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 not to take adverse action against religious organizations that it would not take against other organizations in the enforcement of these restrictions. 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' suit 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 merely directs the Government not to take adverse action against religious organizations that it would not take against other organizations in the enforcement of the § 501(c)(3) restrictions. None of the remarks made by the President suggest 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 for a second, independent reason: even if the Executive Order created some exemption for 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 case on ripeness grounds. It is premature for the Court to consider a challenge to the Order when the Order has not been implemented or applied in a way that would provide specific facts for the Court to evaluate. Indeed, the plaintiffs are unlikely to ever suffer any harm under the Order.

While the Court should dismiss the case for lack of jurisdiction, the complaint also fails to state a claim for relief. The plaintiffs' claims are 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.

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. An organization that engages in such political campaign activity is considered an "action" organization and does not qualify for the § 501(c)(3) exemption. Treas. Reg. § 1.501(c)(3)-1(c)(3).

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 id.* § 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 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. 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." Compl. for Declaratory and Injunctive Relief ¶ 3, ECF No. 1. By doing so, the plaintiffs assert, 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 plaintiffs seek declaratory and injunctive relief against the Executive Order and its enforcement. Compl. at 19.

While the plaintiffs' complaint makes mention of Internal Revenue Code § 7611, the provision establishing special procedures for church tax inquiries, *see* Compl. ¶¶ 38–39, the plaintiffs do not appear to be challenging that provision. Instead, their claims appear to focus exclusively on the Executive Order.

ARGUMENT

I. 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 an issue of subject matter jurisdiction, the court must resolve the jurisdictional issue 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) ("[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) . . . ." (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–102 (1998))); *Scott Air Force Base Props., LLC v. County 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 Digital, 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 id.* 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. 8.

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.

II. The Plaintiffs Lack Standing 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.

A. The jurisdictional requirement of standing

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). One manifestation of the "case or controversy" limitation is the requirement of "standing," which 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. Defenders 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 Defenders of Wildlife*, 504 U.S. at 561.

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

The plaintiffs cannot establish standing 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. 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 selectively against secular organizations. Rather, section 2 of the Executive Order merely directs that the Government not take adverse action against religious organizations that it would not take against other organizations in the enforcement of the restrictions. 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* Compl. ¶¶ 2, 4–7. But these remarks also do not support the plaintiffs' assertions regarding the supposed adoption of a discriminatory policy. The remarks at most suggest that one of the motivations behind the Executive Order was to address perceptions that religious organizations were being unfairly targeted in the enforcement of the requirements of § 501(c)(3). None of the quoted remarks indicates that

[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.

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. Compl. ¶¶ 9, 44–47, 49–56, 59, 61. These remarks—alleged to have been made months before the President issued the challenged 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 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.

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 complaint in this case, by

[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 Aug. 22, 2017).

contrast, includes no allegations at all concerning actions taken or not taken by the IRS following the issuance of the Executive Order. Rather, it is focused exclusively on the Executive Order itself—indeed, the plaintiffs filed their case the same day the Executive Order was issued. As explained above, however, the plaintiffs' characterization of the Executive Order is not supported by the Order's plain text. And because the plaintiffs have not alleged any facts suggesting the IRS has applied or will apply the Executive Order in the manner the plaintiffs describe, 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. 6, 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.

C. 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, Compl. ¶ 62.

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 not secular organizations, from the political campaign activity provisions of § 501(c)(3). Even if the Court could make such an assumption, however, the plaintiffs still could not establish standing because they have not alleged that they themselves have been denied equal treatment under the policy.

In a very similar case brought by the 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.

In this case as well, the plaintiffs have not alleged that they 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.

D. 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. 17; *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* Compl. ¶¶ 20–25. 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* Compl. at 19 (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).

III. For Similar Reasons, the Plaintiffs' Claims Are Not Ripe.

For similar reasons, the plaintiffs cannot meet the jurisdictional requirement of ripeness. "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 Hospitality 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).

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.*, 614 F.3d at 749 (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).

IV. The Complaint Also Fails to State a Claim for Relief Because the Plaintiffs' Allegations Do Not Suggest that the Executive Order Will Be Implemented in the Manner that the Plaintiffs Describe.

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).

The plaintiffs' varied claims 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 merely directs the Government not to take adverse action against religious organizations that it would not take against other organizations in enforcing the § 501(c)(3) political campaign activity restrictions, and it explicitly disclaims any intent to modify any law or grant any enforceable legal rights.

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 Employees 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.[4]

CONCLUSION

Because the Executive Order does not afford unequal treatment to the plaintiffs or cause them any other concrete injury, the plaintiffs cannot meet the requirements of standing and ripeness, and the complaint should be dismissed for lack of subject matter jurisdiction. If it is not dismissed for lack of subject matter jurisdiction, it should be dismissed for failure to state a claim.

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Respectfully submitted,

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[4] 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. Defenders 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").

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