UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC., et al. Plaintiffs v. DONALD J. TRUMP, President, et al. Defendants	)	Civil Action No. 17-cv-330

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR FOR FAILURE TO STATE A CLAIM

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PRELIMINARY STATEMENT

The plaintiffs' challenge to the President's May 4, 2017, Executive Order titled *Promoting Free Speech and Religious Liberty*[1] should be dismissed because the plaintiffs misunderstand the Order's purpose and effect. The Order does not exempt religious organizations from the restrictions on political campaign activity applicable to all tax-exempt organizations; rather, the Order directs the Government, in enforcing the restrictions, not to take adverse action against religious organizations for speech that has not ordinarily been treated as political campaign activity. The allegations in the complaint provide no reason to believe that the Executive Order will be implemented in a way that treats the plaintiffs unfavorably or causes them any harm. Consequently, the plaintiffs cannot establish an "actual or imminent" injury as required by Article III of the Constitution.

The plaintiffs' challenge is founded on an assertion that the Executive Order exempts religious organizations from the restrictions on political campaign activity that are imposed by Internal Revenue Code § 501(c)(3), 26 U.S.C. § 501(c)(3), as a condition of tax-exempt status. According to the plaintiffs, by exempting religious organizations from the restrictions on political campaign activity, the Executive Order affords unfavorable treatment to nonreligious organizations such as the plaintiffs' organization.

This broad assertion is not supported by the text of the Executive Order, nor does the complaint contain any factual allegations to suggest that the Government interprets or will interpret the Executive Order in the manner the plaintiffs describe. The text of the Executive Order itself does not purport to exempt religious organizations from the political campaign activity provisions of § 501(c)(3), nor does it privilege religious organizations over secular

[1] Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017).

organizations. Rather, section 2 of the Order directs the Government, in the enforcement of the § 501(c)(3) restrictions, not to take adverse action against religious organizations for speech that has not ordinarily been treated as political campaign activity. The Court should not search the President's speeches and remarks for meanings that are absent from the text of the Executive Order, but even if that kind of exercise were appropriate, none of the remarks cited by the plaintiffs suggests that the Executive Order grants an exemption to religious organizations while denying the same benefit to secular organizations. And the plaintiffs do not allege that the Internal Revenue Service (IRS) has taken any action to implement the Executive Order in a way that exempts religious organizations from the political campaign activity restrictions of § 501(c)(3).

The Supreme Court and the Seventh Circuit have held that, on a motion to dismiss, a bare assertion without further factual detail is not enough to establish that the Government has adopted a purportedly wrongful policy. Rather, the plaintiff must allege specific, concrete facts to demonstrate that the Government has actually adopted the disputed policy. In this case, the plaintiffs do not provide these necessary supporting allegations, and they cannot do so, because their assertions about the effect of the Executive Order are mistaken. Because the plaintiffs cannot establish that the Government has in fact relieved religious organizations from the restrictions of § 501(c)(3), the plaintiffs cannot claim to have suffered any kind of unfavorable treatment from being denied a similar exception. The plaintiffs therefore cannot establish the kind of "actual or imminent" injury that is needed to meet the jurisdictional requirement of standing. Because the plaintiffs seek to challenge a policy that does not exist, a ruling on the legality of a nonexistent policy would be an impermissible advisory opinion.

Even if the Court could look past this fatal flaw in the complaint, the plaintiffs would still lack standing to challenge the Executive Order for a second, independent reason: even if the Executive Order exempted religious organizations from the restrictions of § 501(c)(3), the plaintiffs' complaint does not allege that they ever asked for the benefit of the same exemption. Because they never sought similar treatment for themselves, the plaintiffs cannot claim to have been denied equal treatment and therefore cannot establish that they have suffered any injury.

The same factors favor dismissing the plaintiffs' challenge on ripeness grounds. It is premature for the Court to consider a challenge to the Order when the challenged provisions of the Order have not been implemented or applied in the way the plaintiffs suggest. Indeed, the plaintiffs are unlikely to ever suffer any harm under the Order.

The Court likewise should dismiss for lack of subject matter jurisdiction the plaintiffs' new claim introduced in their amended complaint. This new claim asserts that, by meeting frequently with religious persons and groups and taking their interests into account in his decisions, the President has "endorsed" religion in violation of the Establishment Clause. The plaintiffs have not alleged that the President's conduct has caused them any direct injury, so they cannot establish standing. And a federal court cannot decide when the President has been too solicitous of religious interests in performing his duties. That is a political question that is outside the authority of the courts.

While the Court should dismiss the case for lack of jurisdiction, the complaint also fails to state a claim for relief. The plaintiffs' challenge to the Executive Order is based on the flawed notion that the Executive Order creates an exemption from the restrictions of § 501(c)(3) exclusively for religious groups. Because the Executive Order does not create any such exemption, the plaintiffs do not state any valid claim for relief. As for the plaintiffs' new claim

challenging the President's broader conduct, the Establishment Clause does not restrict the President's ability to interact with religious persons and groups, and the separation of powers prohibits a court from issuing an order purporting to control the President's day-to-day performance of his official duties.

Thus, this action should be dismissed.

BACKGROUND

I. Statutory and Regulatory Background

Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), provides an exemption from federal income tax for nonprofit organizations meeting certain requirements:

> (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in [26 U.S.C. § 501(h)]), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Id. § 501(c)(3).

The exemption is available only to organizations that do not engage in political campaign activity. *Id.* ("which does not participate in, or intervene in . . . , any political campaign on behalf of (or in opposition to) any candidate for public office"). This restriction on political campaign activity, which was introduced in the Internal Revenue Code of 1954, § 501(c)(3), 68A Stat. 1, 163, is sometimes known as the "Johnson Amendment" (after then-Senator Lyndon Johnson). The restriction is absolute—to qualify for the § 501(c)(3) exemption, an organization may not participate or intervene in any political campaign for or against a candidate for public office. *See* Treas. Reg. § 1.501(c)(3)-1(c)(3). An organization otherwise described in § 501(c)(3) that

engages in such activities may lose its tax-exempt status and, in addition to or in lieu of revocation, may face other consequences such as an excise tax on political expenditures, *see* 26 U.S.C. § 4955; termination assessment of all taxes due, *see id.* § 6852(a)(1); or an injunction against further political expenditures, *see id.* § 7409.

Activities that constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, for example, written or oral statements on behalf of or in opposition to such a candidate. *See* Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii). Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case. *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1421. The IRS has published revenue rulings and guidance to help taxpayers understand and comply with the terms of § 501(c)(3) and its implementing regulations. For example, Revenue Ruling 2007-41, published in 2007, describes 21 different factual situations and analyzes whether they amount to participation or intervention in a political campaign. *Id.* at 1422–26. The restrictions on political campaign activity are also among the subjects discussed in IRS Publication 1828, which provides guidance on numerous tax issues facing churches and religious organizations. *See* Tax Exempt & Gov't Entities, Internal Revenue Serv., Pub. 1828, Tax Guide for Churches & Religious Organizations 7–18 (2015), https://www.irs.gov/pub/irs-pdf/p1828.pdf.

In § 7611 of the Internal Revenue Code, Congress prescribed procedures the IRS must follow before it may conduct an examination of a church. 26 U.S.C. § 7611 (originally enacted as Tax Reform Act of 1984, Pub. L. No. 98-369, § 1033(a), 98 Stat. 494, 1034). The IRS may initiate a "church tax inquiry" only if an appropriate high-level Treasury official reasonably believes that a church may not be exempt from tax or may be carrying on an unrelated trade or

business. *See id.*; *see also id.* § 513 (unrelated trade or business). In addition, before beginning the church tax inquiry, the IRS must provide written notice to the church of the inquiry. *See id.* § 7611(a)(3). An examination of a church's corporate and financial records may begin only after written notice of the examination has been provided and the church has been permitted to request a conference. *See id.* § 7611(b). After an examination, the IRS may determine that a church is not exempt from taxation or is not eligible to receive tax-deductible contributions, or the IRS may issue a notice of deficiency to the organization or, in certain cases, assess an underpayment of tax. *See id.* § 7611(d)(1). However, the IRS may make such a determination "only if the appropriate regional counsel . . . determines in writing that there has been substantial compliance with the requirements of this section and approves in writing of such revocation, notice of deficiency, or assessment." *Id.* The provisions of § 7611 are applicable to any church tax inquiry—they are not limited to situations where a church is believed to have engaged in political campaign activity.

II. Executive Order No. 13,798

On May 4, 2017, the President issued an Executive Order addressing religious liberty. Exec. Order No. 13,798, Promoting Free Speech and Religious Liberty, 82 Fed. Reg. 21,675 (May 4, 2017). The stated purpose of the Order is to "guide the executive branch in formulating and implementing policies with implications for the religious liberty of persons and organizations in America, and to further compliance with the Constitution and with applicable statutes and Presidential Directives." *Id.*

Section 1 of the Order makes it the policy of the Executive Branch "to vigorously enforce Federal law's robust protections for religious freedom." *Id.* § 1. That includes ensuring that religious persons and institutions are "free to practice their faith without fear of

discrimination or retaliation by the Federal Government" and may "participate fully in civic life without undue interference by the Federal Government." *Id.*

In keeping with the policy described in section 1, section 2 of the Order directs that, in enforcement of the tax laws, including the political campaign activity provisions of Internal Revenue Code § 501(c)(3), the Government should not take adverse action based on speech "from a religious perspective" that it would not take based on speech "of similar character" that does not reflect a religious perspective:

> Sec. 2. *Respecting Religious and Political Speech*. All executive departments and agencies (agencies) shall, to the greatest extent practicable and to the extent permitted by law, respect and protect the freedom of persons and organizations to engage in religious and political speech. In particular, the Secretary of the Treasury shall ensure, to the extent permitted by law, that the Department of the Treasury does not take any adverse action against any individual, house of worship, or other religious organization on the basis that such individual or organization speaks or has spoken about moral or political issues from a religious perspective, *where speech of similar character has, consistent with law, not ordinarily been treated as participation or intervention in a political campaign on behalf of (or in opposition to) a candidate for public office by the Department of the Treasury*. As used in this section, the term ''adverse action'' means the imposition of any tax or tax penalty; the delay or denial of tax-exempt status; the disallowance of tax deductions for contributions made to entities exempted from taxation under section 501(c)(3) of title 26, United States Code; or any other action that makes unavailable or denies any tax deduction, exemption, credit, or benefit.

Exec. Order No. 13,798, § 2 (emphasis added).

The Order explicitly disclaims any intent to modify substantive law or grant any enforceable legal rights. Section 2 twice specifies that it applies "to the extent permitted by law." *Id.* Subsection 6(b) specifies that the Order "shall be implemented consistent with applicable law." *Id.* § 6(b). Subsection 6(c) specifies that the Order "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." *Id.* § 6(c).

III. The Present Lawsuit

On May 4, 2017, the same day the Executive Order was issued, plaintiffs Freedom from Religion Foundation, Inc. (FFRF), Dan Barker, and Annie Laurie Gaylor filed this action against the President and the Commissioner of the Internal Revenue Service. In their original complaint, the plaintiffs asserted that the Executive Order "requires the IRS to selectively and preferentially discontinue enforcement of the electioneering restrictions of the tax code against churches and religious organizations, while applying a more vigorous enforcement standard to secular nonprofits." Compl. for Declaratory and Injunctive Relief ¶ 3, ECF No. 1. By doing so, the plaintiffs asserted, the Executive Order violates the Free Speech Clause and the Establishment Clause of the First Amendment; the Equal Protection Clause; the Take Care Clause, U.S. Const. art. II, § 3; and the separation of powers. *See, e.g.*, Compl. ¶¶ 10–12, 80, 86–87, 92–93; Compl. at 19 (requests for relief). The defendants filed a motion to dismiss. Defs.' Mot. to Dismiss for Lack of Subject Matter Juris. or for Failure to State a Claim, ECF No. 16.

On September 19, 2017, the plaintiffs filed an amended complaint. Am. Compl. for Declaratory and Injunctive Relief, ECF No. 26. On September 20, 2017, the Court entered a minute order, ECF No. 27, denying the Government's motion to dismiss as moot and advising that the Government could file a renewed motion to dismiss directed at the amended complaint. The amended complaint restates the claims in the original complaint, *see* Am. Compl. ¶¶ 3, 10, 12–13, 99, 111–112, 117, 119; Am. Compl. at 23–24 (requests for relief), and adds a new claim asserting that the President's "statements and actions also give the actual and apparent appearance of religious endorsement in violation of the Establishment Clause." Am. Compl. ¶ 11; *see also* Am. Compl. ¶ 118.

The plaintiffs seek declaratory and injunctive relief against the Executive Order and its enforcement and an injunction barring the President from "engaging in public acts and deeds constituting government-sponsored endorsements of religion." Am. Compl. at 23–24.

While the plaintiffs' complaint makes mention of Internal Revenue Code § 7611, the provision establishing special procedures for church tax inquiries, *see* Am. Compl. ¶¶ 40–41, the plaintiffs do not appear to be challenging that provision.

ARGUMENT

I. The Plaintiffs' Claims Should Be Dismissed for Lack of Subject Matter Jurisdiction.

A. Standards Governing a Motion to Dismiss for Lack of Subject Matter Jurisdiction

"Federal courts are courts of limited jurisdiction," *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994), and a plaintiff seeking to invoke the jurisdiction of a federal court bears the burden of establishing that the court's exercise of jurisdiction is within the bounds of the Constitution and is authorized by statute. *See id.*

When a defendant raises issues of subject matter jurisdiction, the court may approach the jurisdictional issues in any order, but it must resolve all jurisdictional issues before it proceeds to the merits of the plaintiffs' claims. *See, e.g.*, *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007) (noting that "a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction)" but also noting that a court may "choose among threshold grounds for denying audience to a case on the merits" (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–102 (1998) and quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999))); *Scott Air Force Base Props., LLC v. Cty. of St. Clair*, 548 F.3d 516, 520 (7th Cir. 2008) ("[I]t is axiomatic that a federal court must assure itself that it possesses jurisdiction over the subject

matter of an action before it can proceed to take any action respecting the merits of the action." (quoting *Cook v. Winfrey*, 141 F.3d 322, 325 (7th Cir. 1998))).

When a defendant contends in a motion to dismiss that the facts alleged in the plaintiffs' complaint are insufficient on their face to establish jurisdiction, the court generally does not consider materials outside the complaint in evaluating the motion. *See, e.g.*, *Apex Dig., Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443–44 (7th Cir. 2009) ("Facial challenges [to jurisdiction] require only that the court look to the complaint and see if the plaintiff has sufficiently *alleged* a basis of subject matter jurisdiction."); *accord Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015). However, the court may consider "documents incorporated into the complaint by reference[] and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

"[I]n evaluating whether a complaint adequately pleads" subject matter jurisdiction, the court applies "the same analysis used to review whether a complaint adequately states a claim," including the "facial plausibility requirement" elucidated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Silha*, 807 F.3d at 173–74. This means the Court must examine whether the allegations of the complaint, "accepted as true," contain "factual content that allows the court to draw the reasonable inference" that the case meets the requirements of subject matter jurisdiction. *Id.* at 173–74 (quoting *Iqbal*, 556 U.S. at 678). But the Court does not have to consider allegations that state only bare assertions or conclusions of law without supporting factual details. *See id.*; *see also Iqbal*, 556 U.S. at 678–79 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . . While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."); *Iqbal*,

556 U.S. at 681 (holding that "bare assertions" and "conclusory" allegations were "not entitled to be assumed true").

If the allegations of the complaint are not sufficient to establish subject matter jurisdiction, the case must be dismissed; the court cannot defer ruling on the motion to permit discovery or other further proceedings. *See Iqbal*, 556 U.S. at 684–86 (holding that because the plaintiff's complaint did not allege facts sufficient to meet the "facial plausibility" standard, he was not entitled to any discovery, even if tightly cabined); *Scott Air Force Base Props., LLC*, 548 F.3d at 520, *cited supra* p. 9.

The Court therefore should consider this motion to dismiss for subject matter jurisdiction before it considers the pending Motion to Intervene, ECF No. 5. *See* Defs.' Mem. in Opp'n to Mot. to Intervene 8–9, ECF No. 18.

B. Standing, Ripeness, and the Political Question Doctrine

The constitutional separation of powers, as embodied in Article III of the Constitution, restricts the subject matter jurisdiction of the federal courts to the resolution of specific "'cases' and 'controversies'" and prevents courts from taking action to address matters better suited to legislative or executive action. *Allen v. Wright*, 468 U.S. 737, 750 (1984). The "case or controversy" limitation gives rise to various specific doctrines that impose limits on federal court jurisdiction. *See id.* At least three particular limitations are pertinent in this case: standing, ripeness, and the political question doctrine.

The requirement of "standing" demands that any plaintiff in federal court show "such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975). Standing entails three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (alterations in original) (footnote omitted) (citations omitted). These requirements can be stated more succinctly as "injury in fact, causation, and redressability." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (citing *id.*). The plaintiff bears the burden of establishing each of the three elements. *See Defs. of Wildlife*, 504 U.S. at 561.

When a plaintiff asserts multiple claims, the plaintiff must show that it satisfies the requirements for standing with respect to each claim independently; establishing standing for one claim in the case does not excuse the plaintiff from having to establish standing for other claims. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 351–53 (2006) (explaining that "a plaintiff must demonstrate standing for each claim he seeks to press" and rejecting the notion that establishing standing for a single claim makes it unnecessary for a plaintiff to establish standing for other claims based on the same facts).

"Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807–08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)). Ripeness depends on "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of

withholding court consideration." *Id.* at 808. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or that may not occur at all." *Citizens for Appropriate Rural Rds. v. Foxx*, 815 F.3d 1068, 1079 (7th Cir. 2016) (citing *Texas v. United States*, 523 U.S. 296, 300 (1998)). Ripeness and standing are closely related, and a plaintiff who does not allege a present injury generally cannot meet either requirement. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007) (recognizing that in some cases, "standing and ripeness boil down to the same question"); *Rock Energy Coop. v. Vill. of Rockton*, 614 F.3d 745, 748 (7th Cir. 2010) (noting that standing and ripeness are "closely related" and that both doctrines "bar a plaintiff from asserting an injury" that is contingent on uncertain future events).

A third jurisdictional limitation rooted in Article III of the Constitution is the political question doctrine. The political question doctrine "identifies a class of questions that either are not amenable to judicial resolution because the relevant considerations are beyond the courts' capacity to gather and weigh, . . . or have been committed by the Constitution to the exclusive, unreviewable discretion of the executive and/or legislative—the so-called 'political'—branches of the federal government." *Judge v. Quinn*, 624 F.3d 352, 358 (7th Cir. 2010) (quoting *Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342, 347 (7th Cir. 2001)); *see also, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion) (explaining that the political question doctrine bars federal court jurisdiction when "the question is entrusted to one of the political branches or involves no judicially enforceable rights"). In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court identified six characteristics that indicate a nonjusticiable political question:

> [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;

> or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217, *quoted in Judge*, 624 F.3d at 358; *Vieth*, 541 U.S. at 277–78 (plurality opinion). These characteristics operate as "independent tests," *Vieth*, 541 U.S. at 277 (plurality opinion), and thus the presence of "any one" of the six characteristics is enough to indicate a political question. *INS v. Chadha*, 462 U.S. 919, 941 (1983).

C. The Plaintiffs' Challenge to the Executive Order Fails the Requirements of Standing and Ripeness Because They Have Not Alleged Facts to Establish that the Executive Order Is Being Implemented in a Way that Treats Them Unfavorably Compared to Religious Organizations

1. The plaintiffs have not alleged facts to support their generalized assertion of discriminatory treatment under the Executive Order.

The plaintiffs cannot establish standing to challenge the Executive Order because they do not allege specific facts to support an inference that the Executive Order is being or will be implemented in a manner that prefers religious organizations over secular organizations like FFRF. Neither the text of the Executive Order, the statements by the President, nor any official action by the IRS indicates that the Executive Order will be implemented in the manner hypothesized by the plaintiffs.

The plaintiffs assert that the Executive Order "requires the IRS to selectively and preferentially discontinue enforcement of the electioneering restrictions of the tax code against churches and religious organizations, while applying a more vigorous enforcement standard to secular nonprofits" such as the plaintiffs' organization. Am. Compl. ¶ 3. The plaintiffs assert that this denies them equal treatment in a way that qualifies as an injury for purposes of standing and can support a request for relief that would nullify the supposed preferential treatment. *Cf. Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (holding that, in appropriate cases, injury in

the form of denial of equal treatment can support standing if it can be remedied by "withdrawal of benefits from the favored class").

The plaintiffs' broad theory, however, is not backed by allegations of specific facts that could support an inference that the Executive Order is being implemented in the manner they describe. Consequently, the plaintiffs have not alleged facts that would amount to the kind of "actual or imminent" injury needed to meet the requirements of standing.

When a plaintiff's claims are based on a contention that the Government has adopted a certain policy, a "bare assertion" that the Government has adopted the policy is not enough to satisfy the "facial plausibility" standard elucidated in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Rather, the plaintiff must allege specific facts that demonstrate the adoption of such a policy. *Iqbal* itself illustrates this principle. In *Iqbal*, the plaintiffs alleged, among other things, that the defendants had a policy of subjecting detainees to harsh conditions based on race, religion, and national origin. *Id.* at 666. The Court held that that assertion should be set aside because the plaintiffs did not allege specific facts that would "nudg[e]" the plaintiffs' claim of a discriminatory policy "across the line from conceivable to plausible." *Id*. at 682–83 (alteration in original). The Seventh Circuit has likewise required specific factual allegations to support assertions about the adoption of policies. *See Gill v. City of Milwaukee*, 850 F.3d 335, 344 (7th Cir. 2017) (dismissing a challenge based on allegations of an unlawful policy because the plaintiff did not allege specific facts that would make it plausible that such a policy existed); *McCauley v. City of Chicago*, 671 F.3d 611, 617–19 (7th Cir. 2011) (same).

In this case, the plaintiffs' assertion that the Executive Order establishes an exemption available exclusively to religious organizations is not supported either by the text of the Executive Order or by any detailed factual allegations. The text of the Executive Order does not

direct that religious organizations be exempted from the requirements of § 501(c)(3), nor does it direct that those requirements be enforced in a way that prejudices secular organizations. Rather, section 2 of the Executive Order directs that the Government, in the enforcement of the restrictions, not take adverse action against religious organizations for speech that has not ordinarily been treated as political campaign activity. The text of the Executive Order explicitly provides that it does not alter existing law and that it should be implemented consistent with existing law, which includes the political-campaign activity restrictions of § 501(c)(3).

The plaintiffs point to remarks allegedly made by the President or the White House around the time the Executive Order was issued.[2] *See* Am. Compl. ¶¶ 2, 4–7. The Court should not examine Presidential statements to hunt for meanings that cannot be found in the text of the Executive Order. *Cf. Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820) ("The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest."). In any event, none of the quoted remarks indicates that religious organizations will be exempted from the requirements of § 501(c)(3) while secular organizations will remain subject to them.

The plaintiffs also point to remarks allegedly made by the President on other occasions between June 2016 and February 2017. Am. Compl. ¶¶ 9, 46–49, 51–58, 61, 63. These remarks—alleged to have been made months before the President issued the challenged

[2] Some of the plaintiffs' allegations regarding statements made by the President appear to be inaccurate. For purposes of the present motion to dismiss, the Court can simply assume the truth of the allegations of the complaint, but the Government notes that, if this case is not dismissed, it reserves the right to dispute the plaintiffs' allegations at a later stage.

Executive Order, and in some cases before he took office—are of dubious value for shedding light on the effect of the May 2017 Executive Order. But even assuming that these remarks are relevant, they do not support the plaintiffs' claims of discriminatory treatment. While some of the remarks allude to a desire to "get rid of," "totally destroy," or seek "repeal" of the § 501(c)(3) provisions regarding political campaign activity, it does not follow that the May 2017 Executive Order in fact effects a repeal of those provisions, especially given the language of the Executive Order itself. Moreover—and crucially for purposes of the plaintiffs' theory in this case—none of the quoted statements suggests that the President would seek *partial* repeal of the § 501(c)(3) provisions in a manner that would result in unequal treatment of the plaintiffs. A full repeal of the campaign-activity restrictions would not injure the plaintiffs; it would only benefit them. *See Johnson v. U.S. Office of Pers. Mgmt.*, 783 F.3d 655, 666 (7th Cir. 2015) (holding that the plaintiffs could not establish standing based on a claim that they were treated "too favorably"); *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 823 (7th Cir. 2014) ("[A] party who receives an exemption has no standing to challenge it."). None of the quoted statements alludes to a partial repeal that would lift the restrictions on political campaign activity only for religious organizations, while leaving the restrictions unchanged for secular organizations.

The plaintiffs' amended complaint additionally recites statements allegedly made by the President in June and July 2017, after issuance of the Executive Order. *See* Am. Compl. ¶¶ 68–70. But these statements, like the other cited statements, do not suggest that the Executive Order requires preferential treatment for religious organizations in the enforcement of the requirements of § 501(c)(3). Under the "facial plausibility" standard discussed above, none of the statements supports treating the Executive Order as a directive to treat religious organizations more favorably than secular organizations. *See Bell Atl. Corp.*, 550 U.S. at 557 (explaining that to

survive a motion to dismiss, a complaint must present factual allegations "plausibly suggesting" and "not merely consistent with" a valid claim).

The plaintiffs also allege that some news reports and advocacy organizations have suggested that the Executive Order directs preferential treatment for religious organizations. Am. Compl. ¶¶ 68–79. These allegations are irrelevant. Legal conclusions are not enough to state a proper claim, even when the plaintiff alleges that other persons have drawn the same legal conclusions. Rather, the plaintiff must allege facts that provide a reasonable foundation for those legal conclusions. *Cf. Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1152 n.7 (2013) (holding that the plaintiffs could not establish standing to challenge Government surveillance based on actions taken by third parties to avoid surveillance because those third parties did not have a reasonable basis for believing their communications would be intercepted).

Finally, the plaintiffs allege in their amended complaint that the IRS has "disregard[ed] open and notorious violations of the Johnson Amendment by religious officials." Am. Compl. ¶¶ 109–110. This allegation falls several steps short of supporting the plaintiffs' ultimate contention that the Executive Order establishes a policy of unequal enforcement of the terms of § 501(c)(3). It would not show that IRS has an overall policy of disregarding violations by religious organizations, that such a policy was rooted in the Executive Order, or that secular organizations are subject to stricter enforcement compared to religious organizations. *See Iqbal*, 556 U.S. at 678 ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" (quoting *Bell Atl. Corp.*, 550 U.S. at 557)).

Moreover, the plaintiffs do not identify any action taken by the IRS to suggest that it has taken steps to implement the Executive Order in a way that exempts religious organizations from

the restrictions on political campaign activity while leaving the restrictions in place for secular organizations like FFRF. On the contrary, the IRS has not withdrawn or amended its previously issued regulations or guidance pertaining to application of the § 501(c)(3) provisions governing political campaign activity. Those previously issued regulations and guidance subject religious and nonreligious organizations to the same standards and requirements.

FFRF brought an earlier suit in 2012 challenging what it viewed as inadequate enforcement of the § 501(c)(3) political campaign activity provisions against religious organizations. The suit was later voluntarily dismissed,[3] but during the proceedings, this Court held that FFRF's complaint adequately alleged that the IRS had a policy of favoring religious organizations. *Freedom from Religion Found., Inc. v. Shulman*, 961 F. Supp. 2d 947, 952 (W.D. Wis. 2013) ("At . . . the pleading stage, the Foundation need only *allege* that the IRS has such a policy, which it has done." (citations omitted)). That decision is not binding precedent, however, and it should not be followed in this case, because it did not address the "facial plausibility" standard prescribed by the Supreme Court and Seventh Circuit precedent discussed above, and more particularly the need under that standard to allege specific facts that establish the existence of a policy. Moreover, the 2012 complaint contained at least some specific allegations concerning the IRS's enforcement of the political campaign activity restrictions. *See* Complaint ¶¶ 21–31, *Freedom from Religion Found., Inc.*, 961 F. Supp. 2d 947 (W.D. Wis. Nov. 14, 2012) (Case No. 12-CV-818), https://ffrf.org/images/uploads/legal/FFRFvShulmanComplaint.pdf, *cited in Freedom from Religion Found., Inc.*, 961 F. Supp. 2d at 952. The plaintiffs' allegations in this

[3] FFRF states on its Web site that FFRF agreed to dismiss the 2012 suit because "the IRS demonstrated it does not have a blanket policy or practice of non-enforcement of political activity restrictions." Freedom from Religion Found., Victory: FFRF, IRS settle suit over church politicking, https://ffrf.org/legal/challenges/highlighted-court-successes/item/16261-ffrf-sues-irs-over-non-enforcement-of-church-electioneering-restrictions (last visited Nov. 9, 2017).

case are less specific and, as explained above, are not enough to establish that the IRS has applied or will apply the Executive Order in the manner the plaintiffs describe. Accordingly, the plaintiffs cannot demonstrate any "actual or imminent" injury based on the Executive Order.

Indeed, the Courts of Appeals of both the D.C. Circuit and the Fifth Circuit have rejected attempts to challenge Executive Orders based on a mere possibility that they could be implemented in a questionable manner. In *Building and Construction Trades Department v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002), labor unions and a city government sought an injunction against an Executive Order concerning federal and federally funded construction contracts, contending in part that the Executive Order could be implemented in a manner that conflicted with federal statutes. *See id.* at 30–31. The court held that a "mere possibility" that the Executive Order could be implemented in an unlawful manner could not "justify an injunction against enforcement of a policy that, so far as the present record reveals, is above suspicion in the ordinary course of administration." *Id.* at 33. The court noted that the Executive Order specified that it applied "[t]o the extent permitted by law" and that the Order was facially valid, meaning that it was possible that it could be implemented in a lawful manner. *Id.* (alteration in original) (noting that, to prevail in a facial challenge against a regulation, the plaintiff must "establish that no set of circumstances exists under which the [regulation] would be valid" (alteration in original) (quoting *Reno v. Flores*, 507 U.S. 292, 301 (1993))); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987). The Executive Order challenged in this case likewise specifies that it applies "to the extent permitted by law," *see supra* p. 7, and nothing in the Executive Order makes it impossible that it could be implemented in a lawful manner.

Similarly, in *National Treasury Employees Union v. Bush*, 891 F.2d 99 (5th Cir. 1989), a union sought to challenge an Executive Order authorizing employee drug testing. *Id.* at 100. The

Fifth Circuit found that "because not every application of the Order would be invalid, . . . [a]ny challenges to its implementation must be launched against the individual agency plans promulgated under it." *Id.* at 101. In this case, the plaintiffs must direct their challenge at specific actions taken by the IRS under the Executive Order, and the IRS has not taken any actions to implement the Executive Order in a way that discriminates against secular organizations or otherwise injures the plaintiffs.

Because the plaintiffs' factual allegations do not support their assertion that the Executive Order institutes a policy of unequal treatment, the complaint should be dismissed.

2. The plaintiffs have not made any request to be exempted from the political campaign activity restrictions of § 501(c)(3) in the same way they claim religious organizations have been exempted under the Executive Order.

Another reason the plaintiffs cannot meet the injury-in-fact requirement is that they have not alleged that they themselves have suffered any unequal treatment, as they have not alleged that they sought and were denied an "exempt[ion]" of the kind they claim has been granted to religious organizations, Am. Compl. ¶ 64.

For the reasons explained in the previous section, it would be improper for the Court to assume that the Government has adopted a policy exempting religious organizations and thereby prejudicing secular organizations. Even under such an assumption, however, the plaintiffs still could not establish standing. When plaintiffs have "neither been personally denied equal treatment under the law nor in any way prosecuted by the IRS," and "do not complain about their own tax status," they lack standing if all they do is "point to an assertedly illegal benefit flowing to a third party that happened to be a religious entity." *Abortion Rights Mobilization Inc. v. Baker* (*In re U.S. Catholic Conference*), 885 F.2d 1020, 1022, 1026 (2d Cir. 1989) (stating that such allegations are "not enough" to establish standing).

Indeed, in a very similar case brought by these same plaintiffs, the Seventh Circuit held that the plaintiffs lacked standing to challenge a tax exemption that permits clergy to receive housing benefits from their churches without having to pay federal income tax. *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 825 (7th Cir. 2014). The court noted that to establish standing based on injury in the form of unequal treatment, a plaintiff must have been "personally denied equal treatment." *Id.* at 822 (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)); *see also Flight Attendants Against UAL Offset (FAAUO) v. Comm'r*, 165 F.3d 572, 574 (7th Cir. 1999) ("Ordinarily a person does not have standing to complain about someone else's receipt of a tax benefit."). Because the plaintiffs had never asked for the exemption, they could not claim to have been denied the exemption and therefore could not establish standing. *See Freedom from Religion Found., Inc.*, 773 F.3d at 821. The court acknowledged that there was little reason to believe the plaintiffs would be permitted to claim the exemption, given that the exemption was explicitly limited to clergy, but the court found that that did not warrant any departure from the basic requirements of standing. *See id.* at 824–25 & n.6.[4]

In other words, a plaintiff alleging unequal treatment lacks the requisite personal injury unless and until the person seeks—and is denied—equal treatment. Until that point, the plaintiff complains only of a generalized grievance. Put another way, a person does not have standing to ask that another person's tax benefit be taken away without being denied the benefit himself. Any injury would otherwise be too abstract and diffuse. Here, the plaintiffs have not alleged that they

[4] The plaintiffs later requested tax refunds in connection with one of the disputed tax provisions and, after the IRS denied the refund request, filed a new lawsuit. In that new suit, the district court held that the IRS's denial of the plaintiffs' refund request was enough to establish standing. *See Gaylor v. Mnuchin*, No. 16-cv-215-bbc, 2017 WL 4466621, at *3–6 (W.D. Wis. Oct. 6, 2017). In this case, however, the plaintiffs do not point to any comparable adverse action by the IRS.

have sought and been denied the benefits of the exemption that they claim has been provided to religious organizations. Thus, the plaintiffs cannot establish standing.

3. The plaintiffs cannot establish standing based on any other theory.

As explained above, the plaintiffs have not alleged facts that could support their theory that the Executive Order denies them equal treatment by affording an exemption to religious organizations and not to secular organizations. Nor is there any other theory under which the plaintiffs could establish standing.

Plaintiffs who rely on the Establishment Clause are subject to the same basic standing requirements as plaintiffs who rely on any other provision of law. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 482–90 (1982) (holding that the plaintiffs' reliance on the Establishment Clause did not "demand[] special exceptions" from the requirement of standing). A mere concern with the legality of government action, no matter how sincere, is not enough; the plaintiff must demonstrate that the challenged government action has caused it some personal injury. Indeed, the plaintiffs in this case frequently challenge government action under the Establishment Clause, and in many cases they or their organization have been found to lack standing. *E.g.*, *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (plurality opinion) (concluding that the plaintiffs lacked standing to challenge Executive Branch spending on conferences promoting faith-based programs); *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 825 (7th Cir. 2017), *discussed supra* p. 22; *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 805 (7th Cir. 2011) (holding that the plaintiffs lacked standing to challenge a statute and presidential proclamations concerning a National Day of Prayer); *Freedom from Religion Found., Inc. v. Nicholson*, 536 F.3d 730, 731 (7th Cir. 2008) (holding that the plaintiffs lacked standing to challenge Veterans Administration chaplain programs); *Freedom from Religion Found., Inc. v.*

Zielke, 845 F.2d 1463, 1469 (7th Cir. 1988) (holding that the plaintiffs lacked standing to challenge the placement of a monument to the Ten Commandments in a city park).

The plaintiffs cannot establish standing based on their status as taxpayers. "Absent special circumstances, . . . standing cannot be based on a plaintiff's mere status as a taxpayer." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 134 (2011). The Supreme Court has recognized a narrow exception permitting taxpayers to challenge certain government expenditures under the Establishment Clause, but that exception is inapplicable here for several reasons, including that this case challenges Executive Branch action and does not challenge direct government expenditures. *See id.* at 141–43 (holding that the exception, originally established in *Flast v. Cohen*, 392 U.S. 83 (1968), did not permit challenges to tax credits).

Nor can the plaintiffs establish standing based on their general interest in the separation of church and state, *see* Am. Compl. ¶¶ 22–27. An advocacy organization's interest in the subject matter of a case is not enough to establish standing. *See Valley Forge Christian Coll.*, 454 U.S. at 486 ("It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy."); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976) ("Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III."); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) ("[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the [Administrative Procedure Act, 5 U.S.C. § 702]."). In some circumstances, a membership organization may sue on behalf of its members, but an

organization can establish standing on this basis only if it can identify at least one member who would have standing to sue in his or her own right. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (noting that a membership organization suing on behalf of its members must show that "its members would otherwise have standing to sue in their own right"); *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (noting that prior cases "have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm"). The plaintiffs have not identified any FFRF member who meets the requirements of standing.

The plaintiffs also cannot establish standing based on any impact the § 501(c)(3) political campaign activity restrictions have on FFRF alone, separate from any supposed unequal treatment. Even assuming that the restrictions imposed by § 501(c)(3) cause some injury to the plaintiffs, that injury could not support standing in this case, because it is not traceable to the challenged Executive Order and because the relief the plaintiffs are seeking would not relieve the injury. The plaintiffs are not seeking relief that would release FFRF from the political-campaign activity restrictions of § 501(c)(3); rather, they are seeking relief only to ensure that the restrictions are applied against religious organizations. *See* Am. Compl. at 23–24 (requests for relief); *Johnson v. U.S. Office of Pers. Mgmt.*, 783 F.3d 655, 661–63 (7th Cir. 2015) (holding that even assuming the plaintiffs were injured by administrative burdens imposed by the challenged statute, that was not enough to establish standing to challenge other aspects of the same statute); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

Indeed, if the plaintiffs did aim to secure favorable tax treatment for themselves, rather than merely objecting to favorable tax treatment purportedly granted to other organizations, this Court most likely would lack jurisdiction for a different reason—the suit would be barred by the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), which generally bars federal court jurisdiction over any "suit for the purpose of restraining the assessment or collection of any tax." *Id.*; *see, e.g.*, *Cleveland v. Comm'r*, 600 F.3d 739, 742 (7th Cir. 2010) (per curiam); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 738 (1974) (holding that the Tax Anti-Injunction Act barred a suit pertaining to an organization's qualification for the § 501(c)(3) exemption); 26 U.S.C. § 7428 (authorizing suits seeking declaratory relief relating to § 501(c)(3) status but specifying a narrow procedure for such suits).

4. For similar reasons, the plaintiffs' challenge to the Executive Order is not ripe.

For similar reasons, the plaintiffs' challenge to the Executive Order does not meet the jurisdictional requirement of ripeness.

As discussed above, neither the text of the Executive Order nor the allegations made in the plaintiffs' complaint provide any basis for believing that the Government will implement the Executive Order in a way that exempts religious organizations from the political campaign activity restrictions of § 501(c)(3) while denying a similar exemption to secular organizations. Such a policy may never be implemented, and the plaintiffs may never suffer the kind of unfavorable treatment described in their complaint. This case does not present a concrete set of facts that could anchor an analysis of the plaintiffs' claims, and the plaintiffs are not suffering any present hardship that calls for immediate judicial intervention. *See Rock Energy Coop. v. Vill. of Rockton*, 614 F.3d 745, 749 (7th Cir. 2010) (finding that the plaintiffs' claims were not ripe in part because the plaintiffs did not show how a decision "would resolve some present hardship");

Corey H. v. Bd. of Educ., 534 F.3d 683, 689 (7th Cir. 2008) (holding that a challenge to limits on enrollment of disabled students was not ripe because no concrete action had been taken based on those limits).

D. The Plaintiffs' Claim of a Pattern of Endorsement of Religion Should Be Dismissed Because the Plaintiffs Cannot Establish Standing and Because Their Claim Presents a Nonjusticiable Political Question

1. The plaintiffs lack standing because they have not alleged that the President's conduct has caused them any concrete harm.

The plaintiffs' amended complaint introduced a new claim that the President's "statements and actions" create an "appearance of religious endorsement in violation of the Establishment Clause." Am. Compl. ¶ 11. The Court lacks subject matter jurisdiction over this claim for at least two independent reasons: the plaintiffs lack standing because they cannot show any injury, and the claim raises a nonjusticiable political question.

The plaintiffs' new claim is not explained clearly, but it appears to assert that the President's conduct—including the speeches he delivers, the persons and groups he meets with, and his responsiveness to religious interests—exhibits a broad pattern of "endorsement" of religion. *See* Am. Compl. ¶¶ 11, 16, 81–86, 118.

As explained above, the plaintiffs cannot establish standing to challenge the Executive Order because they have not alleged that the Executive Order causes them any direct, concrete injury. For similar reasons, the plaintiffs cannot show that they have suffered any injury from the President's broader conduct. As explained above, the plaintiffs' reliance on the Establishment Clause and their organization's focus on separation of church and state are not enough to support standing.

The plaintiffs claim they suffer harm when they are exposed to news reports about the President's actions, *see* Am. Compl. ¶ 106, but that is not the kind of injury that can support

standing. In *Freedom from Religion Foundation, Inc. v. Obama*, 641 F.3d 803 (7th Cir. 2011), the Seventh Circuit held that the plaintiffs (including the three plaintiffs in this case) lacked standing to challenge a statute and presidential proclamations concerning a National Day of Prayer. The court found, in line with longstanding Supreme Court precedent, that a feeling of "offense at a public official's support of religion" could not support standing under Article III. *Id.* at 807; *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 483 (1982) (explaining that a "generalized grievance[]" about the legality of Government action is not enough to support standing). As in this case, the plaintiffs suggested that their "generalized grievance" about the Government's actions became a personal injury when they learned about the Government's actions by reading the news. *See Freedom from Religion Found., Inc.*, 641 F.3d at 812 (Williams, J., concurring) (noting that the plaintiffs had stated "that they learned about the National Day of Prayer through the media, through their friends, and by visiting the White House website"). The Seventh Circuit was not persuaded, and the Court should reject the argument in this case as well.

2. The plaintiffs' claim presents a nonjusticiable political question because it would be neither feasible nor proper for a court to decide when a President has been too responsive to the interests of religious persons and groups

The plaintiffs' new claim also presents a political question outside the authority of the federal courts. As explained above, the Supreme Court has identified six characteristics that indicate a nonjusticiable political question. At least four of these characteristics are present in this case.

First, there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). The plaintiffs' new claim is directed not at any particular action taken by the President, but at the manner in which the President performs his duties day by day—how and to whom he speaks, how and to whom he

listens, and how he weighs competing interests in his decisions. But the provisions of Article II of the Constitution—including, for example, the Vesting Clause[5] and the Take Care Clause[6]—commit the executive power to the President and thereby guarantee him autonomy in his performance of executive functions. *See, e.g.*, *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) (en banc) (relying in part on the Vesting Clause and the Take Care Clause and stating that, "[i]n making decisions on personnel and policy, and in formulating legislative proposals, the President must be free to seek confidential information from many sources, both inside the government and outside"); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (holding that it would be improper for the courts to take over the President's duty to "take Care that the Laws be faithfully executed"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867) ("[T]his court has no jurisdiction of a bill to enjoin the President in the performance of his official duties . . . .").

Second, there are "no judicially discoverable and manageable standards" to apply. *Baker*, 369 U.S. at 217. There is no legal test a court could apply to determine whether the President has met with too many religious persons or groups or has been too responsive to their interests. The only kind of judgment that can be made on those matters would be a political judgment.

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[5] U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

[6] U.S. Const. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . .").

The first two factors echo in the third and fourth factors—the plaintiffs' claim raises questions impossible to decide "without an initial policy determination of a kind clearly for nonjudicial discretion," and it would be impossible for a court to "undertak[e] independent resolution without expressing lack of the respect due coordinate branches of government." *Id.* The manner in which the President performs his duties is "clearly for nonjudicial discretion," and judicial supervision of the President's day-to-day conduct would be an unprecedented and unjustified intrusion into the affairs of the Executive Branch. *See Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 343 (7th Cir. 1987) ("The remedies for ineffectual public officials are political rather than constitutional."); *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 806 (7th Cir. 2011) ("The Judicial Branch does not censor a President's speech."). As the Seventh Circuit held in *Freedom from Religion Found., Inc. v. Nicholson*, 536 F.3d 730 (7th Cir. 2008), judicial supervision of Executive Branch action threatens to "subvert the delicate equilibrium and separation of powers that the Founders envisioned." *Id.* at 742–43 (citing *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 612 (2007) (plurality opinion) and *Hein*, 551 U.S. at 617 (Kennedy, J., concurring)); *see also Hein*, 551 U.S. at 612 (plurality opinion) (warning against any rule that would permit courts to supervise "the speeches, statements, and myriad daily activities of the President"); *id.* at 617 (Kennedy, J., concurring) (stating that courts must not "assume the role of speech editors for communications issued by executive officials and event planners for meetings they hold").

Thus, the plaintiffs' new claim should be dismissed for lack of standing or based on the political question doctrine.

II. The Complaint Also Fails to State a Claim for Relief

A. Standards Governing a Motion to Dismiss for Failure to State a Claim

Because the plaintiffs cannot show any present personal injury that satisfies the requirements of standing and ripeness, the case should be dismissed for lack of subject matter jurisdiction. Even if the Court were to find that it has jurisdiction, it should dismiss the case for failure to state a claim under Rule 12(b)(6).

As explained above, a court evaluating a motion to dismiss applies the same basic analysis to determine whether the complaint adequately pleads subject matter jurisdiction and whether it adequately states a claim. *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015). The Court applies the "facial plausibility requirement" elucidated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), under which the Court examines whether the allegations of the complaint, "accepted as true," contain "factual content that allows the court to draw the reasonable inference" that the case establishes the elements of a valid claim. *Silha*, 807 F.3d at 173–74 (quoting *Iqbal*, 556 U.S. at 678). But the Court does not have to consider allegations that state only bare assertions or conclusions of law without supporting factual details. *See supra* pp. 10–11. If the allegations of the complaint are not sufficient to establish a valid claim for relief, the case must be dismissed; the Court cannot defer ruling on the motion to permit discovery or other further proceedings. *See supra* p. 11 (citing *Iqbal*, 556 U.S. at 684–86).

B. The Plaintiffs' Claims Challenging the Executive Order Should Be Dismissed Because the Plaintiffs' Allegations Do Not Suggest that the Executive Order Will Be Implemented in the Manner that the Plaintiffs Describe.

The plaintiffs' varied claims challenging the Executive Order all rest on their mistaken premise that the Executive Order purports to establish an exemption available to religious organizations and not secular organizations. As explained above, neither the text of the Executive

Order nor the allegations of the complaint provide any basis for reading the Executive Order in this way. The plain text of the Executive Order directs the Government, in enforcing the § 501(c)(3) political campaign activity restrictions, not to take adverse action against religious organizations for speech that has not ordinarily been treated as political campaign activity. It explicitly disclaims any intent to modify any law or grant any enforceable legal rights. As a result, the face of the Executive Order provides no basis to conclude that a secular organization will be treated any worse than a religious organization. And, without that necessary predicate, the plaintiffs cannot make out an Equal Protection Clause or Establishment Clause challenge because the *sine qua non* of such a claim—denial of equal treatment—is absent.

To the extent, however, that the plaintiffs' Equal Protection Clause or Establishment Clause claims boil down to the assertion that the Executive Order unconstitutionally singles out religion, such a claim would also be meritless. The Supreme Court has "long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144–45 (1987)); *see Cutter v. Wilkinson*, 544 U.S. 709, 719–20 (2005) (upholding the Religious Land Use and Institutionalized Persons Act as a "permissible legislative accommodation of religion," even though it was not "compelled by the Free Exercise Clause").

Indeed, the Supreme Court has upheld religiously focused exemptions and protections as constitutionally permissible. *See Corp. of the Presiding Bishop*, 483 U.S. at 336–39 (upholding a religion-specific exemption to Title VII as a permissible accommodation even if it was not required by the Free Exercise Clause); *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970) (holding

that exempting religious organizations from a generally applicable property tax did not violate the Establishment Clause). The entire body of religious accommodation laws necessarily single out religion because "[b]y definition any special 'accommodation' requires the employer to treat an employee . . . differently, *i.e.*, preferentially." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002); *see also EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015) ("Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment . . . ."). Consequently, any claim stemming solely from a special focus on religion does not make out a claim for unconstitutional religious favoritism. Rather, the Executive Order advances the constitutionally valid secular purpose of avoiding both the entanglement with religion and the abridgment of free exercise that could arise from taking adverse actions against religious organizations for speech that has not ordinarily been treated as political campaign activity.

Finally, the plaintiffs cannot succeed in a facial challenge to the Executive Order based on a mere theoretical possibility that the Executive Order could someday be implemented in an unlawful manner. Rather, a facial challenge requires the plaintiffs to establish that "no set of circumstances exists under which the [Executive Order] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987). Because the plaintiffs cannot meet that standard, the Executive Order is facially valid, and legal challenges to the Executive Order must be directed at specific action taken under the Order. *See Bldg. & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002); *Nat'l Treasury Emps. Union v. Bush*, 891 F.2d 99, 101 (5th Cir. 1989). IRS

has not taken any steps to implement the Order in any way that might give rise to a constitutional claim.[7]

C. The Facts Alleged in the Plaintiffs' Complaint Do Not State a Claim under the Establishment Clause.

The plaintiffs' new claim that the President's "statements and actions" create an "appearance of religious endorsement," Am. Compl. ¶ 11, also does not state a valid claim under the Establishment Clause. The Establishment Clause does not regulate the President's general responsiveness toward religious persons, groups, or interests, and this Court lacks authority to issue an injunction purporting to supervise the President's day-to-day performance of his duties.

The plaintiffs' new claim is not articulated clearly, but it appears to assert that the President's overall conduct—including the speeches he delivers, the persons and groups he meets with, and his responsiveness to religious interests—exhibits a pattern of "endorsement" of religion. *See* Am. Compl. ¶¶ 11, 16, 81–86, 118. The plaintiffs seek an injunction barring the President from "engaging in public acts and deeds constituting government-sponsored endorsements of religion." Am. Compl. at 23–24.

As an initial matter, notwithstanding the wording of the plaintiffs' complaint, it is not clear that "endorsement" is a useful concept for evaluating the plaintiffs' Establishment Clause claim. In *Doe ex rel. Doe v. Elmbrook School District*, 687 F.3d 840 (7th Cir. 2012) (en banc), the en banc Seventh Circuit stated that "the prevailing analytical tool for the analysis of Establishment Clause claims" is the three-part test described in *Lemon v. Kurtzman*, 403 U.S.

[7] To the extent the plaintiffs rely on the Take Care Clause, U.S. Const. art. II, § 3, it also bears noting that the Take Care Clause does not provide a cause of action against the President or other officers. *See Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1867) (holding that "the duty of the President in the exercise of the power to see that the laws are faithfully executed . . . is purely executive and political"); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (holding that it would be improper for the courts to take over the President's duty to "take Care that the Laws be faithfully executed").

602 (1971), under which a governmental practice violates the Establishment Clause "if it (1) lacks a legitimate secular purpose; (2) has the primary effect of advancing or inhibiting religion; or (3) fosters an excessive entanglement with religion." *Doe*, 687 F.3d at 849 (quoting *Books v. City of Elkhart*, 235 F.3d 292, 301 (7th Cir. 2000) and citing *Lemon*, 403 U.S. at 612–13). The court went on to say that examining whether the challenged Government action amounts to "endorsement" of religion is a "legitimate part of *Lemon*'s second prong." *Id.* at 850. But the court also noted that the applicability of the *Lemon* test is uncertain. *See id.* Ultimately, the court explained, Establishment Clause challenges should be judged "on the basis of judicial interpretation of social facts which must be judged in their unique circumstances," informed by a general principle "that the First Amendment mandates government neutrality . . . between religion and nonreligion." *Id.* (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000), and *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005)). Indeed, some Supreme Court decisions have not applied the *Lemon* test at all, including the Court's most recent Establishment Clause decision, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), which was decided after *Doe*. *See Elmbrook Sch. Dist. v. Doe ex rel. Doe*, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting from denial of certiorari) (criticizing the Seventh Circuit's discussion in *Doe* and stating that, at least after *Town of Greece*, "endorsement" is not a proper test for analyzing Establishment Clause claims); *see also, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion) (observing that the Supreme Court had not applied the *Lemon* test in all Establishment Clause cases and concluding that the test was "not useful" in evaluating the case at hand). And in *Town of Greece*, the Supreme Court further explained that "the Establishment Clause must be interpreted by reference to historical practices and understandings. . . . Any test the Court adopts must acknowledge a practice that was accepted by

the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece*, 134 S. Ct. at 1819 (quoting and citing *Cty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (opinion of Kennedy, J.)).

In any event, whatever the precise test applicable to the plaintiffs' claim, it is clear the Establishment Clause does not restrict the President's ability to speak to or meet with religious persons and groups or to take their interests into account in his decisionmaking. The Supreme Court has emphasized time and again that the Establishment Clause does not require the exclusion of religious persons, groups, or ideas from the public sphere. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (stating that Government action "fostering a pervasive bias or hostility to religion . . . could undermine the very neutrality the Establishment Clause requires"); *Lee v. Weisman*, 505 U.S. 577, 598 (1992) ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."); *see also Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment) ("[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.").

Indeed, a proper analysis of the plaintiffs' Establishment Clause claim must take due account of other constitutional guarantees. The Free Exercise Clause protects religious persons and groups from the imposition of "special disabilities based on their religious status." *E.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)), and the

Free Speech Clause prevents the Government from suppressing their voices based on their religious viewpoints. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112, 119 (2001) (holding that the Free Speech Clause protected a religious organization from discrimination based on its religious viewpoint, and the Establishment Clause did not require such discrimination). And the President himself has personal rights of speech and association, including the right to "receive information and ideas" from religious groups. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)); *cf. Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 806 (7th Cir. 2011) ("The Judicial Branch does not censor a President's speech."); *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 994 (7th Cir. 2006) (commenting that it was "frivolous" for the plaintiffs to assert that the President violated the Establishment Clause by speaking in favor of faith-based organizations and noting that the President is "entitled to express his opinion about such organizations"), *rev'd on other grounds*, *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007); *Van Orden*, 545 U.S. at 723 (Stevens, J., dissenting) (arguing that references to religion in speeches made by public officials often do not raise Establishment Clause concerns because "when public officials deliver public speeches, we recognize that their words are not exclusively a transmission from *the* government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity"). The Establishment Clause should not be read as displacing those rights.

Moreover, the kind of injunction requested by the plaintiffs would be improper. The Supreme Court has held that the separation of powers generally prevents a federal court from issuing an injunction purporting to supervise the President's performance of his duties. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867) ("[T]his court has no jurisdiction of a

bill to enjoin the President in the performance of his official duties . . . ."); *accord Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992) (plurality opinion); *Franklin*, 505 U.S. at 826–29 (Scalia, J., concurring in part and concurring in the judgment). A court order purporting to dictate how the President may speak, with whom he may meet, and how he may weigh competing interests in his decisions would be an unprecedented intrusion into the prerogatives of the Executive Branch.

The injunction requested by the plaintiffs also would be improper because it would not provide clear notice of what is prohibited under the injunction. Rule 65(d)(1) of the Federal Rules of Civil Procedure requires that any injunction issued by a court must "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(B)–(C). An injunction against "engaging in public acts and deeds constituting government-sponsored endorsements of religion" would be too vague to meet this requirement. *See, e.g.*, *McCarthy v. Fuller*, 810 F.3d 456, 461 (7th Cir. 2015) (finding that an injunction barring the defendants from making statements "similar" to statements listed in the order was impermissibly vague); *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 675 (7th Cir. 2008) (finding that an injunction preventing the plaintiff's school from restricting the plaintiff from making "negative comments about homosexuality short of fighting words" would have been impermissibly vague). A vague injunction is not proper against any defendant, and would be especially improper against the President.

CONCLUSION

Because the Executive Order does not afford unequal treatment to the plaintiffs or cause them any other concrete injury, the plaintiffs' challenge to the Executive Order fails to meet the jurisdictional requirements of standing and ripeness and should be dismissed. Similarly, the plaintiffs' challenge to the President's interactions with religious persons and groups should be

dismissed because the plaintiffs have not shown they have been injured by the President's conduct, and their claim presents a purely political question. If the plaintiffs' claims are not dismissed for lack of subject matter jurisdiction, they should be dismissed for failure to state a claim.

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Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

JEFFREY M. ANDERSON
Acting United States Attorney

BRETT A. SHUMATE
Deputy Assistant Attorney General

LESLEY FARBY
Assistant Branch Director

s/ JAMES C. LUH
JAMES C. LUH
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave NW
Washington DC 20530
Tel: (202) 514-4938
Fax: (202) 616-8460
E-mail: James.Luh@usdoj.gov
Attorneys for Defendants