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IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

FREEDOM FROM RELIGION FOUNDATION, INC.; PAUL STOREY; BILLY FERGUSON; KAREN BUCHANAN; JOSEPH MORROW; ANTHONY G. ARLEN; ELISABETH STEADMAN; CHARLES AND COLLETTE CRANNELL; MIKE OSBORNE; KRISTI CRAVEN; WILLIAM M. SHOCKLEY; PAUL ELLCESSOR; JOSEPH RITTELL; WENDY CORBY; PAT KELLEY; CAREY GOLDSTEIN; DEBORA SMITH; KATHY FIELDS; RICHARD MOORE; SUSAN ROBINSON; AND KEN NAHIGIAN,

Plaintiffs,

v.

TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury; DOUGLAS SHULMAN, in his official capacity as Commissioner of the Internal Revenue Service; and SELVI STANISLAUS, in her official capacity as Executive Officer of the California Franchise Tax Board,

Defendants.

Civil No. 2:09-CV-02894-WBS-DAD

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

Hearing Date: March 29, 2010
Time: 2:00 p.m.
Courtroom: 5

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1 COMES NOW, the Defendant, United States of America[1], by their undersigned counsel, and
2 submit the following Memorandum of Points and Authorities in support of their Motion to Dismiss:

3 **I. INTRODUCTION**

4 Plaintiffs are Freedom From Religion Foundation (hereafter "FFRF") and twenty-one named
5 individuals (hereafter "Plaintiffs"). The named individuals allege that they are members of FFRF
6 and are taxpayers residing in the Eastern District of California opposed to government endorsement
7 of religion. Complaint, ¶¶ 8-28. Freedom From Religion Foundation alleges that it represents its
8 members and "competes with churches and religious organizations." Id. at ¶ 58. Plaintiffs allege
9 that they have suffered injuries because "Sections 107 and 265(a)(6) of the Revenue Code provide
10 economic benefits for 'ministers of the gospel' that are not provided to other taxpayers, including
11 taxpayers who are plaintiff members of FFRF in the Eastern District of California." Id. at ¶ 51.
12 Plaintiffs' only other allegation of injury is that, because FFRF may not claim the particular benefits
13 of §§ 107 and 265(a)(6)[2], "FFRF is thereby placed at a competitive disadvantage relative to churches
14 and other organizations whose employees receive tax subsidies." Id. at ¶ 58.

15 Plaintiffs do not have standing to bring this suit because the only injuries they allege are the
16 result of their status as purportedly disadvantaged taxpayers. They have not suffered the type of
17 concrete, particularized injury fairly traceable to either §§ 107 or 265(a)(6) that is a necessary
18 prerequisite to establish Article III standing. The fact that Plaintiffs have not suffered any injury in
19 fact precludes standing even under the narrow exception established by Flast v. Cohen, 392 U.S. 83
20 (1968), which allows taxpayers to challenge certain violations of the Establishment Clause of the
21 First Amendment of the United States Constitution. Because Plaintiffs do not have standing, a

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23 [1] Plaintiffs named Timothy Geithner, in his official capacity as the Secretary of United States
24 Department of Treasury, and Douglas Shulman, in his official capacity as Commissioner of the Internal Revenue Service, as defendants. See Complaint, 1. It is well established that such a suit, one against a
25 federal employee in his official capacity, is essentially a suit against the United States. See Dugan v. Rank, 372 U.S. 609 (1962); Atkinson v. O'Neil, 867 F.2d 589, 590 (10th Cir. 1989); Burgos v. Milton, 709 F.2d
26 1 (1st Cir. 1983); Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir. 1982). Thus, the proper federal defendant is the United States of America.

27 [2] All statutory references refer to the Internal Revenue Code, (26 U.S.C,) unless otherwise
28 noted. All regulations refer to Treasury Regulations (26 C.F.R).

constitutional requirement in order for federal courts to have jurisdiction, Plaintiffs' complaint must be dismissed.

Even if plaintiffs could establish that they have standing, their complaint must still be dismissed because it does not state a claim that either §§ 107 or 265(a)(6) violates the Establishment Clause. The Supreme Court has consistently held that government action does not violate the Establishment Clause when a statute has a secular purpose, its primary effect neither advances nor inhibits religion, and does not foster excessive governmental entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). Statutes that remove a burden on or accommodate religious practice and avoid excessive entanglement have been consistently upheld under this analysis. See Walz v. Tax Com. of New York, 397 U.S. 664 (1970); Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 328 (1987). Sections 107 and 265(a)(6) constitute constitutional accommodations of religious practice by eliminating discrimination between ministers and similarly situated taxpayers. Sections 107 and 265(a)(6) are part of a governmental policy of neutrality toward religion, and government neither advances nor inhibits religious practice through these provisions. Finally, §§ 107 and 265(a)(6) minimize rather than foster governmental entanglement with religion by avoiding the need for overly intrusive inquiries into religious practices. Thus, Plaintiffs' complaint fails to state a claim that §§ 107 and 265(a)(6) violate the Establishment Clause.

II. QUESTIONS PRESENTED

1. Do Plaintiffs have standing to challenge the constitutionality of §§ 107 and 265(a)(6)?
2. Do Plaintiffs state a claim that § 107 violates the Establishment Clause of the First Amendment of the United States Constitution?
3. Do Plaintiffs state a claim that § 265(a)(6) violates the Establishment Clause of the First Amendment of the United States Constitution?

III. LEGAL STANDARD

Fed. R. Civ. P. 12(b)(1) allows a defendant to move to dismiss an action for lack of subject

1 matter jurisdiction. On such a motion, the plaintiff bears the burden of establishing that subject
2 matter jurisdiction exists. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377
3 (1994). If a plaintiff has not established Article III standing for a federal court to have subject
4 matter jurisdiction, the plaintiff's claims must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). See
5 Oregon v. Legal Servs. Corp., 552 F.3d 965, 969 (9th Cir. 2009).

6 Fed. R. Civ. P. 12(b)(6) allows a defendant to move to dismiss an action for failure to state a
7 claim. In order to state a claim, the plaintiff's complaint must contain sufficient factual matter, if
8 accepted as true, to state a claim to relief that is plausible on its face. See Ashcroft v. Iqbal, 129 S.
9 Ct. 1937, 1949 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere
10 conclusory statements, do not suffice." (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
11 (2007))). Although a court must consider the factual allegations in a complaint as true, courts are
12 not bound to accept as true a legal conclusion couched as a factual allegation. See Caviness v.
13 Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010) (citing Iqbal, 129 S. Ct. at
14 1949). "Conclusory allegations of law and unwarranted inferences are insufficient to defeat a
15 motion to dismiss for failure to state a claim." Id. (quoting Epstein v. Wash. Energy Co., 83 F.3d
16 1136, 1140 (9th Cir. 1996)).

17 **IV. RELEVANT STATUTES**

18 26 U.S.C. § 107 provides certain taxpayers with an exclusion from income for amounts
19 attributable to employer-provided housing and housing allowances. The statute states:

20 § 107. Rental value of parsonages.

21 In the case of a minister of the gospel, gross income does not include--
(1) the rental value of a home furnished to him as part of his compensation; or
22 (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental
23 value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.

24 While the language of the statute refers to a "minister of the gospel," this provision applies to
25 individuals who are considered by the practices and tenets of their religions to be the equivalent of
26 "ministers." See Silverman v. Commissioner, 57 T.C. 727, 731 (1972), aff'd in 32 A.F.T.R.2d
27 73-5379, 73-2 U.S.T.C. ¶ 9546 (8th Cir. 1973) (finding cantor of the Jewish faith to be a "minister"
28

for purposes of the Code by looking to the three ministerial service guidelines provided by § 1.1402(c)-5(b)(2)); Salkov v. Commissioner, 46 T.C. 190 (1966) ("Although 'minister of the gospel' is phrased in Christian terms, . . . Congress did not intend to exclude those persons who are the equivalent of 'ministers' in other religions."). In administering § 107, the IRS must determine whether the taxpayer is a minister, whether the taxpayer performs the duties of a minister, the status of the entity employing the minister, whether there was a proper designation of a housing allowance, and the proper amount of the rental allowance. See Treas. Reg. §§ 1.107-1, 1.1402(c)-5.

26 U.S.C. § 265(a)(6) provides that certain taxpayers who receive excludable housing allowances may take deductions for amounts paid in home mortgage interest payments and real property taxes. The statute states, in pertinent part:

> § 265. Expenses and interest relating to tax-exempt income.
>
> (a) General rule. No deduction shall be allowed for–
> (1) Expenses. Any amount otherwise allowable as a deduction which is allocable to one or more classes of income other than interest (whether or not any amount of income of that class or classes is received or accrued) wholly exempt from the taxes imposed by this subtitle, or any amount otherwise allowable under section 212 (relating to expenses for production of income) which is allocable to interest (whether or not any amount of such interest is received or accrued) wholly exempt from the taxes imposed by this subtitle.
> ...
> (6) Section not to apply with respect to parsonage and military housing allowances. No deduction shall be denied under this section for interest on a mortgage on, or real property taxes on, the home of the taxpayer by reason of the receipt of an amount as--
> (A) a military housing allowance, or
> (B) a parsonage allowance excludable from gross income under section 107.

V. DISCUSSION

A. STANDING.

1. Article III standing limits the exercise of the judicial power to Cases or Controversies.

Article III of the United States Constitution requires that the federal judiciary resolve only "Cases" or "Controversies." U.S. Const. Art. III, § 1. The Supreme Court has long interpreted Article III's case-or-controversy requirement to limit the federal judiciary's exercise of jurisdiction to plaintiffs who have sufficiently established "Article III standing." See Hein v. Freedom From Religion Foundation, 551 U.S. 587, 597-598 (plurality opinion) (2007) ("Article III standing . . . enforces the Constitution's case-or-controversy requirement" (quoting DaimlerChrysler Corp. v.

Cuno, 547 U.S. 332, 342 (2006) (internal citations omitted)). For over 200 years, the federal judiciary has limited its exercise of power "solely, to decide on the rights of individuals," Marbury v. Madison, 1 Cranch 137, 170 (1803), and therefore has refrained from reviewing the constitutionality of statutes except "when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act." Frothingham v. Mellon, 262 U.S. 447, 488 (1923).

Thus, the Court has held that standing requires a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Hein, 551 U.S. at 598 (emphasis added) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)); see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-472 (1982) ("At an irreducible minimum, Art. III 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.'" (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979))). A plaintiff seeking to challenge the constitutionality of a statute must show that he has "sustained some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally," in order to satisfy the requirements of Article III standing. Hein, 551 U.S. at 601 (emphasis added) (quoting Frothingham, 262 U.S. at 488 (1923)). As a principal means of limiting "federal-court jurisdiction to actual cases or controversies," Article III standing is "fundamental to the judiciary's proper role in our system of government." Id. at 598 (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997) (internal citations omitted)). As such, federal courts may not waive standing requirements in order to exercise jurisdiction, and must "refrai[n] from passing upon the constitutionality of an act . . . unless obliged to do so in the proper performance of [their] judicial function, when the question is raised by a party whose interests entitle him to raise it." Id. (citing Valley Forge, 454 U.S. at 474) (internal citations omitted) (bracketed material in original)).

The party invoking federal court jurisdiction bears the burden of proof of establishing each element of standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). Thus, in order to

have standing, a plaintiff bears the burden of showing "(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 Environmental Services, 528 U.S. 167, 180-81 (2000). Moreover, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." Lujan, 504 U.S. at 562.

2. Plaintiffs have failed to allege sufficient facts to establish standing to challenge the constitutionality of either §§ 107 or 265(a)(6).

Plaintiffs assert two alternative grounds to establish standing in order to challenge the constitutionality of §§ 107 and 265(a)(6): the named plaintiffs' status as federal taxpayers and the bare allegation that FFRF "competes" with religious organizations. See Complaint, ¶¶ 8-28, 58. However, neither of these grounds are supported by sufficient factual allegations, which, if accepted as true, could establish standing under the requirements imposed by Article III of the United States Constitution. Therefore, Plaintiffs have failed to satisfy their burden of establishing subject matter jurisdiction, and the complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). See Kokkonen, 511 U.S. at 377.

3. Plaintiffs cannot satisfy the Article III standing requirement through their status as taxpayers.

By virtue of the requirement that a plaintiff must allege some concrete and particularized injury redressable by a favorable decision, the Supreme Court has adhered to the longstanding rule established in Frothingham v. Mellon, 262 U.S. 447, denying standing to plaintiffs alleging an injury that arises solely by virtue of their status as taxpayers. Hein, 551 U.S. at 601 ("'[T]he interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure.'" (quoting Doremus v. Board of Ed. of Hawthorne, 342 U.S. 429, 433 (1952) (rejecting a state taxpayer's claim of standing to challenge a state law authorizing public school teachers to read from the Bible))). The Ninth Circuit has also applied the requirement that there be some injury

in fact, observing that allegations by individuals and organizations of injuries sustained by virtue of their status as taxpayers alone are not sufficient to allege any "measurable economic harm" to satisfy the requirements for an injury in fact. Winn v. Arizona Christian Schools Tuition Organization, 562 F.3d 1002, 1007-1008 (9th Cir. 2009) (quoting Hein, 551 U.S. at 592). In contrast, the Ninth Circuit has held that a taxpayer sufficiently alleges an injury in fact when the taxpayer's allegations are based on his own improper treatment. See, e.g., Droz v. Commissioner, 48 F.3d 1120 (9th Cir. 1995) (taxpayer refusing to pay Social Security taxes without meeting the express, religion-specific requirements of § 1402(g) had standing to challenge the statute as violating the Establishment Clause as he had paid the tax and sought a refund).

a. The Flast exception to the general prohibition against taxpayer standing is narrowly construed.

In Flast v. Cohen, the Court created a narrow exception to the Frothingham prohibition against taxpayer standing where a plaintiff alleges a violation of the Establishment Clause. Under the Flast exception, a plaintiff must satisfy a two-part test created in consideration of Article III's requirements: "First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." Flast, 392 U.S. at 102. The Court strictly construed the nexus requirement to narrow the applicability of its exception. Id. ("It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute."). The Court has limited taxpayer standing under the Flast exception to allegations that Congress has violated the Establishment Clause's limits on its power to exercise its taxing and spending power under Article I, § 8 of the Constitution. See, e.g., Bowen v. Kendrick, 487 U.S. 589, 618-619 (1988) (granting standing to plaintiffs challenging a federal program's disbursal of funds to sectarian grantees pursuant to Congress' taxing and spending powers). Moreover, the Court has largely confined application of the Flast exception to its facts: where a spending program authorized by Congress violates the Establishment Clause by spending tax dollars in support of religion. See Hein, 551 U.S. at 609-610.

Importantly, Flast did not abrogate the Article III requirement that a plaintiff allege a

1 concrete and particularized injury in fact. Flast, 392 U.S. at 106. Indeed, the Court was careful to
2 emphasize that an injury in fact was shown in that case only because the Establishment Clause
3 specifically protects taxpayers against use of the taxing and spending power in aid of religion,
4 distinguishing the injury to the taxpayer in Frothingham who merely protested the additional tax
5 burden imposed by congressional appropriations to which she objected. Id. at 105 ("the taxpayer in
6 Frothingham failed to make any additional claim that the harm she alleged resulted from a breach by
7 Congress of the specific constitutional limitations imposed upon an exercise of the taxing and
8 spending power"). The Court held that the Establishment Clause limits Congress' taxing and
9 spending power, observing that James Madison and the other drafters of the Establishment Clause
10 "designed [it] as a specific bulwark against such potential abuses of governmental power," in
11 apprehension of "'authority which can force a citizen to contribute three pence only of his property
12 for the support of any one establishment.'" Id. at 103-104 (quoting 2 Writings of James Madison
13 183, 186 (Hunt ed. 1901)). Therefore, the Flast exception always requires a taxpayer-plaintiff to
14 allege a forcible contribution of his or her taxes to aid religion:

15 > The taxpayer's allegation in such cases would be that his tax money is being extracted and
16 > spent in violation of specific constitutional protections against such abuses of legislative
> power. Such an injury is appropriate for judicial redress, and the taxpayer has established the
> necessary nexus between his status and the nature of the allegedly unconstitutional action to
17 > support his claim of standing to secure judicial review.

18 Id. at 105 (emphasis added). Even Justice Harlan, who dissented on the grounds that the Flast test's
19 historical formulation was untenable, nonetheless agreed with the Court's underlying reasoning that
20 standing could be shown in Flast because the plaintiff had suffered an injury in fact. Id. at 125
21 (Harlan, J. dissenting) ("A taxpayer's claim under the Establishment Clause is not merely one of
22 ultra vires, but one which instead asserts an abridgment of individual religious liberty and a
23 governmental infringement of individual rights protected by the Constitution." (internal quotation
24 marks omitted)).

25 **b. The Flast exception is necessarily limited to actions challenging government spending because a plaintiff does not incur an injury in fact as a result of the treatment of the tax liabilities of a third party.**

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27 The Court has held that government action does not violate the Establishment Clause unless

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1 it involves some form of government expenditure. See, e.g., Rosenberger v. Rectors and Visitors of
2 University of Virginia, 515 U.S. 819, 842-843 (1995) ("The government usually acts by spending
3 money."). In Flast, the Court relied on congressional spending as a precondition to finding an injury
4 caused by a violation of the Establishment Clause. Flast, 392 U.S. at 102 ("Thus, our point of
5 reference in this case is the standing of individuals who assert only the status of federal taxpayers
6 and who challenge the constitutionality of a federal spending program.") (emphasis added). The
7 court in Flast explicitly distinguished injuries allegedly resulting from taxing as opposed to
8 spending:

9 > We do note, however, that the challenged tax in Murdock [v. Commonwealth of
> Pennsylvania, 319 U.S. 105 (1943)] operated upon a particular class of taxpayers. When such
10 > exercises of the taxing power are challenged, the proper party emphasis in the federal
> standing doctrine would require that standing be limited to the taxpayers within the affected
11 > class.

12 Id. at 104 n.25 (emphasis added). By denying the claims of taxpayers who failed to assert a nexus to
13 a program of government spending, the Court implicitly affirmed this limitation the following term
14 in Walz. Walz, 397 U.S. at 676 ("There is no genuine nexus between tax exemption and
15 establishment of religion."). In Flast, the Court recognized that such a distinction is essential to
16 maintaining the Article III requirement that the injury be "appropriate for judicial redress." Flast,
17 392 U.S. at 106. The Court recently affirmed this principle in DaimlerChrysler Corp. v. Cuno.
18 DaimlerChrysler, 547 U.S. at 348. ("The exception recognizes that the 'injury' alleged in
19 Establishment Clause challenges to governmental spending arises not from the effect of the
20 challenged program on the plaintiffs' own tax burdens, but from 'the very "extract[ion] and
21 spend[ing]" of "tax money" in aid of religion.'" (quoting Flast, 392 U.S. at 106) (bracketed material
22 in original, emphasis added)).

23 The Ninth Circuit has followed DaimlerChrysler in adjudicating issues of standing,
24 observing that "taxpayer standing, by its nature, requires an injury resulting from a government's
25 expenditure of tax revenues." PLANS, Inc. v. Sacramento City Unified School Dist., 319 F.3d 504,
26 507 (9th Cir. 2003) (quoting Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 793 (9th Cir. 1999)
27 (en banc)) (internal quotation marks omitted, emphasis added); see also Barnes-Wallace v. City of
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San Diego, 530 F.3d 776, 786 (9th Cir. 2008) (granting plaintiffs standing to challenge nominal-rent leases as a violation of the Federal Establishment Clause because of injury resulting from restricting plaintiffs' use of the land, but specifically rejecting the plaintiffs' alternative taxpayer standing argument due to the lack of expenditure of funds); accord, Winn, 562 F.3d at 1010 ("By structuring the program as a dollar-for-dollar tax credit, the Arizona legislature has effectively created a grant program. . .").

The Court's holding in Flast necessarily limited its scope to government programs involving the expenditure of a taxpayer's taxes yet still giving rise to a particularized and redressable injury in fact fairly traceable to the congressional expenditure. See Flast, 392 U.S. at 106. The exception's limited scope was recognized by each of the concurring and dissenting opinions, which all observed that the holding was limited to taxpayer challenges to federal spending programs. See id. at 107 (Douglas, J. concurring) ("The case or controversy requirement comes into play only when the Federal Government does something that affects a person's life, his liberty, or his property."); id. at 114 (Stewart, J. concurring) ("I join the judgment and opinion of the Court, which I understand to hold only that a federal taxpayer has standing to assert that a specific expenditure of federal funds violates the Establishment Clause of the First Amendment. Because that clause plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution."); id. at 115 (Fortas, J. concurring) ("I would confine the ruling in this case to the proposition that a taxpayer may maintain a suit to challenge the validity of a federal expenditure on the ground that the expenditure violates the Establishment Clause."); id. at 117 (Harlan, J. dissenting) ("They present the question whether federal taxpayers qua taxpayers may, in suits in which they do not contest the validity of their previous or existing tax obligations, challenge the constitutionality of the uses for which Congress has authorized the expenditure of public funds."). Thus, as the Flast court understood it, a plaintiff only alleges an injury suffered by virtue of his or her status as a taxpayer when the injury arises from having his or her tax dollars spent in a way inconsistent with the Establishment Clause.

Furthermore, as the Court most recently recognized in Hein, an injury in fact is still an

essential constitutional requirement under the Flast exception, since granting standing for allegations of injuries sustained solely as a taxpayer could "transform federal courts into forums for taxpayers' 'generalized grievances' about the conduct of government." Hein, 551 U.S. at 611 (quoting DaimlerChrysler, 547 U.S. at 334 (quoting Flast, 392 U.S. at 106)). Such a relaxation of standing requirements "would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government." Id. (quoting U.S. v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring)). Thus, standing under the Flast exception continues to be confined to challenges to federal spending programs pursuant to Congressional appropriations of tax dollars.

c. The government must direct money from taxpayers to religious organizations to cause an injury in fact sufficient to satisfy the Flast exception.

As discussed in Section V.A.3.b, supra, the Court has determined that injury requirement under the Flast exception still must implicate some government expenditure with the purpose or effect of advancing religion. The analytical cornerstone of the Flast exception which creates an Article III injury is the explicit direction by Congress of tax expenditures. See Hein, 551 U.S. at 605 ("The link between congressional action and constitutional violation that supported taxpayer standing in Flast is missing here. . . . These appropriations did not expressly authorize, direct, or even mention the expenditures of which respondents complain.") (emphasis added); cf. Valley Forge, 454 U.S. at 479 (holding that a decision by the Secretary of Health, Education, and Welfare to transfer government property to the petitioner lacked the nexus to congressional tax expenditures required by Flast); but see Bowen, 487 U.S. at 618-620 (granting standing because "appellees' claims call[ed] into question how the funds authorized by Congress are being disbursed pursuant to [a] statutory mandate.").

Merely refraining from taxing without directing some expenditure, as is the case with a tax exemption, does not advance religion in a way that could satisfy the requirements of Article III standing because the resulting injury is not particular or concrete, is not fairly traceable to the congressional action, and is not likely to be redressed by a favorable decision. See DaimlerChrysler,

547 U.S. at 344.[3] Congress must advance religion directly in order to violate the limitations imposed by the Establishment Clause because determining the cause of an injury is too speculative when other causal agents may intercede in the decision of how taxes are directed. See Amos, 483 U.S. at 328 ("A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under Lemon, it must be fair to say that the government itself must have advanced religion through its own activities and influence." (emphasis in original)); see also Arakaki v. Lingle, 477 F.3d 1048, 1064 (9th Cir. 2007) (holding that taxpayer plaintiffs failed to allege facts to find that their injuries were concrete because "a plaintiff's injury is 'conjectural or hypothetical' when it 'depends on how legislators respond' to a change in revenue." (quoting DaimlerChrysler, 547 U.S. at 342)). Plantiffs have not alleged facts indicating that the government has used its influence to directly advance religion.

Indeed, the Court has repeatedly observed that tax exemptions are not the constitutional equivalent of direct expenditures for Establishment Clause purposes, regardless of the putative economic effect of such exemptions. See, e.g., Walz, 397 U.S. at 675 ("The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.' There is no genuine nexus between tax exemption and establishment of religion.") (emphasis added); see also id. at 690 (Brennan, J. concurring) ("Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct

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[3] In DaimlerChrysler, the Court held that it was speculative whether eliminating the tax exemption at issue would affect another taxpayer's tax burden to create injury: "As an initial matter, it is unclear that tax breaks of the sort at issue here do in fact deplete the treasury . . . Plaintiffs' alleged injury is also 'conjectural or hypothetical' in that it depends on how legislators respond to a reduction in revenue, if that is the consequence of the credit. Establishing injury requires speculating that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit; establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions. Neither sort of speculation suffices to support standing." DaimlerChrysler, 547 U.S. at 344 (citing ASARCO, Inc. v. Kadish, 490 U.S. 605, 614 (1989)).

1 transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a
2 whole.") (emphasis in original); Regan v. Taxation with Representation, 461 U.S. 540, 544 & n.5
3 (1983) ("In stating that exemptions and deductions . . . are like cash subsidies, . . . we of course do
4 not mean to assert that they are in all respects identical.") (citing Walz, 397 U.S. at 674);
5 Rosenberger, 515 U.S. at 838-844 (relying on the fact that there were no prohibited "direct money
6 payments" in holding that state funding of printing costs of religious publications did not violate the
7 Establishment Clause).[4] See generally Boris I. Bittker, Churches, Taxes and the Constitution, 78
8 Yale L.J. 1285 (1969) (cited by Justice Brennan in Walz, 397 U.S. at 691 nn.10 & 11); Edward A.
9 Zelinsky, Are Tax 'Benefits' Constitutionally Equivalent to Direct Expenditures?, 112 Harv. L. Rev.
10 379 (1998); Dean M. Kelley, Why Churches Should Not Pay Taxes, 11-13, 47-57 (1977).
11 In Winn v. Arizona Christian School Tuition Organization, the Ninth Circuit found that
12 plaintiffs had standing to challenge an Arizona state tax credit program they claimed impermissibly
13 benefitted parochial schools. Winn, 562 F.3d at 1008. The Arizona program allowed a dollar-for-
14 dollar credit, subject to a $500 ceiling, reducing taxes owed by taxpayers for every dollar
15 contributed to nonprofit organizations that awarded scholarships to children. Id. Plaintiffs in that
16 case challenged the constitutionality of the program because most of the organizations to which
17 taxpayers contributed money restricted the availability of their scholarships to scholarships for
18 attendance at parochial schools. The court concluded that, in essence, the tax credits diverted
19 taxpayers' tax payments to religious institutions; the taxpayers' "contributions [were] costless." Id.
20 (quoting Hibbs v. Winn, 542 U.S. 88, 95 (2004)). The court found that "because it directs how the
21 money will be spent if it is not surrendered to the state," the program constituted an expenditure of
22 state funds, and that the plaintiffs had alleged sufficient injuries to create standing. Id. at 1009. In
23 dicta, the Ninth Circuit suggested that the holding did not turn on the fact that the subsidy at issue
24 was a dollar-for-dollar tax credit, and that "[t]he Supreme Court has recognized, however, that state
25 tax policies such as tax deductions, tax exemptions and tax credits are means of 'channeling . . .
26
27 [4] Furthermore, in Rosenberger, each opinion, including each of the dissents, observed that "tax exemptions did not involve the expenditure of government funds in support of religious activities." 515 U.S. at 881 n.7 (Souter, J., dissenting).
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[state] assistance' to private organizations, which can have 'an economic effect comparable to that of aid given directly' to the organization." Id. (bracketed text in original) (citing Mueller v. Allen, 463 U.S. 388 (1983)). As discussed above, the Supreme Court has repeatedly rejected arguments that tax exemptions are sufficiently qualitatively similar to tax credits to constitute subsidies for Establishment Clause purposes. Indeed, because the Arizona program involved a dollar-for-dollar credit and not a tax exemption, the Winn holding regarding standing should be limited to factually similar cases involving similar tax credits and not extended to tax exemptions.

The Supreme Court's plurality opinion in Texas Monthly v. Bullock, discussed in greater detail in Section V.B.1.e, infra, did not abrogate the injury requirement for standing even though it allowed a plaintiff to challenge tax exemptions granted to third party religious organizations. Texas Monthly v. Bullock, 489 U.S. 1, 9 (1989). The plaintiff in Texas Monthly had attempted to take, and was denied, the challenged tax exemption. This arguably gave rise to a concrete, particularized, fairly traceable, and likely redressable injury in fact. Id. ("A live controversy persists over Texas Monthly's right to recover the $149,107.74 it paid, plus interest."). Because the plaintiff in Texas Monthly did not merely object to a benefit given to some other taxpayer but arguably established that the state's unequal treatment resulted in a concrete injury, the Court concluded that the plaintiff alleged sufficient injury for standing. Id.

d. Plaintiffs may not challenge §§ 107 and 265(a)(6) by virtue of their status as taxpayers because they have not suffered an injury in fact, nor do they satisfy the Flast exception.

Plaintiffs have failed to allege sufficient injury in fact by virtue of their status as taxpayers to satisfy Article III standing requirements. First, nowhere do Plaintiffs contend that the treatment of their taxes was in any way improper. See Complaint. Plaintiffs only contend that the treatment of taxes owed by third parties not before the court was improper. Id. at ¶¶ 5, 55-58. Additionally, despite Plaintiffs' claim that the "tax preferences afforded to ministers of the gospel constitute a subsidy that results in tangible and direct economic injury to FFRF, and to its members and employees, who cannot claim these benefits," such contentions are mere "conclusory statements of law." Id. at ¶ 57. As such, Plaintiffs have not alleged sufficient facts to determine that any

1 economic injuries resulting from the unavailability of a tax exemption are sufficiently concrete,
2 particularized, or redressable by a favorable opinion in an action challenging the constitutionality of
3 §§ 107 and 265. See Arakaki, 477 F.3d at 1059-1065 (remarking that the standing doctrine requires
4 "that a plaintiff's claims arise in a 'concrete factual context' appropriate to judicial resolution"
5 (quoting Valley Forge, 454 U.S. at 472).

6 Furthermore, Plaintiffs fail to satisfy the requirements for standing under the Flast exception.
7 Neither §§ 107 nor 265(a)(6) is a dollar-for-dollar tax credit like the program analyzed in Winn.
8 See Winn, 562 F.3d at 1008. Therefore, neither provision directs or channels the disposition of
9 taxpayers' dollars in a manner consistent with the injuries that have been found sufficient to give rise
10 to taxpayer standing. Nor does either provision direct or channel any expenditure of the Plaintiff-
11 taxpayers' money, not even three pence of it, in aid of religion, and therefore Plaintiffs cannot
12 "identify any personal injury suffered by them as a consequence of the alleged constitutional error."
13 Valley Forge, 454 U.S. at 485 (emphasis in original). Both §§ 107 and 265(a)(6) only affect
14 taxpayers insofar as they have income designated as and actually spent for the housing, and have
15 nothing to do with the direction of congressional appropriations. See Treas. Reg. § 1.107-1(c).
16 Plaintiffs' allegations cannot satisfy the nexus requirement imposed by Flast, and reaffirmed in Hein,
17 that there be an injury in fact fairly traceable to the challenged congressional action and likely
18 redressable by a favorable decision. Hein, 551 U.S. at 611. Plaintiffs have identified no particular
19 or concrete way in which their taxes have been directed to the advancement of religion by virtue of
20 the administration of the Internal Revenue Code. Plaintiffs allege that ministers receive a benefit
21 due to lessened tax burdens, not that tax money has been directed toward them. See Complaint, ¶
22 55. Furthermore, numerous intervening causal agents, unconstrained by congressional direction,
23 may intercede in the expenditure of their tax dollars, reducing the traceability of any injury. Finally,
24 it is entirely speculative that "abolishing the challenged credit will redound to the benefit of the
25 taxpayers" or diminish the amounts that are spent by private entities advancing religion in order to
26 redress any Establishment Clause injury. DaimlerChrysler, 547 U.S. at 344. Therefore, because
27 Congress does not direct or appropriate tax dollars to the advancement of religion through §§ 107
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and 265(a)(6), Plaintiffs fail to satisfy the Flast exception and lack Article III standing by virtue of their status as taxpayers.

4. Plaintiffs cannot satisfy the Article III standing requirement by alleging that they have suffered a competitive disadvantage.

Plaintiffs allege that FFRF "competes with churches and religious organizations, but the competition is unfair. The tax subsidies available to churches, religious organizations, and ministers of the gospel are not available to FFRF and its employees. FFRF is thereby placed at a competitive disadvantage relative to churches and other organizations whose employees receive tax subsidies." Complaint, ¶ 58. Presumably, given the term "competitive disadvantage," Plaintiffs mean to allege standing under the doctrine of "competitor standing," which has been "recognized in circumstances where a defendant's actions benefitted a plaintiff's competitors, and thereby caused the plaintiff's subsequent disadvantage." See Fulani v. Brady, 935 F.2d 1324, 1327 (D.C. Cir. 1991) (citing cases), cert. denied, 502 U.S. 1048 (1992). The doctrine of competitor standing arose from the recognition of injuries in fact incurred by economic actors as a result of third-party activities that were enabled by government regulation. See, e.g., Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152-53 (1970) (finding that data processing company had standing to challenge rulings by Comptroller of the Currency allowing national banks to compete in data processing); Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 403 (1987) (holding that securities brokers had standing to challenge ruling that national banks could act as discount brokers).

Notably, Plaintiffs' Complaint does not allege sufficient facts to indicate that FFRF is in fact in competition with the beneficiaries of §§ 107 and 265(a)(6), such as allegations of a cognizable and particularized arena of competition in which §§ 107 and 265(a)(6) might have affected competition. Moreover, Plaintiffs' Complaint does not allege facts that could show how such a "competitive disadvantage" has occurred as a result of §§ 107 and 265(a)(6). See generally In re United States Catholic Conference, 885 F.2d 1020, 1029 (2d Cir.1989); see also Gottlieb v. FEC, 143 F.3d 618, 621-622 (D.C. Cir. 1998). Without alleging these facts, Plaintiffs' statements regarding the existence of competition and competitive disadvantage amount to "conclusory statements of law," which need not be accepted as true. See Caviness, 590 F.3d at 812. Thus,

Plaintiffs have failed to meet their burden to establish standing and subject matter jurisdiction by alleging sufficient facts to show how the conclusory "competitive disadvantage" caused a concrete, particularized, fairly traceable, and redressable injury. See Arakaki, 477 F.3d at 1059.

Plaintiffs do not allege that they have suffered an injury as a result of being improperly denied the tax relief afforded by §§ 107 and 265(a)(6). Other plaintiffs asserting that a provision of the Internal Revenue Code violates the Establishment Clause have been denied standing when they conceded that their own tax statuses were correctly assessed. See, e.g., In re Catholic Conference, 885 F.2d at 1030-31 ("By asserting that an advantage to one competitor adversely handicaps the others, plaintiffs have not pleaded that they were personally denied equal treatment."); see also Gottlieb, 143 F.3d at 621. Sections 107 and 265(a)(6) deal with the compensation of ministers. FFRF does not allege any facts that show that it competes with churches and religious organization in the retention of ministers and their services, nor that it has been injured by being unable to obtain the services of such ministers.

By failing to allege a factual basis of a competitive injury, Plaintiffs have also failed to allege facts that could establish the standing requirement that the injury be fairly traceable to the challenged provisions and redressable by success in the present suit. See Arakaki, 477 F.3d at 1059-1065. Nor have Plaintiffs alleged any facts that might indicate how invalidating §§ 107 and 265(a)(6) would affect how intensely and to what extent ministers or religious organizations "compete" with Plaintiffs. Plaintiffs have not contradicted the facts that religious organizations do not receive any additional federal funds by designating part of their employees' pay as housing allowances, nor do religious organizations receive any additional funds as a result of the deductibility of mortgage interest paid by ministers. See §§ 107 and 265(a)(6). Moreover, Plaintiffs have not alleged a factual basis to support the contention that invalidating §§ 107 and 265(a)(6) would redress Plaintiffs' injury.

Therefore, Plaintiffs' allegations of injury by not receiving the same statutory benefits that their purported competitors receive are too tenuous, generalized, untraceable, and non-redressable to satisfy the standing requirements of Article III and do not provide any basis for standing.

B. SECTION 107 DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

1. Government accommodation of religion is permissible under the Establishment Clause so long as it has a secular purpose, it does not have the primary effect of advancing or inhibiting religion, and it does not foster excessive entanglement between religion and government.

Plaintiffs allege that "Sections 107 and 265(a)(6) of the Revenue Code . . .violate the Establishment Clause of the First Amendment, in part, because they provide tax benefits only to 'ministers of the gospel,' rather than to a broad class of taxpayers, " "subsidize, promote, endorse, favor, and advance churches, religious organizations, and 'ministers of the gospel,'" and "result in 'excessive entanglement' between church and state contrary to the Establishment Clause." Complaint, ¶¶ 33-35. Plaintiffs further allege that "Sections 107 and 265(a)(6) are not permissible 'accommodations' of religion under the Establishment Clause, in part, because the income taxation of ministers of the gospel under the general rules that apply to other individuals would not interfere with the religious mission of churches or other organizations or the ministers themselves." Complaint, ¶ 36. However, Plaintiffs mistakenly overlook the valid purpose and effect behind § 107: to accommodate religious practice by eliminating disparate tax treatment between similarly situated ministers and other taxpayers, while simultaneously avoiding excessive entanglement with religion.

The Establishment Clause of the First Amendment requires that governments must act with a policy of neutrality toward religion, neither advancing nor inhibiting it. Zorach v. Clauson, 343 U.S. 306, 314 (1952) (upholding a religion-specific exemption from compulsory education laws for students receiving voluntary off-campus religious instruction). The constitutionally required policy of neutrality toward religion "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." Lynch v. Donnelly, 465 U.S. 668, 673 (1984). Thus, in the context of government action accommodating or providing exemptions exclusively to religion or religious organizations, the Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-145

1 (1987) (footnote omitted) (reversing denial of unemployment compensation to claimant discharged
2 for refusal to work on her Sabbath); Amos, 483 U.S. at 334 (upholding exemption to Title VII
3 prohibition on religious discrimination in employment for all employees of religious nonprofit
4 organizations); accord, Gillette v. United States, 401 U.S. 437, 450 (1971) (upholding religion-
5 specific exemption from military draft for those who oppose all wars).

6 When the Court last reviewed the constitutionality of a tax exemption generally applicable to
7 religious entities – rather than one confined to dissemination of religious writings, as in Texas
8 Monthly (which we distinguish in Section V.B.1.e, infra) – it observed that "[t]he basic purpose" of
9 the Establishment Clause "is to insure that no religion be sponsored or favored, none commanded,
10 and none inhibited." Walz, 397 U.S. at 669. "[T]he First Amendment," the Court continued, "will
11 not tolerate either governmentally established religion or governmental interference with religion."
12 Id. The Court in Walz concluded that "each value judgment under the Religion Clauses must
13 therefore turn on whether particular acts in question are intended to establish or interfere with
14 religious beliefs and practices or have the effect of doing so." Id. at 669 (emphasis added).

15 The Walz analysis underpins the three-part test of constitutionality enunciated in Lemon v.
16 Kurtzman, 403 U.S. at 612, and further developed in Agostini v. Felton, 521 U.S. 203, 232 (1997).
17 In Lemon, the Court drew the line between a statute touching upon religion and a prohibited "law
18 respecting an establishment of religion," 403 U.S. at 612, "with reference to the three main evils
19 against which the Establishment Clause was intended to afford protection," namely, "'sponsorship,
20 financial support, and active involvement of the sovereign in religious activity.'" Id. (quoting Walz,
21 397 U.S. at 668). In order to comport with the Establishment Clause, the Court said that: (1) the
22 statute "must have a secular legislative purpose"; (2) "its principal or primary effect must be one that
23 neither advances nor inhibits religion" [citation omitted]; and (3) it "must not foster 'an excessive
24 government entanglement with religion,' Walz, supra, at 674 [parallel citation omitted]." Lemon,
25 403 U.S. at 612-613.[5] Furthermore, as the Court has consistently emphasized, "[t]he limits of

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27 [5] While the Court has occasionally discussed whether "excessive entanglement" is "a factor separate and apart from 'effect'" (Agostini, 521 U.S. at 232) or "an aspect of the inquiry into a statute's
28 effect" (Mitchell v. Helms, 530 U.S. 793, 806 (2000)), it is clear that purpose, effect, and entanglement

1 permissible state accommodation to religion are by no means co-extensive with the noninterference
2 mandated by the Free Exercise Clause." Walz, 397 U.S. at 673 (emphasis added); See Amos, 483
3 U.S. at 334, 339 n.17. Evaluated under these principles, § 107 represents a constitutionally
4 permissible accommodation of religious practice.

5 **a. Section 107 has several valid secular purposes.**

6 **i. Religion-specific provisions that remove burdens on religious**
practice serve valid secular purposes under the Establishment
7 **Clause.**

8 The Supreme Court has consistently held that Congress may create exceptions and
9 exemptions explicitly and exclusively in order to accommodate religious practices without violating
10 the Establishment Clause. See Cutter v. Wilkinson, 544 U.S. 709, 713 (2005) (holding that special
11 privileges granted exclusively to religious prisoners did not violate the Establishment Clause); Bd.
12 of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 705-706 (1994) ("Our cases
13 leave no doubt that in commanding neutrality the Religion Clauses do not require the government to
14 be oblivious to impositions that legitimate exercises of state power may place on religious belief and
15 practice."). Consistent with the permissibility of accommodating religion, a statute that specifies
16 religious entities as exclusive beneficiaries has the valid secular purpose of alleviating governmental
17 interference with religious entities' conduct of religious activities. Amos, 483 U.S. at 335, 338
18 (upholding an exemption granted exclusively to religious organizations because "Congress' purpose
19 was to minimize governmental 'interfer[ence] with the decision-making process in religions'"
20 (quoting Amos v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 594 F.
21 Supp. 791, 812 (D. Utah 1984))). A religion-specific tax exemption may therefore promote a valid
22 secular purpose if it alleviates governmental interference with religious entities and "tends to
23 complement and reinforce the desired separation insulating each from the other." Walz, 397 U.S. at
24 676 (holding that a religion-specific state property tax exemption had a valid secular purpose and
25 effect of avoiding state entanglement with religion).
26 The fact that § 107 involves a tax exemption, rather than the granting of a direct subsidy, is
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28 remain integral to Establishment Clause jurisprudence.

crucial to an understanding of its constitutional soundness. A line of cases going back at least ninety years instructs that government may, consistent with the Constitution, refrain from imposing a burden on religion through a regulatory or tax exemption, even though the scope of the provision is religion-specific.[6]

In the first of these authorities, Arver v. United States, the Supreme Court said that "the unsoundness" of an Establishment Clause challenge to draft exemptions for ministers and theological students was "too apparent" to require further comment. Arver v. United States, 245 U.S. 366, 389-390 (1918). More than fifty years ago, in Zorach v. Clauson, the Court held that the religion-specific exemption did not offend the First Amendment, because the Establishment Clause did not require "that the government show callous indifference to religious groups." 343 U.S. at 314. To do so "would be preferring those who believe in no religion over those who believe." Id.

The Supreme Court last examined a tax exemption granted on the basis of an entity's religious status in Walz, holding that "[t]he legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion," and thus "is neither sponsorship nor hostility." Walz, 397 U.S. at 672. The New York statute did not attempt to establish religion, but "simply spar[ed] the exercise of religion from the burden of property taxation levied on private profit institutions." Id. at 673. The fact that the exemption in Walz also applied to nonreligious organizations was not dispositive for the majority, which found it "unnecessary to justify" the exemption for religious organizations "on the social welfare services or 'good works'" they might provide. Id. at 674. Indeed, to have rested the exemption on a "good works" rationale would have

[6] In addition to this 90-year sequence of judicial precedent, congressional tax exemptions for religious property date back to the earliest days of the Republic. See, e.g., 2 Stat. 194 (1802) (applying the taxing statute of Virginia, which provided an exemption for churches); 6 Stat. 116 (1813) (refunding duties paid by religious organization upon the importation of plates for the printing of Bibles); 6 Stat. 346 (1816) (refunding duties paid by a church upon the importation of vestments); see generally Walz, 397 U.S. at 677 ("Congress, from its earliest days, has viewed the Religion Clauses of the Constitution as authorizing statutory real estate tax exemption to religious bodies"); id. at 681-686 (Brennan, J., concurring). As the Supreme Court has often noted, "early congressional enactments 'provid[e] "contemporaneous and weighty evidence" of the Constitution's meaning.'" Printz v. United States, 521 U.S. 898, 905 (1997) (internal citations omitted).

1 invited excessive entanglement with religion. Id.[7]

2 In a concurring opinion joined by Justices Marshall and Stevens, Justice Brennan focused on
3 the distinction between tax exemptions and "governmental subsidy of churches," which "would of
4 course, constitute impermissible state involvement with religion." Id. at 690. He explained that a
5 "subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources
6 exacted from taxpayers as a whole," whereas an exemption "assists the exempted enterprise only
7 passively, by relieving a privately funded venture of the burden of paying taxes." Id.[8]

8 In Amos, decided in 1987, the Supreme Court drew upon Zorach and Walz in holding that a
9 provision in Title VII of the Civil Rights Act of 1964 exempting religious organizations from the
10 prohibition against religious discrimination in employment did not violate the Establishment Clause.
11 From Walz, the Court concluded that an exemption statute could be a "permissible accommodation"
12 of religion. Amos, 483 U.S. at 334-335. Through Zorach, the Court clarified that the requirement of
13 a secular legislative purpose "does not mean that the law's purpose must be unrelated to religion,"
14 and it emphasized that "the Establishment Clause has never been so interpreted." Id. at 335; accord,
15 Texas Monthly, 489 U.S. at 10 (Court has never required "that legislative categories make no
16 explicit reference to religion") (Brennan, Marshall, & Stevens, JJ.). "Rather, Lemon's 'purpose'
17 requirement aims at preventing the relevant governmental decisionmaker – here, Congress – from
18 abandoning neutrality and acting with the intent of promoting a particular point of view in religious
19 matters." Id.; accord, Gillette, 401 U.S. at 451. The Court in Amos left no doubt that an

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21 [7] In Gillette v. United States, 401 U.S. at 454, the Court relied on Walz, 397 U.S. at 669, in stating that "'[n]eutrality' in matters of religion is not inconsistent with 'benevolence' by way of exemptions
22 from onerous duties . . . so long as an exemption is tailored broadly enough that it reflects valid secular purposes." On that basis, the Court rejected an Establishment Clause challenge to an exemption to the
23 military draft that was then available to anyone "who, by reason of religious training or belief, is conscientiously opposed to participation in war in any form," 401 U.S. at 450 (emphasis added), while
24 excluding from its reach those professing "conscientious objection to a particular war," Id. at 441.

25 [8] Although Justice Brennan retreated from that position in Texas Monthly, a majority of the Court has never done so, as is discussed in Section V.B.1.e, infra, and the argument that "tax expenditure"
26 analysis has no place in Establishment Clause jurisprudence remains compelling. See Section V.A.3.c, supra; see generally Boris I. Bittker, Churches, Taxes and the Constitution, 78 Yale L. J. 1285 (1969) (cited
27 by Justice Brennan in Walz, 397 U.S. at 691 nn.10 & 11); Edward A. Zelinsky, Are Tax 'Benefits' Constitutionally Equivalent to Direct Expenditures?, 112 Harv. L. Rev. 379 (1998); Dean M. Kelley, Why
Churches Should Not Pay Taxes 11-13, 47-57 (1977).

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Establishment Clause challenge will not be upheld "where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion," and that there is "no reason to require that the exemption come packaged with benefits to secular entities." Id. at 335.

As recently as Cutter, decided in 2005, the Court reaffirmed the principle that "'there is room for play in the joints between' the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause." Cutter, 544 U.S. at 719 (quoting Locke v. Davey, 540 U.S. 712, 718 (2004)).

The line of cases including Walz, Amos, and Cutter thus underscore a salient distinction between not imposing a burden on religion and extending a benefit to religion, namely, that government "does not . . . establish religion by leaving it alone." Douglas Laycock, Towards a General Theory of the Religion Clauses, 81 Colum. L. Rev. 1373, 1416 (1981). As the Court explained in Walz, "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." Walz, 397 U.S. at 675. Consequently, "[t]here is no genuine nexus between tax exemption and establishment of religion." Id. at 676.

ii. Section 107 has the valid secular purposes of avoiding burdening religious practice and reinforcing the separation of government and religious entities by ensuring parity between ministers and laypeople.

Plaintiffs have not alleged any facts regarding the legislative purpose behind § 107, and instead rely on conclusory allegations that "Sections 107 and 265(a)(6) are not permissible 'accommodations' of religion under the Establishment Clause, in part, because the income taxation of ministers of the gospel under the general rules that apply to other individuals would not interfere with the religious mission of churches or other organizations or the ministers themselves." Complaint, ¶ 36. Thus, Plaintiffs' conclusory allegations need not be accepted as true. See Caviness, 590 F.3d at 812. Instead, Plaintiffs' assertion misconstrues the way in which § 107 accommodates religious practice.

In reviewing an Establishment Clause challenge, it is appropriate to "consider the historical

context of the statute and the specific sequence of events leading to the passage of the statute." See Cammack v. Waihee, 932 F.2d 765, 774 (9th Cir. 1991). The legislative history and statutory context of § 107 demonstrate that Congress enacted the statute to remove burdens on religious practice by eliminating the distinction between housing provided as a housing allowance and housing provided in kind. Thus, a valid purpose of § 107 is to achieve parity among various denominations of clergy as well as laypeople provided housing at the convenience of their employers, irrespective of a minister's religion or housing arrangements. Section 107 thus accommodates religious practices by exempting religious organizations from burdensome and entangling administrative inquiries by the government. These statutory purposes comport fully with the restraints of the Establishment Clause. By accommodating church-related housing needs and resources, § 107 avoids creating tax-based discrimination for, against, or among the practices of different religions.

A. Section 107 accommodates religious practice by creating parity between ministers and other taxpayers who may exclude the value of housing provided at the convenience of the employer from income.

Church-provided housing is a tradition that dates back at least to the 13th century. Alan Savidge, The Parsonage in England 7-9 (1964). Furthermore, a minister's residence is traditionally more than mere housing. A minister's home is typically used for religious purposes "such as a meeting place for various church groups and as a place for providing religious services such as marriage ceremonies and individual counseling." Immanuel Baptist Church v. Glass, 497 P.2d 757, 760 (Okla. 1972); State v. Erickson, 182 N.W. 315, 319-320 (S.D. 1921); See generally Maurice T. Brunner, Taxation: Exemption of Parsonage or Residence of Minister, Priest, Rabbi, or Other Church Personnel, 55 A.L.R.3d 356, 404 (1974) ("Most ministerial residences can be expected to be incidentally used to some considerable extent as an office, a study, a place of counseling, a place of small meetings, such as boards or committees, and a place in which to entertain and lodge church visitors and guests."). Recognizing that a minister's residence may be used to conduct church business, the constitutions or statutes of many states specifically exempt residences of clergy from property tax. John Witte, Jr., Taxation of Church Property: Historical Anomaly or Valid

1 Constitutional Practice, 64 S. Cal. L. Rev. 363, 391-392 (1991).

2 A federal income tax exemption for parsonages first appeared in § 213(b)(11) of the Revenue
3 Act of 1921, just eight years after the modern federal income tax was authorized by the 16th
4 Amendment to the Constitution. Pub. L. No. 98, § 213(b)(11) (1921); see also Bob Jones Univ. v.
5 United States, 461 U.S. 574, 589 n.14 (1983). This exclusion for "[t]he rental value of a dwelling
6 house and appurtenances thereof furnished to a minister of the gospel as part of his compensation"
7 was carried forward in successive revenue acts and was incorporated into the Internal Revenue Code
8 of 1939 without substantive change. See Report of the Joint Committee on Internal Revenue
9 Taxation, Vol. I at 7 (1927); Revenue Act of 1928, Pub. L. No. 562, ch. 582, § 22(b)(8), 45 Stat.
10 791, 798; Revenue Act of 1932, Pub. L. No. 154, ch. 209, § 22(b)(6), 47 Stat. 169, 179; Internal
11 Revenue Code of 1939, Pub. L. No. 1, 53 Stat. 1, 10. When § 107 came into the Code in its present
12 form in 1954, the addition of § 107(2) allowed ministers to exclude certain "rental allowance[s]."
13 Pub. L. No. 591, ch. 736, sec. 107, 68A Stat. 3, 32.

14 Although the legislative history of the 1921 Revenue Act does not explain why the in-kind
15 exclusion was introduced because the text of § 213(b)(11) was agreed to without debate – the
16 treatment of clergy housing under prior law sheds light on the section's purpose. See 61 S. Cong.
17 Rec. 7162 (daily ed. Nov. 2, 1921). Immediately before the enactment of § 213(b)(11), the Treasury
18 Department had allowed some employees – but not clergy – to exclude the value of employer-
19 provided housing from income, generally utilizing a convenience-of-the-employer rationale. See
20 generally Commissioner v. Kowalski, 434 U.S. 77, 84-90 (1977) (describing history of tax
21 exemptions for employer-provided housing). They included seamen living aboard ship (O.D. 265, 1
22 C.B. 71 (1919)); persons living in "camps" (T.D. 2992, 2 C.B. 76 (1920)); cannery workers (O.D.
23 814, 4 C.B. 84, 84-85 (1921)); and hospital employees (O.D. 915, 4 C.B. 85, 85-86 (1921)). In
24 1921, Treasury had announced that clergy would be taxed on the fair rental value of parsonages
25 provided as living quarters, O.D. 862, 4 C.B. 85 (Apr. 1921), even though ministers traditionally
26 resided in church-provided housing for the convenience of their organizations. Therefore, when
27 Congress enacted § 213(b)(11) later that year, it reversed the Treasury's decision to treat the rental
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value as income and placed ministers on an equal footing with other employees who were already permitted to exclude from income housing provided for their employers' convenience.

Thus, a valid secular purpose of § 107 is to provide for similar tax treatment of certain religious employees as is available to all employees at the convenience of the employer, as codified in § 119: an exemption for certain income attributable to employer-provided housing.

B. Section 107(2) accommodates religious practice by avoiding discrimination between similarly situated ministers of different denominations, religious practices, or traditions.

When churches that did not own parsonages (among them entire denominations) provided their ministers with cash housing allowances in lieu of housing in kind, Treasury continued to take the position that such allowances must be included in income. See I.T. 1694, C.B. II-1, 79 (1923) ("the statute [section 213(b)(11)] applies only to cases where a parsonage is furnished to a minister and not to cases where an allowance is made to cover the cost of a parsonage"). Several courts, however, rejected Treasury's position and held such allowances to be excludable. See Conning v. Busey, 127 F. Supp. 958, 959 (S.D. Ohio 1954); MacColl v. United States, 91 F. Supp. 721, 722 (N.D. Ill. 1950); Williamson v. Commissioner, 224 F.2d 377, 381 (8th Cir. 1955), rev'g 22 T.C. 566 (1954). As the Eighth Circuit stated in Williamson, "it was not the intent nor purpose of Congress that a house allowance in lieu of the rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel should be included in his gross income." Id.

In 1954, Congress resolved the dispute by codifying the prevailing judicial view in Internal Revenue Code § 107(2). Recently, the Supreme Court reaffirmed that "'it is not only appropriate but realistic to presume that Congress was thoroughly familiar'" with pertinent judicial precedents "'and that it expect[s] its enactment[s] to be interpreted in conformity with them.'" Edelman v. Lynchburg Coll., 535 U.S. 106, 117 n.13 (quoting N. Star Steel Co. v. Thomas, 515 U.S. 29, 34 (1995) (emphasis added)). There is no basis for any contrary presumption in connection with § 107(2). Indeed, Congress was urged to include the housing allowance provision in the 1954 Code precisely because the Commissioner "had not acquiesced [in MacColl], and those ministers entitled to relief must litigate in order to get relief." See Forty Topics Pertaining to the General Revision of

1 the Internal Revenue Code: Hearings Before the House Comm. on Ways and Means, 83rd Cong. at
2 1574 (1953) (statement of Ray G. McKennan). The 1954 amendment that added Section 107(2) was
3 expressly intended to eliminate discrimination between ministers who received housing in kind and
4 those who received a cash housing allowance. See H.R. Rep. No. 1337, at 15 (1954); S. Rep. No.
5 1622, at 16 (1954). Courts have observed that the elimination of such discrimination was a valid
6 secular purpose under the Establishment Clause. See, e.g., Warnke v. United States, 641 F. Supp.
7 1083, 1092 (E.D. Ky. 1986) ("Section 107(2) was added to equalize the disparate treatment between
8 ministers who were provided a parsonage and those who were compensated more generously to
9 provide one for themselves."); see also Cutter, 544 U.S. at 724 (finding the lack of discrimination
10 between bona fide faiths relevant to finding valid accommodation).

11 Additionally, Congress has provided similar exemptions from income for housing allowances
12 in other contexts, even though such housing is not provided in-kind. See §§ 134, 912 (granting
13 exemption from income for housing allowances received by military and civilian government
14 employees working overseas). Thus, Congress has statutorily provided that various housing
15 allowances should effectively be treated as provided at the convenience of the employer, even
16 though the employee does not receive the lodging in-kind, in order to eliminate discrimination
17 between similarly situated groups.

18 The legislative and administrative history of the tax exemption for ministers' housing
19 demonstrates that the in-kind exclusion was enacted so that ministers would be treated like similarly
20 situated employees of other employers and that the housing allowance exemption was enacted so
21 that all ministers would be treated equally. Members of the clergy have long been provided with
22 homes at or near their places of worship, and Congress has exercised the discretion that accompanies
23 its taxing power to exempt the value thereof from taxation. See Walz, 397 U.S. at 679. Extension of
24 this "refusal to tax" to the cash equivalent of supplied housing under § 107(2) merely "eliminates the
25 discrimination," in the words of the drafters, that would otherwise exist against ministers, and
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between churches that historically provide parsonages and those that do not.[9] Eliminating existing discriminatory treatment by the government between religious groups constitutes a valid secular purpose. See Found. of Human Understanding v. United States, 88 Fed. Cl. 203, 216 (2009).[10]

Section 107 also removes a burden on religious practice by allowing each church to decide whether and how best to provide for the housing needs of its ministers.[11] The decision whether to furnish clergy with housing in kind, an allowance in cash, or no housing at all depends on many factors, such as church tradition, the size, composition, and wealth of the congregation, the location of the church, and the recipient's status within the ministry. A historic parish, for example, might be more likely to own a parsonage than a newly formed church or a new religious movement. Even if a parsonage were available for the principal minister, the assisting clergy might be given cash instead for the provision of housing.

Section 107 would also satisfy the secular purpose requirement even under the logic of the plurality opinion in Texas Monthly. In applying a more narrow view of the secular purpose prong to tax exemptions, the Court implied that an otherwise constitutionally suspect benefit could be saved if it either did not "burden[] nonbeneficiaries markedly" or it "remov[ed] a significant state-imposed deterrent to the free exercise of religion." Texas Monthly, 489 U.S. at 15. Section 107 provides an in-kind benefit that is also available to secular employers, while also providing a permissive

[9] It is not our position that the mere existence of a tax on ministers, without more, would impose a burden on religion that is itself constitutionally intolerable. See Jimmy Swaggart Ministries v. Cal. Bd. of Equalization, 493 U.S. 378, 390-92 (1990) (rejecting argument that duty of religious ministry to collect nondiscriminatory sales and use taxes from retail purchasers and remit to the state "interfered with religious activities"); Hernandez v. Commissioner, 490 U.S. 680, 699-700 (1989) (holding that the charitable contribution provisions of § 170 did not violate the Establishment Clause).

[10] Though the Court of Federal Claims did not reach the issue of constitutionality of the tests applied by the IRS, it observed that "[w]hile the government 'may constitutionally tax the income of religious organizations [and] may decide not to exercise this power and grant reasonable exemptions to qualifying organizations while continuing to tax those who fail to meet these qualifications,' unconstitutional discrimination may nevertheless arise 'if benefits granted to one religious group are denied to others of essentially the same class.'" Found. of Human Understanding, 88 Fed. Cl. at 216 (citing The Ecclesiastical Order of the ISM of AM, Inc. v. Commissioner, 80 T.C. 833, 841-42 (1983)) (internal citations omitted, bracketed text in original)).

[11] Cf. Boyer v. Commissioner, 69 T.C. 521 (1977) (noting that the purpose of § 107 was to accommodate church needs and practices, rather than to allow a minister to "bootstrap" his chosen secular pursuits into a tax exemption).

accommodation of diverse religious practices by permitting rental allowances for similarly situated ministers whose religious practices might make such a benefit otherwise unobtainable.

Therefore, § 107 has the permissible secular purpose of avoiding government discrimination among religions in providing a benefit widely available to a variety of groups, and therefore furthers one of the core purposes of the Establishment Clause. Cf. Larson v. Valente, 456 U.S. 228 (1982); Fowler v. Rhode Island, 345 U.S. 67 (1953).

C. Section 107 accommodates religious practice by avoiding excessive governmental entanglements with religious entities.

In addition to legislative history, courts consider the implementation of a statute as evidence of the government's purpose. See McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844, 862 (2005) ("The eyes that look to purpose belong to an "objective observer," one who takes account of the traditional external signs that show up in the "text, legislative history, and implementation of the statute," or comparable official act." (quoting Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 308 (2000)) (internal citations omitted)). As discussed in Section V.B.1.a.ii.A, supra, one purpose of § 107 was to put ministers on equal footing with other employees who may exempt employer-provided housing from income under § 119. The implementation of §§ 107 and 119 reveals that another Congressional purpose was to minimize government entanglement with religion that would otherwise result from requiring ministers to comply with § 119.

Administration of § 119 calls for the IRS to inquire into "the extent of business premises," whether the housing is provided "at the convenience of employer," whether the housing was provided "at the place of employment," and whether the housing is provided "as a condition of employment" such that the employee is "required to accept the lodging in order to enable him properly to perform the duties of his employment" See Treas. Reg. § 1.119-1(b)-(c). As discussed in Section V.B.1.c, infra, such inquiries into the practices of ministers and their employing organizations, could require "continuing state surveillance" creating the possibility of a constitutionally impermissible "excessive government entanglement with religion." Walz, 397 U.S. at 674-675. By contrast, § 107, the accompanying Treasury Regulations, and the Internal Revenue

1 Manual specifically limit administrative inquiries into the content and conduct of religious activities,
2 thus avoiding excessive governmental entanglement with religion. Warnke, 641 F. Supp. at 1092
3 (upholding the constitutionality of Treasury Regulation § 1.107-1(b) because it "serves a number of
4 secular purposes" and the administrative requirements of § 107 "promote[] government
5 disentanglement").
6 Unlike § 119, under the administrative requirements for § 107, the IRS need not, and does
7 not, inquire into the terms and conditions of a minister's employment, the place in which a minister
8 conducts his or her duties, and whether or not employer-provided housing is "necessary" for the
9 employee "properly to perform" those duties. Compare Treas. Reg. § 1.119-1(b)-(c) with §
10 1.1402(c)-5 (cross-referenced in §1.107-1(a)). Instead, the inquiry is essentially limited to ensuring
11 that the taxpayer is receiving the housing or housing allowance by virtue of his or her status as a
12 minister, a standard that is broadly defined and with deference to the tenets and practices of the faith.
13 See Treas. Reg. § 1.1402(c)-5.
14 Such a limited inquiry ensures that the IRS avoids inquiries into the content and quality of
15 the operations of religious organizations or the practices and beliefs of a religion. That the
16 administration of § 107 does not create excessive entanglement demonstrates the valid secular
17 purpose of accommodating religious practices by avoiding making the tax treatment of religious
18 employees contingent on satisfying administrative requirements that define the "extent of the
19 business premises," the "place of employment," the "convenience of the employer," "the condition
20 of employment," or "properly [performing] the duties of [] employment." Forcing ministers and
21 their employers to satisfy the administrative inquiries required under § 119 and Treasury Regulation
22 § 1.119(b)-(c) "might affect the way an organization carried out what it understood to be its religious
23 mission" in order to provide its employees with housing exempt from income. Amos, 483 U.S. at
24 336. Therefore, § 107 also has the permissible purpose of accommodating religious exercise by
25 avoiding the impermissible and excessively entangling inquiries that might result from imposing the
26 administrative requirements of § 119.
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b. Section 107 does not have the primary effect of either advancing or inhibiting religion.

i. Government does not advance religion itself through § 107.

A law does not have the primary effect of advancing religion merely because "religious groups [are] better able to advance their purposes on account of [the law]." Amos, 483 U.S. at 336 (citations omitted); accord, Kiryas Joel, 512 U.S. at 687; Bowen, 487 U.S. at 607; Zorach, 343 U.S. at 313. Rather, the test is whether "the government itself has advanced religion through its own activities and influence." Amos, 483 U.S. at 337 (emphasis in original). In contrast, § 107 simply leaves religion alone.

Given the specialized professional qualifications and duties on which eligibility for the exemption under § 107 depends, see Treas. Reg. §§ 1.107-1(a), -1(b), 1.1402(c), it is unlikely that § 107 creates new incentives to religious activity. In addition, meeting the relevant requirements to qualify for an exemption under § 107 would render a minister responsible for paying self-employment (SECA) taxes, including on his parsonage or rental allowance, rather than sharing the correlating FICA tax burden with his or her employer, and thereby possibly increasing his or her overall tax burden, or at least substantially reducing the tax savings from § 107. Regulatory exemptions have been upheld that implicate far more plausible incentives for religious activities than the housing exemption involved here. See Cutter, 544 U.S. at 724-725 (acknowledging the argument that "prison gangs use religious activity to cloak their illicit and often violent conduct," but nonetheless upholding religious accommodations against facial challenge); Kiryas Joel, 512 U.S. at 725 (Kennedy, J., concurring) (discussing draft exemption upheld in Gillette); Amos, 483 U.S. at 337 (exemption from civil rights staffing constraints); Hobbie, 480 U.S. at 144-145 (unemployment benefits); Zorach, 343 U.S. at 312, 315 (time off from public school for religious education).

In particular, § 107 does not provide government funding for any religious activity, as discussed with regard to standing in Section V.A.3.d, supra, Walz makes clear that the "grant of a tax exemption is not sponsorship" prohibited by the Establishment Clause, despite the "indirect economic benefit" accruing therefrom, because "the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." Walz, 397 U.S.

at 675. The Court distinguished the impermissibility of a "direct money subsidy" from a tax exemption on the lesser involvement by the state, finding that an exemption "restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other." Id. at 675-676. While the Court in Regan v. Taxation With Representation pointed out that tax exemption is similar to a direct government subsidy, it quoted Walz to clarify that it did not mean they were identical in all respects. Taxation With Representation, 461 U.S. at 544; cf. Winn, 562 F.3d at 1009 (remarking in dicta that a tax exemption "can have an economic effect comparable to aid given directly," but citing cases involving legislative requirements that donations be made to religious entities to qualify for such tax exemptions (quoting Mueller, 463 U.S. at 399)).

As the Court noted in Walz, "the Court seems always to have viewed attacks upon the constitutionality of the exemptions" for churches and other charitable institutions "as wholly frivolous." 397 U.S. at 686 n.6. In Amos, the Court reiterated that "sponsorship, financial support, and active involvement of the sovereign in religious activity" were required for the government itself to advance religion and result in impermissible effects under Walz and Lemon. Amos, 483 U.S. at 337 (quoting Walz, 397 U.S. at 668); accord, Lemon, 403 U.S. at 612. Indeed, "[n]othing in two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religion." Walz, 397 U.S. at 678.

ii. The primary effect of § 107 is to accommodate the free exercise of religious practice.

Indirect benefits in the form of tax exemptions do not violate the Establishment Clause because they do not constitute "sponsorship, financial support, and active involvement of the sovereign in religious activity." Therefore, even if § 107 is viewed as providing an indirect benefit, it nonetheless does not have the primary effect of advancing religion. Rather, § 107 accommodates the free exercise of religious practice. As discussed in Section V.B.1.a.ii.A, supra, § 107 provides similar economic benefits that would be otherwise available to any employee receiving employer-provided lodging excludable from income under § 119. Section 107(1) provides the same benefit:

exclusion of housing provided in-kind from income. See § 107(1). Arguably, if § 107 did not exist, many employee ministers would be able to obtain the same exclusion through § 119, and § 107 would have no economic effect.[12] However, other churches or religious organizations might have to restructure their operation or practices and even their property ownership in order for their ministers to obtain the benefits of § 119.

Section 107(2) limits the amount of a cash allowance exempted from income to the least of the amounts actually spent on procuring housing, the fair rental value of the property[13], or an amount that would constitute reasonable compensation for the services provided. See Rev. Rul. 78-448, 1978-2 C.B 105. Thus, the economic benefits received by employee ministers under § 107(2) would be the same if their employers were forced to restructure their provision of ministers' housing to comply with § 119.

Both for those ministers who receive in-kind housing and those who receive housing allowances, § 107 accommodates religious practices. As discussed in Section V.B.1.a.ii.B, supra, the purpose underlying § 107(2) was to eliminate the pre-existing discrimination between disparate religious practices that made the tradition, history, wealth, and practices of a religious organization relevant to a minister's tax treatment. By giving religious organizations the option of providing housing to their employees either in-kind or in the form of an allowance, the government removes a significant burden which "might affect the way an organization carried out what it understood to be its religious mission." Amos, 483 U.S. at 336 (emphasis added). Section 107 also avoids placing the burden on religious entities to comply with intrusive administrative inquiries into their conduct of religious activities, by virtue of its religion-sensitive administrative processes, as discussed in

[12] See Benaglia v. Commissioner, 36 B.T.A. 838, 840 (1937) (taxpayer could exclude housing provided by his employer because his job as a motel manager required him to be present and "alert . . . day and night"). Presumably, the same logic could apply to ministers and parsonages; traditionally, the reason parsonages are usually close in proximity to the church building is because ministers must be present and alert at all times, day or night, in order to properly perform their ministerial duties.

[13] We acknowledge that § 107 had not explicitly limited the amount excludable under § 107(2) to the fair rental value of the housing until the passage of the Clergy Housing Allowance Clarification Act of 2002, P.L. 107-181 (2002). Until that point, the IRS and the Tax Court had always interpreted § 107(2) to require a limitation on amounts excludable up to the fair rental value. See, e.g., Rev. Rul. 71-280, 1971-2 C.B. 92; Marine v. Commissioner, 47 T.C. 609 (1967); Reed v. Commissioner, 82 T.C. 208 (1984).

1 greater detail in Section V.B.1.c, infra.

2 Furthermore, the religion-specific administrative processes do not "burden[] nonbeneficiaries
3 markedly." Texas Monthly, 489 U.S. at 15 (plurality opinion). While the provision of housing
4 allowances does remove a significant burden on free exercise of religious entities, the provision of
5 an allowance does not diminish the availability of exemptions from income for employer-provided
6 housing for other taxpayers.

7 Moreover, regardless of the effect of § 107 on the fisc, the existence of § 107 does not affect
8 any third-party taxpayers' overall tax liability. See DaimlerChrysler, 547 U.S. at 344 (noting that "it
9 is unclear that tax breaks of the sort at issue here do in fact deplete the treasury"). Therefore, the
10 primary effect of § 107 is to accommodate the free exercise of religious practices and eliminate
11 government discrimination between religious entities practices while minimizing governmental
12 entanglement with religion, not to impermissibly advance religion.

13 **iii. Exemptions for employer-provided housing allowances are granted to a variety of groups other than ministers.**

14 Section 107 has a neutral effect on religion because, in addition to ministers, some other
15 categories of taxpayers receive tax exemptions for housing and housing allowances that, like §
16 107(2), are tailored to their special housing needs. For example, § 134 of the Code excludes from
17 gross income "any qualified military benefit," meaning "any allowance or in-kind benefit (other than
18 personal use of a vehicle)," which is received by reason of the taxpayer's status as a member of the
19 uniformed services. As is relevant here, one excludable allowance is the "basic housing allowance"
20 authorized in 37 U.S.C. § 403, which varies according to pay grade, dependency status, and
21 geographic location. In addition, § 912 of the Internal Revenue Code excludes from gross income,
22 inter alia, certain "foreign area allowances" paid to civilian officers and employees of the Foreign
23 Service, the CIA, and other agencies, as well as Peace Corps allowances. The Overseas Differential
24 and Allowances Act (ODAA), codified in § 912(1)(C), is the main vehicle for tax-exempt housing
25 allowances for government workers overseas. See, e.g., Induni v. Commissioner, 98 T.C. 618
26 (1992), aff'd, 990 F.2d 53 (2d Cir. 1993) (INS employee); Anderson v. United States, 16 Cl. Ct. 530
27 (1989), aff'd, 929 F.2d 648 (Fed. Cir. 1991) (civilian teachers in overseas military schools); Bell v.

United States, 78-1 U.S. Tax Cas. (CCH) ¶ 9123 (Foreign Service officer).

The legislative history of ODAA reflects that Congress wanted to equalize the treatment accorded to United States employees in foreign countries who were provided free housing, and those who were not, just as § 107(2) was intended to remove discrimination against ministers who receive a cash allowance instead of a parsonage. See Anderson, 16 Cl. Ct. at 533-535. The purpose of ODAA was "to improve and strengthen government overseas activities by establishing a uniform system for compensating all government employees in overseas posts irrespective of the agency by which they are employed" and to "provide uniformity of treatment for all overseas employees to the extent justified by relative conditions of employment." S. Rep. No. 1647, 86th Cong., 2d Sess., 3338, n.7.

Section 107 is therefore one of several special cases – all worthy, in the view of Congress – in which the particular housing requirements of a particular group of employees call for a particular tax exemption. These exemptions all possess the valid secular purpose of lessening the burden of housing costs for persons whose occupations – whether minister, soldier, diplomat, or Peace Corps volunteer – often impose particular housing requirements. Section 107(2), moreover, has the permissible secular purpose of avoiding discrimination among religious practices. Thus understood, § 107(2), as part of the overall § 107 exclusion, cannot be viewed as an establishment of religion.

c. Section 107 does not foster excessive government entanglement with religion.

i. Section 107 limits government entanglement with religion.

At least one court has held that the administration of § 107 does not give rise to excessive entanglement with religion. Flowers v. United States, 49 A.F.T.R.2d (RIA) 438 (N.D. Tex. 1981) ("The Court finds that the requirements of section 107 do not create the substantial entanglement of the kind which the Supreme Court was referring to in Walz"). Nonetheless, Plaintiffs allege that the procedures used to administer § 107 implicate "sensitive, fact-intensive, intrusive, and subjective determinations" that "result in 'excessive entanglement' between church and state contrary to the Establishment Clause." Complaint, ¶ 35. Plaintiffs do not allege any facts that could support the inference that such entanglement exists, let alone that it is excessive. Plaintiffs merely recite the

statute and allege insufficient conclusions of law to support their contention that the administration of § 107 gives rise to excessive entanglement. Therefore, their conclusory allegations need not be accepted as true. See Caviness, 590 F.3d at 812.

Though § 107 may require some administrative contact of the government with religion, the Court has held that avoiding excessive entanglement "cannot mean absence of all contact." Walz, 397 U.S. at 676. Indeed, not all entanglements between church and state have the effect of advancing or inhibiting religion. Agostini, 521 U.S. at 233. Rather than promoting "official and continuing surveillance" of religious entities, Walz, 397 U.S. at 674-675, the administration of § 107 avoids government entanglement with religion by utilizing processes shaped by the concerns particular to inquiries of religious entities, thus minimizing entanglement and maintaining a government policy of neutrality toward religion. Zorach, 343 U.S. at 314. Because Plaintiffs have not alleged any facts that, if taken as true, could support another conclusion, the Complaint fails to state a claim that the administration of § 107 violates the Establishment Clause by fostering excessive governmental entanglement with religion.

ii. Administering § 119 with respect to ministers would give rise to more administrative entanglement.

Without § 107, the regulatory processes implicated by ministers attempting to claim housing exemptions under § 119 would give rise to more administrative entanglement into the content and quality of religious practices, which could be excessive and impermissible. See Boris I. Bittker, Churches, Taxes and the Constitution, 78 Yale L.J. 1285, 1292 n.18 (1969) ("If it is reasonable for Congress to determine that a minister's home is almost always used for pastoral duties, however, the blanket exclusion granted by § 107 might be regarded as a rule of evidence that does not 'prefer' religion but merely reduced the administrative burden of applying § 119 to clergymen."). To administer § 119, the IRS must determine: (1) the extent of the employer's business premises, (2) whether the housing is provided for the convenience of employer, and (3) whether the employee is required to accept the housing in order to enable the proper performance of the employee's duties. See Treas. Reg. § 1.119-1(b).

First, the IRS must assess the location of the employer's business premises. See Treas. Reg.

§ 1.119-1(b)(1). Because determining the "business premises of the employer" requires an inquiry into where an employee performs his or her duties and where the employer conducts his or her business, whether a minister's home is the "business premises" of an employer would likely involve a case-by-case fact-intensive determination as to what duties the minister is required to perform in the home. See Treas. Reg. § 1.119-1(c)(1). Unlike an inquiry under § 107, an inquiry under § 119 would require the IRS to determine whether a house is indeed located on the "business premises" of a religious organization based on to the qualitative and quantitative degree with which it is used to carry on religious business. See, e.g., Rev. Rul. 77-80, 1977-1 C.B. 36 (holding that under § 119, an employee of a religious charitable organization could exclude the value of lodgings in a home where that employee conducted bible studies, seminars on religious topics and prayer meetings, recruited new members, trained representatives, and provided personal counseling services).

Next, applying § 119 would require the IRS to inquire whether the provision of a parsonage by the employer was for the "convenience" of the employer. See Treas. Reg. § 1.119-1(b)(2). Again, this would require additional questioning regarding the religious organization's religious practices, framed in terms of the employer's business convenience. Such an examination might also require the IRS to assess the motivation behind certain religious activities and choices, and whether they are made for the convenience of the employing religious organization rather than the employee.

Finally, the IRS would have to assess the terms of the minister's employment, as the employer must require that the minister accept the lodgings as a condition of employment, meaning the employee must accept the lodging to "properly perform" his or her duties. See Treas. Reg. § 1.119-1(b)(3). Therefore, the application of § 119 would necessitate a more expansive inquiry into the religious organization's expectations of its minister, including whether he or she is truly required to be available at all times, the extent to which he or she is required to entertain guests in his or her home, what constitutes the "proper performance" of a minister's duties, as well as the degree to which the lodging is necessary to perform those duties.

Thus, even if complying with the administrative inquiries under § 119 were entirely voluntary, the continuing determinations as to whether the requirements of § 119 were satisfied in

connection with the provided housing would necessarily implicate the sort of "official and continuing surveillance" that the Supreme Court has held gives rise to an impermissible degree of entanglement under both Walz and Lemon to a greater extent than the administration of § 107.

iii. The regulatory and audit standards for applying § 107 avoid excessive entanglement.

In contrast to the administrative inquiries required by § 119, § 107 minimizes administrative inquiries, and does not call for any active state surveillance of religious entities. In administering § 107, the IRS must determine whether the taxpayer is a minister, whether the taxpayer performs the duties of a minister, the status of the entity employing the minister, whether there was a proper designation of a housing allowance, and the proper amount of the rental allowance. See Treas. Reg. § 1.107-1. None of these inquiries require the IRS to assess the content of the religious practices of a minister or his or her employing entity. See Treas. Reg. §§ 1.107-1(a), 1.1402(c)-5; Knight v. Commissioner, 92 T.C. 199 (1989); Wingo v. Commissioner, 89 T.C. 911 (1987).[14] Plaintiffs have not alleged any facts indicating that the IRS must undertake any "official and continuing surveillance" on account of § 107.

Services performed by a minister may qualify for § 107 either because of the religious nature of the services performed[15] or the entity for which the services are performed.[16] The IRS relies on objective evidence already in the possession of the employer or minister-employee, including legal and financial documentation, to apply the provision and thereby avoids entanglement that would be

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[14] Under Knight and Wingo, there are five factors that collectively determine whether a person qualifies as a minister of the gospel. A minister of the gospel must do a majority of the following: administer sacerdotal functions; conduct worship services; perform services in the control, conduct and maintenance of a religious organization; be considered a spiritual leader by his or her religious body; and be ordained, licensed or commissioned. Only the last factor is a requirement. Although the phrase "duly ordained, licensed or commissioned" is not used in § 107, the concept has been incorporated through Treas. Reg. § 1.107-1's incorporation of the rules contained in Treas. Reg. § 1.1402(c)-5, which applies to ministers who are "duly ordained, commissioned or licensed."

[15] Where a minister's services include the ministration of sacerdotal functions or the conduct of religious worship, the employer need not be a religious organization for the services to be within the exercise of his ministry. See Treas. Reg. §§ 1.107-1(a), 1.1402(c)-5(b)(2)(i), (iii).

[16] A minister's services for a religious organization are within the exercise of his ministry where the services are in the control, conduct, or maintenance of the religious organizations. See Treas. Reg. §§ 1.107-1(a), 1.1402(c)-5(b)(2)(ii).

considered excessive. Furthermore, the requirement that a minister perform religious services or perform services for a religious entity prevents abuse of § 107 by ensuring that the employer is a religious organization, or is sufficiently related to a religious organization, that compliance with § 119 would implicate excessive entanglement.

d. Section 107 utilizes the same regulatory and audit procedures that are used to administer other provisions of the Internal Revenue Code, the constitutionality of which are not in doubt.

The Internal Revenue Code contains several religion-specific provisions whose constitutionality is now settled. It also contains a variety of unquestionably valid exemptions tailored to persons with particular housing requirements. Section 107 fits within the mold of these analogous provisions, and utilizes some of the same administrative procedures.

Section 1402 of the Code contains several exceptions applicable only to ministers and other persons with specified religious affiliations. Under §§ 1402(a)(8) and (c)(4), a minister or a member of a religious order is treated as self-employed, for purposes of the SECA tax, with respect to "the performance of service in the exercise of his ministry" or "duties required by such order." Section 1402(e) permits a minister, a member of a religious order, or a Christian Science practitioner to obtain an exemption from SECA tax if he or she demonstrates religious or conscientious objections to payment of such tax. Under § 1402(g), "any individual," whether lay or clergy, may obtain an exemption from SECA tax "if he is a member of a recognized religious sect," is "an adherent of established tenets or teachings of such sect . . . by reason of which he is conscientiously opposed" to the acceptance of social security, waives all right to social security benefits, and demonstrates that the sect makes equivalent provision for its members. § 1402(g).

Inquiries into whether a taxpayer or organization holds the requisite religious beliefs are required under these and similar sections of the Internal Revenue Code, which have been held to not foster excessive entanglement. The Ninth Circuit, applying the Lemon test, upheld the constitutionality of § 1402(g) against an Establishment Clause challenge in Droz. Droz, 48 F.3d at 1124-25. In Ballinger v. Commissioner, the Tenth Circuit reached the same conclusion regarding §§ 1402(e) and (g), explicitly holding that the administration of §§ 1402(e) and (g) with respect to

1 the plaintiff-minister "does not foster excessive government entanglement with religion." Ballinger
2 v. Commissioner, 728 F.2d 1287, 1292 (10th Cir. 1984) (quoting Hatcher v. Commissioner, 688
3 F.2d 82 (10th Cir.1979)); accord, Templeton v. Commissioner, 719 F.2d 1408, 1412 n.5 (7th Cir.
4 1983) (rejecting a constitutional challenge to § 1402(g) for lack of standing, but also noting that
5 courts reaching the merits of that question had "uniformly held that this section is not
6 unconstitutional"); Bethel Baptist Church v. United States, 822 F.2d 1334, 1340-1341 (3d Cir. 1987)
7 (holding that § 3121(w), providing limited exemption for churches and qualified church-controlled
8 organizations from mandatory participation in social security scheme, did not violate Establishment
9 Clause). Because taxpayers must already provide some of the same information required to comply
10 with § 107 in order to comply with these provisions that have been upheld, the IRS may rely on
11 information that has been held not to constitute excessive entanglement in administering § 107.
12 These decisions reinforce the conclusion that tax exemptions that administratively
13 accommodate religious practice are not unconstitutional, and that the administrative inquiries
14 utilized by the IRS to implement those tax exemptions do not constitute excessive entanglement in
15 violation of the Establishment Clause. Plaintiffs have not alleged any facts that could support any
16 other inference.
17 **e. The plurality opinion in Texas Monthly does not affect the constitutionality of § 107.**
18 In Texas Monthly, Justices Marshall and Stevens joined Justice Brennan in an opinion that
19 concluded that the Establishment Clause was violated by a state sales tax exemption for "periodicals
20 that are published or distributed by a religious faith and that consist wholly of writings promulgating
21 the teachings of the faith and books that consist wholly of writings sacred to a religious faith."
22 Texas Monthly, 489 U.S. at 5. Justice White wrote separately to say that "the proper basis" for
23 invalidating the Texas exemption was that it involved content-based discrimination in violation of
24 the Free Press Clause. Id. at 25-26. The plurality found that question unnecessary to reach. Id. at 5.
25 In a separate concurrence joined by Justice O'Connor, Justice Blackmun proposed "a narrow
26 resolution of the case" on the ground that "a tax exemption limited to the sale of religious literature
27 by religious organizations violates the Establishment Clause." Id. at 28 (emphasis added).
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1 The reasoning of these three separate opinions in Texas Monthly does not support a
2 conclusion that the housing exemption for ministers is unconstitutional. Moreover, the statute at
3 issue in Texas Monthly is readily distinguishable from § 107 in crucial respects.
4 None of the opinions issued in Texas Monthly commanded a majority of the Court. None of
5 those opinions is therefore controlling here, for plurality opinions of the Supreme Court are not
6 binding on lower courts except on the narrow question decided. See, e.g., TranSouth Fin. Corp. v.
7 Bell, 149 F.3d 1292, 1296-97 (11th Cir. 1998). In Texas Monthly, the question was whether a state
8 sales tax exemption "violates the Establishment Clause or the Free Press Clause of the First
9 Amendment when the State denies a like exemption for other publications." Texas Monthly, 489
10 U.S. at 5 (emphasis added). The plurality's decision was that, "when confined exclusively to
11 publications advancing the tenets of a religious faith, the exemption runs afoul of the Establishment
12 Clause." Id. (emphasis added). The present case raises a very different question concerning the
13 administration and exclusion of housing benefits available to ministers of the gospel under § 107 and
14 its analog for non-ministers under § 119, something that has nothing to do with a tax exemption for
15 religious writings that were assessed for their religious content.
16 Moreover, in Texas Monthly, the plurality expressly repudiated any inference "that all
17 benefits conferred exclusively upon religious groups or upon individuals on account of their
18 religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free
19 Exercise Clause." Id. at 18 n.8; see also id. at 38 (Scalia, J., dissenting) (emphasizing that the Court
20 had never adopted such a sweeping proposition). In citing Zorach and Amos in this context, id. at
21 18, the Texas Monthly plurality acknowledged the continued vitality of this line of precedent – i.e.,
22 the same line of precedent on which we rely here – as authority for permitting religion-specific
23 exemptions like § 107. And, the Court has not disavowed that line of precedent in any subsequent
24 opinion. Indeed, just one year after Texas Monthly was decided, a majority of the Court invited the
25 unsuccessful litigants in Employment Division v. Smith to seek religion-specific exemptions from
26 general regulatory laws (under which they were ineligible for unemployment compensation as a
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result of work-related "misconduct" involving ceremonial drug use) through legislative action.[17] Employment Division v. Smith, 494 U.S. 872, 890 (1990). Had such exemptions been regarded as unconstitutional per se, the Smith Court would not have suggested that avenue of relief.

In another decision subsequent to Texas Monthly, the Court cited Walz as controlling the issue of religion-specific legislative exemptions from general statutory requirements without dissent. Cutter, 544 U.S. at 719. The Court did not mention Texas Monthly. See id. In Cutter, the Court explicitly acknowledged that government may create legislative exemptions specific to religious groups that are not "conferred upon a wide array of nonsectarian groups as well as religious organizations," in contrast to what was required by the plurality opinion in Texas Monthly. Id. The Court went on to uphold an exemption that granted benefits only to those with some religious affiliation on the grounds that the statute in question "confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment." Id. at 724.

Additionally, Texas Monthly did not produce a majority overruling the Court's holding in Walz that a tax exemption does not constitute a benefit to religion for Establishment Clause purposes. The plurality argued that the Constitution prohibited "government direct[ing] a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens non-beneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion." Texas Monthly, 489 U.S. at 15. However, any assertion that Justice Brennan regarded a tax exemption to be indistinguishable from an actual "direct subsidy" is impossible to reconcile with the scrupulous distinction that he and the majority drew between the two in Walz. See Walz, 397 U.S. at 690-691 (Brennan, J. concurring) ("A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer."). In seeking to accommodate religious belief and practice by foregoing collection of income tax on that portion of ministers' compensation corresponding to their housing costs, and in seeking to treat all

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[17] The six justices forming the majority in Smith included Justice Stevens as well as the three dissenters in Texas Monthly, Justices Rehnquist, Kennedy and Scalia.

denominations equally by exempting cash allowances from tax in the same way as housing provided in-kind, Congress did not subsidize religious practice and did not offend the Establishment Clause. Walz accordingly remains controlling here.[18]

The plurality opinion in Texas Monthly also cannot support the inference that the result in Walz depended on the breadth of the New York property tax exemption. See Texas Monthly, 489 U.S. at 10-12, 15-16. The exemption in Walz did reach "a large number of nonreligious groups that ostensibly served an expressly articulated secular objective that religious groups could reasonably be thought to advance as well." Id. at 15 n.5. However, only Justice Brennan (joined by Justices Marshall and Stevens) relied on the theory that only "[t]he very breadth" of the scheme in Walz "negates any suggestion that the State intended to single out religious organizations for special preference." Walz, 397 U.S. at 689 (Brennan, J. concurring). The majority in Walz had concluded just the opposite – that it was "unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others." Id. at 674; accord, Rosenberger, 515 U.S. at 881 (Souter, J., dissenting) ("In . . . Walz, we noted that the law at issue was applicable to a 'broad class of property owned by nonprofit [and] quasi-public corporations,' . . . but did not rest on that factor alone.") (internal citation omitted; bracketed material in original). The Court warned in Walz that "the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions." Walz, 397 U.S. at 674. The Court in Walz thus emphasized that it "did not approve an exemption for charities that happened to benefit religion; it approved an exemption for religion as an exemption for religion." Texas Monthly, 489 U.S. at 38 (Scalia, J., dissenting).

The concern over excessive entanglement in Texas Monthly related to the possibility of

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[18] It is telling that all nine justices in Rosenberger understood the critical difference between true subsidies and tax exemptions. The dissenters – including Justice Stevens, who had joined the Texas Monthly plurality – emphasized that "tax exemptions did not involve the expenditure of government funds in support of religious activities." Rosenberger, 515 U.S. at 881 n.7 (Souter, J., dissenting). The majority also relied on the fact that there were no prohibited "direct money payments" in holding that public funding of printing costs of religious publications did not violate the Establishment Clause. See id. at 838-844.

"inconsistent treatment and government embroilment in controversies over religious doctrine" in the enforcement of the narrow sales tax exemption in issue there. See id. at 20. The disputed exemption was not generally available to religious organizations but was limited to their religious publications, i.e., writings "promulgating the teachings of the faith" and those "sacred to a religious faith." Id. at 1. As such, it could hardly avoid excessive entanglement in calling upon civil authorities to decide which writings were "sacred" and which were not. Id. at 5. Even within a single sect, there may be disputes as to what is sacred and what is not. Moreover, the inquiry necessarily required by the Texas statute carried a risk of bias in favor of religions with "inspired" literature. See id. at 20. Finally, the necessity of determining whether certain writings consisted "wholly" of the favored content presented distinct risks of excessive entanglement. Id. at 5. In contrast, determining the "boundaries of exemption" under § 107 does not entail comprehensive scrutiny of doctrinal "message[s] or activity" by secular authorities, as discussed in Section V.B.1.c, supra. Thus, Texas Monthly does not control the constitutionality of § 107.

2. Section 107 does not violate the endorsement test sometimes raised in Establishment Clause cases.

Plaintiffs generally allege that "Sections 107 and 265(a)(6) subsidize, promote, endorse, favor, and advance churches, religious organizations, and 'ministers of the gospel,'" implying that these provisions constitute government "endorsement" of religion. Complaint, ¶ 34 (emphasis added). The Supreme Court has occasionally preferred to assess "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion" instead of using the three-part Lemon analysis discussed in Section V.B.1, supra. See, e.g., County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 595 (1989) (applying the "endorsement test" because it "provides a sound analytical framework for evaluating governmental use of religious symbols"). The endorsement test is analogous to the inquiries under the purpose and effect prongs of the Lemon test by assessing "what viewers may fairly understand to be the purpose" of the challenged government action. Id. (quoting Lynch, 465 U.S. at 692 (O'Connor, J., concurring)); see Lynch, 465 U.S. at 690-692 (O'Connor, J., concurring). However, the "endorsement test" should not be used to examine the constitutionality of § 107.

First and foremost, the endorsement test is inapplicable because the Supreme Court has primarily applied the test in the context of religious displays, where some communicative message is involved and may be attributed to the government. See, e.g., Allegheny, 492 U.S. at 595; Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 763 (1995); see also Lynch, 465 U.S. at 687 (O'Connor, J., concurring); accord, Van Orden v. Perry, 545 U.S. 677, 686 (2005) (declining to use the Lemon test in assessing the constitutionality of a religious display). Furthermore, Plaintiffs do not allege that § 107 conveys any message, nor have Plaintiffs alleged that § 107 has affected their standing in the political community. Lynch, 465 U.S. at 687 (O'Connor, J., concurring). Because § 107 does not implicate communications or displays by the government in support of religion, the endorsement test should not be utilized.

Even if this court did apply the endorsement test, § 107 is readily distinguishable from religious displays that were found to have violated the endorsement test. Neither the purpose nor effect of § 107 includes benefits to ministers that are not similarly available to other groups in the public at large. Instead, § 107 establishes government neutrality toward religion, with the purposes of accommodating religious exercise and avoiding entangling administrative inquiries into the terms and content of religious employment. See Amos, 483 U.S. at 349, (O'Connor, J., concurring in judgment) (removal of government-imposed burdens on religious exercise is more likely to be perceived "as an accommodation of the exercise of religion rather than as a Government endorsement of religion").

The endorsement test applies the standard of a "reasonable observer." See Allegheny, 492 U.S. at 620 ("the constitutionality of [a display's] effect must also be judged according to the standard of a 'reasonable observer'"). Furthermore, "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context' of a challenged program." Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002) (quoting Good News Club v. Milford Central School, 533 U.S. 98, 119 (2001)). Because neither the purpose nor effect of § 107 is to advance religion, but to accommodate its practice, it cannot be seen by a reasonable observer as government "endorsement" of religion. There can be no endorsement of religion because § 107 eliminates discrimination between ministers and other taxpayers who may receive the same benefits of

excluding employer-provided housing under § 119, and therefore does not make "adherence to a religion relevant in any way to a person's standing in the political community." Lynch, 465 U.S. at 687 (O'Connor, J., concurring). In fact, § 107 makes adherence to any religion irrelevant by putting ministers on equal footing with other taxpayers. Therefore, no reasonable observer could conclude that § 107 "carries with it the imprimatur of government endorsement." Zelman, 536 U.S. at 655 (emphasis in original).

Furthermore, in assessing the effect of a practice on a reasonable observer, the endorsement test also takes into account whether the practice has a longstanding history uninterrupted by litigation or controversy. See id. at 631 (O'Connor, J. concurring) ("The question under endorsement analysis, in short, is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one . . ."). The longstanding acceptance of § 107, dating back to 1921 in one legislative form or another, therefore provides additional evidence that a reasonable observer would view § 107 as an accommodation of religion and not an endorsement. Accordingly, even if the Court utilizes the endorsement test, § 107 still passes constitutional muster.

C. SECTION 265(A)(6) DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

1. Section 265(a)(6) does not violate the Establishment Clause because it has a secular purpose, it does not have the primary effect of advancing or inhibiting religion, and it does not foster excessive entanglement between religion and government.

Plaintiffs allege the same legal conclusions regarding § 265(a)(6) as § 107 without any additional facts which must be accepted as true in support of their contentions. Plaintiffs further allege that, when combined, §§ 107 and 265(a)(6) "subsidize, promote, endorse, favor, and advance churches, religious organizations, and 'ministers of the gospel,'" because "'double-dipping' is disallowed for non-clergy taxpayers." Complaint, ¶¶ 34, 50. As discussed in Section V.B.1, supra, a statute affecting the tax treatment of religious entities does not violate the Establishment Clause where the statute has a valid secular purpose, has a primary effect of neither advancing nor inhibiting religion, and does not foster excessive entanglement between religion and government.

Walz, 397 U.S. at 674; accord Lemon, 403 U.S. at 612-613. Section 265(a)(6) allows ministers and military personnel to deduct amounts paid in home mortgage interest or real property taxes, even where such a deduction would be allocable to income received as a housing allowance excludable under §§ 107 or 134 and therefore barred by § 265(a)(1). Thus, for the same reasons discussed in Section V.B.1, supra, Walz controls the constitutionality of § 265(a)(6).

a. Section 265(a)(6) has the valid secular purpose of extending to ministers and military personnel benefits that are otherwise available to all taxpayers.

The Establishment Clause requires that Congress act with a policy of neutrality toward religion, neither advancing nor inhibiting it. Zorach, 343 U.S. at 314. However, Congress may not restrict the availability of a generally provided benefit on account of the beneficiary's religion where doing so "would be preferring those who believe in no religion over those who believe." Id. The Supreme Court has consistently denied the premise "that the First Amendment's Religion Clauses forbid all governmental acknowledgments, preferences, or accommodations of religion." Van Orden, 545 U.S. at 684 n.3; see also Amos, 483 U.S. at 335. Therefore, legislation that remains neutral while acknowledging or accommodating religion may nonetheless have a valid secular purpose. Section 265(a)(6) is part of Congress' general statutory scheme of encouraging taxpayers to purchase homes. The Internal Revenue Code provides several tax-based incentives for individuals to purchase and own homes in a number of ways, the most notable being the allowance of a deduction for home mortgage interest under § 163(h)(3). See generally Joseph A. Snoe, My Home, My Debt: Remodeling the Home Mortgage Interest Deduction, 80 Ky. L.J. 431, 451-453 (1992) (showing how preserving home-buying incentives was central to the legislative purpose of § 163(h) and other provisions of the Code). Other tax code provisions promoting home ownership allow deduction of real property taxes, and allow deduction of points on a home purchase money loan in the year paid. See §§ 164(a), 461(g)(2). These provisions serve the valid secular purpose of encouraging taxpayers to purchase and maintain a home.

Congress enacted § 265(a)(6) in the Tax Reform Act of 1986, Pub. L. No. 99-514 (1986) with a clear declaration of intent to override Revenue Ruling 83-3, 1983-1 C.B. 72. In that Revenue

Ruling, the IRS held that deductions for home mortgage interest and real property taxes claimed by ministers and military personnel would be disallowed. See Rev. Rul. 83-3. The IRS never implemented Revenue Ruling 83-3 after Congress passed legislation to forestall its effectiveness. See Rev. Rul. 87-32, 1987-1 C.B. 131; Rev. Rul. 85-96, 1985-2 C.B. 87. By enacting § 265(a)(6), Congress acknowledged Revenue Ruling 83-3 and overruled it, stating that "it is appropriate to continue the long-standing tax treatment with respect to deductions for mortgage interest and real property taxes claimed by ministers and military personnel who receive tax-free housing allowances." S. Rep. No. 99-313, 61 (1986).

Section 265(a)(6) allows ministers and military personnel to take the applicable tax deductions regardless of whether income used to purchase a home is allocable to an allowance granted under §§ 107 or 134. See §§ 265(a)(1); 265(a)(6). Though the legislative history is sparse, by only allowing ministers and military personnel to take mortgage interest and real property tax deductions in particular, Congress' purpose in enacting § 265(a)(6) was to provide ministers and military personnel the same benefits and incentives incident to purchasing a home as are available to all taxpayers. See S. Rep. No. 99-313 at 61; see also 131 H. Cong. Rec. 12811 (daily ed. December 17, 1985) (statement of Rep. Parris) (noting that overruling Revenue Ruling 83-3 would "preserve the tradition in our Tax Code that our clergy and military personnel receive a tax incentive for buying a home for themselves and families.") As discussed with respect to § 107 in Section V.B.1.a, supra, the circumstances surrounding employer-provided housing for ministers and military personnel require that housing allowances be excludable in order to put similarly situated ministers and military personnel on equal footing with each other and with other taxpayers, while minimizing entanglement with religion. Correspondingly, § 265(a)(6) has the same purpose, and merely takes account of those circumstances to put ministers and military personnel on equal footing with taxpayers able to deduct those same expenses. As with other taxpayers, these deductions provide ministers and military personnel with the same set of incentives to purchase a home, in furtherance of Congress' valid secular purpose of encouraging taxpayers to purchase homes rather than renting them.

Moreover, § 265(a)(6) is not a grant of a direct subsidy, and therefore does not constitute sponsorship, "since the government does not transfer part of its revenue" to ministers. Walz, 397 U.S. at 676. Section 265(a)(6) merely removes discrimination against ministers and military personnel who receive a cash housing allowance instead of actual housing as part of a policy of neutrality toward religion, and therefore § 265(a)(6) does not have the purpose of "advancing" religion. The fact that Congress included a provision restoring the same deductions to taxpayers receiving a tax-exempt military housing allowance is further evidence of the statute's valid secular purpose. See § 265(a)(6)(A).

b. Section 265(a)(6) does not have a primary effect of advancing or inhibiting religion.

As discussed in Section V.B.1, supra, in order to comport with the Establishment Clause, a statute must have a primary effect that "neither advances nor inhibits religion." Lemon, 403 U.S. at 612. Moreover, "for a law to have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence." Amos, 483 U.S. at 328. Government does not impermissibly foster religion in the absence of some "sponsorship, financial support, and active involvement of the sovereign in religious activity." Id. at 337 (quoting Walz, 397 U.S. at 668). Section 265(a)(6) involves no government activity or, for that matter, influence with regard to advancing religion. It merely restores to certain ministers and military personnel a deduction that they would otherwise be allowed except for the operation of § 265(a)(1). Therefore, the primary effect of § 265(a)(6) is to provide the same incentives for ministers and military personnel to purchase a home, rather than rent, with their tax-exempt allowances. Similarly, the benefit that is provided by § 265(a)(6) is available to all taxpayers. Any taxpayer receiving employer-provided housing may exclude the value of those employer-provided lodgings from income under § 119 if the requirements are met, and may still take deductions under §§ 163 and 164 for home mortgage interest and real property taxes on a residence they own. Those taxpayers, therefore, receive the benefits of both exclusion of employer-provided lodgings as well as the various home-ownership deductions and incentives. Therefore, Plaintiffs' contention, in paragraph 50 of the Complaint, that "'double-dipping' is disallowed for non-clergy taxpayers," is without

merit. Because other taxpayers may receive the same economic benefit of both employer-provided housing and deductions for their home mortgage interest payments and real property taxes, § 265(a)(6) has the primary effect of putting ministers and military personnel on equal footing with taxpayers in general. That effect neither advances nor inhibits religion.

c. Section 265(a)(6) does not foster excessive entanglement with religion.

Section 265(a)(6) also does not foster an excessive government entanglement with religion. In fact, it precludes any government entanglement with religion. A taxpayer, whether a minister, civilian lay person, or member of the armed forces, claims the allowed deductions on Schedule A of Form 1040. To determine a taxpayer's qualification for the deductions, the government need not make any inquiry into the taxpayer's religious affiliation or employment. The only issues are whether the taxpayer meets the requirements of §§ 163 and 164, which are determined by objective information already within the taxpayer's control. Without § 265(a)(6), the government might need to inquire whether an individual taxpayer was a religious official who received a tax-exempt housing allowance, and was therefore prohibited from taking a home interest deduction. In this respect, § 265(a)(6) avoids and minimizes the "official and continuing surveillance" of religion or religious affiliation that could constitute excessive entanglement.

2. Section 265(a)(6) does not violate the endorsement test sometimes raised in Establishment Clause cases.

Plaintiffs also allege that § 265 "endorses" religion. Complaint, ¶ 34. However, as discussed with regard to § 107 in Section V.B.2, supra, the "endorsement test" should not be used to examine the constitutionality of § 265(a)(6). As with § 107, § 265(a)(6) is not a religious display, where some communicative message may be attributed to the government. See, e.g., Allegheny, 492 U.S. at 595; accord, Van Orden, 545 U.S. at 686. Furthermore, Plaintiffs have not alleged that § 265(a)(6) actually conveys any message of endorsement or affects any individual's standing in the political community.

Even if this Court did apply the endorsement test, neither the purpose nor effect of § 265(a)(6) includes benefits to ministers of the gospel that are not similarly available to other groups in the public at large, as discussed in Section V.C.1.b, supra. Instead, § 265(a)(6) promotes

government neutrality toward religion, with the purpose of providing the same set of home-buying incentives to ministers and military personnel. Because the endorsement test applies the standard of a "reasonable observer" "deemed aware of the history and context' of a challenged program," a reasonable observer would recognize that the same deductions are available to taxpayers in general. Zelman, 536 U.S. at 655. Thus, there is no endorsement of religion because § 265(a)(6) does not make "adherence to a religion relevant in any way to a person's standing in the political community." Lynch, 465 U.S. at 687 (O'Connor, J., concurring). In fact, § 265(a)(6) explicitly does the opposite by putting both ministers and military personnel on equal footing with other taxpayers. Accordingly, even if the Court utilizes the endorsement test, § 265(a)(6) still passes constitutional muster.

VI. CONCLUSION

For the foregoing reasons: (1) Plaintiffs have failed to meet their burden of establishing subject matter jurisdiction and standing, and therefore the Complaint must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Or, in the alternative, (2) Plaintiffs have failed to state a claim upon which relief can be granted regarding the constitutionality of either § 107 or § 265(a)(6), and therefore the Complaint must be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Respectfully submitted this 26th day of February, 2010.

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By: /s/ Richard A. Schwartz

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing **UNITED STATES' MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF UNITED STATES' MOTION TO DISMISS** has been made this 26th day of February, 2010 via the Court's CM/ECF system to:

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