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11 U.S.C. § 544(b)  
11 U.S.C. § 548(a)(2)  
11 U.S.C. § 548(d)(2)  
42 U.S.C. § 2000bb  
O.R.S. 95.240(1)  
O.R.S. 95.200(10)  
U.S. Const. Amend. I  
U.S. Const. Amend. V

Hartvig v. Tri-City Baptist Temple  
of Milwaukie, Inc. (In re Gomes)

Adv. #97-3309-rld  
Main Case #396-38898-rld7

4/7/98

RLD

Published

The Chapter 7 Trustee commenced an adversary proceeding to recover transfers in the form of tithes and offerings which the debtors made to the Church in the year before filing bankruptcy and while they were insolvent. The parties filed cross-motions for summary judgment based on stipulated facts. The court held that the analysis for recovery of the transfers under 11 U.S.C. §§ 548(a)(2) and 544(b), which incorporates ORS 95.240(1), was identical for purposes of this case. The court held the trustee was entitled to recover the transfers. Spiritual benefits do not constitute "value" for purposes of §§ 548(a)(2) or 544(b), as debtors had no ownership or exclusive right to possess them. Even if the Church gave value for the transfers the value was not given "in exchange for" the tithes where the debtors had access to the Church services and ministries regardless of whether they tithed.

In considering the affirmative defenses raised by the Church, the court held that it need not decide the constitutionality of the Religious Freedom Restoration Act ("RFRA") or the extent to which City of Boerne v. Flores, \_\_\_ U.S. \_\_\_, 117 S.Ct. 2157 (1997) has invalidated RFRA because §§ 548(a)(2) and 544(b) do not impose substantial burdens on the free exercise of religion. The court further held that, given the limits on the scope of the trustee's avoidance powers inherent in the language of the statutes, the requirement that the Church submit to trustee discovery and disgorge funds on occasion did not rise to the level of government action that would constitute an excessive entanglement with religion in violation of the First Amendment. Finally, the court held that because the Church had no reasonable "investment-backed expectation" in retaining the tithes received from insolvent debtors, recovery of the transfers by the Trustee did not violate the takings clause of the Fifth Amendment.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	
	)	Case No. 96-38898-rld7
DANIEL JOSEPH GOMES and	)	
LAURIE ANN GOMES,	)	
	)	
Debtors.	)	Adversary Proceeding
_____	)	No. 97-3309
	)	
DONALD H. HARTVIG, Trustee,	)	
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION
v.	)	
	)	
TRI-CITY BAPTIST TEMPLE OF	)	
MILWAUKIE, INC.,	)	
	)	
Defendant.	)	

This adversary proceeding was heard on March 24, 1998, on the parties' cross-motions for summary judgment, Teresa H. Pearson of Greene & Markley, P.C., appearing in behalf of the plaintiff, Donald H. Hartvig, Trustee (the "Trustee"), and Herbert G. Grey and Kelly E. Ford appearing in behalf of the defendant, Tri-City Baptist Temple of Milwaukie, Inc. (the "Church"). This is a core proceeding over which this court has jurisdiction pursuant to 28 U.S.C.

1 Sections 157 and 1334 and United States District Court of Oregon  
2 Local Rule 2100-1.

3 **STIPULATED FACTS**

4 The parties have stipulated to certain facts for purposes of  
5 considering their respective motions, including the following:

6 The debtors, Daniel Joseph Gomes and Laurie Ann Gomes (the  
7 "Gomes"), filed a voluntary petition under Chapter 7 of the  
8 Bankruptcy Code on November 22, 1996. The parties agree that the  
9 Gomes became insolvent for purposes of 11 U.S.C. Sections 548(a)(2)  
10 and 544(b)<sup>1</sup> on February 1, 1996, approximately ten months before  
11 they filed their Chapter 7 bankruptcy petition, as a result of the  
12 failure of their wholesale candy business.

13 The Church is an independent Baptist Church. It was formed  
14 as an Oregon nonprofit corporation in 1974 and has operated  
15 continuously since that time in Gladstone, Oregon.

16 The Gomes made transfers (the "Transfers") to the Church  
17 prior to their bankruptcy filing, all in the form of tithes and  
18 offerings, totaling \$6,124.00 after February 1, 1996. The Gomes had  
19 ownership and property interests in said \$6,124.00 when they made  
20 the Transfers to the Church. The Gomes received no economic benefit  
21 or tangible personal property in exchange for the Transfers.

22 The Trustee regularly makes demands to a wide variety of  
23 entities, including but not limited to, individuals, businesses,  
24 governmental entities, religious institutions and secular charities,

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25  
26 <sup>1</sup> Unless otherwise indicated, all references to Sections are  
to the Bankruptcy Code, 11 U.S.C. §§ 101, et seq.

1 for repayment of transfers made by debtors prior to the petition  
2 dates in their Chapter 7 bankruptcies pursuant to Sections 547, 548,  
3 549 and 550. The Trustee takes such actions without regard to  
4 whether an entity is religious or secular in nature, and for  
5 religious entities, without regard to any particular entity's  
6 religious doctrine or affiliation. In filing this adversary  
7 proceeding, the Trustee asserted the rights of all unsecured  
8 creditors with claims against the Gomes, including a number of  
9 unsecured creditors whose claims arose prior to February 1, 1996.  
10 In doing so, the Trustee was fulfilling his fiduciary duty to the  
11 creditors of the Gomes' bankrupt estate by seeking to recover funds  
12 for the creditors to share consistent with the scheme for  
13 distribution provided for in the Bankruptcy Code.

14         The Church conducts many different types of ministries and  
15 programs typically associated with Christian churches and community  
16 organizations. Participation in all of the Church's programs is  
17 available both to Church members and to the community at large. The  
18 Church provides its programs without inquiry as to whether  
19 participants have made financial contributions to the Church. The  
20 Church does not charge fees to those who attend its worship services  
21 and does not condition provision of services upon payment for them,  
22 except that it does collect fees in connection with special  
23 functions such as retreats and youth trips and derives revenue from  
24 sales of goods at fundraising events for its youth programs and from  
25 investment income earned on the Church's financial reserves. More  
26 than 95% of the Church's total income is received from tithes and

1 offerings. Performance of the Church's ministries and programs is  
2 made possible through the contributions of the Church's members,  
3 visitors and other financial supporters.

4 The Church's payroll and payroll taxes, insurance, utilities,  
5 equipment, supplies, building and equipment maintenance expenses,  
6 bus operation expenses, and all other regular, recurring expenses of  
7 the Church are paid from funds received as tithes and offerings.  
8 The Church periodically budgets for its future operations based on  
9 the level of recent contributions. In establishing its budget, the  
10 Church expects that members will continue to support the Church's  
11 ministries by consistent giving. In light of the Church's reliance  
12 on tithes and offerings as a substantial portion of its annual  
13 budget, any reduction in tithes and offerings affects the Church's  
14 ability to maintain its programs. The total amount of the Transfers  
15 is approximately one percent of the Church's annual budget.

16 The Church strongly encourages its members to tithe, through  
17 its teachings, its publications and its ministries. However, people  
18 are not required to tithe or to make individual contributions in  
19 order to become or remain members of the Church. Individual  
20 contributions are made confidentially in numbered envelopes, and  
21 only the Church secretary is aware of who makes contributions and in  
22 what amounts contributions are made. The Church secretary tracks  
23 individual contributions to provide statements for contributors' tax  
24 reporting purposes. If a member fails to tithe or to make  
25 individual contributions, such failure is not a basis for revoking  
26 membership or denying access to any of the Church's services or



1 **DISCUSSION**

2 A. Summary Judgment Standards

3 Granting a motion for summary judgment is appropriate only if  
4 there is no genuine dispute as to any material facts, and the moving  
5 party is entitled to judgment as a matter of law. Fed. R. Bankr. P.  
6 7056; Fed. R. Civ. P. 56(c); State Farm Mutual Auto Ins. Co. v.  
7 Davis, 7 F.3d 180, 182 (9th Cir. 1993). Material facts are such  
8 facts as may affect the outcome of the case. Anderson v. Liberty  
9 Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202  
10 (1986). A dispute with regard to a material fact is "genuine" only  
11 if there is sufficient evidence to justify a finding in favor of the  
12 nonmoving party. Id. In considering a motion for summary judgment,  
13 the court is required to draw all inferences from the evidence in  
14 the light most favorable to the nonmoving party. Id.

15 B. Avoidable Transfers Under Sections 548(a)(2) and 544(b)

16 1. Standards for Avoidance

17 The Trustee asserts that the Transfers to the Church are  
18 avoidable pursuant to Sections 548(a)(2) and 544(b). Section  
19 548(a)(2) provides in relevant part as follows:

20 Fraudulent transfers and obligations

21 (a) The trustee may avoid any transfer of an  
22 interest of the debtor in property ... that was  
23 made ... on or within one year before the date of  
the filing of the petition, if the debtor  
voluntarily or involuntarily--

24 . . . . .

24 (2) (A) received less than a reasonably  
25 equivalent value in exchange for such transfer ...;  
and

26 (B) (i) was insolvent on the date that such

1 transfer was made....

2 Section 544(b) provides that the "trustee may avoid any transfer of  
3 an interest of the debtor in property ... that is voidable under  
4 applicable law by a creditor holding an unsecured claim...." The  
5 provision of Oregon state law applicable in this case through  
6 Section 544(b) is ORS 95.240(1), which provides that:

7 A transfer made ... by a debtor is fraudulent  
8 as to a creditor whose claim arose before the  
9 transfer was made ... if the debtor made the  
10 transfer ... without receiving a reasonably  
equivalent value in exchange for the transfer ...  
and the debtor was insolvent at that time....

11 The United States Supreme Court has held that a trustee in  
12 bankruptcy may avoid a transfer under Section 548(a)(2) if the  
13 following matters are established:

14 1) that the debtor had an interest in property;

15 2) that a transfer of that interest occurred within  
16 one year of the filing of the bankruptcy petition;

17 3) that the debtor was insolvent at the time of the  
transfer ...; and

18 4) that the debtor received "less than a reasonably  
19 equivalent value in exchange for such transfer."

20 BFP v. Resolution Trust Corp., 511 U.S. 531, 535, 114 S.Ct. 1757,  
21 1760, reh'g denied, 512 U.S. 1247, 114 S.Ct. 2771 (1994). In light  
22 of the provisions of ORS 95.240(1), cited above, the standards for  
23 determining whether a trustee in bankruptcy may avoid an Oregon  
24 transfer under Section 544(b) are for all practical purposes

25 ///

26 ///

1 identical.<sup>2</sup>

2 Under both Sections 548(a)(2) and 544(b), the Trustee has the  
3 burden of proof by a preponderance of the evidence. See, e.g.,  
4 Western Wire Works, Inc. v. Lawler (In re Lawler), 141 B.R. 425, 428  
5 (9th Cir. BAP 1992); and Vaughan v. McDowell (In re McDowell), 173  
6 B.R. 131, 134 (Bankr. N.D. Ohio 1994).

7 2. Reasonably Equivalent Value

8 The Stipulated Facts establish that the Transfers comprised  
9 assets in which the Gomes had an ownership interest and were made  
10 within one year prior to the date of filing of the Gomes' Chapter 7  
11 petition, during a period when they admittedly were insolvent.  
12 Accordingly, the initial focus of the parties' dispute is whether  
13 the Gomes received less than a reasonably equivalent value in  
14 exchange for the Transfers.

15 Section 548(d)(2)(A) provides that "value" means "property,  
16 or satisfaction or securing of a present or antecedent debt of the  
17 debtor...." Since there is no contention in this case that, in  
18 making the Transfers, the Gomes satisfied or secured a present or  
19 antecedent debt, the dispute regarding value turns on the meaning of  
20 the term "property."

21 The parties agree that the Gomes did not receive any economic  
22 benefit or tangible personal property in exchange for the Transfers.  
23 However, the Church contends that the spiritual benefits the Gomes  
24 received from their participation in Church services and ministries

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25 <sup>2</sup> ORS 95.280(2) provides a four-year statute of limitations  
26 for claims brought under ORS 95.240(1).

1 have value that should not be disregarded in determining trustee  
2 avoidance actions. In addition, the Church points out that the  
3 Gomes regularly attended worship services and attended Church  
4 sponsored activities conducted by or under the supervision of  
5 personnel on the Church's payroll, and the Church provided the  
6 facilities for all such services and activities, including normal  
7 utilities, without charge.

8 The Church argues that such services constitute "property"  
9 for value determination purposes, citing Ellenberg v. Chapel Hill  
10 Harvester Church, Inc. (In re Moses), 59 B.R. 815 (Bankr. N.D. Ga.  
11 1986), and Wilson v. Upreach Ministries (In re Missionary Baptist  
12 Foundation of America, Inc.), 24 B.R. 973 (Bankr. N.D. Tex. 1982).

13 In addition, the parties have stipulated that providing such  
14 services would not be possible in the absence of the Church's  
15 predictable receipt of tithes and offerings from contributors such  
16 as the Gomes. In these circumstances, particularly in light of the  
17 fact that the Gomes did not tithe to the Church with any intent to  
18 defraud their creditors,<sup>3</sup> the Church argues that it would be  
19 inappropriate and inequitable to apply the provisions of Sections  
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21 <sup>3</sup> The title of Section 548 is "Fraudulent transfers and  
22 obligations." However, as applied to the facts of this case, that  
23 title is a misnomer. There is no contention by the Trustee or  
24 otherwise that the Transfers of tithes and offerings by the Gomes to  
25 the Church were intended to be "fraudulent." For purposes of this  
26 court's review of the facts and law in this case, the Gomes' good  
faith in making the Transfers and the Church's good faith in  
accepting them are undisputed. Nonetheless, the Bankruptcy Code  
incorporates the legal concept of "constructive fraud," which does  
not take into account the subjective intent of parties to a  
transfer.

1 548(a)(2) and 544(b) to avoid the Transfers.

2 The Trustee responds that value is present for purposes of  
3 Sections 548(a)(2) and 544(b) only where there is an economic  
4 benefit to the debtor, "because the purpose of the fraudulent  
5 conveyance laws is to preserve the economic value of the debtor's  
6 estate for the benefit of the unsecured creditors." Trustee's Reply  
7 Memorandum at p. 3. See, e.g., Wyle v. C.H. Rider & Family (In re  
8 United Energy Corp.), 944 F.2d 589, 597 (9th Cir. 1991); Weinman v.  
9 Word of Life Christian Center (In re Bloch), 207 B.R. 944, 948 (D.  
10 Colo. 1997); Morris v. Midway Southern Baptist Church (In re  
11 Newman), 203 B.R. 468, 473-74 (D. Kan. 1996).

12 One of the primary goals of the Bankruptcy Code is to achieve  
13 equality of distributions to like situated creditors. 1 Collier on  
14 Bankruptcy ¶ 1.03[2][a] at 1-21 (15th ed. 1998). If Bankruptcy  
15 Courts must factor the worth of nonmarketable services or such  
16 intangible benefits as religious inspiration into their value  
17 determinations, it may be difficult, if not impossible, to avoid  
18 inequities. In addition, making value determinations with respect  
19 to the services performed by religious institutions would appear to  
20 encourage precisely the sort of entanglement with religion that  
21 courts generally are admonished to avoid. See Employment Division,  
22 Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 887,  
23 110 S.Ct. 1595, 1604 (1990):

24 Judging the centrality of different religious  
25 practices is akin to the unacceptable "business of  
26 evaluating the relative merits of differing  
religious claims." United States v. Lee, 455 U.S.,  
at 263 n.2, 102 S.Ct., at 1058 n.2 (STEVENS, J.,

1 concurring).... Repeatedly and in many different  
2 contexts, we have warned that courts must not  
3 presume to determine the place of a particular  
belief in a religion or the plausibility of a  
religious claim. [Citations omitted.]

4 Ultimately, the Bankruptcy Code looks to underlying state law  
5 to determine what is "property." See Nobelman v. American Savings  
6 Bank, 508 U.S. 324, 329, 113 S.Ct. 2106, 2110 (1993); Butner v.  
7 United States, 440 U.S. 48, 55, 99 S.Ct. 914, 918 (1979) ("Property  
8 interests are created and defined by state law.").

9 Oregon fraudulent transfer law defines "property" as  
10 "anything that may be the subject of ownership." ORS Section  
11 95.200(10). That definition is consistent with the definition of  
12 "property" in Black's Law Dictionary 1216 (6th ed. 1990):

13 [t]hat which is peculiar or proper to any person;  
14 that which belongs exclusively to one.... The term  
15 is said to extend to every species of valuable  
16 right and interest. More specifically, ownership;  
17 the unrestricted and exclusive right to a thing;  
the right to dispose of a thing in every legal way,  
to possess it, to use it, and to exclude every one  
else from interfering with it....

18 Likewise, the first definition of property included in the  
19 Oxford English Dictionary 1471 (1971) is

20 [t]he condition of being owned by or belonging to  
21 some person or persons ...; the holding of  
22 something as one's own; the right (esp. the  
23 exclusive right) to the possession, use, or  
disposal of anything (usually of a tangible  
material thing); ownership, proprietorship....

24 See also Fishburn v. Londershausen, 50 Or. 363, 368-69, 92 P. 1060  
25 (1907).

26 What the foregoing definitions have in common is the

1 characterization of property as ownership or an exclusive right to  
2 possession. In this case, the religious services and ministries of  
3 the Church from which the Gomes derived benefit were provided freely  
4 and on a nonexclusive basis to Church members and the community.  
5 The Gomes had and have no enforceable proprietary interest in such  
6 Church services. See Morris v. Midway Southern Baptist Church (In  
7 re Newman), 183 B.R. 239, 247 (Bankr. D. Kansas 1995), aff'd, 203  
8 B.R. 468 (D. Kan. 1996). Accordingly, the Gomes did not and do not  
9 have any "property" interest in such services for purposes of  
10 Section 548(d)(2)(A) and on that basis did not receive a reasonably  
11 equivalent value for the Transfers.

12 3. "... In Exchange For...."

13 Even if this court were to determine that the Gomes received  
14 value for 548(a)(2) and 544(b) purposes, the evidence establishes  
15 that any such value was not received "in exchange for" the  
16 Transfers. The parties have stipulated that the Gomes did not  
17 contribute their tithes and offerings as a *quid pro quo* for their  
18 continued participation in Church services and ministries. The  
19 Gomes were aware that they could continue to be members of the  
20 Church and participate in all Church programs even if they did not  
21 tithe.

22 In addition, the Gomes deducted their 1996 contributions to  
23 the Church, including the Transfers, as charitable contributions on  
24 their federal and state income tax returns. For purposes of Section  
25 170 of the Internal Revenue Code, 26 U.S.C. § 170, a charitable  
26 contribution is a gift or "voluntary transfer of property by the

1 owner to another without consideration therefor." DeJong v.  
2 Commissioner, 36 T.C. 896, 899 (1961), aff'd, 309 F.2d 373 (9th Cir.  
3 1962). In Hernandez v. Commissioner, 490 U.S. 680, 690, 109 S.Ct.  
4 2136, 2144 (1989), the United States Supreme Court discussed the  
5 genesis of the charitable contributions provision of the Internal  
6 Revenue Code:

7       The legislative history of the "contribution or  
8 gift" limitation, though sparse, reveals that  
9 Congress intended to differentiate between  
10 unrequited payments to qualified recipients and  
11 payments made to such recipients in return for  
12 goods or services. Only the former were deemed  
deductible. The House and Senate Reports on the  
1954 tax bill, for example, both define "gifts" as  
payments "made with no expectation of a financial  
return commensurate with the amount of the gift."  
[Citations omitted.]

13       In light of the evidence presented in this case, it would be  
14 inappropriate and inconsistent to find, for purposes of Sections  
15 548(a)(2) and 544(b), that the Gomes made the Transfers in exchange  
16 for a reasonably equivalent value in the form of services and  
17 benefits from the Church.

#### 18 C. Constitutional Issues

##### 19 1. RFRA v. Smith

20       The Church asserts as an affirmative defense that the  
21 Trustee's avoidance and recovery of the Transfers would violate the  
22 rights of the Gomes and the Church under the Free Exercise Clause of  
23 the First Amendment to the United States Constitution.<sup>4</sup> The parties  
24 disagree on the applicable standard for review, the

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25       <sup>4</sup> Congress shall make no law respecting an establishment of  
26 religion, or prohibiting the free exercise thereof....

1 constitutionality of Congress' efforts to establish standards for  
2  
3 review under the Religious Freedom Restoration Act ("RFRA"),<sup>5</sup> and  
4 whether Sections 548(a)(2) and 544(b) impose a substantial burden on  
5 the free exercise of religion.

6         The Church argues that in light of the requirements of RFRA,  
7 the Trustee's enforcement of Sections 548(a)(2) and 544(b) against  
8 the Church to recover the Transfers is subject to strict scrutiny  
9 and may be authorized only if such enforcement is the least  
10 restrictive means of furthering a compelling government interest.  
11 The Trustee contends that because Sections 548(a)(2) and 544(b) are  
12 valid, neutral statutes of general applicability, they are not  
13 subject to strict scrutiny, but rather are constitutional in light  
14 of their reasonable justification. See Employment Division,  
15 Department of Human Services v. Smith, 494 U.S. 872, 110 S.Ct. 1595  
16 (1990). The Trustee further asserts that RFRA's standards are  
17 inapplicable following the Supreme Court's determination that RFRA  
18 is unconstitutional. See City of Boerne v. Flores, \_\_\_ U.S. \_\_\_,  
19 117 S.Ct. 2157 (1997).

20         The Church asserts that the Boerne decision only declared  
21 RFRA unconstitutional as applied to state government action and that  
22 RFRA remains valid and supplies the appropriate standards for  
23 analyzing federal law in the First Amendment context. The Trustee  
24 counters that the 9th Circuit has interpreted the Boerne decision to  
25

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26         <sup>5</sup> 42 U.S.C. §§ 2000bb, et seq.

1 restore the reasonableness test as the applicable standard for  
2 reviewing free exercise challenges to federal as well as state law.  
3 See Freeman v. Arpaio, 125 F.3d 732, 736 (9th Cir. 1997). The  
4 Trustee further argues that Section 544(b) of the Bankruptcy Code is  
5 merely a procedural vehicle for the enforcement of state law, and,  
6 accordingly, the Boerne decision's determination of RFRA  
7 unconstitutionality for state law purposes would govern any  
8 determination under Section 544(b).

9 As a threshold matter, unless enforcement of the concerned  
10 statutes imposes a "substantial burden" on the religious practices  
11 or beliefs of the Gomes or the Church, I do not need to reach any  
12 issues regarding the constitutionality of RFRA or the application of  
13 RFRA strict scrutiny versus the Smith reasonableness standard. I  
14 find no such substantial burden under the facts before me.

15 In Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1994), the  
16 Ninth Circuit stated the test for determining whether a substantial  
17 burden has been imposed on the free exercise of religion:

18 In order to show a free exercise violation using  
19 the "substantial burden" test, the religious  
20 adherent ... has the obligation to prove that a  
21 governmental [action] burdens the adherent's  
22 practice of his or her religion ... by preventing  
23 him or her from engaging in conduct or having a  
24 religious experience which the faith mandates.  
25 This interference must be more than an  
26 inconvenience; the burden must be substantial and  
an interference with a tenet or belief that is  
central to religious doctrine. [Citations omitted.]  
[Emphasis added.]

25 In this case, the facts are undisputed that even though  
26 members of the Church are strongly encouraged to tithe, tithing is

1 not required to become or remain a member of the Church. Further,  
2 the programs and ministries of the Church are available to Church  
3 members and the community at large whether or not they tithe or  
4 otherwise contribute to the Church. The Gomes were aware that they  
5 did not need to tithe or contribute to the Church in order to retain  
6 their membership in the Church and participate in all of its  
7 ministries. Finally, the Gomes "continued their regular attendance  
8 at and participation in the ministries at the Church during the year  
9 before they filed their petition, as they have subsequently."

10 Stipulated Facts, p. 9. [Emphasis added.]

11 There is nothing in Sections 548(a)(2) and 544(b) that  
12 prevents a debtor from continuing to tithe. The Trustee's efforts  
13 to avoid the Transfers have neither restricted the Gomes in their  
14 prepetition or postpetition tithing practices nor done anything to  
15 shake the Gomes' belief that they should tithe. The recovery of  
16 prepetition tithes "may embarrass the debtor, but it does not burden  
17 the debtor's ability to engage in the exercise of religion by making  
18 postpetition tithes." Megard, "Tithing and Fraudulent Transfers in  
19 Bankruptcy: Confirming a Trustee's Power to Avoid the Tithe After  
20 City of Boerne v. Flores," 71 American Bankr. L.J. 413, 424 (1997).

21 In addition, as written and applied, Sections 548(a)(2) and  
22 544(b) are limited in their impact. First, they only allow a  
23 bankruptcy trustee to reach back for defined periods of time prior  
24 to the debtor's bankruptcy filing. The trustee may not avoid all of  
25 a debtor's tithes to a church over the years and may not reach  
26 postpetition tithes.

1           Second, they only allow a bankruptcy trustee to avoid  
2 transfers made for less than a reasonably equivalent value.  
3 Finally, the trustee is subject to the further substantial  
4 limitation that the debtor must be proven insolvent before any  
5 transfer may be avoided.

6           The Church argues that notwithstanding the foregoing  
7 limitations, the Trustee's exercise of his avoidance powers imposes  
8 a substantial burden on the practice of religion, because the Church  
9 relies on the consistent giving of its members to fund its programs.

10          The Church asserts that any disgorgement of tithes to the  
11 Trustee jeopardizes its ability to continue its ministries by  
12 creating budgeting uncertainty. However, the Church does not  
13 provide services in the expectation that all of its members will  
14 contribute to the funding of such services. One of the primary  
15 functions of the Church is relief of the poor. See Church's  
16 Memorandum at p. 15. There can be little question that insolvent  
17 debtors generally would qualify among the poor, and the Church  
18 reasonably could not expect to collect tithes from its insolvent  
19 debtor members.

20          It is understandably important to the Church to achieve as  
21 consistent a level of financial support for its services as  
22 possible. Undoubtedly, the Trustee's efforts to avoid the Transfers  
23 came as an unpleasant and unexpected surprise to the Church, which  
24 did not budget for a recovery by the Trustee. However, in a very  
25 mobile society, tithes and offerings inherently are subject to  
26 fluctuations due not just to the financial reverses of Church

1 members, but also to the moves and deaths of members. Being subject  
2 on occasion to the recovery by a bankruptcy trustee of a limited  
3 portion of an insolvent debtor's tithed funds does not constitute  
4 the type of substantial burden on religion that would justify  
5 heightened scrutiny under RFRA or the Constitution.

6 In the circumstances of this case, the burdens imposed on the  
7 Gomes and the Church by the Trustee's exercise of avoidance powers  
8 under Sections 548(a)(2) and 544(b) are not substantial burdens on  
9 the exercise of religion that would invalidate those sections under  
10 RFRA, whether or not RFRA remains constitutionally viable.

## 11 2. The Establishment Clause

12 The Church further contends that the Trustee's attempts to  
13 avoid the Transfers result in an excessive and unconstitutional  
14 governmental intrusion and entanglement in religion in violation of  
15 the Establishment Clause of the First Amendment to the Constitution.

16 In Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105,  
17 2111, reh'g denied, 404 U.S. 876, 92 S.Ct. 24 (1971), the Supreme  
18 Court set forth a three part test to evaluate the constitutionality  
19 of statutes under the Establishment Clause:

20 First, the statute must have a secular legislative  
21 purpose; second, its principal or primary effect  
22 must be one that neither advances nor inhibits  
23 religion ...; finally, the statute must not foster  
"an excessive government entanglement with  
religion."

24 In applying the Lemon test, the first step is analyzing the  
25 text of the statute(s) under consideration. In this case, there is  
26 nothing in either the texts or the legislative histories of

1 Sections 548(a)(2) and 544(b) that refers to religion or any  
2 religious organization or even hints that the statutes were targeted  
3 at any religiously motivated transfers. The subject statutes are  
4 neutral with respect to religion and generally applicable according  
5 to their terms.

6 However, that does not end the investigation. As stated by  
7 the court in Fitzgerald v. Magic Valley Evangelical Free Church,  
8 Inc. (In re Hodge), 200 B.R. 884, 903 (Bankr. D. Idaho 1996): "The  
9 court ... must also look at the effect of the law in its real  
10 application as strong evidence of its object."

11 In enforcing his bankruptcy avoidance powers, the Trustee  
12 does not discriminate against religion in general or the Church in  
13 particular. The Stipulated Facts reflect that the Trustee regularly  
14 exercises his avoidance powers to recover from a wide variety of  
15 individuals and entities, including religious institutions and  
16 secular charities without regard to the religious or secular nature  
17 of such entities or to any particular entity's religious creed or  
18 affiliation.

19 For this reason, the Church's reliance on Church of the  
20 Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S.Ct.  
21 2217 (1993), is misplaced. In the Lukumi case, the record  
22 established that the city ordinances at issue were designed and  
23 implemented with the specific purpose of restricting the animal  
24 sacrifice practices of the Santeria church.

25 In contrast, Sections 548(a)(2) and 544(b) provide tools for  
26 a trustee in bankruptcy to recover prepetition transfers by debtors

1 to individuals and entities of all kinds, with the goal of  
2 equalizing the recoveries by similarly situated creditors from  
3 debtors' bankrupt estates. See In re Hodge, 200 B.R. at 903-04:

4 In this case, the subject statutes make no  
5 reference to religions or to religious practice.  
6 Similarly, Defendant has offered no proof that the  
7 statutes were in any way intended to target  
8 religious activity. The provisions merely allow a  
9 bankruptcy trustee to recover certain transfers  
10 when specified criteria are satisfied. None of  
11 those criteria are related to religious belief or  
12 practices, nor is it relevant whether there exists  
13 a religious motivation for the transfers. Further,  
14 the Court finds that the avoidance statutes have no  
15 more than an incidental effect on religion. The  
16 purpose of the statutes is to promote the equal  
17 treatment of similarly situated creditors of the  
18 debtor, and to enlarge the pool of funds available  
19 for those creditors by recovering gratuitous  
20 transfers made by insolvent debtors. [Internal  
21 citations omitted.]

22 The Church nonetheless responds that it is unfair for the  
23 reach of Sections 548(a)(2) and 544(b) to extend to the normal  
24 tithes and offerings of a Church member made in the ordinary course  
25 where the member made no change in the pattern of giving during the  
26 period preceding a bankruptcy filing. However, if Congress wanted  
to incorporate an exception for ordinary course giving in Sections  
548(a)(2) and 544(b), it knew how to do so. For example, Section  
547, dealing with bankruptcy trustees' avoidance of preferential  
transfers, specifically incorporates a defense for transactions in  
the ordinary course of business. See 11 U.S.C. § 547(c)(2). This  
court is in no position to recognize an exception to avoidance  
powers where Congress did not create one.

Because Sections 548(a)(2) and 544(b) each has a clear

1 secular purpose, the primary effect of which neither advances nor  
2 inhibits religion, the statutes do not violate the Establishment  
3 Clause of the First Amendment.

4 3. Excessive Entanglement

5 The Church characterizes the Trustee's exercise of authority  
6 under Sections 548(a)(2) and 544(b) as "government action that  
7 audits church ledgers and retroactively seizes private contributions  
8 made to a church." Church Memorandum at p. 26. The Church asserts  
9 that this government action constitutes an unconstitutional  
10 entanglement in religious affairs.

11 I disagree. The Supreme Court has held that the  
12 recordkeeping requirements of the Fair Labor Standards Act are not  
13 substantially burdensome on religious organizations. Tony and Susan  
14 Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 105 S.Ct. 1953  
15 (1985). In comparison, the nontargeted requirement that a church  
16 submit on occasion to trustee discovery in relation to potential  
17 avoidance claims would appear to constitute even less of an  
18 entanglement. See also Jimmy Swaggart Ministries v. Board of  
19 Equalization of California, 493 U.S. 378, 395-96, 110 S.Ct. 688,  
20 698-99, 107 L.Ed.2d 796 (1990) ("[G]enerally applicable  
21 administrative and recordkeeping regulations may be imposed on  
22 religious organization without running afoul of the Establishment  
23 Clause."); In re Hodge, 200 B.R. at 907 ("[R]outine regulatory  
24 interaction between government and churches involving no detailed  
25 monitoring or close administrative contact between secular and  
26 religious bodies does not violate the anti-entanglement command of

1 the Establishment Clause.”).

2       The recovery of contributed tithes and offerings likewise  
3 does not rise to an excessive entanglement, because it merely  
4 requires the payment of funds; it does not impinge directly on  
5 Church beliefs or ministries. Such recovery, on an incidental and  
6 occasional basis, has only the indirect and unintended effect of  
7 limiting the Church’s budget. A much greater entanglement of the  
8 government with religion likely would result if this court were to  
9 ignore the neutral language of Sections 548(a)(2) and 544(b) and  
10 enforce an exception to the Trustee’s avoidance powers for religious  
11 entities such as the Church.<sup>6</sup>

12       4. No Fifth Amendment<sup>7</sup> Taking

13       The Bankruptcy Code is subject to the Fifth Amendment  
14 prohibition against taking private property without just  
15 compensation. See, e.g., United States v. Security Industrial Bank,  
16 459 U.S. 70, 75, 103 S.Ct. 407, 410 (1982). In Penn Central  
17 Transportation Co. v. City of New York, 438 U.S. 104, 124, 98 S.Ct.  
18 2646, 2659 (1978), the Supreme Court identified three factors of  
19 particular significance in considering unconstitutional takings

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21       <sup>6</sup> The Church’s reliance on National Labor Relations Bd. v.  
22 Catholic Bishop of Chicago, 440 U.S. 490, 99 S.Ct. 1313 (1979), in  
23 this case is not supported. There is no reason to believe, either  
24 from the text of the statutes or from the legislative history, that  
25 Congress intended to create an exception for religious giving in  
26 Sections 548(a)(2) and 544(b). In addition, nothing in the facts  
before this Court suggests that the Trustee’s avoidance of the  
Transfers presents a significant risk that the First Amendment will  
be infringed.

27       <sup>7</sup> “ ... nor shall private property be taken for public use,  
28 without just compensation.”

1 claims:

2 a) the economic impact of the law on the  
3 claimant;

4 b) the extent to which the law has  
5 interfered with the claimant's reasonable  
6 "investment-backed expectations;" and

7 c) the character of the government action,  
8 i.e., did the law promote the common good or some  
9 more limited objective.

10 The Church contends that the Trustee's proposed avoidance of  
11 the Transfers constitutes an unconstitutional confiscation of Church  
12 property. There is no question that the Trustee's avoidance of the  
13 Transfers will have an adverse economic effect on the Church. If  
14 the Church is forced to disgorge funds it otherwise would have  
15 available to spend on its ministries, it will suffer a financial  
16 loss. However, such a loss is within the reasonable investment-  
17 backed expectations of the Church for purposes of constitutional  
18 analysis.

19 The provisions of Sections 548(a)(2) and 544(b) have been in  
20 existence in virtually their present forms since the Bankruptcy Code  
21 was enacted by Congress in 1978. In fact, as the Trustee points  
22 out, fraudulent transfer laws have been in existence in various  
23 forms since the Statute of Elizabeth was adopted in 1570. Entities  
24 such as the Church that avail themselves of the benefits of United  
25 States law are charged with knowledge of its restrictions.

26 The Church reasonably could expect that its receipts from



1 recovering the Transfers.

2 This Memorandum Opinion contains the court's findings of fact  
3 and conclusions of law, which will not be stated separately.

4 1. The Trustee's motion for summary judgment is granted.

5 2. The Church's motion for summary judgment is denied.

6 3. Counsel for the Trustee shall prepare and submit within  
7 ten days following the date of entry of this Memorandum Opinion a  
8 form of judgment consistent herewith.

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RANDALL L. DUNN  
Bankruptcy Judge

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16 cc: Teresa H. Pearson  
17 J. Gary McClain  
18 Kelly E. Ford  
Herbert G. Grey  
U.S. Trustee

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