UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS SECULAR HUMANIST ASSOCIATION, INC.	**CIVIL ACTION**
versus	**NO. 04-3165**
CYNTHIA BRIDGES, SECRETARY OF THE LOUISIANA DEPARTMENT OF REVENUE	**SECTION C**

ORDER AND REASONS

Before this Court is Plaintiff New Orleans Secular Humanist Association, Inc.'s ("NOSHA") Motion for Permanent Injunction, requesting that this Court declare two Louisiana sales tax exemptions unconstitutional and unenforceable, as being in violation of the Establishment Clause of the First Amendment to the United States Constitution. NOSHA seeks to enjoin Cynthia Bridges, in her capacity as Secretary of the Louisiana Department of Revenue (the "State"), from enforcing La. R.S. 47:301(8)(e), which exempts the Society of the Little Sisters of the Poor from paying any sales tax, and La. R.S. 47:301(8)(d), which exempts churches and synagogues from payment of sales taxes for the purchase of bibles, songs books, and literature used for religious purposes.

The State has previously filed challenges to NOSHA's standing, a request to dismiss the

matter for failure to state a claim, a request for the Court to abstain from hearing the case, and a request to join necessary parties. All were denied. (Rec. Doc. 8.) On April 17, 2006, this Court granted NOSHA's Motion for Preliminary Injunction, enjoining the State from enforcing La. R.S. 47:301(8)(e) and La. R.S. 47:301(8)(d) as being in violation of the Establishment Clause of the First Amendment to the United States. Having considered the record, the memoranda and the law, the Motion for Permanent Injunction is GRANTED for the following reasons.

I. Background

NOSHA is a Louisiana non-profit corporation which seeks to raise public awareness about the values of secular humanism. NOSHA pays sales and use taxes in Louisiana for a variety of purposes, including the purchase of services and materials, the publishing of news and educational information, and the payment of overnight lodging. The defendant is Cynthia Bridges, Secretary of the Louisiana Department of Revenue, a subdivision of the Louisiana State government authorized under La. R.S. 47:1501. In her capacity as Secretary, Bridges is charged with enforcing the allegedly unconstitutional tax exemptions.

The Plaintiff makes facial constitutional challenges to the two statutes. La. R.S. 47:301(8)(e) exempts the Society of the Little Sisters of the Poor from paying any sales and use taxes.[1] The Little Sisters is an organization affiliated with the Roman Catholic Church, and provides food, clothing, and shelter to the elderly poor. La. R.S. 47:301(8)(d) exempts certain churches and synagogues from paying sales and use taxes on publications used for religious

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[1] Section 301(8)(e) states in pertinent part:

> "For purposes of the payment of the state sales and use tax and the sales and use tax levied by any political subdivision, the term 'person' shall not include the Society of the Little Sisters of the Poor."

purposes. Under La. R.S. 47:301(8)(d), churches and synagogues which have obtained a certificate of authorization from the secretary of the Department of Revenue are exempted from paying sales and use taxes on the purchase of bibles, song books, and literature used for religious purposes.[2] In arguing that the statutes are unconstitutional, NOSHA states that the statutes "favor[] religious persons and/or organizations who conduct faith based actions." (Rec. Doc. 12 at 5.) In other words, the statutes are narrowly drafted to benefit only religious taxpayers and lack constitutionally required breadth and neutrality.

The State opposes the motion, adopting arguments it previously raised in its Motion to Dismiss, and its Opposition to the Motion for Preliminary Injunction, (Rec. Doc. 21 at 1; Rec. Doc. 3; Rec. Doc. 16), which the Court denied in its Orders dated July 7, 2005 and April 17, 2006 (Rec. Doc. 8; Rec. Doc. 17). Because no intervening law or newly developed facts have been presented by the State, the Court declines to revisit its decisions. The State alleges that NOSHA lacks standing to challenge the statutes because NOSHA has failed to prove that the Little Sisters or any churches or synagogues actually use the tax exemption; absent such a showing, the State argues NOSHA has not proven that it is an involuntary donor to these organizations. (Rec. Doc. 21 at 2-4.) Last, the State argues that requiring the currently tax-exempt organizations to pay taxes would violate the organizations' free exercise of religion. (Rec. Doc. 21 at 3-5.) For the reasons below, the Court finds that these arguments are without merit.

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[2] Section 301(8)(d) provides in pertinent part:

> "For purposes of the payment of the state sales and use tax and the sales and use tax levied by any political subdivision, the term 'person' shall not include a church or synagogue. . . . The exclusion from the sales and use tax authorized by this Subparagraph shall apply only to purchases of bibles, song books, or literature used for religious instruction classes."

II. Standard of Review

The standard for obtaining a permanent injunction is "essentially the same" as for obtaining a preliminary injunction. *Lionheart v. Foster*, 100 F.Supp.2d 383, 385 (E.D.La. 1999); *Medx, Inc. v. Ranger*, 788 F.Supp. 288, 289 (E.D.La. 1992). A preliminary injunction is appropriate only when the movant can establish the following four prerequisites: "(1) a substantial likelihood that the movant will prevail on the merits; (2) a substantial threat that irreparable harm will result if the injunction is not granted; (3) the threatened injury outweighs the threatened harm to the defendant; and (4) the granting of the preliminary injunction will not disserve the public interest." *McWaters v. Federal Emergency Management Agency*, 408 F.Supp.2d 221, 228 (E.D. La. 2005) (*citing Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987)). The movant must satisfy all four factors; a failure to establish one of the four factors requires a denial of the preliminary injunction. *See Mississippi Power & Light v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

The only difference in obtaining a motion for permanent injunction is that the movant seeking a permanent injunction must demonstrate actual success on the merits, rather than a substantial likelihood of success. *Calmes v. United States*, 926 F.Supp. 582, 591-92 (N.D. Tex. 1996) (*citing Amoco Production Co., v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n. 12 (1987)). The Fifth Circuit has held that "[i]njunctive relief is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *Holland America Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5 Cir. 1985).

A plaintiff is permitted to move for a permanent injunction via summary judgment. Summary judgment is only proper when the record indicates that there is not a "genuine issue as

to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A genuine issue of fact exists only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247-48 (1986); *see also Taita Chem. Co. v. Westlake Styrene Corp.*, 246 F.3d 377, 385 (5th Cir. 2001). When considering a motion for summary judgment, this Court "will review the facts drawing all inferences most favorable to the party opposing the motion." *Reid v. State Farm Mut. Auto Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its initial burden, however, "the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995). In order to satisfy its burden, the non-moving party must put forth competent evidence and cannot rely on "unsubstantiated assertions" and "conclusory allegations." *See Hopper v. Frank*, 16 F.3d 92 (5th Cir. 1994); *Lujan v. Nat'l. Wildlife Fed'n.*, 497 U.S. 871, 871-73 (1990); *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 649 (5th Cir. 1992).

III. Analysis

This Court finds that all four requirements for a permanent injunction have been met, and that there is no genuine issue of material fact which prevents this Court from issuing the permanent injunction. NOSHA has affirmatively established that La. R.S. 47:301(8)(e) and La. R.S. 47:301(8)(d) violate the Establishment Clause of the First Amendment to the United States

Constitution. La. R.S. 47:301(8)(e) exempts the Society of the Little Sisters of the Poor, an organization affiliated with the Roman Catholic Church, from paying any sales tax. La. R.S. 47:301(8)(d) provides that churches and synagogues who have obtained a certificate of authorization from the Secretary of the Department of Revenue will be exempted from paying sales and use taxes on the purchase of bibles, songs books and literature used for religious purposes.

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." The clause applies to the states through the Fourteenth Amendment. *See e.g., Everson v. Board, of Education*, 330 U.S. 1, 8 (1947). The First Amendment "requires the state to be neutral in its relations with groups of religious believers and nonbelievers. . ." 330 U.S. at 18. "The State must confine itself to secular objectives, and neither advance nor impede religious activity." *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 747 (1976). In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court restated its Establishment Clause jurisprudence. *Id.* at 612-613. For a statute to be constitutional, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster an excessive government entanglement with religion.". The Fifth Circuit has also noted that two additional lines of analysis have since been developed by the Supreme Court: "The second test, the 'coercion' test, measures whether the government has directed a formal religious exercise in such a way as to oblige the participation of objectors. The final test, the 'endorsement' test, prohibits the government from conveying or attempting to convey a message that religion is preferred over non-religion." *Doe v. Beaumont Independent School District*, 240 F.3d 462, 468 (5th Cir. 2001)

(internal citations omitted).

In this matter, the Court is presented with facial challenges to the statutes.[3] With a facial Establishment Clause challenge, the first part of the *Lemon* test is often determinative; the Court must examine the statutes based on their text and the circumstances surrounding their enactment and determine whether the purpose of the legislation is unconstitutional. *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 312- 316 (2000) ("Our Establishment Clause cases involving facial challenges, however, have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose."). The Court may also consider the statutes' "inevitable" effects. *Id.* at 316.

La. R.S. 47:301(8)(e) and La. R.S. 47:301(8)(d) provide exemptions available only to religious organizations, and can be considered together on the basis of this commonality. In *Texas Monthly, Inc. v. Bullock*, 489 U .S. 1 (1989), the Supreme Court held that a Texas state sales tax exemption for religious publications violated the Establishment Clause. "Every tax exemption [available only for religious groups] constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become indirect and vicarious donors." *Id.* at 14 (internal citations omitted). For a tax exemption for religious groups to be constitutional, it must "be warranted by some overarching secular purpose that justifies like benefits for nonreligious groups." *Id.* at 15, n 4. Here, as in *Texas Monthly*, "[t]here is no evidence in the record, and [the State] does not argue in its brief to this Court, that the exemption for religious periodicals was grounded in some secular

[3] Because the Plaintiff's challenge is facial, the Court need not evaluate any facts concerning the application of the statutes; a review of the statutes' text and circumstances surrounding their enactment is sufficient. The State's argument that the Plaintiff has failed to prove the exempt organizations actually use the tax exemptions fails for this reason.

legislative policy that motivated similar tax breaks for nonreligious activities. It certainly appears from [the statutory text] that the exemption was intended to benefit religion alone." *Id.*

In the absence of any controverting evidence, the language of the challenged statutes is clear: the statutes benefit only religious, and not secular, organizations.[4] Thus, the statutes have an unconstitutional purpose and effect under *Lemon*, and NOSHA has established success on the merits of its claims.[5]

This Court also finds a substantial threat that irreparable harm will result if the permanent injunction is not granted. "It is well settled that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary

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[4] These statutes are thus unlike broad, neutral statutes that have been held constitutional because they apply equally to religious and non-religious groups. *See Walz v. Tax Commission of City of New York*, 397 U.S. 664, 666-667 (1970) (statute exempted property taxes for property used exclusively for educational, charitable, and religious uses); *Mueller v. Allen*, 463 U.S. 388, 394-395 (1983) (holding that a Minnesota statute allowing state taxpayers, in computing their state income tax, to deduct expenses incurred in providing tuition, textbooks and transportation for their children attending elementary or secondary school did not violate establishment clause, notwithstanding statistics showing that statute's application primarily benefitted religious institutions and notwithstanding fact that state officials had to determine whether particular textbooks qualified for deduction, where state's efforts to assist parents in meeting rising cost of education served secular purpose and deduction was available to all parents, including those whose children attended public schools and those whose children attended nonsectarian private schools); *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (holding that statute, under which federal government distributes funds to state and local governmental agencies, which in turn lend educational materials and equipment to public and private schools, does not violate Establishment Clause of the First Amendment). Because the statutory text exclusively favors religious organizations, this Court also finds that one of the inevitable effects of the legislation is that the government has obliged the participation of objectors by forcing them to become involuntary donors to the religious organizations exempt under these statutes. *See Texas Monthly*, 489 U.S. at 14. The Court also finds that the State, in enforcing these statutes, is attempting to convey a message that religion is preferred over non-religion, because the statutes give benefits solely to religious groups. *See Doe*, 240 F.3d at 468.

[5] In light of the foregoing analysis, the State's argument that requiring the currently tax-exempt organizations to pay taxes would violate their free exercise of religion is without merit.

injunction." *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981); *Wexler v. City of New Orleans*, 267 F.Supp.2d 559, 568 (E.D. La. 2003); *Howell v. City of New Orleans*, 844 F.Supp. 292, 294 (E.D. La. 1994). Because NOSHA pays sales tax on an ongoing basis, it is, under the rationale of *Texas Monthly*, continually forced to be an involuntary donor and give unwilling support to the religious organizations exempt under these statutes. *See Texas Monthly*, 489 U.S. at 14. Thus, its freedom to worship or not to worship is being violated on an ongoing basis. As this Court found in *American Civil Liberties Union Foundation of Louisiana v. Crawford*, 2002 WL 461649 (E.D. La. 2002), the First Amendment presumption of irreparable harm encompasses the Establishment Clause claims at issue here.

With regard to the third factor to be considered in granting or denying a permanent injunction, the Court finds that NOSHA has shown that the threatened injury outweighs any damage that the injunction may cause the State. NOSHA's First Amendment freedoms are being denied while the statute remains in operation. In contrast, the State, at a minimum, does not appear to be at risk of suffering any harm from a grant of the permanent injunction, and, furthermore, will benefit from the increased collection of tax revenues.[6] Thus in balancing the equities, the scale tips in favor of the Plaintiff.

Finally, the Court finds that granting the permanent injunction will not disserve the public interest; the public interest is best served by enjoining any statute which impermissibly favors a religious group in violation of the Establishment Clause of the First Amendment of the United States Constitution.

The Plaintiff has thus satisfied the four prerequisites necessary to the entitlement to the

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[6] The Court notes that the State does not oppose the motion on these grounds.

permanent injunctive relief sought in this motion with respect to La. R.S. 47:301(8)(e) and La. R.S. 47:301(8)(d).

III. Conclusion

For the foregoing reasons, IT IS ORDERED that New Orleans Secular Humanist Association, Inc.'s Motion for Permanent Injunction (Rec. Doc. 19) is GRANTED as to La. R.S. 47:301(8)(e) and La. R.S. 47:301(8)(d).

IT IS FURTHER ORDERED that the parties will submit a proposed permanent injunction order and judgment, approved as to form, within ten days.

New Orleans, Louisiana, this 1st day of August, 2006.

HELEN G. BERRIGAN
UNITED STATES DISTRICT JUDGE