Richard L. Bolton (SBN: 1012552)
Boardman, Suhr, Curry & Field LLP
P.O. Box 927
Madison, Wisconsin 53701-0927
Pro Hac Vice
Michael A. Newdow (SBN: 220444)
NEWDOWLAW
P.O. Box 233345
Sacramento, California 95623
Attorneys for Plaintiffs

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 GOLDSTIEN; 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 **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO UNITED STATES' MOTION TO DISMISS** Date: May 10, 2010 Time: 1:00 p.m. Courtroom: 5 Judge: The Hon. William B. Shubb Trial Date: Net yet set. Action Filed: October 16, 2010

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I. INTRODUCTION.

Sections 107 and 265(a)(6) of the Internal Revenue Code are Taxing and Spending measures enacted pursuant to Article I, Section 8 of the United States Constitution. These Internal Revenue Code provisions violate the Establishment Clause because they provide preferential tax breaks to ministers of the gospel. Church ministers can pay virtually all of their housing costs with tax-free dollars, but other taxpayers, like the plaintiffs, do not have this benefit.

Taxpayers in federal court can challenge unfair Internal Revenue Code provisions that favor religion. The Supreme Court has consistently recognized since Flast v. Cohen, 392 U.S. 83 (1968), that taxpayers have the right to proceed in federal court to challenge Congressional Taxing and Spending measures that favor religion. The Internal Revenue Code was enacted pursuant to Congress' Taxing and Spending authority and the preferential tax breaks of §107 and §265(a)(6) undisputedly provide a much valued benefit to churches and ministers.

Preferential tax benefits provided to religion violate the Establishment Clause. Neutrality is a *sine qua non* of the Establishment Clause, which means that tax benefits cannot be preferentially provided to religion. The Supreme Court has refused to allow government to preferentially favor religion with tax breaks that are not generally available to other taxpayers, as recognized in Texas Monthly v. Bullock, 489 U.S. 1 (1989).

Tax-free housing for ministers is not justifiable as an accommodation of religion, nor is there any historical evidence that Congress enacted such tax breaks to abate perceived entanglement. The Government only now offers this *post hoc* argument, which is unsupported by any evidence.

Sections 107 and 265(a)(6) affirmatively provide lucrative tax benefits to ministers of the gospel. These benefits are not neutrally available to other taxpayers -- and they do not simply accrue by default as the result of eliminating claimed burdens on the free exercise of religion. Sections 107 and 265(a)(6) provide tax breaks to ministers that are not available to other taxpayers. These tax breaks do not abate any substantial burden on free exercise rights.

Sections 107 and 265(a)(6) create greater government entanglement with religion than the "convenience of the employer" test, which is applicable to non-clergy taxpayers under Internal Revenue Code §119. In order to ensure that preferential tax benefits are limited to religion, §107 and §265(a)(6) require complex determinations relating to the tenets, principles and practices of those churches that provide their clergy with housing or cash housing allowances. Because the tax benefits are only available to ministers of the gospel, the Internal Revenue Service must ensure that these ministers are really dispensing religion -- and not something that could be done by a layman. The Internal Revenue Service, therefore, must engage in fact-intensive and instrusive inquiries to ensure that the individual is in fact a "duly ordained, licensed, or commissioned" minister of the gospel and that the minister is really providing religious services "in the exercise of his ministery." Sections 107 and 265(a)(6), as a result, increase government entanglement with religion in order to restrict preferential tax benefits to the truly religious.

Challenges to tax-free housing for ministers are controversial because these lucrative benefits that are not available to other taxpayers. From the perspective of financial self-interest, ministers and churches are understandably concerned, but so are non-clergy who are denied similar benefits. From the perspective of the Establishment

Clause, preferential tax breaks for ministers violate the fundamental principle of neutrality. Tax breaks, including exemptions and deductions, must be neutral and available on the basis of non-religious criteria. That is not the case with §107 and §265(a)(6).

II. STATEMENT OF FACTS.

A. The Parties.

The plaintiffs challenge provisions of the Internal Revenue Code that were enacted pursuant to the power granted to Congress by Article I, Section 8 of the United States Constitution. (Complaint, ¶3.)

The individual plaintiffs are federal taxpayers who object to the allowance of preferential tax benefits under the Internal Revenue Code, as enacted pursuant to Article I, Section 8 of the United States Constitution. (Complaint, ¶4.) They are all members of Freedom From Religion Foundation, Inc. (Complaint, ¶¶9-28.)

The plaintiff, Freedom From Religion Foundation, Inc. ("FFRF"), is a non-profit membership organization that advocates for the separation of church and state and educates on matters of non-theism. FFRF has more than 13,900 members, in every state of the United States, including more than 2,200 members in the State of California. (Complaint, ¶6.) (FFRF's current membership is 14,486, including 2,353 members in California.)

FFRF represents and advocates on behalf of its members throughout the United States. (Complaint, ¶7.)

FFRF's membership includes individuals who are federal and California taxpayers residing in the Eastern District of California, and they are all opposed to government endorsement of religion. (Complaint, ¶8.)

The defendant Timothy Geithner is the Secretary of the United States Department of the Treasury. (Complaint, ¶29.)

The defendant Douglas Shulman is the Commissioner of the Internal Revenue Service. (Complaint, ¶30.)

The defendant Selvi Stanislaus is the Executive Officer of the California Franchise Tax Board. (Complaint, ¶31.) The plaintiffs seek an injunction against Ms. Stanislaus to prevent continuing violations of the Establishment Clause.

B. Sections 107 And 265(a)(6) Violate The Establishment Clause.

The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." Article 1, Sec. 4 of the California Constitution contains a similarly worded Establishment Clause, and Article 16, Sec. 5 of the California Constitution prohibits aid in support of "any religious sect, church, creed or sectarian purpose." (Complaint, ¶32.)

Sections 107 and 265(a)(6) of the Internal Revenue Code, both on their face and as administered by the defendants Geithner and Shulman, violate the Establishment Clause of the First Amendment because they provide tax benefits only to "ministers of the gospel," rather than to a broad class of taxpayers. (Complaint, ¶33.)

Sections 107 and 265(a)(6) subsidize, promote, endorse, favor, and advance churches, religious organizations, and "ministers of the gospel," and they discriminate against secular organizations, including nonprofit organizations such as FFRF that promote atheism, humanism, secularism, and other non-religious worldviews, as well as their employees and members. (Complaint, ¶34.)

In order to administer and apply §§107 and 265(a)(6), the IRS and the Treasury must make sensitive, fact-intensive, intrusive, and subjective determinations dependent

on religious criteria and inquiries, such as whether certain activities constitute "religious worship" or "sacerdotal functions;" whether a member of the clergy is "duly ordained, commissioned, or licensed," or whether a Christian college or other organization is "under the authority of" a church or denomination. (Complaint, ¶35.) (See also Bolton Aff., Exhibits 12-15.)

Sections 107 and 265(a)(6) are not permissible "accommodations" of religion under the Establishment Clause because the income taxation of ministers of the gospel under the general rules that apply to other individuals would not interfere with the religious mission of churches or other organizations or the ministers themselves. (Complaint, ¶36.)

C. California Tax Benefits To Ministers Also Violate The Establishment Clause.

Sections 17131.6 and 17280(d)(2) of the California Revenue and Taxation Code, both on their face and as administered by the California Franchise Tax Board, under the direction of the defendant Selvi Stanislaus, also violate the Establishment Clause of the First Amendment to the United States Constitution and the Establishment Clause of Article 1, Sec. 4, of the California Constitution, as well as Article 16, Sec. 5 of the California Constitution. (Complaint, ¶37.)

Sections 17131.6 and 17280(d)(2) of the California Revenue and Taxation Code correspond to §§107 and 265(a)(6) of the Internal Revenue Code, and they have the same constitutional defects and infirmities under the Establishment Clauses of the California and United States Constitutions. (Complaint, ¶38.)

The defendant Stanislaus, in her official capacity as the Executive Officer of the California Franchise Tax Board, is responsible for administering and implementing Sections 17131.6 and 17280(d)(2). (Complaint, ¶39.)

The exclusion of housing allowances for clergy cost the State of California an estimated $16 million in tax year 2005. (Bolton Aff., Exhibit 4.)

The California Franchise Tax Board has acknowledged that the exclusion of housing allowances from taxable income encourages more people to work for religious organizations:

> This program [exemption for clergy housing allowances] provides tax relief to taxpayers who work for religious organizations. Presumably, religious organizations provide socially beneficial services. Subsidizing these employees may encourage more people to work for these organizations, thereby increasing the level of services that they can provide. However, this program may lead to some economic distortions. This exclusion may cause changes to compensation packages offered to [or demanded by] clergy that would lead to an increase in the portion of their consumption devoted to housing. (Bolton Aff., Exhibit 4.)

The cost of the clergy housing allowance to the Federal Government will be about $700 million in 2010, and the cost of the exclusion will rise to $800 million by 2013. (Bolton Aff., Exhibit 5.)

D. Tax Breaks For Ministers Are Valuable Benefits.

The housing allowance is the most valuable tax break available to clergy. (Bolton Aff., Exhibit 7.)

Ministers and churches fear losing the housing allowance tax break because of their financial self-interest, but not because of any expressed concern about government entanglement. (Bolton Aff., Exhibits 7-11.)

Ministers, in fact, justify the exemption for housing allowances because of their "good works." (Bolton Aff., Exhibits 7-8.)

The church practice of providing in-kind housing to ministers originated when many congregations attracted priests, rabbis and other "ministers of the gospel" to their communities by providing free housing. (Bolton Aff., Exhibit 6.)

E. Section 107 Increases Government Entanglement With Religion.

Although §107 of the Internal Revenue Code does not limit the tax benefits of §107 to ministers who are "duly ordained, commissioned, or licensed," the IRS requires that a minister of the gospel be "duly ordained, commissioned, or licensed" in order for the minister to be entitled to tax benefits. (Complaint, ¶43.)

Treasury Department regulations do not clarify the meaning of "duly ordained, commissioned, or licensed," and difficult determinations often must be made as to whether this requirement is satisfied. (Complaint, ¶44.)

The §107 exclusion is available, according to the IRS, only when a minister is given use of a home or receives a housing allowance as compensation for service performed "in the exercise of" his or her ministry, a requirement borrowed from 26 U.S.C. §1402(c)(4). (Complaint, ¶45.)

The Treasury regulations under §1402(c)(4) contain detailed rules for determining the circumstances under which services performed by a minister are "in the exercise of" his or her ministry. (Complaint, ¶46.)

Section 1.1402(c)-5(b)(2) of the Treasury Regulations provides that service performed by a minister in the exercise of his ministry includes: 1) the ministration of sacerdotal functions; 2) the conduct of religious worship; and 3) 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. (Complaint, ¶47.)

Section 1.1402(c)-5(b)(2)(ii) of the Treasury regulations further provides that service performed by a minister in the control, conduct and maintenance of a religious organization relates to directing, managing, or promoting the activities of such

organization. This section also provides that 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. The term "religious organization" has the same meaning and application as is given to the term for income tax purposes. (Complaint, ¶48.)

Section 1.1402(c)-5(b)(2)(iv) of the Treasury regulations also provides that if a minister is performing service for an organization which is operated as an integral agency of a religious organization under the authority of a religious body constituting a church or church denomination, all service performed by the minister in the control, conduct, and maintenance of such organization is in the exercise of his ministry, including purely secular duties. (Complaint, ¶49.)

Section 265(a)(6) of the Internal Revenue Code further allows a minister of the gospel to claim deductions under §§163 and 164 of the Internal Revenue Code for residential mortgage interest and property taxes, even though the money used to pay such amounts was received from a church or other employer in the form of a tax-exempt §107 allowance. Such "double-dipping" is disallowed for non-clergy taxpayers. (Complaint, ¶50.)

F. Preferential Tax Breaks Favor Religion.

Sections 107 and 265(a)(6) of the Internal Revenue Code provide economic benefits for "ministers of the gospel" that are not provided to other taxpayers, including federal taxpayers who are plaintiff members of FFRF in the Eastern District of California. (Complaint, ¶51.)

Sections 107 and 265(a)(6), both on their face and as administered by the defendants Geithner and Shulman, violate the Establishment Clause of the First Amendment, and the defendants should be enjoined from any further allowance of such tax benefits to ministers of the gospel. (Complaint, ¶52.)

The defendant Stanislaus similarly should be enjoined from allowing or granting tax benefits under §§17131.6 and 17280(d)(2) of the California Revenue and Taxation Code that are available only to ministers of the gospel. (Complaint, ¶53.)

The actions of all the defendants have the effect each year of excluding hundreds of millions of dollars from taxation, and this exclusion is available only to ministers of the gospel. (Complaint, ¶54.)

G. Tax Preferences Favor Churches In Hiring.

The tax preferences granted to ministers of the gospel under the Internal Revenue Code and the California Revenue and Taxation Code also enable churches and other religious organizations to reduce their salaries and compensation costs. (Complaint, ¶55.)

The tax exemption for housing allowances paid to ministers allows churches to reduce their wage costs, while increasing the net income available to ministers. (Bolton Aff., Exhibits 6, 9-10.) Without the exemption for housing allowances, churches would have to increase pay directed toward clergy compensation. (Bolton Aff., Exhibits 6 and 10.)

The employees of secular organizations such as FFRF are not allowed these tax preferences, and FFRF and other secular organizations incur comparatively greater compensation costs than they would if their employees could be considered "ministers of the gospel." (Complaint, ¶56.)

The tax preferences afforded ministers of the gospel constitute a subsidy that results in tangible and direct economic injury to FFRF, and to its members and employees, who cannot claim these benefits. (Complaint, ¶57.)

FFRF, a non-profit organization, competes with churches and religious organizations, but the competition is unfair. The tax subsidies available to churches, religious organizations, and ministers of the gospel are not available to FFRF and its employees. FFRF is thereby placed at a competitive disadvantage relative to churches and other organizations whose employees receive tax subsidies. (Complaint, ¶58.)

III. RELEVANT STATUTES.

Sexction 107 of the Internal Revenue Code provides ministers of the gospel with an exclusion for amounts attributable to in-kind housing, as well as for cash housing allowances, provided as part of a minister's compensation. Section 107 provides:

> Section 107. Rental Value of Parsonages.
>
> In the case of a minister of the gospel, gross income dose not include -
>
> (1) The rental value of a home furnished to him as part of his compensation; or
>
> (2) The rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.

The plaintiffs challenge both subsections of §107. Subsection (1) provides an exclusion for the value of in-kind housing given to ministers as part of the compensation provided to acquire their services. The plaintiffs contend that subsection (1) provides a preferential exemption to ministers without requiring that in-kind housing be provided for the "convenience of the employer," as required by §119 of the Internal Revenue Code, which is applicable to non-clergy taxpayers.

The plaintiffs also challenge subsection (2) of §107, which allows a tax exemption for cash housing allowances paid by churches to ministers of the gospel. The exemption for cash housing allowances is not available under any circumstances to non-clergy taxpayers. The exemption for cash housing allowances is provided only to ministers.

The plaintiffs further challenge §265(a)(6) of the Internal Revenue Code, which allows ministers to deduct mortgage interest and real estate taxes from their taxable income when the interest is paid with a housing allowance that is already tax exempt. Other taxpayers cannot deduct mortgage interest that is paid with tax-exempt income, except military personnel. Section 265(a)(6) provides:

> Section 265. Expenses and Interest Relating to Tax-Exempt Income.
> (a) General Rule. No deduction shall be allowed for -
> (1) Expenses. Any amount otherwise allowable as a deduction which is allocable to one or more classes of income other than interest (whether or not any amount of income of that class or classes is received or accrued) wholly exempt from the taxes imposed by this subtitle, or any amount otherwise allowable under Section 212 (relating to expenses for production of income) which is allocable to interest (whether or not any amount of such interest is received or accrued) wholly exempt from the taxes imposed by this subtitle.
> (6) Section Not to Apply With Respect to Parsonage and Military Housing Allowances. No deduction shall be denied under this section for interest on a mortgage on, or real property taxes on, the home of the taxpayer by reason of the receipt of an amount as -
> (A) A military housing allowance, or
> (B) A parsonage allowance excludable from gross income under Section 107.

Section 265(a)(1) allows ministers of the gospel to "double-dip," first by exempting cash housing allowances provided, and second by allowing ministers to deduct the amount of mortgage interest and real estate taxes paid with the exempt income. This benefit is not generally available to other taxpayers.

IV. LEGAL STANDARD.

A Complaint must include sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendants are violating the law. Id. See also Cavinass v. Horizon Community Learning Center, Inc., 590 F.3d 806, 812 (9th Cir. 2010). Although the court is not bound to accept as true a legal conclusion couched as a factual allegation, the court must take all of the factual allegations in the complaint as true. Id.

The Complaint in the present case satisfies the federal pleading requirements. The detailed factual allegations, and the reasonable inferences therefrom, go well beyond establishing a plausible claim. The Complaint details the financial benefits preferentially provided to ministers of the gospel under Sections 107 and 265 of the Internal Revenue Code. The Complaint further identifies specific "entangling" determinations that must be made as a predicate to exempting a minister's designated housing allowance.

The Complaint also details the critical fact that the plaintiffs are challenging provisions of the Internal Revenue Code itself, which discriminates in favor of ministers. The Complaint alleges and describes the fact that FFRF competes with churches in the "marketplace" of ideas relating to religion and non-theism. The Internal Revenue Code subsidizes churches, however, solely because they employ ministers of the gospel to preach and promote religion. The Internal Revenue Code does not provide a similar subsidy to organizations like FFRF to support their efforts to promote non-theism.

The Complaint in this case includes more than a short recitation of the legal elements of a claim. The Complaint includes substantial factual detail making fully "plausible" plaintiffs' claims, as indicated by relevant supporting materials.

V. THE PLAINTIFFS HAVE STANDING TO CHALLENGE CONGRESSIONAL TAX CODE PREFERENCES FAVORING RELIGION.

A. Flast v. Cohen Predicates Taxpayer Standing On Challenges To Congressional Action Taken Pursuant To Congress' Taxing And Spending Authority Which Allegedly Violates A Specific Constitutional Limitation.

The individual plaintiffs are federal and state taxpayers who oppose government action that gives preferences to religion over non-religion. They contend that provisions in the Internal Revenue Code, enacted by Congress, confer benefits that favor religion, including tax exemptions to "ministers of the gospel." The individual plaintiffs further contend that Internal Revenue Code preferences violate the Establishment Clause, which is a specific limitation on Congress' Taxing and Spending authority. The standing of the individual plaintiffs, therefore, is based upon their status as taxpayers, who are not allowed the same Internal Revenue Code benefits that Congress has provided to ministers of the gospel.

The defendants Geithner and Shulman (hereinafter referred to as the "Government") incorrectly argue that taxpayer standing is limited to challenging just Congress' "spending" authority. The Government contends that Congress' "taxing" authority cannot be challenged by itself in federal court by taxpayers. Discriminatory preferences in the Tax Code supposedly are too attenuated from taxpayer status to be of judicial concern, unlike preferential spending. The Government makes a false distinction, however, which the Supreme Court and other courts have not recognized.

Taxpayer standing includes challenges to religious preferences embedded in the

Internal Revenue Code itself, which is enacted pursuant to Congress' Taxing and Spending authority. Preferential exemptions and deductions otherwise could never be held up to the measure of the Constitution. In fact, the Supreme Court has always decided cases on the merits involving the constitutionality of tax exemptions, deductions and other benefits, including in Walz v. Tax Commission, 397 U.S. 664 (1970) (involving state property tax exemption for religious non-profit organizations). The Government identifies no case in which the Supreme Court has denied standing to taxpayers challenging preferential Internal Revenue Code provisions. Even in Walz, relied upon by the Government, the Supreme Court had no reservations about the plaintiffs' taxpayer standing.

Taxpayer standing is warranted when a complaint is sufficiently tied to Congressional action, and more particularly, linked to Congress' Taxing and Spending authority. Taxpayers, therefore, can object in federal court to matters relating to Congress' exercise of its taxing authority, as well as its spending authority. The Supreme Court has emphasized that Congress itself must be implicated in a taxpayer complaint, via its Taxing and Spending powers, but in this case that nexus exits as to discriminatory Internal Revenue Code provisions.

The necessary relationship between Congress' Taxing and Spending authority and taxpayer status is missing when the responsibility for causing an unconstitutional use of tax revenue lies solely with the Executive Branch of the Government. When Congress directly enacts a discriminatory Internal Revenue Code provision, which collects revenue unfairly from taxpayers, the nexus between Congress and taxpayer is legally and logically satisfied.

In Flast v. Cohen, 392 U.S. 83, 102-103 (1968), the Supreme Court first set out the two-part test for determining whether a federal taxpayer has standing to challenge an unconstitutional preference for religion:

> First, the taxpayer must establish a logical link between that status [taxpayer] and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only if exercises of congressional power under the taxing and spending clause of Art. I, §8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute . . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, §8.

The Supreme Court concluded on the facts presented in Flast that the nexus demanded for taxpayer standing was satisfied. The plaintiffs challenged an exercise by Congress of its power under Art. I, §8, to spend for the general welfare. In addition, the plaintiffs alleged that the exercise by Congress of its power under Art. I, §8, violated the Establishment Clause of the First Amendment, which constrains and limits Congress' Taxing and Spending authority. "Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the Taxing and Spending power would be used to favor one religion over another or to support religion in general." Id at 103. "The Establishment Clause, therefore, was designed as a "specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific Constitutional limitation upon the exercise by Congress of the Taxing and Spending power conferred by Art. I, §8." Id at 104.

The Supreme Court recently reiterated that federal taxpayer standing requires that Congress bear direct responsibility for a claimed Establishment Clause violation. In Hein v. Freedom From Religion Foundation, 551 U.S. 587 (2007), the Court concluded that there must be a link between Congressional action and an alleged Constitutional violation -- the Executive Branch's unilateral decision to spend Congressional appropriations in violation of the Establishment Clause, therefore, did not sufficiently implicate Congress' Taxing and Spending authority in Hein. "Respondents [in Hein] do not challenge any specific Congressional action or appropriation; nor do they ask the Court to invalidate any Congressional enactment or legislatively created program." Id at 605. The Supreme Court has "refused to extend Flast to permit taxpayer standing for Establishment Clause challenges that do not implicate Congress' Taxing and Spending power." Id at 610. Without such Congressional responsibility, i.e., when the challenged action bears no relationship to Congressional action, a chasm exists between the taxpayers' status and the type of legislative enactment attacked.

The Supreme Court in both Flast and Hein makes clear that federal taxpayer standing is limited to complaints by taxpayers that involve Congressional responsibility for the alleged Establishment Clause violation -- and the challenged Congressional action must implicate Congress' Taxing and Spending authority under Art. I, §8. A federal taxpayer is limited to bringing complaints arising from Congressional action taken pursuant to the Taxing and Spending Clause of the Constitution, as is the case in the present matter. The Internal Revenue Code is a product of Congress' taxing authority.

Because Flast and Hein involved only claims relating to the use of Congressional appropriations, rather than the collection of revenue, the Government argues that improper spending is a necessary element in every taxpayer case -- never mind

discriminatory Internal Revenue Code provisions themselves. Because the taxpayers in Flast and Hein did not challenge the imposition of a tax per se, but rather the spending of a tax, the Government claims that taxpayers are precluded from complaining about religious preferences embedded in the Tax Code itself. In short, the Government reads Flast to allow taxpayer standing only to challenge Congressional spending, but not Congressional taxing.

The 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. Nothing is more central to Congress' Taxing and Spending authority than enactment of the Internal Revenue Code itself. The Government turns Flast on its head by arguing that there is no nexus between the Internal Revenue Code and the objections of taxpayers who are subject to that Code. The Government's argument, if accepted, would even prevent taxpayer standing to religious groups opposed to preferential exemptions given exclusively to non-believers.

B. Internal Revenue Code Preferences For Ministers Of The Gospel Provide Valuable Benefits That Are Not Neutrally Available To Other Taxpayers, Including The Plaintiffs.

The Government argues that Internal Revenue Code exemptions are qualitatively different than direct financial grants to religion, but the Government does not deny that preferential tax exemptions provide substantial financial benefits not available to other taxpayers. The Government also concedes that taxpayers would have standing to object to direct financial grants, but such taxpayers supposedly do not have a sufficient interest

to challenge structural Internal Revenue Code preferences favoring religion. The Government's proposed distinction is not convincing.

Here, in the Ninth Circuit, the Court of Appeals has previously rejected the distinction urged by the Government. In Winn v. Arizona Christian School Tuition Organization, 562 F.3d 1002 (9th Cir. 2009), the plaintiffs sought to challenge income tax credits, which allegedly violated the Establishment Clause. The defendants argued that the plaintiff-taxpayers did not have standing under Flast because no money under the Tax Credit Program passed through the State Treasury, and therefore, the Program allegedly could not be characterized as involving any "expenditure" of public funds. The Ninth Circuit rejected the defendants' objection to standing, after first recognizing that tax policies, such as tax exemptions, are the same in effect as direct-grant programs, according to long-accepted Supreme Court precedent:

> The Supreme Court has recognized that State tax policies such as tax deductions, tax exemptions and tax credits are means of "channeling . . . [state] assistance" to private organizations, which can have "an economic effect comparable to that of aid given directly" to the organization. Mueller v. Allen, 463 U.S. 388, 399, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983). The Court has therefore refused to make artificial distinctions between direct grants to religious organizations and tax programs that confer specific benefits on religious organizations, particularly tax credits such as the one challenged here. As the Court noted, "for purposes of determining whether such aid has the effect of advancing religion," it makes no difference whether the qualifying individual "receives an actual cash payment . . . [or] is allowed to reduce . . . the sum he would otherwise be obliged to pay over to the State." Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 790-91, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973). In either case, "the money involved represents a charge made upon the State for the purpose of religious education." Id at 791; see also, Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221, 236, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987) (Scalia, J., dissenting) ("Our opinions have long recognized -- in the First Amendment context as elsewhere -- the reality that tax exemptions, credits, and deductions are a form of subsidy that is administered through the tax system."). Winn, 562 F.3d at 1009.

The Court of Appeals further concluded in Winn that a sufficient nexus existed between the taxpayers' standing as taxpayers and the legislative exercise of taxing and spending power. In Winn, the Arizona Legislature promulgated a tax credit under the State's analogous Taxing and Spending authority, and therefore the Legislature effectively created a grant program mediated through Arizona taxpayers. In concluding that the plaintiff-taxpayers had standing, the Ninth Circuit emphatically recognized that the Supreme Court has repeatedly decided the merits of Establishment Clause challenges brought by taxpayers challenging tax credits, deductions and exemptions:

> The Supreme Court has repeatedly decided Establishment Clause challenges brought by state taxpayers against state tax credit, tax deduction and tax exemption policies, without ever suggesting that such taxpayers lacked Art. III standing. See, e.g., Mueller, 463 U.S. at 390 (state income tax deduction for school expenses that could be claimed for expenses at religious schools); Nyquist, 413 U.S. at 789-90 (hybrid state tax deduction -- Tax Credit Program for tuition paid to private schools); Hunt v. McNair, 413 U.S. 734, 737-38, 93 S. Ct. 2868, 37 L. Ed. 2d 923 (1973) (state tax exemption for state-issued revenue bonds that went in part to religious schools); Walz v. Tax Commission, 397 U.S. 664, 666, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970) (state property tax exemption for religious non-profit organizations). The Supreme Court has also repeatedly decided challenges brought by state taxpayers to indirect aid programs -- where the ultimate decision to confer aid rested with a private individual and not the government -- and again never suggested that the taxpayers lack standing. See, e.g., Zelman, 536 U.S. at 645 (state tuition grants to parents for public or private schools); Nyquist, 413 U.S. at 781 (state tuition grants to parents for private schools). Although we acknowledge that "the Court's exercise of jurisdiction . . . is not precedent for the existence of jurisdiction," . . . we also note that the [Supreme] Court has rejected the suggestion that its consistent practice of exercising jurisdiction amounts to "mere *sub silentio* holdings" that "command no respect." Hibbs, 542 U.S. at 94. We, therefore, hold that plaintiffs have standing as taxpayers to challenge Section 1089 for allegedly violating the Establishment Clause. Winn, 562 F.3d at 1010-11.

The Government tries to avoid Winn with phantom distinctions. The Government claims that the tax credit in Winn effectively constituted a program of disbursement to benefited schools, while no such "program" exists with regard to the income tax

exemptions for ministers of the gospel. In fact, however, the beneficiaries of the tax exemptions in this case are the ministers eligible for the exemption. They are the intended class of beneficiaries. The exemptions at issue, therefore, are similar to the tax credits in Winn in terms of causing a distribution of benefits to a targeted group. In each instance, the tax policy operates as a "powerful legislative device for directing money" to private organizations and individuals. As in Winn, therefore, the tax exemptions in this case undisputedly constitute a benefit that is not neutrally available, and the benefit arises as a result of the Government's program of preference for ministers of the gospel.

The Government's attempt to distinguish between "dollar-for-dollar" tax credits and income exemptions and deductions is unpersuasive. The Government ignores the economic reality that income exemptions and deductions also have the effect of diverting tax payments to the targeted class of ministers based on the excludable amount of their housing allowance. Just as a home-owner exemption or deduction for expenses incurred to make a home more energy efficient constitute a program of Government support, so also the exemption to ministers operates as a subsidy to ministers for providing religious services "in the exercise of their ministry," which is a necessary requirement of the exemption.

Preferential treatment of an individual or organization under the Internal Revenue Code always has the effect of subsidizing the preferred group. The Supreme Court recognized this in Regan v. Taxation with Representation of Washington, 461 U.S. 540, 544 (1983):

> Both tax exemptions and tax deductions are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions.

Similarly, in Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989), Justice Brennan reasoned that "every tax exemption constitutes a subsidy that affects non-qualifying taxpayers, forcing them to become 'indirect and vicarious donors.' " To reject taxpayer standing in such a situation, moreover, "would effectively insulate under-inclusive statutes from Constitutional challenge." Id at 8, citing Arkansas Writers Project, 481 U.S. at 227. In Arkansas Writers Project, the Court rejected an argument against standing similar to the present case because it was "inconsistent with numerous decisions of this Court in which we have considered claims that others similarly situated were exempt from the operation of a state law adversely affecting the claimant." Id.

In Nyquist, 413 U.S. at 790-91, the Supreme Court again recognized that "in practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion," between a tax benefit and a direct tuition grant. In either instance, "special tax benefits cannot be squared with the principle of neutrality established by the decisions of this [Supreme] Court." Id at 793.

Significantly, taxpayer standing to challenge a tax exemption was also not a bar to jurisdiction in the principal Supreme Court case cited by the Government, decided less than two years after Flast. In Walz v. Tax Commission, 397 U.S. 664 (1970), the Supreme Court substantively addressed taxpayer challenges to the constitutionality of a charitable property tax exemption that included church property. Taxpayer standing was not a bar.

The Supreme Court has never viewed taxpayer objections to preferential exemptions as being beyond the jurisdiction of the Court. In fact, in Hibbs v. Winn, 542 U.S. 88 (2004), the Supreme Court concluded that not even the Tax Injunction Act will bar a suit by taxpayers objecting to an income-tax credit provision. The plaintiffs in

Hibbs were taxpayers who did not qualify for an income tax credit and they therefore brought an action in federal court challenging the Tax Credit Statute and sought to enjoin its operation on Establishment Clause grounds. The plaintiffs did not contest their own tax liability, nor did they seek to impede Arizona's receipt of tax revenues.

The Supreme Court concluded in Hibbs that the taxpayers could proceed with their lawsuit without any impediment by the Tax Injunction Act, "consistent with the decades-long understanding prevailing on this issue." Id at 112. The Court concluded that the Tax Injunction Act only restrained state taxpayers from instituting federal actions to contest their liability for state taxes, but the Act does not stop third parties from pursuing Constitutional challenges to preferential tax benefits in a federal forum. The Court noted a long history of cases, which implicitly belie the Government's claim that such cases all involve plaintiffs without standing:

> Further, numerous federal-court decisions--including decisions of this Court reviewing lower federal-court judgments--have reached the merits of third-party constitutional challenges to tax benefits without mentioning the TIA. e.g., Byrne v. Public Funds for Public Schools of New Jersey, 442 U. S. 907 (1979), summarily aff'g 590 F.2d 514(CA3 1979) (state tax deduction for taxpayers with children attending nonpublic schools violates Establishment Clause), aff'g 444 F. Supp. 1228 (NJ 1978); Franchise Tax Board of California v. United Americans for Public Schools, 419 U. S. 890 (1974) (summarily affirming district-court judgment striking down state statute that provided income-tax reductions for taxpayers sending children to nonpublic schools); Committee for Public Ed. & Religious Liberty v. Nyquist, 413 U. S. 756 (1973) (state tax benefits for parents of children attending nonpublic schools violates Establishment Clause), rev'g in relevant part 350 F. Supp. 655 (SDNY 1972) (three-judge court); Grit v. Wolman, 413 U. S. 901 (1973), summarily aff'g Kosydar v. Wolman, 353 F. Supp. 744, 755-756 (SD Ohio 1972) (three-judge court) (state tax credits for expenses relating to children's enrollment in nonpublic schools violate Establishment Clause); Finlator v. Powers, 902 F.2d 1158 (CA4 1990) (state statute exempting Christian Bibles, but not holy books of other religions or other books, from state tax violates Establishment Clause); Luthens v.Bair, 788 F. Supp. 1032 (SD Iowa 1992) (state law authorizing tax benefit for tuition payments and textbook purchases does not violate Establishment Clause); Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316 (Minn. 1978) (three-judge court) (state law

> allowing parents of public or private school students to claim part of tuition and transportation expenses as tax deduction does not violate Establishment Clause). Id at 108.

The Supreme Court also recognized in Hibbs the distinction between taxpayer claims that may reduce state revenues and third-party claims that may enlarge state revenues. The Supreme Court acknowledged that "numerous federal-court decisions, including the decisions of this [Supreme] Court reviewing lower federal-court judgments -- have reached the merits of third-party Constitutional challenges to tax benefits without mentioning the TIA [Tax Injunction Act]." Id at 110. In fact, "in a procession of cases not rationally distinguishable from this one, no Justice or member of the bar of this Court has ever raised a Section 1341 objection that, according to the petitioner in this case, should have caused us to order dismissal of the action for want of jurisdiction." Id at 111-112.

Finally, in Warren v. Commissioner of Internal Revenue, 302 F.3d 1012 (9th Cir. 2002), the Ninth Circuit Court of Appeals also acknowledged taxpayer standing to challenge the same preferential Internal Revenue Code exemptions at issue in the present case. In Warren, Rev. Richard Warren received approximately $80,000 annually from his church as a cash housing allowance, which he claimed as an exclusion under §107(2) of the Internal Revenue Code. The IRS then filed a Notice of Deficiency, claiming that Rev. Warren's exclusion was excessive because it exceeded the home's fair rental value. That was the issue initially raised in Warren, but after oral argument, the Court of Appeals appointed Professor Erwin Chemerinsky to consider whether the §107(2) exemption violated the Establishment Clause because it provides a tax benefit available only to ministers of the gospel. The parties to the Warren appeal, in the meantime,

settled the immediate issue of Rev. Warren's alleged deficiency. Professor Chemerinsky then filed a Motion to Intervene, while the parties filed a Stipulation of Dismissal.

The Ninth Circuit subsequently denied Professor Chemerinsky's Motion to Intervene, but without prejudice to his right to file a separate civil action. Neither the parties' voluntary dismissal, nor the passage of subsequent Congressional legislation, resolved the Constitutionality of §107(2), but "because Professor Chemerinsky may raise this issue through a separate lawsuit, our [Ninth Circuit's] denial of intervention will not impair his ability to protect his interest as a taxpayer." Id at 1015. "If Professor Chemerinsky chooses to file a separate taxpayer action, the new parties could plead their claims and defenses more specifically and obtain whatever limited discovery and evidentiary proceedings are necessary." Id.

The Government's argument in the present case, to the effect that preferential tax exemptions cannot be challenged in court by third-party taxpayers, is wrong as a matter of law. Preferential tax exemptions undisputedly provide significant benefits to ministers of the gospel, and such benefits are the result of Internal Revenue Code exemptions enacted by Congress pursuant to its Taxing and Spending authority derived from Art. I, §8. An obvious nexus exists, moreover, between the plaintiffs' status and the preferential tax exemptions to which they object on grounds specifically proscribed by the Establishment Clause. Taxpayer standing, in these circumstances, is fully consistent with applicable Supreme Court rationale and precedent holding that exemptions that favor religion are the same as direct subsidies.

C. Preferential Tax Exemptions Subsidize Religion At The Expense Of Other Taxpayers, Including The Plaintiffs.

Tax exemptions like those at issue in this case are recognized by the Federal Government itself to be "tax expenditures." In 1974, the Congressional Budget and

Impoundment Control Act was enacted requiring that a list of tax expenditures be included in the annual Budget in order to control spending and make tax provisions more transparent. Tax expenditures are defined in the Congressional Budget Act of 1974 as "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability." These expenditures, such as those resulting from special tax exemptions, effectively subsidize the beneficiary of the exemption:

> Tax expenditures are government revenue losses resulting from provisions in the Tax Code that allow a taxpayer or business to reduce his or her tax burden by taking certain deductions, exemptions, or credits. Tax expenditures have the same effect on the Federal Budget as spending. They can have effects on recipients similar to grants or other types of subsidies. For instance, if the Government wants to encourage people to buy solar panels for their homes, they can either send checks to those who promise to buy the panels or offer tax breaks once the panels have been purchased.
>
> Tax expenditures can affect more than just the targeted activity. When certain people or organizations are selected to receive targeted tax breaks through tax subsidies, the size of the tax base is reduced and tax rates then have to be increased for everyone in order to bring in an equivalent amount of revenue to the pre-tax expenditure level. Further, if a tax subsidy is not expressly intended to make a tax more efficient, then it will most likely produce an economic inefficiency. For example, when a tax subsidy is given to businesses to invest in a specific commodity, private investment is shifted from some other commodity into the tax-preferred area of investment without regard to return on investment. This creates an economic inefficiency. Tax subsidies can also end up rewarding taxpayers for behavior they would have engaged in regardless of the tax benefit. (See Subsidy Scope-Tax Expenditures, Pew Charitable Trusts.)

The tax exemptions at issue in the present case constitute classic and recognized tax expenditures, costing the Federal Government $700 million this year alone. (Bolton Aff., Exhibit 5; See also Zelman v. Simmons-Harris, 536 U.S. 639, 666 (2002) (O'Connor, J. Concurring) (noting that parsonage exemption for ministers lowered

federal revenues by around $500 million in 2002).) Supreme Court Justice Thomas has identified the very exemption at issue in this case as epitomizing a tax expenditure:

> In the tax literature, this is called a "tax expenditure," a concept "based upon recognition of the fact that a government can appropriate money to a particular person or group by using a special, narrowly directed tax deduction or exclusion, instead of by using ordinary direct spending mechanisms. For example, a government with a general income tax, wanting to add $7,000 to the spendable income of a preacher whose top tax rate is 30%, has two ways of subsidizing him. The government can send the preacher a check for $10,000 and tax him on all of his income, or it can authorize him to reduce his taxable income by $23,333.33 [resulting in a tax saving of $7,000]. If the direct payment were itself taxable and did not alter his tax bracket, the preacher would receive the same benefit from the tax deduction as he would from the direct payment." Wolfman, Tax Expenditures: From Idea to Ideology, 99 Harv. L. Rev. 491-492 (1985). In fact, Congress has provided a similar "tax expenditure" in §107 of the Internal Revenue Code by granting a "minister of the gospel" an unlimited exclusion for the rental value of any home furnished as part of his pay or for the rental allowance paid to him. Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 861, n. 5 (1995) (Thomas, J., Concurring).

The large body of literature about tax expenditures accepts, like Justice Thomas, "the basic concept [that] special exemptions from tax function as subsidies." Id, quoting Adler, The Internal Revenue Code, The Constitution, and The Courts: The Use of Tax Expenditure Analysis in Judicial Decision-Making, 28 Wake Forest L. Rev. 855, 862, n. 30 (1993). See also, Opinion of the Justices of the Massachusetts Supreme Court to the Senate, 514 N.E. 2d 353, 355 (Mass. 1987) (recognizing the practical equivalence of tax deductions and direct government grants).

In Johnson v. Economic Development Corporation, 241 F.3d 501 (6th Cir. 2001), the Sixth Circuit Court of Appeals also concluded that the plaintiff had taxpayer standing to challenge the defendant's issuance of tax-exempt revenue bonds to a religious academy. In that case also, the defendant had argued that the requisite financial interest must be a direct expenditure of government funds, rather than a loss of revenue accruing

from a tax exemption, but the Court concluded that a challenged exemption can provide a basis for taxpayer standing, as consistently recognized by the Supreme Court:

> Contrary to Defendant's argument, the Supreme Court in Doremus did not distinguish between an expenditure and loss of revenue in determining whether there was a "good-faith pocketbook injury." Under Doremus, state taxpayer standing simply requires that there is a "requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct." 342 U.S. at 435. Moreover, the Supreme Court has decided several cases involving Establishment Clause challenges to tax exemptions as they relate to religious entities. See e.g., Walz v. Tax Commission, 397 U.S. 664, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970) (property tax exemption for church(es)); Hunt v. McNair, 413 U.S. 734, 737 L. Ed. 2d 923, 93 S. Ct. 2868 (1973) (tax exemption for state issued revenue bonds, some of which went to religiously-affiliated school(s)); Mueller v. Allen, 463 U.S. 388, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983) (state income tax deduction for school expenses where some of taxpayers' children attended religious schools).

The Court concluded in Johnson that the plaintiff satisfied applicable tests for taxpayer standing, thereby allowing the challenge to substantively move forward. See also, American Civil Liberties Union v. Crawford, 2000 U.S. Dist. LEXIS 17270 (E. D. LA 2000) (court rejected a challenge to the standing of plaintiff to challenge tax exemption allowed to others); Public Funds for Public Schools of New Jersey v. Byrne, 590 F.2d 514, 516 n. 3 (3rd Cir. 1979) (plaintiffs challenged New Jersey income tax exemptions as violative of the Establishment Clause; the Court concluded that "the individual plaintiffs, as taxpayers, have standing under Flast v. Cohen", and the Supreme Court summarily affirmed).

The Fourth Circuit Court of Appeals has also recognized that non-exempt taxpayers have standing to challenge the constitutionality of preferential tax exemptions. In Finlator v. Powers, 902 F.2d 1158, 1160-1161 (4th Cir. 1990), the Court too noted that the Supreme Court has consistently recognized the standing of non-exempt taxpayers to challenge the constitutionality of such otherwise underinclusive statutes.

The Court in Finlator, 902 F.2d at 1161-62, also rejected the argument made by the Government that non-exempt parties must administratively contest a tax prior to payment, refuse to pay the tax, pay the tax under protest or reservation of rights, pay the tax and seek refund, or take some other action to contest their own liability for the underlying tax. The taxpayers in Finlator were found to have standing to raise their constitutional objection to the preferential tax exemption at issue without taking prior administrative action.

By contrast, in In Re United States Catholic Conference v. Baker, 885 F.2d 1020, 1028-29 (2nd Cir. 1989), the Second Circuit Court of Appeals denied plaintiffs taxpayer standing where they did not make a challenge to the Internal Revenue Code itself, i.e., "they do not contend that the Code favors the Church." The taxpayers instead complained that the Internal Revenue Service was lax in its enforcement of statutory restrictions applicable to exempt entities. The Court held that a challenge to an exemption itself, however, was necessary in order to implicate Congress' exercise of its Taxing and Spending power, as required by Flast and Hein.

Here, the individual plaintiffs have standing as taxpayers to object to preferential tax exemptions favoring religion embedded in the Internal Revenue Code itself. The preferences at issue were enacted pursuant to Congress' Taxing and Spending authority under Art. I, §8 of the Constitution. The preferential Internal Revenue Code exemptions, moreover, undisputedly confer a significant benefit to ministers of the gospel, and this benefit is not neutrally available to other taxpayers, including the plaintiffs. Finally, the plaintiffs object to the preferential Internal Revenue Code preferences as violations of the Establishment Clause, which is a specific and recognized limitation on Congress' Taxing

and Spending authority. Each of the elements for taxpayer standing articulated in Flast is clearly satisfied in this case.

In the end, the Government does not argue convincingly that taxpayers should not have standing to make objections to unconstitutional preferences enacted as part of the Internal Revenue Code itself. The Government acknowledges that a taxpayer may object to the unconstitutional use of tax proceeds, but argues that a taxpayer's interest in a neutral taxing scheme is too attenuated from the individual's status as a taxpayer. In fact, however, the Government misreads and misapprehends the requirements for taxpayer standing, all of which are satisfied by the challenge made in this case. To deny standing to challenge intrinsic infirmities in the Internal Revenue Code itself will merely invite the continued subterfuge of using the Code as a means to preferentially subsidize religion in violation of the Establishment Clause.

D. FFRF Also Has Standing To Challenge Tax Preferences That Give Churches A Competitive Advantage.

FFRF has two bases for standing. First, FFRF claims standing as a representative of its members. Second, FFRF claims standing because Internal Revenue Code preferences favoring churches cause FFRF a competitive disadvantage.

FFRF has representational standing in this case under the reasoning of Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 343 (1977). Representational standing is appropriate if: (1) FFRF's members would otherwise have standing to sue on their own rights; (2) the interests that FFRF seeks to vindicate are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Here, FFRF has standing under the criteria specified in Hunt, including because it has individual members, who are also plaintiffs with standing to sue in their own right, as

discussed above. The interests that FFRF seeks to vindicate, moreover, are clearly germane to the organization's purpose, as described in paragraphs 6 and 7 of plaintiffs' Complaint. FFRF is a non-profit membership organization that advocates for the separation of church and state and educates on matters of non-theism. It has 14,486 total members, with members in every state of the United States, including 2,353 members in the State of California. (Complaint, ¶6.) FFRF also represents and advocates on behalf of its members throughout the United States. (Complaint, ¶7.) Finally, FFRF's membership includes individuals who are federal and California taxpayers residing in the Eastern District of California, and they are opposed to government endorsement of religion. (Complaint, ¶8.) The individual plaintiffs in this matter, in fact, are all FFRF members residing in the Eastern District of California. (Complaint, ¶¶9-28.)

FFRF also has standing to pursue this action because of its own direct injury caused by Internal Revenue Code preferences for religion. The Supreme Court recognizes that injuries to competitors are legally cognizable for standing. See Clarke v. Securities Industry Association, 479 U.S. 388, 403 (1987). Implicit in the Supreme Court's reasoning is a requirement that in order to establish an injury as a competitor, a plaintiff must show that it competes with the party to whom the government has bestowed the assertedly illegal benefit. See In Re: United States Catholic Conference v. Baker, 885 F2d 1020, 1029 (2nd Cir. 1989). See also Becker v. Federal Election Comission, 230 F3d 381, 388 (1st Cir. 2000); and Marshall & Ilsley Corporation v. Heimann, 652 F2d 685, 692 (7th Cir. 1981).

FFRF is clearly a "competitor" of the benefited churches. FFRF advocates for the separation of church and state and educates on matters of non-theism. (Complaint, ¶6.) By contrast, churches and organized religion are proselytizers, seeking to convert

individuals into believers of the tenets of each church's particular religious beliefs. As a result, FFRF, a non-profit organization, competes with churches and religious organizations, as alleged in paragraph 58 of plaintiffs' Complaint.

The Complaint specifically alleges that tax preferences granted to ministers of the gospel under the Internal Revenue Code enable churches and other religious organizations to reduce their salaries and compensation costs. (Complaint, ¶55.) This, again, is not just a conclusory allegation without reasonable foundation, as legal scholars have also noted that tax benefits to ministers of the gospel provide "a significant financial benefit to religion because churches and synagogues and mosques can pay their clergy much less because of the tax-free dollars. Without the parsonage exemption, religious institutions would have to pay clergy significantly more to make up this difference." Chemerinsky, Erwin, The Parsonage Exemption Violates the Establishment Clause and Should be Declared Unconstitutional, 24 Whittier Law Review 707, 713 (2003). (See also Bolton Aff., Exhibits 4, 6, 9 and 10.)

By contrast, the employees of organizations such as FFRF are not allowed the tax preferences given to religion, and so FFRF incurs comparatively greater wage costs than if its employees were ministers of the gospel. (Complaint, ¶56.) The tax preferences afforded ministers of the gospel, which reduce wage costs of churches, constitute a subsidy to religion that is not available to FFRF, who cannot claim such benefits, and this results in a tangible and direct economic injury to FFRF, i.e., the government has given FFRF's "competitors" an economic benefit that is not also available to FFRF. (Complaint, ¶57.) The tax subsidies available to churches, religious organizations, and ministers of the gospel are not available to FFRF and its employees, which puts FFRF at

a relative disadvantage to churches and other organizations whose employees receive tax subsidies. (Complaint, ¶58.)

The Government feigns ignorance of the competition between FFRF and the churches benefited by housing exemptions, which is specifically alleged in the Complaint -- and widely known. The Government also seemingly pretends not to understand that subsidizing churches, but not organizations of non-belief, gives an advantage to the subsidized group. The churches, themselves, have not been shy about directly articulating what is at stake: The increased money that churches would pay if they lose government subsidization. That was the premise of the proposed intervention in this action by Rev. Rodgers, and that is one of the reasons for FFRF's own standing in this lawsuit. (Bolton Aff., Exhibits 4, 6, 9 and 10.)

The Government might better understand FFRF's basis for standing if the situation confronting FFRF was reversed. If Congress adopted tax preferences that reduced the operating costs only for organizations like FFRF, then the complaints of many churches would certainly be heard by the courts. The fact that an organization promoting non-theism complains about preferences given to churches, however, is just as appropriate for judicial determination under the Establishment Clause. The promotion of religion in preference to non-belief is every bit as offensive to the Establishment Clause as the preference of any single religion. For that reason, FFRF does have standing in its own right to pursue this action, as well as in its representative capacity.

VI. INTERNAL REVENUE CODE SECTION 107 VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT IS NOT NEUTRAL AND PROVIDES SIGNIFICANT TAX BENEFITS EXCLUSIVELY TO MINISTERS OF THE GOSPEL.

A. Tax Benefits That Are Not Neutrally Available To A Broad Range Of Groups Or Persons Without Regard To Religion Violate The Establishment Clause.

Tax benefits that are not neutral and available to a broad range of groups or persons without regard to religion violate the Establishment Clause. The Supreme Court recognized this principle in Texas Monthly v. Bullock, 489 U.S. 1 (1989), and has never waivered since in its holdings that neutrality is a necessary requirement of such government largesse. In the present case, Internal Revenue Code §107 is not neutral, and therefore, it is unconstitutional.

The absence of neutrality is most evident in §107(2). Section 107(2) allows ministers of the gospel to exclude from their income the full amount of any housing allowance provided by their church. This exemption for cash payments is available only to ministers of the gospel; other taxpayers cannot deduct similar cash allowances, even if provided for the "convenience of the employer." The §107(2) exemption, therefore, confers a substantial financial benefit to ministers, which is not neutrally available to any other taxpayers.

The core notion animating the Establishment Clause is that government may not be overtly hostile to religion -- but government also may not favor religion over non-religion. Texas Monthly 489 U.S. at 9-10. "When the government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens non-beneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . it provides unjustifiable awards of assistance to religious organizations and cannot but convey a

message of endorsement to slighted members of the community." Id at 15, quoting Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., Concurring in Judgment).

Tax exemptions provided exclusively to taxpayers on the basis of religion have never been upheld by the Supreme Court, including in Walz v. Tax Commission of New York City, 397 U.S. 664 (1970). In Walz, the Court sustained a property tax exemption that "applied to religious properties no less than to real estate owned by a wide array of non-profit organizations." Texas Monthly, 489 U.S. at 11. The broad class of non-religious as well as religious beneficiaries was a critical factor in Walz, as well as in other cases decided by the Supreme Court. This factor is consistently emphasized by requiring that benefits to religious organizations also flow to a large number of non-religious groups. Id. "Indeed, were those benefits confined to religious organizations [in Walz], they could not have appeared other than as state sponsorship of religion; if that were so, we [Supreme Court] would not have hesitated to strike them down for lacking a secular purpose and effect." Id.

In reaching its decision in Texas Monthly, Justice Brennan emphasized the importance in Walz that the property tax exemption at issue flowed to a large number of non-religious groups. "The breadth of New York's property tax exemption was essential to our [Supreme Court's] holding that it was not aimed at establishing, sponsoring, or supporting religion." Texas Monthly, 489 U.S.at 12. The Walz decision "in no way intimated that the exemption would have been valid had it applied *only* to the property of religious groups or had it lacked a permissible secular objective." Id at 13, n. 2. (Emphasis in original.) Justice Brennan's explanation in Texas Monthly, moreover, reflected the Court's own long-accepted understanding of the holding in Walz:

> Nor is our reading of Walz by any means novel. Indeed, it has been the Court's accepted understanding of the holding in Walz for almost 20 years. In Gillette v. United States, 401 U.S. 437, 454 (1971), we said: "Neutrality in matters of religion is not inconsistent with benevolence by way of exemptions from onerous duties, Walz v. Tax Commission, 397 U.S. at 669, so long as an exemption is tailored broadly enough that it reflects valid secular purposes." We read Walz to stand for the same proposition in Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 793-794 (1973)."Without intimating whether this factor alone might have controlling significance in another context in some future case," we noted that the breadth of an exemption for religious groups is unquestionably an "important factor" in assessing its constitutionality. Id at 794. Our [Supreme Court] opinion today builds on established precedents; it does not repudiate them. Texas Monthly, 489 U.S.at 13, n. 3.

The Walz decision is distinguishable in other respects as well, including the fact that property taxes are generally imposed without regard to the taxpayer's ability to pay, whereas the federal income tax laws "take ability to pay" into account, including the different rates of taxation and low-income deductions.

The exemption in Walz also reduced potential "entanglement" issues between church and state, including the need to make determinations of property value. Section 107, by contrast, does not avoid entanglement. On the contrary, §107(2) requires fact-sensitive inquiries into the "fair rental value" of the property, and more important, §107 also requires complex inquiries regarding religious concepts, such as defining "ministers of the gospel," "sacerdotal function" and "integral agency" of a church or church denomination. The potential for entanglement, therefore, is increased by virtue of §107, which was not the case in Walz.

Finally, Walz was based in part on a unique historical rationale relating to property tax exemptions for church property dating back to the founding of the Country. Unlike in Walz, however, the exemptions created by §107 lack this historical rationale. The exemption in §107(2) for cash housing allowances paid to ministers was only first

enacted in 1954, and has been questioned ever since. Cf. Kirk v. Commissioner, 51 T.C. 66, 72 (1968), affd. 425 F.2d 492 (D.C. Cir. 1970). As is apparent, therefore, the Walz decision is distinguishable from the present case on many bases.

What remains crucial in evaluating a tax subsidy afforded to ministers is whether some "overarching secular purpose justifies like benefits for non-religious groups." Texas Monthly at 15, n. 4. "In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." Id at 17, quoting Walz, 397 U.S. at 696.

The Supreme Court rejected in Texas Monthly the counter-argument that a sales tax exemption removed a government-imposed burden on the free exercise of religion. According to the Court, "it is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens claimant's freedom to exercise religious rights." Id at 18. In Texas Monthly, the payment of a sales tax to purchasers of religious books did not in any way offend their religious beliefs or inhibit religious activity. A significant deterrence of free exercise rights, however, is necessary in order to sustain a legislative exemption as an appropriate accommodation. Id at 18, n. 8.

Finally, the Supreme Court concluded in Texas Monthly that the tax exemption at issue there was not mandated, or even favored, by the Establishment Clause in order to avoid excessive entanglement. "Not only does the exemption seem a blatant endorsement of religion, but it appears on its face, to produce a greater state entanglement with religion than the denial of an exemption." Id at 19. The risk of entanglement existed

under the exemption statute, according to the Court, because of the need to determine that a publication qualified as being religious. Id.

The Government's attempt to limit Texas Monthly to tax exemptions for publications involving religious speech is not a distinction that favors the Government. Here, the §107 exclusion for ministers is available only when a minister is given use of a home or receives a housing allowance as compensation for services performed "in the exercise of" his or her ministry. Services performed by a minister in the exercise of his ministry include: (1) the administration of sacerdotal functions; (2) the conduct of religious worship; and (3) the control, conduct and maintenance of religious organizations under the authority of a religious body constituting a church or church denomination. In effect, the §107 tax breaks for ministers constitute "preferential support for the communication of religious messages," every bit as much as in Texas Monthly. Id at 28 (Blackmun, J. Concurring).

B. A Majority Of The Supreme Court Agreed On The Establishment Clause Principles In Texas Monthly.

The controlling principles recognized in Texas Monthly were joined in by a majority of five members of the Court. Justice Brennan, joined by Justices Marshall and Stephens, thoroughly distinguished Walz, while concluding that preferential tax exemptions for religion violate the Establishment Clause. Justice Blackmun concurred, joined by Justice O'Connor, and they concluded that the case could be decided on the basis that "a tax exemption *limited to* the sale of religious literature by religious organizations violates the Establishment Clause," without deciding the Free Exercise issues in the case. Id at 28. (Blackmun, Concurring.) In answering the decisive question, Justice Blackmun agreed with the opinion of Justice Brennan:

> In this case, by confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communication of religious messages. Although some forms of accommodating religion are constitutionally permissible, see Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987), this one surely is not. A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable . . . . The Establishment Clause prohibits a tax exemption limited to the sale of religious literature. Texas Monthly, 489 U.S. at 28.

Although Texas Monthly is described by the Government in this case as merely a plurality decision by a splintered Court, it is really a conclusive opinion of the Court on the Establishment Clause issue. The Government implies that Texas Monthly is not binding authority because the five justices who deemed Texas' sales and use tax exemption for religious publications unconstitutional did not sign a single opinion. Marks v. United States, 430 U.S. 188, 193 (1997), however, recognizes the authoritative character of holdings supported by separate opinions that comprise a Court majority. When a fragmented court decides a case in which no single rationale explaining the result enjoys the assent of five justices, the holding of the court may be viewed as that position taken by those Justices who concurred in the judgment on the narrowest grounds. Id. Using this standard, Texas Monthly is an easy case to read because the Court does not even count as being "fragmented" on the Establishment Clause issue.

No meaningful difference exists between Justice Brennan's plurality opinion and Justice Blackmun's concurrence in Texas Monthly applying the Establishment Cause to tax preferences for religious activities. Justice Blackmun, joined by Justice O'Connor, declined to join Justice Brennan's opinion only because Justice Blackmun thought that the Court should not decide what the Free Exercise Clause required regarding the taxation of religious publications. Justice Blackmun, however, did not voice any

disagreement with Justice Brennan's reading of Walz, nor did he leave any doubt that a tax exemption solely for religious publications contravenes the Establishment Clause.

Justice Scalia, in dissent, construed the majority holding in Texas Monthly to prohibit preferential tax benefits provided exclusively to religion. Religious tax exemptions "of the type the Court invalidates today," including the §107 housing exemption, "are likewise affected" by the Texas Monthly holding, according to Justice Scalia. Texas Monthly, 489 U.S. at 24-25. Justice Scalia specifically identified the §107 housing allowance as being within the scope of the Court's holding.

The division within the Texas Monthly majority on the Free Exercise issue is irrelevant to the constitutionality of §107(2) because a Court majority stated unequivocally that a tax exemption solely for religious entities cannot be constitutional, as opposed to a tax break that is available to a broader class of entities, and that can be justified by a permissible secular purpose. See, Rakowski, The Parsonage Exclusion: New Developments, Tax Notes, July 15, 2002, 429; See also Foster, Matthew, Note: The Parsonage Allowance Exclusion: Past, Present and Future, 44 Vand. L. Rev. 149, 175-176 (1991):

> In 1989 the Supreme Court struck down a statute that granted estate sales tax exemption to religious periodicals in Texas Monthly, Inc v. Bullock. A plurality composed of Justices Brennan, Marshall and Stevens relied primarily on Walz v. Tax Commission of New York to hold that the statute was too narrow to pass Establishment Clause scrutiny. ...In a concurring opinion, Justices Blackmun and O'Connor held that a state may not give a tax benefit to proponents of religion without also giving it to others who actively might activate disbelief in religion.
>
> The plurality and concurring opinions in Texas Monthly raise serious doubts about the constitutionality of [Internal Revenue Code] Section 107. Specifically, Section 107 grants a tax break to those who advocate religion for a living, but denies the savings to taxpayers who do not meet the IRS qualifications for a minister of the gospel. Section 107 is drawn and interpreted narrowly and does not embrace a broad class of beneficiaries that might legitimize it under a Walz analysis. As such,

> Section 107 arguably represents a subsidiary directed exclusively to religious beneficiaries, which does not remove any state-imposed deterrent to the free exercise of religion and may provide unjustifiable awards of assistance to religious interests.

Professor Erwin Chemerinsky also counts five justices in Texas Monthly as supporting the conclusion that a tax exemption granted only to religion violates the Establishment Clause. In the Parsonage Exemption Violates the Establishment Clause and Should be Declared Unconstitutional, 24 Whittier Law Review 707, 715-716 (2003), Professor Chemerinsky concludes that the Supreme Court's decision in Texas Monthly was supported by a 5-Justice majority on the decisive preference issue:

> Although Justice Brennan wrote for a plurality of three justices (he was joined by Justices Marshall and Stevens), Justices Blackmun and O'Connor concurred in the judgment and came to the same conclusion: A tax benefit given only to religion violates the Establishment Clause. Justice Blackmun, joined by Justice O'Connor, declared "the Establishment Clause value suggests that a state may not give a tax break to those who spread the gospel that it does not also give to others who actively might advocate disbelief in religion.
>
> Justices Blackmun and O'Connor concurred in the judgment because they thought it unnecessary to discuss the Free Exercise Clause, as was done in the plurality opinion. But Justice Blackmun's opinion left no doubt as to his agreement that the Texas statute violated the Establishment Clause. He wrote: "A statutory preference for the dissemination of religious ideas offends the most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable."
>
> Thus, five justices in Texas Monthly held that the Establishment Clause is violated by a tax exemption that gives "a tax break to those who spread the gospel that it does not also give to others." Internal Revenue Code Section 107 (2) at issue in this case, provides a large tax break to "ministers of the gospel" that no one else can claim. Texas Monthly v. Bullock is squarely on point, and under its controlling authority, Section 107 (2) is unconstitutional.

Neither courts nor commentators have seriously questioned that a majority of the Supreme Court in Texas Monthly agreed and concluded that a tax preference that is not neutral and generally available violates the Establishment Clause. The requirement of

neutrality and general applicability, particularly after Texas Monthly, has consistently prevailed in courts' analysis of tax preferences. This conclusion is well-described by Donna Adler in The Internal Revenue Code, the Constitution and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making, 28 Wake Forest L.Rev. 855 902 (1993):

> Cases decided after Walz have eviscerated the Court's rationale for finding that the property-tax exemption granted by New York State did not violate the Establishment Clause. Texas Monthly, however, cited the holding in Walz favorably and stated explicitly that exemptions like those in Walz would be upheld. What, then, is left in the Walz decision that merits approval from the Court and Texas Monthly? Neither the no-subsidy logic, the historical argument, nor the entanglement argument survives. None of those arguments, which could have been made in Texas Monthly, as well as in Walz, is sufficient to save the sales tax exemption. Rather, the one factual distinction that seems to be the determinative issue is the breadth of the class benefited by the tax exemption.
>
> The Court seems to be adopting an "equal access" type of analysis in the tax exemption area. As long as the benefits offered by the government are available to a wide variety of organizations, the fact that religious institutions will share in those benefits is not objectionable. The Court cites three cases in which statutes were upheld even though benefits flowed to religious institutions -- Widmar v. Vincent, which addressed free access to public space; Mueller v. Allan, which examined a tuition deduction for parochial schools; and Walz which considered a property tax exemption. The Court noted that "in all of these cases, we emphasized that the benefits derived by religious organizations flowed to a large number of non-religious groups as well." Alternatively, if the benefits had been confined to religious organizations, "they could not have appeared other than as state sponsorship of religion" and would have been struck down.
>
> The controlling authority of Texas Monthly, in fact, suggests that even Walz would have been decided differently if the property tax exemption at issue had been limited only to church properties. Cf. In re Springmoor, 498 S.E.2d 177 (N.C. 1998) (invalidating preferential property tax exemption for religious retirement homes). Robert

Sedler makes this point in Understanding the Establishment Clause: The Perspective of Constitutional Litigation, 43 Wayne L. Rev. 1317, 1391-1392 (1997):

> The property tax exemption for church property [in Walz] conferred a very valuable financial benefit on churches, and like any other tax exemption, effectively subsidized the churches' activity. The effect of Walz is to allow the state to provide a financial benefit to religion through a tax exemption when it could not provide such a benefit through a direct grant. Crucial to the Court's holding in Walz is the matter of inclusion. The tax exemption was for non-profit institutions. Therefore, churches qualified for the grant, not because they were churches, but because they were included within the class of non-profit institutions. As one commentator put it, "Those institutions shared a relevant non-religious attribute with secular institutions." There is no doubt that a property tax exemption for churches alone would violate the Establishment Clause as a preference for religion, notwithstanding that such an exemption would avoid the "entanglement problems" that the Court identified in Walz. This point is demonstrated by Texas Monthly, Inc.v. Bullock, where the Court held unconstitutional an exemption from the state sales tax law for "periodicals that are published or distributed by a religious faith and that consists wholly of writing promulgating the teaching of the faith and books that consist wholly of writings sacred to our religious faith." In other words, it is the matter of the inclusion of the religious with the secular that marks the distinction between the constitutionally permissible equal treatment of religion and the constitutionally impermissible preference for religion.
>
> 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.

The government in the present case incorrectly argues that Texas Monthly is merely an interesting plurality decision by a fractured Supreme Court. The Texas Monthly decision, in fact, represents a majority opinion of the Supreme Court on the Establishment Clause issue, and that decision has never been repudiated by the Court. The Texas Monthly decision, and the consistent authority of later Supreme Court decisions, establish that preferential tax benefits constitute a substantive benefit that can not be preferentially conferred upon religion under the Establishment Clause.

C. Section 107(2) Provides Greater Benefits To Ministers Than Section 119 Provides To Non-Clergy Taxpayers.

The Government incorrectly insinuates that Internal Revenue Code §107 merely provides tax benefits to ministers that are otherwise available to all taxpayers under Internal Revenue Code §119. The benefits provided by §107, in fact, are provided to ministers without regard to the requirements of §119. That is precisely why Congress adopted §107 -- and it is precisely why the religious community so vigorously defends the §107 benefits. The requirements of §119 are different and more limiting than the requirements of §107, and for that reason, §107 undisputedly provides preferential benefits to religion that are not neutrally and generally available to a broad range of taxpayers. Ministers constitute a privileged class under §107(2).

Section 107 permits only ministers of the gospel performing religious services to exclude from their taxable income that portion of their compensation that is designated as a housing allowance or housing provided in-kind. In order to claim the housing allowance, two principal conditions must be met:

> 1. The allowance must be provided as compensation for services that ordinarily are the duties of a minister of the gospel. This condition is unrelated to any requirement that the minister's residence be used to perform the services of a minister. The Internal Revenue Service, in fact, has determined that even a retired minister of the gospel is eligible to claim the housing allowance exemption because the allowance is deemed to have been paid as part of the retired minister's compensation for past services as a minister of the gospel. Rev. Rul. 63-156, 1963-2 C.V. 79.
>
> 2. The amount of the housing allowance must be designated in advance by an employing church. The designated housing allowance must then actually be used by the minister for housing purposes.

Subsection (2) of §107, in particular, provides a tax benefit that is unavailable to other taxpayers -- beyond argument. Section 107(2) allows an employing church to designate part of a minister's cash compensation as a housing allowance, which

designated compensation is then tax-free to the minister. By contrast, §119 allows no exemption for cash allowances, even if the allowances are used to provide housing for the convenience of the employer. Section 107(2), moreover, has no requirement that compensation designated as a housing allowance be used for any particular housing selected by the church for its own convenience. The designated compensation paid to the minister is tax-free, unlike for any other taxpayers, and the housing allowance does not have to be used for the convenience of the employer, also unlike the requirement for all other taxpayers.

Ministers derive an enormous financial benefit from Internal Revenue Code Section 107(2) by being paid in tax-exempt dollars. Professor Chemerinsky describes this significant tax break to religion:

> Section 107's blatant favoritism for religion can be seen by comparing it with other provisions of the Internal Revenue Code that provide a benefit to ministers on the same terms as others in similar situations in secular institutions. For example, Section 119 of the Internal Revenue Code allows an income exclusion for the value of meals and lodging that are provided on the business premises of an employer as a convenience to the employer and as a condition of employment. Thus, a minister who is required to live on the church's premises is allowed an exclusion under this provision, but so is the head of a school who lives on the premises, or any other employee who is required to live in housing provided at the workplace. Section 107 is unique in that it provides a benefit to religion -- to "ministers of the gospel" -- that no one else receives.
>
> Section 107(2) allows ministers to be paid without having to pay taxes on some or all of their salary by having it declared a housing allowance. But the benefit is even greater than that: Clergy also can deduct their mortgage payments and real estate taxes from their income tax, even though they paid for these with tax-exempt dollars. Although this type of "double-dipping" generally is not allowed, a specific provision [Section 265(a)(6)] of the Internal Revenue Code permits "ministers of the gospel" who benefit under Section 107(2) to deduct the mortgage interest and property tax that they paid with their tax-exempt allowance. This results in a substantial windfall -- or government subsidy -- for clergy that no one else receives. One commentator explains with a simple example:

> Suppose a taxpayer receives a $1,000 per month rental allowance from the church. Assume also that he pays $333 in mortgage interest every month, and is in the 33% tax bracket. If the taxpayer is allowed to deduct interest under Section 265, then he will get a $111 windfall every month. The church spends $1,000, but the clergyman receives total benefits in the amount of $1,111.
>
> Moreover, the effect is a significant financial benefit to religion because churches and synagogues and mosques can pay their clergy much less because of the tax-free dollars. Without the parsonage exemption, religious institutions would have to pay clergy significantly more to make up this difference.

Chemerinsky, The Parsonage Exemption Violates the Establishment Clause and Should be Declared Unconstitutional, 24 Whittier Law Review, 707, 712-713 (2003).

Section 107(2) does not provide a benefit that is neutrally available to other taxpayers. Section 119, generally applicable to all taxpayers, does not allow for the exclusion of any cash amount paid as compensation, even if used to pay housing costs for the convenience of the employer. Section 119 is applicable only to in-kind housing, which must be provided for the convenience of the employer. The substantial tax benefit of §107(2), therefore, is not available to other taxpayers under §119. Section 107(2) provides a unique benefit that is only available on the basis of religion.

The benefit under §107(2) accrues to ministers who may use their designated housing allowance to purchase an asset that has the potential to appreciate and increase in value. This benefit is not available to other taxpayers:

> Section 107(2) directly benefits ministers and religion. The most direct effect of Section 107(2) is its significant lowering of a minister's tax burden. Section 107(2) concurrently bestows an economic benefit on the minister's church, in much the same manner as Section 107(1). While the support that Section 107(2) provides to ministers and religions is qualitatively identical to Section 107(1), there is one difference. The IRS has interpreted Section 107(2) to allow ministers to purchase homes to exclude the home's fair rental value from gross income. Section 107(2) thus provides minsters with personal benefits beyond any religious

> considerations by allowing an exemption from funds expended on a home which will appreciate in value.

O'Neill, Thomas, A Constitutional Challenge to §107 of the Internal Revenue Code, 57 Notre Dame Law. 853, 864 (1982).

The preferential tax benefits of §107(2) further differ from §119 because the exemption is available without regard to the "convenience of the employer." Section 119 provides an exclusion for housing if: (1) the lodging is furnished on the business premises of the employer; (2) the lodging is furnished for the convenience of the employer; and (3) the employee is required to accept such lodging as a condition of his employment. Under this test, an employee must pay income tax on the value of free housing, except where the lodging meets the "convenience of the employer" requirements.

Section 119 applies only where the employer desires to have a continuous presence of the employee at the job site and to have him within reach at all times. As the Supreme Court held in Commissioner v. Kowalski, 434 U.S. 77, 93 (1977), the convenience of the employer requires that the employee must accept housing in order to properly perform his duties. This requirement is not imposed as a condition of the §107(2) exemption, including as to tax-free payments made directly to ministers. Section 107(2) provides for tax-free compensation to ministers in circumstances that are not available to other taxpayers, including under §119.

Section 107(2) creates an incentive for churches to designate a minister's compensation as a housing allowance in order to increase the minister's net income, while reducing the church's wage payments correspondingly. (Bolton Aff., Exhibit 4.) "The effect is a significant financial benefit to religion because churches and synagogues and mosques can pay their clergy much less because of the tax-free dollars. Without the

parsonage exemption, religious institutions would have to pay clergy significantly more to make up this difference." Chemerinsky, 24 Whittier Law Review at 713. (See also Bolton Aff., Exhibits 6, 9 and 10.) Non-church employers cannot increase the net-compensation of their employees by designating an amount to cover their housing costs -- and therefore, they cannot correspondingly reduce their wage payments. By the simple act of designating a housing allowance for ministers, however, churches and ministers can receive a financial advantage not available to other employers and employees.

The incentive for churches to designate cash housing allowances derives from §107(2). The tax-saving effect of §107(2), in fact, is the very reason that ministers and churches fight to keep this substantial tax benefit, which is not available under §119. Even the proposed intervention in the present case by Reverend Rodgers was based on his claimed financial interest in a tax-free housing allowance, which he and other ministers do not automatically qualify for under §119. Similarly, the National Association of Church Business Administrators sought leave to file an amicus curiae brief in the Ninth Circuit case of Warren v. Commissioner of Internal Revenue, in 2002. Their motion made clear that the interest being protected was economic self interest:

> This Court's [Ninth Circuit] decision will affect how each [church] compensates at least some of its clergy. Further, clergy are compensated very modestly compared to other learned professionals with comparable education and experience. If the church's clergy are required to pay more federal income taxes, then the churches must divert more of their resources from their charitable and religious activities toward their clergy's compensation. As a result, the Amicus Curiae are vitally interested in the outcome of this proceeding. Motion for leave to file amicus curiae brief supporting the decision of United States Tax Court, filed in the United States Court of Appeals for the Ninth Circuit on April 24, 2002, by Attorney Frank Sommerville, attorney for the Amicus Curiae.

Finally, the income tax exclusions for housing allowances provided to overseas government employees and military personnel do not render §107(2) neutral and broad-

based. These exemptions are not part of a broad and comprehensive statutory scheme for excluding housing allowances from taxable income. As Professor Chemerinsky has noted, the government can give its employees a tax break, but §107(2), in contrast, is a benefit only to privately employed clergy, and it is not at all about the government structuring the compensation for its employees:

> The government in the Warren case pointed to the ability of those in the United States military and those employed by the United States in foreign countries, such as in the Foreign Service, the CIA, and the Peace Corps, to be paid in tax-exempt dollars. But these are all federal employees and if the government wants to pay its employees via a tax break it certainly can do so. Section 107(2), in contrast, obviously is a benefit to privately-employed clergy and not at all about the government structuring the compensation for its employees. Indeed, it is noticeable that "ministers of the gospel" in the military or in federal employ in foreign countries get the same tax break as civilians in these entities; but the parsonage exemption benefits only religion.

Chemerinsky, 24 Whittier Law Review at 728.

The Supreme Court rejected an argument similar to the Government's in Texas Monthly, where the State sought to justify its sales tax exemption for religious publications by citing other sales tax exemptions provided for different purposes. The Court was unimpressed by this argument, noting that other exemptions for different purposes did not rescue the exemption for religious periodicals from invalidation. "What is crucial is that any subsidy afforded religious organizations be warranted by some overarching secular purpose that justifies like benefits for non-religious groups." 489 U.S. at 15 n. 4.

The Supreme Court further recognized in Texas Monthly that in evaluating preferences, "the Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that

it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." 489 U.S. at 17, quoting Walz, 397 U.S. at 696.

Here, §107(2) expressly provides an exemption intended to benefit religion alone. The housing allowance exemption for ministers is not grounded in a secular legislative policy that motivates similar tax breaks for non-religious employees. Section 107(2) does not provide an exemption for cash housing allowances paid to ministers for the same reason that the government exempts housing allowances paid to the military and other overseas employees of the government. "The circumference of legislation" providing allowances to overseas government employees does not "encircle a class so broad that it can be fairly concluded" that ministers of the gospel could be thought to fall within the natural perimeter.

The Internal Revenue Code does not exempt cash housing allowances for any private employees other than ministers of the gospel. This is a substantial preferential tax benefit that is not available to other private employees, including under §119. The reason that §107(2) is defended so vigorously by churches and ministers, therefore, is not because it merely duplicates the exemption otherwise available to them under §119; their concern is driven by the fact that this substantial tax benefit would not otherwise be available to them if they are held to the terms applicable to all other taxpayers.

D. Section 107(1) Also Is More Advantageous Than Section 119.

Subsection (1) of §107 also provides tax benefits to ministers that are not generally available. Subsection (1) provides that gross income does not include the rental value of a home furnished to a minister of the gospel "as part of his compensation." The Government contends that this is just a restatement of §119, which allows an exemption

for lodging provided for "the convenience of the employer." Section 107(1), however, is not equivalent to §119.

The Government claims that Congress' intent is evident because the original parsonage exemption enacted by Congress in 1921 was supposedly adopted in response to the Treasury Department's refusal to allow ministers to claim the same "convenience of the employer" exemption allowed to other employees. (Government's Brief at 25.) Even the limited evidence from 1921, however, indicates that Congress intended to create an exemption that is not the same as the §119 exemption for lodging provided for the "convenience of the employer."

The Treasury Department in 1921 did not expressly refuse to recognize "the convenience of the employer" doctrine as it applied to ministers. O.D. 862 merely refused to recognize a flat exemption for housing provided in addition to the salary paid to a minster:

> Where in addition to the salary paid a clergyman is permitted to use the parsonage for living quarters free of charge the fair rental value of the parsonage is considered a part of his compensation for services rendered and as such should be reported as income. [O.D. 862.]

The Treasury Department, in reaching its conclusion in O.D. 862, did not specifically address the "convenience of the employer" doctrine as applied to ministers. There was no analysis of the convenience of the employer, but rather the Department focused on the value of the parsonage as part of clergy compensation, in circumstances where a minister is "permitted" to use the parsonage -- but not required to use it. The Department simply did not address the convenience of the employer doctrine as if it applied -- presumably because ministers could not meet the requirements of the test.

By contrast, the Treasury Department did expressly apply the convenience doctrine when those requirements were met by employees. For example, with respect to fish cannery employees, the Treasury Department concluded:

> Where, from the location or nature of the work, it is necessary that employees engaged in fishing and canning be furnished with lodging and sustenance by the employer, the value of such lodging and sustenance may be considered as being furnished for the convenience of the employer and deemed not, therefore, to be included in computing net income of the employees. [O.D. 814.]

The Department similarly applied the "convenience of the employer" standard in respect to hospital employees:

> Where the employees of hospital are subject to immediate service on demand at any time during the 24-hours of the day and on that account are required to accept quarters and meals at the hospital, the value of such quarters and meals may be considered as being furnished for the convenience of the hospital and does not represent additional compensation to the employees. On the other hand, where the employees are on duty a certain specified number of hours each day and could, if they so desired, obtain meals and lodging elsewhere than in the hospital and yet perform the duties required of them by such hospital, the ratable value of the board and lodging furnished is considered additional compensation. [O.D. 915.]

The implication of O.D. 862 is that clergy did not meet the standards of the administratively-created "convenience of the employer" doctrine. There are reasons for that conclusion, including because ministers can just as easily and successfully perform their job duties if they live at another location, and nothing in their job description requires clergy to live on or near a church property. In fact, churches provided parsonages not as a requirement, but as an attractive financial benefit. (See Bolton Aff., Exhibit 6.)

The "convenience of the employer" rule also was always intended to be narrow, as evidenced by rulings such as O.D. 915 and O.D. 814. It applied, for example, to employees living on a ship, who obviously performed work that could not be performed

as they were living elsewhere. Similarly, the convenience of the employer applies to some hospital employees, but only if they are on call 24 hours a day. The narrow scope of the "convenience of the employer rule," as illustrated by O.D. 915, is the reason why ministers did not meet the standards of that rule -- not that the rule was inapplicable to them.

The subsequent Revenue Act of 1921, in response, did not simply provide that the "convenience of the employer" test should apply to ministers. The Revenue Act of 1921, instead, provided that any free housing provided to ministers as part of their compensation would be exempt from income taxation. The 1921 Act did not limit the exemption to housing provided for the "convenience of the employer," and it thereby provided greater tax benefits to ministers. If the Revenue Act of 1921, in fact, had merely been intended to direct the Treasury Department to apply the "convenience of the employer" doctrine to ministers, that is what the legislation would have said -- instead, it proved an exemption that is independent of the "convenience of the employer," and hence it provides broader privileges.

When §107(1) was enacted in 1954, Congress again allowed a tax benefit to ministers for in-kind housing that was not tied to the "convenience of the employer." Subsection (1) carried forward the unrestricted housing allowance from the Revenue Act of 1921, which provided a tax exemption for ministers that is broader than the exemption in §119, which only allows exemption for housing provided at the "convenience of the employer." The fact that §107 and §119 were both enacted in 1954 makes clear that the parsonage allowance was not simply another way for Congress to articulate the "convenience of the employer" test. The reality is that Congress intended §107,

including subsection (1), to provide a broader exemption independent of the restrictions of §119.

The Government's own historical argument also makes clear that the free-standing housing allowance for ministers under §107(1) was not enacted to avoid any substantial burden on free exercise rights. The Government traces subsection (1) back to the Revenue Act of 1921, which the Government claims was a reaction to the Treasury Department's refusal to apply the "convenience of the employer" doctrine to ministers. According to the Government, Congress intended the Revenue Act of 1921 to reverse the Treasury Department's refusal to apply the "convenience of the employer" doctrine to ministers. Even if that was the case, however, then Congress' alleged motivation was not to abate any substantial burden on free exercise rights. Moving forward in time to 1954, the Government still cites no evidence that subsection (1) of §107 was enacted to avoid any substantial burden. Congress, nonetheless, enacted an exemption for in-kind housing provided to ministers in subsection (1) that provides broader benefits than §119.

To avoid the greater breadth of subsection (1) of §107 as applied to ministers, the Government claims, without evidentiary support, that parsonages really are only provided to ministers for the convenience of the employer; this unsupported factual allegation is contradicted by the known evidence that free housing often was offered by churches as an inducement to employment, and not for the convenience of the employer. (See Bolton Aff., Exhibit 6.) Both subsection (1) and subsection (2) of §107, moreover, make compensation an essential element of the parsonage exemption, i.e., cash or in-kind lodging must be provided as part of a minister's compensation, which is a different requirement than the convenience of the employer test.

The Government's claim that §107(1) is essentially identical to §119 is simply not correct. Section 119 applies only to in-kind lodging that is not intended as compensation. The Supreme Court noted this fact in its background discussion of the "convenience of the employer" doctrine in Commissioner of Internal Revenue v. Kowalski, 434 U.S. 77, 87 (1977). The exclusion from income under "the convenience of the employer" doctrine rests upon the characterization of the benefit as essentially non-compensatory, and it requires that the furnishing of such benefits be necessary to allow an employee to perform his duties properly. By contrast, the parsonage exemption is explicitly dependent upon the parsonage being provided as part of the minister's employment compensation.

Subsection (1) of §107, like subsection (2), therefore, confers a tax benefit on ministers that is not neutrally and generally available to other employees. The parsonage exemption of subsection (1) is not dependent upon the "convenience of the employer," which is critical to the exemption provided by §119. The parsonage allowance is intended to exempt from taxation the value of housing that churches provide to induce ministers to accept employment. Whereas in-kind lodging provided for the "convenience of the employer" is not intended as an inducement to accept employment, the parsonage allowance under subsection (1) exempts benefits provided to ministers that are intended as part of their compensation package.

In sum, the parsonage allowance in subsection (1) of §107 is more advantageous than the exemption provided by §119. The parsonage allowance in subsection (1) of §107 is available preferentially only to ministers of the gospel. Other employees do not receive a comparable benefit under §119, contrary to the Government's unsupported claim.

E. Section 107 Is Not An Accommodation Of A Substantial Government-Imposed Burden On Free Exercise Rights.

The Government further argues that §107 is merely an accommodation of religion that is permissible in the case of government-imposed substantial burdens on Free Exercise rights. According to the Government, §107 modifies the §119 standard applicable to the housing exemption so as to eliminate intrusive government inquiries, while allowing ministers of the gospel a benefit that is otherwise generally available.

The Government's argument lacks merit, in the first place, because the factual predicate is missing: The Government advances no evidence that §107 was enacted by Congress to avoid any potential entanglement between Government and religion. The Government's own description of the historical background to both of the subsections to §107 contradicts the Government's present argument that §107 was intended to relieve Government burdens on free exercise rights. This self-serving argument is not supported by any evidence and seems to be made from whole cloth.

The Government's accommodation argument also lacks substantive merit, particularly with respect to §107(2). Subsection (2) allows ministers to exclude from income a cash rental or housing allowance designated by the employing church. The exemption for cash compensation paid for housing to ministers is unique under the Internal Revenue Code for private employees. Employees of other private employers cannot receive a designated cash housing allowance that is tax deductible -- only church-employed ministers can deduct all of their housing costs from their taxable income.

Section 107(2) cannot be characterized as an accommodation necessary for ministers to qualify for an otherwise generally available benefit. The benefit allowed by §107(2) is not available to other taxpayers, except some overseas government employees and military personnel, and so no accommodation can be justified in order to

preferentially make available a benefit to ministers of the gospel. In fact, Congress enacted §119 and §107(2) as part of the same legislative package in 1954, yet discriminated in favor of ministers by creating a unique tax break that is denied to non-clergy under §119.

The Government argues alternatively that §107(2) was enacted in 1954 in order to allow ministers a tax-free housing allowance even when the employing church does not provide in-kind housing. Under this reasoning, §107(2) also is not responsive to any government-imposed burden on religion, but rather is based upon the intent to give all ministers a tax-free housing allowance, even when they are not provided in-kind housing by their employing church.

The Government's attempt to justify §107(2) as a church-equity accommodation is unpersuasive because the Government is nonetheless providing a benefit preferentially to ministers of the gospel, albeit more of them than before; the exemption for cash housing allowances paid to ministers, moreover, is unrelated to any government-imposed burden; and the tax exemption for cash housing allowances paid to ministers is completely independent of the "convenience of the employer," which is required for other taxpayers.

Providing ministers who are paid in cash with a tax benefit in order to "equalize" their circumstances with ministers provided in-kind housing, is constitutionally unacceptable, without providing a similar exemption to secular employees. Professor Chemerinsky explains the problem for the Government:

> Section 107(2), at issue in this case, provides a huge benefit just to religion: Only ministers of the gospel can be paid a tax-exempt housing allowance. In other words, Section 107(2) creates an enormous inequality: Favoring religious employees and religious institutions over all others. Giving more to religion hardly is a "secular purpose" sufficient to meet the Lemon case test.

> Indeed, the equality argument made by the Government in several of the Amici in the Warren case has no stopping point. Under this reasoning, the Government could directly subsidize housing for clergy if that would equalize the benefits with those who live in housing provided by their churches. The obvious impermissibility of such a subsidy shows why the equality argument is insufficient to justify the parsonage exemption. One Amici says that the purpose of the parsonage exemption is to "equalize the impact of the federal income tax on ministers of poor and wealthy congregations." Helping poorer religions is hardly a secular purpose; surely, the Government cannot subsidize poorer religions out of a desire to help make them more equal with wealthier religions.

Chemerinsky, 24 Whittier Law Review at 724-25.

The Government's accommodation argument with respect to §107(2) is not supported by any recognized legal authority. The Supreme Court's decision in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 43 U.S. 327 (1987), in particular, does not support the Government's argument. In Amos, the Supreme Court considered the constitutionality of an exemption from anti-discrimination hiring laws as applied to religious organizations. The Court upheld the exemption as an appropriate accommodation because of the effect that such regulatory laws might have on the internal operation of religious organizations. The Court recognized in Amos that "at some point, accommodation may evolve into an unlawful fostering of religion." Id at 334-335. In reaching its decision with regard to employment discrimination laws, however, the Supreme Court said that "it is a permissible leglislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Id at 335. "Where, as here, the government acts for the proper purpose of lifting a [government] regulation that burdens the exercise of religion, "then an accommodation may be justified." Id at 338.

The rationale of Amos and other cases involving accommodation of religion is inapplicable to §107. Civil rights laws are regulatory in nature, such as involved in

Amos. They regulate what conduct is prohibited, permitted or required. The application of anti-discrimination hiring rules to a church, therefore, arguably "would interfere with the conduct of religious activities." On this basis, Amos upheld an exemption from the anti-discrimination laws.

In the present case, 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. "To the extent that imposition of a generally applicable tax merely decreases the amount of money [the taxpayer] has to spend on its religious activities, any such burden is not constitutionally significant." Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 391 (1990), citing Hernandez v. Commissioner, 490 U.S. 680, 699 (1989). In Hernandez, the Supreme Court concluded that the federal income tax was not a "constitutionally significant" burden on religion where the taxpayer could not claim a deduction for money paid to the Church of Scientology for religious services. Similarly, §107 is not necessary to alleviate a substantial burden on the exercise of religion. Section 107 simply cannot be justified as relieving a burden on the exercise of religion, contrary to the Government's argument. As in Texas Monthly, therefore, §107 cannot be justified as a means of removing any "imposition on religious activity." See Texas Monthly, 489 U.S. at 15, n. 8.

In the absence of a government-imposed burden on the free exercise of religion, the government cannot preferentially bestow benefits exclusively on religion. In such cases, even a purported religious accommodation impermissibly advances religion if it provides a benefit to religion without providing a corresponding benefit to a large number of non-religious groups or individuals, as described in Texas Monthly, a case in which no substantial government-imposed burden was at issue. In fact, if Congress had truly been

seeking just to equalize the tax treatment of in-kind housing and cash housing allowances, then tax-free allowances could have been provided to taxpayers generally. Instead, Congress enacted a new benefit available only to clergy.

Section 107 provides tax benefits to religion, including the exemption for cash housing allowances, which are not generally available to other taxpayers, including under §119. Because no exemption otherwise exists for cash housing allowances, moreover, §107(2) cannot be construed to accommodate any hypothetical government-imposed burden on the free exercise of religion. Section 107(2), purely and simply, is a tax benefit provided only to religion. As such, the exemption for cash housing allowances provided to ministers by §107(2) makes quite apt the Supreme Court's admonition that even "accommodation may devolve into an unlawful fostering of religion." Amos, 483 U.S. at 334-335.

F. Section 107 Increases Government Entanglement With Religion.

Preferential tax benefits to ministers of the gospel also cannot be justified as a means to avoid government entanglement with religion. This argument by the Government is advanced only hypothetically because no evidence supports the factual predicate that the Government even intended to minimize entanglement via §107. The Government is merely arguing "what if?"

The Government, nonetheless, postulates that the factual inquiries under §107 are less intrusive into religious affairs than the "convenience of the employer" considerations under §119. The Government's claim that administering §119 with respect to ministers would give rise to more entanglement than the inquiries under §107, however, is wrong on the merits.

The Government unpersuasively argues that the inquiries under Internal Revenue Code §119 would cause undue entanglement with religion. The relevant considerations under §119 belie the Government's contention. Section 119 grants an exclusion for lodging furnished to an employee by his employer if three conditions are met: (1) the lodging is furnished for the convenience of the employer; (2) the lodging is on the business premises of the employer; and (3) the employee is required to accept the lodging as a condition of its employment. Vanicek v. Commissioner, 85 T. C. 731, 737-738 (1985). (The familiar "convenience of the employer" test is essentially the same as the "condition of employment" test. Id at 739.) To exclude the value of lodgings from income under §119, moreover, a taxpayer must also show that the lodgings were located on the business premises of the employer, which is defined as a place where the employee performs a significant portion of his duties or on the premises where the employer conducts a significant portion of its business. Id at 739. Inquiring into the subjective intention of the employer is not important to the ultimate decision because Congress intended that an objective test should be used in applying §119. United States Junior Chamber of Commerce v. United States, 167 Ct. Cl. 392, 397 (1964). Finally, §119 applies only to lodging furnished in-kind. Kowalski v. CIR, 64 T. C. 44, 54 (1975). It is these requirements of §119 that the Government now claims "might" entangle the government in inappropriate and continuous "surveillance" of religious organizations. The Government's argument is unsupported by any known authority and it is logically unconvincing.

The Government's claim that inquiries under §107 are not entangling is inplausible. Section 107 excludes from the gross income of a minister of the gospel: (1) the rental value of a home furnished to him as part of his compensation; or (2) the rental

allowance paid to him as part of his compensation, to the extent used to rent or provide a home. This exemption requires the Internal Revenue Service to first determine whether an individual qualifies as a "minister of the gospel." Administrative regulations implementing §107 further require that ministers of the gospel perform duties such as 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. T. Reg. 1.1402(c)-5. 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. T. Reg. 1.1402(c)-5(b)(2)(i).

In practice, the necessary determinations under §107 require that a significant amount of evidence be brought before the IRS just to prove that an individual is in fact a minister for purposes of §107. See Lloyd H. Meyer, IRS Letter Rulings: Rendering Unto Caesar, The Exempt Organization Tax Review (May, 1999 at 331-333) (discussing IRS letter ruling addressing whether "ordained deacons" constitute ministers of the gospel). Although the Government claims that these inquiries involve less entanglement with religion than the requirements of §119, both common sense and reality contradict the Government's argument.

The inquiries under §107 have historically required complex inquiries into the tenets of religious orthodoxy. In Silverman v. Commissioner, 1973 U.S. App. LEXIS 8851 (8th Cir. 1973), aff'd 57 T.C. 727 (1972), for example, the Court of Appeals considered whether a full-time cantor of a Jewish congregation qualified as a minister of the gospel under §107. In reaching a decision, "the significance of ordination in the Jewish religion as practiced in the United States was a central issue as to which the views

of three major branches of Judaism were solicited." After examining the facts of that case against an analysis of the historical background of the cantorate in the Jewish faith, the Court of Appeals concluded that the taxpayer qualified for the §107 exemption.

Similarly, in Salkov v. Commissioner, 46 T. C. 190, 198-199 (1966), the Court also considered whether a full-time cantor in the Jewish faith was a minister of the gospel entitled to exclude a rental allowance from his gross income under §107:

> Regardless of the theoretical power of a Jewish layman, what in fact does Cantor Salkov do and what are his functions? He is a spiritual leader. He teaches. He performs pastoral duties. He is the minister-messenger of the congregation, commissioned and licensed by the congregation and by the Cantors Assembly of America to officiate professionally and regularly in sacred religious service of the Jewish people. He performs what is regarded as a sacerdotal function of Judaism -- the sanctification of the Sabbath and festival wine in a synagogue (compare the Christian mass and Communion); he elevates and holds the sacred Torah (compare the elevation of the Host); and he waves the sacred Lulav (compare the waving of the palms). For long periods of both prayer and service he is the only person standing at the pulpit. At all times he and the rabbi share the pulpit. Historically and functionally he is a sui generis minister. Hence, from the thicket of our factual and legal exploration of this issue, we emerge with the conclusion that in these particular circumstances the petitioner, a full-time cantor of the Jewish faith, qualifies as a "minister of the gospel" within the spirit, meaning and intendment of Section 107.

The Tax Court also had to consider the tenets of the Baptist religion in Colbert v. Commissioner, 61 T. C. 449 (1974). The Court recognized in that case that there is no formal statement of precepts which are binding on Baptist churches, but nevertheless, the term "tenets and practices" as used in the IRS Regulations include "those principles which are generally accepted as beliefs and practices within the Baptist denomination." Id at 455. Determining what constitutes the official "precepts and principles" of a religion, however, necessarily involves drawing fine lines, as in Tenenbaum v. Commissioner, 58 T. C. 1, 8 (1972), where the Court distinguished sacerdotal functions

and religious worship from a minister's job "to encourage and promote understanding of the history, ideals, and problems of Jews by other religious groups."

Questions regarding church hierarchy also must be addressed when applying §107, as in Mosley v. Commissioner, 68 T. C. Memo 1994-457, where the Court considered whether a particular religious organization operated under the authority or control of a church or church denomination. According to the Court, this "can only be determined after reviewing all the facts and circumstances surrounding the relationship between the church denomination and the organization." The Court concluded that "a religious organization is deemed under the authority of 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."

The IRS is regularly required to make these purely religious determinations in administering §107. The difficulty of resolving these religious questions, and the potential for inconsistent conclusions, give rise to far more entanglement than the purely secular inquiries under §119. For example, another difficult religious determination that the IRS must make is whether a Christian college is an "integral agency of a church." This is the subject of many private rulings by the IRS, prompting one commentator to note that "the Service has consistently ruled that ordained ministers who teach at schools that are integrally related to churches are performing services within the exercise of their ministry, no matter what they teach." Newman, On Section 107's Worst Feature: The Teacher-Preacher, 93 TNT 260-20 (emphasis added). College administrators, and even basketball coaches, as well as teachers, can thus qualify for the benefits of §107 if they happen to be ordained ministers. It is often difficult, however, to determine whether the

criteria for "integral part of a church" are satisfied. The IRS uses the criteria listed in Rev. Rul. 72-606 and Rev. Rul. 70-549, in making these determinations. Typical rulings in this area emphasize the intrusiveness of the determination. See LTR 9608027, 96 TNT 39-49; LTR 200002040, 2000 TNT 11-24; and LTR 200925001, 2009 TNT 117-28.

Another contentious religious issue that the IRS must frequently resolve under §107 is whether "sacerdotal functions" are being performed. Although no definition is provided in the regulations of this term, performing baptisms, communion or the Lord's supper, and Christian weddings, clearly qualify as "sacerdotal functions." In other cases, however, the question is far more nuanced. In one ruling, an ordained minister worked for an independent §501(c)(3) organization that was not a church. He spent 75% of his time providing spiritual counseling to drug addicts and alcoholics, and 20% of his time in administrative work, continuing education, networking and general management. Only 5% of his time was spent performing weddings, funerals, prayer services, adult education services and community outreach services. The IRS concluded that the minister did not qualify for favorable tax treatment under §107 because only 5% of his time was spent performing duties such as the conduct of religious worship or the performance of sacerdotal functions. LTR 9231053, 92 TNT 157-53. The ruling raises the basic question of what is the work of a minister -- a question to which it is virtually impossible to provide an objective answer. Purely religious questions of this type illustrate the pervasive entanglement that §107 creates.

The decision in Flowers v. United States, 49 A.F.T.R.2d 438 (N.D. Tex. 1981), cited by the Government, also supports the conclusion that §107 requires active entanglement because "if Congress is going to authorize an exclusion such as Section 107, there has to be some way for the government to monitor those who take the

exclusion." Id. The issue in Flowers involved the application of §107 to "non-hierarchal churches," as to which Rev. Ruling 70-549 purported to "give non-hierarchal churches advice in meeting the requirements of Section 107." Id. Compared to the inquiries under §119, Flowers does not support the Government's claim that §107 is less entangling. The Flowers decision also does not impeach the Supreme Court's later decision in Texas Monthly explaining Walz.

Contrary to the Government's argument, therefore, the determinations required by §107 involve much greater entanglement than the determinations under §119. The inquiries under §107 involve questions that are inherently religious, subjective, intrusive and beyond the general competence of government officials. These determinations create the potential for excessive entanglement, unlike the "convenience of the employer" determinations under §119. Unlike in Walz, therefore, elimination of §107's exemption would reduce entanglement between government and religion.

By contrast, the inquiries under §119 do not impermissibly burden free exercise rights, as the Government insinuates. In the first place, the right to be free from tax or to be permitted to exclude certain items from taxable income is a matter of legislative grace rather than constitutional right. Commissioner v. Sullivan, 356 U.S. 27 (1958); Parker v. Commissioner, 365 F.2d 792, 795 (1966) ("as long as exemptions are denied by the Commissioner on a non-discriminatory basis using specific and reasonable guidelines and without inquiry into the merits of the particular religious doctrines, the withholding of religious exemptions is permissible under the Constitution."). Likewise, the imposition of neutral and generally applicable provisions of the Internal Revenue Code do not impose a burden on religion that is constitutionally unacceptable, which the Government acknowledges, while implying otherwise. (See Government's brief at 28, n. 9, citing

Jimmy Swaggart Ministries v. California Board of Equalization, 493 U.S. 378, 390-92 (1990) (rejecting argument that non-discriminatory sales and use taxes are an unconstitutional burden on free exercise rights).)

Preferential tax benefits, in short, cannot be justified in this case as an accommodation to religion. Neutral and generally applicable rules of taxation as applied to ministers of the gospel do not substantially burden free exercise rights or entangle government with religion, unlike in Amos, involving regulations affecting hiring. Nor is Gillette v. United States, 401 U.S. 437 (1971) (upholding religious exemptions from military draft), comparable to the neutral application of income tax laws. Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987) (allowing unemployment compensation to discharged employee for refusal to work on Sabbath), also is not analogous in terms of any potential burden on free exercise rights. Application of neutral income tax laws to ministers also does not raise issues of religious orthodoxy like those involved in Arver v. United States, 245 U.S. 366 (1918) (upholding draft exemptions for ministers and theological students). All of the examples cited by the Government to support a claim of accommodation are inapposite because they involved potential regulatory burdens on the free exercise of sincerely held religious views. No similar claim is made in this case, nor could it be in light of established Supreme Court precedent.

The Government's entanglement claim does not stand up to even casual scrutiny. On the one hand, the Government defends the entanglement posed by §107, while condemning the secular determinations underlying §119. The Government then asks this Court to conclude that inquiries into the tenets of religion are preferable to asking

whether a church parsonage was provided for the convenience of the employer, as a means to avoid entanglement. The Government's postulate is not plausible.

No factual basis exists to conclude that Congress even considered that preferential tax benefits for ministers were intended as a means to avoid entanglement with religion. The Government certainly does not claim that the in-kind parsonage allowance first enacted in 1921 and later codified in 1954 by §107(1) was motivated by Establishment Clause concerns about the "convenience of the employer" test, which all other taxpayers must satisfy. The Government also does not claim that the exemption for cash housing allowances enacted in 1954 was intended to minimize burdens imposed by neutral and generally applicable Internal Revenue Code provisions. On the contrary, subsection (2) of §107 exempts cash housing allowances paid to ministers, but this exemption is not even provided to other taxpayers under any test. Instead, the Government only provides an exemption for cash housing allowances that are made to ministers of the gospel. Government ultimately is left to pull at straws in arguing that preferential tax benefits are anything other than a subsidy to religion. This case is really about money to ministers, pure and simple.

VII. INTERNAL REVENUE CODE SECTION 265(a)(6) ALSO PROVIDES PREFERENTIAL TAX BENEFITS TO MINISTERS OF THE GOSPEL THAT ARE NOT GENERALLY AVAILABLE TO OTHER TAXPAYERS.

Internal Revenue Code §265(a)(6) also provides a tax benefit to ministers of the gospel that is not generally available to other taxpayers. Section 265(a)(6) allows ministers to deduct mortgage interest and real estate taxes from their taxable income, even when paid from tax-free parsonage allowances. Section 265(a)(1) otherwise generally prohibits deductions for items paid for with income exempt from taxes. Ministers of the gospel, however, can exclude their cash housing allowances from income

-- and they can also deduct mortgage interest paid with the housing allowance. This type of "double-dipping" results in a substantial windfall for clergy that other taxpayers do not receive, except members of the military. See Chemerinsky, 24 Whittier Law Review at 712-713.

The benefit of §265(a)(6) is not generally available to other taxpayers who receive tax-exempt housing allowances. In Induni v. Commissioner of Internal Revenue, 990 F.3d 53, 56-57 (2nd Cir. 1993), the Court of Appeals explicitly recognized that §265(a)(6) created an exemption for only two taxpayer groups: recipients of a parsonage allowance and recipients of military housing allowances:

> By specifying that "no deduction shall be denied under this section" for mortgage interest and real estate expenses incurred by some -- but not all -- groups of taxpayers who enjoy tax-exempt housing allowances, the amendment implies that all other tax-exempt housing allowances are within the ambit of Section 265.

The "double-dipping" for ministers allowed by §265(a)(6) provides a significant financial benefit to ministers of the gospel. It actually allows taxation to be avoided on an amount that exceeds the actual housing allowance received. Two examples to illustrate this effect:

> Example No. 1:
>
> 1. A minister receives compensation from his church of $75,000. The church designates $25,000 as a §107(2) housing allowance. The $25,000 does not exceed the fair rental value of the house.
>
> 2. The minister spends $15,000 of the $25,000 housing allowance for mortgage interest and real property taxes, which are deductible under §§163 and 164 of the Internal Revenue Code. The minister spends the other $10,000 for payment of mortgage principal, utilities, and other non-deductible housing expenses.
>
> 3. The $25,000 housing allowance is excluded under §107(2) because it was all spent for housing. The $25,000 is not included in gross income and is not reported as compensation on the tax return, Form

1040. The $15,000 spent for mortgage interest and real property taxes, moreover, is deductible because of §265(a)(6). These deductions are claimed on Schedule A of Form 1040. If Congress had not enacted Section 265(a)(6), however, these deductions would have been barred by Section 265(a)(1).

4. The minister receives a double benefit for the $15,000. That amount was both excluded and deducted. Taxation, therefore, is avoided on $40,000 of income, representing the sum of the exclusion ($25,000) and the deductions ($15,000).

5. The minister ultimately is allowed both an exclusion and a deduction for the same amount ($15,000). This represents a double benefit unavailable to other taxpayers. Other Americans are given only the benefit of a deduction for mortgage interest and property taxes. The minister, moreover, only spent $25,000 on housing, but taxation was avoided on $40,000 of income. The avoidance of tax on the additional $15,000 provides clergy with a unique financial benefit.

Example No. 2:

1. A minister receives compensation from its church of $75,000, all of which is designated as a §107(2) housing allowance. The $75,000 does not exceed the fair rental value of the house.

2. The minister is married and the spouse earns $35,000 in income. They file a joint income tax return.

3. The minister spends $35,000 of the $75,000 housing allowance for mortgage interest and real property taxes, which are deductible under §§163 and 164 of the Internal Revenue Code. These deductions are available because of §265(a)(6). The minister spends the other $40,000 for payment of principal, utilities, and other non-deductible housing expenses.

4. None of the minister's $75,000 compensation is reportable as taxable income. This amount is not included in gross income and is not reported on the tax return because it was excluded under §107(2). The $35,000 in deductions, moreover, are used to offset the spouse's $35,000 of income. On their joint return, zero taxable income is reported.

5. In this example, $75,000 was spent on housing, but taxation is avoided on $110,000 (i.e., $75,000 plus $35,000). Other taxpayers do not get such a double benefit for the amounts spent on mortgage interest and property taxes.

The Government incorrectly argues that the additional mortgage interest deduction allowed to ministers of the gospel is necessary to give ministers the same deduction as other taxpayers. Other taxpayers can only deduct mortgage interest because the interest was paid with taxable dollars, since they cannot also exempt housing allowances under §107(a). Under Induni, the only taxpayers who can deduct mortgage interest paid with tax-exempt dollars are ministers and military personnel. By enacting a preferential tax benefit under §265(a)(6), therefore, ministers of the gospel receive a substantial tax benefit that exceeds the benefit available to other taxpayers. As the above examples show, §265(a)(6) puts ministers of the gospel in a better financial position than other taxpayers.

The tax preferences allowed to ministers of the gospel by §265(a)(6) violate the Establishment Clause, as recognized by Texas Monthly. The benefit of §265(a)(6) is not neutral and it is not generally available to other taxpayers. Nor are the preferential benefits of §265(a)(6) necessary to alleviate any substantial burden on free exercise rights, and no concern about entanglement is advanced by the Government as justification. Instead, §265(a)(6) stands simply as a benefit available only to ministers and military.

The inclusion of military personnel within the scope of §265(a)(6) does not prevent the preference given to ministers from being unconstitutional. "The circumference of legislation [must] encircle a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." 489 U.S. at 17. "What is crucial is that any subsidy afforded religious organizations be warranted by some overarching secular purpose that justifies like benefits for non-religious groups." 489 U.S. at 15 n. 4. Here, ministers of the gospel are not within the

natural perimeter of a larger preferred class with a common defining characteristic. The Government can provide the military with whatever benefits it determines to be appropriate as employer; with regard to ministers, however, §265(a)(6) defines no broader class with an overarching secular purpose.

The Government's purported secular justification for §265(a)(6) also does not support preferential tax benefits to ministers. The Government claims that the §265(a)(6) deduction to ministers is intended to encourage home ownership, but that justification would apply to any taxpayer that paid mortgage interest with tax-exempt income. Section 265(a)(6), however, distinguishes ministers from other non-military taxpayers, apparently because Congress intended to create a "hyper-incentive" for ministers to become homeowners. If home ownership is desirable for ministers, however, then it is just as desirable for other taxpayers who do not work for churches.

Section 265(a)(6), in reality, is clearly intended to grant tax benefits to ministers that are not available to other taxpayers. This lack of neutrality clearly violates the Establishment Clause prohibitions announced in Texas Monthly. A tax benefit like that in §265(a)(6), called out especially for ministers of the gospel, and which is not generally available to other taxpayers, violates the Establishment Clause. Thus, while the Government may create incentives for home ownership, the Government cannot provide disproportionate benefits to encourage home ownership just by ministers. Section 265(a)(6) is unconstitutional.

VIII. SECTIONS 107 AND 265(a)(6) VIOLATE THE ESTABLISHMENT CLAUSE UNDER THE LEMON TEST.

Section 107 and §265(a)(6) of the Internal Revenue Code violate the Establishment Clause test announced in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). Under the Lemon test, in order to be constitutional, the challenged statutes: (1)

must have a secular purpose; (2) their principal or primary effect must be one that neither advances nor inhibits religion; and (3) they must not foster an excessive government entanglement with religion. The Internal Revenue Code provisions at issue fail this test.

Section 107 and §265(a)(6) violate the Establishment Clause under the Lemon test. In the first place, tax breaks for ministers that are not neutral and available generally to other taxpayers do not have a secular purpose. Here, the exemption for cash housing allowances paid to ministers is provided only to the clergy and it was never intended to abate any substantial government-imposed burden on religion. On the contrary, the government claims that subsection (2) of §107 was enacted to provide additional tax benefits exclusively to ministers, who did not receive in-kind housing from their churches. The intent of subsection (2), therefore, by all accounts was intended to benefit religion.

Congress also intended subsection (1) of §107 to benefit religion. This tax break for in-kind housing provided to ministers originated in the Revenue Act of 1921, whereby Congress allowed a tax exemption for parsonages provided to ministers -- without regard to "the convenience of the employer." The "convenience of the employer" requirement applied to all other private employees, such as nurses and doctors. The circumstances of ministers, however, typically do not satisfy the "convenience of the employer" test, so Congress allowed all ministers to exempt the value of housing provided irrespective of whether they met the "convenience of the employer" test applicable to other private employees. This preferential benefit for ministers was then codified as §107(1) in 1954, at the same time that Congress codified the "convenience of employer" test in §119, applicable to all other employees.

Congress intended to provide a benefit to religion with the parsonage exemption for in-kind housing, even though a comparable exemption was not available to other employees. This intent to provide a preferential benefit to religion is not a secular purpose under the Lemon test. The Government, moreover, identifies no evidence that Congress acted in 1921 with the purpose to abate any Government entanglement with religion, a constitutional concern that had not even been recognized by the courts in 1921. There is simply no evidence that Congress enacted the preferential exemption for in-kind housing provided to ministers for any reason other than to provide a substantial benefit to religion.

Section 265(a)(6), likewise, has no recognizable secular purpose. The tax deduction allowed by §265(a)(6), for mortgage interest and real estate taxes paid with otherwise tax-exempt dollars, is unique to the clergy. The deduction allowed by §265(a)(6), moreover, allows ministers to avoid taxation on an amount that actually exceeds their cash housing allowance, by making the housing allowance tax-exempt and also allowing a deduction for the use of the exempt funds to pay mortgage interest and real estate taxes. Other employees cannot similarly benefit by "double-dipping" because Congress has refused to allow tax-exempt housing allowances for non-clergy.

Even the Government's claimed intent to promote home ownership with the §265(a)(6) deduction does not satisfy the secular purpose test where home ownership is preferentially intended for the clergy. Encouraging home ownership by ministers is not a legitimate secular purpose when other non-clergy are not similarly benefited.

The second prong of the Lemon test is violated by Government action that has a principal or primary effect that advances or inhibits religion. Government action has the primary effect of advancing religion if it is sufficiently likely to be perceived as an

endorsement of religion. This is an objective test, asking whether a reasonable observer who is informed and familiar with the history of the Government practice at issue would perceive the practice as having a predominantly non-secular effect. See Nurre v. Whitehead, 580 F.3d 1087, 1096 (9th Cir. 2009).

Tax breaks provided preferentially to ministers cannot help but be perceived as an endorsement of religion. This, in fact, was the conclusion of the Supreme Court in Texas Monthly. Contrary to the Government's argument in this case, therefore, prohibited religious endorsement is not limited to marble monuments. The Government claims that giving lucrative financial benefits to religion is inherently incapable of giving the appearance of religious endorsement, but the Government's reasoning is not convincing; nor does it reflect the views of the Supreme Court, requiring that tax benefits for religion be neutrally and generally available on the basis of secular criteria, as articulated in Texas Monthly.

An objective observer would perceive §107 and §265(a)(6) as an endorsement of religion, including because Congress has repeatedly acted to promote the financial interests of clergy by giving them special tax privileges not enjoyed by other taxpayers. Contrary to what the Government argues in this case, §107 was not enacted to further lofty principles of constitutional law, such as the avoidance of entanglement between Government and religion. Section 265(a)(6), similarly, was enacted to confer a financial benefit on clergy, rather than to further principles of constitutional law.

By enacting the predecessor of §107(1) in 1921, Congress first provided clergy with an exemption for the fair rental value of a parsonage provided as additional compensation, rather than "for the convenience of the employer." Other taxpayers who

did not qualify for the narrow "convenience of the employer" exemption did not benefit from the 1921 legislation.

Congress subsequently enacted §107(2) in 1954, so as to make cash housing allowances non-taxable for ministers, while other taxpayers were given no avenue to exempt cash allowances, even under the restrictive "convenience of the employer" requirement of §119, which was also enacted in 1954. Only ministers can qualify for the exemption of cash housing allowances.

In 1986, Congress overruled the IRS' position in Rev. Rul. 83-3 that mortgage interest and property taxes could not be deducted by clergy who received §107 allowances. Section 265(a)(6) is a narrow exception to the general rule of §265(a)(1) that disallows deductions allocable to tax-exempt income. This benefit, again, applies only to clergy and the military.

Finally, Congress enacted the Clergy Housing Clarification Act of 2002, thereby resolving the statutory issue on appeal to the Ninth Circuit in the Warren case. Congress acted for the benefit of all clergy by making the Warren case moot, thereby avoiding the likely adverse Ninth Circuit ruling on the constitutionality of §107.

Congress, in short, has acted at every turn to preferentially make tax breaks available for ministers. The resulting Internal Revenue Code includes provisions that are not neutral and generally applicable to other taxpayers on a secular basis. Section 107 and §265(a)(6), in particular, violate the second prong of the Lemon test.

Section 107 has the effect of fostering governmental entanglement with religion. In order to limit the tax break provided by §107 to ministers of the gospel, the IRS must make complex, intrusive and subjective inquiries into religious matters when applying

§107. Unlike the situation in Walz, therefore, the exemption provided by §107 actually increases the Government's entanglement with religion.

By contrast, the secular inquiries of the "convenience of the employer" doctrine under §119 would involve the Government in less entanglement with religion. The procedural component of entanglement analysis under the Establishment Clause is intended to minimize legislative and judicial intrusion into the internal affairs of a religious organization. See Alcazar v. Corporation of the Catholic Archbishop of Seattle, 210 U.S. App. LEXIS 5356 (9th Cir., March 16, 2010). Here, the inquiries required by §107 implicate the procedural component of entanglement to an extent that far exceeds any potential inquiries under §119.

The Supreme Court's holding in Texas Monthly ultimately represents the controlling application of the Lemon test to the present case: Preferential tax benefits to religion, that are not neutral and generally available to other taxpayers on the basis of secular criteria, violate the Establishment Clause. While all taxpayers would like to have exemptions and deductions to cover their housing costs, the reality is that only ministers of the clergy get this break. Sections 107 and 265(a)(6), therefore, violate the Establishment Clause.

CONCLUSION

For all the above reasons, the Government's Motion to Dismiss should be denied.

Dated this 20th day of April, 2010.

/s Richard L. Bolton
Richard L. Bolton (SBN: 1012552)
Boardman, Suhr, Curry & Field LLP
One South Pinckney Street, 4th Floor
P.O. Box 927
Madison, Wisconsin 53701-0927
Pro Hac Vice
Michael A. Newdow (SBN: 220444)
NEWDOWLAW
P.O. Box 233345
Sacramento, California 95623
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Plaintiffs' Memorandum of Points and Authorities in Opposition to United States' Motion to Dismiss has been made this 20th day of April, 2010 via the Court's CM/ECF system to:

Jeremy N. Hendon — Jeremy.Hendon@usdoj.gov
Attorney for the United States of America

Kevin Snider
kevinsnider@pacificjustice.org
Matthew McReynolds
mattmcreynolds@pacificjustice.org
Counsel for Amicus Curiae

Jill Bowers — jill.bowers@doj.ca.gov
Counsel for Selvi Stanislaus

/s Richard L. Bolton
Richard L. Bolton
Counsel for Plaintiffs

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