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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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FREEDOM FROM RELIGION  
FOUNDATION, INC.; PAUL STOREY; NO. CIV. 2:09-2894 WBS DAD  
BILLY FERGUSON; KAREN  
BUCHANAN; JOSEPH MORROW;  
ANTHONY G. ARLEN; ELISABETH  
STEADMAN; CHARLES AND COLLETTE MEMORANDUM AND ORDER RE:  
CRANNELL; MIKE OSBORNE; KRISTI MOTIONS TO DISMISS  
CRAVEN; WILLIAM M. SHOCKLEY;  
PAUL ELLCESSOR; JOSEPH  
RITTELL; WENDY CORBY; PAT  
KELLEY; CAREY GOLDSTEIN;  
DEBORAH 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.

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Freedom From Religion Foundation, Inc. ("FFRF"), a non-profit organization that advocates for the separation of church and state, and several of its members who live in California have filed this action against Timothy Geithner, in his official capacity as the Secretary of the United States Department of Treasury, and 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, seeking a declaration that 26 U.S.C. §§ 107 and 265(a)(6) violate the Establishment Clause of the United States Constitution and that sections 17131.6 and 17280(d)(2) of the California Revenue and Taxation Code violate the Establishment Clause of the United States and California Constitutions and seeking injunctive relief.

Defendants Geithner and Shulman ("federal defendants") and defendant Stanislaus separately move to dismiss plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

I. The Assailed Statutes and Regulations

Section 107 of the Internal Revenue Code ("IRC") provides that:

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

1 exceed the fair rental value of the home, including  
2 furnishing and appurtenances such as a garage, plus the  
cost of utilities.

3 26 U.S.C. § 107. Subsection 1.107-1(a) of the Treasury  
4 Regulations further provides:

5 In order to qualify for the exclusion, the home or rental  
6 allowance must be provided as remuneration for services  
7 which are "ordinarily the duties of a minister of the  
8 gospel." In general, the rules provided in § 1.402(c)-5  
9 will be applicable to such determination. Examples of  
10 specific services the performance of which will be  
considered duties of a minister for purposes of § 107  
include the performance of sacerdotal functions, the  
conduct of religious organizations and their integral  
agencies, and the performance of teaching and  
administrative functions at theological seminaries.

11 The Complaint alleges that the IRS also requires ministers of the  
12 gospel to be "duly ordained, commissioned, or licensed" in order  
13 to be entitled to the exclusion. (Compl. ¶¶ 43-44.)

14 The § 107 exclusion<sup>1</sup> is available only when a minister  
15 is given use of a home or receives a housing allowance as  
16 compensation for services performed "in the exercise" of his  
17 ministry, language that is borrowed from § 1402(c)(4). The  
18 Treasury Regulations promulgated under § 1402(c)(4) provide that  
19 services performed by a minister "in the exercise" of his  
20 ministry include: (1) the ministration of sacerdotal functions;  
21 (2) the conduct of religious worship; and (3) the control,  
22 conduct, and maintenance of religious organizations under the  
23 authority of a religious body constituting a church or church  
24 denomination. Treas. Reg. § 1.1402(c)-(5)(b)(2).

25 IRC § 265(a)(6) allows "ministers of the gospel" to  
26 claim deductions under §§ 163 and 164 of the IRC for residential

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27 <sup>1</sup> The parties and relevant caselaw alternately use the  
28 term "exclusion" and "exemption."

1 mortgage interest and property tax payments, even if the money  
2 used to pay those expenses was received in the form of a tax-  
3 exempt § 107 allowance. Plaintiffs allege that non-clergy  
4 taxpayers are not able to take advantage of this "double  
5 dipping." (Compl. ¶ 47.)

6 Sections 17131.6 and 17280(d)(2) of the California  
7 Revenue and Taxation Code correspond to sections 107 and  
8 265(a)(6) of the IRC.

9 II. Discussion

10 A. Motions to Dismiss for Lack of Subject Matter

11 Jurisdiction

12 Defendants first argue that the court lacks subject  
13 matter jurisdiction over plaintiffs' claims because, in the case  
14 of Stanislaus only, the Eleventh Amendment bars plaintiffs' suit  
15 and, with respect to all defendants, plaintiffs lack standing.

16 "Federal courts are courts of limited jurisdiction.  
17 They possess only that power authorized by Constitution and  
18 statute." Rasul v. Bush, 542 U.S. 466, 489 (2004) (quoting  
19 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377  
20 (1994)). The court is presumed to lack jurisdiction unless the  
21 contrary appears affirmatively from the record. DaimlerChrysler  
22 Corp. v. Cuno, 547 U.S. 332, 342 n.3 (2006). Consistent with  
23 these basic jurisdictional precepts, the Ninth Circuit has  
24 articulated the standard for surviving a motion to dismiss for  
25 lack of jurisdiction as follows:

26 When subject matter jurisdiction is challenged under  
27 Federal Rule of Civil Procedure 12(b)(1), the plaintiff  
28 has the burden of proving jurisdiction in order to  
survive the motion. A plaintiff suing in a federal court  
must show in his pleading, affirmatively and distinctly,

1 the existence of whatever is essential to federal  
2 jurisdiction, and, if he does not do so, the court, on  
3 having the defect called to its attention or on  
4 discovering the same, must dismiss the case, unless the  
5 defect be corrected by amendment.

6 Tosco Corp. v. Cmtys. for a Better Env't, 236 F.3d 495, 499 (9th  
7 Cir. 2001) (citations and internal quotations omitted).

8 Additionally, "[i]f the court determines at any time that it  
9 lacks subject-matter jurisdiction, the court must dismiss the  
10 action." Fed. R. Civ. P. 12(h)(3).

11 1. Eleventh Amendment Immunity

12 Stanislaus argues that plaintiffs' claims against her  
13 in her official capacity are barred by the Eleventh Amendment.  
14 See Hans v. Louisiana, 134 U.S. 1 (1890). The Eleventh Amendment  
15 to the United States Constitution provides: "The Judicial power  
16 of the United States shall not be construed to extend to any suit  
17 in law or equity, commenced or prosecuted against one of the  
18 United States by Citizens of another State, or by Citizens or  
19 Subjects of any Foreign State."

20 The Eleventh Amendment grants states sovereign immunity  
21 against suits in federal court. The State's sovereign immunity  
22 poses "a bar to federal jurisdiction over suits against  
23 non-consenting States." Alden v. Maine, 527 U.S. 706, 728-29  
24 (1999); accord V.O. Motors v. Cal. State Bd. of Equalization, 691  
25 F.2d 871, 873 (9th Cir. 1982). The bar extends to suits in  
26 federal court against a state by its own citizens as well as by  
27 citizens of another state. Edelman v. Jordan, 415 U.S. 651,  
28 662-63 (1974). This jurisdictional bar applies to suits "in  
which the State or one of its agencies or departments is named as  
the defendant" and "applies regardless of the nature of the

1 relief sought," Pennhurst State Sch. & Hosp. v. Halderman, 465  
2 U.S. 89, 100 (1984), including suits for declaratory or  
3 injunctive relief. Cory v. White, 457 U.S. 85, 91 (1982).  
4 Furthermore, a suit for damages against a state official in his  
5 or her official capacity is tantamount to a suit against the  
6 state itself, and is thus subject to the Eleventh Amendment.  
7 Pennhurst, 465 U.S. at 101-02.

8           "The Eleventh Amendment immunity is designed to allow a  
9 state to be free to carry out its functions without judicial  
10 interference directed at the sovereign or its agents." V.O.  
11 Motors, 691 F.2d at 872 (emphasis added). In this case,  
12 plaintiffs sue Stanislaus only in her official capacity as  
13 Executive Director of the California Franchise Tax Board, an  
14 agency of the State of California. Plaintiffs' claims against  
15 her are therefore subject to the Eleventh Amendment's guarantee  
16 of sovereign immunity to the states. Id.; Pennhurst, 465 U.S. at  
17 101-02.

18           Claims under 42 U.S.C. § 1983 for deprivation of  
19 federal civil rights are limited by the Eleventh Amendment.  
20 Because suits against state officials in their official capacity  
21 are tantamount to suits against the state itself, "state  
22 officials sued in their official capacities are not 'persons'  
23 within the meaning of § 1983." Doe v. Lawrence Livermore Nat'l  
24 Lab., 131 F.3d 836, 839 (9th Cir. 1997). An exception to the  
25 rule that state officials are not "persons" under § 1983 is found  
26 in Ex parte Young, 209 U.S. 123 (1908). When sued for  
27 prospective injunctive relief, a state official in her official  
28 capacity is considered a "person" for § 1983 purposes. See Will

1 v. Mich. Dep't of State Police, 491 U.S. 58, 71 n.10 (1989) ("Of  
2 course a state official in his or her official capacity, when  
3 sued for injunctive relief, would be a person under § 1983  
4 because 'official-capacity actions for prospective relief are not  
5 treated as actions against the State.'" ) (quoting Kentucky v.  
6 Graham, 473 U.S. 159, 167 n.14 (1985)).

7           This provides a narrow exception to Eleventh Amendment  
8 immunity where the plaintiff seeks to "end a continuing violation  
9 of federal law." Seminole Tribe of Fla. v. Florida, 517 U.S. 44,  
10 73 (1996) (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)); see  
11 Green, 474 U.S. at 68 ("[T]he availability of prospective relief  
12 of the sort awarded in Ex parte Young gives life to the Supremacy  
13 Clause. Remedies designed to end a continuing violation of  
14 federal law are necessary to vindicate the federal interest in  
15 assuring the supremacy of that law." ).

16           Here, the "continuing violation of federal law" alleged  
17 by plaintiffs is the administration and enforcement of sections  
18 17131.6 and 17280(d)(2) of the California Revenue and Taxation  
19 Code in violation of the Establishment Clause. In their  
20 Complaint, plaintiffs seek only prospective declaratory and  
21 injunctive relief, both of which are available to plaintiffs  
22 bringing suit against a state pursuant to § 1983. See, e.g.,  
23 Nat'l Audubon Soc'y, Inc. v. Davis, 307 F.3d 835, 847 (9th Cir.  
24 2002) (collecting cases).

25           Although Idaho v. Coeur D'Alene Tribe of Idaho, 521  
26 U.S. 261 (1997) limited Ex parte Young and held that the state  
27 sovereignty interest in title to its lands is "core area of state  
28 sovereignty" such that suit for quiet title is barred by the

1 Eleventh Amendment, this limitation does not apply here. See  
2 Aqua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041  
3 (9th Cir. 2000) (finding that sovereignty interest present in  
4 Coeur D'Alene is not present in state taxpayer suits for  
5 violation of federal law and that Ex parte Young applies).  
6 Plaintiffs therefore fall under the Ex parte Young exception for  
7 their § 1983 claim against Stanislaus for alleged violation of  
8 their federal constitutional rights.

9           However, because Ex parte Young does not apply to  
10 supplemental state law claims, see Pennhurst, 465 U.S. at 119-21,  
11 the court will grant Stanislaus's motion to dismiss based on  
12 Eleventh Amendment sovereign immunity with regard to plaintiffs'  
13 claims against her under the California constitution.<sup>2</sup> See 28  
14 U.S.C. § 1367(c); see also Ulaleo v. Paty, 902 F.2d 1395, 1400  
15 (9th Cir. 1990) (explaining that it "would offend federalism" and  
16 not further the justification for the Ex parte Young exception  
17 for a federal court to decide claims that a state violated its  
18 state constitution).

## 19           2. Standing

20           The judicial power of the federal courts is limited to  
21 "Cases" and "Controversies." U.S. Const. Art. III, § 1. The  
22 doctrine of standing is an "essential and unchanging part of the  
23 case-or-controversy requirement of Article III." Lujan v.  
24 Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citing Allen v.  
25 Wright, 468 U.S. 737, 751 (1984)). Article III standing requires

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27           <sup>2</sup> At oral argument, counsel for plaintiffs conceded that  
28 the court lacks jurisdiction over plaintiffs' claims brought  
under the California constitution.

1 that a plaintiff allege "a personal injury fairly traceable to  
2 the defendant's allegedly unlawful conduct and likely to be  
3 redressed by the requested relief." Allen, 468 U.S. at 751.

4 a. Federal Taxpayer Standing

5 The Supreme Court has long held that plaintiffs  
6 alleging an injury that arises solely out of their federal  
7 taxpayer status generally do not have standing in federal court.  
8 See Frothingham v. Mellon, 262 U.S. 447, 487 (1923) (holding that  
9 a taxpayer's "interest in the moneys of the Treasury . . . is  
10 shared with millions of others; is comparatively minute and  
11 indeterminable; and the effect upon future taxation, of any  
12 payment out of the funds, so remote, fluctuating and uncertain,  
13 that no basis is afforded" for standing); see also Hein v.  
14 Freedom From Religion Found., Inc., 551 U.S. 587, 599 (2007) ("As  
15 a general matter, the interest of a federal taxpayer in seeing  
16 that Treasury funds are spent in accordance with the Constitution  
17 does not give rise to the kind of redressable 'personal injury'  
18 required for Article III standing.").

19 This line of taxpayer standing cases is "equally  
20 applicable to . . . taxpayer challenges to so-called 'tax  
21 expenditures,' which reduce amounts available to the treasury by  
22 granting tax credits or exemptions." DaimlerChrysler, 547 U.S.  
23 at 343-44 (state tax credit challenged under Commerce Clause).

24 In Flast v. Cohen, 392 U.S. 88 (1942), however, the  
25 Supreme Court created an exception to the general prohibition on  
26 federal taxpayer standing. In Flast, the Supreme Court held that  
27 federal taxpayers had standing to challenge a statute which  
28 funded education and instruction materials in religious schools

1 on the ground that it violated the Establishment Clause. The  
2 Flast decision has since been cited for the general proposition  
3 that taxpayer plaintiffs have standing when they allege that an  
4 exercise of congressional power under the Taxing and Spending  
5 Clause violates the Establishment Clause of the First Amendment.  
6 See, e.g., DaimlerChrysler, 547 U.S. at 348; United States v.  
7 Richardson, 418 U.S. 166, 173 (1974).

8           The federal defendants argue that plaintiffs' challenge  
9 falls outside of Flast's limited exception because tax exemptions  
10 and deductions are not "expenditures" of government funds as was  
11 the case in Flast. See DaimlerChrysler, 547 U.S. at 348 (stating  
12 that the Flast Court discerned in the history of the  
13 Establishment Clause "the specific evils feared by [its drafters]  
14 that the taxing and spending power would be used to favor one  
15 religion over another or to support religion in general" and that  
16 the "injury" alleged in Establishment Clause challenges to  
17 federal spending is the very "extract[ion] and spen[ding]" of  
18 "tax money" in aid of religion alleged by a plaintiff (quoting  
19 Flast, 392 U.S. at 103, 106)).

20           The Supreme Court, however, has "refused to make  
21 artificial distinctions between direct grants to religious  
22 organizations and tax programs that confer special benefits on  
23 religious organizations." Winn v. Ariz. Christian Sch. Tuition  
24 Org., 562 F.3d 1002, 1009 (9th Cir. 2009) (citing cases).  
25 Rather, the Court has recognized that tax policies such as tax  
26 credits, exemptions, and deductions can have "an economic effect  
27 comparable to that of aid given directly" to religious  
28 organizations. Mueller v. Allen, 463 U.S. 388, 399 (1983). Just

1 as Flast recognized the taxpayer injury from having tax revenues  
2 directly flow to religious organizations, the Court has also  
3 noted that "[e]very tax exemption constitutes a subsidy that  
4 affects nonqualifying taxpayers, forcing them to become 'indirect  
5 and vicarious donors.'" Tex. Monthly, Inc. v. Bullock, 489 U.S.  
6 1, 14 (1989) (plurality opinion) (quoting Bob Jones Univ. v.  
7 United States, 461 U.S. 574, 591 (1983)) (internal quotation  
8 marks omitted); see Regan v. Taxation With Representation of  
9 Wash., 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax-  
10 deductibility are a form of subsidy that is administered through  
11 the tax system. A tax exemption has much the same effect as a  
12 cash grant to the organization of the amount of tax it would have  
13 to pay on its income.").

14           The Supreme Court has decided countless cases where a  
15 tax credit, deduction, or exemption was alleged to violate the  
16 Establishment Clause and either did not address the issue of  
17 taxpayer standing or affirmatively decided that the challengers  
18 did have standing. See, e.g., Hibbs v. Winn, 542 U.S. 88 (2004)  
19 (state taxpayer challenge to state tax credits for payments to  
20 nonprofit "school tuition organizations" that award scholarships  
21 to students in private schools is not prevented by Tax Injunction  
22 Act); Tex. Monthly, 489 U.S. 1 (1989) (nonreligious periodical  
23 had standing to challenge state tax exemption for religious  
24 periodicals); Mueller, 463 U.S. 388 (state taxpayer challenge to  
25 state tax deduction for expenses incurred in providing tuition,  
26 textbooks, and transportation to school children); Comm. for Pub.  
27 Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (state  
28 taxpayer challenge to New York tax credits and deductions for

1 expenses related to attending nonpublic schools); see also Winn,  
2 562 F.3d at 1010-11 (citing cases). While this court must of  
3 course satisfy itself that plaintiffs have standing to bring  
4 their suit, it is not irrelevant that many similar cases have  
5 worked their way up to the Supreme Court.

6 Nor is there, as the federal defendants argue, any  
7 meaningful distinction between tax deductions or exclusions and  
8 tax credits. Tax credits--like those at issue in Winn--are  
9 dollar-for-dollar reductions in tax liability. The Arizona tax  
10 credit challenged in Winn effectively gave state taxpayers a  
11 choice: pay taxes to the state or give money to a student tuition  
12 organization ("STO"). Taxpayer donations to STOs were "free"  
13 because they directly offset taxes due, and the Ninth Circuit  
14 determined that the Arizona credit was essentially a state-  
15 created grant program. Winn, 562 F.3d at 1010. The Winn panel  
16 stated that the tax credit was a "powerful legislative device for  
17 directing money to private organizations," id. at 1009, and  
18 rejected the argument that the money was "not publicly subsidized  
19 simply because it does not pass through the treasury." Id. at  
20 1009-10.

21 These conclusions hold equal weight with respect to tax  
22 deductions and exemptions. In their effort to distinguish the  
23 instant case from Winn, the federal defendants correctly note  
24 that tax exemptions and deductions<sup>3</sup> do not create dollar-for-

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26 <sup>3</sup> Tax exemptions are amounts never entered into the  
27 calculation of taxable income whereas tax deductions are amounts  
28 subtracted from taxable income after it has been calculated. Tax  
deductions and exemptions have the same financial effect on  
taxpayers of reducing the amount of income subject to taxation.

1 dollar reductions in tax liability. Rather, they reduce tax  
2 liability by a percentage directly related to one's income tax  
3 bracket. The deductions and exemptions plaintiffs challenge in  
4 this case provide benefits to "ministers of the gospel" by  
5 allowing them to exempt from taxable income the value of their  
6 housing allowance and to deduct mortgage interest and property  
7 tax expenses from taxable income. These benefits reduce a  
8 minister's would-be tax burden by a percentage of the value of  
9 his or her housing and related expenses. They also, as explained  
10 further below, benefit churches by reducing the cost of hiring  
11 ministers. Whether the benefit is a one-hundred-percent subsidy  
12 of ministers' housing costs or only a partial subsidy is  
13 irrelevant. The effect of either is comparable to what the Ninth  
14 Circuit in Winn considered to be an impermissible grant program,  
15 although admittedly of different amounts.

16 Finally, the federal defendants quote Walz v. Tax  
17 Commission of New York, 397 U.S. 664 (1970), for the proposition  
18 that tax exemptions cannot confer Flast standing on taxpayers.  
19 Yet in Walz the Supreme Court did not address the challengers'  
20 standing. Rather, the Court evaluated the merits of the  
21 Establishment Clause challenge presented. Walz therefore does  
22 not provide support for the federal defendants' position that  
23 plaintiffs lack standing.

24 In sum, Flast has never been interpreted to be so  
25 limited as to prohibit plaintiffs from challenging tax benefits  
26 that by their very terms accrue only to certain religious  
27 authorities simply because the government has chosen to provide  
28 financial aid through exclusions or exemptions from taxable

1 income under the tax code rather than through direct grants. The  
2 court declines to so hold today. Plaintiffs have therefore  
3 established that they have standing as federal taxpayers to  
4 challenge §§ 107 and 265(a)(6) of the Internal Revenue Code for  
5 allegedly violating the Establishment Clause.

6 b. State Taxpayer Standing

7 The Supreme Court recently clarified state taxpayer  
8 standing limits in DaimlerChrysler, stating that the general  
9 prohibition on federal taxpayer standing "applies with  
10 undiminished force to state taxpayers." 547 U.S. at 345. The  
11 Court specifically addressed and rejected the Ninth Circuit's  
12 criteria--most prominently articulated in Hoohuli v. Ariyoshi,  
13 741 F.2d 1169 (9th Cir. 1984)--for determining whether a state  
14 taxpayer met the Doremus v. Board of Education of Borough of  
15 Hawthorne, 342 U.S. 429 (1952), "good-faith pocketbook" test for  
16 whether a taxpayer had standing to sue. DaimlerChrysler, 547  
17 U.S. at 346 & n.4 ("[W]e hold that state taxpayers have no  
18 standing under Article III to challenge state tax or spending  
19 decisions simply by virtue of their status as taxpayers.").

20 While prior Ninth Circuit case law interpreting Doremus may have  
21 articulated different tests for state and federal taxpayer  
22 standing, DaimlerChrysler applies federal taxpayer standing  
23 restrictions to state taxpayers as well. See Arakaki v. Lingle  
24 ("Arakaki II"), 477 F.3d 1049, 1061-63 (9th Cir. 2007) (noting  
25 that DaimlerChrysler effectively overruled Hoohuli).

26 Stanislaus's reliance on Doremus, Arakaki v. Lingle, 423 F.3d 954  
27 (9th Cir. 2005), Hoohuli, and Cammack v. Waihee, 932 F.2d 765  
28 (9th Cir. 1991), therefore, is misplaced in light of

1 DaimlerChrysler.

2           While the Supreme Court has never decided the issue of  
3 whether a state tax benefit was "analogous to an exercise of  
4 congressional power under Article 1, § 8," DaimlerChrysler, 547  
5 U.S. at 347, the Ninth Circuit in Winn specifically noted that  
6 state tax credits constituted exercises of the state's taxing and  
7 spending powers. See 562 F.3d at 1008. Furthermore, as the  
8 court has previously discussed, the Supreme Court has repeatedly  
9 heard and decided state taxpayer suits challenging state tax  
10 credits, exemptions, and deductions under the Establishment  
11 Clause and analyzed them according to the Flast test. See Hibbs,  
12 542 U.S. 88, Tex. Monthly, 489 U.S. 1, Mueller, 463 U.S. 388.<sup>4</sup>

13           Because, as explained above, plaintiffs have  
14 successfully alleged an Establishment Clause violation that meets  
15 Flast's strict dictates, plaintiffs have likewise established  
16 that they have standing as state taxpayers to challenge sections  
17 17131.6 and 17280(d)(2) of the California Revenue and Taxation  
18 Code for allegedly violating the Establishment Clause.

19           B. Motions to Dismiss for Failure To State a Claim

20           On a motion to dismiss, the court must accept the  
21 allegations in the complaint as true and draw all reasonable

22 \_\_\_\_\_  
23           <sup>4</sup> Federal courts have also decided challenges to state  
24 tax benefits under the Equal Protection Clause of the Fourteenth  
25 Amendment. See Hibbs, 542 U.S. at 93-94 ("It is hardly ancient  
26 history that States, once bent on maintaining racial segregation  
27 in public schools, and allocating resources disproportionately to  
28 benefit white students to the detriment of black students,  
fastened on tuition grants and tax credits as a promising means  
to circumvent Brown v. Board of Education, 347 U.S. 483 (1954).  
The federal courts, this Court among them, adjudicated the  
ensuing challenges, instituted under 42 U.S.C. § 1983, and upheld  
the Constitution's equal protection requirement.") (internal  
citation omitted).

1 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416  
2 U.S. 232, 236 (1974), overruled on other grounds by Davis v.  
3 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322  
4 (1972). To survive a motion to dismiss, a plaintiff needs to  
5 plead "only enough facts to state a claim to relief that is  
6 plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct.  
7 1955, 1974 (2007). This "plausibility standard," however, "asks  
8 for more than a sheer possibility that a defendant has acted  
9 unlawfully," and where a complaint pleads facts that are "merely  
10 consistent with" a defendant's liability, it "stops short of the  
11 line between possibility and plausibility." Ashcroft v. Iqbal,  
12 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at  
13 556-57). When ruling on a motion to dismiss, a court's inquiry  
14 is generally limited to the facts alleged in the complaint and  
15 "documents whose contents are alleged in the complaint and whose  
16 authenticity no party questions, but which are not physically  
17 attached to the plaintiff's pleading."<sup>5</sup> Branch v. Tunnell, 14  
18 F.3d 449, 454 (9th Cir. 1994), overruled on other grounds by  
19 Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir.  
20 2002); accord Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir.  
21 1996).

#### 22 The Establishment Clause of the First Amendment

23  
24 <sup>5</sup> Stanislaus objects to Exhibits 6, 7, 8, 9, and 11  
25 attached to the affidavit of Richard L. Bolton as violating Rules  
26 802 and 807 of the Federal Rules of Evidence. Those exhibits are  
27 newspaper articles offered for the truth of the matters therein  
28 asserted. Because the exhibits objected to by Stanislaus are not  
properly subject to judicial notice, the court will not consider  
them in evaluating defendants' motions to dismiss. See Barron v.  
Reich, 13 F.3d 1370, 1377 (9th Cir. 1994).

1 provides that "Congress shall make no law respecting an  
2 establishment of religion . . . ." U.S. Const. Amend. I. In  
3 Lemon v. Kurtzman, 403 U.S. 602 (1971), the Supreme Court  
4 articulated a three-pronged test with which to evaluate whether  
5 federal or state statutes violate the Establishment Clause.  
6 **First**, the statute must have a secular legislative purpose;  
7 **second**, its principal or primary effect must be one that neither  
8 advances nor inhibits religion; and **third**, the statute must not  
9 foster an excessive government entanglement with religion. Id.  
10 at 612-13.

11 a. IRC § 107

12 A statute is unconstitutional if it fails to satisfy  
13 any prong of the Lemon test. Because, for the reasons discussed  
14 below, the court finds that plaintiffs have sufficiently alleged  
15 that § 107 fails to satisfy the second prong in that it has the  
16 unconstitutional effect of advancing religion, the court need not  
17 address the first or third prongs of Lemon dealing with the  
18 legislative purpose of the statute or whether it promotes  
19 excessive government entanglement with religion.

20 The second prong of the Lemon test investigates whether  
21 Congress's action has a "principal or primary effect . . . that .  
22 . . . advances [or] inhibits religion." 403 U.S. at 612.  
23 "Governmental action has the primary effect of advancing or  
24 disapproving of religion if it is sufficiently likely to be  
25 perceived by adherents of the controlling denominations as an  
26 endorsement, and by the nonadherents as a disapproval, of their  
27 individual religious choices." Vasquez v. Los Angeles County,  
28 487 F.3d 1246, 1256 (9th Cir. 2007) (internal citation and

1 quotation marks omitted). This is an objective test, asking  
2 whether a reasonable observer who is "informed . . . [and]  
3 familiar with the history of the government practice at issue,"  
4 would perceive the action as having a predominately non-secular  
5 effect. Id. (alteration in original) (internal citation and  
6 quotation marks omitted).

7 To determine whether the primary message had a  
8 disapproving effect on religion, the restriction must be viewed  
9 "as a whole." Am. Family Ass'n, Inc. v. City & County of San  
10 Francisco, 277 F.3d 1114, 1122 (9th Cir. 2002); see Lynch v.  
11 Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring).  
12 The court therefore evaluates § 107 within the context of the  
13 entire IRC. While courts are "reluctant to attribute  
14 unconstitutional motives to government actors in the face of a  
15 plausible secular purpose," Kreisner v. City of San Diego, 1 F.3d  
16 775, 782 (9th Cir. 1993) (quoting Mueller, 463 U.S. at 394-95),  
17 no such presumption applies in the second Lemon prong analysis.  
18 Even assuming that, as the federal defendants argue, Congress had  
19 the legitimate purpose of avoiding excessive entanglement and  
20 involvement with religion in passing § 107, the court must  
21 nevertheless determine what § 107 actually accomplishes. See  
22 Lynch, 465 U.S. at 690 (O'Connor, J., concurring).

23 The federal defendants first argue that "[t]he grant of  
24 a tax exemption is not sponsorship since the government does not  
25 transfer part of its revenue to churches but simply abstains from  
26 demanding that the church support the state." Walz, 397 U.S. at  
27 675; see id. ("There is no genuine nexus between tax exemption  
28 and the establishment of religion. . . . It restricts the fiscal

1 relationship between church and state, and tends to complement  
2 and reinforce the desired separation insulating each from the  
3 other." ). But see Tex. Monthly, 489 U.S. at 14 (invalidating  
4 sales tax exemption for wholly religious publications).

5 While Walz uses sweeping language, the Supreme Court  
6 has recognized that the breadth of a tax exemption is important  
7 when evaluating Establishment Clause challenges. Id. (noting  
8 that the tax exemption in Walz was broadly applied to property of  
9 charitable and otherwise socially beneficial organizations).

10 Since Walz, the Supreme Court has also recognized that tax  
11 exemptions and deductions provide real benefits to religion  
12 comparable to direct grants that can run afoul of the  
13 Establishment Clause. See, e.g., id.; Mueller, 463 U.S. at 399;  
14 Bob Jones Univ., 461 U.S. at 591; Regan, 461 U.S. at 544; see  
15 also Winn, 562 F.3d at 1009. Walz, therefore, does not control.

16 Plaintiffs allege that § 107 provides an exclusive  
17 benefit to "ministers of the gospel." Specifically, although §  
18 119 allows non-minister taxpayers who receive employer-provided  
19 housing for the "convenience of the employer" to exclude the  
20 value of that housing from taxable income, § 107 provides for  
21 tax-exempt housing and housing allowances for all ministers  
22 regardless of whether they would qualify for the "convenience of  
23 the employer" requirement from § 119. Ministers can thus claim  
24 the exemption under § 107 regardless of whether they must live in  
25 their parsonage as a condition of employment and regardless of  
26 where the parsonage is located. In essence, § 107 provides a  
27 blanket exemption from taxable income for ministers' housing that  
28 is not available to similarly situated secular employees.

1           Moreover, ministers can now also receive a housing  
2 allowance tax-free under § 107(2)--a benefit that no taxpayer can  
3 claim under § 119.<sup>6</sup> No longer must ministers live in a parsonage  
4 on or near church property; rather, ministers can collect the  
5 allowance tax-free and provide their own housing anywhere they  
6 choose. This benefit clearly goes beyond the limited exemption  
7 carved out in § 119 for employer-provided housing on business  
8 premises in which employees are required to live. While the  
9 purpose of passing § 107(2) may well have been to equalize tax  
10 treatment among religions and congregations, plaintiffs'  
11 allegations that the cumulative effect of § 107 clearly goes  
12 beyond merely putting ministers on an "equal footing" with  
13 secular taxpayers cross "the line between possibility and  
14 plausibility." Iqbal, 129 S. Ct. at 1949.

15           It is not difficult to see how § 107 also provides a  
16 direct and exclusive benefit to religion itself: churches can pay  
17 ministers lower salaries because part of their salary is not  
18 subject to tax. A minister who receives use of a parsonage tax  
19 free or who receives a tax-free housing allowance has a greater  
20 net income than a similarly situated secular employee who must  
21 pay taxes on the rental value of the employer-provided home or on  
22 the housing allowance. Churches, therefore, can either pay  
23 ministers the same salaries as similarly situated secular workers  
24 with the effect of giving ministers a greater post-tax income, or

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26           <sup>6</sup> In 1954, Congress added what is now § 107(2) to the  
27 ministerial housing exemption from taxable income: ministers  
28 could then exclude from taxable income a "rental allowance" if  
they received that in lieu of a parsonage. Pub. L. No. 591, ch.  
736, § 107, 68A Stat. 3, 32.

1 they can pay ministers lower salaries than similarly situated  
2 secular employers with the effect of giving ministers an  
3 equivalent post-tax income. While § 107 is a tax exemption to be  
4 claimed by ministers, churches as employers clearly benefit by  
5 being able to pay their ministers more, for less. The financial  
6 effect of the exemption is the same as if the government were  
7 giving direct subsidies to ministers or churches to hire  
8 ministers. See Regan, 461 U.S. at 544.

9           The court recognizes that exclusive benefits to  
10 religion are not per se unconstitutional. Walz, 397 U.S. at 673.  
11 Rather, courts must determine whether an exclusive benefit  
12 crosses the line between permissible accommodation and  
13 unconstitutional fostering of religion. See Amos, 483 U.S. at  
14 334-35. Recognizing that tension exists between the Free  
15 Exercise and Establishment Clauses of the First Amendment, the  
16 Supreme Court has repeatedly said that "there is room for play in  
17 the joints between the Free Exercise and Establishment Clauses,  
18 allowing the government to accommodate religion beyond free  
19 exercise requirements, without offense to the Establishment  
20 Clause." Cutter v. Wilkinson, 544 U.S. 709, 713 (2005) (quoting  
21 Locke v. Davey, 540 U.S. 712, 718 (2004)) (internal quotation  
22 marks omitted).

23           Cases that have upheld exclusive religious exemptions  
24 from generally applicable statutes provide a good guide as to  
25 what types of accommodation are permissible and what types are  
26 not. In Amos, Congress had previously exempted religious  
27 organizations from part of Title VII of the Civil Rights Act of  
28 1964 that forbade employment discrimination on the basis of

1 religion only with respect to religious activities of those  
2 organizations. 483 U.S. at 335-36. Congress later expanded that  
3 exemption to cover the secular activities of religious  
4 organizations as well because it would significantly burden  
5 religious organizations to predict which of its activities a  
6 court would consider to be religious and which activities secular  
7 for purposes of establishing Title VII liability. Id.

8           The statute at issue in Cutter likewise removed the  
9 state-imposed deterrent to the free exercise of religion inherent  
10 when the state incarcerates persons by increasing protection for  
11 prisoners' right to practice their religion. 544 U.S. 709. Even  
12 the cases the federal defendants cite in support of their  
13 position that § 107 is a reasonable accommodation of religion  
14 relate to government-imposed burdens on religious practice. See  
15 Zorach v. Clauson, 343 U.S. 306 (1952) (city statute allowing  
16 public school students to be released from school attendance to  
17 attend religious classes is a constitutional accommodation);  
18 Arver v. United States, 245 U.S. 366 (1918) (military draft  
19 exemption for ministers and theological students is a  
20 constitutional accommodation). Section 107 imposes no such  
21 burden.

22           Some taxes can indeed infringe on Free Exercise rights.  
23 See, e.g., Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105  
24 (1943) (solicitation license tax). The Supreme Court has  
25 repeatedly recognized, however, that the payment of a generally  
26 applicable tax does not implicate the Free Exercise Clause just  
27 because religion must make payments in support of the state.  
28 See, e.g., Jimmy Swaggart Ministries v. Bd. of Equal. of Cal.,

1 493 U.S. 378, 391 (1990) (general sales and use tax does not  
2 impose a "constitutionally significant" burden on religion to the  
3 extent that it "merely decreases the amount of money" the tax-  
4 paying entity has to spend on religious activities) (citing  
5 Hernandez v. Comm'r, 490 U.S. 680, 699 (1980)); Hernandez, 490  
6 U.S. at 700 (rejecting the argument that "an incrementally larger  
7 tax burden interferes with [] religious activities" because  
8 "[t]his argument knows no limitation"); Follett v. Town of  
9 McCormick, S.C., 321 U.S. 573, 578 (1944), (reiterating that a  
10 preacher is not "free from all financial burdens of government,  
11 including taxes on income or property," and "like other citizens,  
12 may be subject to general taxation"). The exclusive benefit to  
13 ministers and religion provided in § 107, therefore, cannot  
14 reasonably be seen as removing a significant state-imposed  
15 deterrent to the free exercise of religion.

16           The federal defendants also argue that § 107 is a  
17 natural outgrowth of the historical tradition of exempting church  
18 property from taxation. See Walz, 397 U.S. at 677. The federal  
19 defendants correctly note that there is a historical precedent  
20 for the state exempting church property from taxation that  
21 precedes the Republic, and such exemptions have been found not to  
22 violate the Establishment Clause. Id. at 667 & n.1. But see id.  
23 at 678 ("[N]o one acquires a vested or protected right in  
24 violation of the Constitution by long use, even when that span of  
25 time covers our entire national existence and indeed predates  
26 it.").

27           Indeed, property tax exemptions serve the important  
28 purpose of keeping government out of the undesirable--and

1 constitutionally questionable--position of having to foreclose on  
2 church property for the nonpayment of taxes. See id. There is  
3 no evidence, however, that income tax exemptions for employees of  
4 religious organizations share a similar historical tradition or  
5 serve a similarly important government purpose. While the income  
6 exempted from taxation under § 107 is that allocated to a  
7 minister's housing expenses, there is no real connection to the  
8 property of the church. To the contrary, § 107(2) completely  
9 severs any tie that might have existed between a church's  
10 property and the ministerial housing allowance, as ministers now  
11 may receive an exemption for housing allowances received and used  
12 to pay for housing that is not owned by the church. Plaintiffs  
13 therefore plausibly allege that § 107's connection with religious  
14 property is too attenuated to fall under the constitutional  
15 protection afforded property tax exemptions.

16 Finally, the federal defendants argue that the effect  
17 of § 107 is to avoid a potential Establishment Clause problem of  
18 excessive entanglement with religion. It is true that actions  
19 taken to avoid potential Establishment Clause violations have a  
20 legitimate secular purpose under Lemon. Nurre v. Whitehead, 580  
21 F.3d 1087, 1095 (9th Cir. 2009); Vasquez, 487 F.3d at 1255; see  
22 Amos, 483 U.S. at 335 ("Under the Lemon analysis, it is a  
23 permissible legislative purpose to alleviate significant  
24 governmental interference with the ability of religious  
25 organizations to define and carry out their religious  
26 missions."). It would follow that some--but not all--of such  
27 actions taken would also have the permissible secular effect of  
28 avoiding Establishment Clause violations.

1           Some efforts that have a legitimate secular purpose  
2 will, however, go too far and cross the line between  
3 accommodation and establishment. See Amos, 483 U.S. at 334-35.  
4 Such is what plaintiffs allege in this case. Regardless of  
5 Congress's motive in passing § 107 and regardless of whether §  
6 107 has an effect of reducing government entanglement with  
7 religion by keeping ministers out of the § 119 exemption,<sup>7</sup>  
8 plaintiffs have alleged sufficient facts which, if accepted as  
9 true, "leave open the possibility" that an objective observer  
10 would determine that § 107 goes too far in aiding and subsidizing  
11 religion by providing ministers and churches with tangible  
12 financial benefits not allowed secular employers and employees.  
13 Winn, 562 F.3d at 1012.

14           In sum, the court believes that plaintiffs have  
15 sufficiently alleged that a reasonable and objective observer  
16 would perceive § 107 as endorsing religion and as having a  
17 predominantly non-secular effect. At this stage in the  
18 proceedings, it is not implausible on the face of plaintiffs'  
19 Complaint that § 107 fails to satisfy the second prong of the  
20 Lemon test. Plaintiffs have therefore stated facts sufficient to  
21 withstand a motion to dismiss on their challenge to the  
22 enforcement of § 107.

23           b. IRC § 265(a)(6)

24           Plaintiffs allege that § 265(a)(6) impermissibly lets  
25 ministers "double dip" in that they can receive a housing  
26

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27           <sup>7</sup> The court need not speculate as to how Congress might  
28 choose to provide ministers with tax-free housing should § 107 be  
found unconstitutional.

1 allowance tax free under § 107, use that allowance to purchase a  
2 home, and receive another tax deduction under § 265(a)(6) for the  
3 interest paid on the mortgage.<sup>8</sup> Looking to the three prongs of  
4 the Lemon test, first, it is clear first from the face of §  
5 265(a)(6) that its purpose is to encourage ministers and military  
6 members who receive tax-free housing allowances to purchase a  
7 home, which is a permissible secular purpose and effect. This is  
8 the same incentive provided to every other American under §  
9 163(h) and property tax deductions under § 164. Plaintiffs also  
10 have not cited any facts that would support an inference that  
11 Congress had a predominantly religious purpose when it passed §  
12 265(a)(6).

13 Further, with respect to § 265(a)(6), there is  
14 substantial legislative history to shed light on Congress's  
15 intent. Section 265(a)(6) was passed in 1986 in the Tax Reform  
16 Act of 1986, Pub. L. No. 99-514, apparently in response to a  
17 Revenue Ruling which held that, unlike other taxpayers who  
18 generally have the ability to deduct home mortgage interest and  
19 property tax payments from taxable income, ministers and military  
20 personnel who received tax-exempt housing allowances were not  
21 allowed deductions for home mortgage interest and real property  
22 taxes under § 265(a)(1). Rev. Rul. 83-3, 1983-1 C.B. 72; see Induni  
23 v. Comm'r, 990 F.2d 53, 56 (2d Cir. 1993). The United States Senate  
24 Finance Committee report on the Act stated that the reason for  
25 changing § 265 to include § 265(a)(6) was because "it is appropriate  
26 \_\_\_\_\_

27 <sup>8</sup> If § 107 is found unconstitutional as this court has  
28 indicated, then plaintiffs' challenge to § 265(a)(6) is moot as  
there would be no "double dipping." The court nevertheless  
addresses plaintiffs' claims.

1 to continue the long-standing tax treatment with respect to deductions  
2 for mortgage interest and real property taxes claimed by ministers and  
3 military personnel who receive tax-free housing allowances." S. Rep.  
4 No. 99-313, 61 (1985).

5 Second, plaintiffs have not alleged sufficient facts to  
6 show that an objective observer would determine that the  
7 predominant effect of § 265(a)(6) is to do anything other than  
8 give ministers and military members the same incentive as every  
9 other American to purchase a home. The fact that ministers  
10 receive their housing allowances tax-free and that therefore  
11 receive some additional benefit from deducting property taxes and  
12 mortgage interest payments is incidental to the predominant  
13 secular effect of giving ministers the same incentive as other  
14 Americans to purchase a home.

15 Plaintiffs do not dispute that § 265(a)(6) has an  
16 effect of encouraging home ownership; rather, they focus on the  
17 financial benefits ministers receive as a result of this  
18 government policy. While it is true that ministers receive a  
19 benefit by being able to "double dip," exclusive benefits are not  
20 per se impermissible. See Tex. Monthly, 489 U.S. at 15.

21 Third, plaintiffs Complaint does not appear to allege,  
22 nor does the court discern, that § 265(a)(6) fosters an excessive  
23 government entanglement with religion. For the foregoing  
24 reasons, defendants' motion to dismiss plaintiffs' claim with  
25 respect to § 265(a)(6) will be granted.

26 b. California Revenue & Taxation Code Sections

27 Plaintiffs' allegations with regard to sections 17131.6  
28 and 17280(d)(2) of the California Revenue and Taxation Code,

1 which incorporate, respectively, §§ 107 and 265(a)(6) of the IRC  
 2 with insignificant changes,<sup>9</sup> are substantially the same as their  
 3 arguments that §§ 170 and 265(a)(6) violate the Establishment  
 4 Clause, and Stanislaus's motion adds nothing to distinguish the  
 5 issues with respect to the state statutes from those with respect  
 6 to §§ 107 and 265(a)(6). Accordingly, for the reasons discussed  
 7 above, the court will deny defendant Stanislaus's motion to  
 8 dismiss with respect to section 17131.6 and grant its motion with  
 9 respect to section 17280(d)(2) of the California Revenue and  
 10 Taxation Code.

11 IT IS THEREFORE ORDERED that defendant Stanislaus's  
 12 motion to dismiss be, and the same hereby is, GRANTED with  
 13 respect to plaintiffs' claims under the California constitution  
 14 and with respect to plaintiffs' claim challenging California  
 15 Revenue and Taxation Code section 17280(d)(2), and DENIED in all  
 16 other respects.

17 IT IS FURTHER ORDERED that the federal defendants'  
 18 motion to dismiss be DENIED with respect to plaintiffs' claim  
 19 challenging IRC § 107 and GRANTED with respect to plaintiffs'  
 20 claim challenging IRC § 265(a)(6).

21 DATED: May 21, 2010



22  
 23 WILLIAM B. SHUBB  
 24 UNITED STATES DISTRICT JUDGE  
 25

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26 <sup>9</sup> At oral argument, counsel for Stanislaus represented  
 27 that section 17131.6, unlike its federal counterpart, contains no  
 28 limitation on the amount that a minister may claim as a housing  
 allowance. This, if anything, would strengthen plaintiffs'  
 claims that California is impermissibly benefitting religion.