

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN**

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FREEDOM FROM RELIGION  
FOUNDATION, INC.,

Plaintiff,

Case No. 12 CV 0818

JOHN KOSKINEN, Acting Commissioner Of The  
Internal Revenue Service,

Defendant.

HOLY CROSS ANGLICAN CHURCH  
and FATHER PATRICK MALONE,

Defendant-Intervenors

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**PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

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The Plaintiff, Freedom From Religion Foundation, Inc., supports the motion to voluntarily dismiss the above captioned matter without prejudice. Voluntary dismissal is appropriate based upon the Government's apparent intent at this time to enforce the electioneering restrictions of § 501(c)(3) of the Internal Revenue Code. The I.R.S., however, is still assessing its over-all policies and procedures related to enforcement of the electioneering restrictions, as to all tax-exempt entities, in light of on-going Congressional hearings. In light of this process, effective relief by the Court in the above-captioned matter would be inextricably bound up in that global process, thereby creating possible complications of overlapping jurisdiction.

FFRF commenced this action because the I.R.S. was evidently not enforcing the electioneering restrictions against churches and religious organizations. In particular, the I.R.S.

had no procedure in place to initiate churches examinations, at least after the District Court of Minnesota invalidated the prior procedure. After that district court decision in 2009, church groups began politicking from the pulpit openly and notoriously, including annual organized politicking on what has come to be known as “Pulpit Freedom Sunday.” In the meantime, an I.R.S. official publicly reported in 2012 an on-going moratorium on church tax examinations, in spite of flagrant and public electioneering by churches and religious organizations.

The I.R.S. has recently, in the context of this litigation, tried to assure FFRF that procedures are now in place for enforcement of the electioneering restrictions of § 501(c)(3), including a procedure to initiate investigations/examinations of churches for possible violations.

FFRF only first received any information from the I.R.S. indicating current practices and policies on June 16, 2014. That is the earliest date that FFRF received any information purporting to reflect I.R.S. policy and practice of enforcing the electioneering restrictions against churches and religious organizations. FFRF’s counsel subsequently discussed the I.R.S.’s current policy and practices with Department of Justice counsel, and as a result, FFRF is satisfied that the I.R.S. does not have a current policy of non-enforcement against churches. Information received from D.O.J. counsel on June 27, 2014, further indicated that the I.R.S. has a procedure in place for “signature authority” to initiate church tax investigations/examinations. Information relating to procedures for processing alleged violations of the political intervention prohibition of § 501(c)(3) was also provided on June 27, 2014. (*See Exhibit A.*)

Based on available information, FFRF and its counsel are satisfied that the I.R.S. no longer has an explicit policy or practice of not enforcing the the electioneering restrictions of § 501(c)(3) against churches. For that reason, FFRF is agreeable to a voluntary dismissal of the pending action.

FFRF remains wary of the I.R.S.'s actual enforcement practices going forward, but such reservations can be addressed in the future, if necessary. Wariness exists, in part, because the I.R.S. is believed to have globally suspended enforcement of the electioneering restrictions as to all tax-exempt organizations. The global moratorium is not specific to churches, but arises from concern regarding the I.R.S.'s enforcement practices in general. The issues relating to I.R.S. enforcement policies have recently been the subject of extensive Congressional investigation, which has apparently prompted the I.R.S. to suspend all examinations of alleged violators of the restrictions of § 501(c)(3).

Because of the I.R.S.'s on-going global assessment of its enforcement policies and practices, any specific relief by the Court in this matter would create inherent complications with the Congressional investigation underway. The enforcement hiatus, nonetheless, gives pause for concern, particularly as to any permanent policy of non-enforce, but this cannot be determined at the present time. Dismissal without prejudice accordingly is warranted.

Dismissal without prejudice also is appropriate in order to avoid uncertainty as to the effect of dismissal. Counsel for the Intervenors have advised FFRF's counsel that they would construe dismissal with prejudice as making them winners on their affirmative defenses challenging the constitutionality and enforceability of the electioneering restrictions of § 501(c)(3). FFRF disagrees that any dismissal would have the effect of a favorable adjudication on the Intervenors' affirmative defenses challenging the validity of the § 501(c)(3) restrictions. Issues relating to the Intervenors' interpretation of voluntary dismissal can be avoided, in any event, however, by dismissing without prejudice, as requested.

Finally, because of FFRF's concerns relating to the Intervenors' interpretation of a dismissal with prejudice, FFRF does condition its stipulation to voluntary dismissal as stated in

the pending motion, *i.e.*, that dismissal be without prejudice.

Dated this 29th day of July, 2014.

By:

**BOARDMAN & CLARK LLP**

*/s/ Richard L. Bolton*

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Notice of Electronic Filing and Service

I hereby certify that on July 29, 2014, this document was filed electronically in accordance with the ECF procedures of the United States District Court, Western District of Wisconsin, under Rule 5(d)(1), Federal Rules of Civil Procedure. All parties who are represented and have consented to service of electronically filed documents are served upon receipt of the NEF from the electronic filing system.

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

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**U.S. Department of Justice**

**Tax Division**

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TWA:RSC:RGRose  
DJ 5-86-3005  
CMN 2013100360

June 27, 2014

**VIA ELECTRONIC MAIL**

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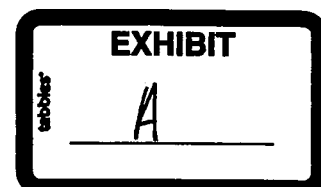
Re: *Freedom From Religion Foundation, Inc. v. Koskinen, et al.*,  
No. 12-CV-818 (W.D. Wis.)

Dear Mr. Bolton:

Attached please find a letter from Mary A. Epps, Acting Director, EO Examinations, to the U.S. Department of Justice. We are providing this letter to you in response to the questions you raised during our discussions earlier this week regarding the possibility of an agreed resolution of the above-referenced matter.

Sincerely,

s/ Richard G. Rose  
RICHARD G. ROSE





TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

June 27, 2014

The Honorable Tamara W. Ashford  
Acting Assistant Attorney General  
Tax Division  
Department of Justice  
950 Pennsylvania Avenue, N.W.  
Room 4333  
Washington, DC 20530


Attention: Civil Trial Section  
Trial Attorneys Richard G. Rose and Richard A. Schwartz

Re: Freedom from Religion Foundation, Inc. v. John Koskinen, Commissioner of the Internal Revenue Service, Civil Action No. 12-CV-818, U.S. District Court for the Western District of Wisconsin  
Your Ref: 5-86-3005, CMN 2013100360

In response to your request for information in the above referenced case, I advise on two points:

1. Subsequent to the publication of proposed regulations on section 7611 of the Internal Revenue Code on August 5, 2009, the IRS has processed several cases involving churches using procedures designed to ensure that the protections afforded to churches by the Church Audit Procedures Act are adhered to in all enforcement interaction between the IRS and churches. The procedures require the reasonable belief determination under section 7611(a) to be made by the Commissioner, TEGE, either directly or as concurrence to the determination made by the Director, Exempt Organizations.

2. Our written procedures for our Dual Track process for information items (a.k.a. referrals) alleging violation of the political intervention prohibition of section 501(c)(3) require evaluation of the information item by our Review of Operations ("ROO") unit and then the Political Activities Referral Committee ("PARC"). With regard to these referrals that concern violations by churches, the PARC has determined that as of June 23, 2014, 99 churches merit a high priority examination. Of these 99 churches, the number of churches alleged to have violated the prohibition during 2010 is 15, during 2011 is 18, during 2012 is 65, and during 2013 is one.

  
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MARY A. EPPS  
Acting Director, EO Examinations