BENJAMIN B. WAGNER
United States Attorney
501 I Street, Suite 10-100
Sacramento, CA 95814

JEREMY N. HENDON
RICHARD A. SCHWARTZ
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044-0683
Telephone: (202) 353-2466
Facsimile: (202) 307-0054
Email: Jeremy.Hendon@usdoj.gov
Richard.A.Schwartz@usdoj.gov
Western.Taxcivil@usdoj.gov

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' REPLY TO PLAINTIFFS' OPPOSITION**

Hearing Date: May 10, 2010
Time: 2:00 p.m.
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## INTRODUCTION

Plaintiffs' Opposition to the United States' Motion to Dismiss ("Opposition") does not change the conclusion that (1) this Court must dismiss the Complaint for lack of standing, or (2) in the alternative this Court must dismiss the Complaint because Plaintiffs fail to state a claim upon which relief can be granted because neither §§ 107 nor §265(a)(6) of the Internal Revenue Code (26 U.S.C.) violate the Establishment Clause of the First Amendment to the United States Constitution. First, federal courts must decline to exercise jurisdiction when a complaint fails to allege facts sufficient for a court to infer that the plaintiff has suffered an injury-in-fact. Despite Plaintiffs' attempts to characterize the legal conclusions alleged in the Complaint as facts, Plaintiffs do not, and cannot, identify any such factual allegations in the Complaint that could give rise to an inference of a Constitutionally sufficient injury or an injury that can be fairly traceable to the alleged wrongful conduct.

Second, Plaintiffs cannot show that either § 107 or § 265(a)(6) violates the prohibition against an "establishment of religion" in the light of the United States Supreme Court's Establishment Clause jurisprudence. The Supreme Court has explicitly stated that governmental accommodation of religion does not run afoul of the Establishment Clause. Sections 107 and 265(a)(6) both have the valid secular purpose and effect of accommodating religion by providing tax treatment in a way that creates less administrative entanglement with religion. Furthermore, the history of acceptance of the parsonage exemption shows that neither §§ 107 nor 265(a)(6) has led to an establishment of religion. In the context of a motion to dismiss, this Court need not accept Plaintiffs' pervasive legal conclusions as true, nor need this Court consider the factual evidence Plaintiffs have offered for the first time in their Opposition. For the reasons described below, the Complaint should be dismissed.

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## I. UNITED STATES' MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFFS HAVE FAILED TO ESTABLISH STANDING AS REQUIRED UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION.

### A. The individual Plaintiffs have failed to establish that they have standing to bring this suit.

The individual Plaintiffs have not established, nor alleged sufficient facts to demonstrate, the concrete, particularized, fairly traceable, or redressable injury owing to the operation of §§ 107 or 265(a)(6) that is necessary in order for them to have standing.[1] Plaintiffs also have not established that a plaintiff, in general, can establish taxpayer standing without challenging some government expenditure. Thus, their claims should be dismissed.

As discussed in the United States' Memo in Support of United States' Motion to Dismiss ("U.S. Memo"), Flast v. Cohen created a narrow exception to the Frothingham prohibition against taxpayer standing where a plaintiff alleges a violation of the Establishment Clause. See U.S. Memo, pp. 7-8. Plaintiffs have not established, nor alleged any facts that could give rise to an inference of, a nexus between their own tax liabilities and the tax exemptions granted to third parties, which is required for the Flast exception to apply. Flast specifically does not abrogate the constitutional requirement that Plaintiffs allege an injury-in-fact as in any other case. In Flast itself, the Court held that standing required a legislative device through which the government takes taxpayers' dollars and spends them in favor of religion to create an injury. Each of the concurring opinions acknowledged that the injury resulted from the expenditure of funds obtained through taxation. See id. at p. 10. By denying the claims of taxpayers who failed to assert a nexus to a program of government spending, the Court implicitly affirmed this limitation the following term in Walz. See Walz v. Tax Comm'n of New York, 397 U.S. 664, 676 (1970) ("There is no genuine nexus between tax exemption and establishment of religion."). In Flast, the Court recognized that such a distinction is essential to maintaining the Article III requirement that the injury be "appropriate for judicial redress." Flast v. Cohen, 392 U.S. 83, 106 (1968).

[1]In addition to the individual plaintiffs, Freedom From Religion Foundation, Inc. ("FFRF") also is a plaintiff. Because one part of FFRF's asserted bases for standing is representative standing (i.e., it has standing if its individual members have standing), it makes the same arguments as the individual plaintiffs make to attempt to demonstrate that they have standing.

The Supreme Court recently affirmed this principle in DaimlerChrysler Corp. v. Cuno, a case which Plaintiffs completely ignore in their Opposition. "The exception recognizes that the 'injury' alleged in Establishment Clause challenges to governmental spending arises not from the effect of the challenged program on Plaintiffs' own tax burdens, but from 'the very "extract[ion] and spend[ing]" of "tax money" in aid of religion.'" DaimlerChrysler, 547 U.S. 332, 348 (2006) (quoting Flast, 392 U.S. at 106) (bracketed material in original, emphasis added)). In DaimlerChrysler, the Supreme Court held that the taxpayer-plaintiffs lacked standing to challenge tax credits and tax exemptions the State of Ohio granted to another taxpayer entity because such action could not actually or even theoretically result in a cognizable injury. See id. at 344. The Court concluded that any injury was too speculative because it assumed that the legislature would use the increased revenue from eliminating the tax break to reduce everyone else's taxes. The Court stated:

> 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.

Id. (citing ASARCO, Inc. v. Kadish, 490 U.S. 605, 614 (1989)).

Here, Plaintiffs have not alleged any facts that satisfy the Supreme Court's test for taxpayer standing. Plaintiffs have not alleged that any additional money is transferred to religious entities as a result of §§ 107 or 265(a)(6). Nor have Plaintiffs alleged that their individual tax burdens would be different in the absence of those provisions. In short, Plaintiffs have not satisfied the minimum requirements for alleging the required injury-in-fact for taxpayer standing.

Plaintiffs assert, however, that "[t]he Supreme Court has never construed Flast to preclude taxpayer challenges to religious preferences embedded in the Internal Revenue Code itself. The Supreme Court and other courts have consistently recognized taxpayer standing to raise challenges to tax exemptions, deductions and credits that allegedly give preference to religion." See Opposition, p. 17. Plaintiffs do not provide any support for such a general, sweeping proposition. Rather than addressing the specific arguments raised by the United States in its motion regarding

their lack of taxpayer standing, Plaintiffs assert that because courts have reached the merits of Establishment Clause cases based on taxpayer challenges to tax exemptions, deductions, or other benefits without specifically addressing standing, those courts necessarily found standing to exist. See id. at pp. 14, 17-19. Plaintiffs' reliance on those cases for the proposition that standing has been met here is misplaced. The Supreme Court has specifically held that federal courts cannot assume jurisdiction in order to decide cases on the merits but instead must first assure themselves that jurisdiction, including standing, exists. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998); see also Legal Aid Soc. of Hawaii v. Legal Services Corp., 145 F.3d 1017, 1029-30 (9th Cir. 1998). In each of the cases relied upon by Plaintiffs, the court did not first assure itself that standing was met before reaching the merits.

In their Opposition, Plaintiffs further conflate the distinction between subsidies and exemptions, even though the Supreme Court has consistently observed that they are treated differently for Establishment Clause purposes, regardless of similarity in economic effect. Compare Opposition, p. 20 with U.S. Memo, pp. 12-13. For example, Plaintiffs describe the effects of an exemption as "the distribution of benefits to a targeted group," even though no money is actually distributed through an exemption. See Opposition, pp. 19-20. Therefore, for purposes of taxpayer standing, Plaintiffs' attempt to equate tax exemptions and tax credits should be rejected.[2]

Plaintiffs rely on Hibbs v. Winn to argue that taxpayers who objected to preferential exemptions given to third parties could maintain their suit, asserting that "the Supreme Court concluded that not even the Tax Injunction Act will bar a suit by taxpayers objecting to an income-tax credit provision." See id. at 21. First, the Tax Injunction Act is not at issue here and thus, Hibbs is inapplicable. Nevertheless, setting aside the fact that Hibbs involved a dollar-for-dollar tax credit and not an exemption, Plaintiffs' characterization of the Supreme Court's holding as support for their standing suggests that the Tax Injunction Act is a less restrictive jurisdictional bar than the constitutionally imposed requirement of an injury-in-fact. However, the Tax Injunction Act

[2]As discussed in the U.S. Memo, because the Arizona program in Winn v. Arizona Christian School Tuition Organization, 562 F.3d 1002 (9th Cir. 2009), 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. See U.S. Memo, pp. 13-14.

precludes a federal court from restraining "the assessment, levy or collection of any tax under State law," a restriction on jurisdiction that is separate and distinct from the standing inquiry of whether the plaintiff has suffered an injury-in-fact. See 26 U.S.C. § 7421(a). As such, in Hibbs, the Supreme Court only affirmed the Ninth Circuit's reversal of the District Court's dismissal of the suit by holding that the Tax Injunction Act would not bar the plaintiffs in that case from suing. Hibbs v. Winn, 542 U.S. 88 (2004). They did not make any ruling regarding standing. See id.

Plaintiffs also mistakenly rely on Johnson v. Economic Dev. Corp., 241 F.3d 501 (6th Cir. 2001), to argue that they do not have to point to some expenditure of government funds in order to establish taxpayer standing. See Opposition, pp. 26-27. Johnson relied on Doremus v. Board of Ed. of Hawthorne, in stating that the plaintiff, a state taxpayer, had the "requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct." See Johnson, 241 F.3d at 508 (citations omitted). That "requisite financial interest" was a measurable appropriation or loss of revenue and a dollars and cents injury in order to establish standing. Id.[3] The Ninth Circuit has since held that the Supreme Court effectively overruled this approach in DaimlerChrysler. See Arakaki v. Lingle, 477 F.3d 1048, 1060 (9th Cir. 2007). Plaintiffs failed to note this development in their Opposition. As the Supreme Court described:

> Indeed, because state budgets frequently contain an array of tax and spending provisions, any number of which may be challenged on a variety of bases, affording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as virtually continuing monitors of the wisdom and soundness of state fiscal administration, contrary to the more modest role Article III envisions for federal courts.

DaimlerChrysler, 547 U.S. at 346 (internal quotations omitted). Accordingly, any reliance by Plaintiffs on Johnson, as well as any other "pocketbook injury" cases decided before DaimlerChrysler, are misplaced.

Although not clearly articulated, Plaintiffs also appear to argue that they would have standing simply as "non-exempt taxpayers" challenging the constitutionality of a claimed "preferential exemption." See Opposition, pp. 21, 27. It is difficult to discern the exact basis for this argument

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[3]This approach to standing is known as the "good-faith pocketbook injury." See id. In applying that approach in Johnson, the Sixth Circuit relied on cases from the Ninth Circuit. See id. The leading Ninth Circuit case was Hoohuli v. Ariyoshi, 741 F.2d 1169, 1180-81 (9th Cir. 1984).

because Plaintiffs mix their discussion of it with their discussion of taxpayer standing. To the extent they do not delineate between the two, as discussed above, the United States has already shown that Plaintiffs do not have taxpayer standing. To the extent that Plaintiffs believe that they have standing separate and apart from taxpayer standing, they are also wrong. Plaintiffs cite Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 221 (1987), to argue that they have standing because to hold otherwise would effectively insulate §§ 107 and 265(a)(6) from constitutional challenge. See Opposition, p. 21. However, Arkansas Writer's Project implicated First Amendment freedom of the press and Equal Protection concerns arising from a state law exempting from the state sales tax newspapers or religious, professional, trade or sports journals sold through regular subscriptions. Arkansas Writer's Project, 481 U.S. at 227. It did not involve taxpayers alleging a violation of the Establishment Clause.[4] The plaintiff was a publisher of a monthly magazine that did not qualify for the exemption. Importantly, the plaintiff paid the sales taxes and sought a refund asserting that subjecting it and not other magazines and newspapers to the sales tax violated its First and Fourteenth Amendment rights.[5] The Supreme Court found that the plaintiff had standing because plaintiff was factually "similarly situated" to others who were exempt from a state law that adversely affected the plaintiff. See id.

Here, Plaintiffs have not established, nor alleged sufficient facts to show, that they are similarly situated to individuals eligible for §§ 107 and 265(a)(6) tax treatment. Plaintiffs provide absolutely no explanation for how they are "similarly situated" and no support to demonstrate that they are in fact "similarly situated." For example, they have not alleged that they either are entitled to or are receiving housing from their employers or from FFRF. They do not allege that their own tax liabilities were improperly administered under §§ 107 or 265(a)(6). Nor do Plaintiffs allege that they are factually similarly situated because they might exempt employer-provided housing through

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[4]On that basis alone, Arkansas Writer's Project is distinguishable because of the different considerations when taxpayers bring a generalized grievance based on an alleged violation of the Establishment Clause.

[5]Arkansas Writer's Project is also distinguishable because the plaintiff had suffered a direct injury that was traceable to the alleged illegal statute since he paid the tax imposed by the statute and his specific claim could be redressed since it was quantifiable.

§ 119.[6] Plaintiffs suggest that they are harmed by §§ 107 and 265(a)(6) in providing or obtaining compensation because churches pay their ministers less than FFRF needs to pay its employees due to those provisions. However, they have not identified any compensation paid to FFRF employees, nor which FFRF employees are comparable to ministers. Plaintiffs also have not alleged any difference in compensation between themselves and ministers. Thus, they cannot be found to be similarly situated. Accordingly, Plaintiffs' reliance on Arkansas Writer's Project is misplaced.

Plaintiffs further contend that they have standing to bring this action based on Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990). Plaintiffs are incorrect. First, the government respectfully submits that Finlator was wrongly decided. Taxpayers generally do not have standing in cases where they allege an injury that arises solely by virtue of their status as taxpayers. See Hein v. Freedom from Religion Foundation, 551 U.S. 587, 601 (2007); DaimlerChrysler, 547 U.S. at 346. Although Plaintiffs in Finlator were seeking to invalidate a state sales tax and thus were bringing the suit as taxpayers asserting an injury by virtue of their status as taxpayers, the court did not address taxpayer standing concerns to determine whether their situation fit within the narrow exception that provides for taxpayer standing under Flast. In addition, Finlator relied heavily on Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) and Arkansas Writer's Project but, in both of those cases, Plaintiffs contested the tax and sought a refund of taxes paid. See Texas Monthly, 489 U.S. at 6; Arkansas Writer's Project, 481 U.S. at 1161. The Finlator court, without support, incorrectly held that such action was not a necessary prerequisite to establish standing. Acknowledging that the taxpayer plaintiffs had to show some injury connected to the allegedly unconstitutional statute, however, the court found that the taxpayer plaintiffs suffered actual injury simply because they had to protest the tax in order to claim the exemption from taxation. That alleged injury is nonsensical. If such "harm" is all that is needed in order to have standing to seek a tax deduction or exemption, then every taxpayer would have standing to challenge and/or seek to have applied to her every single

[6]This is important because one of the purposes for Congress in enacting § 107 was to put ministers of the gospel on equal footing with other taxpayers who could claim the § 119 benefits. Thus, in order for Plaintiffs to be "similarly situated," some allegation of unfair or improper tax treatment must be at issue such that they would be eligible to obtain either treatment under §§ 107 and 265(a)(6) or treatment under § 119, but nevertheless did not obtain such treatment.

deduction and exemption found in the Internal Revenue Code simply because she is a taxpayer. That result is in direct conflict with the clear line of cases that deny such a broad basis for taxpayer standing, and adopting it would turn federal courts into courts of general grievances.

In the face of the marked distinction between exemptions and subsidies in general, as well as the longstanding constitutional requirement to allege an injury-in-fact, Plaintiffs fail to identify any concrete, particular tax liability that is the source of any alleged injury. Plaintiffs do not contest a tax liability of their own. However, Plaintiffs ask this Court to ignore, and thereby undermine, the constitutional standing requirements of factual concreteness, particularity, redressability and traceability. Plaintiffs ask this Court to set a standard so low that any taxpayer may contest the tax liability of any other taxpayer even though no "Case or Controversy" properly exists between the parties. Muskrat v. United States, 219 U.S. 346 (1911); see also Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). To grant Plaintiffs standing when they have not even alleged facts that would indicate that they might seek similar tax treatment would confer standing on the basis of a purely "psychic injury," and abrogate the requirements that ensure that federal courts do not become courts of generalized grievances. See Hein, 551 U.S. at 619 (Scalia, J. concurring).

**B. FFRF has also failed to establish that it has standing to bring this suit.**

FFRF asserts that it has two bases for establishing standing to bring this case: representational standing and competitor standing. For the reasons discussed above, FFRF does not have representational standing because none of its members have standing. Further, FFRF does not have competitor standing because it has not properly alleged, nor established, that it is a competitor of churches or religious organizations and/or that application of §§ 107 and 265(a)(6) caused it direct and real financial injury as compared to some potential, hypothetical injury.

FFRF has not alleged a sufficient legally cognizable injury that is fairly traceable to the challenged provisions and redressable by success in the present suit. FFRF asserts that it is injured because §§ 107 and 265(a)(6) allow churches and other religious organizations to reduce their salaries and compensation costs which causes FFRF to incur "comparatively greater wage costs than if its employees were ministers of the gospel." See Opposition, p. 31 (citing Complaint, ¶¶ 55-57). The first problem with this allegation of injury is that FFRF has never identified what, if any, of its

employees would provide services similar to ministers. In fact, FFRF has not identified any employees to whom it provides compensation. Therefore, FFRF has not alleged sufficient facts to support its conclusory allegations that it is required to pay "comparatively greater wage costs than if its employees were ministers of the gospel."

The second problem is that these allegations of injury involve intervening factors and actors that undercut both traceability and redressability, and thus preclude a finding of standing. See Fulani v. Brady, 935 F.3d 1324, 1330 (D.C. Cir. 1991). In Fulani, a potential Presidential candidate brought suit against the Secretary of the Treasury because the Internal Revenue Service ("IRS") had granted tax-exempt status to an organization that ran the Presidential debates but that organization had denied the plaintiff the opportunity to participate in the debates. The D.C. Circuit found that standing was lacking because of

> the presence of intervening factors that influence both traceability and redressability. Were the FEC to change its regulations, revocation of the [third party]'s tax-exempt status could have virtually no effect on the [third party]'s debate activities. Moreover, as discussed supra, the [third party] itself could engage in a variety of activities ranging from declining to sponsor the debate to restricting the debates in such a manner that Fulani still would be unable to attain the level and quality of media exposure she seeks.

Id. Similarly here, the presence of intervening factors that influence both traceability and redressability prevents a finding of competitor standing. Like in Fulani, §§ 107 and 265(a)(6) could only cause FFRF's alleged injury after other intervening causal factors, including the religious organizations' actions and the behavior of individual ministers, took effect. For example, it is speculative that churches would have to pay clergy more if §§ 107 and 265(a)(6) are found unconstitutional. In fact, eliminating the statutes might have very little effect on religious organizations. Clergy might accept less compensation if necessary, or the religious organizations could take other action, including increasing private donations, to make up for the difference. In such situations, FFRF would still be in the same position as it is now, and this Court could not redress FFRF's alleged "injury."

Furthermore, despite its allegations to the contrary, FFRF is not a competitor to churches or religious organizations. In its Opposition, FFRF asserts that it is a competitor of churches because it "advocates for the separation of church and state and educates on matters of non-theism (Complaint,

¶ 6.) . . . [and] [b]y contrast, churches and organized religion are proselytizers, seeking to convert individuals into believers of the tenets of each church's particular religious beliefs." See Opposition, pp. 30-31. FFRF alleges that it advocates for the separation of church and state and educates on matters of non-theism. FFRF does not allege that it seeks to convert individuals into non-believers of the tenets of religious beliefs. FFRF does not allege that churches or religious organizations are advocating for church and state mingling. Therefore, they cannot be considered to be competing in the same market or arena of competition. Moreover, they have not alleged what, if any, competitive dynamics exist, let alone that they have been affected by §§ 107 or 265(a)(6). Accordingly, FFRF has not met its burden of showing it is a direct competitor of churches or religious organizations.

Therefore, FFRF's allegations of injury are too tenuous, generalized, untraceable, and non-redressable to satisfy the standing requirements of Article III and do not provide any basis for standing. Because none of the Plaintiffs have established standing, the Court should dismiss the Complaint for lack of subject matter jurisdiction.[7]

## II. THE UNITED STATES' MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFFS HAVE FAILED TO ALLEGE SUFFICIENT FACTS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

### A. The Complaint has not satisfied the legal standard to withstand a motion to dismiss for failure to state a claim.

In analyzing whether or not a statute violates the Establishment Clause, courts evaluate whether a statute (1) has a valid secular purpose, (2) has a principal or primary effect that neither advances nor inhibits religion, and (3) does not foster an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971). In certain cases where government endorsement of religion is alleged, courts analyze a statute's purpose and primary effect in the same inquiry. See, e.g., Newdow v. Rio Linda Union School Dist., 597 F.3d 1007, 1019 (9th Cir. 2010)

[7]Contrary to Plaintiffs' assertions that rejecting their standard of taxpayer standing would effectively insulate §§ 107 and 265(a)(6) from constitutional challenge, Opposition, p. 21, the Supreme Court has explicitly held that the fact that no one else has standing does not mean that anyone who wishes to may challenge a statute. See Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 489 (1982), United States v. Richardson, 418 U.S. 166, 179 (1974), Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.").

("Under the Endorsement Test, we look to see whether the challenged governmental action has the purpose or effect of endorsing, favoring, or promoting religion, particularly if it has the effect of endorsing one religion over another.").

Under either test, a complaint must allege sufficient factual matter to give rise to "a claim for relief that is plausible on its face." Caviness v. Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010) (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)). Plaintiffs have not alleged any factual matter in the Complaint that could give rise to the inference that §§ 107 and 265(a)(6) have no valid secular purpose. Nor have Plaintiffs alleged sufficient factual matter in the Complaint to give rise to an inference that the primary effects of either §§ 107 or 265(a)(6) are anything other than to accommodate religion, which neither advances nor inhibits it. Finally, Plaintiffs have not alleged facts in the Complaint that suggest that either statute fosters an excessive government entanglement with religion. Instead, Plaintiffs allege "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" that §§ 107 and 265(a)(6) are unconstitutional. See Iqbal, 129 S. Ct. at 1949 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Sections 107 and 265(a)(6), like constitutional statutes with analogous provisions, have valid secular purposes, primary effects that neither advance nor inhibit religion, and avoid an excessive government entanglement with religion. The Complaint thus fails to state a claim upon which relief may be granted, and must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

**B. Sections 107 and 265(a)(6) satisfy the purpose prong of the Lemon test.**

**1. The Supreme Court has consistently upheld statutes accommodating religion as having valid secular purposes under the Lemon test.**

**a. Supreme Court precedent shows that accommodation of religion to avoid either entanglement or a violation of the Establishment Clause constitutes a valid secular purpose.**

Plaintiffs broadly misconstrue the analysis for finding whether or not a statute has a valid secular purpose. The Supreme Court has held that the government's purpose must be judged from the perspective of an "objective observer" who is assumed to be acquainted with the text, legislative history, implementation of the statute, or comparable official act. Salazar v. Buono, No. 08-472, 2010 U.S. Lexis 3674, at *48 (April 28, 2010) (plurality opinion); McCreary County, Ky. v.

American Civil Liberties Union of Ky., 545 U.S. 844, 862 (2005) (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000)); see also Edwards v. Aguillard, 482 U.S. 578, 594-595 (1987). An objective observer so familiarized with §§ 107 and 265(a)(6) would find that they are part of the government's statutory framework to provide taxpayers with an exemption for employer-provided housing in various employment contexts while minimizing the potential for administrative entanglement with religion.

As described in the U.S. Memo, §§ 107 and 265(a)(6) have the valid secular purposes of accommodating the religious practices of ministers and religious organizations by avoiding potential Establishment Clause violations and unconstitutional entanglement with religion that might otherwise result from the administration of the Internal Revenue Code. See U.S. Memo, pp. 29-31. In assessing a statute's purpose, the Ninth Circuit has "made it clear that '[g]overnmental actions taken to avoid potential Establishment Clause violations have a valid secular purpose under Lemon.' Any other standard would prove unworkable." Nurre v. Whitehead, 580 F.3d 1087, 1095 (9th Cir. 2009) (quoting Vasquez v. L.A. County, 487 F.3d 1246, 1255 (9th Cir. 2007), cert. denied, 552 U.S. 1062 (2007)). Furthermore, the mere existence of a religious purpose does not render a statute unconstitutional under Lemon if the statute has sufficient secular purpose. Newdow, 597 F.3d at 1034 ("That certain enactments can have both secular and religious purposes and still be constitutional has been recognized by the Supreme Court."). Because the Complaint does not allege any facts that could rebut that accommodation of religious practice or avoidance of potential Establishment Clause violations are valid secular purposes of §§ 107 and 265(a)(6), Plaintiffs' asserted legal conclusion that §§ 107 and 265(a)(6) lack a valid purpose must be rejected.

Contrary to Plaintiffs' assertion that a governmental "intent to provide a preferential benefit to religion is not a secular purpose under the Lemon test," Opposition, p. 73, the Supreme Court has repeatedly acknowledged the permissibility of government action to minimize entanglement and interference with religious practices. In a line of cases including Walz, Amos, and Cutter, the Supreme Court has held that "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 (1987). The Supreme Court has

been reluctant to invalidate Congress' attempts to accommodate religion because "'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 v. Wilkinson, 544 U.S. 709, 719 (2005) (quoting Locke v. Davey, 540 U.S. 712, 718 (2004)) (emphasis added). Thus, courts have held the government's purpose to be valid even where legislation provides benefits exclusively to religion in order to achieve accommodation. Cutter, 544 U.S. at 713.

The Ninth Circuit has also upheld religion-specific exemptions to laws of general applicability as accommodations of religious practices because "the Constitution 'affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.'" Nurre, 580 at 1095-96 (quoting Lynch v. Donnelly, 465 U.S. 668, 673 (1984)); see also Access Fund v. U.S. Dept. of Agriculture, 499 F.3d 1036, 1045 (9th Cir. 2007), Inouye v. Kemna, 504 F.3d 705, 714 n.11 (9th Cir. 2007). The Ninth Circuit has held more generally that accommodation is a permissible governmental purpose to prevent an Establishment Clause violation. Vasquez v. Los Angeles County, 487 F.3d 1246, 1255-1256 (9th Cir. 2007) (citing cases in other circuits holding the same). Moreover, the Ninth Circuit has been "'reluctant to attribute unconstitutional motives' to government actors in the face of a plausible secular purpose." Nurre, 580 F.3d at 1096 (internal citations omitted).

**b. Supreme Court precedent establishes that government may accommodate religion in order to avoid entanglement that could result from the administration of the Internal Revenue Code.**

Plaintiffs assert that § 107 cannot serve as a valid accommodation because "income tax laws are not regulatory in nature and do not govern behavior. Rather, they only impose a monetary burden, which is not a constitutionally significant burden." Opposition, p. 58. However, the Supreme Court has specifically held that government acts with the valid purpose to accommodate religious practice when it creates a religion-specific exemption to an otherwise generally applicable statute if the regular application of the statute "might affect the way an organization carried out what it understood to be its religious mission." Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336 (1987) (emphasis added).

Accommodation may be justified in avoiding the excessive entanglement between government and religion that might result from the mere inquiries involved in the administration of an otherwise valid statute. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979) ("It is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."). Plaintiffs correctly note that complying with the Internal Revenue Code is compulsory for all taxpayers and entails regular administrative inquiries. See Hernandez v. Commissioner, 490 U.S. 680, 696 (1989). However, in Hernandez, the Supreme Court only held that a "routine regulatory interaction which involves no inquiries into religious doctrine . . . and no 'detailed monitoring and close administrative contact' between secular and religious bodies does not of itself violate the nonentanglement command." Id. at 696-697 (emphasis added). Similarly, in Jimmy Swaggart Ministries, the Court only held that California's Sales and Use Tax Law did not significantly burden free exercise rights where the only claimed burden on religion was a reduction in income. See Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 390-391 (1990). In neither case did the Supreme Court discuss the procedural burdens that might arise if a provision of the Internal Revenue Code required an examination of the contents of religious belief. On the other hand, several religion-specific exemptions contained in the Internal Revenue Code have been challenged and held to not violate the Establishment Clause because they were valid accommodations of religion. See, e.g., Droz v. Commissioner, 48 F.3d 1120, 1123 (9th Cir. 1995) (upholding the constitutionality of a religion-specific accommodation in the tax code after noting that "compulsory participation in the Social Security system interferes with Droz's free exercise rights, but is not unconstitutional"), Bethel Baptist Church v. United States, 822 F.2d 1334, 1340-1342 (3d Cir. 1987). Plaintiffs, on the other hand, argue that "The law is clear that preferential tax exemptions for religion, which are not neutral and applicable to a broad class of beneficiaries, violate the Establishment Clause." Thus, Plaintiffs' conclusions as to the invalidity of accommodation in the form of a tax exemption are simply incorrect.

Additionally, in contexts specifically involving the employer-employee relationship between religious organizations and employees conducting religious practices, the Ninth Circuit has held that

the First Amendment requires government to create "ministerial exceptions" to otherwise generally applicable statutes. See, e.g.,, Alcazar v. Corp. of Catholic Archbishop, 598 F.3d 668, 673 (9th Cir. 2010) ("The Religion Clauses thus compel a ministerial exception from neutral statutory regimes that interfere with the church-clergy employment relationship."), Werft v. Desert Southwest Annual Conference of United Methodist Church, 377 F.3d 1099, 1102 (9th Cir. 2004) ("The ministerial exception does not apply solely to the hiring and firing of ministers, but also relates to the broader relationship between an organized religious institution and its clergy, termed the 'lifeblood' of the religious institution." (citing McClure v. Salvation Army, 460 F.2d 553, 559 (5th Cir. 1972))), Bollard v. California Province of the Soc'y of Jesus, 196 F.3d 940, 946 (9th Cir. 1999) ("the ministerial relationship lies so close to the heart of the church that it would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decisions"). The Ninth Circuit explained the reasons for the ministerial exception in Bollard, and reiterated those principles as recently as March 16, 2010:

> Entanglement has substantive and procedural components. "On a substantive level, applying [a] statute to the clergy-church employment relationship creates a constitutionally impermissible entanglement with religion if the church's freedom to choose its ministers is at stake." As for the procedural dimension, the very process of civil court inquiry into the clergy-church relationship can be sufficient entanglement.

Alcazar, 598 F.3d at 672-673 (quoting Bollard, 196 F.3d at 946-947). The ministerial exception is based on an understanding that "the [Supreme] Court holds the church-minister relationship especially inviolate" and that "a religious organization's freedom to select its clergy is protected under the Free Exercise Clause." Id. at 674 (citing Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952)). Therefore, if a statute might influence and interfere with the church-minister relationship and thereby threaten entanglement, government may accommodate religion in order to avoid such entanglement or Establishment Clause violation by minimizing either substantive or procedural burdens specific to religion. Id. at 671-672.

**2. Sections 107 and 265(a)(6) have the valid secular purposes of accommodating religious practice and avoiding violating the Establishment Clause.**

Several factors, including the statutes' implementation, subsequent legislative clarification, and the statutes' relation to the rest of the Internal Revenue Code, demonstrate that §§ 107 and

265(a)(6) have the valid purpose of accommodating religious practices. As described in the U.S. Memo, Congress passed the predecessor to § 107(1) shortly after the Treasury began allowing certain categories of employees to exclude the value of employer-provided housing from income under a convenience-of-the-employer rationale. See U.S. Memo, pp. 24-26. The parsonage exemption was made available to ministers shortly after the Treasury announced that ministers would be required to include the value of such parsonages in income.

By offering tax treatment in § 107 analogous to the exclusion for housing provided at the convenience of the employer, but specifically without requiring religious entities to structure their employment relationships to meet a "convenience of the employer" test, government is able to avoid both substantive and procedural entanglement. Otherwise, the administration of § 119 risks inhibiting religion and threatens to violate the Establishment Clause as a result of excessive substantive entanglement by inducing religious entities to structure their employment relationships to fit into § 119. Applying § 119 to parsonages would also create greater procedural entanglement than the administration of § 107, as discussed in greater detail below, as a result of potential inquiries into religious practices that would be necessary to verify the "convenience of the employer," the "business premises," and the "conditions of employment." See Treas. Reg. § 1.119-1(b).

The purpose of § 107 is therefore valid because it avoids potential burdens on religious practices and church-minister relationships, and thus avoids potential Establishment Clause violations and entanglement. Furthermore, in providing that a cash allowance may be excluded from income in the same way as housing provided in-kind to certain ministers, § 107(2) has the valid secular purpose of avoiding an Establishment Clause violation arising from the preference of any particular religion or religious practice. See Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). Plaintiffs allege that "§107(2) cannot be construed to accommodate any hypothetical government-imposed burden on the free exercise of religion." Opposition, p. 59. However, as discussed in the U.S. Memo, § 107(2) avoids discriminatory treatment between similarly situated ministers with different religious traditions, organizations and

histories and avoids the substantive entanglement of influencing how religious entities structure their employment relationships. See U.S. Memo, pp. 27-28. The Ninth Circuit has held that constitutionally impermissible substantive entanglement with religion may occur "if the church's freedom to choose its ministers is at stake." Bollard, 196 F.3d at 946-947. Since a valid governmental purpose is to avoid Establishment Clause violations and substantive entanglement, § 107(2) also has a valid governmental purpose.

Also contrary to Plaintiffs' contentions, Congress' explicit purpose in passing § 265(a)(6) was to ensure that the same mortgage interest deduction was available to all taxpayers, not to grant a narrow benefit to ministers alone. As discussed in the U.S. Memo, Congress passed § 265(a)(6) in reaction to IRS Revenue Ruling 83-3, which held that ministers would be disallowed mortgage interest deductions due to the exempt nature of their housing allowances. See Rev. Rul. 83-3, 1983-1 C.B. 72. Section 265(a)(6) thus preserves the availability and incentivizing effects of home mortgage interest and real property tax deductions under §§ 163 and 164 and avoids discrimination on the basis of a taxpayer's religious vocation or service in the military.

Section 265(a)(6) also operates to ensure that the amounts received to obtain housing effectively remain exempt from income tax. Specifically, because ministers and members of the military might obtain housing through exempted cash allowances, these two groups of taxpayers would not be able to take deductions available to other taxpayers who may exempt employer-provided housing under § 119 but may still deduct home mortgage interest and real property tax payments on their separate principal residence from income. Finally, like § 107, § 265(a)(6) only extends to amounts spent in relation to housing, while § 265(a)(1) bars any interest deduction that can be attributed to exempt income. See 26 U.S.C. § 265(a)(6). Section 265(a)(6) is therefore limited to providing equal treatment for ministers and members of the military with respect to employer-provided housing. But even if such treatment were preferential, as Plaintiffs allege, it would nonetheless be valid as an accommodation for the same reasons described above.

Thus, §§ 107(1), 107(2), and 265(a)(6) have valid secular purposes of enabling religious entities to make their own employment decisions without the substantive or procedural entanglement resulting from the administration of the Internal Revenue Code. Because Plaintiffs have not alleged

facts that could give rise to the inference that these are not valid purposes of §§ 107 or 265(a)(6), they cannot show that the statutes violate the first prong of the Lemon test.

**C. Sections 107 and 265(a)(6) satisfy the primary effect prong of the Lemon test.**

**1. Plaintiffs have not alleged facts that could give rise to an inference that §§ 107 or 265(a)(6) have the primary effect of advancing or inhibiting religion.**

The primary effect prong of the Lemon test requires that a statute have a principal or primary effect that neither advances nor inhibits religion. The primary effects of §§ 107 and 265(a)(6) are the same as the government's valid purpose: accommodating religious practice by avoiding excessive entanglement. Whether or not such accommodations might mean that more ministers incidentally qualify for exemption than under § 119, as Plaintiffs allege, is irrelevant because the primary effect is to avoid Establishment Clause violations through accommodation, which neither advances not inhibits religion. As discussed in the U.S. Memo, pp. 31-32, government does not impermissibly advance religion where, as a result of religious accommodation, "religious groups are better able to advance their purposes." Amos, 483 U.S. at 336. In order for government action to have a primary effect of advancing religion, government must have "advanced religion through its own activities and influence." Id. at 337 (emphasis added).

Plaintiffs offer no factual allegations that could support the inference that government itself has advanced religion, nor have Plaintiffs indicated any way in which religion might be advanced by avoiding Establishment Clause violations. Moreover, any facts alleged for the first time in the Opposition or attached to the Affidavit of Richard L. Bolton need not be considered by a Court in deciding a motion to dismiss for failure to state a claim upon which relief may be granted. See Schneider v. California Dept. of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). The Complaint only contains the statements that "Sections 107 and 265(a)(6) 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" and "Sections 107 and 265(a)(6) of the Revenue Code provide economic benefits for 'ministers of the gospel' that are not provided to other taxpayers." However, these allegations of the benefits received by ministers are precisely the types of conclusions of law that need not be taken as true, even in the context of a motion to dismiss.

Caviness, 590 F.3d at 812. Because the Complaint does not allege factual matter beyond conclusory allegations of law couched in statements of fact, Plaintiffs cannot establish that the primary effects of §§ 107 and 265(a)(6) are neither to advance nor inhibit religion.

The fact that §§ 107 and 265(a)(6) have the primary effect of accommodating religion and not advancing it, as alleged by Plaintiffs, is supported by the fact that the IRS historically held that the magnitude of the exemption and deduction available under § 107(2) was limited to the fair rental value of the housing actually procured. 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). Furthermore, the Clergy Housing Allowance Clarification Act of 2002 was passed specifically to limit the exemptions taken under § 107(2) to the fair rental value of the housing actually procured. See P.L. 107-181 (2002). Limiting the amount of income-exclusion to the fair rental value ensures the economic equivalence between any adjustment to tax liabilities resulting from the application of § 107(2) and an exemption provided under § 119. See 26 U.S.C. §§ 107(2), 265(a)(6).[8]

Plaintiffs' assertions that the primary effect of § 107 is to advance religion is further undermined by the broader statutory scheme surrounding § 107, which includes I.R.C. §§ 119, 911(a), and 912. These provisions recognize that ministers, government officers living abroad, Peace Corps employees, and members of the military all receive housing in their employment relationships, but that particular circumstances of those taxpayers render the provision of housing in-kind and the convenience of the employer test undesirable or inappropriate. The unique circumstances of each class of taxpayer require different administrative procedures. Still, each income exclusion is effectively limited in value to the fair rental value of the housing provided or procured in order to ensure that each exemption provides economically equivalent tax treatment.

Further, Plaintiffs rely heavily on the continuing vitality of Texas Monthly v. Bullock in claiming that any such accommodation to religion must be extended to all taxpayers if provided at

[8]Plaintiffs also fail to take into account the fact that housing provided by the employer under § 119 could be more valuable than housing provided under § 107. For example, if an employee is provided housing in an expensive mansion under § 119, while a minister is provided housing in a dilapidated and aging parsonage in a low-income neighborhood under § 107, the value of the housing provided is greater under § 119. Thus, Plaintiffs' focus on only the value of the benefit received is misleading and should be rejected.

all. See Opposition, p. 58. However, the plurality opinion in Texas Monthly is not controlling law, as discussed in greater detail in the U.S. Memo, pp. 40-44. Furthermore, Plaintiffs' logic is inconsistent with Supreme Court's accommodation jurisprudence following Texas Monthly. See, e.g., Cutter, 544 U.S. at 724.[9] Just as the Supreme Court allows accommodations to be defined with reference to religion in order to combat religion-specific burdens, "religious accommodations . . . need not 'come packaged with benefits to secular entities.'" Id. at 724 (quoting Amos, 483 U.S. at 335). Because the potential for entanglement arises with respect to the church-minister relationship, religion-specific accommodation is appropriate without the need to extend that treatment to all taxpayers as Plaintiffs suggest.[10]

Plaintiffs instead assert that §§ 107 and 265(a)(6) violate the second Lemon prong because "government action has the primary effect of advancing religion if it is sufficiently likely to be perceived as an endorsement of religion." Opposition, pp. 73-74. Plaintiffs cite Nurre v. Whitehead for this proposition, even though that case involved the constitutionality of government censorship of a students' speech, and not the effects of a tax exemption. See Nurre, 580 F.3d at 1092. Unlike a tax exemption, perceived endorsement was a relevant effect in that case because the challenged action had a primarily communicative effect. Id. at 1096-1097. The endorsement test has not been consistently applied in recent Supreme Court Establishment Clause cases, especially not in recent cases involving religious accommodation. See, e.g., Cutter, 544 U.S. at 720 (suggesting that the accommodation would pass muster under the endorsement test but not applying it); see also Van

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[9]A Westlaw search of cases citing Texas Monthly reveals that no Supreme Court cases have cited Texas Monthly for any point of law since 1994.

[10]Plaintiffs argue that the separate concurrences in Texas Monthly together compose a majority supporting their contention that "a tax preference that is not neutral and generally available violates the Establishment Clause." Opposition, pp. 37-42. However, Plaintiffs ignore the concurring Justices' concerns regarding the fact that religious publications were at issue. That distinction led each of the Justices to only concur in the judgment instead of joining the plurality. Justice White concurred because content-based discrimination of speech "is plainly forbidden by the Press Clause of the First Amendment." Texas Monthly, 489 U.S. at 26 (White, J. concurring). Justices Blackmun and O'Connor wrote that they were wary of the possibility of government subsidizing religious publications because "Texas engaged in preferential support for the communication of religious messages," and thereby identified itself with the contents of those messages. Id. at 28 (Blackmun, O'Connor, JJ. concurring). Such a holding would be consistent with the religious accommodation cases cited by Justices Blackmun and O'Connor, which held that government must have "advanced religion through its own activities and influence," rather than simply leaving religion alone. Amos, 483 U.S. at 337.

Orden v. Perry, 545 U.S. 677, 686 (2005) (plurality opinion) (assessing the constitutionality of a religious display with "analysis . . . driven both by the nature of the monument and by our Nation's history"). Plaintiffs thereby misconstrue the relevant inquiry in assessing the primary effects of governmental accommodation of religion by relying primarily on the endorsement test here.

Even if the endorsement test did apply, an "objective observer" understanding the text, history, implementation, and statutory regime of which both §§ 107 and 265(a)(6) are a part, would see these provisions as accommodations of religion and not as endorsements of religion, as explained above. Sections 107 and 265(a)(6) treat a minister's tax liabilities in a similar manner as if §§ 119, 911(a) or 912 applied instead. Indeed, where the government's purpose is to accommodate religion, a statute is more likely to be perceived by such an objective observer "as an accommodation of the exercise of religion rather than as a Government endorsement of religion." Amos, 483 U.S. at 349 (O'Connor, J., concurring). In light of the history of both statutes, it is also clear that neither statute has led to a government establishment of religion as Plaintiffs suggest.

Thus, because §§ 107 and 265(a)(6) have a primary effect of accommodating religion, do not advance or inhibit religion, and because the Complaint alleges no facts indicating otherwise, §§ 107 and 265(a)(6) do not violate the second prong of the Lemon test.

**D. Sections 107 and 265(a)(6) satisfy the entanglement prong of the Lemon test.**

Plaintiffs do not argue that § 265(a)(6) gives rise to any unconstitutional entanglement whatsoever. Section 107 does not foster an excessive government entanglement with religion as Plaintiffs allege; instead it promotes government disentanglement with religion. In contending that § 107 causes unconstitutional entanglement, Plaintiffs only allege that Treasury Regulation § 1.1402(c)-5, the regulation used in administering parts of § 107, causes the IRS to undertake "purely religious determinations." See Opposition, p. 63. However, Plaintiffs do not argue that Treasury Regulation § 1.1402(c)-5 or its implementing statute are unconstitutional; nor do they acknowledge that such regulations have been upheld against Establishment Clause challenges. See, e.g., Droz, 48 F.3d at 1124, Ballinger v. Commissioner, 728 F.2d 1287, 1292 (10th Cir. 1984). Thus, by utilizing the administrative procedures of Treasury Regulation § 1.1402(c)-5, which have already withstood constitutional challenge, § 107 does not create excessive entanglement. See, e.g.,

Flowers v. United States, 49 A.F.T.R.2d (RIA) 438, *18 (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"), Warnke v. United States, 641 F. Supp. 1083, 1092 (E.D. Ky. 1986) ("Treasury Regulation 1.107-1(b) does not look to the merits of any particular religion but merely implements and elaborates on the intent of Congress").

Section 107, through Treasury Regulation § 1.1402(c)-5, avoids the potential procedural entanglement that could arise in administering § 119, as discussed in the U.S. Memo. See U.S. Memo, pp. 36-38. By limiting inquiries to whether a ministerial employment relationship complies with the religious entity's set of stated beliefs, § 107 avoids unconstitutional entanglement. See Jones v. Bradley, 590 F.2d 294, 295 (9th Cir. 1979) ("It is clearly impermissible to inquire into the 'truth' of religious doctrines or beliefs. There is no prohibition, however, against ruling whether or not a set of beliefs constitutes a religion when deciding if First Amendment protections apply.") (citing United States v. Ballard, 322 U.S. 78, 64 (1944)). Section 119, on the other hand, poses the concern of procedural entanglement. In particular, determining the "convenience of the employer," "the business premises," or "the terms and conditions of employment," may require inquiries into the contents of a church-minister employment relationship, as well as an inquiry into the content of religious practices. See Treas. Reg. § 1.119-1(b). Such inquiries would require the IRS to determine whether or not an employee was "required to accept the lodging in order to enable him properly to perform the duties of his employment," which in turn would require an assessment of what constitutes the proper performance of the duties of a minister's employment. Ministers attempting to qualify under § 119 in the absence of § 107 would raise the possibility that the IRS would have to examine the terms and conditions of ministers' employment relationships, along with the contents of their stated religious tenets and practices, in order to determine whether such housing was provided "for the convenience of the employer." Thus, relative to § 107, § 119 would entail a greater degree of the prohibited "continuing state surveillance" of the church-minister relationship. Walz, 397 U.S. at 674-675.

Plaintiffs argue that § 107 entails unconstitutional entanglement because "[t]he inquiries under § 107 have historically required complex inquiries into the tenets of religious orthodoxy."

Opposition, p. 61. However, Plaintiffs fail to acknowledge that none of the courts performing such an inquiry believed it was violating the Establishment Clause by doing so. Moreover, as the Supreme Court observed in Walz, "Separation in this context cannot mean absence of all contact." Walz, 397 U.S. at 676. The relevant inquiry is whether there has been excessive entanglement. As Plaintiffs point out, in Flowers, the district court did hold that monitoring efforts performed by the government were necessary for the implementation of § 107, but the district court explicitly held that such efforts did not cause excessive entanglement. Flowers, 49 A.F.T.R.2d (RIA) at *18.

Administering § 107 only requires the IRS to obtain objective evidence already in the possession of the employer or minister-employee, including legal and financial documentation, which do not bear on the validity or contents of the tenets or practices of the religion. See Boyer v. Commissioner, 69 T.C. 521, 534 (1977). Such documents are already provided in the normal course of tax administration, and even if they were not, the provisions of § 107 do not give rise to the intrusive kind of surveillance that would constitute the form of excessive entanglement contemplated by Walz. See Warnke, 641 F. Supp. at 1091 ("Clearly, Regulation 1.107-1(b) is broadly applied to include a variety of acceptable qualifying designators who may designate by very informal methods."). As Plaintiffs themselves argue, such routine regulatory inquiries do not constitute excessive entanglement. Hernandez, 490 U.S. at 696.

Plaintiffs acknowledge that "what constitutes 'religious worship' and 'the administration of sacerdotal functions,' in turn, depend on the tenets and practices of the particular religious body at issue," and not any rulings or determinations made by the IRS. See Opposition, p. 61. The IRS's administration of these issues only ensures that taxpayers' claims for tax purposes are consistent with the tenets and practices stated by an employing religious entity, and these provisions do not call for any inquiry into whether or not the tenets and practices have valid religious content. See, e.g., Haimowitz v. Commissioner, 73 T.C.M. (CCH) 1812 (1997) (executive director of a temple, later recognized as a Fellow in Synagogue Administration was not performing services that are ordinarily the duties of a minister of the gospel, according to the taxpayer's testimony regarding the duties he did not perform); Silverman v. Commissioner, 533 F.2d 94 (8th Cir. 1973), aff'g, 57 T.C. 727 (1972) (finding cantor of the Jewish faith to be a "minister" for purposes of the Code by looking to the

guidelines provided by Treas. Reg. § 1.1402(c)-5(b)(2) and the professed practices of the Jewish faith); Salkov v. Commissioner, 46 T.C. 190 (1966) (finding Judaism could have two separate and distinct classes of persons (the cantor and the rabbi) who were properly considered "ministers" for purposes of the Code and that Congress did not intend to exclude those persons who are the equivalent of "ministers" in other religions). Because the determination of who qualifies as a minister is left to the religious entity's objective certification that the organization views the minister as such, there is no procedural entanglement caused by this inquiry. See Jones, 590 F.2d at 295.

In addition to avoiding procedural entanglement, as discussed above, the administration of § 107 avoids substantive entanglement with religion that might arise as a result of administering § 119. Because § 107 does not induce ministers or churches to structure and define the terms of their employment relationships in ways that meet the requirements of a statute, the substantive entanglement discussed in Bollard is avoided. See Alcazar, 598 F.3d at 674 (finding that the decision whether or not to pay the plaintiff overtime wages "does involve the Catholic Church's selection of its ministers"). Were § 119 applicable without § 107, those tax incentives "might affect the way an organization carried out what it understood to be its religious mission" by causing religious entities to purchase more property (and thus potentially dictate how churches and religious organizations spend their funds) in their own capacities in order to provide in-kind housing to their employees. Amos, 483 U.S. at 336. Moreover, religious entities might structure their religious principles or employment relationships to strictly comply with § 119's requirements. Faced with such a scenario, the IRS might be required to assess whether or not the rationales offered by religious entities were in fact the terms and conditions of ministerial employment and whether those terms were in fact "required" pursuant to the religious organization's stated religious beliefs. Thus § 119 creates the possibility of greater substantive entanglement than § 107.

Thus, Plaintiffs have failed to show that §§ 107 or 265(a)(6) could foster an unconstitutionally excessive government entanglement with religion, and thus do not violate the third prong of the Lemon test.

**CONCLUSION**

Because the Complaint (1) fails to allege facts that establish that any of the named plaintiffs have

standing and (2) fails to allege facts sufficient to state a claim upon which relief can be granted, the Complaint should be dismissed.

Respectfully submitted this 3rd day of May, 2010.

BENJAMIN B. WAGNER

United States Attorney

By: /s/ Richard A. Schwartz

JEREMY N. HENDON
RICHARD A. SCHWARTZ
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 353-2466
Telephone: (202) 307-6322

**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that service of the foregoing **UNITED STATES' REPLY TO PLAINTIFFS' OPPOSITION** has been made this 3rd day of May, 2010 via the Court's CM/ECF system to:

| | |
|---|---|
| Michael Newdow<br>Richard L. Bolton<br>*Counsel for Plaintiffs* | NewdowLaw@gmail.com<br>rbolton@boardmanlawfirm.com |
| Kevin Snider<br>Matthew McReynolds<br>*Counsel for Amicus Curiae* | kevinsnider@pacificjustice.org<br>mattmcreynolds@pacificjustice.org |
| Jill Bowers<br>*Counsel for Selvi Stanislaus* | jill.bowers@doj.ca.gov |

/s/ Richard A. Schwartz
JEREMY N. HENDON
RICHARD A. SCHWARTZ
Trial Attorneys, Tax Division
U.S. Department of Justice