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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CIVIL DIVISION

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 Director of the California Franchise Tax Board,

Defendants.

2:09-CV-02894-WBS-DAD

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY DEFENDANT SELVI STANISLAUS TO DISMISS (FRCP 12(b)(1) and (6))

Date: March 29, 2010
Time: 2:00 p.m.
Courtroom: 5
Judge: The Hon. William B. Shubb
Trial Date: Not yet set.
Action Filed: October 16, 2010

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OTHER AUTHORITIES

Defendant Selvi Stanislaus (Stanislaus), sued only in her official capacity as Executive Officer of the State of California Franchise Tax Board, submits this Memorandum of Points and Authorities in support of her Motion to Dismiss (Motion) the Complaint for Declaratory and Injunctive Relief (Complaint) filed by Plaintiffs Freedom From Religion Foundation, Inc. (FFRF), and its members 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.

INTRODUCTION

Stanislaus's Motion to dismiss Plaintiffs' Establishment Clause challenge to her enforcement of California Revenue and Taxation Code sections 17131.6 and 17280(d)(2) should be granted for three reasons.[1] First, this Court lacks subject matter jurisdiction over Plaintiffs' claims against Stanislaus. Stanislaus is sued only in her official capacity as Executive Officer of the State of California Franchise Tax Board. Complaint, p. 6:13. Plaintiffs' claims against her are barred by sovereign immunity and the Eleventh Amendment. *Hans v. State of Louisiana,* 134 U.S. 1 (1890). Stanislaus has not waived her sovereign immunity, and Plaintiffs' claim "to relief and remedies under 42 U.S.C. § 1983" (Complaint, p. 13:12) do not overcome the sovereign immunity bar to their "official capacity" suit against her because "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Department of State Police*, 491 U.S. 58, 71 (1989) (holding "that neither a State nor its officials acting in their official capacities are 'persons' under § 1983"). Therefore the Court lacks subject matter jurisdiction over Plaintiffs' claims against Stanislaus. Fed. R. Civ. P. 12(b)(1).

Second, Plaintiffs lack taxpayer standing to sue because they fail to allege any injury caused by an expenditure of state funds. *Doremus v. Board of Education of Borough of Hawthorne,* 342 U.S. 429, 433-434 (holding that to establish taxpayer standing a plaintiff must

[1] References to sections 17131.6 and 17280(d)(2) in this Memorandum refer to these sections of the California Revenue and Taxation Code.

allege that the activity challenged "is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting" a government program); *Cammack v. Waihee*, 932 F.2d 765, 769 (9th Cir. 1991) (finding that state and municipal taxpayers had standing to challenge the expenditure of state tax revenues to provide 65 percent of Hawaii's public employees with paid Good Friday holiday). Plaintiffs fail to allege a measurable appropriation or expenditure of state funds caused solely by Stanislaus's activity in enforcing sections 17131.6 and 17280(d)(2). Plaintiffs lack standing to sue Stanislaus. Therefore their claims against her must be dismissed. Fed. R. Civ. P. 12(b)(1).

Third, even if this Court has subject matter jurisdiction over Plaintiffs' claims against Stanislaus, and these Plaintiffs have standing to sue her, nevertheless their Complaint fails to state a claim on which relief can be granted against Stanislaus because sections 17131.6 and 17280(d)(2) survive Establishment Clause scrutiny under the three-part test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) (drawing a constitutional distinction between a statute touching upon religion and a prohibited "law respecting an establishment of religion"), quoting *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970) (internal quotation marks omitted) (holding that New York statute exempting from real property tax realty owned by a religious association and used exclusively for religious purposes did not violate the Establishment Clause).

"The construction given by California courts to the establishment clause of article I, section 4 [of the California Constitution] is guided by decisions of the United States Supreme Court[,]" including *Lemon*. *Paulson v. Abdelnour*, 145 Cal.App.4th 400, 420-421 (2007), citing *East Bay Asian Local Development Corp. v. State of California*, 24 Cal.4th 693, 713 (2000). For this reason, Plaintiffs' supplemental claims against Stanislaus under the California "no preference" clause also must be dismissed. Cal. Const., art. I, § 4. Plaintiffs' claims against Stanislaus under the California "no aid" clause fail because the tax exemption and deduction respectively created by Sections 17131.6 and 17280(d)(2) do not confer a "[d]irect financial benefit upon a particular religion[.]" *Paulson*, 145 Cal.App.4th at 435.

Plaintiffs have failed to state a claim on which relief can be granted against Stanislaus. Therefore their Complaint against her must be dismissed. Fed. R. Civ. P. 12(b)(1) and (6).

STATEMENT OF FACTS

Plaintiff FFRF "is a non-profit membership organization that advocates for the separation of church and state and educates on matters of non-theism[,]" having members "in every state of the United States, including more than 2,200 members in the State of California." Complaint, p.2:25-28. Each of the 21 individual Plaintiffs allege that he or she "is an adult individual who is a member of FFRF and a federal and California taxpayer who resides in the Eastern District of California[,]" and "is opposed to government endorsement of religion, including preferential and exclusive tax benefits for religious organizations and ministers of the gospel." Complaint, p.3:6-6:2.

Defendant Stanislaus is sued only in her official capacity as Executive Officer of the State of California Franchise Tax Board. Complaint, p.6:10-12. See, Cal. Gov. Code § 15701 (defining "Executive Officer" of the Franchise Tax Board). The Franchise Tax Board is a state agency. Cal. Gov. Code § 15700.

STATEMENT OF THE CASE

By their Complaint, Plaintiffs seek declaratory and injunctive relief against Stanislaus on the grounds that her enforcement of sections 17131.6 and 17280(d)(2) constitutes a continuing violation of federal law. Specifically, Plaintiffs allege that Stanislaus's enforcement of these statutes violates "the Establishment Clause of the First Amendment to the United States Constitution and … the Establishment Clause of the California Constitution and the no aid provision of the California Constitution[,]" entitling them to declaratory and injunctive relief and "relief and remedies under 42 U.S.C. § 1983." Complaint, p. 2:14-13:12; U.S. Const., amend. I, cl. 1; Cal. Const., art. I, § 4; art. XVI, § 5.

Section 17131.6 states:

> Section 107 of the Internal Revenue Code is modified by substituting in paragraph (2) the phrase "the rental allowance paid to him or her as part of his or her compensation, to the extent used by him or her to rent or provide a home" in lieu of the phrase "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 value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities" contained therein.

Cal. Rev. & Tax. Code § 17131.6. Section 107(2) of the Internal Revenue Code excludes from gross income a minister's "rental allowance." 26 U.S.C. § 107(2). Thus, section 17131.6 creates a state tax exemption from gross income for a minister's home rental allowance that is analogous to the federal exemption created by section 107(2).

Section 17280(d)(2) states that "[n]o 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 … [a] parsonage allowance excludable from gross income under Section 107 of the Internal Revenue Code." Cal. Rev. & Tax. Code § 17280(d)(2). Thus section 17280(d)(2) creates a mortgage interest and real property tax deduction for ministers without regard to whether the taxpayer receives a parsonage allowance that is excludable from gross income under Title 26, United States Code, section 107.[2]

By this Motion, Stanislaus denies Plaintiffs' allegation and seeks dismissal of this case for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Even if this Court finds that it has jurisdiction over Plaintiffs' claims against Stanislaus, nevertheless this Court should dismiss the Complaint for failure to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6).

DISCUSSION

I. THE COMPLAINT SHOULD BE DISMISSED BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER STANISLAUS.

A. Plaintiffs' Claims Against Stanislaus Are Barred by Sovereign Immunity and the Eleventh Amendment.

Plaintiffs' claims against Stanislaus, sued only in her official capacity as Executive Officer of the State of California Franchise Tax Board, must be dismissed because those claims are barred by sovereign immunity and the Eleventh Amendment. U.S. Const., amend. XI; *Hans v. Louisiana,* 134 U.S. 1. *Hans* holds that the Eleventh Amendment bars citizen suits against nonconsenting states in federal court, including suits like this one, alleging federal questions jurisdiction. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (Foundation Press 3d ed.

[2] References in this Memorandum to sections 107(2) and 107 refer to these sections of Title 26 of the United States Code (the Internal Revenue Code).

2000) vol. 1 § 3-3, pp. 240-241, fn. 138. "*Hans* has been reaffirmed in case after case, often unanimously and by exceptionally strong Courts[.]"[3] Id. at p. 241 fn. 139, quoting *Pennsylvania v. Union Gas*, 491 U.S. 1, 34 (1989), overruled on other grounds, *Seminole Tribe of Florida v. Florida*, 517 U.S. 43, 66 (1996) (holding that Congress lacked authority under the Indian commerce clause to abrogate the states' Eleventh Amendment immunity).

Plaintiffs assert no claim of sufficient force to defeat Stanislaus's sovereign immunity, for which the phrase "Eleventh Amendment immunity" is "convenient shorthand but something of a misnomer":

> The Eleventh Amendment makes explicit reference to the States' immunity from suits "commenced or prosecuted against of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Alden v. Maine, 527 U.S. 706, 711 (1999), quoting U.S. Const., amend. XI.

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, a case decided the same day as *Alden*, the Supreme Court of the United States further describes the contours of the Eleventh Amendment as an embodiment of the principle that Article III does not supersede the States' sovereign immunity:

> Though its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state, we have long recognized that the Eleventh Amendment accomplished much more: It repudiated the central premise of

[3] See, e.g., *Pennhurst State School and Hospital v. Halderman* (II), 465 U.S. 89, 98-99 (1984) (holding that the Eleventh Amendment bars federal court from ordering state officials to conform their conduct to state law); *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468 (1987) (plurality opinion) (holding that the Eleventh Amendment bars a citizen from suing his own state in federal court); accord, *Duhne v. New Jersey,* 251 U.S. 311, 313 (1920) (mem.) (holding that citizen suit in federal court in his own state to enjoin enforcement of Eighteenth Amendment was barred); *Smith v. Reeves*, 178 U.S. 436, 446-448 (1900) (holding that a state does not consent to suit in federal court merely by consenting to suit in the courts of its own creation and barring suit arising under the Constitution); *Fitts v. McGhee*, 172 U.S. 516, 524-525 (1899) (holding that suit alleging violation of Due Process Clause is barred).

> *Chisholm* [*v. Georgia*, 2 Dall 419, 1 L.Ed. 440 (1793)] that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union. This has been our understanding of the Amendment since the landmark case of *Hans v. Louisiana*[.]

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 669-670 (1999) (holding that sovereign immunity was neither validly abrogated by the Trademark Remedy Clarification Act [the Lanham Act], nor voluntarily waived by the State's activities in interstate commerce), citing, *inter alia, Pennhurst State School and Hospital v. Halderman* (II), 465 U.S. 89, 97-98 (1996) (holding that the Eleventh Amendment bars federal courts from ordering state officials to conform their conduct to state law) and *Seminole Tribe*, 517 U.S. at 54, 66-68.

The Supreme Court's Eleventh Amendment jurisprudence recognizes "only two circumstances in which an individual may sue a state": first, an unequivocal congressional abrogation of the Eleventh Amendment through a valid exercise of Congress's power to enforce the Fourteenth Amendment, and, second, the state's consent. *College Savings Bank*, 527 U.S. at 670. Stanislaus has not waived sovereign immunity, and Plaintiffs cite no federal statute showing the unequivocal intent of Congress to waive the state's sovereign immunity.

B. B. Stanislaus Is Not Amenable to Suit under 42 U.S.C. § 1983.

Plaintiffs' claim "to relief and remedies under 42 U.S.C. § 1983" (Complaint, p. 13:12) does not overcome the sovereign immunity bar to their suit against Stanislaus, sued only in her official capacity, because "a suit against a state official in his or official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Department of State Police*, 491 U.S. at 71, citing *Brandon v. Holt*, 469 U.S. 464, 471 (1985). "As such, it is no different from a suit against the State itself." *Id.* citing illustratively *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985). The *Will* court grounded its decision in the recognition that sovereign immunity and the Eleventh Amendment bar suit federal court against nonconsenting states:

> Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity, or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity.

Will, 491 U.S. at 66, citing *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 472-473 (1987) (plurality opinion) (holding that Eleventh Amendment bars citizen from suing his own state).

The test whether a state has waived its Eleventh Amendment immunity "is a stringent one." *College Savings Bank*, 427 U.S. at 675. In applying this stringent test, the United States Court of Appeals for the Ninth Circuit has opined that "[a] state waives its immunity when it voluntarily invokes federal jurisdiction or makes a clear declaration that it intends to submit itself to [federal] jurisdiction." *Bank of Lake Tahoe v. The Bank of America,* 318 F.2d 914, 917 (9th Cir. 2003) (holding that state waived its sovereign immunity by joining bank's motion to remove case to federal court), quoting *In re Lazar*, 237 F.3d 967, 976 (9th Cir. 2001), in turn quoting *College Savings Bank, id.*

Stanislaus is not before this Court voluntarily. She has neither consented to this lawsuit nor waived her immunity from Plaintiffs' claims in this action.

C. C. Plaintiffs Lack Standing to Sue Stanislaus.

Plaintiffs' claims against Stanislaus must be dismissed for lack of State taxpayer standing, because they fail to allege any government expenditure of funds arising from her enforcement of Sections 17131.6 and 17280(d)(2). "The bedrock requirement for standing is that the challenger suffer injury." *Cammack v. Waihee*, 932 F.2d 765, 769 (9th Cir. 1991) (finding that state and municipal taxpayers had standing to challenge the expenditure of tax revenues on paid leave days for the Good Friday holiday). In order to determine a state taxpayer's standing, the court must examine the injury requirements pertinent to the type of taxpayer standing asserted. *Id.*

The state and municipal taxpayers in *Cammack* challenged an Hawaii statute that gave state employees a paid holiday on Good Friday, a Christian holy day. In construing the Supreme Court's holding in *Doremus,* the *Cammack* court explained that absent government expenditure of funds there is no taxpayer standing:

> The seminal state taxpayer standing case is *Doremus v. Board of Education*, 342 U.S. 429[.] In that case, the Supreme Court explained that a state taxpayer has standing to challenge a state statute when the taxpayer is able to show that he "has sustained or is immediately in danger of sustaining some direct injury as the result of [the challenged statutes'] enforcement.'" *Id.* at 434[.]

Cammack, 932 F.2d at 769. The *Cammack* court further explained that "[t]he direct injury required by *Doremus* is established when the taxpayer brings a 'good-faith pocketbook action'; that is, when the challenged statute involves the expenditure of state tax revenues." *Id.*, quoting *Hoohuli v. Ariyoshi*, 742 F.2d 1169, 1179 (9th Cir. 1984) (holding that pleadings must "set forth the relationship between the taxpayer, tax dollars, and the allegedly illegal government activity") (citing *Doremus*); and citing illustratively, *Reimers v. State of Oregon*, 863 F.2d 630, 632 n.4 (9th Cir. 1988) (finding no state taxpayer standing where taxpayer does not challenge the disbursement of state funds) (citing *Doremus*). But, as noted in *Cammack,* "*Hoohuli*, the leading case on this issue in this circuit, does not require that the taxpayer prove that her tax burden will be lightened by elimination of the questioned expenditure." *Cammack*, 932 F.2d at 769-770, citing illustratively *Minnesota Federation of Teachers v. Randall*, 891 F.2d 1354, 1357 (8th Cir. 1989) (following *Hoohuli*); and citing contrastively *District of Columbia Common Cause v. District of Columbia*, 848 F.2d 1, 5 (D.C. Cir. 1988) (holding injury redressed by elimination of expenditure, rather than by decrease in taxation).

In alleging that state funds were expended to provide a paid religious holiday, Good Friday, to many state workers, the *Cammack* taxpayers established "pocketbook" injury caused by the statute they challenged, even though, like the California statutes challenged in this case, it "appropriate[d] no funds to carry out its purposes":

> By providing for state holidays … the statute has at least the fiscal impact that many state and local government offices are closed and many state and local government employees need not report to work. Furthermore, in 1970, the Hawaii Legislature enacted a public collective bargaining law which mandated that the terms and conditions of public employment be determined through a collective bargaining process. The statute recognized that "joint decision making [between public employees and their employers] is the modern way of administering government." The number and dates of paid leave days are among the mandatory subjects of collective bargaining. All collective bargaining agreements currently in effect between public employees and their employees provide for numerous paid leave days, either expressly or through incorporation[.] Good Friday is included as one such paid leave day. These collective bargaining agreements cover approximately sixty-five percent of Hawaii's public employees.

Cammack, 932 F.2d at 767 (citations omitted). The *Cammack* court found that "this allegation identifie[d] an expenditure of public funds sufficiently related to" the taxpayers' constitutional claim.

By contrast, Plaintiffs in this case allege only that the challenged statutes, which create certain exemptions and deductions from taxable gross income, "provide economic benefits for 'ministers of the gospel' that are not provided to other taxpayers[,]'" and "constitute a subsidy" that injures Plaintiffs by placing them "at a competitive disadvantage relative to churches and other organizations[.]" (Complaint, p.11:1-12:11.) Plaintiffs' Complaint is devoid of any allegation of "an expenditure of public funds sufficiently related to" their constitutional claims. Thus the Complaint does not survive scrutiny under *Cammack*, *Hoohuli*, *Reimers*, and *Doremus*.

The question whether a plaintiff has taxpayer standing to sue arises as an aspect of federal subject matter jurisdiction under Article III of the United States Constitution, and state taxpayers like the Plaintiffs taxpayers in this case, seeking injunctive relief in federal court, must first establish the court's subject matter jurisdiction. *Flast v. Cohen*, 392 U.S. 83, 101-103 (1968), citing, *inter alia*, *Doremus,* 342 U.S. 429. Plaintiffs in this case fail to allege any injury caused by an expenditure of state funds. Plaintiffs lack standing to bring this lawsuit. Stanislaus's Motion to dismiss should therefore be granted for lack of subject matter jurisdiction. *Reimers*, 863 F.2d at 632 n.4; Fed. R. Civ. P. 12(b)(1).

II. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED BECAUSE STANISLAUS'S ENFORCEMENT OF SECTIONS 17131.6 AND 17280(D)(2) DOES NOT VIOLATE THE FEDERAL OR STATE CONSTITUTION.

A. Stanislaus's Enforcement of Sections 17131.6 and 17280(d)(2) Does Not Constitute a Continuing Violation of the Establishment Clause.

Stanislaus's enforcement of sections 17131.6 and 17280(d)(2) does not constitute a continuing violation of the federal Establishment Clause. U.S. Const., amend. I, cl. 1. The purpose of the Establishment Clause is "to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz v. Tax Commission*, 397 U.S. at 669 (holding that New York statute exempting from real property tax realty owned by a religious association and used exclusively for religious purposes does not violate the Establishment Clause).

In *Lemon v. Kurtzman*, the Supreme Court of the United States set out a three-part test to determine whether a statute comports with the Establishment Clause. *Lemon v. Kurtzman*, 403 at

612-613. First, the statute "must have a secular legislative purpose," second, "its principal or primary effect must be one that neither advances nor inhibits religion," and third, it "must not foster 'an excessive entanglement with religion.'" *Id.*

1. Valid Secular Purpose

Sections 17131.6 and 17280(d)(2) serve a secular purpose under *Lemon v. Kurtzman* because these statutes remove a burden on religious practice by providing a tax exemption and deduction, respectively, not a direct subsidy. A direct subsidy involves the transfer of public monies, while an exemption does not. This distinction was crucial to the *Walz* court's determination that the real property tax exemption created by the New York statute scrutinized in that case was constitutionally sound:

> 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 'on the public payroll.' There is no genuine nexus between tax exemption and establishment of religion. As Mr. Justice Holmes commented in a related context 'a page of history is worth [a] volume of logic.' The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.

Walz, 397 U.S. at 675-676, quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

There is no principled basis to distinguish between the constitutionally sound New York ad valorem property tax exemption at issue in *Walz* and the California tax exemption and deduction at issue in this case. Sections 17131.6 and 17280(d)(2) have a valid secular purpose.

2. Principal or Primary Effects

Sections 17131.6 and 17280(d)(2) do not have a principal or primary effect of either advancing or inhibiting religion. As the *Walz* court held, "[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them." *Walz*, 397 U.S. at 674-675. But a law does not have the primary effect of advancing religion because religious groups benefit from the law. Rather, for a law that benefits religion to be unconstitutional, "it must be fair to say that the government itself has advanced religion through its own activities and influence." *Corporation of the Presiding*

Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987) (holding that exempting secular activities of religious organization from Title VII's prohibition against religious discrimination in employment did not violate the Establishment).

Examination under *Lemon* of "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority," shows that Stanislaus neither advances nor inhibits religion by enforcing sections 17131.6 and 17280(d)(2). *Lemon v. Kurtzman*, 403 U.S. at 615. While religious institutions are indirectly benefited by California's abstention, through the challenged statutes, from taxing them, these statutes appropriate no direct aid to any religious organization, and thus they establish no prohibited relationship between church and State. Therefore, Sections 17131.6 and 17280(d)(2) do not have the constitutionally prohibited principal or primary effect of advancing or inhibiting religion.

3. No Excessive Entanglement with Religion.

Sections 17131.6 and 17280(d)(2) do not foster excessive entanglement between religion and government. That the challenged exemption and deduction apply only to ministers does not render them constitutionally infirm under *Lemon*. *Cf.* Complaint, p. 12:1-11. In essence, the tax exemption and tax deduction respectively created by sections 17131.6 and 17280(d)(2), like the challenged statutory exemption in *Corporation of the Presiding Bishop*, remove a burden from the exercise of religion. "Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Corporation of the Presiding Bishop v. Amos*, 483 U.S. at 338. In order to understand how this is so, we must first look to how the taxing authorities construe the term "ministers of the gospel."

As used in Sections 107(2) and 107 of the Internal Revenue Code, and as incorporated by reference in Sections 17131.6 and 17280(d)(2), words like "ministers" and "churches" carry no exclusionary religious connotation. Although "phrased in Christian terms" to apply "in the case of a minister of the gospel," the United States Tax Court long ago decided that "Congress did not intend to exclude those persons who are the equivalent of 'ministers' in other religions." *Salkov*

v. Commissioner of Internal Revenue, 46 T.C. 190, 194, 199 (1966) (holding that a Jewish cantor is a "minister of the gospel" under section 107(2) of the Internal Revenue Code).

Like the Tax Commissioner, Stanislaus has consistently applied that principle to all religions in her enforcement of sections 17131.6 and 17280(d)(2). *See, e.g., In the Matter of the Appeal of Nickolas and Mabel H. Kurtanek (In re Kurtanek)*, California State Board of Equalization No. 87-SBE-035 (May 7, 1987), at n. 2 (citing *Salkov v. Commissioner*, 46 T.C. at 194).[4] Further, the Supreme Court of the United States has held that a "long-standing" agency interpretation may be entitled to *Chevron* deference even though it is through "means less formal than 'notice and comment' rulemaking." *Barnhart v. Walton*, 535 U.S. 212, 221-222 (2002), citing comparatively *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("stating, without delineation of means, that the " 'power of an administrative agency to administer a congressionally created … program necessarily requires the formulation of policy'" [quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)]).

The Supreme Court has stated that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot officially be preferred over another." *Larson v. Valente*, 456 U.S. 228, 245 (1982) (holding that Minnesota statute imposing registration and disclosure requirements on churches that obtained more than 50 percent of their income from nonmembers fostered excessive government entanglement in religion). Because the challenged California statutes provide a tax exemption and tax deduction for "ministers" of any religion, they do not discriminate among religions and thus avoid excessive entanglement with religion.

Sections 17131.6 and 17280(d)(2) survive Establishment Clause scrutiny under the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. at 612-613; U.S. Const., amend. I, cl. 1. Therefore Stanislaus's Motion to dismiss should be granted for failure to state facts on which a claim can be granted. Fed. R. Civ. P. 12(b)(6).

[4] A copy of *In re Kurtanek* is attached as Exhibit A. The Court may take judicial notice of this State of California Board of Equalization decision. Fed. R. Evid. 201. See, *Central Delta v. U.S. Fish and Wildlife Service,* 653 F.Supp.2d 1066, 1078-1079 (E.D. Cal. 2009).

B. Sections 17131.6 and 17280(d)(2) Do Not Violate the California "No Preference" Clause.

For the same reasons that sections 17131.6 and 17280(d)(2) do not violate the Establish Clause of the First Amendment to the Constitution of the United States, these statutes survive scrutiny under California's "no preference clause." Cal. Const., art. I, § 4. Section 4 states that "[t]he Legislature shall make no law respecting an establishment of Religion." *Id.*

"While the California Constitution is a document of independent force, the protections it creates in article I, section 4, concerning the establishment of religion are no broader than those created by the First Amendment of the United States and 'coincide with the intent and purpose' of the federal establishment clause." ¶*Paulson v. Abdelnour*, 145 Cal.App.4th. at 420, quoting *East Bay Asian Local Development Corp.*, 24 Cal.4th at 718. As the *Paulson* court observes, "[i]n its most recent application of the California establishment clause, our state Supreme Court relied almost exclusively on United States Supreme Court cases interpreting and applying the federal establishment clause[,]" and "[p]rominent among that authority is *Lemon v. Kurtzman*[.]" Paulson, 145 Cal.App.4th at 420-421, citing *East Bay Asian Local Development Corp.*, 24 Cal.4th at 713.

In *East Bay*, the Supreme Court of California ruled that, insofar as a landmark preservation law may burden a religious entity's free exercise rights, an accommodating exemption is a proper, constitutionally permissible, secular purpose. "Having concluded … that an exemption from a landmark preservation law satisfies all prongs of the *Lemon* test, it follows that the exemption is neither a governmental preference for nor discrimination against religion." *East Bay*, 24 Cal.4th at 719. Thus, since the exemption is neither a governmental preference for nor discrimination against religion, it does not violate article I, section 4, of the California Constitution, which guarantees free exercise of religion without discrimination or preference. *Id.* at 719-720.

Sections 17131.6 and 17280(d)(2), like the religion-accommodating exemption to landmark preservation scrutinized by the *East Bay* court, neither create a governmental preference for nor discriminate against religion, and thus do not violate the California establishment clause. Cal.

Const., art. I, § 4. And just as there is no principled basis to distinguish between the constitutionally sound New York ad valorem property tax exemption at issue in *Walz* and the California tax exemption and deduction at issue in this case, so too there is no principled basis to distinguish between the constitutionally sound exemption to landmark preservation law challenged by the *East Bay* appellants and the tax exemption and deduction challenged by Plaintiffs state taxpayers in this case.

C. Sections 17131.6 and 17280(d)(2) Do Not Violate California's "No Aid" Clause.

Sections 17131.6 and 17280(d)(2) do not violate the California "no aid" clause. Cal. Const., art. XVI, § 5. Section 5 states:

> Neither the Legislature, nor any ... city ... shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by ... any city ... for any religious creed, church, or sectarian purpose whatever[.]

Cal. Const., art. XVI, § 5.

The California Supreme Court has construed this language to prohibit more than the appropriation of public funds in aid of religion:

> [The] terms [of Section 5] forbid granting "anything" to or in aid of sectarian purposes, and prohibit public help to "support or sustain" a sectarian-controlled school. The section thus forbids more than the appropriation or payment of public funds to support sectarian institutions. It bans any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes.

California Educational Facilities Authority v. Priest, 12 Cal.3d 593, 605 fn. 12 (1974). Applying *California Educational Facilities Authority* to the religion-accommodating exemption to a landmark preservation law challenged in *East Bay*, the California Supreme Court held that the exemption did not violate Section 5 because it did not "give rise to any governmental involvement in the entities or institutions that benefit from the exemption, and even assuming that some parochial schools will benefit from the exemption, that benefit is not the 'support' contemplated by and banned by article XVI, section 5." *East Bay Local Asian Development Corp.*, 24 Cal.4th at 721 (citing *California Educational Facilities Authority*, 12 Cal.3d at 605).

When a statute has a primary secular purpose, the state is not required to prohibit a religious institution from receiving the indirect, remote, and incidental benefits that the statute provides. *California Educational Facilities Authority*, 12 Cal.3d at 605. As demonstrated above, sections 17131.6 and 17280(d)(2) have the primary secular purposes of removing a burden on religious practice. Therefore, the state is not required to prevent "ministers of the gospel" from receiving the indirect, remote, and incidental benefits of the tax exemption that sections 17131.6 and 17280(d)(2) provide.

The challenged statutes do not violate California's "no aid" clause. Cal. Const., art. XVI, § 5. Therefore, Stanislaus's Motion to dismiss should be granted for failure to state facts on which relief may be granted. Fed. R. Civ. P. 12(b)(6).

CONCLUSION

For the foregoing reasons, Defendant Stanislaus' Motion to Dismiss should be granted without leave to amend. Fed. R. Civ. P. 12(b)(1) and (6).

Dated: February 26, 2010

Respectfully Submitted,

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EXHIBIT A

In the Matter of the Appeal of NICKOLAS AND MABEL H. KURTANECK

Case Information:

Docket/Court: 87-SBE-035, California State Board of Equalization

Date Issued: 05/07/1987

Tax Type(s): Personal Income Tax

OPINION

This appeal is made pursuant to section 19057, subdivision (a),[1] of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of Nickolas and Mabel H. Kurtaneck for refund of personal income tax in the amounts of $291.73, $85.84, $231.43, and $278.07 for the years 1977, 1978, 1979, and 1980, respectively.

The issue presented for our decision is whether Nickolas and Mabel H. Kurtaneck, husband and wife, were entitled to exclude from their gross income a ministerial housing allowance received from Biola University for each of the four years in question. Since Mrs. Kurtaneck is a party to this appeal solely because she filed a joint return with her husband, only Nickolas Kurtaneck shall be referred to as "appellant" in this opinion.

Appellant is an ordained minister who is employed as a senior pastor at the Grace Brethren Church of Norwalk, California. For the past 25 years, appellant has also been employed as professor at Biola University, a Christian university in La Mirada. Specifically, he is a faculty member of the Talbot Theological Seminary and School of Theology (Talbot) which is a graduate school of divinity under the auspices of Biola University. Talbot offers eight advanced degree programs in Christian theological education, preparing its graduates for careers in church ministry. Through its Department of Biblical Studies, Talbot also provides courses in theology to undergraduate students who often enter the ministry on graduation or matriculate to the graduate programs at Talbot or other theological seminaries. Appellant teaches biblical studies to undergraduates in Talbot's Department of Biblical Studies.

For the appeal years 1977, appellant received housing allowances from both the Grace Brethren Church and Biola University as part of his compensation. Appellant treated the allowances as parsonage allowances and excluded both amounts from his California gross income. On review, the Franchise Tax Board allowed the exclusion of the housing allowance received from Grace Brethren Church, but included in appellant's gross income the amount of parsonage allowance he received from Biola University. Appellant paid the resulting deficiency assessments and filed claims for refund. Respondent denied the refund claims.

In this appeal, appellant argues that he should be allowed to exclude the parsonage allowance received from Biola University because said amount represented compensation for services as a minister at a religious college. It is appellant's position that his teaching of biblical studies as a professor at Talbot constituted the exercise of his ministry. Whereas respondent's determination in regard to the imposition of tax is presumptively correct, appellant bears the burden of showing error in that determination. (*Appeal of K. L. Durham,* Cal. St. Bd. of Equal., Mar. 4, 1980.)

Section 17741 provides in part, that in the case of a minister of the gospel,[2] gross income does not include the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home. This statute is substantially similar to its federal counterpart, Internal Revenue Code section 107. Because of this similarity, the interpretations and effect given the federal provision by the federal administrative bodies and courts are relevant in determining the proper construction of the California statute. (*Meanley* v.*McColgan,* 49 Cal. App.2d 203, 209 [121 P.2d 45] (1942); *Rihn* v. *Franchise Tax Board,* 131 Cal.App.2d 356, 360 [280 P.2d 893] (1955); see *Appeal of John Z. and Diane W. Mraz,* Cal. St. Bd. of Equal., July 26, 1976, and the cases cited therein.)

Treasury Regulation section 1.107-1, subdivision (a), states, in part, that in order to qualify for the parsonage allowance exclusion, the home or rental allowance must be provided as remuneration for services which are ordinarily the duties of a minister and that, in general, the rules set forth in section 1.1402(c)-5 of the regulations will be applicable to such determination. As examples of specific services, the performance of which will be considered duties of a minister for purposes of the federal statute, the regulation cites the performance of sacerdotal functions; the conduct of religious worship; the administration and maintenance of religious organizations and their integral agencies; and the performance of teaching and administrative duties at theological seminaries.

Treasury Regulation section 1.1402(c)-5, subdivision (b)(2), provides, for purposes of exemption from the federal self-employment tax, a list of the kinds of services an ordained minister performs in the exercise of his ministry and suggests possible rules for determining whether particular services meet the criteria of the regulations. The tax court has concluded that these of the rules are a reasonable interpretation of the federal parsonage allowance section and should be used in analyzing whether an individual's service is performed in the exercise of his ministry. (*Toavs* v. *Commissioner,* 67 T.C. 897, 903 (1977) .)

The kinds of services that a minister performs in the exercise of his ministry include "the ministration of sacerdotal functions and the conduct of religious worship, and the control, conduct, and maintenance of religious organizations (including the religious boards, societies, and other integral agencies of such organizations), under the authority of a religious body constituting a church or church denomination." (Treas. Reg. § 1.1402(c)-5, subd. (b)(2).) The regulations then set forth five applicable tests for determining whether services performed by a minister are performed in the exercise of his ministry. Arguing that appellant must show Biola University to be an integral part of a particular religious organization before his rental allowance can be considered remuneration for services which are ordinarily the duties of a minister, the Franchise Tax Board ostensibly contends that appellant must meet the fourth test. This test provides, in part, that, if a minister performs services for an organization which is operated is an integral agency of a religious organization under the authority of a religious body constituting a church or church denomination, all service performed by him in the control, conduct, and maintenance of such organization is in the exercise of his ministry. (Treas. Reg. § 1.1402(c)-5, subd. (b)(2)(iv).) "Any religious organization is deemed to be under the authority of a religious body constituting a church or church denomination if it is organized and dedicated to carrying out the tenets and principles of a faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith." (Treas. Reg. § 1.1402(c)-5, subd. (b)(2)(ii).) Whether a particular organization is an integral agency of a religious organization or is an independent institution can only be determined by examining all the attendant facts and circumstances. (*Toavs* v. *Commissioner,* supra, 67 T.C. at 904- 905.)

Revenue Ruling 72-606, 1972-2 C.B. 78, lists the following criteria that the Internal Revenue Service considers in determining whether a church-related institution is an integral agency of a religious organization: (1) whether the religious organization incorporated the institution; (2) whether the corporate name of the institution indicates a church relationship; (3) whether the religious organization continuously controls, manages, and maintains the institution; (4) whether

the trustees or directors of the institution are approved by or must be approved by the religious organization or church; (5) whether trustees or directors may be removed by the religious organization or church; (6) whether annual reports of finances and general operations are required to be made to the religious organization or church; (7) whether the religious organization or church contributes to the support of the institution; and (8) whether, in the event of dissolution of the institution its assets would be turned over to the religious organization of church. The revenue ruling states that the absence of one or more of these characteristics is not necessarily determinative and, where application of the criteria to the facts of a particular case does not yield a clear answer, organizational authorities are asked to comment whether the institution in question is an integral agency.

Furthermore, Revenue Ruling 70-549, 1970-2 C.B. 16, provides guidance as to how a college can satisfy the criteria of the Internal Revenue Service to become an integral agency of a "nonhierarchical church." (See *Flowers* v. *United States,* 49 A.F.T.R. 2d (P-H) ¶ 82-340 at 82-442.) Where a college is supported by a church lacking a central governing body that exercises direct control over its institutions, Revenue Ruling 70-549 states that the college can nevertheless be as effectively controlled by the church through a board of directors whose members are required to be church members and which is controlled by church elders. Moreover, if all of its faculty and students are members of the church, subjects are taught with emphasis on religious principles, and ministers for the church receive training there, the college will be considered as having been operated, in practice, as an integral agency of the church and any minister serving on the faculty as a teacher or administrator will be able to exclude a rental allowance from his gross income.

In the present matter, appellant has not furnished any evidence regarding the legal connection between Biola University and a particular religious organization or the control or management of the university, whether direct or indirect, by a particular church. Appellant has submitted seven letters written by pastors and administrators from various Southern California churches of different denominations, each certifying that Biola University, including Talbot Theological Seminary, is an integral agency of his church. However, the basis for that conclusion appears to be that many of the pastors of these churches received their ministerial training at Talbot and, therefore, Biola University was an important institution to these churches. Appellant's own Grace Brethren Church merely indicates that it provides financial support to Biola University, that a number of its congregation attend school there, and that several Biola students serve the church. While these letters show that Biola University trains students for careers in the ministry and offers a source of clergy for several area churches, there is no evidence in the record to suggest that any particular church controlled or managed Biola University its graduate school of theology, its finances, faculty membership, student enrollment, or curriculum. Rather, the record appears to demonstrate that Biola University was an independent institution which provided instruction in theological and religious training to students representing a number of religions denominations. Three of the supporting letters, in fact, state outright that Talbot is not under the authority of their denominations and a flier submitted by appellant describes Talbot as an interdenominational school.

Upon consideration of the evidence in the record, we must find that appellant has not proven that either Biola University or Talbot was controlled or operated as an integral agency of a religious organization under the authority of a religious body constituting a church or church denomination. Accordingly, appellant, although a minister of the gospel, was not performing service in the exercise of his ministry while teaching at Biola University and is, therefore, not entitled to exclude the rental allowance furnished to him as part of his compensation. [3] Therefore, respondent's action in denying the refund claims will be sustained.

ORDER

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, AND DECREED, pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Nickolas and Mabel H. Kurtaneck for refund of personal income tax in the amounts of $293.73, $85.84, $231.43, and $278.07, for the years 1977, 1978, 1979, and 1980, respectively, be and the same is hereby stained.

Done at Sacramento, California, this 7th day of May, 1987, by the State Board of Equalization, with Board Members Mr. Collis, Mr. Dronenburg, Mr. Bennett, Mr. Carpenter and Ms. Baker present.

1

Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the years in issue.

2

The phrase "minister of the gospel" applies to those individuals having ministerial status in their respective religions. (*Boyer* v. *Commissioner,* 69 T.C. 527, 529 (1977) .) A "minister" is a person authorized to administer the sacraments, preach, and conduct worship services whereas "gospel" means a message, teaching, doctrine, or course of action having certain religious validity. (*Salkov* v. *Commissioner,* 46 T.C. 190, 194 (1966) .)

3

See Revenue Ruling 63-90, 1963-1 C.B. 27, where the Internal Revenue Service held that ministers who held teaching or administrative positions in a religious organization, which was not an integral agency of a church but operated exclusively for religious purposes and devoted to providing religious training to students of various denomination, were not performing services as ministers of the gospel; compare Revenue Ruling 62-171, 1962-2 C.B. 39, where the federal tax agency reached the opposite result in the case of ministers who were employed as administrators and teachers of both religious and secular subjects by parochial schools and universities that were "integral agencies of religious organizations under the authority of a religious body constituting a church or church denomination."