IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC.; ANNIE LAURIE GAYLOR; ANNE NICOL GAYLOR; and DAN BARKER, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Civil Case No. 11-cv-626

UNITED STATES' BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

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Introduction

Plaintiffs pray that this Court will declare 26 U.S.C. § 107,[1] a tax statute, unconstitutional and enjoin the United States from enforcing it. They allege that § 107 violates the Establishment Clause and the Equal Protection Clause of the United States Constitution. But Plaintiffs' Complaint is fundamentally flawed in ways that require it be dismissed in its entirety. First, Plaintiffs have failed to allege that the United States has waived sovereign immunity to be sued for the relief they seek, so their entire suit is barred. Second, Plaintiffs have failed to establish that they (as taxpayers, as individuals, or as an entity) have standing to challenge the constitutionality of § 107 under either the Establishment Clause or the Equal Protection Clause because they cannot show a concrete and particularized injury fairly traceable to an allegedly wrongful act by the United States and redressable by a favorable decision in this Court. Accordingly, Plaintiffs' Complaint should be dismissed.

I. ALLEGATIONS CONTAINED IN THE COMPLAINT

A. Factual Allegations

Plaintiffs are Freedom From Religion Foundation (hereafter "FFRF") and three named individuals (hereafter "Individual Plaintiffs"). FFRF describes itself as "a non-profit membership organization that advocates for the separation of church and state and educates on matters of non-theism." (Complaint ¶ 6.) It has 17,167 members in every state and the District of Columbia. (Id.) FFRF's membership includes individuals who are federal taxpayers and "who are opposed to government preferences and favoritism toward religion." (Id. ¶ 8.) FFRF "represents and advocates on behalf of its members throughout the United States." (Id. ¶ 7.)

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[1]All statutory references refer to the Internal Revenue Code (26 U.S.C.), unless otherwise noted.

Plaintiffs further allege that Individual Plaintiffs, board members of FFRF, currently receive a housing allowance designated by the governing body of FFRF, and that the housing allowances have been so designated for 2012. (Id. ¶¶ 9-12.) The housing allowance paid to Individual Plaintiffs does not exceed their housing-related expenses. (Id. ¶ 12.)

B. Jurisdictional Allegations

Plaintiffs challenge the constitutionality of § 107. Plaintiffs allege that they have suffered injuries because § 107 violates the Establishment Clause of the First Amendment "because it provides tax benefits only to 'ministers of the gospel,' rather than to a broad class of taxpayers" (Compl. ¶ 19), and "result[s] in 'excessive entanglement' between church and state" (id. ¶ 21). Section 107 provides certain taxpayers an exclusion from income for amounts attributable to employer-provided housing and housing allowances. Section 107 states:

> In the case of a minister of the gospel, gross income does not include–
> (1) the rental value of a home furnished to him as part of his compensation; or
> (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.

Individual Plaintiffs allege that their housing allowances do not qualify for exclusion from their gross income because they "are not practicing religious clergy." (Compl. ¶ 3.) Plaintiffs contend that § 107 "discriminates against the [I]ndividual [P]laintiffs who cannot receive the same tax benefits [as ministers of the gospel may] because they are not practicing religious clergy." (Id. ¶ 20.) Plaintiffs also allege that § 107 "violates the equal protection rights of the [I]ndividual [P]laintiffs." (Id. ¶ 46.)

Invoking this Court's jurisdiction under 28 U.S.C. § 1331, with reference to 28 U.S.C. §§ 2201 and 1343 (Compl. ¶ 2), Plaintiffs seek prospective relief in the form of: 1) a declaration

that § 107 "violates the Establishment Clause and the Equal Protection Clause of the United States Constitution" and 2) an injunction against the United States "from continuing to grant or allow preferential tax benefits under § 107 . . . exclusively to religious clergy" (Compl., Prayer for Relief, ¶¶ A-B).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) allows a defendant to move to dismiss an action for lack of subject matter jurisdiction. On such a motion, the plaintiff bears the burden of establishing that subject matter jurisdiction exists. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). To establish subject matter jurisdiction, a plaintiff must show, among other things, that the United States has waived sovereign immunity to suit, see Macklin v. United States, 300 F.3d 814, 819 (7th Cir. 2002), and that the plaintiff has standing to sue, American Federation of Government Employees, Local 2119 v. Cohen, 171 F.3d 460, 465 (7th Cir. 1999) ("Obviously, if a plaintiff cannot establish standing to sue, relief from this court is not possible, and dismissal under 12(b)(1) is the appropriate disposition."); see Pollack v. United States Dep't of Justice, 577 F.3d 736, 738-39 (7th Cir. 2009). If the plaintiff cannot make this showing, even with all facts in the complaint accepted as true and all reasonable inferences drawn in the plaintiff's favor, the complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. See Peters v. Clifton, 498 F.3d 727, 730, 734 (7th Cir. 2007) (affirming dismissal of complaint for lack of subject matter jurisdiction).

III. ARGUMENT

Plaintiffs' Complaint should be dismissed for lack of subject matter jurisdiction because they have failed to allege that the United States has waived sovereign immunity for this suit and because they have failed to allege sufficient facts to show that they have standing to challenge § 107 as a violation of the Establishment Clause or as a violation of their equal protection rights. Each of these fatal flaws precludes this Court from considering this case.

A. Plaintiffs' Complaint should be dismissed because they have not alleged that the United States has consented to be sued.

Before a federal district court may entertain a suit against the United States, a plaintiff must identify 1) "a statute that confers subject matter jurisdiction on the district court" and 2) "a federal law that waives the sovereign immunity of the United States to the cause of action." Macklin, 300 F.3d at 819. Failure to satisfy both of these requirements "mandates the dismissal of the plaintiff's claim." Id.; see also United States v. Mitchell, 445 U.S. 535, 538 (1980) (plaintiffs must "look beyond the jurisdictional statute for a waiver of sovereign immunity").

Because this case arises under the United States Constitution and a federal statute, this Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331. But the Complaint must be dismissed because Plaintiffs fail to identify any federal law that waives the sovereign immunity of the United States for their claims. "It is axiomatic that a suit cannot be maintained against the United States without its consent." Balistrieri v. United States, 303 F.2d 617, 619 (7th Cir. 1962). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." Lane v. Pena, 518 U.S. 187, 192 (1996) (internal citations omitted).

Plaintiffs' only jurisdictional statutory citations are to 28 U.S.C. §§ 1331, 2201, and 1343 (Compl. ¶ 2), but none of these statutes waives the United States' sovereign immunity and provides its consent to be sued. Kester v. Campbell, 652 F.2d 13, 15 (9th Cir. 1981) (28 U.S.C. § 1331 does not waive sovereign immunity); Beale v. Blount, 461 F.2d 1133, 1138 (5th Cir. 1972) (28 U.S.C. §§ 1331 and 1343 "may not be construed to constitute waivers of the federal government's defense of sovereign immunity"); Balistrieri, 303 F.2d at 619 (28 U.S.C. § 2201 does not waive sovereign immunity). The challenged statute, § 107, similarly contains no waiver of sovereign immunity. Because Plaintiffs have failed to identify "a federal law that waives the sovereign immunity of the United States to the cause of action," see Macklin, 300 F.3d at 819, this Court lacks subject matter jurisdiction. See also Schilling v. Wis. Dep't of Natural Res., 298 F. Supp. 2d 800, 802-04 (W.D. Wis. 2003) (Crabb, J.) (dismissing suit because plaintiffs did not aver a waiver of sovereign immunity). The Complaint should be dismissed in its entirety.

B. Plaintiffs do not have standing to challenge the constitutionality of § 107 under the Establishment Clause, therefore this claim should be dismissed.

Plaintiffs have one grievance: ministers of the gospel receive a tax exemption that they do not receive. Because Plaintiffs make a facial challenge to a tax exemption without identifying a specific injury they have suffered as a result of the operation of § 107, Plaintiffs presumably purport to have standing as aggrieved taxpayers. But taxpayer standing is generally prohibited, and Plaintiffs' allegations do not fit into the single, narrow exception to the prohibition on taxpayer standing because they fail to allege that Congress has made an expenditure of their tax dollars for the benefit of a sectarian entity. Similarly, Plaintiffs fail to allege that they have suffered any other, non-taxpayer injury. Therefore, Plaintiffs' objection to § 107 does not provide them with standing because it is not a concrete and particularized injury fairly traceable

to an allegedly wrongful act by the United States and redressable by a favorable decision in this Court. A plaintiff may not merely allege a violation of the Establishment Clause in order to circumvent the constitutional requirement of an injury in fact before a federal court may exercise jurisdiction:

> If an establishment of religion is alleged to cause real injury to particular individuals, the federal courts may adjudicate the matter. Like other constitutional provisions, the Establishment Clause acquires substance and meaning when explained, elaborated, and enforced in the context of actual disputes. That reality underlies the case-or-controversy requirement . . . .

Ariz. Christian Sch. Tuition Org. v. Winn, — U.S. —, 131 S. Ct. 1436, 1449 (2011) (hereafter, "ACSTO"). Instead, a plaintiff must demonstrate that he or she meets the constitutional requirements for standing to sue.

Article III of the United States Constitution requires that the federal judiciary resolve only "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. The Supreme Court has long interpreted Article III's case-or-controversy requirement to limit the federal judiciary's exercise of jurisdiction to plaintiffs who have sufficiently established "Article III standing." See Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 597-598 (2007) (plurality opinion)[2] ("Article III standing . . . enforces the Constitution's case-or-controversy requirement." (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006) and Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004))). For more than 200 years, the federal judiciary has limited its exercise of power "solely, to decide on the rights of individuals," Marbury v. Madison, 5 U.S.

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[2] The Hein plurality opinion "is controlling because it expresses the narrowest position taken by the Justices who concurred in the judgment." Freedom From Religion Found., Inc. v. Nicholson, 536 F.3d 730, 738 n.11 (7th Cir. 2008) (citing Marks v. United States, 430 U.S. 188, 193 (1977)); accord Laskowski v. Spellings, 546 F.3d 822, 827 (7th Cir. 2008).

137, 170 (1803), and therefore has refrained from reviewing the constitutionality of statutes except "when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act." Frothingham v. Mellon, 262 U.S. 447, 488 (1923), decided with Massachusetts v. Mellon. The limitation imposed by the case-or-controversy requirement of Article III standing is "fundamental to the judiciary's proper role in our system of government." Hein, 551 U.S. at 598 (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997) and Simon v. E. Ky. Welfare Rights Org. 426 U.S. 26, 37 (1976)).

The party invoking federal court jurisdiction bears the burden of proof to establish each element of standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). To do so, a plaintiff must show "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Serv, 528 U.S. 167, 180-81 (2000). "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." Lujan, 504 U.S. at 562 (quotation omitted).

Here, Plaintiffs do not have standing to litigate the claim that § 107 violates the Establishment Clause because they cannot show that they have suffered an injury in fact. They do not have Article III standing because, without such an injury in fact, they allege no harm that is fairly traceable to an action of the United States or redressable by a favorable decision. Therefore, Plaintiffs' Establishment Clause claim should be dismissed for lack of subject matter jurisdiction.

1. Plaintiffs have not alleged a direct, personal injury to themselves as taxpayers as a result of the enforcement of § 107.

Plaintiffs have not suffered the personal injury that is concrete and particularized and actual or imminent, which is necessary to establish standing for themselves as taxpayers. "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)); accord Lujan, 504 U.S. at 563 (the "injury in fact" test "requires that the party seeking review be himself among the injured" (quotation omitted)); Hein, 551 U.S. at 598 (standing requires a "personal injury" (quoting Allen v. Wright, 468 U.S. 737, 751 (1984))).

Constitutional challenges that are abstract, conjectural, or hypothetical may not be heard because federal courts "have no power per se to review and annul acts of Congress on the ground that they are unconstitutional." Frothingham, 262 U.S. at 488; accord ACSTO, 131 S. Ct. at 1441-42 ("a plaintiff who seeks to invoke the federal judicial power must assert more than just the 'generalized interest of all citizens in constitutional governance.'" (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974))); Freedom From Religion Found., Inc. v. Obama, 641 F.3d 803, 807-08 (7th Cir. 2011) ("The 'psychological consequence presumably produced by observation of [government officials'] conduct with which one disagrees' is not an 'injury' for the purpose of standing." (quoting Valley Forge, 454 U.S. at 485)). It is not sufficient for a plaintiff to claim "only harm to his and every citizen's interest in proper application of the Constitution and laws and [seek] relief that no more directly and

tangibly benefits him than it does the public at large." Lujan, 504 U.S. at 573-74. Instead, a plaintiff "must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." Frothingham, 262 U.S. at 488.

Therefore, the Supreme Court has long adhered to the rule established in Frothingham, and affirmed in Doremus v. Board of Ed. of Hawthorne, 342 U.S. 429, 433 (1952), to deny standing to a plaintiff alleging an injury that arises solely by virtue of his or her status as a taxpayer. See ACSTO, 131 S. Ct. at 1444-45; Hein, 551 U.S. at 600-01. "'[T]he interests of a taxpayer in the monies of the federal treasury are too indeterminable, remote, uncertain and indirect'" to create an injury in fact sufficient for any one taxpayer to challenge an expenditure of tax dollars collected. Hein, 551 U.S. at 600-01 (quoting Doremus, 342 U.S. at 433). The effect of some challenged governmental activity on a plaintiff's tax liability fails to provide a "direct and particular financial interest" sufficient to constitute the injury in fact that leads to Article III standing. Doremus, 342 U.S. at 434-435 (rejecting a state taxpayer's alleged standing to challenge a state law authorizing public school teachers to read from the Bible).

Plaintiffs here do not allege any facts to show that they have the requisite "direct and particular financial interest" sufficient to constitute an injury in fact in this case. All they allege is that, as taxpayers, they object to the tax exemption that ministers of the gospel receive. Their allegations are insufficiently direct and particular to provide the requisite injury in fact for Article III standing. Therefore, Plaintiffs fall squarely within the Supreme Court's long-

established prohibition against taxpayer standing and their claims under the Establishment Clause should be dismissed.

2. Plaintiffs do not qualify for the Flast exception to the prohibition against taxpayer standing because they do not challenge a government expenditure.

The Supreme Court created a narrow exception to the prohibition against taxpayer standing in Flast v. Cohen, for cases in which a plaintiff alleges that government has made an expenditure in violation of the Establishment Clause. 392 U.S. 83, 102-03 (1968). In Flast, the plaintiffs-petitioners alleged that they paid federal taxes and that Congress appropriated funds that were used to finance secular instruction and teaching materials in religious schools. Id. at 85-86. An injury in fact arose in that case only because the Establishment Clause limits congressional power to tax and spend; specifically, it protects taxpayers against the government's use of both the taxing power and the spending power in aid of religion. The Court observed that James Madison and the other drafters of the Establishment Clause "designed [it] as a specific bulwark against such potential abuses of governmental power," in apprehension of "'authority which can force a citizen to contribute three pence only of his property for the support of any one establishment.'" Id. at 103-104 (quoting 2 Writings of James Madison 183, 186 (Hunt ed. 1901)). Therefore, the Flast exception requires a taxpayer-plaintiff to allege a forcible contribution of his or her taxes to aid a particular religious entity. Id. at 105.

The point of reference for Flast "is the standing of individuals who assert only the status of federal taxpayers and who challenge the constitutionality of a federal spending program." Id. at 102 (emphasis added). Under the Flast exception, a plaintiff must demonstrate that he or she has suffered an injury in fact by satisfying a two-part test: "First, the taxpayer must establish a

logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." Id. The Flast Court itself strictly construed the nexus requirement to narrow the applicability of its exception to government programs involving the expenditure of taxes yet still giving rise to a particularized and redressable injury in fact fairly traceable to the congressional expenditure. Id. ("It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute."); see id. at 105-06. Each of the concurring and dissenting opinions in Flast observed that the holding was limited to taxpayer challenges to federal spending programs. See id. at 107 (Douglas, J. concurring); id. at 114 (Stewart, J. concurring); id. at 115 (Fortas, J. concurring); id. at 117 (Harlan, J. dissenting).

In the forty-three years since Flast, the Supreme Court has largely confined application of the Flast exception to its facts: a taxpayer-plaintiff states an injury in fact when alleging that an appropriation authorized by Congress (funded by the plaintiff's tax dollars) violates the Establishment Clause by spending those tax dollars in support of religion. E.g., Hein, 551 U.S. at 609-10. The injury to a plaintiff challenging such an expenditure is that his or her "property is transferred through the Government's Treasury to a sectarian entity." ACSTO, 131 S. Ct. at 1446 (emphasis added). "When the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth. In that case a resulting subsidy of religious activity is, for purposes of Flast, traceable to the government's expenditures." Id. at 1446-47. "Flast thus understood the injury alleged in Establishment Clause challenges to federal spending to be the very extraction and spending of tax money in aid of religion alleged by a plaintiff. Id. at 1446 (quotation and alterations omitted). As such, Flast can and should be relied upon only if a

plaintiff challenges a legislative expenditure of funds that were collected, in part, by taxes paid by the plaintiff. See id. at 1448.

An "expenditure" for purposes of the Flast exception is an outlay of taxpayer funds, not a legislative decision to refrain from collecting funds. See id. at 1447 (declining to extend the Flast exception to an action challenging the constitutionality of a tax benefit for which there was no governmental expenditure). In ACSTO, Arizona offered taxpayers dollar-for-dollar tax credits for their contributions to school tuition organizations ("STOs"), some of which were sectarian. Id. at 1440. The taxpayer-respondents alleged that Arizona's diminished revenues, as a result of the tax dollars not collected because of the credit, constituted a "government spending program that distributes state tax revenues" and a "tax expenditure." Brief of Respondents, ACSTO, 131 S. Ct. 1436 (2011), 2010 WL 3624706, at *26, 44. The Supreme Court rejected this argument and held instead that tax benefits, including the tax credits at issue, are qualitatively different from government spending for Establishment Clause purposes. ACSTO, 131 S. Ct. at 1447 ("The distinction between governmental expenditures and tax credits refutes respondents' assertion of standing. . . . The STO tax credit is not tantamount to a religious tax or to a tithe and does not visit the injury identified in Flast."). "When the government declines to impose a tax . . . there is no such connection between dissenting taxpayer and alleged establishment," and therefore no injury in fact that can provide taxpayer standing to sue. Id. at 1446-47; see also Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 675 (1970) (observing that a tax exemption is not government sponsorship of religion because "the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state").

Thus, without an allegation of government spending in support of religion, there is no injury in fact to a taxpayer-plaintiff, "even if one assumes that an expenditure or tax benefit depletes the government's coffers." ACSTO, 131 S. Ct. at 1444. The Court could not presume an injury in fact by operation of a tax credit because such a finding would rely on speculation that "lawmakers react to revenue shortfalls by increasing respondents' tax liability." Id. (observing that a "finding of causation would depend on the additional determination that any tax increase would be traceable to the [third-party tax benefits], as distinct from other governmental expenditures or other tax benefits" (citing DaimlerChrysler, 547 U.S. at 344)). The Court affirmed that it is the specific extraction of funds from a dissenter by the Government which is then given directly to aid or establish religion that is the necessary requirement for the narrow Flast exception to apply. See id. at 1446-48; accord Nicholson, 536 F.3d at 743 (concluding that FFRF did not have standing to challenge a clinical chaplaincy program in hospitals under the purview of the United States Department of Veterans Affairs because FFRF had not shown that Congress had "extracted from it tax dollars" to implement and establish the program); cf. Bowen v. Kendrick, 487 U.S. 589, 618-619 (1988) (finding standing for plaintiffs challenging a federal program's disbursal of funds to sectarian grantees pursuant to Congress' taxing and spending powers).

Here, like the plaintiffs in ACSTO, Plaintiffs have failed to establish a taxpayer injury because § 107 does not provide for the extraction of any taxes, from Plaintiffs or any other taxpayer. See ACSTO, 131 S. Ct. at 1448. Section 107 does not expend the Plaintiff-taxpayers' money, not even three pence of it, in aid of religion. See id. at 1447. Instead, § 107 reflects a legislative decision to refrain from imposing a tax on ministers. See id. at 1446-47. Therefore,

Plaintiffs' allegations cannot satisfy the nexus requirement imposed by Flast, and subsequently reaffirmed and explained in Hein and ACSTO, that they have suffered a concrete and particularized injury in fact as taxpayers. See Hein, 551 U.S. at 611-12; ACSTO, 131 S. Ct. at 1447-48. It follows that they have similarly failed to show any harm traceable to § 107 or redressable by the relief requested in the Complaint. See Lujan, 504 U.S. at 568-69. Plaintiffs' claim under the Establishment Clause is therefore barred by the Frothingham prohibition on taxpayer standing, and should be dismissed.

3. This Court may not enlarge the Flast exception to find that Plaintiffs have suffered an injury in fact as taxpayers.

The Flast exception may not be applied in this case to find that Plaintiffs have suffered an injury in fact as taxpayers. It is also clear that the Flast exception may not be enlarged to accommodate Plaintiffs' suit. Laskowski, 546 F.3d at 826 ("[T]the Supreme Court has now made it abundantly clear that Flast is not to be expanded at all." (emphasis in original)). The Seventh Circuit has adhered closely to the narrow confines of the Flast exception since the Supreme Court's opinion in Hein. In Hein, the plurality admonished and reversed the Seventh Circuit for "extend[ing] Flast" rather than "apply[ing] Flast." 551 U.S. at 614-15.

In Hein, FFRF and others sued the head of the White House Office of Faith-Based and Community Initiatives and other federal defendants for violating the Establishment Clause because, among other things, "President Bush and former Secretary of Education Paige gave speeches that used 'religious imagery' and praised the efficacy of faith-based programs in delivering social services." Id. at 592. Judge Shabaz, of the Western District of Wisconsin, dismissed the claims against the petitioners before the Supreme Court for lack of standing, holding that the suit did not fit within the Flast exception because the challenged activities were

undertaken by members of the executive branch of the federal government, and were not "'exercises of congressional power' sufficient to provide a basis for taxpayer standing under Flast." Id. at 596 (quoting Freedom From Religion Found., Inc. v. Towey, No. 04-C-381-S, 2005 U.S. Dist. LEXIS 39444 (W.D. Wis., Nov. 15, 2004) (Shabaz, J.)). The Seventh Circuit, however, reversed the district court in a split decision. Freedom From Religion Found., Inc. v. Chao, 433 F.3d 989 (7th Cir. 2006). The majority concluded that federal taxpayers had standing to challenge actions taken by the executive branch, on Establishment Clause grounds, as long as those actions were "financed by a congressional appropriation," even if there was no specific expenditure enacted by, and financed by, Congress. Id. at 997.

Hein reaffirmed that the Flast exception is as explicit as it is limited: because the complained-of expenditures were not "expressly authorized or mandated by any specific congressional enactment, [FFRF's] lawsuit is not directed at an exercise of congressional power, see Valley Forge, 454 U.S. at 479, and thus lacks the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked,' Flast, 392 U.S. at 102." Hein, 551 U.S. at 608-09 (parallel citations omitted). Thus, the case "[fell] outside 'the narrow exception' that Flast 'created to the general rule against taxpayer standing established in Frothingham.'" Id. at 608 (quoting Kendrick, 487 U.S. at 618). The Court rejected FFRF's argument that it was "arbitrary" to distinguish between money spent by the executive branch, and money spent pursuant to a specific congressional appropriation. Id. at 609. The Court "decline[d] the invitation to extend [Flast's] holding" to expand the capacity for plaintiffs alleging taxpayer standing to challenge expenditures by the Executive Branch. Id. (noting that the Court has "rejected the view that taxpayer standing 'extends to the Government as a whole, regardless of

which branch is at work in a particular instance'" (quoting Valley Forge, 454 U.S. at 484, n.20)). Moreover, Hein explained, "we have repeatedly emphasized that the Flast exception has a 'narrow application in our precedent,' Cuno, 547 U.S. at 348, that only 'slightly lowered' the bar on taxpayer standing, [United States v.]Richardson, 418 U.S. [166,] 173 [1974], and that must be applied with 'rigor,' Valley Forge, [454 U.S.] at 481." Id. (parallel citations omitted).

Since Hein, the Seventh Circuit has declined every invitation to extend the Flast exception. E.g., Laskowski, 546 F.3d at 827 ("Permitting a taxpayer to proceed against a private grant recipient for restitution to the Treasury as a remedy in an otherwise moot Establishment Clause case would extend the Flast exception beyond the limits of the result in Flast. After Hein, such an extension is unwarranted."); Nicholson, 536 F.3d at 737-45 (concluding that FFRF lacked standing to challenge the constitutionality of a medical chaplaincy program within hospitals under the purview of the Department of Veterans Affairs because the program was initiated and funded by executive action, not by congressional mandate); Hinrichs v. Speaker of the House of Representatives, 506 F.3d 584, 598-99 (7th Cir. 2007) (reversing an injunction entered by the district court against the practice in the Indiana House of Representatives of regularly offering a sectarian prayer because the plaintiffs "have not shown that the legislature has extracted from them tax dollars for the establishment and implementation of a program that violates the Establishment Clause. . . . Instead, the plaintiffs allege only an 'expenditure of government funds in violation of the Establishment Clause,' which the Court explicitly rejected as inadequate in Hein." (quoting Hein, 551 U.S. at 603 (internal citations omitted))).

District courts within the Seventh Circuit have followed the Seventh Circuit's interpretation of Flast. As Judge Conley of the Western District of Wisconsin observed, "the

Seventh Circuit reads Hein as "(1) 'narrowly confining [the Flast exception] to its facts' and (2) counseling lower courts that the exception 'is not to be expanded at all.'" Freedom From Religion Found., Inc. v. Ayers, 748 F. Supp. 2d 982, 985 (W.D. Wis. 2010) (quoting Laskowsi, 546 F.3d at 823, 826) (emphasis and alteration in original). Before Judge Conley, FFRF argued that it had taxpayer standing to sue federal defendants for a declaration that "the concurrent resolution of the U.S. House of Representatives directing . . . the Architect of the Capitol[ ] to engrave the Pledge of Allegiance and the National Motto in the Capitol Visitor Center violates the Establishment Clause." Id. at 983-84. Judge Conley found that FFRF (and two of the Individual Plaintiffs named in this suit) failed to establish injury in fact because they could not "point to any specific congressional appropriation for the allegedly unconstitutional concurrent resolution." Id. at 987 (emphasis in original).

The result should be the same here as it was in Ayers. Plaintiffs attack a congressional enactment, § 107, but as described above, that statute does not extract tax money from Plaintiffs, nor does it spend tax money in support of religion. Therefore, Plaintiffs have not suffered an injury in fact as taxpayers and do not have standing to sue. Just like in Ayers, and in each of the cases in the Seventh Circuit cited above, Plaintiffs have failed to fit their allegations into the narrow confines of the Flast exception. This Court should decline any invitation to expand Flast at all, see Laskowski, 546 F.3d at 826, let alone to encompass Plaintiffs' claims here. Their challenge to § 107 under the Establishment Clause should be dismissed.

4. Plaintiffs have not alleged facts to show that they have suffered any other injury in fact as a result of the enforcement of § 107.

Even without taxpayer standing, there are ways in which a tax provision may be challenged. For example, a plaintiff may challenge his or her own allegedly unconstitutional tax

treatment, because such a case presents a specific, direct injury to the plaintiff. See § 7422 (prescribing the process by which a taxpayer may sue for a refund); Droz v. Comm'r, 48 F.3d 1120, 1121-22 (9th Cir. 1995) (taxpayer had standing to raise an unsuccessful appeal making an Establishment Clause challenge to § 1402(g), which permits a religious exemption from payment of Social Security taxes, when he failed to pay the taxes, was assessed a deficiency by the IRS, and unsuccessfully challenged that deficiency in Tax Court); Warnke v. United States, 641 F. Supp. 1083, 1084-85, 92 (E.D. Ky. 1986) (holding on the merits that a self-employed minister who properly filed a suit for refund was not entitled to the exemption in § 107, and that the regulations for § 107 were "constitutionally valid and enforceable"); see also Templeton v. Comm'r, 719 F.2d 1408, 1412 & n.5 (7th Cir. 1983) (rejecting a constitutional challenge to § 1402(g) for lack of standing, and noting that courts reaching the merits of whether the religion-specific tax provision violates the Establishment Clause had "uniformly held that this section is not unconstitutional").

The Supreme Court acknowledged the proper mechanism for bringing such a suit in ACSTO. Referring to the plaintiffs in Texas Monthly v. Bullock, 489 U.S. 1 (1989), the Court indicated that an injury in fact had been properly alleged even though the challenged tax benefit was not facially applicable to the plaintiff. See ACSTO, 131 S. Ct. at 1449 ("[I]f a law or practice, including a tax credit, disadvantages a particular religious group or a particular nonreligious group, the disadvantaged party would not have to rely on Flast." (citing Texas Monthly, 489 U.S. at 8)). The plaintiff in Texas Monthly, a secular magazine, had attempted to take and was denied by the state of Texas a tax exemption that, on its face, was applicable only to religious publications. Texas Monthly, 489 U.S. at 6. Because the plaintiff in Texas Monthly

challenged the constitutionality of its own tax treatment, and did not merely object to a benefit that may be given to some other taxpayer, it alleged a concrete, particularized injury sufficient to provide standing to challenge the constitutionality of the tax exemption for religious publications. ACSTO, 131 S. Ct. at 1449; see also Texas Monthly, 489 U.S. at 8 ("A live controversy persists over Texas Monthly's right to recover the $149,107.74 it paid, plus interest."). This distinction was considered decisive by the Court in ACSTO, which held that Arizona taxpayers did not have standing to challenge a state tax credit under the Establishment Clause because they did not allege an actual injury involving their own tax liabilities. See ACSTO, 131 S. Ct. at 1440, 1447-49.

Here, Plaintiffs fail to allege that they have suffered a concrete injury resulting from the operation of § 107. Unlike the plaintiff in Texas Monthly, Plaintiffs do not contend that the actual treatment by the United States of their own taxes was in any way improper. (See Compl.) Like the plaintiffs in ACSTO, Plaintiffs' allegations essentially amount to the complaint that third parties' tax treatment is unconstitutional. (See Compl. ¶¶ 15-21, 38-48.) Because Plaintiffs challenge a tax exemption that has not adversely affected their individual tax liabilities, Plaintiffs have not alleged any concrete or particularized injury sufficient to allow their challenge to the constitutionality of § 107. See ACSTO, 131 S. Ct. at 1443-45.

Instead, Plaintiffs' allegations are "merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional." See Frothingham, 262 U.S. at 488. This objection is not a legal injury. See Freedom From Religion Found., Inc. v. Obama, 641 F.3d at 807-08 (7th Cir. 2011) ("The 'psychological consequence presumably produced by observation of conduct with which one

disagrees' is not an 'injury' for the purpose of standing." (quoting Valley Forge, 454 U.S. at 485)). Were this Court to conclude that Plaintiffs have suffered an injury in fact "consisting solely of an alleged violation of a personal constitutional right to a government that does not establish religion,"

> principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment, or standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws, to choose but two among as many possible examples as there are commands in the Constitution.

Valley Forge, 454 U.S. at 489 n.26 (quotation omitted).

Because Plaintiffs have failed to show that they have suffered any injury in fact, there can be no harm to Plaintiffs resulting from the operation of § 107 that is traceable to an action taken by the United States or redressable by this Court; therefore, they do not have Article III standing to make an Establishment Clause challenge to the statute. See Lujan, 504 U.S. at 568-69.

C. Plaintiffs do not have standing to challenge the constitutionality of § 107 as a violation of their equal protection rights, therefore this claim should be dismissed.

Plaintiffs allege that § 107 violates the "Equal Protection Clause" of the United States Constitution. (Compl. ¶ 1; Id., Prayer for Relief, ¶ A.) By its terms, the Equal Protection Clause of the Fourteenth Amendment applies only to state action, not federal action. Templeton, 719 F.2d at 1413. The Equal Protection Clause is, however, incorporated into the Due Process Clause of the Fifth Amendment, which is applicable to federal action. Id. "The scope of the equal protection guarantee under the Fifth Amendment is essentially the same as under the Fourteenth Amendment." Estate of Kunze v. Comm'r, 233 F.3d 948, 954 (7th Cir. 2000). But Plaintiffs' equal protection claim adds nothing to their Establishment Clause claim. See World Outreach

Conf. Ctr. v. City of Chicago, 591 F.3d 531, 534 (7th Cir. 2009) ("Discrimination by an official body can always be attacked as a violation of the equal protection clause–but that would usually add nothing, when the discrimination was alleged to be based on religion, to a claim under the religion clauses of the First Amendment." (citing Locke v. Davey, 540 U.S. 712, 720 n.3 (2004))); Conyers v. Abitz, 416 F.3d 580, 586 (7th Cir. 2005) (holding that a plaintiff's "free-exercise claim arises under the First Amendment and gains nothing by attracting additional constitutional labels" like equal protection). Therefore, for all of the reasons stated supra in § III.B, Plaintiffs have failed to allege that they have suffered an injury in fact sufficient to provide standing to challenge § 107 as a violation of equal protection.

Even if Plaintiffs' equal protection claim is distinct from their Establishment Clause claim, Plaintiffs lack standing to sue upon this claim. Plaintiffs do not allege that they have been injured by the existence or enforcement of § 107. See supra § III.B. Plaintiffs' sole grievance that can be construed from their thin and vague allegations regarding equal protection appears to be that § 107 exists and ministers of the gospel receive a tax exemption that they do not. As described supra in §§ III.B.1 and 4, without an allegation that § 107 has a direct and discriminatory impact upon Plaintiffs, their claims are abstract and hypothetical. There is no Flast analogue that permits "taxpayer standing" for purposes of a suit alleging a violation of equal protection rights – and even if there were, Plaintiffs would not qualify for it. See supra §§ III.B.2-3. Allowing Plaintiffs' equal protection claim to survive, on the facts alleged, would invite this Court to "review and annul [an act] of Congress on the ground that [it is] unconstitutional." Frothingham, 262 U.S. at 488. As discussed supra, that would contravene this Court's Article III authority to hear and adjudicate cases "solely, to decide on the rights of

individuals." Marbury v. Madison, 5 U.S. 137, 170 (1803). Plaintiffs simply fail to allege sufficient facts to show that they have suffered the type of injury in fact required to give them Article III standing to challenge § 107 as a violation of their rights to equal protection. Their equal protection claim should be dismissed for lack of subject matter jurisdiction.

D. FFRF's allegations should be dismissed because FFRF, as an entity, does not have standing to challenge the constitutionality of § 107.

Like any individual, an association like FFRF may sue on its own behalf when it has alleged sufficient facts to demonstrate that it has standing to do so. Assuming the applicability of the general allegations in the Complaint, and considering the allegations specific to FFRF (see Compl. ¶¶ 6-8), for all of the reasons identified supra in §§ III.B and C, FFRF has not sufficiently alleged a direct and specific injury to the organization that is traceable to an action by the United States and redressable by the relief sought. FFRF does not challenge a government expenditure upon a sectarian entity pursuant to congressional action, nor does it contest its own tax liabilities. Therefore, FFRF does not have standing, in its own right, to challenge the constitutionality of § 107 in any respect. If any of the Individual Plaintiffs had standing to sue, FFRF may have had "associational standing," Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977), but as shown above, they do not. Therefore, FFRF's constitutional challenges to § 107 should be dismissed for lack of subject matter jurisdiction. See Pollack v. United States Dep't of Justice, 577 F.3d 736, 743 (2009) (affirming dismissal of suit for lack of subject matter jurisdiction when neither individual members of an organization, nor the organization itself suing in a representational capacity, had standing).

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs' Complaint is fatally flawed and should be dismissed because this Court lacks subject matter jurisdiction to hear it. Plaintiffs have failed to show that the United States has waived sovereign immunity to be sued for the relief they seek, therefore the entire case is barred. Even if the case were not barred, each claim – that § 107 violates the Establishment Clause and Plaintiffs' equal protection rights – should be dismissed independently because Plaintiffs have not shown that they have suffered an injury in fact sufficient to establish Article III standing to challenge § 107 for either claim. Therefore, Plaintiffs' Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on December 23, 2011, service of the foregoing United States' Brief in Support of Its Motion to Dismiss Plaintiffs' Complaint for Lack of Subject Matter Jurisdiction was made upon Plaintiffs by filing it with the Clerk of Court using the CM/ECF system.

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