UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC.,	)	
	)	Case No. 12-CV-818
Plaintiff,	)	
v.	)	
DOUGLAS SHULMAN, COMMISSIONER OF THE INTERNAL REVENUE SERVICE,	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS

This case involves a challenge to the manner in which the IRS enforces 26 U.S.C. § 501(c)(3),[1] which, among other things, requires all tax-exempt organizations to refrain from political campaign activity, or risk losing tax-exempt status. According to the Freedom From Religion Foundation, Inc. ("FFRF"), the IRS systematically refuses to enforce these restrictions against churches and religious groups, while the IRS steadfastly requires all other tax-exempt organizations to refrain from political activity. In fact, however, the IRS has already implemented a constitutional policy for enforcing § 501(c)(3) with respect to ***all*** tax-exempt entities, religious and non-religious alike. Thus, the entire premise of FFRF's Complaint is demonstrably false.

But there is no reason to analyze the merits of FFRF's Complaint. At this juncture, the Court is first obliged to explore a threshold question: has FFRF filed a complaint that properly invokes this Court's jurisdiction? The answer is no. Even if FFRF were correct that the IRS

[1] All statutory references refer to the Internal Revenue Code (26 U.S.C.), unless otherwise noted.

systematically refuses to enforce political activity restrictions against churches and religious organizations (and, of course, that allegation is false), its Complaint is nevertheless fatally flawed for two reasons.

First, FFRF lacks standing to challenge the IRS's enforcement of § 501(c)(3) as FFRF has not suffered any concrete or particularized injury fairly traceable to the action (or inaction) it challenges. FFRF has not suffered any injury at all – at best, the organization has a disagreement with what it falsely claims is a policy not to conduct church tax audits. Thus, FFRF has no standing to sue the IRS in this case because, absent an injury that is concrete and particular to FFRF, the suit merely asks this Court to issue an advisory opinion that is untethered to the rights of the individual litigants. In addition, the Court should dismiss the Complaint under the doctrine of prudential standing because the issues raised by FFRF are at bottom political – and thus more appropriately resolved by the legislative and executive branches.

Second, FFRF has failed to cite a statute that effectively waives the United States' sovereign immunity for this suit. FFRF's reliance on the Administrative Procedure Act ("APA") fails. The APA does not waive sovereign immunity where the plaintiff has not suffered any legal injury, where the plaintiff does not identify a discrete, final agency action to challenge, or where the challenged action has been committed to agency discretion by law. The allegations in this suit amount to no more than a programmatic attack on the manner in which the IRS enforces its own rules and regulations. Under the circumstances, review under the APA is barred because such decisions fall within the IRS's broad discretion regarding how to enforce the internal revenue laws. In short, the IRS itself is fundamentally in the best position to make

decisions regarding whether, when, and how to conduct church tax inquiries. For all of these reasons, FFRF's Complaint should be dismissed in its entirety.

ALLEGATIONS CONTAINED IN THE COMPLAINT

I. Factual Allegations

FFRF describes itself as "a non-profit membership organization that advocates for the separation of church and state and educates on matters of non-theism." (Compl. ¶ 7.) FFRF's membership includes individuals "who are opposed to government preferences and favoritism toward religion." (Id. ¶ 9.) FFRF "represents and advocates on behalf of its members throughout the United States." (Id. ¶ 8.) FFRF pleads no facts regarding its own interaction with the IRS, but makes various "allegations" regarding the IRS's purported enforcement policy.

II. Jurisdictional Allegations

FFRF alleges that the IRS has a "policy of non-enforcement of the electioneering restrictions of § 501(c)(3) against churches and other religious organizations." (Id. ¶ 21.) In support of this allegation, FFRF asserts that "in recent years, churches and religious organizations have been blatantly and deliberately flaunting the electioneering restrictions of § 501(c)(3)." (Id. ¶ 22.) FFRF further alleges that the IRS "has failed even to designate an official with authority to initiate enforcement of §501(c)(3) against churches and other religious organizations." (Id. ¶ 27.)

FFRF alleges that it does not receive the same "preferential treatment" of "non-enforcement of the electioneering restrictions of §501(c)(3)," (id. ¶ 34), even though FFRF makes no allegations regarding the enforcement of the political activity restrictions of § 501(c)(3) as to FFRF. According to FFRF, the alleged "policy of non-enforcement of the

electioneering restrictions of § 501(c)(3) as to churches and religious organizations" constitutes a violation of the Establishment Clause of the First Amendment of the Constitution because the IRS "provides preferential treatment that is not neutral and generally applicable to all tax-exempt organizations," (id. ¶ 31), and "discriminat[es] against other non-profit organizations, including the plaintiff FFRF, solely on the basis of religious criteria," (id. ¶ 30), which "results in obligations on secular non-profits, including the Plaintiff FFRF, that are not imposed on churches." (Id. ¶ 33.)

Invoking this Court's jurisdiction under 28 U.S.C. § 1331, with reference to 28 U.S.C. §§ 2201 and 1443, (id. ¶ 3), FFRF seeks: (1) a declaration that the IRS's policy "violates the Establishment Clause and the Due Process Clause of the United States Constitution"; (2) an injunction against the IRS to cease the policy that FFRF asserts exists; and (3) an order compelling the IRS to "comply with necessary steps to designate an IRS official legally authorized to initiate action against churches and other religious organizations." (Id., Prayer for Relief, ¶¶ a-c.) FFRF also alleges that the "United States has waived sovereign immunity, pursuant to 5 U.S.C. § 702, for actions that seek specific relief other than money damages." (Id. ¶ 4.)

STATUTORY SCHEME

Section 501(c)(3) provides for the exemption from federal income tax for entities organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the 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 § 501(h)), and which does not participate

in, or intervene in (including the publishing or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office. While Treas. Reg. § 1.501(c)(3)-1(c)(1) clarifies that an organization is operated "exclusively" for exempt purposes if the organization engages "primarily" in activities which accomplish one or more of the exempt purposes specified in § 501(c)(3), the prohibition on political campaign activity is absolute. Thus, for an organization to be described in § 501(c)(3) and for the IRS to recognize it as such, the law requires that the organization not participate or intervene in any political campaign for or against a candidate for public office. Section 170(c)(2)(D) contains a similar requirement for organizations to be eligible to receive tax-deductible charitable contributions.

The relevant Treasury regulation states that an organization is not operated exclusively for one or more exempt purposes if it is an "action" organization. Treas. Reg. § 1.501(c)(3)-1(c)(3). The Treasury regulations further define an "action" organization as an organization that participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii). The term "candidate for public office" is defined as an individual who offers himself, or is proposed by others, as a contestant for an elective office, whether such office be national, State, or local. The regulations further provide that activities that constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.

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. In 2007, the IRS published Rev. Rul. 2007-41, 2007-1 C.B. 1421, which applies this analysis to 21 different specific factual situations. The 21 factual situations are grouped into seven topics:

1. Voter Education, Voter Registration and Get Out the Vote Drives.
2. Individual Activity by Organization Leaders.
3. Candidate Appearances.
4. Candidate Appearances Where Speaking or Participating as a Non-Candidate.
5. Issue Advocacy v. Political Campaign Intervention.
6. Business Activity.
7. Web Sites.

Section 501(c)(3) describes several exempt purposes, including charitable, religious, educational, and scientific purposes. The IRS educates exempt organizations about the prohibition on political campaign activity[1] and conducts examinations of exempt organizations.[2]

Section 7611 sets forth specific procedures for the IRS to follow with respect to examinations of churches. Section 7611 was added by Section 1033(a) of the Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494. Under the provisions of Section 7611(a), the IRS may begin a "church tax inquiry" only if an appropriate high-level Treasury official reasonably believes, on the basis of facts and circumstances recorded in writing, that a church: (i) may not be exempt, by reason of its status as a church, from tax under § 501(a); or (ii) may be carrying on an unrelated trade or business within the meaning of § 513. In addition, before beginning the church tax inquiry, the IRS must provide written notice to the church of the inquiry. I.R.C. § 7611(a)(3)(A) and (B). The statute further provides that an examination of "church records" –

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[1] See http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Political-Campaign-Intervention-by-501(c)(3)----Tax-Exempt-Organizations-Educating-Exempt-Organizations.

[2] The IRS's self-published FY2012 Annual Report & FY2013 Work Plan contains a comprehensive overview of the function of the Exempt Organizations division. See http://www.irs.gov/pub/irs-tege/FY2012_EO_AnnualRpt_2013_Work_Plan.pdf.

defined as "all corporate and financial records regularly kept by a church" (I.R.C. § 7611(h)(4)) – may be begun only after written notice of the examination has been given and the church has been provided with an opportunity for a conference if it so requests. I.R.C. § 7611(b).

As the result of an examination, the IRS may determine that an organization is not a church that is exempt from taxation or an organization eligible to receive tax-deductible contributions, or it may issue a notice of deficiency to the organization or (in certain cases) assess an underpayment of tax. I.R.C. § 7611(d)(1). However, § 7611(d)(1) requires that 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."

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) allows a defendant to move to dismiss an action for lack of subject matter jurisdiction. On such a motion, the plaintiff bears the burden of establishing that subject matter jurisdiction exists. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). To establish subject matter jurisdiction, a plaintiff must show, among other things, that the plaintiff has standing to sue and that the United States has waived sovereign immunity to suit. See Macklin v. United States, 300 F.3d 814, 819 (7th Cir. 2002); American Federation of Government Employees, Local 2119 v. Cohen, 171 F.3d 460, 465 (7th Cir. 1999). If the plaintiff cannot make these showings, even with all facts in the complaint accepted as true and all reasonable inferences drawn in the plaintiff's favor, the complaint must be dismissed. See Peters v. Clifton, 498 F.3d 727, 730, 734 (7th Cir. 2007) (affirming dismissal of complaint for lack of subject matter jurisdiction).

ARGUMENT

I. FFRF LACKS STANDING TO MAINTAIN THIS ACTION.

FFRF lacks standing to maintain this suit for two reasons: (1) FFRF fails to allege that it suffered a concrete injury that is fairly traceable to the government's challenged conduct that is redressable by the requested relief; and (2) the relief requested by FFRF would require this Court to supervise the IRS's enforcement policies and decisions. For both of these reasons, as explained more fully below, the Complaint should be dismissed.

A. FFRF Lacks Standing To Maintain This Suit Because It Has Not Alleged An Injury In Fact As A Result Of The IRS's Enforcement Of §§ 501(c)(3) & 7611.

Article III of the United States Constitution requires that the federal judiciary resolve only "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. For more than 200 years, the federal judiciary has limited its exercise of power "solely, to decide on the rights of individuals," Marbury v. Madison, 5 U.S. 137, 170 (1803), and therefore has refrained from reviewing the constitutionality of statutes except when the resolution of some actual injury requires that the Court adjudicate the constitutionality of a challenged act. See Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 597-598 (2007) (plurality opinion)[3] ("The federal courts are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution."). The limitation imposed by the case-or-controversy requirement of Article III standing is "fundamental to the judiciary's proper role in our system

[3] The Hein plurality opinion "is controlling because it expresses the narrowest position taken by the Justices who concurred in the judgment." Freedom From Religion Found., Inc. v. Nicholson, 536 F.3d 730, 738 n.11 (7th Cir. 2008); accord Laskowski v. Spellings, 546 F.3d 822, 827 (7th Cir. 2008).

of government." Id. at 598 (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997) and Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976)).

Constitutional challenges like FFRF's that are abstract, conjectural, or hypothetical may not be heard because federal courts "have no power per se to review and annul acts of Congress on the ground that they are unconstitutional." Frothingham v. Mellon, 262 U.S. 447, 488 (1923), decided with Massachusetts v. Mellon; accord Ariz. Christian Sch. Tuition Org. v. Winn, — U.S. —, 131 S. Ct. 1436, 1441-42 (2011) (hereafter, "ACSTO") ("a plaintiff who seeks to invoke the federal judicial power must assert more than just the generalized interest of all citizens in constitutional governance") (quotation omitted). It is simply not sufficient for a plaintiff to claim "only harm to [its] and every citizen's interest in proper application of the Constitution and laws and [seek] relief that no more directly and tangibly benefits him than it does the public at large." Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992). Indeed, it is fundamental to the role of the federal judiciary that it does not issue orders regarding the preferred manner of executive action where the rights of the individual litigants before the courts are not at stake.

> The province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion. Questions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court.

Marbury v. Madison, 5 U.S. at 170.

"[A]t an irreducible minimum, Article III [of the Constitution] requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" Valley Forge Christian

College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)) (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)); accord Defenders of Wildlife, 504 U.S. at 563 (the "injury in fact" test "requires that the party seeking review be himself among the injured" (quotation omitted)); Hein, 551 U.S. at 598 (standing requires a "personal injury" (quoting Allen, 468 U.S. at 751)).

The party invoking federal court jurisdiction bears the burden of proving each element of Article III standing. Defenders of Wildlife, 504 U.S. at 561. To do so, a plaintiff must show "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Serv, 528 U.S. 167, 180-81 (2000). The Supreme Court has also recently re-emphasized that an allegedly threatened injury must be *certainly impending* to constitute an injury for standing purposes.

> Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending. Thus, we have repeatedly reiterated that "threatened injury must be *certainly impending* to constitute injury in fact," and that "[a]llegations of *possible* future injury" are not sufficient.

Clapper v. Amnesty Int'l USA, — U.S. —, 133 S. Ct. 1138, 1147 (2013) (emphasis in original) (quoting Defenders of Wildlife 504 U.S. at 565 n.2; Whitmore v. Arkansas 495 U.S. 149, 158-160 (1990)) (other internal citations omitted). The requirement that an injury in fact be concrete, as opposed to hypothetical or conjectural, and particular, as opposed to general, ensures that the action is susceptible to judicial adjudication. Allen, 468 U.S. at 751-52. FFRF fails to satisfy any of these constitutional requirements.

1. Concrete and Particularized.

FFRF has not identified any "concrete" injury that it has suffered as a result of any IRS decision to enforce, or not enforce, the restrictions on political activity set forth in § 501(c)(3). Rather, the Complaint is founded entirely on the false allegation that the IRS systematically refuses to enforce political activity restrictions against churches and religious organizations. Thus, the Complaint is not about concrete injury to FFRF. The Complaint merely sets forth FFRF's disagreement with this alleged policy of non-enforcement as to churches and religious organizations. But the Supreme Court has uniformly rejected arguments that a right to constitutional government is a sufficiently concrete injury for standing, even in the context of alleged violations of the Establishment Clause. See Hein, 551 U.S. at 619-20 (Scalia, J. concurring).

Even beyond failing to allege a sufficiently "concrete" injury, FFRF has not alleged that it has suffered a "particularized" injury that could constitute an injury in fact. FFRF does not seek a refund of taxes paid or allege that its tax-exempt status is in danger as a result of government action (or inaction). FFRF has not alleged that it has changed its behavior in any way as a result of the allegations in the Complaint, other than filing this lawsuit.

In addition, FFRF does not identify how a purported failure to designate an "appropriate high level Treasury official" to conduct church tax inquires has affected ***its*** behavior or legal status – nor could it. Church tax inquiries are initiated pursuant to the dictates of § 7611. But FFRF is not a church and is not subject to any inquiry under § 7611. Therefore, FFRF has no standing to challenge IRS enforcement action with respect to the designation of an official to initiate church tax inquiries. Indeed, the IRS does not reveal the existence of any ongoing

church tax inquiries pursuant to the stringent disclosure prohibitions set forth in § 6103, so FFRF would have ***no basis even to know*** whether any such church tax inquiries had begun (aside from the limited audit information that makes its way to the public domain via a publicly filed lawsuit, for example). See Thomas v. U.S., 890 F.2d 18, 20-21 (7th Cir. 1989) (holding that disclosure of information contained in a Tax Court opinion was not a disclosure prohibited by § 6103).[4]

The only allegation in the Complaint regarding FFRF's own treatment is that FFRF is within a class of "other non-profit organizations," (Compl. ¶ 30), which are not treated precisely the same as churches under the Internal Revenue Code. That allegation plainly does not concern a right or injury particular to FFRF, and it cannot constitute grounds for standing.

In essence, FFRF's purported injury is at most a "psychic injury," which the Supreme Court has consistently denied as a sufficient factual basis for standing. See Hein, 551 U.S. at 619-20 (Scalia, J. concurring). In Valley Forge, 454 U.S. at 485-86, the Court unequivocally rejected this kind of psychic injury as a basis for standing:

> [Plaintiffs] fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. 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.

[4] Because public disclosure of a taxpayer's "return information," which includes "whether [a] taxpayer's return was, is being, or will be examined or subject to other investigation or processing," is prohibited by § 6103, and FFRF does not allege that it has based its allegations on any such return information, FFRF would necessarily need to rely on public documents or statements by the IRS, which would be contained in court records, press releases, and the like. FFRF has not done so here.

Id.; Freedom From Religion Found., Inc. v. Obama, 641 F.3d 803, 807-08 (7th Cir. 2011) ("The 'psychological consequence presumably produced by observation of [government officials'] conduct with which one disagrees' is not an 'injury' for the purpose of standing."); accord Freedom from Religion Found., Inc. v. Chao, 447 F.3d 988, 989 (7th Cir. 2006) (denial of en banc rehearing) (Easterbrook, J. concurring) ("Where's the concrete injury? The loss (if any) is mental distress that plaintiffs, who are bystanders to the challenged program, suffer by knowing about conduct that they deem wrongful. Article III does not permit courts to entertain such complaints.").

In sum, no constitutionally cognizable injury has occurred because FFRF has not (and cannot) identify some right to vindicate that goes beyond its desire to see the government act in accordance with FFRF's vision of how to enforce the tax laws. Defenders of Wildlife, 504 U.S. at 563; Gladstone, 441 U.S. at 99 ("The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy ***between himself and the defendant***.") (emphasis added). As a result, FFRF has not alleged an injury in fact, and does not have standing to maintain this action.

2. Fairly Traceable to the Challenged Government Action.

FFRF also cannot identify an injury that is fairly traceable to any injurious government action (or inaction). See Defenders of Wildlife, 504 U.S. at 568. For starters, FFRF has failed to plead any facts that connect its (purported) injury to IRS action. Certainly FFRF's current status as a tax-exempt organization, (Compl. ¶ 6), cannot be traced to whether the IRS has any policy of non-enforcement of § 501(c)(3), given that FFRF has alleged that it abides by the political activity prohibition of § 501(c)(3). (Id.) Nor could FFRF's (purported) injury be linked to

whether the IRS has designated an "appropriate high-level Treasury official" to initiate church tax inquiries under § 7611. FFRF is not a church and § 7611 thus does not apply.

FFRF merely alleges that "the Internal Revenue Service confers benefits solely on the basis of religious criteria," (id. at ¶ 37), while acknowledging that FFRF has done nothing to test whether it would come under the purview of any such policy. (Id. at ¶ 6.) Though FFRF claims that the alleged policy provides for treatment that is not "neutrally available," (id. at ¶ 29), FFRF does not point to any concrete statement of such criteria in order to evaluate its constitutionality, and, moreover, never claims to have been denied such treatment. As a result, FFRF cannot establish an injury that is fairly traceable to government action.

Really, FFRF's theory of standing would entitle it to challenge any law enforcement decision (or lack thereof) by any agency solely on grounds that someone received treatment different than the treatment FFRF believes it would receive. Such an injury is at best a "stigmatic injury" – "judicially cognizable to the extent that [FFRF is] personally subject to discriminatory treatment." Allen, 468 U.S. at 757 n.22. Indeed, government cannot be said to have advanced everything that it does not prohibit, otherwise any plaintiff would have standing to challenge any government inaction. Such logic would render the standing requirement, and the fair traceability requirement, a nullity.

3. Redressable by a Favorable Decision in this Case.

Finally, the Complaint does not identify an injury that can remedied by a favorable decision by this Court. The reason is simple: granting the relief FFRF seeks would require the Court to supplant its views with those of the IRS by setting the enforcement priorities for the agency to apply. "The Judicial Branch does not instruct the Executive Branch how to make its

own decisions. The judicial task is to ensure that executive decisions conform to law, and this decision is lawful." Orum v. Comm'r, 412 F.3d 819, 821 (7th Cir. 2005) (citing Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004)); see also Railway Labor Executives Asso. v. Dole, 760 F.2d 1021, 1023-1024 (9th Cir. 1985) ("it remains virtually impossible for a district court to write the qualitative standards for, and to supervise the enforcement efforts of, the agency charged" with enforcement).

Even if this Court were to accept FFRF's invitation to supervise the initiation, execution, and resolution of church tax inquiries, the relief sought here would still not affect FFRF or its ability to engage in political activity. Therefore, FFRF has not alleged an injury that could be redressed by a favorable decision of this Court. The Supreme Court's distinction between a plaintiff who has "a direct stake in the outcome of a litigation" and "a person with a mere interest in the problem" clearly illustrates that FFRF's purported injury cannot be remedied by a favorable decision in the instant suit. See United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 689 n.14 (1973) (standing doctrine is meant "to distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem"). "A plaintiff who would have been no better off had the defendant refrained from the unlawful acts of which the plaintiff is complaining does not have standing under Article III of the Constitution to challenge those acts in a suit in federal court." McNamara v. City of Chicago, 138 F.3d 1219 (7th Cir. 1998); Harp Advertising Illinois, Inc. v. Village of Chicago Ridge, 9 F.3d 1290 (7th Cir. 1993).

Here, FFRF does not have any cognizable stake in the outcome of this litigation. It does not pray for a refund of any taxes it has paid. It does not seek a judicial determination of its tax-

exempt status, nor does it challenge any agency action that would or could adversely affect it. None of the relief FFRF requests would affect FFRF's tax liabilities or ability to engage in political activity in the slightest amount. Nor would this relief affect whether churches and religious organizations are permitted by § 501(c)(3) to engage in political activity and maintain their tax-exempt status; they may not. Thus, any purported injury that FFRF "is disadvantaged *vis à vis* churches and religious organizations" would not be redressed with a favorable decision. (Compl. ¶ 34; see Compl., Prayer for Relief ¶¶ a-c.) See Schlesinger, 418 U.S. at 217 n.7 ("[t]he generalized nature of respondents' claim is revealed by the scope of relief sought"). Therefore, no "injury" to FFRF alleged in the Complaint can be redressed by a favorable decision of this Court, no matter how much satisfaction FFRF might get from a declaration and injunction requiring the IRS to audit more churches.

B. The Doctrine Of Prudential Standing Bars This Suit.

In addition to the constitutionally mandated requirements for standing, federal courts also apply certain self-imposed prudential principles in determining whether litigants have standing. Gladstone, 441 U.S. at 99-100. Though the "prudential standing" doctrine has been less exhaustively defined than the constitutional standing doctrine, prudential standing encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." Allen, 468 U.S. at 751 (citing Valley Forge, 454 U.S. at 474-75); see also Elk Grove Unified School District v. Newdow, 542 U.S. 1, 12 (2004).

First, pursuant to the prudential standing doctrine, courts have dismissed cases that were not susceptible to judicial adjudication due to the attenuated nature of the injuries alleged by a plaintiff, especially where the plaintiff is clearly outside the class of litigant that has a statutory or other right to challenge such governmental action. For example, in Newdow, the Supreme Court held that even though Newdow satisfied the constitutional standing requirements, he nonetheless did not satisfy the prudential standing requirements where serious questions arose regarding his right to assert the interests of his daughter, a person not before the Court, and raised significant questions of state family law. Id. at 17-18 & n.8. Here, similar circumstances demonstrate that FFRF lacks prudential standing.

For one thing, FFRF is not asserting or attempting to litigate its own rights. Rather, FFRF is litigating the question whether the IRS systematically refuses to enforce political activity restrictions against churches and religious groups. Even if there were such a policy (and there is not), it would not even apply to FFRF – a non-religious organization. As discussed above, FFRF has not identified any rights of its own that it seeks to vindicate by this action, nor is it even asserting the rights of some other party to challenge some government action. As such, FFRF's suit is barred. See MainStreet Organization of Realtors v. Calumet City, Ill., 505 F.3d 742, 746 (7th Cir. 2007).

Second, FFRF does not fall within the "zone of interests" of either §§ 501(c)(3) or 7611. Neither §§ 501(c)(3) nor 7611 provide FFRF with any statutory right of action to challenge the tax-exempt status of any person or organization other than itself. On the contrary, pursuant to I.R.C. § 7428, an organization may dispute the IRS's determination of its tax-exempt status under § 501(c)(3), but only that organization may challenge the IRS designation. See I.R.C. §§

7428(a)(1)(A) & (b)(1); see also Fulani v. Brady, 935 F.2d 1324, 1327 (D.C. Cir. 1991); see also Fulani v. Bentsen, 35 F.3d 49 (2d Cir. 1994).

With respect to § 7611, that section governs the procedures that the IRS is required to use when auditing churches. Those procedures place specific constraints on the IRS's interactions with churches during IRS enforcement proceedings. See Music Square Church v. U.S., 218 F.3d 1367, 1370-72 (Fed. Cir. 2000). Because § 7611 provides specific requirements for the IRS's treatment of churches (and not for other taxpayers), FFRF is not within the "zone of interests" required to satisfy the requirements of prudential standing.

Finally, to the extent that FFRF raises questions regarding the proper degree of enforcement by the IRS, those questions are more appropriately addressed in the representative branches of government. Congress has already weighed in on the procedures for IRS examinations of churches by enacting § 7611 in the first place. Moreover, the Executive is entitled to prioritize certain enforcement responsibilities over others. Heckler v. Chaney, 470 U.S. 821, 831-32 (1985) ("The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."). This Court should refuse FFRF's invitation to supplant the IRS in making determinations regarding how to allocate its scarce agency resources. FFRF's Complaint should be dismissed for these reasons as well.

II. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT WAIVE THE UNITED STATES' SOVEREIGN IMMUNITY.

"It has long been established, of course, that the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). In other words, the

United States, as a sovereign entity, may be sued only to the extent that it has consented to such suit by statute. United States v. Mitchell, 445 U.S. 535, 538 (1980). Absent a waiver, sovereign immunity shields the United States and its agencies from suit. F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994); Balistrieri v. United States, 303 F.2d 617, 619 (7th Cir. 1962) (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)) ("It is axiomatic that a suit cannot be maintained against the United States without its consent.").

In addition, a "waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." Lane v. Pena, 518 U.S. 187, 192 (1996) (internal citations omitted). Where the United States has not consented to suit, dismissal for lack of subject matter jurisdiction is proper. F.D.I.C., 510 U.S. at 475; Miller v. Tony & Susan Alamo Found., 134 F.3d 910, 915-16 (8th Cir. 1998); Murray v. United States, 686 F.2d 1320, 1322 (8th Cir. 1982). Finally, the plaintiff bears the burden of demonstrating that the government has unequivocally waived its sovereign immunity. Barnes v. United States, 448 F.3d 1065, 1066 (8th Cir. 2006).

In the instant case, FFRF relies on the Administrative Procedure Act ("APA"), specifically 5 U.S.C. § 702, to support its assertion that the United States has waived sovereign immunity for this case. (Compl. ¶ 4.) FFRF's reliance on the APA fails, however, for the following reasons: (1) the APA cannot operate as a waiver of sovereign immunity where the plaintiff fails to allege an injury in fact sufficient to provide Article III standing to sue; (2) even if FFRF had sufficiently alleged an injury in fact, judicial review of the purported IRS policy in this case is unavailable because FFRF cannot identify a discrete, final agency action to

challenge; and (3) the challenged action (to the extent there is any action to challenge) is committed to agency discretion by law.

A. The APA Does Not Waive The United States' Sovereign Immunity Because FFRF Has Failed To Allege An Injury In Fact.

The APA does not waive sovereign immunity here because FFRF does not have standing to sue upon any of the claims made in the Complaint, or for any of the relief requested therein. See § I.A, supra; Califano v. Sanders, 430 U.S. 99, 107 (1977) ("the APA does not afford an implied grant of subject-matter jurisdiction"). Indeed, the APA's reference to persons "adversely affected or aggrieved" has been interpreted to encompass only those who would otherwise have standing to challenge an agency decision. See Doe v. Chao, 540 U.S. 614, 624-25 (2004) (citing Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 126 (1995). Thus, for the APA to operate as a waiver of sovereign immunity, a plaintiff must allege an injury in fact sufficient to provide Article III standing to sue. Apter v. Richardson, 510 F.2d 351, 353 (7th Cir. 1975). This requirement ensures "that the plaintiff has a sufficient personal stake in the outcome of the controversy to ensure vigorous presentation of the issues." Id. (citing Flast v. Cohen, 392 U.S. 83, 102-03 (1986)); see also Students Challenging Regulatory Agency Procedures, 412 U.S. at 689.

As discussed above, FFRF lacks standing because it has not alleged that it has suffered a concrete, particularized injury that is redressable by a favorable decision of this Court. Moreover, FFRF cannot establish that this Court should exercise jurisdiction over this action pursuant to the doctrine of prudential standing. See § I.B, supra. The APA does not somehow override these standing requirements; instead, the waiver of sovereign immunity contained in

the APA is similarly limited to circumstances where a taxpayer alleges that it has suffered sufficient injury to maintain standing generally. Thus, invoking the APA does not cure FFRF's failure to show that it has standing, and does not waive sovereign immunity in this case.

B. FFRF Cannot Satisfy The Threshold Requirements For Review Under The APA.

Even if the Court were to conclude that FFRF has sufficiently alleged that it has standing to sue upon any of the claims made in the Complaint, the APA still does not provide a waiver of sovereign immunity because judicial review under the APA is unavailable where, as here, FFRF does not challenge any discrete, identifiable, or final agency action. Thus the APA does not confer a waiver of sovereign immunity.

1. Judicial Review under the APA is Limited to Review of Discrete Agency Action that the Agency is Required to Take.

FFRF alleges that the IRS has "a policy of non-enforcement of the electioneering restrictions of § 501(c)(3) against churches and other religious organizations." (Compl. ¶ 21.) However, FFRF does not identify any statement or formulation of such a policy. FFRF merely infers that the IRS has such a policy. Building on its theme, FFRF alleges that the IRS has yet to designate a "high ranking official within the IRS to approve and initiate enforcement of the restrictions of §501(c)(3) against churches and religious organizations," (Compl. ¶¶ 2, 27). These allegations fail to identify any discrete, identifiable action that the IRS is required to take. Review under the APA is therefore barred.

"Failures to act are sometimes remediable under the APA, but not always." Norton, 542 U.S. at 61. Judicial review of a failure to act under the APA is available "only where a plaintiff asserts that an agency failed to take a ***discrete*** agency action that it is ***required to take***." Id. at 64

(emphasis in original). As the Supreme Court explained, such "limitations rule out several kinds of challenges" including "broad programmatic attack[s]" of the type at issue here. Id. at 64. For example, in Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990), the Supreme Court rejected a challenge to the Bureau of Land Management's "land withdrawal review program." Id. at 879. According to the Court, the program was not an agency action at all. The Court explained:

> [R]espondent cannot seek ***wholesale*** improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular "agency action" that causes it harm.

Id. at 891 (emphasis in original). Likewise, in Norton, the Court elaborated that "[g]eneral deficiencies in compliance" lack the specificity required to support judicial review under the APA. 542 U.S. at 66. Indeed, the APA's limitations on judicial review are intended "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." Id. "If courts were empowered to enter general orders compelling compliance with broad statutory mandates," "it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management." Id. at 66-67.

The same is true here. FFRF makes allegations regarding a policy of non-enforcement and, predictably, does not identify any statement or formulation of such a policy. FFRF's Complaint is no more than a "programmatic attack" on the manner in which the IRS enforces § 501(c)(3). FFRF asks this Court to require the IRS to make decisions regarding enforcement

priorities that are better left to the IRS or to Congress. FFRF essentially asks that the judicial branch inject itself into the day-to-day management of church tax inquiries.

Indeed, FFRF is dissatisfied with the degree to which the IRS has undertaken audits of churches and religious groups, even though the IRS is not "required" to initiate any church tax inquiries pursuant to § 7611. Rather, such decisions fall within the IRS's broad discretion regarding how it conducts its investigations. According to the plain language of § 7611(d), the IRS "may" revoke church status under certain circumstances. The word "may" implies discretion. See Wilson v. Comm'r, 705 F.3d 980, 992-93 (9th Cir. 2013); Jama v. ICE, 543 U.S. 335, 346 (2005) ("The word 'may' customarily connotes discretion."); Fernandez v. Brock, 840 F.2d 622, 632 (9th Cir. 1988) ("'May' is a permissive word, and we will construe it to vest discretionary power absent a clear indication from the context that Congress used the word in a mandatory sense.").

This case is not within the scope of the APA because the Commissioner does not owe any duty to FFRF nor does FFRF request the Service to perform a mere ministerial act. See Norton, 542 U.S. at 64 (observing that the APA "empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing ***how*** it shall act.'") (emphasis in original) (quoting Attorney General's Manual on the Administrative Procedure Act 108 (1947)). On the contrary, FFRF seeks to have this Court require the IRS to adopt FFRF's enforcement preferences. This is not a duty that is owed to any particular individual or organization, but rather is a generalized duty in support of the Service's overall mission.

Moreover, the process of examining an organization's returns is an act replete with discretion. Such examinations require a constant exercise of discretion and judgment – and are clearly not the type of discrete, ministerial, and required actions that are remediable under the APA. Put simply, because FFRF ultimately seeks to have this Court oversee the "manner and pace" of IRS compliance with congressional directives, judicial review under the APA is simply not available. Id. at 67.

2. Judicial Review under the APA is Limited to "Final" Agency Action.

Second, FFRF cites to no "final" agency action for this Court to review. For a court to have jurisdiction over claims seeking judicial review of an agency action under the APA, it must determine that the action is final. See 5 U.S.C. § 704 (limiting judicial review to "final agency action"); Nat'l Wildlife Fed'n, 497 U.S. at 894 ("we intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect"); see also Ticor Title Ins. Co. v. Fed. Trade Comm'n, 814 F.2d 731, 746 n.2 (D.C. Cir. 1987) (noting that the finality requirement also applies to "agency action made reviewable by statute"). A final agency action "(1) 'marks the consummation of the agency's decision making process – it must not be of a merely tentative or interlocutory nature'; and (2) the action 'must be one by which rights or obligations have been determined or from which legal consequences will flow.'" Domestic Secs. v. Secs. & Exch. Comm'n, 333 F.3d 239, 246 (D.C. Cir. 2003) (quoting Bennett v. Spear, 520 U.S. 154, 177-78 (1997)). A court therefore must consider "whether the agency's position is definitive and whether it has a direct and immediate effect on the day-to-day business of the parties." Indep. Petroleum Ass'n of Am. v. Babbitt, 235 F.3d 588, 595-96 (D.C. Cir. 2001).

In the present case, even accepting all the allegations in the Complaint as true, there has been no final agency action or policy with respect to the enforcement, or not, of the political activity restrictions of § 501(c)(3) against churches and other religious organizations. And as discussed above, FFRF does not identify any particular agency action that has caused it injury. FFRF makes no reference to any particular agency action, ruling, determination, or policy statement. FFRF is plainly attempting to challenge what it perceives or infers is the "lack" of an enforcement policy, which cannot constitute final agency action. For this reason too, judicial review under the APA is unavailable, and FFRF's complaint must be dismissed.

C. Judicial Review Under The APA Is Unavailable Because The Enforcement Decisions At Issue Are Committed To Agency Discretion By Law.

Even if the Court were to conclude that FFRF has met the threshold requirements for judicial review under the APA, the APA still does not provide a waiver of sovereign immunity because the agency action at issue in this case is committed to agency discretion by law. Section 701(a)(2) of the APA states that "[t]his chapter applies, according to the provisions thereof, except to the extent that . . . agency action is committed to agency discretion by law." Section 702 is included in the referenced chapter, so its sovereign immunity waiver does not apply – and jurisdiction is therefore lacking – if the § 701(a)(2) exception applies. Lunney v. United States, 319 F.3d 550, 551, 554, 558, 560 (2d Cir. 2003); see Steenholdt v. FAA, 314 F.3d 633, 634, 638 (D.C. Cir. 2003) (§ 701(a)(2) exception is jurisdictional). Therefore, because any "policy of non-enforcement of the electioneering restrictions of § 501(c)(3) against churches and other religious organizations," (Compl. ¶ 21), assuming it is an agency action, is one committed to agency discretion by law, the Court should dismiss FFRF's claim for lack of subject matter jurisdiction.

Agency decisions regarding whether, when, and how to bring enforcement actions are presumptively non-reviewable – and, thus, committed to agency discretion by law – because the agency itself is fundamentally in the best position to make decisions to enforce its own rules and regulations. Indeed, as the Supreme Court announced in Heckler, an "agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." 470 U.S. at 831. This presumption of non-reviewability applies because an agency decision not to enforce

> often involves a complicated balancing of a number of factors which are peculiarly within its expertise . . . including whether a violation has occurred, . . . whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.

Id.; see also Balt. Gas & Elec. Co. v. FERC, 252 F.3d 456, 459 (D.C. Cir. 2001) ("[A]n agency's decision not to exercise its enforcement authority, or to exercise it in a particular way, is committed to its absolute discretion. Such matters are not subject to judicial review."); accord Nat'l Wildlife Fed'n v. Envtl. Prot. Agency, 980 F.2d 765, 772-73 (D.C. Cir. 1992). Moreover, the IRS, like any other agency "is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." Shell Oil Co. v. Envtl. Prot. Agency, 950 F.2d 741, 764 (D.C. Cir. 1991) (quoting Heckler, 470 U.S. at 831-32).

Such is the case here. The Treasury Department's Office of Tax Policy and the IRS are best suited to identify and prioritize the internal revenue law issues that should be addressed through examinations, enforcement actions, regulations, revenue rulings, revenue procedures, notices, and other published administrative guidance. The IRS, with suggestions from all interested parties, including taxpayers, tax practitioners, and industry groups, is uniquely

qualified to make decisions regarding the enforcement issues that are most important to taxpayers and tax administration. Most importantly, the IRS is in the best position to prioritize its own enforcement decisions based on how to allocate its limited resources.

Indeed, Congress has erected a detailed structure to govern tax enforcement. Congress has delegated "the administration and enforcement of" the tax laws exclusively to the Secretary and the Commissioner, see I.R.C. § 7801(a), including the power to "prescribe all needful rules and regulations for the enforcement of" those laws. I.R.C. § 7805(a). Congress has reserved to itself the task of overseeing the enforcement of the revenue laws by creating a Joint Committee on Taxation to investigate the administration, operation, and effects of the tax system. I.R.C. §§ 8001-8023. This structure reflects a deliberate judgment that the vigor of the government's enforcement of the tax laws is generally not a matter for litigation instituted by private parties.

While the rule is well established that agency decisions regarding enforcement decisions are presumptively non-reviewable, "the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." Heckler, 470 U.S. at 832-33. In such situations, courts consider "both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action." Sec'y of Labor v. Twentymile Coal Co., 456 F.3d 151 (D.C. Cir. 2006) (quoting Drake v. FAA, 291 F.3d 59, 70 (D.C. Cir. 2002)). Review is not available where, for example, a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Twentymile Coal Co., 456 F.3d at 156 (quoting Heckler, 470 U.S. at 830; Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971)). See also Borrelli v. Sec'y of Treasury, 343 F. Supp.

2d 249, 254-255 (S.D.N.Y. 2004) ("an agency's decision not to adopt a particular course of enforcement action is presumed to be exempted from judicial review, unless a plaintiff makes a showing that 'the substantive statute contains guidelines for the agency to follow in exercising its enforcement powers'") (citation omitted).

In Borrelli, 343 F. Supp. 2d at 254-55, the plaintiffs attempted to challenge the IRS's choice regarding how to enforce § 503. According to the court, the IRS's enforcement decision was entitled to a presumption against judicial review, and the plaintiffs were required to rebut that presumption. The plaintiffs relied on § 503(a)(1)(B), but the court concluded that the statute "merely sets forth the substantive standard to be enforced, but does not provide sufficient 'guidelines for exercise for [their] enforcement power.'" Id. (citations omitted). "In other words, 26 U.S.C. § 503(a)(1)(B) tells the I.R.S. ***what*** standard to enforce, but not ***how*** to enforce it." Id. (emphasis in original).

The same is true here. There is no law that cabins the IRS's discretion to enforce the political activity restrictions of § 501(c)(3).[5] Therefore, there is no meaningful standard by which a court could review the exercise of that discretion. To be sure, there is a statutory framework that contemplates the existence of, and a legal role for, church tax inquiries and examinations, and the Treasury Department has promulgated regulations regarding such claims. See I.R.C. § 7611. But these statutes and regulations are silent on the relevant issue in that they

[5] Notably, the APA standards of review found in 5 U.S.C. § 706 cannot provide the applicable legal standards for this purpose, because otherwise the agency discretion exception would never apply. See Lunney, 319 F.3d at 559 n.5 (rejecting use of the "arbitrary and capricious" standard in § 706 on this basis); Steenholdt, 314 F.3d at 639 (rejecting use of the "substantial evidence" standard in § 706 on this basis). Rather, the applicable standard must come from the statute, regulation, or policy statement governing the agency action. Steenholdt, 314 F.3d at 638.

do not provide a legal standard that would permit judicial review of the IRS's discretion to enforce the political activity restrictions of § 501(c)(3) by way of a church tax inquiry.

In sum, Congress has not limited the IRS's "exercise of enforcement power" in this area "by setting substantive priorities, or by otherwise circumscribing [the] agency's power to discriminate among issues or cases it will pursue." Heckler, 470 at 833. As a result, the presumption of non-reviewability regarding IRS decisions to enforce the political activity restrictions of § 501(c)(3) cannot be overcome. Because this deficiency is jurisdictional, FFRF's suit must be dismissed.

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Because FFRF has failed to identify "a federal law that waives the sovereign immunity of the United States to the cause of action," see Macklin, 300 F.3d at 819, this Court lacks subject matter jurisdiction. See also Schilling v. Wis. Dep't of Natural Res., 298 F. Supp. 2d 800, 802-04 (W.D. Wis. 2003) (dismissing suit because plaintiffs did not aver a waiver of sovereign immunity). The Complaint must, therefore, be dismissed in its entirety.[6]

[6] There is no question that the remaining jurisdictional citations in the Complaint do not waive sovereign immunity. See Beale v. Blount, 461 F.2d 1133, 1138 (5th Cir. 1972) (28 U.S.C. §§ 1331 and 1343 "may not be construed to constitute waivers of the federal government's defense of sovereign immunity"); Balistrieri, 303 F.2d at 619 (28 U.S.C. § 2201 does not waive sovereign immunity); Lonsdale v. United States, 919 F.2d 1440, 1443-1444 (10th Cir. 1990) ("Sovereign immunity is not waived by general jurisdictional statutes such as 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1340 (jurisdiction over actions arising under the Internal Revenue Code), and 28 U.S.C. § 1361 (action to compel a government officer to perform his duty).").

CONCLUSION

For all of the foregoing reasons, FFRF's Complaint should be dismissed.

Dated: April 8, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on April 8, 2013, service of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS was made upon Plaintiff by filing it with the Clerk of Court using the CM/ECF system.

/s/ Richard G. Rose
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