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Challenges to Federal Income Tax Exemption of the Clergy and Government Support of Sectarian Schools Through Tax Credits Device and the Unresolved Questions After *Arizona v. Winn*: Is the U.S. Supreme Court Standing in the Way of Taxpayer Standing to Seek Meritorious Redress?

Gabriel O. Aitsebaomo

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**CHALLENGES TO FEDERAL INCOME TAX EXEMPTION
OF THE CLERGY AND GOVERNMENT SUPPORT OF
SECTARIAN SCHOOLS THROUGH TAX CREDITS DEVICE
AND THE UNRESOLVED QUESTIONS AFTER *ARIZONA V.
WINN*: IS THE U.S. SUPREME COURT STANDING IN THE
WAY OF TAXPAYER STANDING TO SEEK MERITORIOUS
REDRESS?**

*Gabriel O. Aitsebaomo**

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I. INTRODUCTION

Ever since the United States Congress enacted Internal Revenue Code (“I.R.C”) §107 (“Section 107”)¹ to exempt ministers of the gospel from paying federal income tax on either the income paid to them as compensation for housing² or the rental value of a home provided to them as compensation,³ the clergy has enjoyed unquestioned exclusion

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1. I.R.C. §107 (West 2013).
 2. *Id.* at §107(2).
 3. *Id.* at §107(1).

of the subsidy from gross income until the sex scandals that shook TV Ministries in the 1980s drew scrutiny to the little known tax provision.⁴ In recent years, however, the necessity of the exemption has not only been questioned,⁵ but some critics and interest groups have assailed the provision altogether as violating the Establishment Clause⁶ of the First Amendment's prohibition against government support of religion.⁷ As if

4. See, e.g., *In re: PTL Club, et al. v. United States* (United States District Court for the Central) (No. 88-236) District Court Reverses Injunction Against Service's Revocation Of Ptl Club's Tax-Exempt Status, TAX NOTES TODAY, Apr. 1, 1988, available at LEXIS 88 TNT 84-50.

In May 1973, the Service issued a ruling to the PTL Club, which was operated by Jim and Tammi Bakker, granting the organization tax exempt status under section 501(c)(3). In June 1987, as a result of sex scandals that enveloped PTL leader, Jim Bakker, the PTL Club, and its related Heritage Village Church and Missionary Fellowship, Inc., Fort Heritage Campgrounds and Christian Retreat, and PTL Enterprise; all filed for bankruptcy under Chapter 11. In late 1987, the IRS advised the bankruptcy trustee that it intended to revoke the PTL Club's exempt status and that the revocation would be retroactive to May 31, 1981.

Id. See also *Treasury Advocates Few Changes For Exempt Television Ministries*, TAX NOTES TODAY, Oct. 7, 1987, available at LEXIS 87 TNT 195-H.

The House Ways and Means Oversight Subcommittee, continuing its series of hearings into the universe of tax exempt organizations, took a look October 6 at the world of television ministries. Unlike previous hearings, which focused on lobbying and political activities of exempt organizations and unrelated business income tax, the televangelist hearing appears to have been prompted by one event: the PTL scandal involving Jim and Tammy Bakker. The PTL scandal, particularly allegations that the Bakkers had enriched themselves with tax-exempt funds, provided the Administration with the material that it needed to make some minor recommendations, while at the same time avoiding the politically sensitive issues associated with religion. Assistant Treasury Secretary O. Donaldson Chapoton said that the Administration generally supports the current statutory scheme governing television ministries; he did, however, suggest measures that might better enforce the current prohibition of private inurement from tax-exempt funds.

Id.

5. "[I]t's fair to question why the clergy needs a tax-free allowance for more than one home, and whether tax-exempt churches should subsidize millionaire ministers." Laura Saunders, *Tax Break For Clergy Questioned*, WALL ST. J., Aug. 23, 2011, available at <http://online.wsj.com/article/SB10001424053111903635604576476340089320176.html>.

6. The Establishment Clause is one of many clauses in the First Amendment to the United States Constitution. The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. 1.

7. Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should be Declared Unconstitutional*, 24 WHITTIER L. REV. 707, 725-26 (2003) (arguing that the only reason that Congress allowed the minister of the gospel a tax exemption "is to assist religion and that violates the establishment clause"). See Professor Eric Rakowski, *Are Federal Income Tax Preferences for Ministers' Housing Constitutional?*, TAX NOTES TODAY, Apr. 30, 2002, available at LEXIS 2002 TNT 83-26 (arguing that "section 107 is unconstitutional because the benefit it provides is limited to religious officials, rather than part of an exclusion available to a broader group of taxpayers and justified by a permissible secular purpose"). See also Michael L. Gompertz, *Lawsuit Challenges Income Tax Preferences for Clergy*, TAX NOTES, July 5, 2010, at 81-94 (arguing that sections 107 and 265(a)(6)(B) are unconstitutional because they are narrow tax preferences that violate the establishment clause.). *But see*, Erika King, *Tax Exemptions and the*

to exacerbate the furor, Congress subsequently enacted I.R.C. §265(a)(6) (“Section 265(a)(6)”), to allow ministers of the gospel to deduct from their federal income tax return real property taxes and mortgage interest paid on the home purchased with already tax-free money.⁸ The problem for the protesters⁹ of these exemptions is that to obtain a judicial review of the constitutionality of these tax provisions on the merits, they must first scale the procedural hurdle of the Article III standing bar.¹⁰

In general, taxpayers do not have standing to challenge a federal or state statute that allegedly violates the United States Constitution because a taxpayer’s stake in the moneys of the treasury is relatively small and infinitesimal given that such stake is held in common with a plethora of other taxpayers.¹¹ Nevertheless, *Flast v. Cohen* (“*Flast*”),¹² provides a limited exception¹³ to the general prohibition against taxpayer standing if the taxpayer satisfies a two-prong nexus test in alleging that a certain government enactment violates the Establishment Clause of the First Amendment to the U.S. Constitution.¹⁴

Pursuant to this two-prong nexus exception under *Flast*,¹⁵ the Federal District Court for the Eastern District of California ruled on May 21, 2010, in *Freedom From Religion Foundation Inc. v. Timothy Geithner* (“*FFRF v. Geithner*”),¹⁶ that certain taxpayers had standing to

Establishment Clause, 49 SYRACUSE L. REV. 971, 973 (1999) (contending that “neither religious tax exemptions nor taxation of religious entities violates the prohibition on entanglement of church and state; but that, depending on the larger legislative scheme in question, and whether conventional charitable institutions are similarly exempted, religious tax exemptions may violate the norm of equal treatment also embodied in the clause”). See also Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion*, 33 CARDOZO L. REV. 1633, 1636 (2012) (section 107 and the exclusion from gross income it grants to clerical recipients of housing and parsonage allowances are constitutionally permitted, though not constitutionally required, responses to the problems of entanglement inherent in the relationship between modern government and religion). See also Martha M. Legg, *Excluding Parsonages from Taxation: Declaring a Victor in the Duel Between Caesar and the First Amendment*, 10 GEO J.L. & PUB. POLICY 269 (2012) (concluding that the parsonage exclusions do not violate the Establishment Clause).

8. I.R.C. §265(a)(6) (West 2013).

9. Principal among these protesters is the Freedom From Religion Foundation (“FFRF”), an atheist organization which prides itself as an educational watchdog organization dedicated to keeping church and state separate.

10. Under Article III, Section 2 of the United States Constitution, the judicial power of the federal courts is limited to cases and controversies. U.S. CONST. art. III, § 2, cl. 1.

11. *Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923).

12. *Flast v. Cohen*, 392 U.S. 83 (1968).

13. See *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) (noting that *Flast* provides a “narrow exception” to the rule against standing).

14. *Flast*, 392 U.S. at 102-03.

15. *Id.*

16. *Freedom From Religion Found., Inc. v. Geithner*, 715 F. Supp. 2d 1051 (E.D. Cal. 2010).

challenge the constitutionality of Section 107.¹⁷ Although the ruling was heralded at the time by some as possibly paving a way for the potential demise of the procedural roadblock against taxpayer standing to challenge alleged government support of religion through the tax code,¹⁸ the ruling was stymied on April 4, 2011, with the release of the Supreme Court's opinion in *Arizona v. Winn* ("Arizona").¹⁹ In *Arizona*, the United States Supreme Court ruled that taxpayers lacked standing to challenge the constitutionality of an Arizona law that provided state tax credits to taxpayers in exchange for contributions they made to certain School Tuition Organizations ("STOs"), which subsequently used the contributions to pay for scholarships to students attending private religious schools.²⁰ Furthermore, the Supreme Court stated under the general prohibition against taxpayer standing that when "a government expends resources or declines to impose a tax, its budget does not necessarily suffer" to visit the requisite harm or injury necessary to confer taxpayer standing.²¹

Rather than apply the two-prong nexus exception as provided in *Flast*²² to find taxpayer standing, the Supreme Court, instead, factually distinguished *Flast* by holding that because the alleged religious funding of sectarian education challenged in *Arizona* was effected indirectly through the issuance of tax credits, as opposed to a direct government extraction and spending of public funds in support of religious instruction in sectarian schools (as was the case in *Flast*), the indirect tax credit financing device does not give rise to government spending under *Flast* to bestow Article III standing upon taxpayers.²³

To buttress its distinction that there was no government spending involved in the tax credit funding mechanism to invoke Article III standing, the Supreme Court proclaimed that "[w]hen Arizona taxpayers choose to contribute to STOs, they spend 'their own money,'²⁴ not

17. I.R.C. §107 (West 2013).

18. SAMUEL A. DONALDSON, IS THIS THE END OF DAYS FOR THE PARSONAGE ALLOWANCE?, IMPORTANT DEVELOPMENTS IN FEDERAL INCOME ESTATE & GIFT TAXATION AFFECTING INDIVIDUALS 8(Aug. 2009-Sept. 2010); see also William Shubb, *Court Allows Constitutional Challenge to Ministerial Housing Allowance Exclusion*, TAX NOTES TODAY, May 25, 2010, available at LEXIS 2010 TNT 100-10.

19. *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

20. *Id.* at 1437.

21. *Id.* at 1443.

22. *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968) (discussing the two prong nexus exception).

23. *Arizona*, 131 S. Ct. at 1438-39.

24. *Id.* at 1447 (internal quotations added). Ironically, some of the STOs' advertisement suggests that contributors do not actually spend their own money. For instance, The Arizona Episcopal School Foundation, has on its website Q&A section the following: "What does this

money the state has collected from respondents or from other taxpayers. . . .²⁵ Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are ‘not owed to the State’²⁶ and, in fact, pass directly from taxpayers to private organizations.’²⁷ Against this background, the Supreme Court concluded that “what matters under *Flast* is whether sectarian STOs receive government funds drawn from general tax revenues, so that moneys have been extracted from a citizen and handed to a religious institution in violation of the citizen’s conscience.”²⁸

Such a superficial distinction between a tax credits device of funding sectarian education and a direct expenditure method (which formed the nucleus of the ruling) is flawed, without a material difference, not principled, or even entirely correct, because the dispositive inquiry for standing purposes is premised entirely on the form in which the contribution was made rather than the substance of the contribution taken as a whole. Likewise, the ruling exemplifies the Court’s misconception of the tax implications of tax credits vis-a-vis tax deductions. Given the culminating dismissal of *FFRF v. Geithner*²⁹ due

[contribution] cost me? Nothing. Your contribution is subtracted in full from total state taxes owed for the year when you file your 2010 return.” *Frequently Asked Questions*, ARIZONA EPISCOPAL SCH. FOUND., <http://www.az-esf.org/faq.php> (last visited Mar. 6, 2013). See also The Arizona STO, JTO advertisement with the following:

Show your support through the Arizona Private School Tax Credit Program. Every Arizona tax payer that supports the JTO will receive a dollar-for-dollar Arizona tax credit up to a maximum of \$500 for filing single or married (filing separate returns) and \$1,000 for married (filing joint returns). A tax credit is more beneficial than a tax deduction; it is a dollar-for-dollar credit to your Arizona tax liability. *In other words, you can pay your taxes to the State of Arizona or to the JTO.* Encourage your family and friends to support this worthy cause as well. Even your company can get involved with matching donations. *It will not cost anyone a dime!* It WILL benefit the children and families in our community. You do not need to have school-aged children to participate. We encourage you to contact the JTO or your tax professional for further information about getting involved in this program.”

JEWISH TUITION ORG., <https://www.jtphoenix.org/> (last visited Mar. 6, 2013) (emphasis added).

25. *Arizona*, 131 S. Ct. at 1447.

26. *Id.* at 1448 (internal quotations added). But, according to the *Arizona Republic*, from 1998 to 2008, the Arizona STOs tax credit program cost Arizonians about \$380 million in forgone revenue. That is about \$38 million in forgone revenue per year. Projected to 2012, that would be about \$532 million (i.e., \$38 million per year x fourteen years, since 1998) in forgone revenue. Pat Kossan & Ronald J. Jansen, *Bill is signed by Gov. Brewer*, THE ARIZONA REPUBLIC (May 11, 2010 12:00AM), <http://www.azcentral.com/arizonarepublic/local/articles/2010/05/11/20100511tuition-tax-credit-bill.html>. See also *Arizona*, 131 S. Ct. at 1444 (stating “[r]espondents may be right that Arizona’s STO tax credits have an estimated annual value of over \$50 million”).

27. *Arizona*, 131 S. Ct. at 1448.

28. *Id.* at 1448.

29. See *FFRF v. Geithner*, 715 F. Supp. 2d 1051 (E.D. Cal. 2010).

to the Supreme Court's disinclination in *Arizona*³⁰ to apply the principles of *Flast* outside of its narrow factual settings, coupled with the Court's declaration that when "a government expends resources or declines to impose a tax, its budget does not necessarily suffer"³¹ to confer Article III standing upon taxpayer, there is no gainsaying the fact that the Supreme Court's ruling in *Arizona*³² essentially hands governments the ammunition to circumvent the Establishment Clause restraint on government support of religion by denying taxpayer standing under *Flast*³³ whenever the government affirmatively funds religion, albeit indirectly, through the use of tax credits or "declines to impose a tax"³⁴ by granting an exclusive federal income tax exemption to the minister of the clergy.³⁵ Besides, the comments made in the separate concurring opinion written by Justices Scalia and Thomas—that "*Flast* is an anomaly in our jurisprudence, irreconcilable with Article III restrictions on federal judicial power . . ."³⁶—warrants the question of whether the Supreme Court is resolved to standing in the way of taxpayer standing to seek meritorious redress under *Flast* to challenge alleged government support of religion through devices under the tax laws.

To answer these questions, Part II of the article begins with a critical examination of the parsonage exemption Act as was originally conceived at inception, the expansion and modification of the Act over the years, and the current statutory framework of the exemption under the Internal Revenue Code ("Code"). Part III evaluates who is considered a minister of the gospel within the meaning of the Code, and whether a minister of the gospel may obtain a parsonage exemption for more than one home at a time. Part IV discusses the various attempts to rid the Code of the parsonage exemption. In this part, the article analyzes the Federal District Court's ruling in *FFRF v. Geithner*³⁷ allowing taxpayers standing to challenge the constitutionality of the parsonage exemption and the subsequent U.S. Supreme Court decision in *Arizona*³⁸ that led to the voluntary dismissal by stipulation of *FFRF v. Geithner*. Part V scrutinizes the underpinnings of the U.S. Supreme

30. See *Arizona*, 131 S. Ct. at 1436.

31. *Id.* at 143.

32. See *id.*

33. See *Flast v. Cohen*, 392 U.S. 83 (1968).

34. *Arizona*, 131 S. Ct. at 1443.

35. I.R.C. §107 (West 2013).

36. *Arizona*, 131 S. Ct. at 1450 (Scalia, J., concurring).

37. See *FFRF v. Geithner*, 715 F. Supp. 2d 1051 (E.D. Cal. 2010).

38. *Arizona*, 131 S. Ct. 1436.

Court's ruling in *Arizona* and queries, among others, whether Arizonians really "spend their own money" when they contribute to STOs and receive state tax credits in exchange for their contributions.³⁹ The article contends that the premise of the ruling is superficial, flawed, incorrect, not logical or principled, and the author sides with the dissent that taxpayers should have been accorded standing under *Flast* to pursue their claims on the merits. Part VI examines the recurring question of whether the parsonage exemption violates the Establishment Clause of the First Amendment to the U.S. Constitution under the *Lemon* enunciation, and argues that it does. Part VII concludes that the U.S. Supreme Court is resolved to standing in the way of taxpayer standing to seek meritorious redress of alleged government support of religion through tax devices by holding that (1) when "a government expends resources or declines to impose a tax, its budget does not necessarily suffer"⁴⁰ to confer Article III standing upon taxpayer, and (2) that because "respondents challenge a tax credit as opposed to government expenditure, they lack Article III standing under *Flast v. Cohen*."⁴¹

II. EXCLUSION FROM GROSS INCOME OF THE VALUE OF A HOME FURNISHED TO A MINISTER OF THE GOSPEL

A. *Inception and Expansion of the Scope of the Parsonage Exemption*

The exclusion of the rental value of a home provided to a minister of the gospel from gross income (the parsonage exemption)⁴² dates back to the Revenue Act of 1921 (the "Act").⁴³ Under § 213(b)(11) of the Act, Congress provided that gross income does not include the "rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation."⁴⁴ The exact text of the exclusion was readopted by Congress and included in the Revenue Acts of 1928⁴⁵ and 1932,⁴⁶ as well as the Internal Revenue Code of 1939.⁴⁷ Prior to the parsonage exemption revisions in the Internal Revenue Code of 1954,⁴⁸ only ministers who were provided in-kind

39. *Id.* at 1447.

40. *Id.* at 1443.

41. *Id.* at 1437.

42. I.R.C. §107 (West 2013).

43. Pub. L. No. 67-98, 42 Stat. 239, 67th Congress, Sess. I. CH. 136 (1921).

44. *Id.*

45. Revenue Act of 1928, ch. 853, sec. 22(b)(8), 45 Stat. 798 (1928).

46. Revenue Act of 1932, ch. 209, sec. 22(b)(6), 47 Stat. 179 (1932).

47. I.R.C. §22(b)(6), ch 2, 53 Stat. 10 (1939).

48. I.R.C. ch. 736, 68A Stat. 32 (1954).

housing were allowed to exclude the value of the parsonage provided to them as compensation from gross income.⁴⁹ Consequently, ministers who were not provided a home but instead received additional money to compensate them for the expense of renting their own homes were somewhat penalized because they were required to include in gross income and pay federal income tax on the supplemental pay they received in lieu of not being furnished a home.⁵⁰ To remedy this apparent disparate treatment, Congress amended the Code in 1954 to “remove the discrimination in existing law by providing that the present exclusion is to apply to rental allowances paid to ministers to the extent used by them to rent or provide a home.”⁵¹

Apart from expanding the scope of the parsonage exemption, Congress also replaced the phrase “a dwelling house and appurtenances thereof” in the existing provision with the term “a home.”⁵² By substituting the word “home” for the phrase, “a dwelling house and appurtenances thereof” Congress made clear that it did not intend for the revision of the provision to alter the principal meaning of the Act.⁵³ With these changes, the text of the 1954 Code, as revised, read: “[i]n 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.”⁵⁴

Based on the revised language of the provision, the U.S. Tax Court ruled in favor of the taxpayer in *Warren v. Commissioner* (“*Warren*”),⁵⁵ by holding that section 107 rental exclusion is limited to the amount used to provide a home and not the lesser of the amount used to provide a home or the fair market rental value of the home as contended by the Service.⁵⁶ Upon appeal by the Service, the Ninth Circuit, on its own

49. I.R.C. § 22(b)(6), ch. 2, 53 Stat. 10 (1939).

50. *General Revenue Revision: Hearings Before the H. Comm. on Ways & Means*, 83rd Cong. 1 (Statement of Hon. Peter F. Mark, Jr., on H.R. 4275, Concerning the Taxability of a Cash Allowance Paid to Clergymen in Lieu of Furnishing Them a Dwelling on Forty Topics Pertaining to the General Revision of the Internal Revenue Code).

51. S. REP. NO. 1622, 83rd Cong. 2d Sess. 186 (1954); see also H.R. REP. NO. 1337, 83rd Cong., 2d Sess., A35 (1954).

52. I.R.C. § 107(1), ch. 736, 68A Stat. 32 (1954).

53. H.R. REP. 1337, 83rd Cong., 2d Sess. A35 (1954); S. Rept. 1622, 83d Cong., 2d Sess. 186 (1954) (stating that the word “home” as used in both paragraphs is not intended to change the law under section 22(b)(6) of the Code of 1939 which used the term “dwelling house and appurtenances thereof”).

54. *Id.* See also I.R.C. § 107.

55. *Warren v. Comm’r*, 114 T.C. 343 (2000).

56. *Id.* at 344.

motion, raised the issue of the constitutionality of section 107 altogether in reviewing the appeal.⁵⁷ Concerned over a potential declaration by the Ninth Circuit that section 107 was unconstitutional all in all if the Ninth Circuit Court of Appeals reviewed the parsonage exemption on the merits, the clergy lobbied Congress to intervene.⁵⁸

In response, Congress passed the Clergy Housing Clarification Act of 2002⁵⁹ to explain that the exclusion allowed under I.R.C. §107 may not exceed the fair rental value of the home, including furnishings, appurtenances, and costs of utilities.⁶⁰ The intent of this legislation was to render moot the Ninth Circuit Court of Appeals' consideration of the *Warren* appeal, including the Court's intended review of the constitutionality of the parsonage exemption (I.R.C. §107).⁶¹ This

57. *Warren v. Comm'r*, 302 F.3d 1012, 1014 (9th Cir. 2002). ("After oral argument, we appointed Prof. Chemerinsky as amicus. We requested supplemental briefing from the parties and amici on whether we should consider the constitutionality of § 107(2) and, if so, whether Rev. Warren's claimed exclusion violates the Establishment Clause because it provides a tax benefit available only to 'ministers of the gospel.'").

58. See 148 CONG. REC. H1299 (daily ed. Apr. 16, 2002) (statement of Rep. Pomeroy).

Mr. Speaker, in one of the most obvious cases of judicial overreach in recent memory, the Ninth Circuit Court of Appeals in San Francisco is poised to inflict a devastating tax increase on America's clergy. Unless Congress acts quickly, the 81-year-old housing tax exclusion for members of the clergy will be struck down by judicial overreach on the part of America's most reversed and most activist circuit court I had a very interesting roundtable meeting in North Dakota yesterday with a number of clergy terribly concerned about the underlying threat to the housing allowance. North Dakota has more churches per capita than any other State in the country, more than 2,000 churches, 78 percent of which are located in communities of under 2,500 people. These are congregations just struggling to get by. We have already lost 400 churches over the last several years, and projections are we could lose another fifty in this decade. I had one of the roundtable participants talk about how, when their daughter was born, the trustee who happened to be the city accountant said they should go down and apply for food stamps, because they were now eligible, but that was all that could be paid. One other minister talked about when the pledges did not come in on schedule, they were simply not given their full dimension of meager salary. And to think about laying upon these congregations and these faithful servants of those congregations, the pastors, this new tax bill is really completely unacceptable. One of the pastors participating gave me the tax return that he was about to put in the mail yesterday. It reflects the combined income of him and his wife, both pastors serving a church in Fargo, North Dakota. Although making a very modest income, the tax hit, if they lost the housing exclusion, would be an additional \$3,958.

Id.

59. *Description Of H.R. 4156, the "Clergy Housing Clarification Act Of 2002," As Passed By The House Of Representatives On April 16, 2002*, JOINT COMM. ON TAXATION, Apr. 18, 2002 available at 2002 WL 34255180.

60. *Id.*

61. *Warren*, 302 F.3d at 1014. "On May 20, 2002, the President signed into law the Clergy Housing Allowance Clarification Act of 2002, Pub. L. No. 107-181, 116 Stat. 583, which resolved the question of statutory interpretation raised by the parties. Its sponsors explained that this bill was

legislative change essentially ushered in the language of the current statutory framework of Section 107.

B. The Current Statutory Frame Work of the Parsonage Exemption

Today's statutory framework of the parsonage exemption is governed by section §107.⁶² The provision states in relevant parts that “[i]n 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.”⁶³

Treasury Regulations clarify that the word “home” as used within the meaning of the Code means “a dwelling place (including furnishings) and the appurtenances thereto, such as a garage.”⁶⁴ Likewise, the Regulations explain that the “term ‘rental allowance’ means an amount paid to a minister to rent or otherwise provide a home if such amount is designated as rental allowance pursuant to official action taken . . . by the employing church or other qualified organization.”⁶⁵ In order for the home or rental allowance to be exempt from income, however, it must be provided to the minister as compensation in consideration for his services as a minister of the gospel and the amount must be formally designated as such by the organization paying the allowance, either in its minutes, contract, resolution, or other official document, prior to payment.⁶⁶

III. WHO IS CONSIDERED A MINISTER OF THE GOSPEL?

A. Overview

In general, a minister of the gospel is any individual who has been “duly ordained, commissioned, or licensed [as a] minister of a church,”⁶⁷ and such individual must be engaged in services of the kind typically

designed to prevent this Court from reaching the constitutionality of § 107(2).” *Id.*

62. I.R.C. §107 (West 2013).

63. *Id.*

64. Treas. Reg. §1.107-1(b) (1963).

65. *Id.*

66. *Id.* at § 1.107-1(a)-(b).

67. Rev. Rul. 59-270, 1959-2 C.B. 44. *See also* Treas. Reg. §1.107-1(a).

performed by a minister of the gospel.⁶⁸ Services typically performed by a minister of the gospel that fall within the purview of the Code's definition include "the performance of sacerdotal functions, the conduct of religious worship, the administration and maintenance of religious organizations and their integral agencies, and the performance of teaching and administrative duties at theological seminaries."⁶⁹

Notwithstanding the Service's apparent narrow restriction of the exemption to ordained or commissioned ministers, the Tax Court has extended the exclusion to include an unordained, duly commissioned Minister of the synagogue vested with complete authority to exercise his ministry in the conduct of religious worship, education, and the performance of sacerdotal rites or tenets of Judaism.⁷⁰ Accordingly, the ultimate determination of whether or not a preacher is considered a minister of the gospel within the meaning of the Code and thus entitled to the parsonage exemption is based on the facts and circumstances of each particular case.

B. Is a Minister of the Gospel Entitled to Parsonage Allowance Exemption for More than One Home at a Time?

As stated above, section 107⁷¹ excludes from the gross income of a minister of the gospel the rental value of "a home" provided to him, as part of his compensation, or the rental allowance paid to him to the extent used by him to rent or provide "a home."⁷² Treasury Regulations §1.107-1(b) explains that the term "home" as used in the Code means "a dwelling place (including furnishings) and the appurtenances thereto, such as a garage."⁷³ Furthermore, "rental allowance" means "an amount paid to a minister to rent or otherwise provide a home"⁷⁴

Because Congress did not explicitly limit the exclusion of section

68. Rev. Rul. 59-270.

69. *Id.* (noting that "[t]he rules provided by section 1.1402 (c)-1 (e) of the Regulations are for determining whether services performed by a minister are in the exercise of his ministry in the case of 'any individual who is a duly ordained, commissioned, or licensed minister of a church . . . ' and who elects to have the Federal old age and survivors insurance system established by the Social Security Act extended to service performed by him in his capacity as such a minister. Therefore, such regulations indicate that the scope of the phrase 'minister of the gospel' as used in section 107 of the Code is commensurate with such phrase as interpreted in I.T. 1306, *supra*, under the Revenue Act of 1921 and I.T. 3658, *supra*, under the 1939 Code").

70. *Silverman v. CIR*, 57 T.C. 727, 731 (1972).

71. I.R.C. §107.

72. *Id.*; Treas. Reg. §1.107-1.

73. *Id.* at §1.107-1(b).

74. *Id.*

107 to only one home in the textual language that the exclusion applies to the rental value of “a home,” an issue arose in 2010 in *Driscoll v. Commissioner* (“*Driscoll*”)⁷⁵ regarding whether a minister may properly exclude from gross income the parsonage allowance paid to him to maintain two homes for himself in one taxable year.⁷⁶ The minister in question, Philip A. Driscoll (“Minister Driscoll”), was an ordained minister for the Mighty Horn Ministries, Inc. (the “Church”).⁷⁷ During the years at issue, Minister Driscoll and his wife owned a principal residence or home in Cleveland, Tennessee (the “Cleveland Home”), and a lake second home (the “Lake Home”) in Lake Ocoee near Cleveland, Tennessee.⁷⁸ From 1996 to 1999, the Church paid Minister Driscoll parsonage allowances to maintain both the Cleveland Home and the Lake Home.⁷⁹ Minister Driscoll excluded all of the payments from his gross income, contending that the payments were all excludible from his gross income under I.R.C. §107.⁸⁰ The I.R.S., however, disagreed, contending that the parsonage allowance was only applicable to Minister Driscoll’s principal residence, the Cleveland Home, and thus inapplicable to his second vacation residence, the Lake Home.⁸¹

Relying on I.R.C. §7701(p)(1) definitions,⁸² the Tax Court sided with Minister Driscoll,⁸³ and ruled against the I.R.S., pointing out that in interpreting the meaning of the term “a home” as used in the Code, the

75. *Driscoll v. Comm’r*, 135 T.C. 557 (2010), *rev’d and remanded*, 669 F.3d 1309 (11th Cir. 2012), *cert. denied*, 133 S. Ct 358 (2012).

76. *Id.* at 560.

77. *Id.* at 558.

78. *Id.* at 558-59.

79. *Id.* at 559.

80. *Id.* at 559-60.

81. *Id.* at 559.

82. I.R.C. §7701(p) (West 2013)

p) Cross references.—

(1) Other definitions.—

....

(1) Singular as including plural, section 1 [1 USCS § 1]

(2) Plural as including singular, section 1 [1 USCS § 1].

Id.

83. *Driscoll*, 135 T.C. at 566

We hold that the portion of the Ministries parsonage allowance that the Ministries paid to Mr. Driscoll as part of his compensation during each of the years at issue and that he used during each of those years to provide for himself a lake second home satisfies the requirements in section 107(2) that an allowance be paid to him as part of his compensation and be used to provide a home. Accordingly, we hold that petitioners are entitled for each of the taxable years at issue to exclude from gross income under section 107 the Ministries parsonage allowance with respect to their lake second home.

Id.

singular includes the plural unless the statute indicates otherwise.⁸⁴ Upon appeal of the Tax Court's ruling by the I.R.S. to the United States Court of Appeals,⁸⁵ the Eleventh Circuit, in a de novo review of the U.S. Tax Court's ruling, reversed the Tax Court on February 8, 2012 and remanded the case, holding that the word "home" as used in the legislative history of the provision had a "decidedly singular connotation."⁸⁶

With respect to the Tax Court's reliance on I.R.C. §7701(p)(1) definitions that singular terms in the Code included their plural forms, the Eleventh Circuit ruled that such cross references "are made only for convenience" and do not apply especially if "the context [of the legislative use of the word] indicates otherwise."⁸⁷ Accordingly, the parsonage exemption, as interpreted by the Eleventh Circuit Court of Appeals on February 8, 2012 applies to only one home at a time during the tax year.⁸⁸

IV. ATTEMPTS TO ELIMINATE THE PARSONAGE EXEMPTION FROM THE CODE

A. *In General*

Ironically, one of the preliminary attempts to rid the Code of the parsonage exemption emanated from the executive branch. In his state of the Union address, President Ronald Reagan⁸⁹ asked Secretary of the Treasury, Donald Regan,⁹⁰ for a plan of action to simplify and make the tax code fairer to everyone.⁹¹ In response, Treasury Secretary Regan

84. I.R.C. §7701(p)(1), successor to I.R.C. §7701(m)(1), the hitherto provision during the litigation.

85. *Comm'r v. Driscoll*, 669 F.3d 1309 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 358 (2012).

86. *Id.* at 1311-12. "'Home' is defined as 'the house and grounds with their appurtenances habitually occupied by a family: one's principal place of residence: DOMICILE.'" (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1082 (1993)). "Based upon this definition, we conclude that 'home' has decidedly singular connotations." *Id.* at 1311-12.

87. *Driscoll*, 669 F.3d at 1311. (The Eleventh Circuit explained "the Dictionary Act's singular-to-plural provision should only apply if the context of I.R.C. § 107(2) reasonably supports such an application. We hold that it does not.")

88. *Id.* at 1312 ("As the Commissioner argues, the consistent use of the singular in this legislative history—'a dwelling house,' 'a home,' and 'the home'—demonstrate that Congress intended for the parsonage allowance exclusion to apply to only one home.")

89. The 40th President of the United States serving from 1981–1989.

90. The 66th United States Secretary of the Treasury serving from 1981–1985.

91. U.S. DEP'T OF TREASURY, TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH: THE DEP'T REPORT TO THE PRESIDENT, vol. I, iii, (1984), *available at* <http://www.treasury.gov/resource-center/tax-policy/Documents/tres84v1Sum.pdf>. In the report the Secretary of the Treasury Donald Regan wrote to the President saying: "[i]n your state of the Union

proposed, among others, the repeal of the exclusion of the housing allowances for ministers. In the proposal, the Treasury Secretary reasoned that the existing exclusion from federal income tax of the parsonage allowance “departs from generally applicable income measurement principles, with the result that ministers pay less tax than other taxpayers with the same or even smaller economic incomes.”⁹²

Due, however, to the overwhelming negative reaction from the clergy in opposition⁹³ to the proposed elimination of the subsidy, the President relented and the parsonage exemption was retained in the Code.⁹⁴ Apart from the failed attempt by the executive branch to eliminate the parsonage exemption, other groups and taxpayers have tried, but the most recent are the judicial challenges brought by the Freedom From Religion Foundation Incorporation.

B. Freedom From Religion Foundation Inc. v. Timothy Geithner

1. Summary Facts of the Case.

The Freedom From Religion Foundation Incorporation (“FFRF”) is a nonprofit free-thought⁹⁵ organization based in Wisconsin⁹⁶ and part of its mission is dedicated to promoting, among others, the principle of

address, you said: ‘To talk of meeting present situation by increasing taxes is a Band-Aid solution which does nothing to cure an illness that been coming on for half a century, to say nothing of the fact that it poses a real threat to economic recovery I am asking secretary Don Regan for a plan for action to simplify the entire tax code so all taxpayers, big and small, are treated more fairly I have asked that specific recommendations, consistent with those objectives, be presented to me by December 1984.’” *Id.*

92. See U.S. DEP’T OF TREASURY, *TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH: THE DEPARTMENT REPORT TO THE PRESIDENT*, vol. II, 49 (1984). In the proposal the Treasury Secretary argued that “[t]here is no evidence that the financial circumstances of ministers justify special tax treatment. The average minister’s compensation is low compared to other professionals, but not compared to taxpayers in general. Moreover, the tax benefit of the exclusion provides a disproportionately greater benefit to relatively affluent ministers, due to the higher marginal tax rates applicable to their incomes.” *Id.*

93. *Clergy Unhappy With Proposed Elimination of Parsonage Allowance*, TAX NOTES TODAY, Jan. 2, 1985, available at LEXIS 26 Tax Notes 13. (“Treasury has received 20 letters from clergy who oppose the elimination of the parsonage allowance as provided for in the department’s tax reform proposal.”) *Id.*

94. *Rental Value of Parsonage: Clergy Got Relief From Original Treasury Proposal*, TAX NOTES TODAY, July 30, 1985, available at LEXIS 28 Tax Notes 623 (“Treasury has noted that the President’s tax reform plan does not contain Treasury’s November 1984 proposal for repealing the exemption for ministers’ housing allowances.”).

95. The national office of Freedom From Religion Foundation is housed in Freethought Hall, located in Madison Wisconsin. *About Freethought Hall*, FREEDOM FROM RELIGION FOUND., <http://ffrf.org/about/about-freethought-hall> (last visited Mar. 10, 2013).

96. *Id.*

separation of church and state.⁹⁷ Members of its California branch instituted this suit against Treasury Secretary Timothy Geithner,⁹⁸ I.R.S. Commissioner Douglas Schulman,⁹⁹ et al, “seeking a declaration that I.R.C. §§107 and 265(a)(6) violate the Establishment Clause of the United States Constitution”¹⁰⁰ by providing support for religion.

2. Text of the Statutes Challenged by *Freedom From Religion Foundation, Inc.*

i. Rental value of parsonages – I.R.C. §107

I.R.C. §107 provides in relevant parts 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 exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.¹⁰¹

ii. Expenses and interest relating to tax-exempt income –I.R.C. §265(a)(6)

Section [265(a)] not to apply with respect to parsonage and military housing allowances. No deduction shall be denied under this section for interest on a mortgage on, or real property taxes on, the home of the taxpayer by reason of the receipt of an amount as—

(A) a military housing allowance, or

(B) a parsonage allowance excludable from gross income under [I.R.C.

97. See *FFRF v. Geithner*, 715 F. Supp. 2d 1051, 1055 (E.D. Cal. 2010).

98. Is the 75th United States Secretary of the Treasury. *Secretaries of the Treasury*, U.S. DEP'T OF THE TREASURY, http://www.treasury.gov/about/history/Pages/edu_history_secretary_index.aspx (last visited Mar. 10, 2013).

99. Is the 47th and current Commissioner of Internal Revenue. *Comm'r of Internal Revenue Douglas H. Shulman*, I.R.S., <http://www.irs.gov/uac/Commissioner-of-Internal-Revenue-Douglas-H.-Shulman> (last visited Mar. 10, 2013).

100. *FFRF*, 715 F. Supp. 2d at 1055-56.

101. I.R.C. §107 (West 2013).

Sec. 107].¹⁰²

In response, the Government moved to dismiss the suit, contending, among others, that plaintiff lacked standing to bring the claim in federal court.¹⁰³

3. Do Taxpayers Have Standing to Sue for the Relief Sought?

In general, the power of the federal courts is constrained by Article III, Section 1 of the U.S. Constitution to only cases and controversies in which the plaintiff has standing.¹⁰⁴ To obtain standing, Article III mandates that the plaintiff allege “a personal injury fairly traceable to the defendant’s alleged unlawful conduct and likely to be redressed by the requested relief.”¹⁰⁵ Against this background, the Supreme Court enunciated that plaintiffs generally do not possess standing to commence a federal suit where they allege an injury based exclusively on their status as taxpayer because a taxpayer’s stake in the moneys of the U.S. treasury is relatively small and infinitesimal since such stake is held in common with several other taxpayers.¹⁰⁶

Notwithstanding this general prohibition against federal taxpayer standing, the U.S. Supreme Court created an exception under *Flast v. Cohen* by holding that taxpayers had standing to challenge a statute which provided funds for educational and instructional materials to religious schools on the basis that such practice was in violation of the establishment clause.¹⁰⁷

Although *Flast* involved the expenditure of federal funds appropriated by Congress under the Elementary and Secondary Education Act of 1965 to finance instruction in religious schools¹⁰⁸ (as opposed to a statute exempting income of ministers from taxation), the Federal District Court, citing the U.S. Supreme Court, stated that it will not allow such “artificial distinctions”¹⁰⁹ between direct grants to religious organizations and tax programs that provide like benefits to religious organizations deter it from finding that taxpayers in the instant case had standing under *Flast* to challenge the constitutionality of

102. *Id.* at §265(a)(6).

103. *FFRF*, 715 F. Supp. 2d at 1056-57.

104. *Id.* at 1059 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

105. *Id.* See also *Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923)

106. *Allen*, 468 U.S. at 751.

107. *FFRF*, 715 F. Supp. 2d at 1059. See *Flast v. Cohen*, 392 U.S. 83, 87-88 (1968).

108. *Flast*, 392 U.S. at 85-86.

109. *FFRF*, 715 F. Supp. 2d at 1060.

sections §107 and 265(a)(6).¹¹⁰

In reaching its decisions, the Federal District Court stated that analogous to the basis of finding injury in *Flast*, the U.S. Supreme Court has also found that “[e]very tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become indirect vicarious ‘donors.’”¹¹¹ Accordingly, the Federal District Court concluded that “[a] tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income.”¹¹² Consequently, the Federal District Court held on May 21, 2010, that the plaintiffs have established, under *Flast*, that they have standing as federal taxpayers to challenge I.R.C. §§107 and 265(a)(6).¹¹³

Following this verdict, the United States Supreme Court was considering a taxpayer standing issue in a case involving *Arizona v. Winn* (“*Arizona*”).¹¹⁴ Consequently, the shelf life of the Federal District Court’s ruling that taxpayer had standing to challenge the federal statute would rest upon the outcome of the *Arizona* case discussed below.

C. Arizona Christian School Tuition Organizations v. Kathleen Winn

1. Summary Facts of the Case

In 1997, the Arizona legislature enacted section 43-1089 of the Arizona code which grants individual taxpayers a dollar-for-dollar tax credit in exchange for contributions they make to School Tuition Organizations (“STOs”).¹¹⁵ An STO is a private nonprofit organization established under the laws of the State of Arizona. Under Arizona state law, an STO is required to distribute a minimum of ninety percent of the revenue it receives in the form of scholarships or tuition grants to students who are enrolled in Arizona nongovernment primary or secondary schools.¹¹⁶ Even though the State of Arizona does not

110. *Id.* at 1060-61.

111. *Id.*; see also *Texas Monthly Inc. v. Bullock*, 489 U.S. 1, 14 (1989).

112. *FFRF*, 715 F. Supp. 2d at 1060 (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983)).

113. *Id.* at 1061 (“Plaintiffs have therefore established that they have standing as federal taxpayers to challenge §§ 107 and 265(a)(6) of the Internal Revenue Code for allegedly violating the Establishment Clause.”).

114. See *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

115. *Id.* at 1040. See ARIZONA REV. STAT. ANN. §43-1089 (West 2013). See also *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1005 (9th Cir. 2009), *cert. granted, cause remanded sub nom. Arizona Sch. Choice Trust v. Winn*, 131 S. Ct. 2091 (U.S. 2011) and *rev’d*, 131 S. Ct. 1436 (U.S. 2011) and *rev’d and remanded*, 658 F.3d 889 (9th Cir. 2011).

116. *Arizona*, 131 S. Ct. at 1440-41.

generally set the scholarship award guidelines for STOs, the state prohibits STOs from discriminating in their award of scholarships on the basis of race, color, or national origin.¹¹⁷

Other than the racial discrimination prohibition, there is nothing in the Arizona statute that forbids an STO from awarding scholarships preferentially to schools that provide religious instructions or admit students based on a preferred religious affiliation.¹¹⁸ Consequently, scholarships could, and were awarded, indiscriminately to sectarian schools.¹¹⁹ To induce contributions, taxpayers who contribute money to STOs are allowed under the statute to receive a state tax credit of up to \$500¹²⁰ when they file their Arizona state income tax return.¹²¹

2. Contention of Plaintiff-Taxpayers

Plaintiff-Taxpayers contended that because the largest STOs restricted their scholarship awards to religious private schools, students desiring to attend nonreligious private schools were effectively disadvantaged due to the fact that only a disproportionately smaller

117. *Id.* See also section (G)(2) of the ARIZONA REV. STAT. ANN. §43-1089.

118. See *Arizona*, 562 F. 3d at 1006 (noting that “[i]n practice, plaintiffs allege, many STOs have opted to limit the schools to which they offer scholarships, and a number of STOs provide scholarships that may be used only at religious schools or schools of a particular denomination. For example, plaintiffs allege that Arizona’s three largest STOs, as measured by the amount of contributions reported in 1998, each restricts its scholarships to use at religious schools. The largest of these, the Catholic Tuition Organization of the Diocese of Phoenix, restricts its scholarships to use at Catholic schools in the Phoenix Diocese such as St. Mary’s, which advertises its mission as being ‘to provide a quality Catholic education by developing and sustaining a rich tradition grounded in Gospel and family values.’ The second largest STO, the Arizona Christian School Tuition Organization, expressly restricts scholarships to use at ‘evangelical’ Christian Schools. The third largest, Brophy Community Foundation, restricts its scholarships to use at two Catholic schools, one of which advertises its goal to be ‘instill[ing] a knowledge of the truths of faith, enlightened by the post-Conciliar teachings of the Church,’ and the other of which promotes itself as offering students ‘an intimate relationship with God’ through ‘the process of nurturing the soul’”).

119. *Id.* See also *Winn v. Killian*, 307 F. 3d 1011, 1014 (9th Cir. 2002)

At least 94% of that amount was donated to STOs that restrict their scholarships or grants to students attending religious schools; three religious STOs received 85% of the donations made that year. The principal beneficiary of the funds that otherwise would have been paid to the state as tax revenues was the Catholic Diocese of Phoenix. The program expanded significantly in 1999, its second year of operation; according to plaintiffs, the Catholic Diocese of Phoenix alone received \$ 4.5 million for its STO that year, and the Catholic Diocese of Tucson reported more than \$ 850,000 in donations as a result of the tax scheme.

Id.

120. In the case of a married taxpayer filing a joint return, the credit is increased to \$1,000. ARIZONA REV. STAT. ANN. §43-1089(A).

121. *Winn*, 562 F. 3d at 1005.

number of STO-provided scholarships became available to them.¹²² This inequality in the award of STO scholarships preferentially to students attending religious schools—made possible by the state approved design of the program—the plaintiffs contend causes the program to violate the Establishment Clause of the U.S. Constitution.¹²³

3. Court's Ruling

The Ninth Circuit held that the plaintiff-taxpayers had Article III standing under *Flast* to challenge the constitutionality of the exchange of the Arizona tax credits for taxpayers' contributions to STOs because plaintiffs have sufficiently alleged that the state used its taxing and spending power to advance religion in violation of the Establishment Clause of the First Amendment.¹²⁴ The United States Supreme Court, however, reversed, holding that because taxpayers' suit "challenge[d] a tax credit as opposed to a [direct] government expenditure, they lack[ed] Article III standing under *Flast v. Cohen*."¹²⁵ In reaching its decision, the Supreme Court enunciated that to come within the purview of *Flast*'s limited exception to the standing bar, taxpayers must satisfy a two-prong test.¹²⁶

First, there must be a logical link between plaintiff's status and the statute challenged.¹²⁷ To satisfy this prong, the Supreme Court explains, taxpayer may allege that the federal government violated the Establishment Clause of the First Amendment in the use of its legislative power to collect and spend taxpayer money.¹²⁸ To satisfy the second prong, taxpayer must show a nexus between the plaintiff's status and the allegation of constitutional violation challenged.¹²⁹ This prong, the Court contends, is satisfied by taxpayer showing that government money had been spent to fund religion in violation of the Establishment Clause of the First Amendment.¹³⁰ According to *Flast*, "[w]hen both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to

122. *Id.* at 1006.

123. *Id.*

124. *Id.* at 1010-11. ("We therefore hold that plaintiffs have standing as taxpayers to challenge Section 1089 for allegedly violating the *Establishment Clause*.").

125. *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1437 (2011)

126. *Id.* at 1438.

127. *Id.* at 1445 (explaining the first prong of the *Flast* test).

128. *Id.*

129. *Id.* (explaining the second prong of *Flast* test).

130. *Id.*

invoke a federal court's jurisdiction."¹³¹

Rather than applying the two-prong test as noted,¹³² the Supreme Court instead further explained that after stating the two prongs, *Flast* evaluated them together and enunciated that taxpayers "suffer a particular injury for standing purposes when, in violation of the Establishment Clause and by means of the taxing and spending power, their property is transferred through the Government's Treasury to a sectarian entity."¹³³ To come within this rule, the Supreme Court continues, the taxpayer's allegation would be that "his money is being extracted and spent in violation of specific constitutional protection against such abuses by legislative power."¹³⁴ The Supreme Court posited that the "'Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed."¹³⁵ After expressing these rules, the Supreme Court concluded that because the government was not directly spending taxpayers' money that had already been extracted and placed in government treasury, but instead was issuing tax credits to taxpayers in exchange for contributions they made to STOs (which in turn used the contributions to support education in religious schools), taxpayers do not have the requisite standing to pursue their claims.¹³⁶

V. ANALYSES OF THE SUPREME COURT'S RULING

A. *Standing In General*

Clearly, the taxpayers in *Arizona* had no standing, merely as taxpayers, to contest the alleged government funding of religion in violation of the Establishment Clause because, as a general matter, a taxpayers' stake in the moneys of the treasury is relatively very small and inestimable and thus cannot serve as a basis to confer Article III standing.¹³⁷

131. *Flast*, 392 U.S. at 103.

132. *Arizona*, 131 S. Ct. at 1438.

133. *Id.* at 1445-46.

134. *Id.* at 1446.

135. *Id.* at 1447.

136. *Id.* at 1438.

137. *Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923) (establishing the rule against taxpayer standing). *See also Arizona*, 131 S. Ct. 1436 (discussing the basis of standing).

B. *The Flast Exception*

However, under the *Flast* exception, taxpayer may obtain standing if a two-prong nexus test is satisfied, namely: (1) whether there is a logical link between the plaintiff's status and the statute challenged, and (2) whether there is a nexus between the plaintiff's status and the allegation of constitutional violation challenged.¹³⁸ Pursuant to *Flast*, both nexus inquiries are satisfied when taxpayer alleges that a statute enacted under the legislature's taxing and spending power violates the Establishment Clause.¹³⁹ Accordingly, *Flast* held that "[w]hen both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction."¹⁴⁰

In *Arizona*, the plaintiff-taxpayers appeared to have met both *Flast* nexuses when they alleged that the Arizona State legislature enacted a tax statute pursuant to its taxing and spending power under the state constitution and that the tax statute violated the Establishment Clause by granting tax credits to taxpayers in exchange for their contributions to STOs, which in turn used the contributions to fund scholarships in sectarian schools.¹⁴¹ Rather than declare that the plaintiffs "have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction"¹⁴² as prescribed by *Flast*, the Supreme Court, instead, utilized a superficial form-over-substance analysis to factually distinguish *Flast* by holding that because the alleged religious funding challenged in *Arizona* was effected indirectly through the use of tax credits as opposed to a direct government appropriation and spending of taxpayer money in aid of religion (as was the case in *Flast*), the indirect tax credit funding device does not visit the injury identified in *Flast* to confer taxpayer with Article III standing to sue.¹⁴³

To buttress its distinction in support of its contention that government money was not involved in the contributions to STOs to

138. See *Flast*, 392 U.S. at 102-03 (discussing the *Flast* exception).

139. See *Id.* at 102-03 ("The taxpayer-appellants in this case have satisfied both nexuses to support their claim of standing under the test we announce today. Their constitutional challenge is made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds. In addition, appellants have alleged that the challenged expenditures violate the Establishment and *Free Exercise Clauses of the First Amendment.*") (emphasis added).

140. *Id.* at 103.

141. See Plaintiffs' claim in *Arizona*, 131 S. Ct. at 1441.

142. See *Flast*, 392 U.S. at 103.

143. See *Arizona*, 131 S. Ct. at 1438-39.

finance scholarships in sectarian schools (to provide support for standing), the Supreme Court declared that “[w]hen Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the state has collected from respondents or from other taxpayers.”¹⁴⁴ . . . Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations.”¹⁴⁵

C. *Do Arizonians Really “Spend Their Own Money” When They Contribute To STOs And Receive State Tax Credits in Return For the Contribution (to preclude taxpayer Standing Under Flast)?*

The Supreme Court’s pronouncement that “[w]hen Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the state has collected from respondents or from other taxpayers (and thus affords no basis for standing under *Flast*)”¹⁴⁶ is flawed, not entirely correct, and exemplifies the Court’s misconception of the distinction between tax credits and tax deductions.

First, the point of contention here is not that private taxpayers who make normal contributions to STOs, in general, are not “spend[ing] their own money”¹⁴⁷ when they make such contributions. Rather, the point of contention is with the Supreme Court’s refusal to recognize that when a state issues a dollar-for-dollar tax credit to taxpayers in exchange for their contributions to STOs which operate under a state mandate to distribute at least ninety percent¹⁴⁸ of its contributions to finance scholarships in private schools, and in the instant case, private sectarian schools, the state *ipso facto* subrogates itself as the *de facto* contributor, thus making the contribution the spending of taxpayers’ money in aid of religion, in violation of the Establishment Clause.

Put differently, by issuing tax credits to taxpayers in exchange for their private contributions to STOs, the state government is in essence converting an otherwise private contribution into a state contribution or state spending of taxpayers’ money in aid of religion (because the only

144. *Id.* at 1447. See Professor Edward A. Zelinsky, *Winn and the Inadvisability of Constitutionalizing Tax Expenditure Analysis*, 121 YALE L.J. ONLINE 25, 27 (2011) (“Winn thus resurrects a question which has lain quiescent since Rosenberger: Does tax expenditure analysis help to decide the constitutionality of tax and direct outlay programs?”).

145. *Arizona*, 131 S. Ct. at 1448.

146. *Id.* at 1447.

147. This is in reference to the Supreme Court’s assertions that “[w]hen Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the state has collected from respondents or from other taxpayers.” *Id.* at 1447 (emphasis added).

148. The STOs are allowed to keep ten percent to offset operating expenses. *Id.* at 1440.

taxpayer who can benefit from the tax credit is a contributor who already owes taxes to the state).¹⁴⁹ This is so because tax credits, unlike tax deductions, result in a dollar-for-dollar reduction of the amount of tax a taxpayer owes to the government.¹⁵⁰

Therefore, if the contributor-taxpayer did not owe the state of Arizona any income taxes, he would not have used the tax credit in the first place because the tax credit is applied only after the contributor-taxpayer had already calculated the total amount of income tax liability owed to the state government and then draw on the tax credit to pay down the tax liability owed. Thus, taxpayer receiving the tax credit would have no other use for it except to apply it to pay down the amount of tax liability he already owed to the government. Hence, because the state is giving back to the contributor that which he previously paid/contributed to the STO, the state vicariously becomes the contributor to the STO since it alone is out of money equal to the amount of the contribution to the STO.¹⁵¹

Furthermore, had the taxpayer not received the tax credit, he would have had to remit his full tax liability (unreduced by the tax credit) to the state's treasury in the form of state income tax payment.¹⁵² Likewise, it is plausible that taxpayers would not have made any or some of the contributions to the STOs in the first place had they not known or were they not promised by the STOs that they would be reimbursed for all or some of their contributions in the form of a state tax credit—thus, making their contribution not really theirs but the state's.¹⁵³ In that regard, isn't the government the ultimate contributor of the money to the STO, which was eventually used to fund scholarships to students in private sectarian schools?

That is why the Supreme Court's assertion that "[w]hen Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the state has collected from respondents or from other taxpayers"¹⁵⁴ is incorrect, flawed, and not logically sound. The only reason why the STOs did not directly receive money that "the state [had

149. In which case, the contribution would violate the Establishment Clause of the First Amendment to the U.S. Constitution. See U.S. CONST. amend. I.

150. See discussion *infra* at V(D) example.

151. See illustration of this point in the Romeo and Juliet example *infra* at Part V(D).

152. This is so because a tax credit is a dollar-for-dollar reduction of the amount of tax taxpayer owes.

153. "What does this cost me? Nothing. Your contribution is subtracted in full from total state taxes owed for the year when you file your 2010 return." *How You Can Help*, THE ARIZONA EPISCOPAL SCH. FOUND., <http://www.az-esf.org/how.htm> (last visited Mar. 10, 2013).

154. *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1447 (2011).

already] collected from respondents or from other taxpayers”¹⁵⁵ is because the state affirmatively chose not to demand remittance of the income tax liability already owed to it from the STO-contributing taxpayers. Instead of demanding the tax, the state decided to forgive up to \$1,000 of the tax liability owed to it by crediting the same amount to the STO-contributing taxpayers to offset up to \$1,000 of the contribution they made to the STOs (so as to circumvent the Establishment Clause proscription against government support of religion).¹⁵⁶

Consequently, the government has undeniably extracted¹⁵⁷ money from taxpayers (by requiring state income tax payments to it) and has spent¹⁵⁸ taxpayer money to fund education in sectarian schools in violation of the Establishment Clause¹⁵⁹ (by issuing dollar-for-dollar tax credits to taxpayers in exchange for contributions they made to the STOs rather than demanding that the taxpayers remit up to \$1,000 of state taxes owed to it).¹⁶⁰ Therefore, taxpayers in Arizona should have been accorded standing under *Flast*. The following example illustrates how the issuance of state tax credits is tantamount to government spending of taxpayer money to finance education in sectarian schools in violation of the Establishment Clause (so as to afford a basis for standing under *Flast*).

D. *Romeo and Juliet Example*¹⁶¹

Assume the following facts: Romeo and Juliet are married and are citizens of the state of Arizona. Romeo and Juliet filed a joint state income tax return in 2011 and had a state income tax liability of \$3,000 before the application of state income tax credits. Romeo and Juliet contributed \$1,000 to an STO, which in turn awarded the \$1,000 (without reduction for expenses)¹⁶² in scholarships to fund math and

155. *Id.*

156. See ARIZONA REV. STAT. ANN. §43-1089 (West 2013) (allowing for provision of the tax credits).

157. The first prong of *Flast*. See *Arizona*, 131 S. Ct. at 1445 (discussing the elements of *Flast*).

158. Second criterion necessary to meet *Flast*. See *Arizona*, 131 S. Ct. at 1445 (discussing the elements of *Flast*).

159. “The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the ‘purpose’ or ‘effect’ of advancing or inhibiting religion.” See *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2461 (citing *Agostini v. Felton*, 117 S. Ct. 1997 (1997)).

160. *Id.*

161. This foregoing example is based purely on hypothetical facts.

162. A typical STO is permitted under ARIZONA REV. STAT. ANN. §43-1089 (West 2013) to withhold up to ten percent of its contributions for administration of the program.

reading skills at St. John's Catholic school (sectarian school) in Phoenix, Arizona.

Without any state tax credits, Romeo and Juliet would have an out of pocket expenditure in the total amount of \$4,000 (\$3,000 income tax liability payable to the state of Arizona and \$1,000 contribution to the STO which in turn is used by the STO to fund education in the sectarian schools). Given these facts, the state's treasury would increase by \$3,000 with the payment by Romeo and Juliet of the tax liability owed to the state government.¹⁶³ If, however, the state grants Romeo and Juliet a tax credit¹⁶⁴ of \$1,000 against the \$3,000 tax liability owed (so as to reimburse them for the \$1,000 they contributed to the STO), the government's treasury would only increase by \$2,000 (\$3,000 minus the \$1,000 credit) with the resulting deficit of \$1,000 going to pay for taxpayer's contribution to the STO which in turn goes to fund education in the sectarian school.

When the dust settles, Romeo and Juliet would have a total out-of-pocket expenditure of only \$3,000 (\$4,000 minus \$1,000 of state tax credit to reimburse them for their STO contribution) instead of the \$4,000 (\$3,000 owed to the state and \$1,000 contribution to the STO) they would have incurred had there not been the state tax credit.¹⁶⁵ Since only the government is out of the \$1,000 that passed through the STO to the sectarian school, only the government's money was in essence "contributed" to the STO, which in turn ended up in the coffers of the sectarian school (through the STO) in violation of the Establishment Clause—contrary to the opinion of the Supreme Court that "[w]hen Arizona taxpayers choose to contribute to STOs, they spend their own money."¹⁶⁶

The Supreme Court's erroneous contention stems from its conclusion that because the \$1,000 of tax credit was not collected first by the state, deposited into its treasury, before being given back out to the STO,¹⁶⁷ the \$1,000 is not government's money (even though it was

163. In the event that Romeo and Juliet have not paid the \$3,000 owed, the Treasury would have a receivable due from Romeo and Juliet.

164. This credit would reduce the tax liability on a dollar-for-dollar basis.

165. This goes to show they didn't spend their money in the first place.

166. The fact that the contribution is actually borne by the state of Arizona and not the taxpayer can be seen in the websites of some of the STOs advertisements. For instance, in the Q&A section of the Arizona Episcopal School Foundation website, the following question and answer is posted: "What does this [STO contribution] cost me? *Nothing*. Your contribution is subtracted in full from total state taxes owed for the year when you file your 2010 return." *How You Can Help*, THE ARIZONA EPISCOPAL SCH. FOUND., <http://www.az-esf.org/how.htm> (last visited Mar. 10, 2013) (emphasis added).

167. As was the case with *Flast v. Cohen*, 392 U.S. 83 (1968).

owed to the government in income tax) and hence does not afford a basis for standing under *Flast*. Such a superficial distinction is not logically sound because it should be immaterial that the \$1,000 of income tax owed to the state that was forgiven in the form of tax credit was not collected first by the state and then given back out to the STO because at the end, when you collapse the two methods of financing,¹⁶⁸ both are in substance essentially the same and without a material difference.

Likewise, the Supreme Court's opinion that "[l]ike contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations"¹⁶⁹ is misleading and not entirely correct because tax credits are used by the STO contributor to pay down income tax liability already owed to the state. Additionally, the statement further exemplifies the Court's misunderstanding of the difference between tax deductions and tax credits and why tax credits, as used in the instant case, are akin to a government spending of taxpayer money in aid of religion,¹⁷⁰ and hence, should have afforded a basis for taxpayer standing under *Flast*.

As illustrated in the Romeo and Juliet example above,¹⁷¹ the \$1,000 of tax credit issued to Romeo and Juliet was to offset the \$1,000 of income tax liability they owed to the state. Had they not received the \$1,000 of tax credit to reimburse them for the \$1,000 of STO contribution, they would have paid the \$1,000 in income tax to the state. Consequently, the \$1,000 contribution was indeed money owed to the government (contrary to the Supreme Court's assertion),¹⁷² which ended up in the coffers of the STO, in contravention of the Establishment Clause.

168. That is, the tax credit step (used in *Arizona*) and the direct collecting of the tax first and then spending the collected money later (which the Court seems to suggest would have afforded a basis for standing).

169. *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011).

170. And thus violates the Establishment Clause. "The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." See *Zelman v. Simmons-Harris*, 536 U.S. at 648-49 (citing *Agostini v. Felton*, 521 U.S. 203, 223-24 (1997)).

171. See *supra* Part V(D).

172. The Supreme asserted in *Arizona* that "contributions yielding STO tax credits are not owed to the State." See *Arizona*, 131 S. Ct. at 1449.

E. Is Indirect Aid of Religion Through The Grant of Tax Credits in Exchange for Contributions to STOs Materially Different Than Direct Extraction and Spending of Taxpayer Money in Aid of Religion?

1. A Distinction Without a Difference

The Supreme Court's holding in *Arizona* was centered on its distinction that "[b]ecause respondents challenge a tax credit as opposed to a government expenditure, they lack Article III standing under *Flast v. Cohen*."¹⁷³ Such distinction is without a material difference and not sound or principled because the outcome of the inquiry for standing purposes is premised entirely on the form in which the contribution was made rather than the substance of the contribution taken as a whole. Put differently, the Supreme Court's holding is saying that if the state had, say, written a check of \$1,000 from its treasury to the STOs which then negotiated the draft to a sectarian school, taxpayers would have had Article III standing to challenge the spending but because the state, instead, issued tax credits (of up to \$1,000 each) to taxpayers to reimburse them for their contributions (of up to \$1,000 each) to the STOs, which in turn gave the \$1,000 to sectarian schools, such use of tax credit funding device would not confer Article III standing merely because the money did not pass through the state treasury first before being given to the sectarian school—despite the fact that, in substance, the same amount of government's money ended up in the coffers of the sectarian schools in both situations.¹⁷⁴

2. Elevation of Form-Over-Substance

Such a form-over-substance differentiation¹⁷⁵ based solely on the means employed is puzzling because, ironically, it's the same Supreme Court that developed the substance-over-form doctrine that the government has routinely used to recast transactions that are mere devices used to avoid taxation so as to reflect their true economic

173. *Id.* at 1437. (holding that: "Because respondents challenged a tax credit as opposed to a government expenditure, they lack Article III standing under *Flast v. Cohen*.").

174. *Id.* at 1457 (Kagan, J., dissenting) "Whenever taxpayers have standing under *Flast* to challenge an appropriation, they should also have standing to contest a tax expenditure. Their access to the federal courts should not depend on which type of financial subsidy the State has offered." *Id.*

175. *See id.* at 1458 (Kagan, J., dissenting) (arguing that under the majority's view, "form prevails over substance, and differences that make no difference determine access to the judiciary.").

realities. Under this doctrine, the Supreme Court enunciated in 1945 that:

The incidence of taxation depends upon the *substance* of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant. A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title. To permit the true nature of a transaction to be disguised by *mere formalisms*, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.¹⁷⁶

Undoubtedly, the reason why Arizona employed the tax credits scheme (rather than a direct spending of taxpayer money) to generate the contributions to STOs which then used the contributions to grant scholarships to students in sectarian schools was to circumvent the Establishment Clause prohibition against state support of religion. It is apparent that the state knew it would run afoul of the Establishment Clause if it directly paid taxpayers' money in treasury to the STOs which then transmitted the money down to a sectarian school; that is presumably why it employed the tax credit device to mask the true nature of the transaction, which seemingly was to find a way to use state money to aid instruction in private religious schools.

In the words of the U.S. Supreme Court in *Court Holding* above, “[t]o permit the true nature of a transaction to be disguised by *mere formalisms*, which exist solely to alter [the Establishment Clause prohibition] would seriously impair the effective administration of the . . . policies of Congress.”¹⁷⁷ Because the tax credit structure was ostensibly a mere conduit for channeling funds to the sectarian schools through the STOs, the substance of the transaction (which is government funding of sectarian education with taxpayer money) should govern over the form employed (which was the issuance of state tax credits in exchange for taxpayer contributions to STOs).

Accordingly, the Supreme Court should have looked beyond the form employed to the substance of the contributions taken as a whole and should have found, as argued by the dissent discussed below, that taxpayers in *Arizona* had Article III standing under the *Flast* exception

176. *CIR v. Court Holding*, 65 S. Ct. 707, 708 (1945) (emphasis added).

177. *Id.* at 708 (emphasis added).

to the general rule against taxpayer standing to challenge the constitutionality of the Arizona STO tax credits funding.

F. The Dissent in Arizona By Justice Kagan

The dissent in *Arizona*, written by Justice Kagan and joined by Justices Ginsburg, Breyer, and Sotomayor, correctly asserted that plaintiff-taxpayers had standing under *Flast* to pursue their claims¹⁷⁸ and properly disagreed with the majority's opinion that "because respondents challenge[d] a tax credit as opposed to a government expenditure, they lack Article III standing under *Flast v. Cohen*."¹⁷⁹ According to Justice Kagan, "this distinction finds no support in case law, and just as little in reason."¹⁸⁰ Furthermore, contrary to the majority opinion's finding that taxpayers lacked the requisite injury element to support standing, the dissent, stated that taxpayers could "satisfy not only Article III's injury requirement, but also its causation and redressability requirements."¹⁸¹

In this regard, the dissent argued that plaintiffs satisfied the injury requirement when they alleged that the state transferred public funds, in the form of tax credits, to the STOs.¹⁸² With respect to the causation element of standing, the dissent posited that plaintiffs satisfied this requirement by alleging that the state of Arizona caused them to suffer injury by enacting a statute that allowed taxpayers to transfer funds through the STOs to sectarian schools that were ultimately reimbursed with state issued tax credits.¹⁸³ Against this background, the dissent argued that the plaintiffs' prayer for an injunction against the tax credit issuance would redress the alleged harm by abating the continued issuance of the tax credit by the state in exchange for the contributions made through the STOs to sectarian schools.¹⁸⁴ Thus, contrary to the majority's opinion, the dissent argued that the plaintiffs need not show that the injunction remedy would impact their personal tax payments.¹⁸⁵

Consequently, the dissent appropriately concluded that plaintiffs should have been granted taxpayer standing to pursue their claims because "when taxpayers object to the spending of tax money in

178. *Arizona*, 131 S. Ct. at 1452. (Kagan, J., dissenting) ("I would therefore affirm the Court of Appeals' determination . . . that Plaintiffs can pursue their claim in federal court.")

179. *Id.* at 1437.

180. *Id.* at 1452 (Kagan, J., dissenting).

181. *Id.* at 1460 n.10.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

violation of the Establishment Clause (whether through tax credits or appropriations), an injunction against the spending would . . . redress their injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally.”¹⁸⁶ Likewise, the dissent is correct in its conclusion that taxpayers met the *Flast* exception to be granted standing to pursue their claims on the merits because, as previously stated, the majority’s factual differentiation of *Flast* based simply on the method of financing employed “finds no support in case law, and just as little in reason.”¹⁸⁷

Notwithstanding the fact that the Supreme Court’s holding in *Arizona* led to the plaintiffs’ voluntary withdrawal¹⁸⁸ of the *FFRF v. Geithner* California case—thus preventing the issues raised in the case from being litigated on the merits—an unresolved question that continue to persist is whether the parsonage exemption indeed violates the Establishment Clause of the First Amendment to the U.S. constitution?

VI. DOES THE PARSONAGE EXEMPTION VIOLATE THE ESTABLISHMENT CLAUSE?

A. *In General*

In *FFRF v. Geithner*,¹⁸⁹ taxpayers sought a declaration that sections 107 and 265(a)(6) of the Internal Revenue Code violate the Establishment Clause by providing a parsonage exemption to the minister of the gospel to the exclusion of other ministers. Following the Supreme Court’s ruling in *Arizona* that when “a government expends resources or declines to impose a tax, its budget does not necessarily suffer”¹⁹⁰ to visit the requisite harm necessary to confer Article III standing upon taxpayers, FFRF voluntarily filed a motion to dismiss its suit on stipulations by both parties on June 17, 2011.¹⁹¹

Subsequent to the dismissal without prejudice, FFRF filed yet another suit¹⁹² in Wisconsin on September 13, 2011, but this time, seeking a judicial declaration that section 107 violates the Establishment

186. *Id.*

187. *Id.* at 1452.

188. Order on Stipulation of Dismissal, *FFRF v. Geithner*, No. 2:09-CV-02894-WBS-DAD (E.D. Cal. June 17, 2011).

189. *FFRF v. Geithner*, 715 F. Supp. 2d 1051 (E.D. Cal. 2010).

190. *Arizona*, 131 S. Ct. at 1437.

191. Order on Stipulation of Dismissal, *supra* note 188.

192. Freedom From Religion Found. Inc. v. Geithner, No. 11-CV-626, available at <http://ffrf.org/legal/challenges/ongoing-lawsuits/>.

Clause by providing preferential and discriminatory tax benefits in favor of ministers of the gospel to the exclusion of other non-ministers of the gospel, such as plaintiffs who are members of FFRF and received similar housing allowances.¹⁹³

Following the government's answer and motion to dismiss¹⁹⁴ for lack of subject matter jurisdiction because plaintiffs failed to allege in their original complaint that the United States had waived its sovereign immunity right to be sued, FFRF filed an amended complaint ("Amended Complaint")¹⁹⁵ on January 13, 2012, to cure the jurisdictional defect in the original complaint by including in the Amended Complaint a provision that the United States had waived sovereign immunity under 5 U.S.C. §702.¹⁹⁶

B. Summary Facts of the Amended Complaint

The plaintiffs in the Amended Complaint included three individuals, namely, Anne Nicol Gaylor, Annie Laurie Gaylor, and Dan Barker, all of whom are non-believers (atheists), federal taxpayers, and life-time members of FFRF.¹⁹⁷ All three plaintiffs received housing allowances provided by the FFRF and designated as such by the FFRF Executive Council and FFRF governing body.¹⁹⁸ The housing allowances paid to the FFRF plaintiffs did not exceed their housing expenses.¹⁹⁹

However, because the plaintiffs are not ministers of the gospel as defined under section 107,²⁰⁰ they are not entitled to exclude the housing allowances from their gross income (as would ministers of the gospel). Interestingly, FFRF plaintiff Dan Barker was previously an ordained preaching minister of the gospel who had received the parsonage exemption in the past and was able to exclude the payments at the time

193. *Id.*

194. US Government's Brief in Support of Its Motion to Dismiss Plaintiffs' Complaint For Lack of Subject Matter Jurisdiction, Freedom From Religion Found. Inc. v. Geithner, Civil Case No. 11-CV- 626, available at <http://ffrf.org/uploads/legal/Geithner-motion-to-dismiss.pdf>.

195. See Plaintiffs' Amended Complaint, Freedom From Religion Found. Inc. v. Geithner, No. 11-CV-626, (W.D. Wisc. Dec. 23, 2011), available at <http://ffrf.org/uploads/legal/Geithner-amendcomplaint.pdf>.

196. *See id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. To be a minister of the gospel within the meaning of the Code, the minister must be "duly ordained, commissioned, or licensed [as a] minister of a church." Rev. Rul. 59-270, 1959-2 C.B. 44.

from gross income under section 107.²⁰¹ The plaintiffs allege that section 107 violates the Establishment Clause and the equal protection section of the Due Process Clause of the Constitution because it provides an exclusive and discriminatory benefit to the minister of the gospel.²⁰²

C. *The Establishment Clause and the Lemon v. Kurtzman Test*

The Establishment Clause of the First Amendment to the U.S. Constitution provides that “Congress shall make no law respecting of an establishment of religion.”²⁰³ In interpreting this proscription, the United States Supreme Court developed a three-part test in *Lemon v. Kurtzman* (“*Lemon*”)²⁰⁴ for determining whether a given federal or state statute runs afoul of the proscription.

Under the *Lemon* enunciation: (1) “the statute must have a secular legislative purpose”; (2) the “principal or primary effect” of the statute “must be one that neither advances nor inhibits religion”; and (3) “the statute must not foster an excessive government entanglement with religion.”²⁰⁵ Against this background, we proceed to evaluate whether the parsonage exemption violates the Establishment Clause of the First Amendment to the U.S. Constitution²⁰⁶ beginning with the first part of the *Lemon* test.

D. *Does the Parsonage Exemption Have a Secular Legislative Purpose?*

The answer to this inquiry requires an examination of the purpose of the legislative act creating the parsonage exemption. The Parsonage exemption was originally enacted as part of the Revenue Act of 1921.²⁰⁷ Because the legislative history of the Revenue Act of 1921 (the “Act”) is tacit on the primary rationale for the parsonage exemption,²⁰⁸ we look to the Committee Reports of the 1954 modification of the governing Code provision to glean the legislative purpose of the Act. In his remark to Congress explaining the reasons why he sponsored the addition of I.R.C.

201. See Plaintiffs’ Amended Complaint, *supra* note 195.

202. *Id.*

203. U.S. CONST. amend. I.

204. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

205. *Id.* at 612-13.

206. U.S. CONST. amend. I.

207. Pub. L. No. 67-98, 42 Stat. 239, 67th Congress, Sess. I. ch. 136 (1921).

208. See *e.g.*, *Driscoll v. Comm’r*, 135 T.C. 557, 561 (2010). (“As respondent concedes, the rationale for the exclusion from gross income in section 213(b)(11) of the Revenue Act of 1921 of the so-called parsonage allowance is ‘obscure.’”).

§107(2) to the existing statute, Congressman Peter F. Mack Jr. stated the following on June 9, 1953 that:

On March 26 of this year, I introduced H.R. 4275 to permit clergymen to exclude from gross income that amount paid to them by a church specifically in lieu of furnishing them a dwelling house. Under our present tax laws, section 22(B), persons who are furnished a dwelling house in connection with their occupation must include within gross income for tax purposes the rental value of such dwelling. Subsection (6) exempts clergymen therefrom. In most cases such dwelling house is the parsonage, manse or parish house. Yet where the church does not furnish its clergy a dwelling house because it does not own one or because of other circumstances, the sum of the money paid by the church to the clergymen specifically in lieu of furnishing him a dwelling must be included in gross income and taxed in the usual graduated manner. If enacted, my proposal would remove this inequity and permit all clergymen to exclude from gross income that part of a specific rental allowance up to the rental value of the rental house actually occupied.

*Mr. Chairman, I hope that your committee will favorably report this bill at a very early date. Certainly, in these times when we are being threatened by a godless and antireligion world movement we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight against this foe. Certainly this is not too much to do for these people who are caring for our spiritual welfare.*²⁰⁹

In response to Congressman Peter Mack's statements and advocacy, Congress passed I.R.C. §107(2) which expanded the parsonage exemption to exclude from gross income the rental allowance paid to a minister of gospel as part of his compensation, to the extent used by him to rent or provide a home.²¹⁰

As can be seen from Congressman Peter Mack's comments calling for an expedited passage of the parsonage exemption because, "in these times when we are being threatened by a godless and antireligion world movement we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight against this

209. *Hearings Before the H. Comm. on Ways & Means*, 83rd Cong. 1 (June 9, 1953) (Statement Of Hon. Peter F. Mack, Jr, On H.R. 4275, Concerning The Taxability Of A Cash Allowance Paid To Clergymen In Lieu Of Furnishing Them A Dwelling On Forty Topics Pertaining to the General Revision of the Internal Revenue Code, pg. 1574-1575) (emphasis added).

210. I.R.C. §107(2) (West 2013).

foe,”²¹¹ it is clear that the legislative purpose of I.R.C. §107(2)²¹² of the parsonage exemption was principally to advance religion with no discernible secular purpose whatsoever.²¹³ That is seemingly why the parsonage exemption was narrowly tailored to specifically benefit only ministers of the gospel to the exclusion of other ministers.

To assure this outcome, the Department of Treasury stipulated bright line rules for qualification as a minister of the gospel.²¹⁴ Consequently, the parsonage exemption lacks a secular purpose to comport with the Establishment Clause’s proscription against Congress making laws respecting of religion. Even though a federal or state statute that violates any part of the three-part *Lemon* test is unconstitutional,²¹⁵ the foregoing evaluation would proceed to examine whether the principal or primary effect of the statute advances or inhibits religion.

E. Does the Parsonage Exemption’s “principal or primary effect” advance or inhibit religion?

Under the second prong of the *Lemon* test, the principal or primary effect of the statute “must be one that neither advances nor inhibits religion.”²¹⁶ On its face, the parsonage exemption appears to have a principal or primary effect of advancing religion because the exemption expressly provides that “[i]n 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

211. See U.S. CONST. amend. I.

212. I.R.C. §107(2).

213. *Hearings Before the H. Comm. on Ways & Means*, 83rd Cong. 1 (June 9, 1953) (Statement Of Hon. Peter F. Mack, Jr, On H.R. 4275, Concerning The Taxability Of A Cash Allowance Paid To Clergymen In Lieu Of Furnishing Them A Dwelling On Forty Topics Pertaining to the General Revision of the Internal Revenue Code, pg. 1574-1575) (“Certainly, in these times when we are being threatened by a godless and antireligion world movement we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight against this foe. Certainly this is not too much to do for these people who are caring for our spiritual welfare.”).

214. Treas. Reg. §§1.107-1(a); 1.107-1(b); Rev. Rul. 59-270, 1959-2, C.B. 44 (clarifying the qualifications and duties of a minister of the gospel).

215. See *Vernon v. City of LA*, 27 F. 3d 1385, 1396-97 (9th Cir. 1994) (“The Supreme Court has held that the challenged practice must survive all three prongs of the *Lemon* analysis in order to be held constitutional.”); *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (“State action violates the *Establishment Clause* if it fails to satisfy any of these prongs.”).

216. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

a home.”²¹⁷

This contention is buttressed by the fact that under the prevailing tax regime, no other taxpayer is allowed to exclude employer-provided housing, lodging, or allowance, from gross income except in cases where the taxpayer-employee is required to accept such housing or lodging as a condition of his employment and the housing or lodging is provided on the business premises of the employer.²¹⁸

Thus, unlike the housing exemption under I.R.C. §119(a)(2),²¹⁹ the parsonage exemption does not require, as a condition for the receiving the exemption, that the clergy accept the housing or allowance as a condition of employment and that the housing or rental (in cases where an allowance was furnished) be provided on the business premises of the employer.²²⁰ Instead, the parsonage exemption is a rather unconstrained tax benefit designed exclusively to seemingly advance religion by providing the housing subsidy to the minister of the gospel without any precondition other than just being a minister of the gospel.²²¹

According to Congressman Jim Ramstad, R. Minn., “[c]lergy members of every faith and denomination rely on the housing allowance. Without it, America’s clergy face a devastating tax increase of \$2.3 billion over the next 5 years.”²²² These statements buttress the fact that the parsonage exemption has the principal effect of advancing religion in violation of the second *Lemon* test.²²³

Likewise, the contention that the parsonage exemption has a principal or primary effect of advancing religion can be gleaned from the comments made by the religious establishment (that lobbied Congress) in opposition to the proposal to eliminate the parsonage exemption. For example, *ChristianityToday Magazine* reports that:

The allowances are a big help to pastors. (Matt Branaugh quoting Richard Hammar in his annual Church & Clergy Tax Guide They ‘represent the most significant tax benefit enjoyed by ministers.’) They’re a big help to churches, especially small ones, as they try to recruit and retain gifted pastors, often on tight budgets. Church leaders also claim allowances help communities, keeping churches active and

217. I.R.C. §107 (West 2013) (emphasis added).

218. *Id.* at I.R.C. §119(a)(2).

219. *Id.*

220. The only qualification for the exclusion is that taxpayer is a “minister of the gospel” as defined under I.R.C §107.

221. I.R.C. §107.

222. Clergy Housing Allowance Clarification Act of 2002, 148 Cong. Rec. H1299-01 (Apr. 16, 2002).

223. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

healthy in local neighborhoods. When CHACA was under consideration, one congressman warned the loss of the benefit might chase away many clergy who suddenly faced added housing costs on already modest salaries. With the economy still inching to recovery after a multiyear recession and many congregations struggling to offer pay raises, the housing allowance is a benefit churches don't want to lose.²²⁴

Accordingly, by expressly excluding the parsonage allowance from the gross income of only the minister of the gospel,²²⁵ the statute has the principal effect of advancing religion. Ironically, the Federal government seemed to have recognized this fact in 1984 when the then Secretary of Treasury, Donald T. Regan, proposed the repeal of the parsonage exemption to President Ronald Reagan. In the proposal for change, the Secretary stated:

The exclusion from income of the parsonage allowance departs from generally applicable income measurement principles, with the result that ministers pay less tax than other taxpayers with the same income or even smaller economic incomes. Thus, a minister with a salary of \$18,000 and a \$6,000 cash housing allowance is in the same economic position and has the same ability to pay tax as a taxpayer (such as a teacher) earning \$24,000 in taxable income and spending \$6,000 on housing. The tax liability of the minister is considerably less, however, due to the current exclusion from taxable income of the parsonage allowance. Further, as with other deviations from income measurement principles, the exclusion of the parsonage allowance narrows the tax base and places upward pressure on marginal tax rates. There is no evidence that the financial circumstances of ministers justify special tax treatment. The average minister's compensation is low compared to other professions, but not compared to taxpayers in general. Moreover, the tax benefit of the exclusion provides a disproportionately greater benefit to relatively affluent ministers, due to the higher marginal tax rates applicable to their incomes.²²⁶

Additionally, the statements by Congressman Peter Mack, the sponsor of the I.R.C. §107(2), to the House Ways and Means Committee advocating the enactment of the provision further supports the contention that the principal or primary effect of the enactment of

224. See *Housing Disallowance?*, CHRISTIANITY TODAY, <http://www.christianitytoday.com/1e/2011/spring/housing.html> (last visited Mar. 10, 2013).

225. See I.R.C. §107.

226. DEP'T OF THE TREASURER, TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH (Nov. 27, 1984).

parsonage exemption was to advance religion of the minister of the gospel. In his remarks, Congressman Peter Mack stated:

Of our clergymen 55 percent are receiving less than \$2,500 per year. This is some \$256 (sic) less than the \$2,668 annual median income for our labor force. It is well to keep in mind that many of these clergymen support families like the rest of us, and that many of these clergymen still receive low income based on the 1940 cost of living but must pay 1953 rents for a dwelling house.²²⁷

Consequently, the parsonage exemption has a principal or primary effect of advancing religion.

G. Does the Statute Foster an Excessive Government Entanglement With Religion?

Finally, the last prong of the *Lemon* test requires that “the statute must not foster an excessive government entanglement with religion.”²²⁸ As the foregoing analysis reveals, the parsonage exemption fosters an excessive government entanglement with religion because the statute is narrowly tailored to benefit only the “minister of the gospel” as defined by the government.²²⁹

In Rev. Rul. 59-270,²³⁰ the Treasury Department defined a minister of the gospel within the meaning of I.R.C. §107, as an individual who is “a duly ordained, commissioned, or licensed minister of a church.”²³¹ Such narrow definition encumbers the government with the burden of determining who is a minister of the gospel and who is not and consequently fosters an excessive government entanglement with religion.

To further illustrate the extent that the statute fosters excessive government entanglement with religion, the Treasury Department noted in Revenue Ruling 59-270²³² that neither a “minister of music” nor a “minister of education” is a minister of the gospel within the meaning of I.R.C. §107 because neither of them was “an ordained minister of the

227. *Hearings Before the H. Comm. on Ways & Means*, 83rd Cong. 1 (June 9, 1953) (Statement Of Hon. Peter F. Mack, Jr, On H.R. 4275, Concerning The Taxability Of A Cash Allowance Paid To Clergymen In Lieu Of Furnishing Them A Dwelling On Forty Topics Pertaining to the General Revision of the Internal Revenue Code, pg. 1575).

228. See *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

229. Rev. Rul. 59-270, 1959-2 C.B. 44. See also Treas. Reg. §1.107-1(a) (1963) (clarifying the duties of a minister of the gospel).

230. Rev. Rul. 59-270, 1959-2 C.B. 44.

231. *Id.*

232. *Id.*

gospel” despite the fact that both performed services and functions typical of the office of a minister of the gospel.²³³ Such intrusive evaluation of the functions of various clergies to ascertain whether or not they are ministers of the gospel does nothing more than excessively tangle the government in the web of religion in violation of the Establishment Clause. Accordingly, the parsonage exemption violates the Establishment Clause of the First Amendment of the Constitution.

VII. CONCLUSION

As the foregoing article demonstrates, the parsonage exemption runs afoul of the Establishment Clause restraint on government support of religion by providing a subsisting exclusive tax subsidy to the minister of the gospel (to the exclusion of other ministers) with no discernible secular purpose. Likewise, the state of Arizona’s use of tax credits device to systematically finance scholarships through STOs to students attending sectarian schools is materially indistinguishable from the state expending treasury funds in support of the education of students attending private sectarian schools.

Although, in general, taxpayers do not have standing, merely as taxpayers, to challenge these alleged affront on the Establishment Clause, taxpayers in both of these instances should have been granted Article III standing to have the merits of their allegations reviewed under the principles of *Flast* except that the U.S. Supreme Court appears now resolved to stand in the way of taxpayer standing by enunciating, based on a superficial distinction, that because “respondents challenge a tax credit as opposed to a government expenditure, they lack Article III standing under *Flast v. Cohen*”²³⁴ to bring suit, and that when “a government expends resources or declines to impose a tax, its budget does not necessarily suffer” to confer Article III standing upon taxpayer.²³⁵ Such a flimsy differentiation between a tax credits funding device and a direct expenditure method (which formed the nucleus of the ruling) is flawed, unsound, without a material difference, not principled, or even entirely correct, because the dispositive inquiry for standing purposes is premised entirely on the form in which the contribution was made rather than the substance of the contribution taken as a whole.

233. *Id.*

234. *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1437 (2011).

235. *Id.*

