IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC., DAN BARKER, and ANNIE LAURIE GAYLOR, Co-Presidents of FFRF, *Plaintiffs*, v. DONALD TRUMP, President of the United States; and JOHN KOSKINEN, Commissioner of the Internal Revenue Service, *Defendants*, CHARLES MOODIE, KOUA VANG, PATRICK W. MALONE, and HOLY CROSS ANGLICAN CHURCH, *Proposed Defendant-Intervenors*.	Case No. 3:17-CV-00330

PROPOSED DEFENDANT-INTERVENORS' MEMORANDUM
IN SUPPORT OF THEIR MOTION TO DISMISS

Plaintiff FFRF asks this Court to issue an injunction requiring the IRS to penalize internal church teaching, including the preaching of Proposed Intervenors Reverend Charles Moodie, Pastor Koua Vang, and Father Patrick Malone to their church congregations (collectively the "Churches"). But since 1871, the United States Supreme Court has repeatedly confirmed that the Religion Clauses of the First Amendment prevent the government from interfering with internal church affairs.[1] *See Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1871). The importance of this safeguard is near its apex when it comes to the religious guidance that religious leaders give

[1] Consistent with IRS practice and Plaintiff FFRF's allegations, we use the term "church" as shorthand for religious groups of all religious traditions.

their congregations from the pulpit during worship services. "[U]nder our constitutional scheme," the government has no competence or authority to "disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." *Fowler v. State of R.I.*, 345 U.S. 67, 70 (1953) (reversing conviction for sermon delivered to congregation in park). Indeed, the principle that government may not interfere with pastoral speech to congregations is so fundamental that the Supreme Court has justified other basic forms of church autonomy protection by reference to it. In its unanimous and seminal *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* decision, the Supreme Court held that government may not interfere in the selection or retention of church leaders, because churches must be able to decide freely "who will preach their beliefs, teach their faith, and carry out their mission." 565 U.S. 171, 196 (2012).

This constitutional principle is so powerful that the Churches' and the government's interest in preserving church autonomy need not be balanced against competing societal interests such as preventing employment discrimination. Rather, in the context of internal church affairs, "the First Amendment has struck the balance" in favor of church autonomy. *Id.* at 196.

Here, there is little doubt that FFRF's requested injunction against the Churches and other houses of worship would violate both the Free Exercise Clause and the Establishment Clause by requiring the government to interfere with the internal affairs of the Churches. The content of a sermon preached from the pulpit by a minister to his or her congregation is both a "matter[] of church government as well as [one] of faith and doctrine." *Hosanna-Tabor*, 565 U.S. at 186. It is a matter of church government because deciding who speaks to the members of the church and what that person says is a basic part of how a church governs its internal affairs. And it is a matter of faith and doctrine because preaching on the important topics of the day—including politics—

and relating those topics to the faith of a church's members is a quintessential part of how a church propagates its faith.

Indeed, it is telling that the "remedy" FFRF requests—an injunction requiring the IRS to regulate church teaching from ministers to their congregations, *see, e.g.*, Dkt. 1 ¶¶ 14, 90, 92—is entirely unprecedented. There is not a single reported case upholding the imposition of such restrictions against churches. And for good reason: granting FFRF's request here would be "forcefully unconstitutional—one of the most sweeping violations of the First Amendment in American history." Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 Notre Dame L. Rev. 1919, 1952 (2015).

The Court should dismiss FFRF's complaint.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Johnson Amendment

Church tax exemption is part of an "unbroken" history that "covers our entire national existence and indeed predates it." *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970). And "for so long as federal income taxes have had any potential impact on churches," churches have been "expressly exempt from the tax." *Id.* at 676.

Churches are classified as exempt from federal income tax under 26 U.S.C. § 501(c)(3), which also encompasses a number of other charitable non-profit organizations. In 1954, then-Senator Lyndon Johnson proposed a tax code amendment—now known popularly as the "Johnson Amendment"—that prohibited such non-profits from "interven[ing] in any political campaign" by making statements in support of "any candidate for any public office." 100 Cong. Rec. 9,604 (1954) (Statement of Sen. Johnson). In 1987, Congress expanded the prohibition to include not

only statements of support, but also statements of opposition to a candidate. H.R. Rep. No. 100-391, pt. 2, at 1621 (1987).

There is no indication from the Congressional record that Congress intended this restriction to specifically limit internal church speech. *Id.* (no mention of houses of worship). There is some reason to think that Congress did not so intend. *See* Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. Rev. 1137, 1145-46 n.31 (2009) (noting evidence that Sen. Johnson "did not intend or consider the effect of the prohibition" on churches).

B. The IRS's Interpretation of the Johnson Amendment

The IRS, however, interprets the speech restrictions in the Johnson Amendment to apply to churches, as it makes clear in its own motion to dismiss. Dkt. 17 at 4-5. Its regulations "absolutely prohibit" churches, including the Churches requesting intervention here, from "directly or indirectly" making "public statements" that are "in favor of (or in opposition to) any candidate for public office" during "an official church service." *See* IRS Publication 1828, *Tax Guide for Churches and Religious Organizations* ("IRS Church Tax Guide") at 7-8, http://www.irs.gov/pub/irs-pdf/p1828.pdf; *accord* 26 C.F.R. § 1.501(c)(3)-1(a)(1), (c)(3)(i) (2009). To make this clear, Example 4 in the IRS's tax guide for churches gives an example of a minister instructing the church's congregation "[d]uring regular services" that they have a "duty" to vote for a certain candidate. IRS Church Tax Guide at 8. The guide states that this communication is forbidden because it was "made during an official church service." *Id.* By contrast, the same statement from the same minister speaking in his personal capacity to an audience that includes the same individuals would have been permissible had it appeared in the newspaper and not during a church service. *Id.* (Example 1).

The rule against "indirect" statements also prohibits sermons on specific religious issues, where the IRS's own determination of the "facts and circumstances" surrounding the sermons leads it to believe that the statement includes a "message favoring or opposing a candidate." *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421 (2007); *accord* IRS Church Tax Guide at 6-9. These "facts and circumstances" that the IRS considers include whether a sermon used banned "code words" such as "pro-life" or "pro-choice." *See* IRS 1993 EO CPE Text, *Election Year Issues*, at 411, http://www.irs.gov/pub/irs-tege/eotopicn93.pdf. The IRS lists seven holistic "key factors" it considers when determining whether "issue advocacy" crosses the line into impermissible "political campaign intervention," but it does not restrict itself to those factors. *See* Rev. Rul. 2007-41; *accord* Dkt. 1 at ¶ 36 (listing some of the "factors").

C. The IRS's Failure to Enforce the Johnson Amendment Against Internal Church Speech

But while the IRS has been very clear that it interprets its regulations to limit internal church speech, there is not a single court ruling that upholds an attempt to enforce them in that way. The only reported decisions concerning application of the limitations to churches or religious organizations addressed external communications with the public about candidates. *See Branch Ministries v. Rossotti*, 211 F.3d 137, 139 (D.C. Cir. 2000) (church purchase of full-page ad in USA Today opposing candidate Bill Clinton); *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 851-53 (10th Cir. 1972) (religious ministry radio broadcasts about candidates).

This is not to say that the IRS is unaware of any internal church speech it deems impermissible. For instance, it issued a report in 2006 stating that it identified 12 times in the 2004 election cycle where "[r]eligious leaders us[ed] the pulpit to endorse or oppose a particular candidate." *See* Internal Revenue Service, IR-2006-36, *IRS Releases New Guidance and Results of Political Intervention Examinations* (Feb. 24, 2006), https://www.irs.gov/uac/irs-releases-new-guidance-

and-results-of-political-intervention-examinations. But it did not revoke the tax-exempt status of those churches. *Id*. Similarly, in a high-profile investigation of All Saints Church in Pasadena, California, the IRS found that a 2004 anti-war sermon criticizing President Bush violated the IRS regulations, but it declined to impose any penalty. Mayer, 89 B.U. L. Rev. at 1139. And in the last nine years, thousands of pastors nationwide have preached sermons in ways that directly challenge the IRS's interpretation of Johnson Amendment. *See, e.g.*, Complaint ¶¶ 23, 25, *Freedom From Religion Found. v. Koskinen*, 298 F.R.D. 385 (W.D. Wis. 2014) (No. 3:12-cv-0818) ("*Koskinen I*"), Dkt. 1.

This refusal to enforce its own extremely explicit regulations is all the more striking given the IRS's strong statutory enforcement mandate. By law, if the Secretary of the Treasury finds that a section 501(c)(3) entity has "flagrant[ly]" made "political expenditures" in violation of its status, he "shall immediately make a determination of any income tax payable by such organization" and "any such tax shall become immediately due and payable," and he "shall" submit "a demand for immediate payment of such tax." 26 U.S.C. § 6852; *see also* 26 U.S.C. § 7409 (empowering the IRS to commence a "civil action" to "enjoin any section 501(c)(3) organization" from "flagrantly" making "political expenditures"—including "the publication or distribution of statements").

Refusing to enforce its own regulations also means that the IRS has not had to defend them. Under the Anti-Injunction Act, 26 U.S.C. § 7421, non-profits that want to challenge tax regulations must normally first lose their tax-exempt status, "pay the tax," and "sue for a refund." *Gaylor v. Lew*, No. 16-cv-215-bbc, 2017 WL 222550, at *2 (W.D. Wis. Jan. 19, 2017).

D. FFRF's Lawsuits to Enforce the IRS's Interpretation Against Churches

The IRS's enforcement timidity against internal church teaching led FFRF to file its first lawsuit seeking a reversal of enforcement policy. The lawsuit, filed on November 14, 2012, sought

an injunction requiring the IRS "to enforce the electioneering restrictions of § 501(c)(3) of the Tax Code against churches." Complaint ¶¶ 1-2, *Koskinen I*, Dkt. 1. FFRF alleged that there were "open and notorious violations" by "more than 1500 clergy" in 2012 as a part of a "deliberate and coordinated display of noncompliance." *Id.* at ¶¶ 23, 25.

Present Intervenors Father Malone and Holy Cross Anglican successfully intervened in that lawsuit to protect their rights under the First Amendment and the Religious Freedom Restoration Act. *Koskinen I*, 298 F.R.D. at 387-88. This Court granted intervention as of right because, *inter alia*, Father Malone and Holy Cross Anglican had a protectable "interest in having Father Malone preach to the church about whom to vote [against]," and to argue that protecting this interest was "compelled by the Establishment Clause and other laws." *Id.* at 386-87. Shortly after the Court granted intervention, FFRF settled *Koskinen I* with the IRS and dismissed its lawsuit without prejudice. *See* Joint Motion for Dismissal, *Koskinen I*, Dkt. 38 (July 17, 2014).

FFRF filed the present lawsuit on May 4, 2017. The 2017 lawsuit is a copycat of the 2012 lawsuit. For example, the core of FFRF's complaint asks this Court to order the IRS to "enforce the restrictions in Internal Revenue Code § 501(c)(3) against churches . . . , including the electioneering restrictions[.]" *Compare* Dkt. 1 ¶ 14 *with Koskinen I*, Dkt. 1 ¶ 2 (requesting "enforcement of the restrictions of § 501(c)(3) against churches . . . , including the electioneering restrictions").

FFRF's complaint also seeks to enjoin a recent Executive Order concerning the IRS's enforcement of the Johnson Amendment. Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017). The IRS takes the position that the Executive Order has no independent force of law. Dkt. 17 at 18.

FFRF's lawsuit requests orders both enjoining enforcement of the Executive Order and mandating enforcement of the IRS's long-stated position against the religious speech of religious ministers to their houses of worship during religious services. *See, e.g.*, Dkt. 1 ¶ 14 (stating that, in addition to an order enjoining the Executive Order, FFRF "also requests the Court to order the Defendants to neutrally enforce the restrictions in the Internal Revenue Code § 501(c)(3) against churches . . . , including the electioneering restrictions"); *id.* at ¶¶ 90-92 (same).

Proposed Intervenors Reverend Charles Moodie, Pastor Koua Vang, Father Patrick Malone, and Holy Cross Anglican Church moved to intervene on June 29, 2017. Dkt. 5. Defendants filed a motion to delay the parties' time to respond to the intervention motion until August 22, Dkt. 13, when Defendants' responsive pleading or motion to dismiss was due. This Court granted Defendants' motion on July 5. Dkt. 15.[2]

MOTION TO DISMISS STANDARD

Rule 12(b)(6) requires dismissal where the plaintiffs fail "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In evaluating a motion to dismiss, courts must "accept the well-pleaded facts in the complaint as true," but they "'need not accept as true legal conclusions, or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.'" *Kolbe & Kolbe Millwork, Co. v. Manson Ins. Agency, Inc.*, 983 F. Supp.

[2] While this Court has not yet had the opportunity to rule on the Churches' motion to intervene, they file this motion to avoid prejudice to their interests and to offer the court the opportunity to consider their argument. *See Ctr. for Biological Diversity v. EPA*, 2013 WL 1729573 (N.D. Cal. Apr. 22, 2013) (intervenors filed motions to intervene and to dismiss on same day; court considered both motions in same opinion, first granting motion to intervene and then granting motion to dismiss); *Kalos v. Wisenbaker Holdings, LLC*, 2011 WL 761474 (E.D. Va. Feb. 23, 2011) (same); *National Casualty Co. v. Davis*, 1991 WL 101648 (N.D. Ill. Jun. 3, 1991) (intervenors filed motion to intervene on March 29, then filed motion to dismiss and motion for summary judgment on April 9; court granted motion to intervene on June 3 and set briefing schedule for motions). Moreover, since the Churches' argument presents a threshold issue for the Court's consideration that the Defendants have not raised, this is the best time to consider it.

2d 1035, 1041 (W.D. Wis. 2013) (quoting *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009)). In ruling on a motion to dismiss, a court may consider documents "attached to the complaint or referred to in it," along with "matters of public record." *Eichman v. Mann Bracken, LLC*, 689 F. Supp. 2d 1094, 1096 (W.D. Wis. 2010) (citing *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002)). Courts may also consider "judicially noticed documents," including "historical documents, documents contained in the public record, and reports of administrative bodies," without "converting a motion to dismiss into a motion for summary judgment." *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998).

Here, the Churches move for dismissal on the basis of the First Amendment's "internal-affairs doctrine." *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), *overruled on other grounds by Hosanna-Tabor*, 565 U.S. 171. Whether the doctrine applies "is a pure question of law" which a reviewing court "must determine for itself." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 833 (6th Cir. 2015); *Miller v. Bay View United Methodist Church, Inc.*, 141 F. Supp. 2d 1174, 1181 (E.D. Wis. 2001) (noting that the applicability of the doctrine "is a question of law for the court"); *accord Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 608-09 (Ky. 2014) ("the determination . . . is a question of law for the trial court, to be handled as a threshold matter"). And a court must consider the doctrine at the earliest possible juncture to avoid "allow[ing] itself to get dragged into a religious controversy[.]" *Tomic*, 442 F.3d at 1042. In the sensitive context of internal church affairs, it is "not only the conclusions" that the Court could reach "which may impinge on the rights guaranteed by the Religion Clauses," but also "the very process of inquiry" itself. *Id.* at 1038-39 (quoting *NLRB v. Catholic Bishop of Chicago*,

440 U.S. 490, 502 (1979)).[3] Thus, by resolving the church autonomy question "early in litigation, the courts avoid excessive entanglement in church matters." *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 n.1 (10th Cir. 2002) (analogizing to qualified immunity).

ARGUMENT

I. The Religion Clauses of the First Amendment prevent FFRF from requiring the government to interfere with the Churches' teaching or governance.

There will be some difficult cases at the outer reaches of the First Amendment's internal affairs doctrine. But this is not one of them. FFRF's requested injunction limiting the ability of the Churches to teach their own members the principles of their faith and to govern themselves in accordance with their beliefs strikes right at the heart of the First Amendment. FFRF's claim should be dismissed by a straightforward application of the internal affairs doctrine.

Specifically, the internal affairs doctrine, as articulated by the Seventh Circuit, forbids governments to, among other things, "interfere in the internal management of churches, as they sometimes do in the management of prisons or school systems." *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008). This doctrine applies in several different contexts. For example, governments may not decide issues involving church doctrine and heresy, church leadership, church membership, or "governance structure." *Tomic*, 442 F.3d at 1038.[4] The thread running

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[3] The Churches intend to raise several other defenses to FFRF's claim, including under the Free Speech, Free Exercise, and Free Assembly Clauses of the First Amendment and under the Religious Freedom Restoration Act. Dkt. 6 at 13-14. However, at the motion to dismiss stage, the Churches raise only their church autonomy defense and reserve the right to raise their other defenses at the summary judgment stage or at trial.

[4] *Hosanna-Tabor*, decided after *Tomic* and *Schleicher*, left their main holdings intact but changed some of the bases for those holdings. *Hosanna-Tabor* clarified that the ministerial exception was not jurisdictional, and that the ministerial exception is a constitutional doctrine rooted in both Religion Clauses, rather than a principle of statutory interpretation. 565 U.S. at 195 n.4 ("the exception operates as an affirmative defense to an otherwise cognizable claim, not a

through these cases is the idea that under the Free Exercise Clause and the Establishment Clause, government officials—judicial, legislative, or executive—may not interfere with either "matters of church government" or "of faith and doctrine." *Hosanna-Tabor*, 565 U.S. at 186 (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).

Here, FFRF seeks to have the government interfere with both matters of church government and matters of faith and doctrine. FFRF requests an injunction requiring the IRS to restrict internal church communications, including those that the Churches make. Dkt. 1 at ¶¶ 14, 33; ¶ 66 (requesting enforcement "of electioneering restrictions as to churches and church officials"); ¶ 90 ("Plaintiffs seek an order mandating that the enforcement policies of § 501(c)(3) by the Defendant Koskinen not preferentially favor churches") ¶ 92 (alleging that nonenforcement violates the Establishment and Equal Protection Clauses). This means, for example, that FFRF seeks enforcement of Example 4 in the IRS Church Tax Guide—penalizing a house of worship for allowing its minister to tell the congregation during religious services that they have a religious duty to make a certain electoral choice. IRS Church Tax Guide at 8. In other words, FFRF is trying to force the IRS to penalize the Churches. *See* Dkt. 6 at 5 (ministers of the Churches tell their congregants about their religious duties with respect to voting).

Such an injunction would violate both the self-government and faith-and-doctrine parts of the internal affairs doctrine. It would interfere with the Churches' self-government by imposing a penalty on them because their leaders communicated their beliefs to their congregations. And it would interfere with the Churches' faith and doctrine by penalizing them for seeking to apply the tenets of their faith to the major public issues of the day. Indeed, FFRF's requested injunction

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jurisdictional bar"); *id.* at 181 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.").

would require the government to engage in an unprecedented, wide-ranging violation of the internal affairs doctrine—deeply entangling government agencies and the courts in decisions about what specific religious guidance ministers may offer to the Churches' members during the Churches' services. But neither courts nor the IRS should be in the business of vetting sermons.

Below we explain in greater detail the basis for the internal affairs doctrine, how it applies to FFRF's requested injunction against the Churches, and why FFRF's injunction would worsen church-state relations.

A. The First Amendment's internal affairs doctrine prohibits government from interfering in the Churches' internal affairs.

1. The internal affairs doctrine is rooted in both the Establishment Clause and the Free Exercise Clause.

Both the Establishment and Free Exercise Clauses of the First Amendment protect the internal affairs of houses of worship from government intrusion or control. *Hosanna-Tabor*, 565 U.S. at 188 (the First Amendment prevents "interfere[nce] with the internal governance of the church"). The internal affairs doctrine is fundamental to the First Amendment's intended autonomy for houses of worship.[5] *Hosanna-Tabor*, 565 U.S. at 189 (the "First Amendment itself . . . gives special solicitude to the rights of religious organizations"); *Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184, 188 (7th Cir. 1994) (Courts must not "limit the scope of the protection granted to religious bodies" by the First Amendment). This doctrine is reflected in an "overwhelming weight of precedent going back over a century," *Young*, 21 F.3d at 188, and it stems from both the Free Exercise and the Establishment Clause, *Hosanna-Tabor*, 565 U.S. at 184.

[5] Variants of the "internal affairs doctrine" are sometimes referred to as the "church-autonomy doctrine" or the "ecclesiastical abstention doctrine." *See, e.g.*, *Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013) (church-autonomy doctrine); *Bryce*, 289 F.3d at 655 (same); *Puri v. Khalsa*, 844 F.3d 1152, 1164 (9th Cir. 2017) (ecclesiastical abstention doctrine).

And the doctrine has benefits for both the church and the state—it protects the church from government control or coercion, and it structurally safeguards the state from getting entangled in internal church matters. *See Schleicher*, 518 F.3d at 475 (the "internal affairs doctrine" maintains a healthy "separation between church and state" by keeping governments from "tell[ing] a church" how to manage "the affairs of the church").

Accordingly, courts have long recognized that the First Amendment "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116 (citing *Watson v. Jones*, 80 U.S. (13 Wall.) at 728-29; *accord Hosanna-Tabor*, 565 U.S. at 186 (same). This freedom includes an "unquestioned" "full and free right" to "teach any religious doctrine," particularly within the contexts of "voluntary religious associations" organized "to assist in the expression and dissemination" of that doctrine. *Watson*, 80 U.S. (13 Wall.) at 728-29; *accord Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., and Kagan, J., concurring) (noting that this right gives "concrete protection" to internal church "expression").

The internal affairs doctrine, then, is "best understood" as "marking a boundary between two separate polities, the secular and the religious." *Korte*, 735 F.3d at 677. This boundary reflects "a structural limitation imposed on the government by the Religion Clauses," which "categorically prohibits federal and state governments from becoming involved" in internal church matters. *Conlon*, 777 F.3d at 836. That the doctrine is "categorical" means that it "operates as a complete immunity, or very nearly so." *Korte*, 735 F.3d at 678. Thus, "there is no balancing of competing interests, public or private," *id.*, because in the context of such ecclesiastical matters, "the First Amendment has struck the balance." *Hosanna-Tabor*, 565 U.S. at 196.

Moreover, while the doctrine most clearly applies to facially religious issues, it also applies to matters of church government that are "purely nondoctrinal." *Tomic*, 442 F.3d at 1039 (quoting *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999)). The relevant trigger for the doctrine is not whether a scripture is being quoted or a theological justification cited, but rather whether "secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive." *Id.* For instance, in the ministerial exception context, a court may not "probe the *real reason*" for a church's employment decision about a minister because "a civil court—and perhaps a jury—would be required to make a judgment about church doctrine." *Hosanna-Tabor*, 565 U.S. at 205 (Alito, J., and Kagan, J., concurring). Governmental second-guessing is forbidden based solely on the fact that the minister is "at the heart of [the] religious organization" such that the government's interference would "only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment." *Alicea-Hernandez v. The Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003) (quoting *McClure v. The Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972)).

2. The internal affairs doctrine applies especially to internal church teaching—where a church minister is teaching principles of the faith to members of the church.

The internal affairs doctrine applies with particular force to governmental interference with internal church teaching—when a minister teaches principles of the faith to his or her congregants, particularly from the pulpit. Indeed, courts have long recognized that the internal affairs doctrine itself is "rooted in protection of the First Amendment rights of the church to discuss church doctrine and policy freely." *Bryce*, 289 F.3d at 658. This is in part because the "very existence" of churches is uniquely "dedicated to the collective expression and propagation of shared religious ideals." *Hosanna-Tabor*, 565 U.S. at 200-01 (Alito, J., and Kagan, J., concurring). This makes a "church's message . . . of singular importance," and the selection of its content "*per se* a religious

matter." *Alicea-Hernandez*, 320 F.3d at 704 (quoting *Minker v. Balt. Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1356 (D.C. Cir. 1990)). Intrusion into church teaching robs the church of the "strictly ecclesiastical" control over how to "minister to the faithful." *Hosanna-Tabor*, 565 U.S. at 187-89.

Hence courts have been quick to disclaim any "competence . . . under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." *Fowler*, 345 U.S. at 70. An intrusion into this extremely sensitive area of internal governance—where the speaker is the minister, the audience is the congregation, and the context is a religious worship service—is effectively "a law targeting religious beliefs as such" and is therefore "never permissible." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017) (quoting *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993) and citing *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality op.)). Any such attempt to "punish the expression of religious doctrines" in this context is categorically forbidden. *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990); *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) ("The freedom to hold religious beliefs and opinions is absolute."). The Free Exercise Clause categorically protects *both* "the *act* of declaring a belief in religion" and "the act of discussing that belief with others." *McDaniel*, 435 U.S. at 635 (Brennan, J., concurring).[6]

Moreover, government interference in internal church teaching would quickly entangle courts and other government bodies, including the IRS, in internal church considerations of faith and doctrine. *See Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir.

[6] Even outside the church-service context, government may not "act as supervisors and censors of religious speech," *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1822 (2013), or attempt to "direct[ ] and control[ ] the content of . . . prayers," *Lee v. Weisman*, 505 U.S. 577, 588 (1992).

1985) (allowing "governmental standards" to control church affairs "would significantly, and perniciously, rearrange the relationship between church and state"). Courts are right, then, to avoid "government involvement in such ecclesiastical decisions." *Hosanna-Tabor*, 565 U.S. at 189.[7]

B. FFRF's requested injunction would result in gross governmental interference in the Churches' internal affairs.

Under the principles explained above, FFRF's proposed injunction is flatly unconstitutional. FFRF wants "the prohibition[s] of § 501(c)(3)" applied to "churches" when their "clergy or other religious leaders, acting as representatives" of the churches provide internal guidance "about moral or political issues from a religious perspective" in a way to could be seen to support or oppose a candidate. *See* Dkt. 1 at ¶¶ 37, 64; *see also* ¶¶ 51, 56 (objecting to allowing "pastors and ministers . . . [to] speak[] their own minds from their own pulpits" or permitting a "dialogue within . . . churches and temples").

That would violate both the church self-government and faith-and-doctrine aspects of the internal affairs doctrine. By attacking whether the Churches' "clergy or other religious leaders" can speak to their congregants, in a worship service, "about moral or political issues from a religious perspective," FFRF attempts to put the IRS in the role of general superintendent of not just the Churches but also every church, synagogue, and mosque in the country, with the Department of Justice as its enforcement arm. That violates the principle that government must

[7] For this reason, courts regularly reject defamation claims that arise out of "internal ecclesiastical dispute and dialogue." *Bryce*, 289 F.3d at 658-59 & n.2 (finding that "internal church dialogue" about a church member was "protected by the First Amendment under . . . the church autonomy doctrine."); *see also Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1576-77 (1st Cir. 1989) (rejecting defamation claim for statements from church hierarchy to minister); *accord Hiles v. Episcopal Diocese of Mass.*, 773 N.E.2d 929, 937 n.12 (Mass. 2002) (rejecting defamation claim due to "absolute First Amendment protection for statements made . . . in an internal church disciplinary proceeding"); *Westbrook v. Penley*, 231 S.W.3d 389, 393-96 (Tex. 2007) ("doctrine of church autonomy" barred a defamation claim against pastor who published a "members-only" letter to the church about former member).

not "interfere in the internal management of churches[.]" *Schleicher*, 518 F.3d at 475. And by targeting the Churches' speech from the pulpit—where the Churches' ministers have the duty to proclaim the beliefs of their respective Churches, Dkt. 6 at 5—FFRF's proposed injunction interferes with the Churches' ability to proclaim and teach their own "faith and doctrine." *Hosanna-Tabor*, 565 U.S. at 186 (quoting *Kedroff*, 344 U.S. at 116).

Notably, FFRF never alleges that the teaching in question is anything but entirely legal—nothing approaching incitement, sedition, or even defamation. Nor does FFRF allege that the teaching is a sham or otherwise religiously insincere. Rather, FFRF objects simply because the teaching is of a kind "absolutely prohibited" for non-profits. IRS Church Tax Guide at 7-8; *see also* Dkt. 17 at 4-5 (emphasizing that the "restriction is absolute").

Whatever else the internal affairs doctrine protects against, it *must* protect against government intrusion into internal church teaching delivered by a minister from a religious perspective to the congregation during a religious worship service. Courts have repeatedly noted the importance of churches, ministers, religious speech, and religious services in their resolution of internal affairs cases. *Hosanna-Tabor*, 565 U.S. at 196 (protecting church decisions); *Rweyemamu v. Cote*, 520 F.3d 198, 209 (2d Cir. 2008) (noting the inability of courts to assess the teaching of clergy); *Bryce*, 289 F.3d at 659 (protecting "internal church dialogue"); *Alicea-Hernandez*, 320 F.3d at 704 (noting the need to protect church communications, since the "voice . . . [of] the church is *per se* a religious matter" and "a church's message . . . is of singular importance" (citation omitted)); *Fowler*, 345 U.S. at 70 (protecting "sermons delivered at religious meetings"). And while not all church autonomy cases present each of these considerations, the confluence here makes application straightforward, especially since each are presented in or near their purest form. Thus, FFRF's desired governmental intrusion goes to "the heart of [the] religious organization," and so

granting FFRF's relief would necessarily result in "coercive effect[s]" that undermine the church's freedom to "preach its values" and "teach its message" to its own congregation. *Alicea-Hernandez*, 320 F.3d at 703-04 (quoting *McClure*, 460 F.2d at 560, and *Rayburn*, 772 F.2d at 1168).

What makes that result stand out in even sharper relief is the unusual way that FFRF's request would specifically target internal church affairs for regulation. If FFRF gets its way, a minister would still be free to go on TV and preach a sermon in his personal capacity opposing a candidate on sincere religious grounds, and all of his congregants could watch him and follow his guidance. IRS Church Tax Guide at 7. In fact, the minister could preach that sermon in virtually any context *but* his own church. The sole place FFRF would regulate is also the context that the internal affairs doctrine primarily protects: "an official church service." *Id.* at 8. The speaker, the speech, and the audience are essentially the same, yet FFRF wants to entangle the government specifically in the *religious worship service* as such. That is impermissible. *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., and Kagan, J., concurring) ("the conducting of worship services" receives special First Amendment protection because it is a "key religious activit[y]").

C. FFRF's requested injunction would bring with it a host of negative effects.

Aside from the bald constitutional violation it would represent, FFRF's requested injunction would result in a host of negative effects: it would harm church-state relations, target protected religious speech, and be grossly disproportionate to the claimed violation.

1. FFRF's injunction would harm church-state relations generally.

FFRF's proposed injunction would also be a bad outcome for church-state relations, even in churches that generally agree with FFRF's on-again, off-again view that non-profits should refrain

from internally discussing political matters.[8] For "[e]ven if government policy and church doctrine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of that goal." *Rayburn*, 772 F.2d at 1170-71 (quoting Douglas Laycock, *Toward a General Theory of the Religious Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1399 (1981)). Whether a church agrees or disagrees with FFRF's view, it "is entitled to pursue its own path without concession to the views of a federal agency," for "'both religion and government can best work to achieve their lofty aims if each is left free of the other within its respective sphere.'" *Id.* (quoting *McCollum v. Bd. of Ed.*, 333 U.S. 203, 212 (1948)). Indeed, the government's long nonenforcement of its regulations against churches demonstrates that it has little appetite for the kind of "official and continuing surveillance" necessary to maintain the regime of sermon-vetting that its regulations ostensibly call for. *Walz*, 397 U.S. at 675 (warning of the entanglement problems arising from long-term state surveillance of church matters).

And that is another fundamental problem with FFRF's requested injunction. At a certain level, what is at issue is not so much whether a church may endorse or oppose a candidate. If FFRF's statistics are correct—as the Court must generally assume on a motion to dismiss—then the overwhelming majority of churches will not do either. Dkt. 1 ¶ 41. The issue is *who decides*—the church or a federal agency? Under the autonomy recognized by the internal affairs doctrine, that

[8] FFRF has been inconsistent on this point. *See* FFRF Press Release, *Trump's proposal would turn churches into PACs* (July 22, 2016), https://ffrf.org/news/news-releases/item/27172-trump-s-proposal-would-turn-churches-into-pacs (stating, contrary to its claim in this lawsuit, that the IRS regulations "[do] not silence . . . free speech rights," and that allowing "tax-exempt" entities to discuss politics would be a "threat to our democracy" and would essentially turn the entities "into money-laundering operations").

answer is clear and categorical: the church, and only the church.[9] *Korte*, 735 F.3d at 678 (recognizing that church autonomy is "categorical"; "there is no balancing of competing interests, public or private"). Thus, the First Amendment categorically prohibits FFRF's requested injunction.

2. FFRF's requested injunction would target normally-protected speech.

FFRF's requested injunction would also target lawful, religious speech offered in a wholly religious context, meaning the necessary net result would be the restriction of religious belief. That is, yet again, impermissible. *See, e.g.*, *Smith*, 494 U.S. at 877 ("punish[ing] the expression of religious doctrines" is categorically forbidden). FFRF suggests that the restrictions are necessary to prevent any taxpayer subsidies to political speech. *See, e.g.*, Dkt. 1 at ¶ 92. But even if that were true—and it is obviously not[10]—it would not make any sense here. The internal religious speech at issue in this case does not come at any more than a *de minimis* cost. Sermons and internal teaching will happen on a regular basis anyway, and so removing restrictions on internal church speech will not lead to increased church spending, but simply freedom to address a wider range of religious subject matter during religious services. FFRF's only purpose in restricting religious speech's content is just that: restricting the expressed religious beliefs. And that is unconstitutional. *See McDaniel*, 435 U.S. at 635 (Brennan, J., concurring) (The Free Exercise Clause categorically

[9] Another, related problem from reaching the wrong answer on the "who decides" question is that, over time, the alleged majority view which FFRF seeks to advance here becomes ever more entrenched as "the choices of clergy which conform to the preferences of public agencies [are] favored over those which are neutral or opposed." *Rayburn*, 772 F.2d at 1170. But the majority cannot enlist government aid in putting a thumb on the scales of theological opinion.

[10] Many political organizations are tax-exempt, including "Political Action Committees," which—by law—are tax-exempt *only if* they attempt to influence elections. *See* IRS, *Exempt Function*, https://www.irs.gov/charities-non-profits/political-organizations/exempt-function-political-organization. The significant tax benefit largely unique to 501(c)(3) organizations is their ability to accept tax-deductible contributions. *See* Mayer, 89 B.U. L. Rev. at 1146.

protects both "the act of declaring a belief in religion" and "the act of discussing that belief with others").

3. FFRF's proposed remedy is grossly disproportionate to the claimed violation.

Worse yet, the punishment FFRF proposes does not fit the supposed offense. Although there is no cognizable financial interest in restricting the church teaching at issue here, a church's failure to abide by FFRF's restrictions in even one sermon would jeopardize a church's entire tax status. As FFRF admits, this would leave churches "seriously harmed" by "devastating and irreparable" tax consequences. Dkt. 1 ¶ 68; *see also* IRS Church Tax Guide at 7, 18 (stating that the IRS can revoke the church's tax-exempt status and the ability of members to deduct contributions from their taxes, and may impose excise taxes against both the church and its leadership). It would also give rise to extensive, ongoing entanglement between the church and the state, as government officials would gain access to sensitive internal financial records of the church necessary to determine tax liability. *Walz*, 397 U.S. at 674 (listing the ways that "[e]limination of exemption would tend to expand the government" in the affairs of the church, including via "the direct confrontations and conflicts that follow" from starting down the path of church taxation). That threat of irreparable harm directly and unjustifiably assaults churches' constitutionally guaranteed independence. *See Hosanna-Tabor*, 565 U.S. at 194 (rejecting as "immaterial" the contention that the former minister was just seeking frontpay instead of reinstatement, since an "award of such relief would operate as a penalty on the Church" for exercising its autonomy).

II. Contrary to FFRF's claims, the Establishment Clause and the Take Care Clause prevent the government from interfering with the Churches' religious teaching, and neither the Free Speech nor the Equal Protection Clause requires such interference.

FFRF argues that unless the IRS restricts the Churches' speech to their own members, it violates the Establishment, Free Speech, Equal Protection, and Take Care Clauses by

"privileg[ing] religion over nonreligion." Dkt. 1 ¶¶ 1, 10-12, 94a. But that ignores the reality that the internal affairs doctrine is rooted in the Religion Clauses, and thus protects houses of worship, not houses of philosophy. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (secular "philosophical and personal" beliefs, however laudable, are not protected by Religion Clauses). The Constitution requires neither an "atheist autonomy doctrine" for secular entities nor a "non-ministerial exemption" for the leadership of non-religious groups. Church autonomy is for churches.

The Constitution itself "'gives special solicitude to the rights of religious organizations' *as* religious organizations, respecting their autonomy to shape their own missions, conduct their own ministries, and govern themselves in accordance with their own doctrines as religious institutions." *Korte*, 735 F.3d at 677 (quoting *Hosanna-Tabor*, 565 U.S. at 189). And that's because, "[i]n a religious nation that wants to maintain some degree of separation between church and state," the government cannot "tell a church whom to ordain (or retain as an ordained minister), how to allocate authority over the affairs of the church, or which rituals and observances are authentic." *Schleicher*, 518 F.3d at 475. The "strong hands-off principle" required for churches' internal affairs by the First Amendment simply "isn't justified for organizational associations that are not religiously affiliated." *Korte*, 735 F.3d at 678.

Nor is it inequality to treat different entities differently. FFRF does not claim to ordain ministers, to observe rituals, or to otherwise engage in the kinds of religious deliberations necessary to be preserved from governmental intrusion. And it is precisely to protect the unique needs and roles of religious organizations that the Supreme Court has long approved legal exemptions that "alleviat[e] significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987). If, as FFRF claims, it violates several clauses of the Constitution to

"confer benefits solely on the basis of religious criteria," Dkt. 1, ¶ 89, then "all manner of religious accommodations would fall." *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005). Rather, "[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, [there is] no reason to require that the exemption come packaged with benefits to secular entities." *Amos*, 483 U.S. at 338.

In fact, as FFRF acknowledges (without complaint), the IRS has always treated churches differently from other 501(c)(3) organizations. *See, e.g.*, Dkt. 1, ¶¶ 38-39 (IRS must "follow[] special procedures" before investigating churches). For instance, churches and their integrated auxiliaries are not required to report their income to the government due to concerns about entanglement between government and religion. 26 U.S.C. § 6033(a)(3)(A)(i); *see also* 25 C.F.R. § 1.6033-2. And, unlike most other section 501(c)(3) entities, houses of worship are automatically entitled to receive charitable deductions. 26 U.S.C. § 508(c)(1).

This special treatment of churches makes sense given the deep historical tradition of First Amendment protection for churches' internal affairs. *See Hosanna-Tabor*, 565 U.S. at 182 (tracing the First Amendment's protections for church autonomy back to Magna Carta in 1215, and detailing the long legal tradition arising under both the Free Exercise and Establishment Clauses). Thus it should come as no surprise that continuing to treat churches with the same respect that the Founders did does not violate the Establishment Clause. *See Town of Greece*, 134 S. Ct. at 1819 ("[T]he Establishment Clause must be interpreted by reference to historical practices and understandings." (internal quotation marks omitted)). It is FFRF that proposes an interpretation of the First Amendment inconsistent with centuries of precedent.

FFRF's odd free speech claim also lacks merit. FFRF briefly alleges a desire to engage in what it describes as "electioneering." *See* Dkt. 1 ¶ 70; *but see supra* n.8. But FFRF's proposed remedy—

to place restrictions on church speech, rather than to remove restrictions on nonreligious speech—is not the right way to resolve a Free Speech Clause violation. Nothing about protecting the internal teachings and governance of churches prevents FFRF from speaking. The Supreme Court has emphasized that in the context of the First Amendment, "it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United v. FEC*, 558 U.S. 310 (2010); *see also United States v. Alvarez*, 567 U.S. 709, 720 (2012). If FFRF believes it faces an unconstitutional limit on its speech, it should try to lift that limit, not fight to impose limits on others.

Finally, with no constitutional basis for its claim, FFRF's invocation of the Take Care Clause must also fail. The Religion Clauses require resisting—not enforcing—government restrictions on the Churches' speech to their own members. Thus, granting FFRF's requested remedy would itself violate the Take Care Clause.

CONCLUSION

There is a reason that the IRS has never actually enforced its regulations against internal church speech: because it knows it won't hold up against a First Amendment defense. Even in the context of *public governmental* religious speech, courts have been clear that "[g]overnment may not seek to define permissible categories of religious speech." *Town of Greece*, 134 S. Ct. at 1822 (upholding legislative prayer). That is even more true for the *internal church teachings* at issue here.

The Court should dismiss FFRF's complaint.

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Respectfully submitted,

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