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11  
12 IN THE UNITED STATES DISTRICT COURT  
13  
14 FOR THE EASTERN DISTRICT OF CALIFORNIA  
15  
16 CIVIL DIVISION

17  
18 FREEDOM FROM RELIGION )  
19 FOUNDATION, INC.; PAUL STOREY; )  
20 BILLY FERGUSON; KAREN )  
21 BUCHANAN; JOSEPH MORROW; )  
22 ANTHONY G. ARLEN; ELISABETH )  
23 STEADMAN; CHARLES AND )  
24 COLLETTE CRANNELL; MIKE )  
25 OSBORNE; KRISTI CRAVEN; )  
26 WILLIAM M. SHOCKLEY; )  
27 PAUL ELLCESSOR; JOSEPH RITTELL; )  
28 WENDY CORBY; PAT KELLEY; )  
29 CAREY GOLDSTIEN; DEBORA SMITH; )  
30 KATHY FIELDS; RICHARD MOORE; )  
31 SUSAN ROBINSON; AND )  
32 KEN NAHIGIAN, )

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

**PLAINTIFFS' REPLY  
MEMORANDUM REGARDING  
QUESTION BY COURT**

33 )  
34 Plaintiffs, )

Judge: The Hon. William B. Shubb  
Trial Date: Net yet set.  
Action Filed: October 16, 2010

35 )  
36 v. )

37 )  
38 TIMOTHY GEITHNER, in his official )  
39 capacity as Secretary of the United States )  
40 Department of the Treasury; DOUGLAS )  
41 SHULMAN, in his official capacity as )  
42 Commissioner of the Internal Revenue )  
43 Service; and SELVI STANISLAUS, in her )  
44 official capacity as Executive Officer of )  
45 the California Franchise Tax Board, )

46 )  
47 Defendants. )  
48 )

1 **I. The Historical Evidence Indicates That Congress First Adopted**  
2 **The Parsonage Exemption In Order To Provide A Benefit To**  
3 **Ministers Rather Than To Avoid Entanglement.**  
4

5 The Court inquired during oral argument in this case whether any further evidence  
6 could be found as to Congress' intent in 1921 when first adopting the parsonage  
7 exemption. The plaintiffs had previously noted that the extant evidence contradicts the  
8 Government's claim that the exemption was intended to avoid entanglement. During  
9 argument, however, the Court questioned plaintiffs' counsel as to any other evidence of  
10 Congress' intent.

11 The Supreme Court noted in Commissioner v. Kowalski, 434 U.S. 77, 84 (1977),  
12 that the phrase "convenience of the employer" first appeared in a Treasury Decision in  
13 1919, in a ruling exempting lodging furnished to seamen aboard ship (see Exhibit A  
14 attached hereto):

15 Board and lodging furnished to seamen, in addition to their cash  
16 compensation, is held to be supplied for the convenience of the employer  
17 and the value thereof is not required to be reported in such employee's  
18 income tax returns. (O.D. 265, 1 Cum. Bull. 71 (1919.)  
19

20 The following year, in 1920, the Treasury Department amended Regulation  
21 §213(a), Article 33, thereby formally distinguishing lodging provided for the convenience  
22 of the employer from lodging provided as part of an employee's compensation for  
23 services. See Kowalski, 434 U.S. at 84-85, quoting T. D. 2992, 2 Cum. Bull. 76 (1920):

24 Art. 33. Compensation Paid Other Than In Cash. - Where services are  
25 paid with something other than money, the fair market value of the thing  
26 taken in payment is the amount to be included as income. . . . When living  
27 quarters such as camps are furnished to employees for the convenience of  
28 the employer, the ratable value need not be added to the cash  
29 compensation of the employee, but where a person receives as  
30 compensation for services rendered a salary and in addition thereto living  
31 quarters, the value to such person of the quarters furnished constitutes  
32 income subject to tax. [Emphasis added.] (See Exhibit B attached  
33 hereto.)

1  
2 The 1921 Treasury Department Decision in O.D. 862, previously cited,  
3 subsequently concluded that the minister's parsonage was a component of compensation,  
4 rather than something provided for the convenience of the employer. The language of  
5 O.D. 862, compared to the Treasury Regulation adopted in 1920, makes apparent that the  
6 parsonage allowance was not deemed by the Department to be provided for the  
7 convenience of the employer:

8 Where in addition to the salary paid, a clergyman is permitted to use the  
9 parsonage for living quarters free of charge, the fair rental value of the  
10 parsonage is considered a part of his compensation for services rendered  
11 and as such should be reported as income.  
12

13 The 1921 Revenue Act, subsequently granting ministers an exemption for the  
14 value of free living quarters, nullified the conclusion by the Treasury Department that  
15 housing provided to clergy should be treated as income subject to taxation. Congress did  
16 not act to avoid entanglement in 1921, but rather acted to repudiate the decision by the  
17 Treasury Department that the value of a parsonage provided to clergy was subject to  
18 taxation; the 1921 Revenue Act created a benefit for clergy that the Treasury Department  
19 had concluded was not otherwise warranted under the Revenue Code. The 1921 Revenue  
20 Act did not reflect, or otherwise infer, an intent to avoid entanglement, but merely  
21 provided a tax benefit not otherwise available to clergy.

22 The language of the 1921 Revenue Act, when compared to the Treasury  
23 Department's language in amended Treasury Reg. §213(a), Article 33, shows Congress'  
24 intent to create an exemption for clergy in the situation "where a person receives as a  
25 compensation for services rendered a salary and in addition thereto living quarters." The  
26 1921 Revenue Act specifically enacted an exemption applicable where a minister is  
27 provided living quarters as compensation for services, as opposed to the situation where

1 "living quarters such as camps are furnished to employees for the convenience of the  
2 employer." The parsonage allowance that originated in the Revenue Act of 1921  
3 excluded from gross income "the rental value of a dwelling house and appurtenances  
4 thereof furnished to a minister of the gospel as part of his compensation." (Emphasis  
5 added.)

6 The fact that Congress created an exemption specific to housing provided as part  
7 of a minister's compensation is significant. If Congress had meant for the parsonage  
8 exemption to merely be an alternative to the "convenience of the employer" test, then the  
9 exemption would not be defined in terms of the rental value of housing furnished to a  
10 minister "as part of his compensation." O.D. 862 determined that parsonages are not  
11 provided to clergy "for the convenience of the employer," but rather they are provided as  
12 part of a minister's compensation for services, within the meaning of amended Treasury  
13 Reg. §213(a), Article 33. The Revenue Act of 1921 simply overruled O.D. 862 by  
14 exempting the minister's housing even though not provided for the convenience of the  
15 employer.

16 The 1921 Revenue Act overruled O.D. 862 by providing a benefit to ministers  
17 who did not qualify under the Department's "convenience of the employer" doctrine; in  
18 the process, Congress created an exemption to Treasury Reg. §213(a), Article 33, that  
19 was applicable only to ministers. This preference by Congress for ministers of the gospel  
20 was the motivation for the parsonage exemption, rather than avoidance of any  
21 entanglement under the "convenience of the employer" doctrine, which was not deemed  
22 applicable to ministers. No evidence indicates that entanglement was on Congress' mind  
23 in 1921.

1 Dated this 13th day of May, 2010.

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15 **CERTIFICATE OF SERVICE**

16  
17  
18 IT IS HEREBY CERTIFIED that service of the foregoing Plaintiffs' Reply  
19 Memorandum Regarding Question By Court has been made this 13th day of May, 2010  
20 via the Court's CM/ECF system to:

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