churches play in society.

B. Primary Effect Neither Advances Nor Inhibits Religion

Consistent with its purpose, § 6033(a)(3) minimizes the frequency and extent of the contacts between church and state. Section 6033(a)(3) does not even call for affirmative government action—it simply provides exemption from a regulatory requirement—though plaintiff suggests that the exemption is effectively a form of unconstitutional aid and financial benefit to religion. Plaintiff's assertion is contradicted by the Supreme Court's holding in *Amos*, where the Court unequivocally stated that "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337 (italics in original). Section 6033(a)(3), which removes a legislatively-imposed administrative burden, cannot be fairly described as governmental advancement of religion.

Indeed, it is well established that tax exemptions are a matter of legislative grace, *see Stinson Estate v. U.S.*, 214 F.3d 846, 848 (7th Cir. 2000), and the legislature is free to attach conditions to eligibility for such exemptions. *See Comm'r v. Trustees of Lumber Inv. Ass'n.*, 100 F.2d 18, 29 (7th Cir. 1938). Thus, conditioning tax exemption on filing a Form 990 is a choice Congress has made for some organizations, and Congress has permissibly chosen to decline to impose the same requirement on churches. That choice does not constitute "sponsorship, financial support, and active involvement of the sovereign in religious activity," *Walz v. Tax*

Comm'n, 397 U.S. 664, 668 (1970), and therefore does not run afoul of the Establishment Clause. Legislative exemption from otherwise applicable regulations "may make the churches' task marginally easier than it would be were no exemption given," but that does not constitute an advancement of religion prohibited by the Establishment Clause. *See Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F.2d 260, 263-64 (4th Cir. 1988); *see Cohen v. City of Des Plaines*, 8 F.3d 484, 492-93 (7th Cir. 1993); *see also Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000). Thus, § 6033(a)(3) satisfies the effects prong of the *Lemon* test, regardless of whether the statute accommodates free exercise.

Plaintiff ignores the fact that certain groups receiving revenues below a certain threshold are also exempt from the requirement to file a Form 990, *see* I.R.C. § 6033(a)(3); (Def. Br. at 17-18), meaning that a wide variety of groups are eligible for the same exemption without reference to their religious affiliation. That presumption is consistent with the purpose and effect of presuming that certain types of organizations qualify for tax-exemption – in this instance, groups with low annual revenues – without the need for the government to collect, process, and verify information about such groups.

Nor does plaintiff rebut the basic conclusion that government itself does not act to advance religion under § 6033(a)(3). Instead, plaintiff insists that *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), controls the result here. However, no financial assistance is given by § 6033(a)(3) because it does not condition the availability of any tax benefit on religious affiliation. *See* I.R.C. § 501(c)(3). Nor does the exemption from the requirement to file an information return "burden nonbeneficiaries markedly." *Texas Monthly*, 489 U.S. at 15. And though imposing administrative burdens on religious organizations may not be constitutionally impermissible under the Free Exercise Clause, alleviating such burdens is constitutionally permissible if Congress determines

that removing such costs or barriers enhances free exercise and the separation of church and state. Indeed, the court in *Cohen* was presumably not ignorant of *Texas Monthly* when it upheld the church-specific exemption at issue in that case. *See Cohen*, 8 F.3d at 492-93.

Plaintiff also argues that *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869 (7th Cir. 2014), undermines the viability of § 6033(a)(3) as an accommodation because "secular groups are identical with respect to the attribute selected for that accommodation." (Pl. Br. at 24.) However, *Center for Inquiry* challenged a statute that "discriminates arbitrarily among religious and ethical beliefs," and therefore failed to rationally serve its stated purpose. *See Center for Inquiry*, 758 F.3d at 874-75. Section 6033(a)(3) does not discriminate arbitrarily, but rather provides a legislative exemption from an otherwise applicable filing requirement on the basis of a reasonable presumption that certain types of organizations are eligible for tax-exempt status. Plaintiff instead glosses over the stated purpose of § 6033(a)(3) and concludes that "concerns about associational intrusions are as compelling for FFRF and other secular tax-exempt organizations as they are for churches." (Pl. Br. at 26.) But no impermissible entanglement between church and state—with the attendant possibility of political divisiveness feared by the Court in *Lemon*—is threatened by continuous and ongoing government surveillance of secular non-profit organizations such as plaintiff. Therefore, *Center for Inquiry* does not undermine the conclusion that § 6033(a)(3) is constitutional because it selects churches to be exempt from an otherwise applicable filing requirement.

C. No Excessive Entanglement

As previously discussed, § 6033(a)(3) minimizes government entanglement with religion by curtailing the extent of administrative contact between the government and churches. Therefore, § 6033(a)(3) passes this prong of the *Lemon* test as well.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in defendant's opening brief, § 6033(a)(3) passes the *Lemon* test and summary judgment should be granted in favor of the defendant. Plaintiff's claims for relief should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on October 15, 2014, service of the foregoing REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT was made upon plaintiffs by filing it with the Clerk of Court using the CM/ECF system.

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