UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiff,

v.

DOUGLAS SHULMAN, Commissioner of the Internal Revenue Service,

Defendant.

Case No. 12-CV-0818

BRIEF IN SUPPORT OF
PROPOSED INTERVENORS' MOTION TO INTERVENE

Proposed intervenors consist of Holy Cross Anglican Church, a small church in central Wisconsin, and its vicar, Father Patrick Malone, a Benedictine abbot. Father Malone believes that his Anglican faith requires him to provide timely religious instruction on matters relevant to the Church, including specific moral considerations about voting for particular political candidates. The Church, in turn, believes that it has a religious duty to receive and act on that guidance. While the Church and Father Malone understand that the Internal Revenue Service prohibits such guidance within the context of Church services, they believe that they have a constitutional and statutory right to obey their religious beliefs.

Plaintiff Freedom From Religion Foundation ("FFRF") has sued Defendant Shulman in an effort to have the agency that Shulman directs, the IRS, punish Father Malone and the Church for Father Malone's religious guidance on political

candidates.[1] Father Malone and the Church seek to protect their statutory and constitutional rights against the imposition of such punishment, and therefore oppose FFRF's lawsuit. As the real parties in interest, Father Malone and the Church now move for leave to intervene as of right under Fed. R. Civ. P. 24(a). Alternatively, they seek permissive intervention under Rule 24(b). FFRF has stated that it anticipates opposing the motion at this time; Defendant had not yet taken a position on the motion at the time of filing.

FACTUAL AND PROCEDURAL BACKGROUND

Proposed Intervenors.

Father Malone is the vicar of Holy Cross Anglican Church ("Church") in Milwaukee, Wisconsin, and is responsible for the Church's preaching and teaching. Fr. Malone Decl. ¶ 2. He is also a member of the Order of Saint Benedict and has served as Abbot of the Anglican Communion Benedictines, a Benedictine community devoted to prayer, for over a year. *Id.* He has over 25 years of pastoral and ministry experience. *Id.*

Holy Cross Anglican Church is a member of The Anglican Church of North America and under the diocese of CANA East, the diocese of the Convocation of Anglicans in North America that covers the eastern half of the United States. *Id.* at ¶ 3. There are 55 active members of the church who regularly attend Sunday wor-

[1] Proposed Intervenors recognize that Douglas Shulman is no longer the Commissioner of the IRS. However, since as of the date of this filing he remains the named Defendant in this case, they continue to refer to him as such.

ship services. *Id.* The IRS has recognized the Church's I.R.C. § 501(c)(3) status. *Id.* at ¶ 4.

Religious Beliefs and Teaching.

As the vicar of Holy Cross Anglican Church, Anglican teaching requires Father Malone to preach to the Church about what it means to be a follower of Jesus Christ. *Id.* at ¶ 5. This requires Father Malone to preach Anglican religious beliefs without censoring any part of Scripture. *Id.* at ¶ 6 (citing Article XIX, 39 Articles of Religion (September 12, 1801), *available at* http://anglicansonline.org/basics/thirty-nine_articles.html (noting that the church must be a place "in which the pure Word of God is preached")).

Such beliefs include the Anglican duty to "uphold and advocate justice in society" and to "seek relief and empowerment of the poor and needy," particularly for "the most vulnerable among [society, such as] . . . the unborn." *Id.* at ¶ 7 (quoting CANA East Statement of Belief, *available at* http://canaeast.com/#/welcome/we-believe; *and* CANA East Vision & Mission: Transform Injustice, *available at* http://canaeast.com/#/vision-mission/transform-injustice). Seeking justice for the marginalized is a basic Anglican duty that, when not followed, renders the performance of other religious actions hollow and meaningless. *Id.* at ¶ 8 (citing *Isaiah* 1:10-17, 58:1-12; *Amos* 5:10-24; *and Jeremiah* 22:13-17). Indeed, Anglicans believe that providing for "the least of" society directly serves God, and failing to do so is sinful and evidence of a dead faith. *Id.* at ¶ 9 (citing *Matthew* 25:31-46; Article XXI of the 39 Articles).

To fulfill his duties as vicar, and to equip the Church congregation to fulfill theirs as Anglicans, Father Malone must preach about current problems in society and proper responses to those problems. *Id.* at ¶ 9 (citing *Proverbs* 31:8-9; *Micah* 6:8). Often, proper responses require Anglicans to intervene in the political process. Anglicans have long respected the examples of St. Thomas Becket opposing governmental limitations on religious freedom, preacher John Bunyan's refusal to recognize government authority over preaching, politician William Wilberforce's decades-long battle to end British slavery, preacher John Wesley's efforts at prison reform, Dietrich Bonhoeffer's public opposition to the Third Reich, and Rev. Martin Luther King Jr.'s demand for racial equality. *Id.* at ¶¶ 17-18 (noting that Bunyan, Wilberforce, Wesley, Bonhoeffer, and King are all memorialized at Westminster Abbey, an Anglican church). Thus, Anglicans recognize that a proper response to injustice is political action, including voting for candidates for public office who have promised to advance justice in society and protect the disadvantaged, and voting against candidates who take positions that harm those goals. *Id.* at ¶ 10 (citing *Matthew* 25:14-28, 22:21). Thus, as he believes God leads him to, Father Malone preaches to the Church about specific candidates that they should not vote for. *Id.* at ¶ 11. He has done so in the past, as recently as the November 2013 elections, and plans to do so again in the future. *Id.* at ¶ 12.

Similarly, Anglican doctrine also requires Father Malone to preach about specific moral issues that have direct political implications, and to do so near in time to elections, when the Church congregation can act on that teaching via voting and

advocacy. *Id.* at ¶ 13. This teaching on moral issues does not always include guidance about particular political candidates. *Id.*

For instance, Father Malone has taught the Anglican belief that every human being is made in the image of God, that it is wrong to intentionally take the life of innocent human beings, that unborn children are full members of the human community, and thus that elective abortion is a grievous injustice against unborn children, against mothers, and against society. *Id.* at ¶ 14. Since elective abortion is legal and widely practiced, Father Malone believes that he must regularly and appropriately instruct the Church congregation of their duty to insist on protections for the unborn and vote against those who would deny those protections. *Id.* at ¶ 15. He has given such issue-focused sermons to the Church in the past and plans to do so again in future sermons. *Id.* at ¶ 16. Father Malone believes that failing to give such sermons would be a sin against God, and would render the Church's witness to the Gospel of Christ "inauthentic, irrelevant, and ineffective." *Id.* at ¶ 19 (citing Martin Luther King, Jr., *Letter from a Birmingham Jail*).

Further, Father Malone believes that these sermons should come during normal worship services and religious gatherings since segregating it "into separate times, separate roles, or different places because that would falsely communicate . . . that Jesus' call to obedience is somehow diminished as it concerns political matters." *Id.* at ¶ 20. Nor does the Church have any other facility in which it could hold such sermons, or other entities under which it could operate for such messages to be delivered. *Id.* at¶¶ 21-22. Even if it did, Father Malone believes it would be wrong, and even impossible, to shed his role as vicar to deliver those messages. *Id.* at ¶ 20.

The IRS prohibitions.

Relying on its regulatory authority, the IRS "absolutely prohibit[s]" the Church, and Father Malone in his role as vicar of the Church, from "directly or indirectly" making "public statements" that are "in favor of or in opposition to any candidate for public office[.]" *See* IRS Publication 1828, *Tax Guide for Churches and Religious Organizations* ("IRS Church Tax Guide") at 7, *available at* http://www.irs.gov/pub/irs-pdf/p1828.pdf (last visited December 12, 2013); 26 C.F.R. § 1.501(c)(3)-1(a)(1), (c)(3)(i) (2009). The IRS has specifically identified a minister's sermon to his church about voting for or against political candidates as "absolutely prohibited." IRS Church Tax Guide at 7-8 (see Example 4). It has also stated that sermons on specific religious issues may also be absolutely prohibited based on its own determination of the "facts and circumstances" surrounding the sermons. *Id.* These "facts and circumstances" include the use of banned "code words" such as "pro-life," which Father Malone often uses in his sermons on the sanctity of human life. *See* IRS 1993 EO CPE Text, *Election Year Issues* ("*Election Year Issues*") at 411, *available at* http://www.irs.gov/pub/irs-tege/eotopicn93.pdf (last visited December 12, 2013). If the Church violates either of these prohibitions, the IRS may revoke its tax-exempt status and impose excise taxes against both it and Father Malone personally. IRS Church Tax Guide at 7, 15; *see also* I.R.C. § 4955(a)—(c) (2006) (authorizing excise taxes). Both punishments would deeply harm the Church, particularly due to its small size and its members' and leaders' modest income. Fr. Malone Decl. at ¶ 27.

Though the Church and Father Malone have been open about their religious exercise and their plan to continue it, the IRS has never enforced these prohibitions against them. *Id.* at ¶ 29. Indeed, to be forthright about their religious exercise, in 2013 they participated in the "Pulpit Initiative," which publicly joined their names to that of other churches engaged in a similar exercise of faith. http://www.speakupmovement.org/Church/Content/pdf/PFS2013FinalParticipantListforPublishing.pdf (public listing showing that Holy Cross Anglican Church was one of over 1200 churches that preached a sermon in 2013 that the IRS prohibits).

The present lawsuit.

FFRF seeks to change the IRS's enforcement approach through this lawsuit. FFRF filed the lawsuit on November 14, 2012, seeking an injunction requiring the IRS "to enforce the electioneering restrictions of § 501(c)(3) of the Tax Code against churches," and to order the IRS to have an official "initiate enforcement of the restrictions of § 501(c)(3) against churches[.]" Dkt. 1, Compl. ¶¶ 1-2. Notably, FFRF does not ask that it be treated like churches (i.e., without the application of § 501(c)(3) speech restrictions), but rather that churches be treated like it.

In its complaint, FFRF specifically identifies the types of sermons that it wants punished by the IRS to include what Father Malone and the Church have done and plan to do in the future. For instance, FFRF identifies the sermons preached in the 2012 Pulpit Initiative as punishable "noncompliance with the electioneering restrictions of § 501(c)(3)." Compl. ¶ 23. And the exemplar that it holds up as a "blatant[] and deliberate[] flaunting of the electioneering restrictions" is a letter that a Catholic bishop sent to the parishes under his authority. Compl. ¶ 22. But this letter

merely instructed the parishes "to vote" in a manner "faithful to Christ and your Catholic Faith," which required voting against "politicians . . . who callously enable the destruction of innocent human life in the womb." *See* http://ncronline.org/blogs/ncr-today/peoria-bishop-orders-catholics-polls (text of the letter) (last visited Dec. 12, 2013). This is the kind of teaching that Father Malone believes that his Anglican faith requires him to preach to the Church about the sanctity of human life. Thus, it is also what FFRF seeks to have this Court order the IRS to punish.

Since FFRF filed its lawsuit, Defendant moved to dismiss for lack of jurisdiction on April 8, 2013. The motion was denied on August 19, 2013, and Defendant filed his answer on August 27, 2013. The parties held a scheduling conference on September 26, 2013, and the Defendant moved for a certificate of appealability on December 2, 2013.

Father Malone and the Church only recently learned of this lawsuit to compel the IRS to punish their religious exercise, and have since decided to seek intervention to protect their threatened rights.

STANDARD OF REVIEW

In evaluating a motion to intervene, courts "must accept as true the non-conclusory allegations" made by the proposed intervenor, *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995), and "should avoid rigid construction of Rule 24." *Jessup v. Luther*, 227 F.3d 993, 998 (7th Cir. 2000).

ARGUMENT

I. Father Malone and the Church should be granted intervention as of right.

Fed. R. Civ. P. 24(a)(2) permits intervention as of right if: "(1) the application is timely; (2) the applicant has an 'interest' in the property or transaction that is the subject of the action; (3) the disposition of the action as a practical matter may impair or impede the applicant's ability to protect that interest; and (4) no existing parties adequately represent the applicant's interest." *U.S. v. Thorson*, 219 F.R.D. 623, 627 (W.D. Wis. 2003) (quoting *Security Ins. Co. of Hartford v. Schipporeit*, 69 F.3d 1377, 1380 (7th Cir. 1995)). "A motion to intervene as of right . . . should not be dismissed unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts which could be proved under the complaint." *Reich*, 64 F.3d at 321, (quoting *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir. 1983)). These requirements "are broadly interpreted in favor of intervention." *Id.* The court's review is also "guided primarily by practical considerations, not technical distinctions." *Id.*

Father Malone and the Church (hereafter, "the Church") meet each of the criteria and should be allowed to intervene as a matter of right.

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

Timeliness is determined "from the time the potential intervenors learn that their interest might be impaired." *Reich*, 64 F.3d at 321; *accord Thiel v. Wride*, 2013 WL 3224427, at *2 (E.D. Wis. June 25, 2013). The "test of timeliness is reasonableness": courts look to see if the intervenor has been "reasonably diligent in learning of a suit that might affect their rights," and have acted "reasonably promptly" to in-

tervene "upon so learning." *Thorson*, 219 F.R.D. at 627 (quoting *Reich*, 64 F.3d at 321). Courts then consider "the prejudice to the original parties if intervention is permitted and the prejudice to the intervenor if his motion is denied." *Reich*, 64 F.3d at 321 (citing *Shea v. Angulo*, 19 F.3d 343, 349 (7th Cir. 1994)).

The present motion presents no timeliness problems. It is being filed less than sixty days after the Church first learned of FFRF's lawsuit, Fr. Malone Decl. ¶ 32, and the Church quickly took steps to be able to intervene, *id.* at ¶¶ 34-35. Thus, measuring "from the time the [Church] learn[ed] that their interests might be impaired," *Reich*, 64 F.3d at 321, the timeliness standard is met. By comparison, courts have allowed intervention nineteen months after learning of a lawsuit, *id.*, after a final judgment had been rendered and just days before the deadline for appeal ran out, *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009), and eight years after a consent decree was entered, *U.S. v. City of Chicago*, 870 F.2d 1256, 1263 (7th Cir. 1989).

Even if the Church *had* known of the lawsuit when it was filed last November, the unprecedented nature of FFRF's claim reasonable would have made it reasonable to see if it could survive the inevitable motion to dismiss. Indeed, the slim docket sheet on this case shows that the primary action in the case concerned that motion, which was resolved less than four months ago, *see* Dkt. 17 (Aug. 19, 2013 Decision and Order denying the motion to dismiss). Thus, FFRF's novel claim has only recently become a square threat to the Church's religious exercise necessitating its intervention.

Nor would intervention work any prejudice to the parties. Identification of experts is not due until May of next year, discovery remains open until August of next year, and dispositive motions are not due until April of next year. *See* Dkt. 22 (Scheduling Order). Further, the only issues raised and decided with the motion to dismiss were legal ones.

The timeliness requirement exists "to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." *Aurora Loan Srvs., Inc. v. Caddieth*, 442 F.3d 1018, 1027 (7th Cir. 2006) (quoting *Lefkovitz v. Wagner*, 395 F.3d 773, 778 (7th Cir. 2005)). Here, the Church was not tardy and the lawsuit will not be derailed. The Church's request to intervene should therefore be granted. *See*, *e.g.*, *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) ("The motion to intervene was made at an early stage of the proceedings, the parties would not have suffered prejudice from the grant of intervention at that early stage, and intervention would not cause disruption or delay in the proceedings. These are traditional features of a timely motion.")

B. The Church has a protectable interest in the subject of the action.

The Church is entitled to intervene because FFRF seeks to force the Defendant to punish it for exercising its fundamental constitutional and civil rights.

To determine whether a protectable interest is at stake, courts "focus on the issues to be resolved by the litigation and whether the potential intervenor has an interest in those issues." *Reich*, 64 F.3d at 322. Courts have "embraced a broad definition of the requisite interest" sufficient to justify intervention, *Lake Investors*, 715 F.2d at 1259, requiring only that it be a "direct and substantial" interest, *id.*, in a

"legally protected right that is in jeopardy and can be secured" by intervention. *Aurora Loan*, 442 F.3d at 1022. Thus, Rule 24 requires "only that, as a practical . . . matter, [the Church's] interests *could be* impaired." *Habitat Educ. Ctr., Inc. v. Bosworth*, 221 F.R.D. 488, 492-93 (E.D. Wis. 2004) (emphasis added).

Here, the Church has both a practical and legal protectable interests in this lawsuit that *will be* impaired if FFRF succeeds. The sole purpose of the lawsuit is to force the IRS to punish the Church for its religious exercise. This would necessarily harm a host of the Church's legally protected rights, including:

1. The rights secured by the Religion Clauses of the First Amendment to the United States Constitution, including the Church's right to be free from government interference with internal church decisions that affect the faith and mission of the church itself, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012); its right to engage in different sorts of religious exercise free from interference from laws that are not neutral and generally applicable, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993); and its right to be free from discriminatory laws that favor other religious groups, *see Larson v. Valente*, 456 U.S. 228, 247 n.23 (1982). Father Malone's interest in preaching to the church, and the church's interest in hearing that preaching, fall squarely within the protections of the Free Exercise Clause and the Establishment Clause.
2. The rights secured by the Free Speech Clause of the First Amendment to the United States Constitution, including the Church's right to be free from content-based restrictions on religious and political speech, *see Capitol Square*

Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995); its right to be free from vague, prolix laws that can only be applied on a case-by-case basis and thus broadly restrict and chill its religious and political speech, *see Citizens United v. FEC*, 130 S. Ct. 876, 912–13 (2010); its right to be free from laws that discriminate against religious and political speech based upon the identity of the speaker, *id.*; and its right to expressive association, *see Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000). Father Malone's interest in preaching to the church, and the church's interest in hearing that preaching, fall squarely within the protections of the Free Speech Clause.

3. The right to be free from substantial government-imposed burdens on religious exercise secured by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq*. *See*, *e.g.*, *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013).

Given that these laws exist to protect the Church's right to freely express its religious beliefs, intervention is appropriate to protect that right. *Flying J*, 578 F.3d at 572 (recognizing that "the 'interest' required for intervention as a matter of right" requires that the intervenor "be someone whom the law on which his claim is founded was intended to protect.").

Further, the Church would suffer significant practical harm to its interests if FFRF obtains its desired relief. The IRS would be compelled to punish the Church's religious exercise with revocation of the Church's tax exempt status, which would both subject the Church's income to detailed examination and taxation by the federal government and prevent the Church's members from obtaining a charitable tax deduction for their tithes to the Church. IRS Church Tax Guide at 15; 26 C.F.R.

§ 1.501(c)(3)-1(a)(1), (c)(3)(i) (2009). Moreover, the IRS could also impose excise taxes against both the Church and Church leaders such as Father Malone. IRS Church Tax Guide at 15; I.R.C. § 4955(a)—(c) (2006). These compelled penalties would both chill the Church's religious exercise and, when imposed, severely harm the Church due to its small size and the modest income of its members and leadership. Fr. Malone Decl. ¶ 27.

This is more than sufficient to establish a cognizable interest under Rule 24. Courts have permitted far less concrete interests, such as that of "timber companies" who intervened "in an action to bar logging in a national forest even though they had no logging contracts and merely wanted an opportunity to bid for such contracts in the future." *City of Chicago v. Federal Emergency Management Agency*, 660 F.3d 980, 986 (7th Cir. 2011) (citing *Kleissler v. U.S. Forest Service*, 157 F.3d 964, 969-70 (3d Cir. 1998)). Indeed, this case presents the "strongest case for intervention" because it is not a case "where the aspirant for intervention could file an independent suit, but where the intervenor-aspirant has no claim against the [opposing party] yet [still has] a legally protected interest that could be impaired by the suit." *Bosworth*, 221 F.R.D. at 494 (quoting *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers*, 101 F.3d 503, 507 (7th Cir. 1996)). The Church has no stand-alone claim against FFRF; its only interest is in keeping FFRF obtaining its stated goal of forcing the IRS to chill and limit the Church's religious exercise.

C. The Church's ability to protect its interests may be impaired by the disposition of this action.

"[D]emonstrat[ing] the direct and significant nature of [the Church's] interest" often alone "meets the impairment prong of Rule 24(a)(2)." *Reich*, 64 F.3d at 323. As

the advisory committee explained, "[i]f an [intervenor] would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." Fed. R. Civ. P. 24, advisory committee's note. Here, there is no doubt that if the FFRF prevails, the Church religious exercise will be chilled and punished. Accordingly, this factor also weighs heavily in favor of granting intervention.

D. The Church's interests are not adequately represented by the existing parties to the action.

Finally, the Court should allow the Church to intervene because the Defendants cannot adequately represent its interests in this case. This factor presents a low hurdle: the Church need not show that, in fact, its interests are not being adequately represented, only that "the representation of [its] interest 'may' be inadequate[.]" *Thorson*, 219 F.R.D. at 627 (quoting *Lake Investors*, 715 F.2d at 1261); *accord Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). And courts must treat "the burden of making that showing . . . as minimal." *Thorson*, 219 F.R.D. at 627.

Here, it is impossible for the Defendant to adequately represent the Church's interests because he represents the agency that has repeatedly branded those interests as "absolutely prohibited." IRS Church Tax Guide at 7. Nor is there any doubt on this point: the IRS has specifically identified the precise religious exercise that the Church seeks to protect via intervention—sermons that provide religious instruction on voting for specific candidates—as illegal. *Id.* at 7-8, Example 4. Similarly, it has created a broad "facts and circumstances" test that chills and effectively proscribes most issue-related sermons. *Id.* at 7-8; *Election Year Issues* at 411 (ban-

ning the use of "code words" such as "pro-life"). Indeed, the longest part of the IRS's instructional tax guide for churches—four times longer than the next longest section—solely concerns the restrictions that the IRS places on the Church's sermons. *Id.* at 7-15; *see also* IRS Rev. Rul. 2007-41 (additional lengthy instructions on IRS church speech restrictions). As recently as 2002, the director of the IRS's exempt organization division testified before Congress that the religious exercise that the Church seeks to protect is prohibited. *See Review of Internal Revenue Code Section 501(c)(3) Requirements for Religious Organizations: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 107th Cong. 2 (2002). And in 2006, the IRS enforced these rules against 37 churches via excise taxes or written warnings. *See* 2004 Political Activity Compliance Initiative (PACI) Summary of Results, *available at* http://www.irs.gov/pub/irs-tege/one_page_statistics.pdf (last visited Dec. 12, 2013). This long-standing, official opposition to the Church's interests far surpasses the "minimal" burden of simply showing that that the IRS's representation "may" be inadequate. *Thorson*, 219 F.R.D. at 627.

Nor does it matter that Defendant is a government agent seeking the same general outcome as the Church. First, even governmental entities that are *charged by statute* to specifically represent a private party's interests "may" not be able to adequately represent them due to the entities' larger duty to represent the public's interest, and those two interests do "not always dictate precisely the same approach to the conduct of the litigation." *Trbovich*, 404 U.S. at 538; *see also Cal. Dump Truck Owners Ass'n* v. *Nichols*, 275 F.R.D. 303, 308 (E.D. Cal. 2011) (private applicant not adequately represented by government agency because applicant's interests were

more "narrow and parochial" and agency was required to consider "impact its rules will have on the state as a whole"); *Delano Farms Co.* v. *Cal. Table Grape Comm'n*, 1:07-CV-1610, 2010 WL 2942754, at *2 (E.D. Cal. 2010) (no adequacy of representation because "USDA, as an agency of the Executive Branch must balance a number of policy considerations"). By contrast, Defendant in this case is charged by IRS regulation to *oppose* the Church's interests. Thus, where, as here, "the government ha[s] substantive interests at variance with that of the [intervenor]"—and interest variance here is complete, not merely substantial—it cannot adequately represent the intervenor's interests. *Solid Waste Agency*, 101 F.3d at 508.

Second, only if the intervenor and the original party have "identical" interests does the presumption arise that the original party is an adequate representative. *Id.* A mere general similarity in desired outcome is insufficient. And, once again, the IRS obviously does not have an interest in defending the Church's rights to engage in religious speech that the IRS "absolutely prohibit[s]." IRS Church Tax Guide at 7.

Further, while the IRS has defended against FFRF's claims, it has not asserted any defenses under RFRA or the Freedom of Speech, Free Exercise, and Establishment Clauses of the First Amendment, nor given any indication that it would do so to the same extent as would the Church. These factors satisfy the standard for showing that "the representation of [the Church's] interest 'may' be inadequate[.]" *Thorson*, 219 F.R.D. at 627 (quoting *Lake Investors*, 715 F.2d at 1261).

Finally, the Church is also uniquely situated in this case to provide information and offer arguments from the perspective of the people who engage in precisely the religious exercise that FFRF seeks to punish. And counsel for the Church litigate

extensively on First Amendment grounds in state and federal courts throughout the country, and thus are capable of presenting information and arguments that may shed additional light on the constitutional issues before the Court. Counsel for the Church has frequently represented intervenors in Establishment Clause litigation alongside federal, state, and local government entities. *See*, *e.g.*, *Newdow* v. *Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010) (in Establishment Clause challenge, adopting argument of Defendant-Intervenors).[2]

II. Alternatively, the Church should be permitted to intervene under Rule 24(b).

Even if this Court were to find that the Church cannot intervene as of right, permissive intervention is appropriate. Rule 24(b) authorizes this Court to permit intervention with "an applicant's claim or defense and the main action have a question of law or fact in common." The determination of whether a party will be able to intervene is within the discretion of the court, which will consider whether it will unduly delay the main action or unfairly prejudice the existing parties. Fed. R. Civ. P. 24(b).

The Church easily qualifies for permission to intervene in this case. The Church's interest in protecting its religious exercise presents common questions of law and fact with those of the existing parties. It does not seek to introduce any new issue, but only to present further legal arguments as to why FFRF's claim should

[2] Should this Court be inclined to find that Defendant Shulman currently adequately represents the Church's interests, the Church requests that it defer consideration of that question until later in the case, when the Church can further evaluate the adequacy of Defendant Shulman's representation. *See Solid Waste Agency*, 101 F.3d at 508-509; *accord Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 776 (7th Cir. 2007).

fail. As noted above, this motion is timely and intervention will neither require any change to existing deadlines nor prejudice the current parties. The significance of the Church's interests in the subject matter of this litigation outweighs any marginal additional burden that would be caused by intervention. *See City of Chicago*, 660 F.3d at 986 (reversing denial of permissive intervention, noting that a concern about "unwieldy" litigation was insufficient to justify denying intervention, especially where the intervenor promised to streamline its participation). Even if the Court concluded that the Church cannot intervene as of right, it should nonetheless permit intervention under Fed. R. Civ. P. 24(b).

CONCLUSION

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

Dated: December 12, 2013

Respectfully submitted,

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