preference exists, the court proceeds to apply the three-pronged establishment clause inquiry derived from Lemon v Kurtzman, 403 US 602, 29 L Ed 2d 745, 91 S Ct 2105, under which (1) the statute must have a secular legislative purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) the statute must not foster an excessive governmental entanglement with religion.

<=37> CONSTITUTIONAL LAW §961
establishment of religion --

Headnote: <=38> [10]
A statute primarily having a secular effect does not violate the establishment of religion clause of the Federal Constitution's First Amendment merely because it happens to coincide or harmonize with the tenets of some or all religions.

<=39> CONSTITUTIONAL LAW §972
establishment of religion -- taxation -- charitable deduction -- valuation of religious benefit --

Headnote: <=40> [11]
For purposes of determining the validity, under 170 of the Internal Revenue Code (26 USCS 170), of a taxpayer's charitable contribution deduction of a payment that generated a religious benefit to the taxpayer, the need to ascertain what portion of the payment was a purchase and what portion was a contribution does not ineluctably create entanglement problems, so as to violate the establishment of religion clause of the Federal Constitution's First Amendment, by forcing the government to place a monetary value on a religious benefit; a valuation method under which the government inquires into the cost, if any, to the donee of providing the good or service at issue, while requiring qualified religious institutions to disclose relevant information about church costs, involves administrative inquiries that, as a general matter, bear no resemblance to the kind of government surveillance that poses an intolerable risk of government entanglement with religion.

<=41> APPEAL §1331.5
what reviewable --

Headnote: <=42> [12A] <=43> [12B]
On certiorari to review United States Court of Appeals decisions as to whether the denial of a requested charitable deduction, under 170 of the Internal Revenue Code (26 USCS 170), for certain payments made by taxpayers to churches in order to receive certain religious services violates the establishment of religion clause of the Federal Constitution's First Amendment, the United States Supreme Court--although not ruling out the possibility that, under the circumstances of a particular case, an inquiry by the Internal Revenue Service (IRS) under 170 into a religious institution's expenses might raise entanglement problems so as to violate the establishment clause--need only decide that IRS inquiries into the cost, if any, to the institution of providing a particular good or service generally pose no constitutional problem, where the taxpayer's claim in the case at hand necessitates no such valuation inquiry.

<=44> CONSTITUTIONAL LAW §972
free exercise of religion -- income taxes -- denial of charitable deduction -- payments for religious services -- burden on religious practice --

Headnote: <=45> [13A] <=46> [13B] <=47> [13C]
The disallowance of a requested charitable deduction under 170 of the Internal Revenue Code (26 USCS 170) for payments made by taxpayers to branch churches of the Church of Scientology in order to receive services known as "auditing"--that is, one-to-one encounter sessions between a participant and a Church official during which the participant's areas of spiritual difficulty are identified--and "training"--that is, doctrinal courses in which participants seek to attain the qualifications necessary to serve as auditors--does not violate the free exercise of religion clause of the Federal Constitution's First Amendment by placing a heavy burden on the central practice of Scientology, because (1) it is doubtful whether the alleged burden is a substantial one, in that (a) neither the payment nor the receipt of taxes is forbidden by the Scientology faith generally, (b) Scientology does not proscribe the payment of taxes in connection with auditing or training sessions specifically, (c) the burden imposed on auditing or training derives solely from the fact that, as a result of the deduction denial, adherents have less money available to gain access to such sessions, and such a burden is no different from that imposed by any public tax or fee, and (d) it is unclear why the Scientologist "doctrine of exchange"--according to which any time one receives something one must pay something back--would be violated by a deduction disallowance so long as an adherent is free to pay for as many auditing and training sessions as he wishes, and (2) even a substantial burden would be justified by the broad public interest in maintaining a sound tax system that is free of myriad exceptions flowing from a wide variety of religious beliefs.

<=48> CONSTITUTIONAL LAW §961
free exercise of religion --

Headnote: <=49> [14]
The relevant inquiry under the free exercise of religion clause of the Federal Constitution's First Amendment asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.

<=50> COURTS §95.5
constitutional questions -- scope and extent of inquiry -- interpretation of religious faith --

Headnote: <=51> [15]
It is not within the judicial ken, when inquiring under the free exercise of religion clause of the Federal Constitution's First Amendment as to whether the government has placed a substantial burden on the observation of a central religious belief or practice, to question the centrality of particular beliefs or practices to a faith or the validity of particular litigants' interpretations of those creeds.

<=52> TAXES §16
classification --

Headnote: <=53> [16]
A federal tax must be uniformly applicable to all, except as Congress provides explicitly otherwise.

<=54> APPEAL §1029

<=55> STATUTES §152
sufficiency of record -- evidence -- legislative acquiescence --

Headnote: <=56> [17A] <=57> [17B] <=58> [17C] <=59> [17D] <=60> [17E]
On certiorari to review United States Court of Appeals decisions as to whether payments made by taxpayers to branch churches of the Church of Scientology in order to receive certain religious services are deductible under 170 of the Internal Revenue Code (26 USCS 170) as charitable contributions, the United States Supreme Court (1) will not conclude that the Internal Revenue Service (IRS) has accorded such payments disparately harsh treatment compared to payments to other churches and synagogues for their religious services, where the taxpayers did not endeavor at trial to adduce from the IRS or other sources any specific evidence about other

SYLLABUS: The Church of Scientology (Church) provides "auditing" sessions designed to increase members' spiritual awareness and training courses at which participants study the tenets of the faith and seek

religious faiths' transactions, because in the absence of such facts, the Supreme Court has no legitimate way to appraise accurately whether the IRS' prior revenue rulings as to the deductibility of payments for other faiths' services have applied a proper analysis with respect to any or all of the religious practices in question, and (2) will not conclude that Congress, in modifying 170 over the years, has impliedly acquiesced in the principle that payments for religious services are deductible, because even if one assumes that Congress has acquiesced in a specific IRS ruling that pew rents, building fund assessments, and periodic dues paid to a church are deductible, such a ruling articulates no broad principle of deductibility, and without information about the nature or structure of those three specific types of payments, the Supreme Court has no way of discerning any possible unifying principle or whether such a principle would embrace payments for the religious services at issue.

<=61> APPEAL §1029

<=62> INTERNAL REVENUE §82.6
sufficiency of record -- conclusiveness of administrative determinations -- unofficial tax brochure --

Headnote: <=63> [18A] <=64> [18B]
On certiorari to review decisions by two United States Courts of Appeals affirming a judgment of the Tax Court of the United States that payments made by taxpayers to branch churches of the Church of Scientology in order to receive certain religious services are not deductible under 170 of the Internal Revenue Code (26 USCS 170) as charitable contributions, the United States Supreme Court will not conclude that deductibility of such payments is required by an unofficial "question and answer guidance package," a brochure issued by an official of the Internal Revenue Service (IRS), that (1) refers to a previous IRS revenue ruling that pew rents, building fund assessments, and periodic dues paid to a church are deductible under 170, and (2) states that fixed payments for similar religious services are fully deductible; the Supreme Court will not rely on such a brochure because (1) the Supreme Court's practice, in ascertaining the IRS' justifications for its administrative practice, is to rely on the IRS' official rulings, not on the unofficial interpretations of particular IRS officials, and (2) the brochure was not included in the record before the Tax Court or the Courts of Appeals and was not issued until months after certiorari was granted.

to attain the qualifications necessary to conduct auditing sessions. Pursuant to a central tenet known as the "doctrine of exchange," the Church has set forth schedules of mandatory fixed prices for auditing and

training sessions which vary according to a session's length and level of sophistication and which are paid to branch churches. Under § 170 of the Internal Revenue Code of 1954, petitioners each sought to deduct such payments on their federal income tax returns as a "charitable contribution," which is defined as a "contribution or gift" to eligible donees. After respondent Commissioner of Internal Revenue (Commissioner or IRS) disallowed these deductions on the ground that the payments were not "charitable contributions," petitioners sought review in the Tax Court. That court upheld the Commissioner's decisions [***2] and rejected petitioners' constitutional challenges based on the Establishment and Free Exercise Clauses of the First Amendment. The Courts of Appeals affirmed on petitioners' separate appeals.

Held: Payments made to the Church's branch churches for auditing and training services are not deductible charitable contributions under § 170. Pp. 689-703.

(a) Petitioners' payments are not "contribution[s] or gift[s]" within the meaning of § 170. The legislative history of the "contribution or gift" limitation reveals that Congress intended to differentiate between unrequited payments to qualified recipients, which are deductible, and payments made to such recipients with some expectation of a quid pro quo in terms of goods or services, which are not deductible. To ascertain whether a given payment was made with such an expectation, the external features of the transaction in question must be examined. Here, external features strongly suggest a quid pro quo exchange of petitioners' money for auditing and training sessions, since the Church established fixed prices for such sessions in each branch church; calibrated particular prices to sessions of particular lengths [***3] and sophistication levels; returned a refund if services went unperformed; distributed "account cards" for monitoring prepaid, but as-yet-unclaimed, services; and categorically barred the provision of free sessions. Petitioners' argument that a quid pro quo analysis is inappropriate when a payment to a church either generates purely religious benefits or guarantees access to a religious service is unpersuasive, since, by its terms, § 170 makes no special preference for such payments and its legislative history offers no indication that this omission was an oversight. Moreover, petitioners' deductibility proposal would expand the charitable contribution deduction far beyond what Congress has provided to include numerous forms of payments that otherwise are not, or might not be, deductible. Furthermore, the proposal might raise problems of entanglement between church and state, since the IRS and reviewing courts would be forced to differentiate "religious" benefits or services from "secular" ones. Pp. 689-694.

(b) Disallowance of petitioners' § 170 deductions does not violate the Establishment Clause. Petitioners' argument that § 170 creates an unconstitutional denominational [***4] preference by according disproportionately harsh tax status to those religions that raise funds by imposing fixed costs for participation in certain religious practices is unpersuasive. Section 170 passes constitutional muster, since it does not facially differentiate among religious sects but applies to all religious entities, and since it satisfies the requisite three-pronged inquiry under the Clause. First, the section is neutral both in design and purpose, there being no allegation that it was born of animus to religion in general or to Scientology in particular. Second, its primary effect -- encouraging gifts to charitable entities, including but not limited to religious organizations -- does not advance religion, there being no allegation that it involves direct governmental action endorsing religion or a particular religious practice. Its primary secular effect is not rendered unconstitutional merely because it happens to harmonize with the tenets of religions that raise funds by soliciting unilateral donations. Third, the section threatens no excessive entanglement between church and state. Although the IRS must ascertain the prices of a religious institution's services, [***5] the regularity with which such payments are waived, and other pertinent information about the transaction, this is merely routine regulatory interaction that does not involve the type of inquiries into religious doctrine, delegation of state power, or detailed monitoring and close administrative contact that would violate the nonentanglement command. Nor does the application of § 170 require the Government to place a monetary value on particular religious benefits. Petitioners' claim to the contrary raises no need for valuation, since they have alleged only that their payments are fully exempt from a quid pro quo analysis -- not that some portion of those payments is deductible because it exceeds the value of the acquired service. In any event, the need to ascertain what portion of a payment was a purchase and what portion was a contribution does not ineluctably create entanglement problems, since the IRS has eschewed benefit-focused valuation in cases where the economic value of a good or service is elusive, and has instead employed a valuation method which inquires into the cost (if any) to the donee of providing the good or service. This method involves merely administrative [***6] inquiries that, as a general matter, bear no resemblance to the kind of governmental surveillance that poses an intolerable risk of entanglement. Pp. 695-698.

(c) Disallowance of petitioners' § 170 deductions does not violate the Free Exercise Clause. Although it is doubtful that, as petitioners allege, the disallowance

imposes a substantial burden on the central practice of Scientology by deterring adherents from engaging in auditing and training sessions and by interfering with their observance of the doctrine of exchange, *United States v. Lee, 455 U.S. 252, 260,* establishes that even a substantial burden is justified by the broad public interest in maintaining a sound tax system, free of myriad exceptions flowing from a wide variety of religious beliefs. That this case involves federal income taxes, rather than the Social Security taxes considered in Lee, is of no consequence. Also of no consequence is the fact that the Code already contains some deductions and exemptions, since the guiding principle is that a tax must be uniformly applicable to all, except as Congress provides explicitly otherwise. *Id., at 261.* [***7] Indeed, the Government's interest in avoiding an exemption is more powerful here than in Lee, in the sense that the claimed exemption there stemmed from a specific doctrinal obligation not to pay taxes, whereas there is no limitation to petitioners' argument that they are entitled to an exemption because an incrementally larger tax burden interferes with their religious activities. Pp. 698-700.

(d) Petitioners' assertion that disallowing their claimed deductions conflicts with the IRS' longstanding practice of permitting taxpayers to deduct payments to other religious institutions in connection with certain religious practices must be rejected in the absence of any specific evidence about the nature or structure of such other transactions. In the absence of those facts, this Court cannot appraise accurately whether IRS revenue rulings allowing deductions for particular religious payments correctly applied a quid pro quo analysis to the practices in question and cannot discern whether those rulings contain any unifying principle that would embrace auditing and training session payments. Pp. 700-703.

COUNSEL: Michael J. Graetz argued the cause and filed briefs for petitioners [***8] in both cases.

Deputy Solicitor General Merrill argued the cause for respondent in both cases. With him on the brief were Solicitor General Fried, Assistant Attorney General Rose, Deputy Solicitor General Wallace, Alan I. Horowitz, and Robert S. Pomerance. +

+ Briefs of amici curiae urging reversal were filed for the American Jewish Congress et al. by Walter J. Rockler, Julius Greisman, Paul S. Berger, and Marc D. Stern; and for the Council on Religious Freedom by Lee Boothby.

JUDGES: Marshall, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, Blackmun, and Stevens, JJ., joined. O'Connor, J., filed a dissenting opinion, in which Scalia, J., joined, post, p. 704. Brennan and Kennedy, JJ., took no part in the consideration or decision of the cases.

OPINIONBY: MARSHALL

OPINION: [*683] [**2140] JUSTICE MARSHALL delivered the opinion of the Court. Section 170 of the Internal Revenue Code of 1954, (Code), *26 U. S. C. § 170,* permits a taxpayer to deduct from gross income the amount of a "charitable contribution." The Code defines that term as a "contribution or gift" to certain eligible donees, including entities organized and [***9] operated exclusively for religious purposes. n1 We granted certiorari to determine [*684] whether taxpayers may deduct as charitable contributions payments made to branch churches of the Church of Scientology [**2141] (Church) in order to receive services known as "auditing" and "training." We hold that such payments are not deductible.

n1 Section 170 provides in pertinent part:

"(a) Allowance of deduction

"(1) General Rule

"There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.

. . .

"(c) Charitable contribution defined

"For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of --

. . .

"(2) A corporation, trust, or community chest, fund, or foundation --

"(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

"(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or

international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

"(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

"(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office. . . ."

[***10]

I

Scientology was founded in the 1950's by L. Ron Hubbard. It is propagated today by a "mother church" in California and by numerous branch churches around the world. The mother Church instructs laity, trains and ordains ministers, and creates new congregations. Branch churches, known as "franchises" or "missions," provide Scientology services at the local level, under the supervision of the mother Church. *Church of Scientology of California v. Commissioner, 823 F. 2d 1310, 1313 (CA9 1987),* cert. denied, *486 U.S. 1015 (1988).*

Scientologists believe that an immortal spiritual being exists in every person. A person becomes aware of this spiritual dimension through a process known as "auditing." n2 Auditing involves a one-to-one encounter between a participant (known as a "preclear") and a Church official (known as [*685] an "auditor"). An electronic device, the E-meter, helps the auditor identify the preclear's areas of spiritual difficulty by measuring skin responses during a question and answer session. Although auditing sessions are conducted one on one, the content of each session is not individually tailored. [***11] The preclear gains spiritual awareness by progressing through sequential levels of auditing, provided in short blocks of time known as "intensives." *83 T. C. 575, 577 (1984),* aff'd, *822 F. 2d 844 (CA9 1987).*

n2 Auditing is also known as "processing," "counseling," and "pastoral counseling." *83 T. C. 575, 577 (1984),* aff'd, *822 F. 2d 844 (CA9 1987).*

The Church also offers members doctrinal courses known as "training." Participants in these sessions study the tenets of Scientology and seek to attain the qualifications necessary to serve as auditors. Training courses, like auditing sessions, are provided in sequential levels. Scientologists are taught that spiritual gains result from participation in such courses. *83 T. C., at 577.*

The Church charges a "fixed donation," also known as a "price" or a "fixed contribution," for participants to gain access to auditing and training sessions. [***12] These charges are set forth in schedules, and prices vary with a session's length and level of sophistication. In 1972, for example, the general rates for auditing ranged from $625 for a 12 1/2-hour auditing intensive, the shortest available, to $4,250 for a 100-hour intensive, the longest available. Specialized types of auditing required higher fixed donations: a 12 1/2-hour "Integrity Processing" auditing intensive cost $750; a 12 1/2-hour "Expanded Dianetics" auditing intensive cost $950. This system of mandatory fixed charges is based on a central tenet of Scientology known as the "doctrine of exchange," according to which any time a person receives something he must pay something back. *Id., at 577-578.* In so doing, a Scientologist maintains "inflow" and "outflow" and avoids spiritual decline. *819 F. 2d 1212, 1222 (CA1 1987).*

The proceeds generated from auditing and training sessions are the Church's primary source of income. The Church promotes these sessions not only through newspaper, [*686] magazine, and radio advertisements, but also through free lectures, free personality tests, and leaflets. [***13] The Church also encourages, and indeed rewards with a 5% discount, advance payment for these sessions. *822 F. 2d, at 847.* The Church often refunds unused portions of prepaid auditing or training fees, less an administrative charge.

Petitioners in these consolidated cases each made payments to a branch church for auditing or training sessions. They sought to deduct these payments on their federal income tax returns as charitable contributions under § 170. Respondent [**2142] Commissioner, the head of the Internal Revenue Service (IRS), disallowed these deductions, finding that the payments were not charitable contributions within the meaning of § 170. n3

n3 The petitioner in No. 87-963, Robert L. Hernandez, was denied a deduction of $7,338 and was assessed a tax deficiency of $2,245 for 1981. *819 F. 2d 1212, 1215 (CA1 1987).* Of the petitioners in No. 87-1616, Katherine Jean Graham was denied a deduction of $1,682 and was assessed a tax deficiency of $316.24 for 1972; Richard M. Hermann was denied a tax deduction of $3,922 and was assessed a tax deficiency of $803 for 1975; and David Forbes Maynard was denied a deduction of $5,000 (including a carryover of $2,385 for

contributions made in 1976) and was assessed a tax deficiency of $643 for 1977. *83 T. C., at 575-579.*

[***14]

Petitioners sought review of these determinations in the Tax Court. That court consolidated for trial the cases of the three petitioners in No. 87-1616: Katherine Jean Graham, Richard M. Hermann, and David Forbes Maynard. The petitioner in No. 87-963, Robert L. Hernandez, agreed to be bound by the findings in the consolidated Graham trial, reserving his right to a separate appeal. Before trial, the Commissioner stipulated that the branch churches of Scientology are religious organizations entitled to receive tax-deductible charitable contributions under the relevant sections of the Code. This stipulation isolated as the sole statutory issue whether payments for auditing or training sessions constitute "contribution[s] or gift[s]" under § 170. n4

n4 The stipulation allowed the Tax Court to avoid having to decide whether the particular branches to which payments were made in these cases qualified under § 170(c)(2) and § 501(c)(3) of the Code as tax-exempt organizations entitled to receive charitable contributions. In a separate case decided during the pendency of this litigation, the Tax Court held that the mother Church in California did not qualify as a tax-exempt organization under § 501(c)(3) for the years 1970 through 1972 because it had diverted profits to its founder and others, had conspired to impede collection of its taxes, and had conducted almost all activities for a commercial purpose. *Church of Scientology of California v. Commissioner, 83 T. C. 381 (1984).* The Court of Appeals for the Ninth Circuit affirmed, basing its decision solely on the ground that the Church had diverted profits for the use of private individuals. It did not address the other bases of the Tax Court's decision. *Church of Scientology of California v. Commissioner, 823 F. 2d 1310 (1987),* cert. denied, *486 U.S. 1015 (1988).*

[***15]

[*687] The Tax Court held a 3-day bench trial during which the taxpayers and others testified and submitted documentary exhibits describing the terms under which the Church promotes and provides auditing and training sessions. Based on this record, the court upheld the Commissioner's decision. *83 T. C. 575 (1984).* It observed first that the term "charitable contribution" in § 170 is synonymous with the word "gift," which case law had defined "as a voluntary transfer of property by the owner to another without consideration therefor." *Id., at 580,* quoting *DeJong v. Commissioner, 36 T. C. 896, 899 (1961)* (emphasis in original), aff'd, *309 F. 2d 373 (CA9 1962).* It then determined that petitioners had received consideration for their payments, namely, "the benefit of various religious services provided by the Church of Scientology." *83 T. C., at 580.* The Tax Court also rejected the taxpayers' constitutional challenges based on the Establishment and Free Exercise Clauses of the First Amendment.

The Courts of Appeals [***16] for the First Circuit in petitioner Hernandez's case, and for the Ninth Circuit in Graham, Hermann, and Maynard's case, affirmed. The First Circuit rejected Hernandez's argument that under § 170, the IRS' ordinary inquiry into whether the taxpayer received consideration for his payment should not apply to "the return of a commensurate religious benefit, as opposed to an economic or financial benefit." *819 F. 2d, at 1217* (emphasis in original). [*688] The court found "no indication that Congress intended to distinguish the religious benefits sought by Hernandez from the medical, educational, scientific, literary, or other benefits that could likewise provide the quid for the quo of a nondeductible payment to a charitable organization." Ibid. The court also rejected Hernandez's argument that it was impracticable [**2143] to put a value on the services he had purchased, noting that the Church itself had "established and advertised monetary prices" for auditing and training sessions, and that Hernandez had not claimed that these prices misstated the cost of providing these sessions. *Id., at 1218.*

Hernandez's constitutional [***17] claims also failed. Because § 170 created no denominational preference on its face, Hernandez had shown no Establishment Clause violation. *Id., at 1218-1221.* As for the Free Exercise Clause challenge, the court determined that denying the deduction did not prevent Hernandez from paying for auditing and training sessions and thereby observing Scientology's doctrine of exchange. Moreover, granting a tax exemption would compromise the integrity and fairness of the tax system. *Id., at 1221-1225.*

The Ninth Circuit also found that the taxpayers had received a "measurable, specific return . . . as a quid pro quo for the donation" they had made to the branch churches. *822 F. 2d, at 848.* The court reached this result by focusing on "the external features" of the auditing and training transactions, an analytic technique which "serves as an expedient for any more intrusive inquiry into the motives of the payor." Ibid. Whether a particular exchange generated secular or religious benefits to the taxpayer was irrelevant, for under § 170 "[i]t is the structure of the transaction, and not the type [***18] of benefit received, that controls." *Id., at 849.*

The Ninth Circuit also rejected the taxpayers' constitutional arguments. The tax deduction provision did not violate the Establishment Clause because § 170 is "neutral in its design" and reflects no intent "to visit a disability on a particular [*689] religion." *Id., at 853.* Furthermore, that the taxpayers would "have less money to pay to the Church, or that the Church [would] receive less money, [did] not rise to the level of a burden on appellants' ability to exercise their religious beliefs." *Id., at 851.* Indeed, because the taxpayers could still make charitable donations to the branch church, they were "not put to the choice of abandoning the doctrine of exchange or losing the government benefit, for they may have both." Ibid. Finally, the court noted that the compelling governmental interest in "the maintenance of a sound and uniform tax system" counseled against granting a free exercise exemption. *Id., at 852-853.*

We granted certiorari, *485 U.S. 1005 (1988);* [***19] *486 U.S. 1022 (1988),* to resolve a Circuit conflict concerning the validity of charitable deductions for auditing and training payments. n5 We now affirm.

n5 Compare *Christiansen v. Commissioner, 843 F. 2d 418 (CA10 1988)* (holding payments not deductible), cert. pending, No. 87-2023; *Miller v. IRS, 829 F. 2d 500 (CA4 1987)* (same), cert. pending, No. 87-1449, with *Neher v. Commissioner, 852 F. 2d 848 (CA6 1988)* (holding payments deductible); *Foley v. Commissioner, 844 F. 2d 94 (CA2 1988)* (same), cert. pending, No. 88-102; *Staples v. Commissioner, 821 F. 2d 1324 (CA8 1987)* (same), cert. pending, No. 87-1382. The rulings for the taxpayer in the Neher, Foley, and Staples cases rested on statutory, not constitutional, grounds.

II For over 70 years, federal taxpayers have been allowed to deduct the amount of contributions [***20] or gifts to charitable, religious, and other eleemosynary institutions. See 2 B. Bittker, Federal Taxation of Income, Estates and Gifts para. 35.1.1 (1981) (tracing history of charitable deduction). Section 170, the present provision, was enacted in 1954; it requires a taxpayer claiming the deduction to satisfy a number of conditions. n6 The Commissioner's stipulation [**2144] in this case, however, [*690] has narrowed the statutory inquiry to one such condition: whether petitioners' payments for auditing and training sessions are "contribution[s] or gift[s]" within the meaning of § 170.

n6 The charitable transfer must be made to a qualified recipient, § 170(c), within the taxable year, § 170(a)(1), and consist of cash or qualified property, *26 U. S. C. §§ 170*(e)-(h) (1982 ed. and Supp. V), not exceeding a specified percentage of the taxpayer's income in the year of payment or (where a carryover is permitted) in subsequent years. *26 U. S. C. §§ 170*(b), 170(d) (1982 ed. and Supp. V).

[***21]

The legislative history of the "contribution or gift" limitation, though sparse, reveals that Congress intended to differentiate between unrequited payments to qualified recipients and payments made to such recipients in return for goods or services. Only the former were deemed deductible. The House and Senate Reports on the 1954 tax bill, for example, both define "gifts" as payments "made with no expectation of a financial return commensurate with the amount of the gift." S. Rep. No. 1622, 83d Cong., 2d Sess., 196 (1954); H. R. Rep. No. 1337, 83d Cong., 2d Sess., A44 (1954). Using payments to hospitals as an example, both Reports state that the gift characterization should not apply to "a payment by an individual to a hospital in consideration of a binding obligation to provide medical treatment for the individual's employees. It would apply only if there were no expectation of any quid pro quo from the hospital." S. Rep. No. 1622, supra, at 196 (emphasis added); H. Rep. No. 1337, supra, at A44 (emphasis added). n7

n7 The portions of these Reports explicating the term "gifts" actually address a closely related provision of the Code, § 162(b), which refers specifically to § 170. Section 162(b) provides, in pertinent part, that a taxpayer may not deduct as a trade or business expense a "contribution or gift" which would have been deductible under § 170 were it not for the fact that the taxpayer had already met the maximum amount (measured as a percentage of income) which § 170(b) permits to be deducted.

[***22]

In ascertaining whether a given payment was made with "the expectation of any quid pro quo," S. Rep. No. 1622, supra, at 196; H. Rep. No. 1337, supra, at A44, the IRS has customarily examined the external features of the transaction in question. This practice has the advantage of obviating [*691] the need for the IRS to conduct imprecise inquiries into the motivations of individual taxpayers. The lower courts have generally embraced this structural analysis. See, e. g., *Singer Co. v. United States, 449 F. 2d 413, 422-423 (Ct. Cl. 1971)* (applying this approach and collecting cases), cited in *United States v. American Bar Endowment, 477 U.S. 105, 117 (1986);* see also 2 B. Bittker, supra, at para. 35.1.3 (collecting cases). We likewise focused on external features in *United States v. American Bar Endowment, supra,* to resolve the taxpayers' claims that they were entitled to partial deductions for premiums

paid to a charitable organization for insurance coverage; the taxpayers contended that they had paid unusually high premiums in an effort to make a contribution [***23] along with their purchase of insurance. We upheld the Commissioner's disallowance of the partial deductions because the taxpayers had failed to demonstrate, at a minimum, the existence of comparable insurance policies with prices lower than those of the policy they had each purchased. In so doing, we stressed that "[t]he sine qua non of a charitable contribution is a transfer of money or property without adequate consideration." *Id., at 118* (emphasis added in part). n8

n8 The sole taxpayer in American Bar Endowment who had demonstrated the existence of a lower premium insurance program failed to show that he was aware of this less expensive option at the time he purchased his insurance. *477 U.S., at 118.*

In light of this understanding of § 170, it is readily apparent that petitioners' payments to the Church do not qualify as "contribution[s] or gift[s]." As the Tax Court found, these payments were part of a quintessential quid pro quo exchange: [***24] in return for their money, petitioners received an identifiable benefit, namely, auditing and training sessions. The Church established [**2145] fixed price schedules for auditing and training sessions in each branch church; it calibrated particular prices to auditing or training sessions of particular lengths and levels of sophistication; it returned a refund if auditing and training services went unperformed; it distributed "account [*692] cards" on which persons who had paid money to the Church could monitor what prepaid services they had not yet claimed; and it categorically barred provision of auditing or training sessions for free. n9 Each of these practices reveals the inherently reciprocal nature of the exchange.

n9 The Tax Court referred to a Church policy directive which stated:

"Price cuts are forbidden under any guise.

"1. PROCESSING MAY NEVER BE GIVEN AWAY BY AN ORG. Processing is too expensive to deliver.

. . .

"9. ONLY FULLY CONTRACTED STAFF IS AWARDED FREE SERVICE, AND THIS IS DONE BY INVOICE AND LEGAL NOTE WHICH BECOMES DUE AND PAYABLE IF THE CONTRACT IS BROKEN." *83 T. C., at 577-578, n. 5.*

[***25] Petitioners do not argue that such a structural analysis is inappropriate under § 170, or that the external features of the auditing and training transactions do not strongly suggest a quid pro quo exchange. Indeed, the petitioners in the consolidated Graham case conceded at trial that they expected to receive specific amounts of auditing and training in return for their payments. *822 F. 2d, at 850.* Petitioners argue instead that they are entitled to deductions because a quid pro quo analysis is inappropriate under § 170 when the benefit a taxpayer receives is purely religious in nature. Along the same lines, petitioners claim that payments made for the right to participate in a religious service should be automatically deductible under § 170.

We cannot accept this statutory argument for several reasons. First, it finds no support in the language of § 170. Whether or not Congress could, consistent with the Establishment Clause, provide for the automatic deductibility of a payment made to a church that either generates religious benefits or guarantees access to a religious service, that is a choice Congress has thus far declined to make. [***26] Instead, Congress has specified that a payment to an organization operated exclusively for religious (or other eleemosynary) purposes [*693] is deductible only if such a payment is a "contribution or gift." *26 U. S. C. § 170*(c). The Code makes no special preference for payments made in the expectation of gaining religious benefits or access to a religious service. *Foley v. Commissioner, 844 F. 2d 94, 98 (CA2 1988)* (Newman, J., dissenting), cert. pending, No. 88-102. The House and Senate Reports on § 170, and the other legislative history of that provision, offer no indication that Congress' failure to enact such a preference was an oversight. Second, petitioners' deductibility proposal would expand the charitable contribution deduction far beyond what Congress has provided. Numerous forms of payments to eligible donees plausibly could be categorized as providing a religious benefit or as securing access to a religious service. For example, some taxpayers might regard their tuition payments to parochial schools as generating a religious benefit or as securing access to a religious service; such payments, [***27] however, have long been held not to be charitable contributions under § 170. *Foley, supra, at 98,* citing *Winters v. Commissioner, 468 F. 2d 778 (CA2 1972);* see *id., at 781* (noting Congress' refusal to enact legislation permitting taxpayers to deduct parochial school tuition payments). Taxpayers might make similar claims about payments for church-sponsored counseling sessions or for medical care at church-affiliated hospitals that otherwise might not be deductible. Given that, under the First Amendment, the IRS can reject otherwise valid claims of religious benefit only on the ground that a [**2146] taxpayers' alleged beliefs are not sincerely held, but not on the ground that

such beliefs are inherently irreligious, see *United States v. Ballard, 322 U.S. 78 (1944),* the resulting tax deductions would likely expand the charitable contribution provision far beyond its present size. We are loath to effect this result in the absence of supportive congressional intent. Cf. *United States v. Lee, 455 U.S. 252, 259-261 (1982).* [***28]

[*694] Finally, the deduction petitioners seek might raise problems of entanglement between church and state. If framed as a deduction for those payments generating benefits of a religious nature for the payor, petitioners' proposal would inexorably force the IRS and reviewing courts to differentiate "religious" benefits from "secular" ones. If framed as a deduction for those payments made in connection with a religious service, petitioners' proposal would force the IRS and the judiciary into differentiating "religious" services from "secular" ones. We need pass no judgment now on the constitutionality of such hypothetical inquiries, but we do note that "pervasive monitoring" for "the subtle or overt presence of religious matter" is a central danger against which we have held the Establishment Clause guards. *Aguilar v. Felton, 473 U.S. 402, 413 (1985);* see also *Widmar v. Vincent, 454 U.S. 263, 272, n. 11 (1981)* ("[T]he University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech'" than by opening its forum to religious as well as nonreligious [***29] speakers); cf. *Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 716 (1981).* Accordingly, we conclude that petitioners' payments to the Church for auditing and training sessions are not "contribution[s] or gift[s]" within the meaning of that statutory expression. n10

n10 Petitioners have not argued here that their payments qualify as "dual payments" under IRS regulations and that they are therefore entitled to a partial deduction to the extent their payments exceeded the value of the benefit received. See *American Bar Endowment, 477 U.S., at 117* (citing *Rev. Rul. 67-246, 1967-2 Cum. Bull. 104).* We thus have no occasion to decide this issue.

III

We turn now to petitioners' constitutional claims based on the Establishment Clause and the Free Exercise Clause of the First Amendment.

[*695] A Petitioners argue that denying their requested deduction violates the Establishment Clause in two [***30] respects. First, § 170 is said to create an unconstitutional denominational preference by according disproportionately harsh tax status to those religions that raise funds by imposing fixed costs for participation in certain religious practices. Second, § 170 allegedly threatens governmental entanglement with religion because it requires the IRS to entangle itself with religion by engaging in "supervision of religious beliefs and practices" and "valuation of religious services." Brief for Petitioners 44. Our decision in *Larson v. Valente, 456 U.S. 228 (1982),* supplies the analytic framework for evaluating petitioners' contentions. Larson teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman, 403 U.S. 602 (1971).* n11

n11 "'First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen, 392 U.S. 236, 243 (1968);* finally, the statute must not foster "an excessive governmental entanglement with religion." Walz [v. *Tax Comm'n, 397 U.S. 664, 674 (1970)].*'" *Lemon v. Kurtzman, 403 U.S., at 612-613,* quoted in *Larson v. Valente, 456 U.S., at 252.*

[***31]

[**2147] Thus analyzed, § 170 easily passes constitutional muster. The line which § 170 draws between deductible and nondeductible payments to statutorily qualified organizations does not differentiate among sects. Unlike the Minnesota statute at issue in Larson, which facially exempted from state registration and reporting requirements only those religious organizations that derived more than half their funds from members, § 170 makes no "explicit and deliberate distinctions between different religious organizations," *456 [*696] U.S., at 246-247, n. 23,* applying instead to all religious entities.

Section 170 also comports with the Lemon test. First, there is no allegation that § 170 was born of animus to religion in general or Scientology in particular. Cf. *Larson, supra, at 254-255* (history of Minnesota restriction reveals hostility to "Moonies" and intent to "get at . . . people that are running around airports"). The provision is neutral both in design and purpose. Second, the primary effect of § 170 -- encouraging gifts to charitable entities, including but not limited to religious organizations -- is neither [***32] to advance nor inhibit religion. It is not alleged here that § 170 involves "[d]irect government action endorsing religion or a particular religious practice." *Wallace v. Jaffree, 472 U.S. 38, 69 (1985)* (O'Connor, J., concurring in judgment). It may be that a consequence of the quid pro

quo orientation of the "contribution or gift" requirement is to impose a disparate burden on those charitable and religious groups that rely on sales of commodities or services as a means of fundraising, relative to those groups that raise funds primarily by soliciting unilateral donations. But a statute primarily having a secular effect does not violate the Establishment Clause merely because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland, 366 U.S. 420, 442 (1961);* see also *Bob Jones University v. United States, 461 U.S. 574, 604, n. 30 (1983).* Third, § 170 threatens no excessive entanglement between church and state. To be sure, ascertaining whether a payment to a religious institution is part of a quid pro quo transaction [***33] may require the IRS to ascertain from the institution the prices of its services and commodities, the regularity with which payments for such services and commodities are waived, and other pertinent information about the transaction. But routine regulatory interaction which involves no inquiries into religious doctrine, see Presbyterian Church in [*697] *U. S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 451 (1969),* no delegation of state power to a religious body, see *Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982),* and no "detailed monitoring and close administrative contact" between secular and religious bodies, see *Aguilar, 473 U.S., at 414,* does not of itself violate the nonentanglement command. See *Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 305-306 (1985)* (stating that nonentanglement principle "does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations" or the recordkeeping requirements of the Fair Labor Standards [***34] Act) (citation omitted). As we have observed, supra, at 694, it is petitioners' interpretation of § 170, requiring the Government to distinguish between "secular" and "religious" [**2148] benefits or services, which may be "fraught with the sort of entanglement that the Constitution forbids." *Lemon, supra, at 620.* Nor does the application of § 170 to religious practices require the Government to place a monetary value on particular religious benefits. As an initial matter, petitioners' claim here raises no need for valuation, for they have alleged only that their payments are fully exempt from a quid pro quo analysis -- not that some portion of these payments is deductible because it exceeds the value of the acquired service. Cf. *American Bar Endowment, 477 U.S., at 117* (describing "dual character" payments) (citing, inter alia, *Rev. Rul. 68-432, 1968-2 Cum. Bull. 104, 105);* see n. 10, supra. In any event, the need to ascertain what portion of a payment was a purchase and what portion was a contribution does not ineluctably create entanglement problems by forcing the [***35] Government to place a monetary value on a religious benefit. In cases where the economic value of a good or service is elusive -- where, for example, no comparable good or service is sold in the marketplace -- the IRS has eschewed benefit-focused valuation. Instead, it has often employed as an alternative [*698] method of valuation an inquiry into the cost (if any) to the donee of providing the good or service. See, e. g., *Oppewal v. Commissioner, 468 F. 2d 1000, 1002 (CA1 1972)* (cost of providing a "religiously-oriented" education); *Winters v. Commissioner, 468 F. 2d 778 (CA2 1972)* (same); *DeJong v. Commissioner, 309 F. 2d 373 (CA9 1962)* (same). This valuation method, while requiring qualified religious institutions to disclose relevant information about church costs to the IRS, involves administrative inquiries that, as a general matter, "bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion." *Tony and Susan Alamo Foundation, supra, at 305;* [***36] cf. *Lemon, 403 U.S., at 621-622* (school-aid statute authorizing government inspection of parochial school records created impermissible "intimate and continuing relationship between church and state" because it required State "to determine which expenditures are religious and which are secular"). n12

n12 We do not rule out the possibility that, under the circumstances of a particular case, an IRS inquiry under § 170 into a religious institution's expenses might raise entanglement problems. Because petitioners' claim necessitates no valuation inquiry, however, we need only decide here that such inquiries into cost under § 170 generally pose no constitutional problem.

B Petitioners also contend that disallowance of their § 170 deductions violates their right to the free exercise of religion by "plac[ing] a heavy burden on the central practice of Scientology." Brief for Petitioners 47. The precise nature of this claimed burden is unclear, but it appears to operate in two ways. First, [***37] the deduction disallowance is said to deter adherents from engaging in auditing and training sessions. Second, the deduction disallowance is said to interfere with observance of the doctrine of exchange, which mandates equality of an adherent's "outflow" and "inflow."

[*699] The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden. *Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141-142 (1987); Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S., at 717-719; Wisconsin v. Yoder, 406 U.S. 205, 220-221 (1972).* It is not within the judicial ken to question the

centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. *Thomas, supra, at 716.* We do, however, have doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one. [***38] Neither the payment nor the receipt of taxes is forbidden by the Scientology faith generally, and Scientology does not proscribe the payment of taxes in connection with auditing or training sessions specifically. Cf. *United States v. Lee, 455 U.S., at 257.* Any burden imposed on auditing or training therefore derives solely from the fact that, as a result of the deduction denial, adherents have less money available to gain access to such sessions. This burden is no different from that imposed by any public tax or fee; indeed, the burden imposed by the denial of the "contribution or gift" deduction would seem to pale by comparison to the overall federal income tax burden on an adherent. Likewise, it is unclear why the doctrine of exchange would be violated by a deduction disallowance so long as an adherent is free to equalize "outflow" with "inflow" by paying for as many auditing and training sessions as he wishes. See *822 F. 2d, at 850-853* (questioning substantiality of burden on Scientologists); *819 F. 2d, at 1222-1225* (same). In any event, we need not decide whether the burden [***39] of disallowing the § 170 deduction is a substantial one, for our decision in Lee establishes that even a substantial burden would be justified by the "broad public interest in maintaining a sound tax system," free of "myriad exceptions flowing [*700] from a wide variety of religious beliefs." *455 U.S., at 260.* In Lee, we rejected an Amish taxpayer's claim that the Free Exercise Clause commanded his exemption from Social Security tax obligations, noting that "[t]he tax system could not function if denominations were allowed to challenge the tax system" on the ground that it operated "in a manner that violates their religious belief." Ibid. That these cases involve federal income taxes, not the Social Security system, is of no consequence. Ibid. The fact that Congress has already crafted some deductions and exemptions in the Code also is of no consequence, for the guiding principle is that a tax "must be uniformly applicable to all, except as Congress provides explicitly otherwise." *Id., at 261* (emphasis added). Indeed, in one respect, the Government's interest in avoiding an exemption is more powerful [***40] here than in Lee; the claimed exemption in Lee stemmed from a specific doctrinal obligation not to pay taxes, whereas petitioners' claimed exemption stems from the contention that an incrementally larger tax burden interferes with their religious activities. This argument knows no limitation. We accordingly hold that petitioners' free exercise challenge is without merit.

IV We turn, finally, to petitioners' assertion that disallowing their claimed deduction is at odds with the IRS' longstanding practice of permitting taxpayers to deduct payments made to other religious institutions in connection with certain religious practices. Through the appellate stages of this litigation, this claim was framed essentially as one of selective prosecution. The Courts of Appeals for the First and Ninth Circuits summarily rejected this claim, finding no evidence of the intentional governmental discrimination necessary to support such a claim. *822 F. 2d, at 853* (no showing of "the type of hostility to a target of law enforcement that would support a claim of selective enforcement"); *819 F. 2d, at 1223* (no "discriminatory intent" proved). [***41]

[*701] In their arguments to this Court, petitioners have shifted emphasis. They now make two closely related claims. First, the IRS has accorded payments for auditing and training disparately harsh treatment compared to payments to other churches and synagogues for their religious services: Recognition of a comparable deduction for auditing and training payments is necessary to cure this administrative inconsistency. Second, Congress, in modifying § 170 [**2150] over the years, has impliedly acquiesced in the deductibility of payments to these other faiths; because payments for auditing and training are indistinguishable from these other payments, they fall within the principle acquiesced in by Congress that payments for religious services are deductible under § 170.

Although the Commissioner demurred at oral argument as to whether the IRS, in fact, permits taxpayers to deduct payments made to purchase services from other churches and synagogues, Tr. of Oral Arg. 30-31, the Commissioner's periodic revenue rulings have stated the IRS' position rather clearly. A 1971 ruling, still in effect, states: "Pew rents, building fund assessments, and periodic dues paid to a church [***42] . . . are all methods of making contributions to the church, and such payments are deductible as charitable contributions within the limitations set out in section 170 of the Code." *Rev. Rul. 70-47, 1970-1 Cum. Bull. 49* (superseding A.R.M. 2, Cum. Bull. 150 (1919)). We also assume for purposes of argument that the IRS also allows taxpayers to deduct "specified payments for attendance at High Holy Day services, for tithes, for torah readings and for memorial plaques." *Foley v. Commissioner, 844 F. 2d, at 94, 96.* The development of the present litigation, however, makes it impossible for us to resolve petitioners' claim that they have received unjustifiably harsh treatment compared to adherents of other religions. The relevant inquiry in determining whether a payment is a "contribution or gift" under § 170 is, as we have noted, not whether the payment secures religious [*702] benefits or access to religious services, but whether the

transaction in which the payment is involved is structured as a quid pro quo exchange. To make such a determination in this case, the Tax Court heard testimony and received [***43] documentary proof as to the terms and structure of the auditing and training transactions; from this evidence it made factual findings upon which it based its conclusion of nondeductibility, a conclusion we have held consonant with § 170 and with the First Amendment. Perhaps because the theory of administrative inconsistency emerged only on appeal, petitioners did not endeavor at trial to adduce from the IRS or other sources any specific evidence about other religious faiths' transactions. The IRS' revenue rulings, which merely state the agency's conclusions as to deductibility and which have apparently never been reviewed by the Tax Court or any other judicial body, also provide no specific facts about the nature of these other faiths' transactions. In the absence of such facts, we simply have no way (other than the wholly illegitimate one of relying on our personal experiences and observations) to appraise accurately whether the IRS' revenue rulings have correctly applied a quid pro quo analysis with respect to any or all of the religious practices in question. We do not know, for example, whether payments for other faiths' services are truly obligatory or whether any or [***44] all of these services are generally provided whether or not the encouraged "mandatory" payment is made. The IRS' application of the "contribution or gift" standard may be right or wrong with respect to these other faiths, or it may be right with respect to some religious practices and wrong with respect to others. It may also be that some of these payments are appropriately classified as partially deductible "dual payments." With respect to those religions where the structure of transactions involving religious services is established not centrally but by individual congregations, the proper point of reference for a quid pro quo analysis [*703] might be the individual congregation, not the religion as a whole. Only upon a proper factual record could we make these determinations. Absent such a record, we must reject petitioners' administrative consistency argument. n13

n13 Petitioners argue that an unofficial "question and answer guidance package" recently issued by an IRS official requires deductibility of payments for auditing and training sessions. Referring to the revenue ruling on pew rents, the brochure states that "fixed payments for similar religious services" are fully deductible. See IRS Official Explains New Examination-Education Program on Charitable Contributions to Tax-Exempt Organizations, BNA Daily Report for Executives, Special Report No. 186, J-1, J-3 (Sept. 26, 1988) (cited in Reply Brief for Petitioners 6). In ascertaining the IRS' justifications for its administrative practice, however, our practice is to rely on the agency's official rulings, not on the unofficial interpretations of particular IRS officials. In any event, the brochure on which petitioners rely was not included in the record before the Tax Court or the Courts of Appeals in these cases, and, in fact, was issued months after we granted certiorari.

[***45]

[**2151] Petitioners' congressional acquiescence claim fails for similar reasons. Even if one assumes that Congress has acquiesced in the IRS' ruling with respect to "[p]ew rents, building fund assessments, and periodic dues," *Rev. Rul. 70-47, 1970-1 Cum. Bull. 49,* the fact is that the IRS' 1971 ruling articulates no broad principle of deductibility, but instead merely identifies as deductible three discrete types of payments. Having before us no information about the nature or structure of these three payments, we have no way of discerning any possible unifying principle, let alone whether such a principle would embrace payments for auditing and training sessions.

V

For the reasons stated herein, the judgments of the Courts of Appeals are hereby

Affirmed.

DISSENTBY: O'CONNOR

DISSENT: [*704] JUSTICE O'CONNOR, with whom JUSTICE SCALIA joins, dissenting.

The Court today acquiesces in the decision of the Internal Revenue Service (IRS) to manufacture a singular exception to its 70-year practice of allowing fixed payments indistinguishable from those made by petitioners to be deducted as charitable contributions. Because the IRS cannot constitutionally be allowed [***46] to select which religions will receive the benefit of its past rulings, I respectfully dissent.

The cases before the Court have an air of artificiality about them that is due to the IRS' dual litigation strategy against the Church of Scientology (Church). As the Court notes, ante, at 686-687, n. 4, the IRS has successfully argued that the mother Church of Scientology was not a tax-exempt organization from 1970 to 1972 because it had diverted profits to the founder of Scientology and others, conspired to impede collection of its taxes, and conducted almost all of its activities for a commercial purpose. See *Church of Scientology of California v. Commissioner, 83 T. C. 381 (1984),* aff'd, *823 F. 2d 1310 (CA9 1987),* cert. denied,

486 U.S. 1015 (1988). In the cases before the Court today, however, the IRS decided to contest the payments made to Scientology under *26 U. S. C. § 170* rather than challenge the tax-exempt status of the various branches of the Church to which the payments were made. According to the Deputy Solicitor General, the IRS challenged [***47] the payments themselves in order to expedite matters. Tr. of Oral Arg. 26-29. See also *Neher v. Commissioner, 852 F. 2d 848, 850-851 (CA6 1988).* As part of its litigation strategy in these cases, the IRS agreed to several stipulations which, in my view, necessarily determine the proper approach to the questions presented by petitioners.

The stipulations, relegated to a single sentence by the Court, ante, at 686, established that Scientology was at all relevant times a religion; that each Scientology branch to which payments were made was at all relevant times a "church" within the meaning of § 170(b)(1)(A)(i); and that [*705] Scientology was at all times a "corporation" within the meaning of § 170(c)(2) and exempt from general income taxation under *26 U. S. C. § 501*(a). See App. 38, paras. 52-53; [**2152] *83 T. C. 575, 576 (1984),* aff'd, *822 F. 2d 844 (CA9 1987).* As the Solicitor General recognizes, it follows from these stipulations that Scientology operates for "'charitable purposes'" and puts the "public interest above the private interest." Brief for [***48] Respondent 30. See also *Neher, supra, at 855.* Moreover, the stipulations establish that the payments made by petitioners are fixed donations made by individuals to a tax-exempt religious organization in order to participate in religious services, and are not based on "market prices set to reap the profits of a commercial moneymaking venture." *Staples v. Commissioner, 821 F. 2d 1324, 1328 (CA8 1987),* cert. pending, No. 87-1382. The Tax Court, however, appears to have ignored the stipulations. It concluded, perhaps relying on its previous opinion in Church of Scientology, that "Scientology operates in a commercial manner in providing [auditing and training]. In fact, one of its articulated goals is to make money." *83 T. C., at 578.* The Solicitor General has duplicated the error here, referring on numerous occasions to the commercial nature of Scientology in an attempt to negate the effect of the stipulations. See Brief for Respondent 13-14, 23, 25, 44.

It must be emphasized that the IRS' position here is not based upon the contention that a portion of the knowledge received from [***49] auditing or training is of secular, commercial, nonreligious value. Thus, the denial of a deduction in these cases bears no resemblance to the denial of a deduction for religious-school tuition up to the market value of the secularly useful education received. See *Oppewal v. Commissioner, 468 F. 2d 1000 (CA1 1972); Winters v. Commissioner, 468 F. 2d 778 (CA2 1972); DeJong v. Commissioner, 309 F. 2d 373 (CA9 1962).* Here the IRS denies deductibility solely on the basis that the exchange is a quid pro quo, even though the quid is exclusively of spiritual or religious worth. Respondent [*706] cites no instances in which this has been done before, and there are good reasons why.

When a taxpayer claims as a charitable deduction part of a fixed amount given to a charitable organization in exchange for benefits that have a commercial value, the allowable portion of that claim is computed by subtracting from the total amount paid the value of the physical benefit received. If at a charity sale one purchases for $1,000 a painting whose market value is demonstrably [***50] no more than $50, there has been a contribution of $950. The same would be true if one purchases a $1,000 seat at a charitable dinner where the food is worth $50. An identical calculation can be made where the quid received is not a painting or a meal, but an intangible such as entertainment, so long as that intangible has some market value established in a noncontributory context. Hence, one who purchases a ticket to a concert, at the going rate for concerts by the particular performers, makes a charitable contribution of zero even if it is announced in advance that all proceeds from the ticket sales will go to charity. The performers may have made a charitable contribution, but the audience has paid the going rate for a show.

It becomes impossible, however, to compute the "contribution" portion of a payment to a charity where what is received in return is not merely an intangible, but an intangible (or, for that matter a tangible) that is not bought and sold except in donative contexts so that the only "market" price against which it can be evaluated is a market price that always includes donations. Suppose, for example, that the charitable organization that traditionally [***51] solicits donations on Veterans Day, in exchange for which it gives the donor an imitation poppy bearing its name, were to establish a flat rule that no one gets a poppy without a donation of at least $10. One would have to say that the "market" rate for such poppies was $10, but it would assuredly not be true that everyone who "bought" a poppy for $10 made no contribution. Similarly, if one buys a $100 seat at a prayer breakfast [*707] -- receiving as the quid pro quo food for both body and soul -- it would [**2153] make no sense to say that no charitable contribution whatever has occurred simply because the "going rate" for all prayer breakfasts (with equivalent bodily food) is $100. The latter may well be true, but that "going rate" includes a contribution.

Confronted with this difficulty, and with the constitutional necessity of not making irrational

distinctions among taxpayers, and with the even higher standard of equality of treatment among religions that the First Amendment imposes, the Government has only two practicable options with regard to distinctively religious quids pro quo: to disregard them all, or to tax them all. Over the years it has chosen the [***52] former course.

Congress enacted the first charitable contribution exception to income taxation in 1917. War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 330. A mere two years later, in A.R.M. 2, *1 Cum. Bull. 150 (1919),* the IRS gave its first blessing to the deductions of fixed payments to religious organizations as charitable contributions:

"[T]he distinction of pew rents, assessments, church dues, and the like from basket collections is hardly warranted by the act. The act reads 'contributions' and 'gifts.' It is felt that all of these come within the two terms.

"In substance it is believed that these are simply methods of contributing although in form they may vary. Is a basket collection given involuntarily to be distinguished from an envelope system, the latter being regarded as 'dues'? From a technical angle, the pew rents may be differentiated, but in practice the so-called 'personal accommodation' they may afford is conjectural. It is believed that the real intent is to contribute and not to hire a seat or pew for personal accommodation. In fact, basket contributors sometimes receive the same accommodation informally."
[***53]
[*708] The IRS reaffirmed its position in 1970, ruling that "[p]ew rents, building fund assessments and periodic dues paid to a church . . . are all methods of making contributions to the church and such payments are deductible as charitable contributions." *Rev. Rul. 70-47, 1970-1 Cum. Bull. 49.* Similarly, notwithstanding the "form" of Mass stipends as fixed payments for specific religious services, see infra, at 709, the IRS has allowed charitable deductions of such payments. SeeRev. Rul. 78-366, *1978-2 Cum. Bull. 241.*

These rulings, which are "official interpretation[s] of [the tax laws] by the [IRS]," *Rev. Proc. 78-24, 1978-2 Cum. Bull. 503, 504,* flatly contradict the Solicitor General's claim that there "is no administrative practice recognizing that payments made in exchange for religious benefits are tax deductible." Brief for Respondent 16. Indeed, an Assistant Commissioner of the IRS recently explained in a "question and answer guidance package" to tax-exempt organizations that "[i]n contrast to tuition payments, religious observances generally [***54] are not regarded as yielding private benefits to the donor, who is viewed as receiving only incidental benefits when attending the observances. The primary beneficiaries are viewed as being the general public and members of the faith. Thus, payments for saying masses, pew rents, tithes, and other payments involving fixed donations for similar religious services, are fully deductible contributions." IRS Official Explains New Examination-Education Program on Charitable Contributions to Tax-Exempt Organizations, BNA Daily Report for Executives, Special Report No. 186, J-1, J-3 (Sept. 26, 1988). Although this guidance package may not be as authoritative as IRS rulings, see ante, at 703, n. 13, in the absence of any contrary indications it does reflect the continuing adherence of the IRS to its practice of allowing deductions for fixed payments for religious services.

There can be no doubt that at least some of the fixed payments which the IRS has treated as charitable deductions, or which the Court assumes the IRS would allow taxpayers to [*709] deduct, ante, at 690-691, are as "inherently reciprocal," ante, at 692, as [**2154] the payments for auditing at issue here. In exchange [***55] for their payment of pew rents, Christians receive particular seats during worship services. See Encyclopedic Dictionary of Religion 2760 (1979). Similarly, in some synagogues attendance at the worship services for Jewish High Holy Days is often predicated upon the purchase of a general admission ticket or a reserved seat ticket. See J. Feldman, H. Fruhauf, & M. Schoen, Temple Management Manual, ch. 4, p. 10 (1984). Religious honors such as publicly reading from Scripture are purchased or auctioned periodically in some synagogues of Jews from Morocco and Syria. See H. Dobrinsky, A Treasury of Sephardic Laws and Customs 164, 175-177 (1986). Mormons must tithe their income as a necessary but not sufficient condition to obtaining a "temple recommend," i. e., the right to be admitted into the temple. See The Book of Mormon, 3 Nephi 24:7-12 (1921); Reorganized Church of Jesus Christ of Latter-day Saints, Book of Doctrine and Covenants § 106:1b (1978); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 330, n. 4 (1987).* A Mass stipend -- a fixed payment given to a Catholic priest, [***56] in consideration of which he is obliged to apply the fruits of the Mass for the intention of the donor -- has similar overtones of exchange. According to some Catholic theologians, the nature of the pact between a priest and a donor who pays a Mass stipend is "a bilateral contract known as do ut facias. One person agrees to give while the other party agrees to do something in return." 13 New Catholic Encyclopedia, Mass Stipend, p. 715 (1967). A finer example of a quid pro quo exchange would be hard to formulate.

This is not a situation where the IRS has explicitly and affirmatively reevaluated its longstanding interpretation of § 170 and decided to analyze all fixed religious contributions under a quid pro quo standard. There is no indication whatever that the IRS has abandoned its 70-year practice with respect [*710] to payments made by those other than Scientologists. In 1978, when it ruled that payments for auditing and training were not charitable contributions under § 170, the IRS did not cite -- much less try to reconcile -- its previous rulings concerning the deductibility of other forms of fixed payments for religious services or practices. SeeRev. Rul. 78-189, *1978-1 Cum. Bull. 68* [***57] (equating payments for auditing with tuition paid to religious schools).

Nevertheless, respondent now attempts to reconcile his previous rulings with his decision in these cases by relying on a distinction between direct and incidental benefits in exchange for payments made to a charitable organization. This distinction, adumbrated as early as the IRS' 1919 ruling, recognizes that even a deductible charitable contribution may generate certain benefits for the donor. As long as the benefits remain "incidental" and do not indicate that the payment was actually made for the "personal accommodation" of the donor, the payment will be deductible. It is respondent's view that the payments made by petitioners should not be deductible under § 170 because the "unusual facts in these cases . . . demonstrate that the payments were made primarily for 'personal accommodation.'" Brief for Respondent 41. Specifically, the Solicitor General asserts that "the rigid connection between the provision of auditing and training services and payment of the fixed price" indicates a quid pro quo relationship and "reflect[s] the value that petitioners expected to receive for their money." Id., at [***58] 16.

There is no discernible reason why there is a more rigid connection between payment and services in the religious practices of Scientology than in the religious practices of the faiths described above. Neither has respondent explained why the benefit received by a Christian who obtains the pew of his or her choice by paying a rental fee, a Jew who gains entrance to High Holy Day services by purchasing a ticket, a Mormon who makes the fixed payment necessary for a temple recommend, or a Catholic [**2155] who pays a Mass stipend, [*711] is incidental to the real benefit conferred on the "general public and members of the faith," BNA Daily Report, at J-3, while the benefit received by a Scientologist from auditing is a personal accommodation. If the perceived difference lies in the fact that Christians and Jews worship in congregations, whereas Scientologists, in a manner reminiscent of Eastern religions, see App. 78-83 (testimony of Dr. Thomas Love), gain awareness of the "immortal spiritual being" within them in one-to-one sessions with auditors, ante, at 684-685, such a distinction would raise serious Establishment Clause problems. See *Wallace v. Jaffree, 472 U.S. 38, 69-70 (1985)* [***59] (O'Connor, J., concurring in judgment); *Lynch v. Donnelly, 465 U.S. 668, 687-689 (1984)* (concurring opinion). The distinction is no more legitimate if it is based on the fact that congregational worship services "would be said anyway," Brief for Respondent 43, without the payment of a pew rental or stipend or tithe by a particular adherent. The relevant comparison between Scientology and other religions must be between the Scientologist undergoing auditing or training on one hand and the congregation on the other. For some religions the central importance of the congregation achieves legal dimensions. In Orthodox Judaism, for example, certain worship services cannot be performed and Scripture cannot be read publicly without the presence of at least 10 men. 12 Encyclopaedia Judaica, Minyan, p. 68 (1972). If payments for participation occurred in such a setting, would the benefit to the 10th man be only incidental while for the personal accommodation of the 11th? In the same vein, will the deductibility of a Mass stipend turn on whether there are other congregants to hear the Mass? And conversely, does the fact that the payment of a tithe by [***60] a Mormon is an absolute prerequisite to admission to the temple make that payment for admission a personal accommodation regardless of the size of the congregation?

Given the IRS' stance in these cases, it is an understatement to say that with respect to fixed payments for religious [*712] services "the line between the taxable and the immune has been drawn by an unsteady hand." *United States v. Allegheny County, 322 U.S. 174, 176 (1944)* (Jackson, J.). This is not a situation in which a governmental regulation "happens to coincide or harmonize with the tenets of some or all religions," *McGowan v. Maryland, 366 U.S. 420, 442 (1961),* but does not violate the Establishment Clause because it is founded on a neutral, secular basis. See *Bob Jones University v. United States, 461 U.S. 574, 604, n. 30 (1983).* Rather, it involves the differential application of a standard based on constitutionally impermissible differences drawn by the Government among religions. As such, it is best characterized as a case of the Government "put[ting] an imprimatur on [all but] one religion." [***61] *Gillette v. United States, 401 U.S. 437, 450 (1971).* That the Government may not do.

The Court attempts to downplay the constitutional difficulty created by the IRS' different treatment of other fixed payments for religious services by accepting the Solicitor General's invitation to let the IRS make case-specific quid pro quo determinations. See ante, at 702

("The IRS' application of the 'contribution or gift' standard may be right or wrong with respect to these other faiths, or it may be right with respect to some religious practices and wrong with respect to others"). See also Brief for Respondent 41-42. As a practical matter, I do not think that this unprincipled approach will prove helpful. The Solicitor General was confident enough in his brief to argue that, "even without making a detailed factual inquiry," Mormon tithing does not involve a quid pro quo arrangement. Id., at 43-44. At oral argument, however, the Deputy Solicitor [**2156] General conceded that if it was mandatory, tithing would be distinguishable from the "ordinary case of church dues." Tr. of Oral Arg. 36-37. If the approach suggested by the Solicitor General [***62] is so malleable and indefinite, it is not a panacea and cannot be trusted to secure First Amendment rights against arbitrary incursions by the Government.

[*713] On a more fundamental level, the Court cannot abjure its responsibility to address serious constitutional problems by converting a violation of the Establishment Clause into an "administrative consistency argument," ante, at 703, with an inadequate record. It has chosen to ignore both longstanding, clearly articulated IRS practice, and the failure of respondent to offer any cogent, neutral explanation for the IRS' refusal to apply this practice to the Church of Scientology. Instead, the Court has pretended that whatever errors in application the IRS has committed are hidden from its gaze and will, in any event, be rectified in due time.

In my view, the IRS has misapplied its longstanding practice of allowing charitable contributions under § 170 in a way that violates the Establishment Clause. It has unconstitutionally refused to allow payments for the religious service of auditing to be deducted as charitable contributions in the same way it has allowed fixed payments to other religions to be deducted. Just as [***63] the Minnesota statute at issue in *Larson v. Valente, 456 U.S. 228 (1982),* discriminated against the Unification Church, the IRS' application of the quid pro quo standard here -- and only here -- discriminates against the Church of Scientology. I would reverse the decisions below.

Religious Technology Center, et al., Plaintiffs, v. Robin Scott, et al., Defendants; Religious Technology Center, et al., Plaintiffs, v. Larry Wollersheim, et al., Defendants

Nos. CV 85-711 MRP, CV 85-7197 MRP

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

660 F. Supp. 515; 1987 U.S. Dist. LEXIS 3418; 3 U.S.P.Q.2D (BNA) 1115; Copy. L. Rep. (CCH) P26,139

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CORE TERMS: similarity, injunction, preliminary injunction, religious, hardship, scripture, adherent, copyright infringement, extrinsic, stolen, registration, registered, sequence, likelihood of success, infringement, copyrighted, religion, infringe, substantially similar, technology, intrinsic, dictated, copied, notice, dissolution, practicing, comparing, trademark, enjoined, deposit

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JUDGES: Mariana R. Pfaelzer, United States District Judge.

OPINIONBY: PFAELZER

OPINION: [*516] MEMORANDUM OF DECISION

MARIANA R. PFAELZER, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

Plaintiffs' application for a preliminary injunction under *17 U.S.C. § 502*(a) was argued on January 26, 1987 before the Honorable Mariana R. Pfaelzer. Having considered the oral and written arguments made and the evidence filed in this case, the Court has concluded that plaintiffs have not made a sufficient showing of likelihood of success on the merits, and have not shown that the balance of hardships justifies the preliminary injunction they seek.

II. BACKGROUND

This case originated in the theft in 1983 by Robin Scott of certain documents belonging to the plaintiff Church of Scientology International, Inc. ("the Church"). Plaintiffs and some defendants (David Mayo, The Church of the New Civilization, defendants Haber, Nelson, Zegel, Hartog and Reisdorf -- collectively [**2] "the new Church") regard these documents as religious scriptures, embodying part of the advanced technology practiced by Scientologists. In particular, the documents stolen included a series of bulletins describing a procedure known as "New Era Dianetics for Operating Thetans," "NED for OTs" or "NOTs" ("NOTs"). These stolen materials were eventually returned to the Church, but not, plaintiffs charge, before they had been passed to and copied by various defendants.

[*517] Plaintiffs brought this suit in 1985, alleging, inter alia, theft of trade secrets and RICO violations. At that time, plaintiffs sought and were granted a preliminary injunction prohibiting use by the new Church of materials derived from the stolen documents. Defendants appealed the granting of the preliminary injunction and, in August 1986, the Ninth Circuit ruled that the injunction must be dissolved because injunctions are not available to private plaintiffs under civil RICO and because the documents at issue, as religious scriptures, did not have the independent economic value required to be protected by California's law of trade secrets. *Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1088, 1090 (9th [**3] Cir. 1986)*, cert. denied, *479 U.S. 1103, 55 U.S.L.W. 3571, 94 L. Ed. 2d 187, 107 S. Ct. 1336 (1987)*. The court noted that "the higher level materials at issue in this suit have neither copyright nor trademark protection," *id. at 1078 n.2*. The

court also expressed "no view whether the new Church's materials are copies of the Church materials stolen by Scott," id. n.3.

Following the dissolution of the preliminary injunction, Norman Starkey, as Executor of the Estate of L. Ron Hubbard dba L. Ron Hubbard Library ("the Hubbard Estate"), registered a copyright in the NOTs materials with the United States Copyright Office (Registration Number TXU 257 326, November 10, 1986). On November 20, 1986, the Hubbard Estate executed a license agreement granting plaintiff Religious Technology Center ("RTC") an exclusive license to reproduce, distribute and utilize NOTs and "the right to pursue, litigate, settle, compromise, or deal with in any way, any and all actions and causes of action . . . for the infringement or violation of any copyright" in the materials. On December 5, 1986, this Court granted plaintiffs leave to file an amended complaint stating a new claim for copyright infringement. This application for a preliminary [**4] injunction under *17 U.S.C. 502*(a) followed.

III. DISCUSSION

To obtain a preliminary injunction, plaintiffs must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in plaintiff's favor. *Apple Computer, Inc. v. Formula International, Inc., 725 F.2d 521, 523 (9th Cir. 1984).* The more this balance of hardships weighs against the movants and in favor of defendants, the more robust must be the showing of movants' likelihood of success on the merits to justify an injunction. See *Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 502 (9th Cir. 1980).*

A. Likelihood of Success on the Merits

Defendants argue that plaintiffs have no more than a remote chance of success on the merits. They base this argument on two grounds: first, that the copyright is invalid; and second, that the new Church's materials do not infringe the NOTs materials.

1. The Validity of Plaintiffs' Copyright

Plaintiffs' certificate of copyright registration is prima facie evidence of the validity of the NOTs copyrights, *17 U.S.C. § 410*(c). Defendants [**5] have the burden of overcoming this presumption of validity, Apple at 523. Defendants attempt to carry this burden by pointing, first of all, to the testimony of defendant Mayo at the evidentiary hearing before the first injunction was issued that he and not L. Ron Hubbard was the author of the NOTs materials. The NOTs copyright registration application ("the application") lists L. Ron Hubbard as the author of the work in question, and defendants thus hope to raise sufficient doubt as to the truthfulness of the application for registration to overcome the presumption of the copyright's validity. However, there are a number of problems with Mayo's testimony, not the least of which is that the evidence shows him to have publicly attributed the NOTs materials to L. Ron Hubbard on more than one occasion, see, e.g., Reporter's Transcript, November 21, 1985, at 34. Also, this Court did not find Mayo to be a credible witness. Even if believed, Mayo's testimony is not inconsistent with plaintiffs' application. [*518] NOTs is registered as a compilation. Mayo indicated that, while a number of people, including L. Ron Hubbard, worked on NOTs, Hubbard revised and approved the final product [**6] before it was issued, id. at 50-51. Each NOTs series bears a copyright notice reading "Copyright [date]/by L. Ron Hubbard/ALL RIGHTS RESERVED." Defendants, in short, have not succeeded in rebutting the presumption that L. Ron Hubbard was indeed the author of each NOTs series and of the compilation as a whole. At most, defendants have created some doubt as to whether Hubbard owned the copyright as author or as the employer in a work-for-hire situation, see *17 U.S.C. § 201*(b).

Defendants' other challenges to the validity of the copyright are easily disposed of. Defendants contend that the Hubbard Estate perpetrated a fraud on the Copyright Office by representing the materials as a "secure test" to get around the deposit requirement of *17 U.S.C. § 407*(a), 37 C.F.R. Ch. 11 § 202.19. Plaintiffs, however, provide convincing evidence that they applied for and were granted "special relief" from the deposit requirement under 37 C.F.R. § 202.20(d) and did not misrepresent the nature of their materials. Defendants also argue that plaintiffs are estopped from seeking this injunction by their failure to assert the copyright claim earlier. However, plaintiffs were not dilatory in the filing [**7] of this suit, and haste, rather than delay, marks the registration and assertion of the copyright following the dissolution of the injunction on plaintiffs' other legal theories. The Hubbard Estate cannot be faulted for its failure to register earlier its copyright in unpublished materials that were never meant to be distributed to the public.

B. Do Defendants' Materials Infringe the NOTs Copyright?

Defendants' claim that the new Church materials do not infringe the NOTs materials poses a somewhat more difficult problem. To establish copying by the new Church, plaintiffs must show that the new Church had access to the copyrighted materials and that there is

substantial similarity between NOTs and defendants' materials. *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977).*

Clearly, the new Church had access to the NOTs materials. Even if plaintiffs cannot ultimately establish that the new Church received the stolen NOTs package or copies thereof, it is undisputed that Mayo and other officers of the new Church were intimately familiar with NOTs and had earlier assisted in writing or been trained through the use of the NOTs [**8] materials. Mayo himself described his efforts to "reconstruct" NOTs from memory in creating the new Church's "Advanced Ability V" ("AAV") materials. Reporter's Transcript, November 21, 1985, 28-30. For the purposes of a claim for copyright infringement, it does not matter whether defendants, if they copied NOTs, did so with the originals in front of them or from memory.

Given defendants' undeniable access to NOTs, the question to be answered is whether AAV is substantially similar to NOTs. This inquiry is complicated by two characteristics of the copyrighted material: (1) NOTs describes a process or procedure which cannot itself be copyrighted, see *Mazer v. Stein, 347 U.S. 201, 98 L. Ed. 630, 74 S. Ct. 460 (1954); Baker v. Selden, 101 U.S. 99, 25 L. Ed. 841 (1879); 17 U.S.C. § 102*(b); and (2) NOTs is alleged to be the sacred scripture of a religion. Neither feature, of itself, requires the conclusion that NOTs is not protected by copyright or that AAV does not infringe that copyright, but taken together these features do serve to make the determination more difficult. n1

> n1 To make this determination, the Court compared NOTs to the AAV materials contained in Volume 1 of defendants' exhibits in opposition to the first preliminary injunction. This version of AAV seems to be the final one, and bears a copyright notice, "Copyright Church of the New Civilization 1984."

[**9]

Defendants argue that, as a process or procedure, NOTs is not subject to copyright [*519] protection at all. This assertion by defendants is somewhat disingenuous, since each series of the AAV materials, like NOTs, is clearly marked with a copyright notice. It is, however, true that copyright protection does not extend to the ideas expressed in a work. Presumably, it was for this reason that plaintiffs originally relied on the laws of trade secret, not copyright, as the basis of their suits against defendants. The Church has already failed in its attempt to obtain a preliminary injunction on its trade secret theory. While plaintiffs are not foreclosed from pursuing this theory at trial, see *City of Anaheim v. Duncan, 658 F.2d 1326, 1328 n.2 (9th Cir. 1981);* 11 Wright & Miller, Federal Practice and Procedure, Civil § 2962 at 630-31 (1973), it cannot form the basis of the injunction they now seek.

Even if an idea, procedure or discovery is in the public domain, it is well established that the expression of the idea can be protected by copyright, see, e.g., Sid & Marty Krofft at 1163. The nature of the procedure described in NOTs and in AAV, however, requires a certain level [**10] of similarity of expression. The NOTs procedure, briefly, treats a particular condition of the adherent through the use of a structured sequence of questions, dictated in part by the adherent's response to the questions as registered on a device known as the Hubbard E-meter. It appears that the wording of the questions must conform to a standard; in addition, there is a fairly large vocabulary of specialized terminology used to describe phenomena that might be encountered during the procedure. It can also be assumed that the use and behavior of the needles or dials on an E-meter can be described only in a limited number of similar ways. Similarities of expression dictated by the nature of the process described do not constitute infringement, cf., *Frybarger v. International Bus. Mach., Inc., 812 F.2d 525, 529-530 (9th Cir. 1987); Apple Computer, Inc. v. Formula International, Inc., 725 F.2d 521, 525 (9th Cir. 1984).* In comparing NOTs with AAV, this Court has taken care to look for similarities that are not the result of the similarity of the procedures being described. Due in part to the indirect style in which both works are written, there is ample text to compare.

The [**11] religious nature of the ideas expressed in NOTs and AAV also renders comparison difficult. AAV is not identical to NOTs, but substantial similarity, not identity, is all that plaintiffs must show. The test for substantial similarity is two-fold: first, an "extrinsic" test is applied to determine whether the ideas expressed in the two works are similar; and second, an "intrinsic" test is used to determine whether, given similarity of ideas, the expression of these ideas is substantially similar, Sid & Marty Krofft at 1164. The extrinsic test may require analytic dissection of the work or even expert testimony, id.

Defendants argue that this Court cannot apply the extrinsic test to determine whether NOTs and AAV express the same or similar ideas, because to do so would impermissibly entangle the Court in determining religious doctrine, see, *Serbian Orthodox Diocese for the United States of America and Canada v. Milivojevich, 426 U.S. 696, 708-09, 49 L. Ed. 2d 151, 96 S. Ct. 2372 (1976);* Presbyterian Church in the *United States v. Mary Elizabeth Blue Hull Mem. Presby. Church, 393 U.S. 440, 449, 21 L. Ed. 2d 658, 89 S. Ct. 601 (1969).* Defendants'

argument is a troubling one, because it seems to lead to the conclusion that religious [**12] scriptures cannot be protected by copyright. This result is untenable, however. Where the statutory formalities have been met, scriptures must receive the same protection as other works. Not only would any other result offend the first amendment's guarantee of freedom of religion, it would also inevitably involve courts in deciding whether various works are or are not religious scriptures -- an inquiry of even greater constitutional infirmity. Where "neutral principles of law" are available to resolve religious property disputes, see *Jones v. Wolf, 443 U.S. 595, 604, 61 L. Ed. 2d 775, 99 S. Ct. 3020 (1979),* courts can, and in this case must, apply them.

[*520] Defendants also overstate the constitutional pitfalls involved in comparing these two works. This Court need not evaluate the religious significance of any differences between NOTs and AAV. It is only necessary to determine whether such differences exist and, if they do, whether similarities or differences predominate. The inquiry is one of linguistic, not theological, interpretation. The difficulty of this inquiry is also reduced by the nature of the procedures described in NOTs and AAV. Both works deal, not with abstract matters of religious principle, but with [**13] concrete applications laid out step-by-step. If A happens, the student auditor is told, do B. At this level of examination, the similarities between NOTs and AAV overwhelm any differences between them. The AAV and NOTs procedures treat the same conditions in the same ways by use of the same commands and steps. The two works clearly express substantially the same ideas.

Defendants, in any event, have rendered the application of the extrinsic test unnecessary by admitting, at least for the purposes of this application for a preliminary injunction, that the procedure described in AAV is substantially similar to that described in NOTs. For example, the Advanced Ability Center ("AAC"), run by the new Church, published a price list in its Journal in which the "Name Used by Church of SCN" is given for each "Name of Service at AAC," see, e.g., The Journal of the Advanced Ability Center, Vol. 1 No. 4, May-June 1984 at 31. On this list, under "Training," item seven is the AAC's "Advanced Ability 5 Pro Auditor's Crse." The corresponding Church of Scientology entry is "NOTs Auditor Course." As another example, at the November 21, 1985 hearing on plaintiff's first application for a [**14] preliminary injunction, a videotape was played in which defendants Mayo and Zegel both said that the techniques and procedures offered at the AAC were standard Scientology services, Reporter's Transcript at 56-57, but had to be given different names because the Church of Scientology had registered their trademark in the name "Scientology," id. at 58-59. On the tape, Zegel explained that "it's not an interpretation or a reinterpretation of the material; a very precise application and exactly the way the material was laid out, just legally we will be in jeopardy if we call it Scientology," id. at 59. Mayo claimed that the tape was made under false pretenses, but did not deny the truth of the statements made in it.

Having determined that NOTs and AAV express substantially the same idea, the Court must apply the intrinsic test for similarity of expression. See Sid & Marty Krofft, at 1164. Defendants argue that, by this test, the two works are not substantially similar because NOTs contains more headings than AAV, the discussions of individual issues vary in length between the two works, and the order and sequence of subject matter are not alike. New Church defendants' Memorandum [**15] of Points and Authorities in Support of Motion to Dismiss at 7. This analysis, however, resembles the extrinsic test, cf. Sid & Marty Krofft at 1166; the intrinsic test depends not on dissection of the works, but on "the response of the ordinary reasonable person," id. at 1164.

Keeping in mind the similarities required by the subject matter of the two works, and scrupulously avoiding any evaluation of the religious doctrine contained therein, this Court cannot conclude that the ordinary reasonable person would find NOTs and AAV substantially similar in expression. This finding is different from but not inconsistent with the Court's finding of substantial similarity that led to the imposition of the first preliminary injunction in this case in November 1985. At that time, the Court concluded, as above, that the two documents described the same procedure. The Court further concluded, and remains convinced, that nobody could have created AAV without having a copy of NOTs at hand. Such a conclusion does not necessarily imply a finding of substantial similarity of expression justifying an injunction under *17 U.S.C. § 502*(a).

NOTs and AAV do share a number of similarities of [**16] expression. Like NOTs, AAV consists of numbered "series"; while NOTs is apparently in this format because [*521] it was originally issued piecemeal in a series of bulletins as research on the technology progressed, there is no evident reason for AAV to be in this format except to more closely resemble NOTs. While the sequence of topics dealt with in AAV and NOTs is similar, there are differences. Whether the sequence is dictated by the demands of the subject matter is not clear.

AAV is written in much the same informal style as NOTs, and the two works have a number of sentences and images in common. For example, NOTs notes that

"stress is also a heavy button," NOTs Series 6, page 1, while AAV says that "Stress can be a heavy button," AAV Series 8. In NOTs, certain entities are described as saying "Yah, yah, I'm your nemesis . . .," NOTs Series 7, page 3; in AAV they say "'Yeah, I'm your nemesis' or whatever," AAV Series 8. Similarities like these are found throughout the documents. However, the bulk of AAV consists of text not found in NOTs. The actual percentage of text that appears to have been copied verbatim is very small, although a much larger proportion of AAV seems to be a paraphrase [**17] of NOTs. In summary, the similarities between the two documents raise serious questions going to the merits of plaintiffs' claim of copyright infringement, but are not so clear as to require a finding of a reasonable likelihood of success.

IV. The Balance of Hardships

Since plaintiffs have shown only a possibility of eventual success on their claim of copyright infringement, they must demonstrate that the hardship to defendants that would result from the granting of an injunction is exceeded by the hardship to plaintiffs should their application be denied. *Apple Computer, Inc. v. Formula International Inc., 725 F.2d 521, 523 (9th Cir. 1984).* A preliminary injunction could and very likely would cause irreparable injury to defendants. Defendants and the adherents of the new Church are likely to be prevented from practicing their religion by the issuance of an injunction. While in theory the new Church would be permitted to practice -- and could not, of course, be enjoined from practicing -- the auditing procedures described in AAV, in practical effect they would find this practice significantly chilled by the fear that whatever materials they used might violate an injunction. [**18] The first preliminary injunction in this case apparently put the new Church's Advanced Ability Center out of business. A very strong showing of hardship to plaintiffs would be required to justify the imposition of an injunction so severely affecting defendants' constitutional rights to practice their religion unhindered.

Balanced against this harm of constitutional proportions is plaintiffs' fear that their confidential scriptures will be made public. However, defendants have repeatedly expressed their own opposition to the publication of the advanced technology of Scientology, so the risk of this injury seems remote. In addition, if it was defendants' intention to make the technology public, they could do so without infringing plaintiffs' copyright by creating and publishing a noninfringing description of the procedure.

Plaintiffs also expect to suffer pecuniary damage through the loss of parishioners' fees if the lack of an injunction allows the new Church to lure adherents away by offering the same services more cheaply. It is apparent that many new Church adherents were once members of the Church, and that there is competition for members and for the fees that they pay for services, [**19] between the two groups. Until enjoined in November 1985, defendant Mayo and the new Church offered adherents standard Scientology services for less than the prices charged by the Church. The Church will undoubtedly lose revenues if the new Church is once again able to compete for parishioners. It is unclear how much, if any, of this loss could be traced to copyright infringement and how much to defendants' ability to offer the same procedures. In any event, monetary damages are available to redress such injury.

Finally, plaintiffs fear the loss of control over the integrity of their materials. They claim that defendants are modifying the procedure by revising NOTs, resulting not [*522] only in spiritual harm to adherents of the new Church, but also in damage to the Church's reputation. The new Church clearly advertises its procedure to be the same as that offered by the Church; if the procedure actually delivered by the new Church is somehow less effective than that offered by the Church, plaintiffs' reputation may suffer injury. Again, however, this injury would result more from defendants' ability to employ a procedure not subject to copyright protection than from infringement of the copyright. [**20]

On balance, it appears that the potential hardship from interference with defendants' religious freedom that would result from a preliminary injunction in this case exceeds the possible injury to plaintiffs if the injunction does not issue. In the absence of a showing of a reasonable likelihood of plaintiffs' success on the merits of their claim of copyright infringement, plaintiffs' application for a preliminary injunction must be, and hereby is, denied.

IT IS SO ORDERED.

RELIGIOUS TECHNOLOGY CENTER and CHURCH OF SCIENTOLOGY INTERNATIONAL, INC., Plaintiffs-Appellees, v. LARRY WOLLERSHEIM, et al., Defendants, and CHURCH OF THE NEW CIVILIZATION, HARVEY HABER, DEDE REISDORF, JON ZEGEL and DAVID MAYO, Defendants-Appellants

No. 85-6547

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

796 F.2d 1076; 1986 U.S. App. LEXIS 27912

August 8, 1986, Filed

PRIOR HISTORY: [**1]

An Appeal from the United States District Court for the Central District of California, Hon. Mariana R. Pfaelzer, Judge Presiding.

D.C. No. CV 85-7197-MRP.

CORE TERMS: church, injunctive relief, new church, adherent, trade secret, treble damages, higher level, trade secrets, injunction, equitable relief, injunctive, stolen, Clayton Act, antitrust, religious, legislative history, state law, equitable, preliminary injunction, racketeering activity, theft, predicate, engrams, organized crime, antitrust laws, private party, technology, competitor, ordering, exposure

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JUDGES: Pregerson, Poole, and Thompson, Circuit Judges.

OPINIONBY: PREGERSON

OPINION: [*1077] PREGERSON, Circuit Judge.

The Church of the New Civilization ("new church") is a splinter from the Church of Scientology ("Church"). The Church alleged that certain scriptural materials offered by the new church were copies of materials stolen from the Church. Recognizing federal jurisdiction under the Racketeer Influenced and Corrupt Organization Act ("RICO"), the district court held that the Church's materials constituted a trade secret and granted the Church a preliminary injunction ordering the new church to desist from using or disseminating the disputed materials.

We reverse the district court's order granting a preliminary injunction. Pursuant to this court's order, the district court advised that it issued its preliminary injunction "on both the plaintiffs' *18 U.S.C. §§ [**2] 1861*-1968 [1961-1968] ("RICO") claim and on plaintiffs' state law trade secrets claim." We resolve the appeal, therefore, under both these theories. We hold that injunctive relief is not available to a private plaintiff in a civil RICO action. Additionally, we hold that the California courts would conclude that sacred scriptures do not meet the definition of a trade secret under California law.

FACTS

The Church of Scientology teaches that a person's behavior and well-being are improved by removing "engrams" from the unconscious mind. Engrams are impressions recorded by the unconscious mind in times of trauma in this life or in previous lives. Engrams return in moments of similar stress to the detriment of the person's behavior. Removing engrams from the unconscious permits the person's analytical mind to function unhindered.

Engrams are located and purged through "auditing." Auditing uses the "technology" and "advanced technology" of the Church. An "auditor" directs a set of structured questions and drills ("rundowns") at the Church adherent. The adherent's responses are measured on a "Hubbard E-meter" which reflects changes in "skin voltage." The auditor's aim is to detect [**3] the "buttons" which indicate a conscious or subconscious response to the rundown and enable the adherent to identify his or her engrams. The adherent must proceed through a series of increasingly sophisticated technologies of closely structured questions and answers to reach "a higher spiritual existence."

The Church asserts that the unsupervised, premature exposure of an adherent to these materials will produce a spiritually harmful effect. n1 The Church keeps the [*1078] higher level materials in secure places, and makes the materials available only to adherents who agree in writing to maintain their confidentiality. The Church stated to the district court that it does "not safeguard these materials from any commercial consideration."

n1 The new church, which follows essentially identical religious precepts and practices to those of the Church, does not dispute this assertion.

Defendant David Mayo was apparently at one time a close associate of Church founder L. Ron Hubbard, and assisted in the preparation [**4] of the Church's higher level materials. n2 Following an acrimonious dispute between Mayo and other senior Church officers, Mayo left the Church and, in July 1983, established the Church of the New Civilization. The new church embraces beliefs and provides counseling and training to its adherents which are essentially identical to those offered by the Church.

n2 The new church asserts that Mayo authored the disputed higher level materials. The Church vigorously disputes this, maintaining that Hubbard created all Church materials.

Hubbard apparently assigned the materials, together with other materials forming the technology and advanced technology of "Scientology" and "Dianetics," to the Religious Technology Center. See *Church of Scientology International v. The Elmira Mission of the Church of Scientology, 794 F.2d 38,* slip op. at 14 (2d Cir. 1986) (Hubbard validly assigned his rights in all Scientology materials to Religious Technology Center). Hubbard apparently intended the Center to be the "trustee of the scriptures" of Scientology. The Center makes available the higher level materials of the advanced technology to Church offices around the world in the form of "packs." Apparently the advanced technology packs at issue here are only available at six Church offices in the world.

Many lower level materials are copyrighted, and these copyrights apparently passed to the Religious Technology Center in Hubbard's will. The trademarks "Dianetics" and "Scientology" are now similarly held by the Center. The higher level materials at issue in this suit have neither copyright nor trademark protection.

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In December 1983, Robin Scott, and two others (all of whom are unrelated to this action) stole certain higher level materials from Church offices in Copenhagen, Denmark. Danish authorities subsequently convicted Scott of burglary. While the stolen materials were returned, the Church maintains that copies were made and that the new church later acquired these copies. The district court found that the higher level materials offered to its adherents by the new church are "essentially identical" to the stolen Church materials. n3

n3 The new church states that it began using its higher level materials in August 1983, before the Scott theft. It claims that Mayo, as the principal original author of the Church's materials, wrote the new church's materials from memory. It also asserts that the new church's materials differ from the Church's materials because they reflect "improvements" recently added by Mayo. The district court rejected Mayo's testimony as not credible. "The court does not believe that anyone, even Mr. Mayo, could have reproduced from memory materials substantially identical to those stolen in Denmark from the church. The documents are too voluminous, too detailed and too nearly identical in substance and wording to have been created by Mr. Mayo without reference to the stolen documents."

The new church asserts that there is no evidence to link the new church to the Scott theft. The Church offered evidence to the district court of international phone calls by new church members around the time of the theft, and produced a handwritten memorandum in which defendant Harvey Haber, then a new church officer, referred to a conversation with a person alleged to be Ron Lawley, a colleague of Scott. The memo then records what appears to be a continuing series of negotiations involving an offer and counteroffer. The memo does not refer to any agreement between the negotiating parties. The Church's complaint alleges that the new church obtained the materials from Scott's colleagues in February 1984.

Because we dissolve the injunction on jurisdictional grounds, we express no view whether the new church's materials are copies of the Church materials stolen by Scott.

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The present suit was filed on November 4, 1985. The Church states that, in late October 1985, it learned that the new church intended to disseminate the contents of

the materials stolen by Scott "in a non-confidential setting." Counsel for defendant Larry Wollersheim, a former Church adherent who has a pending California state tort action against the Church, had obtained copies of the higher level materials during the deposition of defendants Margaret Singer and Richard Ofshe. Singer [*1079] had obtained the materials from defendant Leta Schlosser. Schlosser testified that she had received the materials from an adherent of the new church. On November 1, 1985, the Los Angeles Superior Court hearing Wollersheim's suit against the Church refused a Church request to seal its records including the Church's higher level materials. Three days later, the Church brought this suit in federal court against the new church, its principal officers, Wollersheim, his counsel, and those allegedly involved in passing the materials to Wollersheim's counsel. The suit based jurisdiction on the RICO claim and stated six pendent California state law claims including misappropriation of trade secrets. [**7]

The district court first granted a temporary restraining order preventing the state court plaintiff and the new church from disclosing the confidential materials. The court then conducted an evidentiary hearing lasting two days, and, on November 23, 1985, granted the Church the preliminary injunction that prompted this appeal.

The injunction prohibited the new church, its officers "and those persons in active concert or participation with them or who are acting at their request or insistence . . . from using, distributing, exhibiting or in any way publicly revealing" any version of certain enumerated higher level Church materials. The enjoined parties were required to return all such material in their possession to the court under seal. The court also required the Church to post a bond of $100,000.

In supplementary findings of fact, the district court stated that it "views this as a stolen document case." The court recognized that both parties accepted that adherents must be exposed to the materials in strict progression. On this basis, the court concluded that Church adherents may suffer irreparable harm from the unsupervised dissemination of the materials, thus justifying preliminary [**8] injunctive relief. In additional comments from the bench, the district court held the materials to constitute a misappropriated trade secret but noted that the Church was not arguing commercial disadvantage as an injury. The court also recognized its jurisdiction under RICO "based on the idea that the documents were stolen and that they found their way into their present use."

The new church filed a timely appeal. We denied the new church a stay pending appeal, but heard the appeal on an expedited schedule. We have jurisdiction under *28 U.S.C. § 1292*(a)(1).

STANDARD OF REVIEW

Determining whether a private remedy should be afforded for violation of duties mandated by a statute that does not expressly create a suitable private remedy causes the concepts of "standing," "subject matter jurisdiction," and "implication of a private cause of action" to "overlap . . . even more than they ordinarily would." *National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 455-56, 38 L. Ed. 2d 646, 94 S. Ct. 690 (1974).* The issue is best described as falling within the generic problem of "federal jurisdiction" without attempting to characterize it with [**9] greater specificity. See generally 13 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3531.6 at 494-506 (2d ed. 1984). We are obligated to raise a jurisdictional issue sua sponte as a threshold question before considering a matter on its merits. See *Solano v. Beilby, 761 F.2d 1369, 1370 (9th Cir. 1985); Othman v. Globe Indemnity Co., 759 F.2d 1458, 1462-63 (9th Cir. 1985).* Interpretation of the statute under which an injunction has been issued is a question of law, which we review *de novo. California ex rel. Van de Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1308, 1312 (9th Cir. 1985).* We review matters of state law *de novo. In re McLinn, 739 F.2d 1395, 1403 (9th Cir. 1984)* (en banc).

[*1080] I. Is Injunctive Relief Available to a Private Party in a Civil RICO action?

A.

The Church's basis for federal jurisdiction is *18 U.S.C. § 1964* ("civil RICO"). n4 Civil RICO permits both the government and private plaintiffs to sue for violations of substantive provisions of the Racketeer Influenced and Corrupt Organizations Act, which formed Title IX of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. [**10] 941 (1970), as amended, codified as *18 U.S.C. §§ 1961*-1968. Neither party questioned before the district court, nor in briefs before this court, whether injunctive relief is available under civil RICO. We ordered the parties to submit supplemental briefs on this issue.

n4 The Church's complaint alleges federal jurisdiction under *RICO, 18* U.S.C. § 1964. The complaint also alleges jurisdiction under *28 U.S.C. §§ 1332* and 1339, covering diversity, patent, trademark, and copyright matters, and pendent jurisdiction over several state claims. The parties are not diverse, both being California corporations. The

complaint makes no substantive allegations of patent, copyright, or trademark infringement. Thus, RICO provides the only basis for federal court jurisdiction over the Church's complaint.

Civil RICO is directed at "racketeering activity," which it defines as any act "chargeable" under several generically described state criminal laws; any act "indictable" under numerous specific federal criminal provisions, [**11] including mail and wire fraud; and any "offense" involving narcotics or bankruptcy or securities fraud "punishable" under federal law. *18 U.S.C. § 1961*(1). Civil RICO prohibits the use of income derived from a "pattern of racketeering activity" in relation to an "enterprise" engaged in or affecting interstate commerce. *18 U.S.C. § 1962*(a). A "pattern" of racketeering activity "requires at least two acts of racketeering activity." *18 U.S.C. § 1961*(5). Broad criminal penalties are provided for RICO violations. See *18 U.S.C. § 1963.* In addition, Congress provided for a civil enforcement scheme, including private treble damages actions. See *18 U.S.C. § 1964.*

Despite repeated efforts by courts to limit the reach of civil RICO private damages actions, it is clear that suits alleging the requisite predicate acts are entitled to federal court jurisdiction, even if the acts are of a common-garden variety far removed from what is normally regarded as "organized crime" activity. See *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 105 S. Ct. 3275, 3284-85, 87 L. Ed. 2d 346 (1985)* (civil RICO suit may be based on commercial contract dispute involving two allegations of mail and [**12] wire fraud; civil RICO jurisdiction requires no prior criminal convictions for predicate acts nor any showing of "racketeering injury.") The Church's complaint alleges that the higher level materials are the Church's trade secret which the new church misappropriated through several acts of mail or wire fraud constituting a pattern of racketeering activity. n5 The complaint characterizes the contacts between the new church and Wollersheim and his counsel as a conspiracy within RICO's definition of "enterprise." The Church's complaint also includes a claim for money damages under RICO. Thus, the Church apparently satisfies the federal jurisdictional requirements for a civil RICO damages action. n6

n5 The new church characterizes the predicate acts as the Copenhagen burglary and the receipt of the stolen materials. It argues that since the theft was not punishable in the United States, it cannot be a predicate act, and thus the Church has not demonstrated a pattern of racketeering. Even if the Danish theft falls outside RICO, the Church alleges sufficient telephone and mail contacts between the new church and Scott's group to satisfy the pattern requirement through several predicate acts of mail and wire fraud.

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n6 While the complaint states a claim for money damages, at the hearing on the motion for the preliminary injunction, the Church denied that it had suffered financially from the new church's behavior. Rather, the Church characterized its injury as the harm caused to its adherents from premature, unsupervised exposure to the higher level materials. It is not clear whether such an injury is sufficient to allow the Church to press even a civil RICO damages action.

In Sedima, the Supreme Court stated that "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. . . . Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise." *105 S. Ct. at 3285-86.* The district court found such a "nexus" between the Scott theft and the new church. The court did not expressly find a further nexus between the new church's actions via the predicate acts and the injury to the Church adherents. Sedima apparently requires such a nexus for civil RICO damages "standing."

Assuming that this nexus can be established, the injury alleged by the Church may not be compensable under civil RICO. In a footnote in Sedima, the Court explains that civil RICO damages "include, but are not limited to . . . competitive injury." *105 S. Ct. at 3286 n.15.* In disagreeing with the dissent's attempt to limit civil RICO standing, Sedima apparently embraces the notion that "harm proximately caused by the forbidden conduct" is compensable. Id. The court gives no indication whether nonfinancial proximate harm, such as the emotional-type injury alleged by the Church, is compensable under civil RICO. Since we are reviewing only the injunctive relief granted to the Church, we need not decide this issue. However, if the action proceeds to trial on the Church's damages claim, the district court will then be obliged to confront the problem.

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[*1081] B.

No appellate court has expressly determined whether civil RICO permits a private party to secure injunctive relief. The Fourth Circuit has implied that injunctive relief is not available to a private civil RICO plaintiff, but reserved ultimate judgment on the matter. See *Dan River, Inc. v. Icahn, 701 F.2d 278, 290 (4th Cir. 1983)* ("While we do not undertake to resolve the question . . . in light of the most recent indications from the Supreme Court, Dan River's action for equitable relief under RICO might well fail to state a claim."). In dictum in a moot appeal in *Trane Co. v. O'Connor Securities, 718 F.2d 26, 28 (2d Cir. 1983)* the Second Circuit stated: "We have the same (serious) doubts [as courts such as the Fourth Circuit in Dan River] as to the propriety of private party injunctive relief. . . ." More recently, in *Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 489 n.20 (2d Cir. 1984)*, rev'd, *473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*, the Second Circuit observed that "it thus seems altogether likely that § 1964(c) as it now stands was not intended to provide private parties injunctive relief." However, the precedential [**15] value of this conclusion, itself somewhat equivocal, is thrown into considerable doubt by the Supreme Court's total rejection of the conclusions drawn by the Second Circuit from its historical analysis of the RICO statute. See *473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346.*

In contrast, the Eighth Circuit, expressly without resolving the issue, has hinted that injunctive relief may be available either under civil RICO or under a court's general equitable powers. See *Bennett v. Berg, 685 F.2d 1053, 1064 (8th Cir. 1982)* (citing a law review article which supports the availability of injunctive relief), aff'd on rehearing, *710 F.2d 1361* (8th Cir.) (en banc), cert. denied, *464 U.S. 1008, 78 L. Ed. 2d 710, 104 S. Ct. 527 (1983)*. n7 See also *USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 97-98 (6th Cir. 1982)* (affirming grant of injunctive relief to private plaintiff on pendent state claims where RICO provided federal jurisdiction base).

n7 The Eighth Circuit panel cited Blakey and Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts -- Criminal and Civil Remedies, *53 Temple L.Q. 1014, 1038 nn. 132-33 (1980)* (statutory language provides for equitable relief). *685 F.2d at 1064.*

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A similar disunity of views exists among those district courts that have confronted the issue. The only three published decisions explicitly to hold that injunctive relief is not available to a civil RICO plaintiff are all from the Northern District of Illinois. See *Miller v. Affiliated Financial Corp., 600 F. Supp. 987, 994 (N.D. Ill. 1984); DeMent v. Abbott Capital Corp., 589 F. Supp. 1378, 1382-83 (N.D. Ill. 1984);* and *Kaushal v. State Bank of India, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983).* See also *Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 85-86 (W.D.N.Y. 1982)* (statutory attachment not available to private civil RICO plaintiff).

Two district courts have held that injunctive relief is available to a private civil RICO plaintiff. See *Aetna Casualty and Surety Co. v. Liebowitz, 570 F. Supp. 908, 910-11 (E.D.N.Y. 1983),* aff'd on other grounds, *730 F.2d 905 (2d Cir. 1984);* and *Chambers Development Co. v. Browning-Ferris Industries, 590 F. Supp. 1528, 1540-41 [*1082] (W.D. Pa. 1984).* Additionally, several district courts have simply assumed the availability of injunctive relief to civil RICO plaintiffs. See *USACO Coal Co. v. Carbomin [**17] Energy, Inc., 539 F. Supp. 807, 814-16* (W.D. Ky.), aff'd on other grounds, *689 F.2d 94 (6th Cir. 1982); Marshall Field & Co. v. Icahn, 537 F. Supp. 413, 420 (S.D.N.Y. 1982); Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1014 (S.D. Tex. 1981).*

Still other district courts have raised, but managed to avoid deciding the issue. See *McLendon v. Continental Group, Inc., 602 F. Supp. 1492, 1518-19 (D.N.J. 1985)* ("The law [in this area] is in great flux."); *Kaufman v. Chase Manhattan Bank, N.A., 581 F. Supp. 350, 359 (S.D.N.Y. 1984).*

Thus, we must decide essentially as a matter of first impression for an appellate court whether injunctive relief may be granted to a private plaintiff under civil RICO. When interpreting a statute, the plain meaning of the words used is controlling absent "a clearly expressed legislative intent to the contrary." *United States v. Turkette, 452 U.S. 576, 580, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981)* (quoting *Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980)); Powell v. Tucson Air Museum Foundation of Pima County, 771 [**18] F.2d 1309, 1311 (9th Cir. 1985).* When the language of a statute is ambiguous, we construe the statute in the light of Congress's purpose in enacting it as expressed in the legislative history. See *Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 9-10, 48 L. Ed. 2d 434, 96 S. Ct. 1938 (1976).*

C.

Section 1964 has four parts. n8 Part (c) was added late in RICO's legislative passage through Congress. The bill passed by the Senate included only the present parts (a), (b), and (d). See infra slip op. pages 19-20; *Sedima, 105 S. Ct. at 3280-81.*

n8 *18 U.S.C. § 1964* states:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

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Part (a) is a broad grant of equitable jurisdiction to the federal courts. Part (b) permits the government to bring actions for equitable relief. Part (d) grants collateral estoppel effect to a criminal conviction in a subsequent civil action by the government. Part (c), the private civil RICO provision, states that a private plaintiff may recover treble damages, costs and attorney's fees. In contrast to part (b), there is no express authority to private plaintiffs to seek the equitable relief available under part (a).

Admittedly, part (c) also does not expressly limit private plaintiffs "only" to the enumerated remedies, nor does part (a) expressly limit the availability of the illustrative [*1083] equitable remedies to the government. See Strafer, Massumi, and Skolnick, Civil RICO in the Public Interest: "Everybody's Darling," *19 Am. Crim. L. Rev. 655, 710 (1982).* However, the inclusion of a single statutory reference to private plaintiffs, and the identification of a damages and fees remedy for such plaintiffs in part (c), logically carries the negative implication that no other remedy was intended to be conferred on private plaintiffs.

As the Supreme [**20] Court has emphasized, Congress expressly admonished that RICO "be liberally construed to effectuate its remedial purposes," and that "the statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Sedima, 105 S. Ct. at 3286;* see also, *Turkette, 452 U.S. at 587.* In this spirit, those sympathetic to a private equitable remedy under civil RICO have suggested two other readings of the statute. The Church urges us to adopt either or both of these constructions of section 1964.

First, the Church suggests that it is significant that the treble damage clause of section 1964(c) is preceded by "and" rather than "to." Thus, it is suggested, all appropriate relief, including the equitable remedies of part (a), are available to private plaintiffs because there is no clear statutory limitation. Moreover, the Church argues, there is no good reason for Congress denying victims equitable relief while permitting them damages relief. See Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, *58 Notre Dame L. Rev. 237, 332 (1982);* Blakey and Gettings, Racketeer Influenced and [**21] Corrupt Organizations (RICO): Basic Concepts -- Criminal and Civil Remedies, *53 Temple L.Q. 1014, 1038 n.133 (1980).* No court has accepted this reading. Indeed, two courts have been vehement in their rejection of this analysis. See *Sedima, 741 F.2d at 489 n.20* ("rather remarkable argument"); *Kaushal, 556 F. Supp. at 582* ("bizarre and wholly unconvincing as a matter of plain English and the normal use of language."). See also infra note 11.

Second, the Church asserts that the variation in language used in parts (a) and (b) of section 1964 indicate that Congress did not intend to limit the inherent powers of federal courts to grant equitable relief in suitable cases. The argument is made that because part (b) grants the Attorney General the express power to seek temporary equitable relief, other parties are permitted to seek permanent equitable relief. Moreover, the Church contends, if the availability of equitable relief under section 1964 were determined solely by part (b), part (a) would become superfluous. See J. Fricano, Civil RICO -- An Antitrust Plaintiff's Considerations, in 1 Current Problems in Federal Civil Practice 827-28 (PLI, 1983); [**22] *Chambers, 590 F. Supp. at 1540.*

The Church develops this textual argument with particular vigor. It argues that part (a), alone of the subparts of section 1964, is general in theme and apparently unrestricted in application. Its plain words place no limit on the class or category of litigants who might avail themselves of the remedies it makes available under RICO. While the other subparts of section 1964 provide for specific relief to specific parties, the Church observes that they give no indication that part (a) is anything other than a simple and broad grant of jurisdiction. See Belgard, Private Civil RICO Plaintiffs Are Entitled to Equitable Relief under § 1964(a), 2 RICO Law Rep. 537, 537-38 (1985). The Church reads section 1964(b) as permission for the government to secure injunctive relief without satisfying the traditional equity tests of irreparable harm and inadequacy of alternative remedy at law. See *United States v. Cappetto, 502 F.2d 1351, 1358-59 (7th Cir. 1974),* cert. denied, *420 U.S. 925, 95 S. Ct. 1121, 43 L. Ed. 2d 395 (1975).* Thus, the Church asserts, part (b) does not restrict RICO injunctive relief to the government, but merely sets aside [**23] for civil RICO cases the traditional rule that only a victim may enjoin a crime. See *In re Debs, 158 U.S. 564, 582-84, 15 S. Ct. 900, 39 L. Ed. 1092 (1895).* Thus, the Church would have us read part (a) as sufficient for a [*1084] federal court to grant an injunction to a private RICO plaintiff even if part (c) had never been added to section 1964.

This latter construction of section 1964 is certainly a plausible reading of the statutory language. However, our review of Congress' intent in enacting civil RICO convinces us that the Church is incorrect. The legislative history mandates us to hold that injunctive relief is not available to a private party in a civil RICO action. The Supreme Court's apparent endorsement of the conclusion that we reach here reinforces this reading of the statute. See *Sedima, 105 S. Ct. at 3280* ("The civil remedies in the bill passed by the Senate, S. 30, were limited to injunctive actions by the United States and became §§ 1964(a), (b), and (d).").

D.

RICO has a long legislative lineage. The Organized Crime Control Act of 1970 was derived from S. 30, 91st Cong., 1st Sess., 115 Cong. Rec. 769 (1969). Title IX of the Act, RICO, was added [**24] to S. 30 by the Senate. The substance of Title IX was contained in an earlier Senate bill, S. 1861, 91st Cong., 1st Sess., 115 Cong. Rec. 9,568-71 (1969). See also 116 Cong. Rec. 591 (remarks of Sen. McClellan). Neither S. 1861 nor S. 30 contained a private civil cause of action. An earlier predecessor of RICO, S. 1623, 91st Cong. 1st Sess., 115 Cong. Rec. 6,995-96 (1969), did contain a private civil cause of action based closely on the Clayton Act, providing explicitly for injunctive relief as well as for treble damages. S. 1623 §§ 3(c), 4(a). That bill was itself patterned on two earlier Senate bills, S. 2048 and S. 2049, 90th Cong. 1st Sess. (1967), both of which provided for private civil action similar to that in S. 1623. See generally, Belgard, 2 RICO Law Rep. at 538 (quoting relevant provisions of these bills).

The Senate Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary replaced S. 1623 with S. 1861 apparently in part because S. 1861 provided broader governmental civil relief, such as the investigative demand, and was in other ways a more comprehensive bill. See Hearings on Measures Relating to Organized Crime Before the Subcommittee [**25] on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 387-88, 407-08 (1969).

There were also a number of House predecessors to RICO which paralleled S. 30. See H.R. 19215, 91st Cong. 2d Sess. 116 Cong. Rec. 31,914 (1970). H.R. 19215 included a more complete private cause of action section than that eventually inserted by the House, and explicitly allowed for private party injunctive relief.

While the Act for the most part originated in the Senate, the civil RICO provision permitting suit by private persons, *18 U.S.C § 1964*(c), originated in the House. See *Sedima, 105 S. Ct. at 3280.* During hearings on S. 30 before the House Judiciary Committee, Representative Steiger proposed the addition of a private treble damages action "similar to the private damage remedy found in the antitrust laws. . . . Those who have been wronged by organized crime should at least be given access to a legal remedy. In addition, the availability of such a remedy would enhance the effectiveness of title IX's prohibitions." Organized Crime Control: Hearings on S. 30, and related proposals, before Subcommittee No. 5 of the House Committee on the Judiciary [**26] , 91st Cong., 2d Sess. 520 (1970) ("House Hearings"). The American Bar Association also proposed an amendment "based upon the concept of Section 4 of the Clayton Act." *Id. at 543-44, 548, 559;* see 116 Cong. Rec. 25,190-91 (1970); *Sedima, 105 S. Ct. at 3280-81.*

Significantly, Representative Steiger's proposal, like those in the rejected Senate bills, provided explicitly for a private injunctive remedy under section 1964(a). House Hearings at 521 (subsection (c) of proposal of Rep. Steiger). The legislative history is silent as to why the subcommittee rejected this language and explicitly created only the private action for treble damages which

was eventually enacted as section 1964(c). See 116 Cong. Rec. 25,190 (remarks of Sen. McClellan welcoming [*1085] House addition of private treble damages remedy). The adopted statutory language was drawn from H.R. 19586, 91st Cong., 2d Sess. 56 (1970), one of the two House bills that paralleled S. 30. In choosing H.R. 19586 over H.R. 19215, the House apparently explicitly rejected a private injunctive relief provision.

E.

The Church's argument rests on the assertion that the private treble damages remedy [**27] provided by section 1964(c) is additional to the equitable RICO remedies made available to private plaintiffs by section 1964(a). The legislative history offers some support for this thesis. Introducing the bill during House debate, the House sponsor, Representative Poff, stated:

Courts are given broad powers under the title to proceed civilly, using essentially their equitable powers, to reform corrupted organizations, for example, by prohibiting the racketeers to participate any longer in the enterprise, by ordering divestitures, and even by ordering dissolution or reorganization of the enterprise. In addition, at the suggestion of the gentleman from Arizona (Mr. Steiger) and also the American Bar Association and others, the committee has provided that private persons injured by reason of a violation of the title may recover treble damages in Federal courts -- another example of the antitrust remedy being adapted for use against organized criminality.

116 Cong. Rec. 35,295 (1970) (emphasis added). Earlier, during Senate floor debate on the bill before the addition of the present section 1964(c), Senator McClellan, the bill's principal Senate sponsor, described [**28] the value of civil RICO thus:

Since enactment of the Sherman Antitrust Act in 1890, the courts have used several equitable remedies . . . to implement the language of *15 U.S.C. sections 1* and 2. I believe, and numerous others have expressed a similar belief, that these equitable devices can prove effective in cleaning up organizations corrupted by the forces of organized crime.

Id. at 592.

However, two separate episodes from the history of civil RICO's legislative passage convince us that the conclusions the Church would have us draw from these congressional statements do not reflect Congress' intent in section 1964. First, the House rejected an amendment, described as "an additional civil remedy," which would expressly permit private parties to sue for injunctive relief under section 1964(a). Second, in the very next year after RICO's enactment, Congress refused to enact a bill to amend section 1964 and give private plaintiffs injunctive relief.

During debate on the House floor, Representative Steiger offered an amendment that would have allowed private injunctive actions, fixed a statute of limitations, and clarified venue and process requirements. [**29] 116 Cong. Rec. at 35,346; see also id. at 35,227-28. n9 The proposal was greeted with some hostility because it had not been reviewed [*1086] in committee, and Representative Steiger withdrew it without a vote being taken. Id. at 35,346-47. Representative Steiger's withdrawal was in response to remarks by the bill's House sponsor. Representative Poff stated:

Mr. Chairman, I want to pay special tribute to the gentleman in the well for having raised the issue which his amendment defines. It does offer an additional civil remedy which I think properly might be suited to the special mechanism fashioned in title IX. Indeed, I am an author of an almost identical amendment. It has its counterpart almost in haec verba in the antitrust statutes, and yet I suggest to the gentleman that prudence would dictate that the Judiciary Committee very carefully explore the potential consequences that this new remedy might have in all the ramifications which this legislation contains and for that reason, I would hope that the gentleman might agree to ask unanimous consent to withdraw his amendment from consideration with the understanding that it might properly be considered [**30] by the Judiciary Committee when the Congress reconvenes following the elections or some other appropriate time.

Id. at 35,346 (emphasis added). The House then passed the bill, with the treble damages provision in the form recommended by the Committee. Id. at 35,363-64. The Senate did not seek a conference and adopted the bill as amended in the House. Id. at 36,296.

n9 Representative Steiger's amendment was very specific. The present section 1964(c), the private treble damages remedy, which the House had already agreed to add to the bill, and the present part (d), concerning collateral estoppel, would become parts (e) and (g) respectively of section 1964. 116 Cong. Rec. at 35,346. The new part (c) proposed by Representative Steiger read:

(c) Any person may institute proceedings under subsection (a) of this section. In any proceeding brought by any person under subsection (a) of this section, relief shall be granted in conformity with the principles which govern the granting of injunctive relief from threatened loss or damages in other cases. Upon the execution of proper bond against damages from an injunction improvidently granted and a showing of immediate danger of irreparable loss or damage, a preliminary injunction may be issued in any action before a determination thereof upon its merits.

Id. A new part (d) would permit the government to sue for damages; proposed part (f) would allow government intervention in private suits of "general public importance"; and proposed part (h) provided for a five year statute of limitations tollable during the pendency of a government or private suit on a similar matter. Id.

[**31]

In the next term of the Senate, the same amendment as that offered by Representative Steiger on the House floor during debate on the RICO bill, see supra note 9, was proposed as a bill to amend the now enacted legislation. S. 16, 92nd Cong., 1st Sess. (1971). See Victims of Crime, Hearing before the Subcommittee on Criminal Laws and Procedures of the Senate Committee of the Judiciary, 92nd Cong., 1st Sess. 3 (1972). The new bill "would expand the available civil remedies" since "now only the United States can institute injunctive proceedings." Id. at 158. (Statement of Richard Velde, Associate Administrator, Law Enforcement Assistance Administration) (emphasis added). n10

n10 While post-enactment legislative history is not by any means conclusive, it cannot merely be ignored. *North Haven Board of Education v. Bell, 456 U.S. 512, 530-35, 72 L. Ed. 2d 299, 102 S. Ct. 1912 (1982).*

The Senate Judiciary Committee reported favorably on S. 16, 92d Cong., 2d Sess., 118 Cong. Rec. 29,368-69 (1972). [**32] The committee report noted that RICO as enacted, provided for private treble damages actions, and that the new bill would supplement this and "authorize private injunctive relief from racketeering activity." S. Rep. No. 1070, 92d Cong., 2d Sess. 10 (1972) (emphasis added). During Senate floor debates on S. 16, Senator McClellan observed that the bill would add to existing private RICO remedies by "authorizing private injunctive relief from racketeering activity." 118 Cong. Rec. 29,370 (1972). See also id. (remarks of Senator Hruska). Although the Senate passed S. 16, the bill never passed the House, and its substance never became law.

The clear message from the legislative history is that, in considering civil RICO, Congress was repeatedly presented with the opportunity expressly to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress rejected the addition of any such provision.

F.

This clear message is reinforced by recalling that civil RICO was intended to provide a private cause of action modeled on the analogous provision of the antitrust laws. See 116 Cong. Rec. 592 (remarks of Sen. McClellan); [**33] *id. at 602* (remarks of Sen. Hruska) (RICO's civil provisions employ "time-tested antitrust remedies"); S. Rep. No. 617, 80-82, 125, 160 (1969); 116 Cong. Rec. 35,295 (Private treble damages provision is "another example of the antitrust remedy being adapted for use [*1087] against organized criminality.") (remarks of Rep. Poff); House Hearings at 543-44 (testimony of ABA President Wright); *Sedima, 105 S. Ct. at 3282* ("The clearest current in [the legislative] history is the reliance on the Clayton Act model. . . .").

The language of the treble damages antitrust remedy, section four of the Clayton Act, *15 U.S.C. § 15*(a), is similar to that of civil RICO. n11 The Supreme Court has explicitly held that the language of section 4 precludes private injunctive relief. See *Paine Lumber Co. v. Neal, 244 U.S. 459, 471, 61 L. Ed. 1256, 37 S. Ct. 718 (1917).* Cf. *Minnesota v. Northern Securities Co., 194 U.S. 48, 70-71, 48 L. Ed. 870, 24 S. Ct. 598 (1904)* (no private right to injunctive relief under section 4 of Sherman Act). Private antitrust plaintiffs can, however, secure injunctive relief only by virtue of a separate section of the Clayton Act which expressly [**34] provides for private equitable actions. See Section 16 codified at *15 U.S.C. § 26.* n12 RICO contains no parallel provision to section 16's grant of a private right to injunctive relief.

n11 *15 U.S.C. § 15*(a) provides in pertinent part:

"(A)ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Emphasis added.)

It should be noted that this provision includes the word "and" before stating the remedy. It was the inclusion of this word in civil RICO that prompted the Church and some commentators to conclude that civil RICO permitted private injunctive relief. See supra [Slip Op.] page 18. The fact that the Clayton Act treble damages provision does not extend to private injunctive relief, even with the "and" included, surely undermines the argument that its inclusion in section 1964(c) indicates that injunctive relief is not precluded by that section.

[**35]

n12 *15 U.S.C. § 26* provides in pertinent part:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

A proviso to this section prevents an equitable suit against a common carrier.

Presumably, had it desired to do so, Congress could have completed the analogy between civil RICO and the antitrust laws by including in civil RICO a private equitable relief remedy like section sixteen of the Clayton Act. That it did not do so, despite [**36] the repeated efforts of several members of Congress, strongly suggests that Congress did not intend to give private civil RICO plaintiffs access to equitable remedies. n13

n13 The Church argues that comparisons with section 16 of the Clayton Act are inappropriate because the Clayton Act also includes a provision, section 15, *15 U.S.C. § 25,* expressly limiting injunctive relief to the government and thus the statutes -- RICO and the Clayton Act -- are not similar. See Belgard 2 RICO Law Rep. at 541, n.13. See also Fricano, Civil RICO at 828-29. This argument is to no avail. The legislative history shows that Congress recognized and accepted the validity of the comparison during the passage of RICO.

In his remarks on the House floor which prompted Representative Steiger to withdraw his late amendment specifically providing injunctive relief to a private RICO plaintiff, Representative Poff stated that Representative Steiger's amendment "has its counterpart almost in haec verba in the antitrust statutes." 116 Cong. Rec. 35,346. See supra page 1086. Representative Poff must have been comparing Representative Steiger's abortive private injunctive relief provision to section 16 of the Clayton Act, the private antitrust injunctive relief provision. Thus, Congress was well aware that civil RICO was not symmetrical with the antitrust laws with respect to private injunctive relief. Congress' rejection of Representative Steiger's amendment is additional proof that Congress deliberately and knowingly excluded private injunctive relief from the arsenal of remedies created by RICO.

[**37]

G.

Further support for the conclusion that injunctive relief is not available under civil [*1088] RICO is found in the Supreme Court doctrine that sharply limits the implication of causes of action or remedies not expressly provided by statute.

It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979); see also *Touche Ross & Co. v. Redington, 442 U.S. 560, 568, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979).*

Where a statute provides an elaborate enforcement scheme that confers authority to sue on both government officials and private citizens, "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens." *Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 14, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981).* "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies [**38] it considered appropriate." *Id. at 15.* Compare Sea Clammers (no private right of action implied in federal environmental statutes) with *Herman & MacLean v. Huddleston, 459 U.S. 375, 380-87, 74 L. Ed. 2d 548, 103 S. Ct. 683 (1983)* (implied remedy under securities

law available because of congressional intent even where cumulative to express remedies).

For civil RICO, there are strong indicia of congressional intent against any implied injunctive relief remedy. Similarly, there is no indication in the language of section 1964 that civil RICO was not intended, as its plain wording states, to limit private plaintiffs only to damages, costs, and fees. Taken together, the legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO. n14

n14 The Church argues that a more appropriate test whether civil RICO implies a private right is that articulated in *Cort v. Ash, 422 U.S. 66, 78, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975).* See Belgard, 2 RICO Law Rep. at 539. Cort posed four "relevant" questions to assist in determining "whether a private remedy is implicit in a statute not expressly providing one." *Cort, 422 U.S. at 78.* We see no conflict between Cort and the more recent line of Supreme Court cases upon which we rely. Applying the Cort factors still produces a ruling adverse to the Church. First, the Church is not "one of the class for whose especial benefit the statute was enacted." Id. (emphasis in original). RICO was aimed principally at protecting the public from organized crime front enterprises, not at enabling a religious organization to prevent the dissemination of doctrinal materials by a rival religious organization. Second, as we have discussed supra, there is substantial "indication of legislative intent, explicit and implicit" against an implied private remedy. Id. Third, while implying an injunctive remedy may be consistent generally with RICO's purpose, in this particular case, we doubt whether this is so. Id. Fourth, to the extent that the dispute here concerns trade secrets misappropriation, "it would be inappropriate to infer a cause of action based solely on federal law." Id.

[**39]

H.

Thus we conclude that Congress did not intend to give private RICO plaintiffs any right to injunctive relief. In reaching this conclusion, we recognize that strong policy arguments can be made to support a right to injunctive relief for private RICO plaintiffs.

It may be that in drawing the line between private equitable relief and private damages, Congress wished to preclude federal courts from interfering with the day-to-day running of businesses at the behest of what might be only a disgruntled competitor. However, this same concern about anticompetitive litigation has been frequently leveled at RICO's treble damages provision. The Supreme Court, despite expressing sympathy for this concern, has rejected it as not consistent with the statute's wording and history. See *Sedima, 105 S. Ct. at 3277-78.*

In contrast, we recognize the force of the Church's argument that a private injunctive remedy would permit an injured party to put an immediate stop to racketeering behavior that threatens his or her business [*1089] with economic destruction before the business has been brought to its knees. While the treble damages remedy is a potent weapon, it necessarily assumes [**40] that economic injury has occurred. The preventive effect of injunctive relief is often a more just remedy. Although civil RICO empowers the government to bring an injunctive suit to protect a threatened enterprise, we recognize that the resources of the United States Attorney's office are limited. Civil RICO deliberately created dual avenues of enforcement -- private and public. We recognize that precluding enforcing parties from employing the weapon of equitable relief partially hamstrings the statute's effect. "Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps," *Sedima, 105 S. Ct. at 3284,* and use of equitable remedies by private parties would frequently result in substantial benefits to society generally. These broad social benefits, such as the dismantling of an illegitimate enterprise, would generally exceed the gain to the private plaintiff from this action, especially where the individual's injury has been ameliorated by treble damages.

Even so, while, on balance, it may well have been desirable for Congress to have extended to private parties the right to injunctive relief under civil RICO, we are convinced that Congress [**41] chose not to do so, and we must respect and follow that judgment. n15

n15 Since the remedy granted to the Church by the district court was beyond the jurisdiction of the court, it is not necessary for our resolution of this appeal to reach the additional jurisdictional questions whether the Church had standing to assert its adherents' "religious injury" caused by the new church's alleged conduct and whether the dispute was ripe for resolution by the court. See *Liberty National Insurance Holding Co. v. Charter Co., 734 F.2d 545, 553 n.19 (11th Cir. 1984); Raypath, Inc. v. City of Anchorage, 544 F.2d 1019, 1021 (9th Cir. 1976)* (per curiam) (if no cause of action can exist, the case should be dismissed before reaching the issue of standing).

By resolving this appeal on jurisdictional grounds we avoid deciding the significant first amendment

issues raised by the district court's injunction. For example, the effect of the injunction's prohibition on the use of any of the higher level materials is to curtail the religious practice of the new church's adherents. See *Sherbert v. Verner, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963).* Similarly, the court's review of the Church's stolen materials and the new church's documents to determine whether essential elements have been appropriated raises the potential for impermissible entanglement in matters of religious doctrine. See *Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976).* Further, the court's recognition of "religious injury" from premature unsupervised exposure to Church materials as irreparable harm justifying an injunction prompts worrisome establishment concerns. See *Lemon v. Kurtzman, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971).*

[**42]

II. Can Religious Materials Constitute a Protectible Trade Secret?

The Church's complaint included several pendent California state law claims, including misappropriation of trade secrets. Even though the Church is not entitled to injunctive relief under RICO, we must also decide whether it is entitled to the same relief under state law. See *USACO, 689 F.2d at 97-98* (affirming on state law grounds an injunction which district court had issued where RICO provided the jurisdictional base).

"The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law." *Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481, 40 L. Ed. 2d 315, 94 S. Ct. 1879 (1974); Chicago Lock Co. v. Fanberg, 676 F.2d 400, 404-05 (9th Cir. 1982).* States may regulate trade secrets only to the extent that state law does not conflict with federal copyright and patent laws. *Kewanee, 416 U.S. at 479.* We review matters of state law *de novo. McLinn, 739 F.2d at 1403.*

Before 1985, California trade secrets law was based on Restatement of Torts § 757, comment (b) (1939). The leading California case prior to the [**43] present legislation adopted verbatim the Restatement's definition of trade secret:

It is now settled that a trade secret may consist of any formula, pattern, devise or [*1090] compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

Sinclair v. Aquarius Electronics, Inc., 42 Cal. App. 3d 216, 221, 116 Cal. Rptr. 654, 658 (1974) (emphasis omitted); see also *Chicago Lock, 676 F.2d at 404;* 7 B. Witkin, Summary of California Law, Equity § 82 (8th ed. 1974 and Supp. 1984). The Restatement (Second) of Torts omitted section 757 and any reference to trade secrets. In response, a Uniform Trade Secrets Act was drafted. California adopted this uniform Act, with minor changes, in 1985. See 14 U.L.A. 537, 538-40 (1980 and 1985 Supp.); M. Jager, Trade Secrets Law, § 3.04 (1985); 3 R. Milgrim, Milgrim on Trade Secrets App. AA (1985). n16

n16 Because the new church's alleged trade secrets' misappropriation spanned the effective date of the California statute, both old and new law must be applicable to sustain the injunction. See Cal. Civ. Code § 3426.10.

[**44]

California law now defines a trade secret as:

information, including a formula, pattern, compilation, program, devise, method, technique, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Cal. Civ. Code § 3426.1(d) (West Supp. 1986).

The district court held that the Church's higher level materials were a trade secret. The court relied heavily on the Church's concededly elaborate efforts to maintain the secrecy of its materials. However, the Church's contention that the disputed materials are "religious scripture" was not reconciled with the California statute's reference to "economic value" as an element of a protectible trade secret.

To be protectible as a trade secret under either Restatement section 757 or the new California statute, the confidential material must convey an actual or potential commercial advantage, presumably measurable in dollar terms. We do not accept that a trade secret can [**45] be based on the spiritual advantage the Church believes its adherents acquire over non-adherents by using the materials in the prescribed manner. Former

Restatement § 757 defines trade secrets as information which is "used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." (Emphasis added). See also 1 Milgrim § 2.02 ("An element common to the definitions [of trade secret] is actual use of the secret in a trade or business.") (emphasis added); Klitzke, Trade Secrets: Important Quasi-Property Rights, *41 Bus. Lawyer 555, 559 (1986)* ("Information that can have no commercial value cannot be the subject of trade secret protection."); Commissioners' Comment to § 1 of Uniform Act, 14 U.L.A. at 543 ("The definition includes information that has commercial value from a negative viewpoint. . . . (A) trade secret need not be exclusive to confer a competitive advantage. . . .") (emphasis added).

No published California decision has yet construed Civ. Code § 3426.1(d)'s definition of trade secret. In the only significant effort by any state court to construe the Uniform Act's definitional [**46] reference to "independent economic value," the Minnesota Supreme Court stated: "This statutory element carries forward the common law requirement of competitive advantage. . . . This does not mean . . . that the owner of the trade secret must be the only one in the market. . . . If an outsider would obtain a valuable share of the market by gaining certain information, then that information may be a trade secret if it is not known or readily ascertainable." *Electro-Craft Corp. v. Controlled Motion, Inc., 332 N.W.2d 890, 900 (Minn. 1983)* (emphasis added). We think it probable that the California courts will follow the Minnesota Supreme Court's view because of the wording of the California criminal law equivalent of Civ. Code § 3426.1(d). Cal. Penal Code § 499c(a)(9) (West Supp. 1986) states: [*1091] "'Trade secret' means . . . information . . . which is secret and which is not generally available to the public, and which gives one who uses it an advantage over competitors who do not know of or use the trade secret." (Emphasis added) See *People v. Serrata, 62 Cal. App. 3d 9, 22, 133 Cal. Rptr. 144, 152 (1976)* ("The phrase 'advantage over competitors' [in [**47] Cal. Pen. Code § 499c] refers to any form of commercial advantage." (emphasis added)).

In its supplementary findings of fact, the district court noted that the new church offers its services to its adherents at a price "substantially less than that charged by the Church." However, the Church alleged no competitive market advantage from maintaining the secrecy of its higher level materials. Indeed, to do so would raise grave doubts about its claim as a religion and a not-for-profit corporation. Rather, the Church alleges that its precepts require adherents to be audited in a structured manner with exposure to higher level materials only when the auditor considers the adherent ready. The injury inflicted on the Church by the new church's misappropriation of its "secret" is the "religious harm" that would be suffered by Church adherents from premature unsupervised exposure to the materials. The value of the confidential materials is thus spiritual not commercial, and the materials cannot be said to have the "independent economic value" necessary to qualify as a protectible trade secret. n17

n17 The Church relies heavily on language in *Purcell v. Summers, 145 F.2d 979, 985 (4th Cir. 1944)* which states that unfair competition law applies fully to religious and not-for-profit organizations. That case involved an injunction under South Carolina law for the improper use of a church's name by a splinter church. The Methodist Episcopal Church South had merged with two other churches to form the United Methodist Church. Dissident members who opposed the merger formed their own church using the former name. The Fourth Circuit held that the property and charitable gifts of the merged church would be threatened by the use of its former name by a different church.

Purcell does not involve trade secrets. Rather, it is an example of "the common law of trademark infringement and unfair competition [which] is replete with cases holding that benevolent, religious, charitable or fraternal organizations are entitled to injunctive relief protecting against the continued use of their name by local chapters which disaffiliate." *United States Jaycees v. San Francisco Junior Chamber of Commerce, 354 F. Supp. 61, 71 (N.D. Cal. 1972)* (citing numerous cases), aff'd *513 F.2d 1226 (9th Cir. 1975)* (per curiam).

[**48]

III. Conclusion

The Church was not entitled to an injunction either under civil RICO or under California trade secrets law. We therefore dissolve the injunction forthwith.

REVERSED.

Religious Technology Center, et al., Plaintiffs, v. Robin Scott, et al., Defendants; Religious Technology Center, et al., Plaintiffs, v. Larry Wollersheim, et al., Defendants

Nos. CV 85-711 MRP, CV 85-7197 MRP

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

660 F. Supp. 515; 1987 U.S. Dist. LEXIS 3418; 3 U.S.P.Q.2D (BNA) 1115; Copy. L. Rep. (CCH) P26,139

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JUDGES: Mariana R. Pfaelzer, United States District Judge.

OPINIONBY: PFAELZER

OPINION: [*516] MEMORANDUM OF DECISION

MARIANA R. PFAELZER, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

Plaintiffs' application for a preliminary injunction under *17 U.S.C. § 502*(a) was argued on January 26, 1987 before the Honorable Mariana R. Pfaelzer. Having considered the oral and written arguments made and the evidence filed in this case, the Court has concluded that plaintiffs have not made a sufficient showing of likelihood of success on the merits, and have not shown that the balance of hardships justifies the preliminary injunction they seek.

II. BACKGROUND

This case originated in the theft in 1983 by Robin Scott of certain documents belonging to the plaintiff Church of Scientology International, Inc. ("the Church"). Plaintiffs and some defendants (David Mayo, The Church of the New Civilization, defendants Haber, Nelson, Zegel, Hartog and Reisdorf -- collectively [**2] "the new Church") regard these documents as religious scriptures, embodying part of the advanced technology practiced by Scientologists. In particular, the documents stolen included a series of bulletins describing a procedure known as "New Era Dianetics for Operating Thetans," "NED for OTs" or "NOTs" ("NOTs"). These stolen materials were eventually returned to the Church, but not, plaintiffs charge, before they had been passed to and copied by various defendants.

[*517] Plaintiffs brought this suit in 1985, alleging, inter alia, theft of trade secrets and RICO violations. At that time, plaintiffs sought and were granted a preliminary injunction prohibiting use by the new Church of materials derived from the stolen documents. Defendants appealed the granting of the preliminary injunction and, in August 1986, the Ninth Circuit ruled that the injunction must be dissolved because injunctions are not available to private plaintiffs under civil RICO and because the documents at issue, as religious scriptures, did not have the independent economic value required to be protected by California's law of trade secrets. *Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1088, 1090 (9th [**3] Cir. 1986)*, cert. denied, *479 U.S. 1103, 55 U.S.L.W. 3571, 94 L. Ed. 2d 187, 107 S. Ct. 1336 (1987)*. The court noted that "the higher level materials at issue in this suit have neither copyright nor trademark protection," *id. at 1078 n.2*. The

court also expressed "no view whether the new Church's materials are copies of the Church materials stolen by Scott," id. n.3.

Following the dissolution of the preliminary injunction, Norman Starkey, as Executor of the Estate of L. Ron Hubbard dba L. Ron Hubbard Library ("the Hubbard Estate"), registered a copyright in the NOTs materials with the United States Copyright Office (Registration Number TXU 257 326, November 10, 1986). On November 20, 1986, the Hubbard Estate executed a license agreement granting plaintiff Religious Technology Center ("RTC") an exclusive license to reproduce, distribute and utilize NOTs and "the right to pursue, litigate, settle, compromise, or deal with in any way, any and all actions and causes of action . . . for the infringement or violation of any copyright" in the materials. On December 5, 1986, this Court granted plaintiffs leave to file an amended complaint stating a new claim for copyright infringement. This application for a preliminary [**4] injunction under *17 U.S.C. 502*(a) followed.

III. DISCUSSION

To obtain a preliminary injunction, plaintiffs must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in plaintiff's favor. *Apple Computer, Inc. v. Formula International, Inc., 725 F.2d 521, 523 (9th Cir. 1984).* The more this balance of hardships weighs against the movants and in favor of defendants, the more robust must be the showing of movants' likelihood of success on the merits to justify an injunction. See *Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 502 (9th Cir. 1980).*

A. Likelihood of Success on the Merits

Defendants argue that plaintiffs have no more than a remote chance of success on the merits. They base this argument on two grounds: first, that the copyright is invalid; and second, that the new Church's materials do not infringe the NOTs materials.

1. The Validity of Plaintiffs' Copyright

Plaintiffs' certificate of copyright registration is prima facie evidence of the validity of the NOTs copyrights, *17 U.S.C. § 410*(c). Defendants [**5] have the burden of overcoming this presumption of validity, Apple at 523. Defendants attempt to carry this burden by pointing, first of all, to the testimony of defendant Mayo at the evidentiary hearing before the first injunction was issued that he and not L. Ron Hubbard was the author of the NOTs materials. The NOTs copyright registration application ("the application") lists L. Ron Hubbard as the author of the work in question, and defendants thus hope to raise sufficient doubt as to the truthfulness of the application for registration to overcome the presumption of the copyright's validity. However, there are a number of problems with Mayo's testimony, not the least of which is that the evidence shows him to have publicly attributed the NOTs materials to L. Ron Hubbard on more than one occasion, see, e.g., Reporter's Transcript, November 21, 1985, at 34. Also, this Court did not find Mayo to be a credible witness. Even if believed, Mayo's testimony is not inconsistent with plaintiffs' application. [*518] NOTs is registered as a compilation. Mayo indicated that, while a number of people, including L. Ron Hubbard, worked on NOTs, Hubbard revised and approved the final product [**6] before it was issued, id. at 50-51. Each NOTs series bears a copyright notice reading "Copyright [date]/by L. Ron Hubbard/ALL RIGHTS RESERVED." Defendants, in short, have not succeeded in rebutting the presumption that L. Ron Hubbard was indeed the author of each NOTs series and of the compilation as a whole. At most, defendants have created some doubt as to whether Hubbard owned the copyright as author or as the employer in a work-for-hire situation, see *17 U.S.C. § 201*(b).

Defendants' other challenges to the validity of the copyright are easily disposed of. Defendants contend that the Hubbard Estate perpetrated a fraud on the Copyright Office by representing the materials as a "secure test" to get around the deposit requirement of *17 U.S.C. § 407*(a), 37 C.F.R. Ch. 11 § 202.19. Plaintiffs, however, provide convincing evidence that they applied for and were granted "special relief" from the deposit requirement under 37 C.F.R. § 202.20(d) and did not misrepresent the nature of their materials. Defendants also argue that plaintiffs are estopped from seeking this injunction by their failure to assert the copyright claim earlier. However, plaintiffs were not dilatory in the filing [**7] of this suit, and haste, rather than delay, marks the registration and assertion of the copyright following the dissolution of the injunction on plaintiffs' other legal theories. The Hubbard Estate cannot be faulted for its failure to register earlier its copyright in unpublished materials that were never meant to be distributed to the public.

B. Do Defendants' Materials Infringe the NOTs Copyright?

Defendants' claim that the new Church materials do not infringe the NOTs materials poses a somewhat more difficult problem. To establish copying by the new Church, plaintiffs must show that the new Church had access to the copyrighted materials and that there is

substantial similarity between NOTs and defendants' materials. *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977).*

Clearly, the new Church had access to the NOTs materials. Even if plaintiffs cannot ultimately establish that the new Church received the stolen NOTs package or copies thereof, it is undisputed that Mayo and other officers of the new Church were intimately familiar with NOTs and had earlier assisted in writing or been trained through the use of the NOTs [**8] materials. Mayo himself described his efforts to "reconstruct" NOTs from memory in creating the new Church's "Advanced Ability V" ("AAV") materials. Reporter's Transcript, November 21, 1985, 28-30. For the purposes of a claim for copyright infringement, it does not matter whether defendants, if they copied NOTs, did so with the originals in front of them or from memory.

Given defendants' undeniable access to NOTs, the question to be answered is whether AAV is substantially similar to NOTs. This inquiry is complicated by two characteristics of the copyrighted material: (1) NOTs describes a process or procedure which cannot itself be copyrighted, see *Mazer v. Stein, 347 U.S. 201, 98 L. Ed. 630, 74 S. Ct. 460 (1954); Baker v. Selden, 101 U.S. 99, 25 L. Ed. 841 (1879); 17 U.S.C. § 102*(b); and (2) NOTs is alleged to be the sacred scripture of a religion. Neither feature, of itself, requires the conclusion that NOTs is not protected by copyright or that AAV does not infringe that copyright, but taken together these features do serve to make the determination more difficult. n1

> n1 To make this determination, the Court compared NOTs to the AAV materials contained in Volume 1 of defendants' exhibits in opposition to the first preliminary injunction. This version of AAV seems to be the final one, and bears a copyright notice, "Copyright Church of the New Civilization 1984."

[**9]

Defendants argue that, as a process or procedure, NOTs is not subject to copyright [*519] protection at all. This assertion by defendants is somewhat disingenuous, since each series of the AAV materials, like NOTs, is clearly marked with a copyright notice. It is, however, true that copyright protection does not extend to the ideas expressed in a work. Presumably, it was for this reason that plaintiffs originally relied on the laws of trade secret, not copyright, as the basis of their suits against defendants. The Church has already failed in its attempt to obtain a preliminary injunction on its trade secret theory. While plaintiffs are not foreclosed from pursuing this theory at trial, see *City of Anaheim v. Duncan, 658 F.2d 1326, 1328 n.2 (9th Cir. 1981);* 11 Wright & Miller, Federal Practice and Procedure, Civil § 2962 at 630-31 (1973), it cannot form the basis of the injunction they now seek.

Even if an idea, procedure or discovery is in the public domain, it is well established that the expression of the idea can be protected by copyright, see, e.g., Sid & Marty Krofft at 1163. The nature of the procedure described in NOTs and in AAV, however, requires a certain level [**10] of similarity of expression. The NOTs procedure, briefly, treats a particular condition of the adherent through the use of a structured sequence of questions, dictated in part by the adherent's response to the questions as registered on a device known as the Hubbard E-meter. It appears that the wording of the questions must conform to a standard; in addition, there is a fairly large vocabulary of specialized terminology used to describe phenomena that might be encountered during the procedure. It can also be assumed that the use and behavior of the needles or dials on an E-meter can be described only in a limited number of similar ways. Similarities of expression dictated by the nature of the process described do not constitute infringement, cf., *Frybarger v. International Bus. Mach., Inc., 812 F.2d 525, 529-530 (9th Cir. 1987); Apple Computer, Inc. v. Formula International, Inc., 725 F.2d 521, 525 (9th Cir. 1984).* In comparing NOTs with AAV, this Court has taken care to look for similarities that are not the result of the similarity of the procedures being described. Due in part to the indirect style in which both works are written, there is ample text to compare.

The [**11] religious nature of the ideas expressed in NOTs and AAV also renders comparison difficult. AAV is not identical to NOTs, but substantial similarity, not identity, is all that plaintiffs must show. The test for substantial similarity is two-fold: first, an "extrinsic" test is applied to determine whether the ideas expressed in the two works are similar; and second, an "intrinsic" test is used to determine whether, given similarity of ideas, the expression of these ideas is substantially similar, Sid & Marty Krofft at 1164. The extrinsic test may require analytic dissection of the work or even expert testimony, id.

Defendants argue that this Court cannot apply the extrinsic test to determine whether NOTs and AAV express the same or similar ideas, because to do so would impermissibly entangle the Court in determining religious doctrine, see, *Serbian Orthodox Diocese for the United States of America and Canada v. Milivojevich, 426 U.S. 696, 708-09, 49 L. Ed. 2d 151, 96 S. Ct. 2372 (1976);* Presbyterian Church in the *United States v. Mary Elizabeth Blue Hull Mem. Presby. Church, 393 U.S. 440, 449, 21 L. Ed. 2d 658, 89 S. Ct. 601 (1969).* Defendants'

argument is a troubling one, because it seems to lead to the conclusion that religious [**12] scriptures cannot be protected by copyright. This result is untenable, however. Where the statutory formalities have been met, scriptures must receive the same protection as other works. Not only would any other result offend the first amendment's guarantee of freedom of religion, it would also inevitably involve courts in deciding whether various works are or are not religious scriptures -- an inquiry of even greater constitutional infirmity. Where "neutral principles of law" are available to resolve religious property disputes, see *Jones v. Wolf, 443 U.S. 595, 604, 61 L. Ed. 2d 775, 99 S. Ct. 3020 (1979),* courts can, and in this case must, apply them.

[*520] Defendants also overstate the constitutional pitfalls involved in comparing these two works. This Court need not evaluate the religious significance of any differences between NOTs and AAV. It is only necessary to determine whether such differences exist and, if they do, whether similarities or differences predominate. The inquiry is one of linguistic, not theological, interpretation. The difficulty of this inquiry is also reduced by the nature of the procedures described in NOTs and AAV. Both works deal, not with abstract matters of religious principle, but with [**13] concrete applications laid out step-by-step. If A happens, the student auditor is told, do B. At this level of examination, the similarities between NOTs and AAV overwhelm any differences between them. The AAV and NOTs procedures treat the same conditions in the same ways by use of the same commands and steps. The two works clearly express substantially the same ideas.

Defendants, in any event, have rendered the application of the extrinsic test unnecessary by admitting, at least for the purposes of this application for a preliminary injunction, that the procedure described in AAV is substantially similar to that described in NOTs. For example, the Advanced Ability Center ("AAC"), run by the new Church, published a price list in its Journal in which the "Name Used by Church of SCN" is given for each "Name of Service at AAC," see, e.g., The Journal of the Advanced Ability Center, Vol. 1 No. 4, May-June 1984 at 31. On this list, under "Training," item seven is the AAC's "Advanced Ability 5 Pro Auditor's Crse." The corresponding Church of Scientology entry is "NOTs Auditor Course." As another example, at the November 21, 1985 hearing on plaintiff's first application for a [**14] preliminary injunction, a videotape was played in which defendants Mayo and Zegel both said that the techniques and procedures offered at the AAC were standard Scientology services, Reporter's Transcript at 56-57, but had to be given different names because the Church of Scientology had registered their trademark in the name "Scientology," id. at 58-59. On the tape, Zegel explained that "it's not an interpretation or a reinterpretation of the material; a very precise application and exactly the way the material was laid out, just legally we will be in jeopardy if we call it Scientology," id. at 59. Mayo claimed that the tape was made under false pretenses, but did not deny the truth of the statements made in it.

Having determined that NOTs and AAV express substantially the same idea, the Court must apply the intrinsic test for similarity of expression. See Sid & Marty Krofft, at 1164. Defendants argue that, by this test, the two works are not substantially similar because NOTs contains more headings than AAV, the discussions of individual issues vary in length between the two works, and the order and sequence of subject matter are not alike. New Church defendants' Memorandum [**15] of Points and Authorities in Support of Motion to Dismiss at 7. This analysis, however, resembles the extrinsic test, cf. Sid & Marty Krofft at 1166; the intrinsic test depends not on dissection of the works, but on "the response of the ordinary reasonable person," id. at 1164.

Keeping in mind the similarities required by the subject matter of the two works, and scrupulously avoiding any evaluation of the religious doctrine contained therein, this Court cannot conclude that the ordinary reasonable person would find NOTs and AAV substantially similar in expression. This finding is different from but not inconsistent with the Court's finding of substantial similarity that led to the imposition of the first preliminary injunction in this case in November 1985. At that time, the Court concluded, as above, that the two documents described the same procedure. The Court further concluded, and remains convinced, that nobody could have created AAV without having a copy of NOTs at hand. Such a conclusion does not necessarily imply a finding of substantial similarity of expression justifying an injunction under *17 U.S.C. § 502*(a).

NOTs and AAV do share a number of similarities of [**16] expression. Like NOTs, AAV consists of numbered "series"; while NOTs is apparently in this format because [*521] it was originally issued piecemeal in a series of bulletins as research on the technology progressed, there is no evident reason for AAV to be in this format except to more closely resemble NOTs. While the sequence of topics dealt with in AAV and NOTs is similar, there are differences. Whether the sequence is dictated by the demands of the subject matter is not clear.

AAV is written in much the same informal style as NOTs, and the two works have a number of sentences and images in common. For example, NOTs notes that

"stress is also a heavy button," NOTs Series 6, page 1, while AAV says that "Stress can be a heavy button," AAV Series 8. In NOTs, certain entities are described as saying "Yah, yah, I'm your nemesis . . .," NOTs Series 7, page 3; in AAV they say "'Yeah, I'm your nemesis' or whatever," AAV Series 8. Similarities like these are found throughout the documents. However, the bulk of AAV consists of text not found in NOTs. The actual percentage of text that appears to have been copied verbatim is very small, although a much larger proportion of AAV seems to be a paraphrase [**17] of NOTs. In summary, the similarities between the two documents raise serious questions going to the merits of plaintiffs' claim of copyright infringement, but are not so clear as to require a finding of a reasonable likelihood of success.

IV. The Balance of Hardships

Since plaintiffs have shown only a possibility of eventual success on their claim of copyright infringement, they must demonstrate that the hardship to defendants that would result from the granting of an injunction is exceeded by the hardship to plaintiffs should their application be denied. *Apple Computer, Inc. v. Formula International Inc., 725 F.2d 521, 523 (9th Cir. 1984).* A preliminary injunction could and very likely would cause irreparable injury to defendants. Defendants and the adherents of the new Church are likely to be prevented from practicing their religion by the issuance of an injunction. While in theory the new Church would be permitted to practice -- and could not, of course, be enjoined from practicing -- the auditing procedures described in AAV, in practical effect they would find this practice significantly chilled by the fear that whatever materials they used might violate an injunction. [**18] The first preliminary injunction in this case apparently put the new Church's Advanced Ability Center out of business. A very strong showing of hardship to plaintiffs would be required to justify the imposition of an injunction so severely affecting defendants' constitutional rights to practice their religion unhindered.

Balanced against this harm of constitutional proportions is plaintiffs' fear that their confidential scriptures will be made public. However, defendants have repeatedly expressed their own opposition to the publication of the advanced technology of Scientology, so the risk of this injury seems remote. In addition, if it was defendants' intention to make the technology public, they could do so without infringing plaintiffs' copyright by creating and publishing a noninfringing description of the procedure.

Plaintiffs also expect to suffer pecuniary damage through the loss of parishioners' fees if the lack of an injunction allows the new Church to lure adherents away by offering the same services more cheaply. It is apparent that many new Church adherents were once members of the Church, and that there is competition for members and for the fees that they pay for services, [**19] between the two groups. Until enjoined in November 1985, defendant Mayo and the new Church offered adherents standard Scientology services for less than the prices charged by the Church. The Church will undoubtedly lose revenues if the new Church is once again able to compete for parishioners. It is unclear how much, if any, of this loss could be traced to copyright infringement and how much to defendants' ability to offer the same procedures. In any event, monetary damages are available to redress such injury.

Finally, plaintiffs fear the loss of control over the integrity of their materials. They claim that defendants are modifying the procedure by revising NOTs, resulting not [*522] only in spiritual harm to adherents of the new Church, but also in damage to the Church's reputation. The new Church clearly advertises its procedure to be the same as that offered by the Church; if the procedure actually delivered by the new Church is somehow less effective than that offered by the Church, plaintiffs' reputation may suffer injury. Again, however, this injury would result more from defendants' ability to employ a procedure not subject to copyright protection than from infringement of the copyright. [**20]

On balance, it appears that the potential hardship from interference with defendants' religious freedom that would result from a preliminary injunction in this case exceeds the possible injury to plaintiffs if the injunction does not issue. In the absence of a showing of a reasonable likelihood of plaintiffs' success on the merits of their claim of copyright infringement, plaintiffs' application for a preliminary injunction must be, and hereby is, denied.

IT IS SO ORDERED.

Docket No. 7994-71

UNITED STATES TAX COURT

62 T.C. 551; 1974 U.S. Tax Ct. LEXIS 71; 62 T.C. No. 62

July 30, 1974, Filed

DISPOSITION: [**1]

Decision will be entered under Rule 155.

CORE TERMS: auditing, processing, counseling, auditor, medical care, deductible, amounts paid, spiritual, marital, audited, ailments, travel, audit, services rendered, religion, trained, transportation, psychotherapy, psychological, nondeductible, psychologist, prevention, suicidal, disease, personal expense, qualifications, alleviated, psychology, awareness, depressed

SYLLABUS: Held, amounts paid in 1968 by petitioner for Scientology processing for himself and his wife and for Scientology auditing for his wife at Hubbard College of Scientology and Hubbard Academy of Personal Independence and related travel expenses are not properly deductible as medical expenses under sec. 213, I.R.C. 1954.

COUNSEL: Edward M. Cohen, for the petitioner.

Richard J. Hunter, for the respondent.

JUDGES: Scott, Judge.

OPINIONBY: SCOTT

OPINION: [*551] Respondent determined a deficiency in petitioner's Federal income tax for the calendar year 1968 in the amount of $5,546.24.

Some of the [**2] issues raised by the pleadings have been disposed of by the parties, leaving for decision whether payments made in 1968 by petitioner for Scientology auditing for himself and his wife by an ordained priest and for his wife at the Hubbard College of Scientology and the Hubbard Academy of Personal Independence and related travel expenses are deductible as medical expenses.

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly.

Donald H. Brown (hereinafter petitioner) was a resident of Minnetonka, Minn., at the time he filed his petition in this case. Petitioner and his wife, Catherine H. Brown, filed their joint Federal income tax return for the calendar year 1968 with the district director of internal revenue, Minneapolis, Minn.

Petitioner and his wife began marital counseling with Rev. Clyde A. Benner (hereinafter Benner), a priest of the Episcopal Church, in late 1964. They had been referred to Benner for marital counseling by their minister, Rev. Clem Wagstrom, United Church of Christ, Minnewashta Heights, Minn. At the time petitioner's wife came to Benner for counseling she felt that she was depressed, had a low energy level, and had suicidal tendencies. [**3]

[*552] Benner was not a licensed psychiatrist or psychologist, but he was an ordained minister. He also held a degree in chiropractic but never treated petitioner or his wife as a chiropractor. The statements he used to bill petitioner were headed "Dr. C. A. Benner," but petitioner knew Benner had no medical training other than as a chiropractor. Benner made no claim that he was a psychologist, but he did state to petitioner's wife that he used psychological principles in his counseling work. He alluded to these principles as the Christian Ethic and described his services as

helping two people to be responsible to each other, to act responsively to one another, and to have greater understanding.

Early in the course of the counseling sessions, Benner referred petitioner and his wife to a clinical psychologist for testing to determine whether their problems were of the type he could handle by pastoral counseling. Benner would not counsel psychotic people or seriously neurotic individuals. The tests indicated that both petitioner and his wife had personality problems but that these problems were of the type that Benner and the psychologist felt could be helped by Benner's pastoral [**4] counseling.

Benner's counseling with petitioner's wife did help to alleviate her depression and low energy level, and she ceased to have suicidal tendencies. Benner would talk with petitioner's wife and suggest books for her to read. He would then discuss these books with petitioner's wife with emphasis on the relationship of the statements in the books to her life.

In late 1967 Benner suggested to petitioner and his wife that they could further develop their awareness and achieve greater peace within themselves through Scientology. All services rendered by Benner to petitioner and his wife from January to April 1968 were in the nature of Scientology processing for which they paid him $1,838. At that time Benner was working toward becoming a fully qualified Scientology auditor and was qualified to render Scientology processing services to others at the lower levels of such processing.

The Scientology creed espouses the belief that the spirit can be saved and that the spirit can save and heal the body. Scientology auditors are not required to be medically trained in any way and achieve their status as auditors by reaching a high level in the same courses they administer to the [**5] individuals they audit.

In Scientology auditing each person audited is asked the same specific set of questions while he holds an instrument called an E-meter which electrically measures his response. His answer to the questions and the readings from the E-meter are then used as an indication of his personal condition. There are no questions directed to the person audited as an individual or to his specific problems, nor are his answers [*553] analyzed by the Scientology auditor. During the audits no ailments of mind or body of the person being audited are diagnosed or treated, but if an auditor discovers that a person undergoing auditing has an organic defect, he will advise the person being audited to seek medical help.

After Benner in early 1968 had audited petitioner and his wife using Scientology processing to the extent of his then training as a Scientology auditor, petitioner and his wife went to the Church of Scientology, Minneapolis, Minn., where the auditors were qualified to process at a higher level. They expected through this further Scientology auditing to receive an improvement in their ability to communicate with each other and with other people and to better [**6] handle any disagreements they might have. They felt that they did receive improvement from the further processing and later in 1968, with the encouragement of Benner, petitioner and his wife traveled to East Grinstead, England, and Edinburgh, Scotland, to take courses at the Hubbard College of Scientology and the Hubbard Academy of Personal Independence. Petitioner paid over $12,000 for the courses taken by himself and his wife at the Hubbard College and the Hubbard Academy. The amount of $6,560 represented the cost of his wife's courses.

Petitioner's wife not only received auditing, but she also took courses in England costing a total of $1,092 in which she learned to audit herself and other individuals. Petitioner's wife believed that as a result of the Scientology processing she received from Benner and from the Scientologists in England, her mental outlook improved and some of her physical ailments, including migraine headaches, a hypothyroid condition, and irregular menstrual cycle were alleviated.

On his 1968 Federal income tax return, petitioner claimed as deductions for medical expense payments to Benner for counseling, and payments for his wife's Scientology courses [**7] in England, as well as travel expense to Benner's office, the local Scientology building, and his wife's share of the travel expenses to England in an amount totaling $9,007.20. Respondent disallowed this claimed deduction on the basis that none of the expenses constituted payment for medical care as defined by section 213, I.R.C. 1954. n1

----------Footnotes----------

n1 All references are to the Internal Revenue Code of 1954.

----------End Footnotes----------

OPINION

Section 213 provides, with certain limitation, that there shall be allowed as a deduction expenses paid for medical care of the taxpayer, his spouse, and dependents. Medical care is defined in section 213 (e) as amounts paid for "the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or [*554] function of the body" and "for transportation primarily for and essential to medical care." n2 Section 1.213-1(e)(1)(ii), Income Tax Regs., requires that "Deductions for expenditures for medical care * * * be confined strictly to expenses incurred primarily [**8] for the prevention or alleviation of a physical or mental defect or illness."

----------Footnotes----------

n2 SEC. 213. MEDICAL, DENTAL, ETC., EXPENSES.

(e) Definitions. -- For purposes of this section --

(1) The term "medical care" means amounts paid --

(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body,

(B) for transportation primarily for and essential to medical care referred to in subparagraph (A), or

----------End Footnotes----------

The determination of what is medical care depends not on the experience, qualifications, and title of the person rendering the services, but on the nature of the services rendered. *George B. Wendell, 12 T.C. 161, 163 (1949).* n3 Therefore, the fact that none of the persons who rendered Scientology processing to petitioner and his wife in 1968 was trained or licensed in medicine, psychiatry, or psychology is not determinative of the issue in this case. It is necessary to consider whether the services rendered [**9] to petitioner and his wife were for "medical care" as defined in section 213(e). If the services are of such a character as to fall under this definition, the amounts paid for such services are deductible. *George B. Wendell, supra.*

----------Footnotes----------

n3 Respondent has recognized and further amplified this rule in *Rev. Rul. 63-91, 1963-1 C.B. 54,* and does not base his argument in this case on the qualifications of Benner or of the auditors of the Church of Scientology.

----------End Footnotes----------

Section 262 provides that "Except as otherwise expressly provided * * *, no deduction shall be allowed for personal, living, or family expenses." The provisions of section 213, in providing for a deduction for medical expenses, allow by express provision for the deduction of an item of personal or family living expense; but if payments for services for a taxpayer's general physical, mental, or spiritual well-being or that of his family do not fall within the definition of medical expenses in that [**10] section, their amount is a nondeductible expense. As we pointed out in *Edward A. Havey, 12 T.C. 409, 411-412 (1949),* many expenses such as the costs of vacations or athletic club fees to keep a taxpayer physically fit may be directly beneficial to the general health of a taxpayer, but they are nondeductible personal or living expenses.

Petitioner contends that when he and his wife consulted Benner for marital counseling it was for the purpose of receiving treatment for psychological problems each was experiencing and that Benner's counseling services were to them in the nature of psychotherapy. Petitioner argues that the Scientology processing administered to them by Benner and later by auditors at the Hubbard College of Scientology in 1968 was in furtherance of the psychotherapeutic treatment he and his wife received prior to 1968 from Benner.

[*555] Respondent takes the position that the marital counseling petitioner and his wife received from Benner was not psychotherapy but rather was personal counseling, and that the Scientology processing he administered to petitioner and his wife in 1968 was not in the nature of psychotherapy. Respondent [**11] also argues that evidence as to the substantive nature of auditing received by petitioner's wife at the Hubbard College of Scientology was too indefinite to prove that payments for the courses there were medical expenses.

We agree with respondent. Petitioner and his wife were initially referred to Benner so that they might receive marital counseling from him. Although the record is very sparse as to the nature of any other counseling petitioner and his wife received from Benner, there is nothing to indicate that it was of other than a personal nature. However, whatever may have been the type of counseling petitioner and his wife received from Benner during the years prior to 1968, there is no issue before us concerning the deductibility of the cost of any services other than the Scientology processing petitioner and his wife received in 1968. There is nothing in the record to indicate that this processing or auditing was for anything other than the spiritual well-being of petitioner and his wife. The record shows that petitioner and his wife received the same auditing procedures as any other person receiving Scientology auditing. The questions asked of all were the same and there [**12] was no special analysis of the answers geared to any particular problems which petitioner's wife might have had. Petitioner in his final brief (entitled "Petitioner's Re-Argument") states that "It should be clarified totally that Scientology is a religion, with a practice of counseling which seeks to enable the individual to get along in life better, while finding greater spiritual awareness of himself." n4 Petitioner's payments for the Scientology processing which is a general part of the religion of Scientology is somewhat comparable to the payment by a taxpayer of tuition for his child at a regular private educational institution primarily for the child's education. Even though the child may have emotional problems which become less pronounced while attending the school (*H. Grant Atkinson, Jr., [*556] 44 T.C. 39 (1965))* or may be blind and profit from the greater degree of personal attention (*Arnold P. Grunwald, 51 T.C. 108 (1968)),* such tuition payments are not deductible medical expenses but rather nondeductible personal expenses.

----------Footnotes----------

n4 The United States Court of Appeals for the District of Columbia in *Founding Church of Scientology v. United States, 409 F. 2d 1146 (C.A.D.C. 1969),* certiorari denied *396 U.S. 963 (1969),* concluded that the Church of Scientology had made a prima facie case that it was a bona fide religion. In its opinion the court stated at p. 1154:

"Auditing or processing, in their view, treats the spirit of man, not his body, though through the healing of the spirit the body can be affected. They have culled from their literature numerous statements disclaiming any intent to treat disease and recommending that Scientology practitioners send those under their care to doctors when organic defects may be found. They have introduced through testimony a document which they assert all those who undergo auditing or processing must sign which states that Scientology is 'a spiritual and religious guide intended to make persons more aware of themselves as spiritual beings, and not treating or diagnosing human ailments of body or mind, and not engaged in the teaching of medical arts or sciences * * *.'"

----------End Footnotes---------- [**13]

Even if we accept petitioner's contention that his wife was suffering from various psychological problems, the record is clear that she did not receive treatment from the Scientology auditors directed at her specific problems. She testified that one worked his own way through the courses by answering a standard set of questions. There was no evidence as to what sort of questions were asked and what sort of guidance was received from Scientologists who were not trained in either psychology or medicine. A qualified Scientology auditor achieves that status by simply progressing through a required number of courses, and indeed petitioner's wife became qualified to audit other individuals in this manner.

There is a total lack of evidence concerning any specific treatment rendered to petitioner or his wife for any specific problems they may have had during the Scientology processing or auditing. Petitioner's wife stated in her testimony that her depressed and suicidal feelings were alleviated and that certain physical ailments she had experienced were improved as a result of Scientology auditing. If we were to accept her evaluation of the benefits she received from Scientology auditing [**14] as a fact, which we do not since she totally lacked the expertise to have any weight given to her conclusion as to the reasons for her improvement, it would not follow that the amounts petitioner expended for her Scientology auditing are deductible medical expenses. That an indirect medical benefit may result from a personal expense does not make that personal expense deductible, since deductible medical expenses are limited to those

primarily incurred for medical care. *Donnelly v. Commissioner, 262 F. 2d 411, 413* (C.A. 2, 1959), affirming *28 T.C. 1278 (1957)*. See also *John J. Thoene, 33 T.C. 62 (1959)*.

We hold that petitioner is not entitled to deduct as medical expenses the amounts paid in 1968 to Benner for Scientology processing and to the Hubbard College of Scientology and the Hubbard Academy of Personal Independence for his wife's Scientology auditing.

Since we conclude that the Scientology auditing received by petitioner and his wife in 1968 was not medical care, the transportation expense incurred by petitioner and his wife in traveling to Benner's office and by petitioner's wife [**15] in traveling to the Hubbard College in England was not paid for transportation primarily for and essential to medical care and is therefore disallowed.

Decision will be entered under Rule 155.

CHURCH OF SCIENTOLOGY OF CALIFORNIA and FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., Plaintiffs, against JAMES SIEGELMAN, FLO CONWAY, J. B. LIPPINCOTT COMPANY and MORRIS DEUTSCH, Defendants.

No. 79 Civ. 1166 (GLG)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

475 F. Supp. 950; 1979 U.S. Dist. LEXIS 10177; 5 Media L. Rep. 2021

August 27, 1979

CORE TERMS: church, religious, defamation, defamatory, counterclaim, First Amendment, actual malice, religion, motion to dismiss, summary judgment, abuse of process, public figure, free exercise, establishment, interview, utterance, auditor, facie, burden of proof, attributed, non-profit, registered, emotional, auditing, cult, constitutional rights, cause of action, state of mind, world-wide, malicious

COUNSEL: [**1]

Cohn, Glickstein, Lurie, Ostrin & Lubell, New York City, for plaintiffs by Jonathan W. Lubell and Audrey J. Isaacs, New York City, of counsel.

Clark, Wulf, Levine & Peratis, New York City, for defendants Siegelman and Conway by Melvin L. Wulf, New York City, of counsel.

Lester, Schwab, Katz & Dwyer, New York City, for defendant Lippincott by Patrick A. Lyons, New York City, of counsel.

Rosner & Rosner, New York City, for defendant Deutsch by Jonathan Rosner, New York City, of counsel.

OPINIONBY: GOETTEL

OPINION: [*951]

OPINION

In this latest libel action brought by the plaintiffs, two branches of the litigious Church of Scientology, n1 motions have been made by the various defendants to dismiss the complaint for failure to state a claim upon which relief may be granted, Fed.R.Civ.P. 12(b)(6), for judgment on the pleadings, Fed.R.Civ.P. 12(c), and for summary judgment, Fed.R.Civ.P. 56. The plaintiffs have cross-moved to dismiss the counterclaims raised against them.

n1. A lexis scan provided this Court of reported decisions in the United States courts in which the Church of Scientology was a party revealed the existence of thirty such cases. See Exhibit C, Motion of Defendant Deutsch to Dismiss Complaint, for Judgment on the Pleadings, or for Summary Judgment Dismissing the Complaint.

[**2]

The defendants Siegelman and Conway are the co-authors of the book Snapping: America's Epidemic of Sudden Personality Change, which was published by defendant J. B. Lippincott Company in 1978. In this book the authors attempt to explore what they describe as the "phenomenon . . . (of) sudden and drastic alterations of personality," investigating in the process the effects on personality of the techniques used by many of the current religious "cults" and mass-marketed self help therapies. Included among the many groups studied and commented upon was the [*952] Church of Scientology. n2 The plaintiffs now contend that included among the passages in the book relating to the Church of Scientology were a number of highly defamatory comments.

n2. Although the text of Snapping covers two-hundred and fifteen pages, only seven and one-half of these deal specifically with the Church of Scientology.

Following publication of Snapping, and as a result of the interest generated by it, and the topic generally, the defendant [**3] Siegelman, along with the defendant Deutsch, a former member of the Church of Scientology, appeared as guests on the syndicated television program "The David Susskind Show." The plaintiffs allege that during the course of the program both of these defendants, in response to certain questions posed, made defamatory comments about the Church. n3 The plaintiffs additionally assert that further defamatory remarks were made by Siegelman and Conway in an interview which was published in People magazine.

n3. Although Mr. Susskind took part in the discussion, neither he, nor any of the television entities, were named as defendants in this action.

The plaintiffs in the instant action, the Church of Scientology of California, which is registered in California as a non-profit, religious corporation, and the Founding Church of Scientology of Washington, D.C., which is registered in Washington, D.C. as a non-profit, religious corporation, are part of the worldwide Scientology religion of which the plaintiffs assert there [**4] are more than five million members, over three million of them in the United States. Numerous local churches of Scientology are located throughout the United States and in various foreign countries. n4 The plaintiffs assert that their individual churches have been seriously injured by the defendants' alleged defamatory statements, and that as a result their ability to function as a non-profit organization has been seriously impaired. The plaintiffs now seek damages against all of the defendants.

n4. Apparently all of these local churches are separately incorporated in a state in which they conduct their activities.

The defendants have alleged a number of grounds upon which the complaint should be dismissed. They first assert, characterizing this action as one concerning statements of religious practice and beliefs, and citing to a long line of Supreme Court cases, that this suit is barred by the free exercise and establishment clauses of the First Amendment. n5

n5. The First Amendment states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." U.S.Const. Amend. 1.

[**5]

It is well established that "testing in court the truth or falsity of religious beliefs is barred by the First Amendment." *Founding Church of Scientology v. United States, 133 U.S.App.D.C. 229, 243, 409 F.2d 1146, 1156 (D.C.Cir.1969).* See *United States v. Ballard, 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944).* Courts must remain neutral in matters of religious doctrine and practice, *Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968),* avoid involvement in the affairs of any religious organization or group, *Wolman v. Walter, 433 U.S. 229, 97 S. Ct. 2593, 53 L. Ed. 2d 714 (1977), Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947),* and resist the making of any type of ecclesiastical determination, Presbyterian Church in the *United States v. Hull Memorial Presbyterian Church, 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969),* See *Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1975).* As has been noted, the First Amendment rests "upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." [**6] *McCollum v. Board of Education, 333 U.S. 203, 212, 68 S. Ct. 461, 465, 92 L. Ed. 649 (1948).*

The defendants assert that this doctrine of non-entanglement with religion bars the bringing of a libel action by a religious denomination, such as the Church [*953] of Scientology, n6 when the alleged libel relates to the validity of religious beliefs and practices. The Court agrees that where validity of religious beliefs are at issue involvement by the judiciary would be inappropriate. See *Cimijotti v. Paulsen, 230 F. Supp. 39* (N.D.Iowa, 1964). It does not follow from this, however, that simply because a religious organization is a party to an action that that action should be immediately categorized as a theological dispute. Where the alleged defamation relates to secular matters, and where the issues can be resolved by neutral principals of law, no First Amendment bar exists. As was noted by the Supreme Court in a somewhat different context, "civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property." Presbyterian Church in the *United States v. Hull Memorial Presbyterian Church, 393 U.S. at 449, 89 S. Ct. at 606.*

n6. In *Founding Church of Scientology v. United States, 133 U.S.App.D.C. 229, 409 F.2d 1146 (D.C.Cir.1969),* the court held, in view of the plaintiff's having made out a Prima facie case that Scientology was a religion, and of the defendant's decision not to contest such a characterization, that for the purposes of that action the Church of Scientology was to be treated as a religion entitled to the protection of the free exercise clause. None of the

defendants in the instant action have, as of this time, challenged the plaintiffs' description of themselves as religious institutions.

[**7]

In the instant action the alleged defamatory remarks do not, on their face, relate to the validity of religious beliefs or practices. Rather, these statements deal with the alleged debilitating physical and psychological effect certain actions by the Church of Scientology have upon its members. While the Court will be vigilant to avoid any entanglement with theological questions should they arise, at this time no such questions are presented. Accordingly, the Court finds that the free exercise and establishment clauses to the First Amendment are no bar to this action.

Having determined that this action is not precluded by the free exercise and establishment clauses, the Court must next turn to more traditional defamation concerns and determine whether the plaintiff churches constitute public figures within the doctrine of *New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).* n7

n7. The defendants have also asserted that, since the plaintiffs are religious associations and not individuals, their rights to compensation for damages is non-existent, and that therefore the action should be dismissed. The Court, however, finds no merit to this claim for, while it is true that the great majority of defamation cases have been brought by individuals to protect their reputation, See, e.g., *Herbert v. Lando, 441 U.S. 153, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979); Time, Inc. v. Firestone, 421 U.S. 448, 95 S. Ct. 1557, 43 L. Ed. 2d 773 (1976),* corporations have also been allowed to maintain such actions. See, e.g., *Friends of Animals, Inc. v. Associated Fur Manufacturers, 46 N.Y.2d 1065, 416 N.Y.S.2d 790, 390 N.E.2d 298 (1979); Cole Fischer Rogow, Inc. v. Carl Ally, Inc., 29 A.D.2d 423, 288 N.Y.S.2d 556* (1st Dep't. 1968). In *Cole Fischer Rogow, Inc., supra at 427, 288 N.Y.S.2d at 562,* it was held that for a corporation to recover in defamation it was necessary that:

"the language used must tend directly to injure plaintiff in its business, profession or trade, and must "impute to the plaintiff some quality which would be detrimental, or the absence of some quality which is essential to the successful carrying on of his office, profession or trade.' "

Thus, if the plaintiffs, after having established the liability of any or all of the defendants, can meet the Cole Fischer test and show direct injury, they would then be entitled to compensation for damages.

[**8]

In New York Times it was held that a public official could not recover in defamation absent proof that the defendant made the statement knowing it to be false, or with reckless disregard as to whether it was false or not. This standard of proof has been extended so as to apply to public figures as well as public officials. *Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).* Thereafter, the Supreme Court, in *Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 94 S. Ct. 2997, 3009, 41 L. Ed. 2d 789 (1974),* attempted to define the ways in which a person could become a public figure:

"For the most part those who attain this status have assumed roles of especial [*954] prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."

Applying this standard to the facts of the instant action the Court finds the plaintiffs, the Church of Scientology of California, and the Founding [**9] Church of Scientology of Washington, D.C., to be public figures. The plaintiffs are component parts of a large world-wide religious movement which claims to have over five million adherents. Unlike the plaintiff in *Time, Inc. v. Firestone, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976),* n8 the instant plaintiffs have taken affirmative steps to attract public attention, and actively seek new members and financial contributions from the general public. n9 See *James v. Gannett, 40 N.Y.2d 415, 386 N.Y.S.2d 871, 353 N.E.2d 834 (1976).* As was found in regards to another religious institution (the Gospel Spreading Church) this Court believes the Church of Scientology to be "an established church with substantial congregations . . . (which) seeks to play "an influential role in ordering society.' " *Gospel Spreading Church v. Johnson Publishing Co., 147 U.S.App.D.C. 207, 208, 454 F.2d 1050, 1051 (D.C.Cir.1971).* The Church of Scientology has thrust itself onto the public scene, and accordingly should be held to the stringent New York Times burden of proof in attempting to make out its case for defamation. See *Church of Scientology of California v. Cazares, 455 F. Supp. 420 (M.D.Fla.1978);* [**10] *Church of Scientology of California v. Dell Publishing Co., Inc., 362 F. Supp. 767 (N.D.Cal.1973).* n10 See also *Friends of Animals, Inc. v. Associated Fur*

Manufacturers, Inc., 46 N.Y.2d 1065, 416 N.Y.S.2d 790, 390 N.E.2d 298 (1979).

n8. In Firestone it was held that a prominent socialite involved in a heavily publicized (with extensive media coverage) divorce action was not a public figure since such publicity had been involuntarily obtained as a result of the plaintiff being "compelled to go to court by the State in order to obtain legal release from the bonds of matrimony." Id. at 454, 96 S. Ct. at 965.

n9. The plaintiffs, in order to attract both contributors and new adherents to their religion, utilize street-side solicitations, distribute large amounts of printed matter, and send unrequested literature through the mails.

n10. In Dell Publishing Co. the court, although not directly addressing the public figure issue, applied the New York Times actual malice standard in determining the motion before it.

[**11]

Holding the plaintiffs to the New York Times burden of proof, however, does not resolve the issue before the Court. The defendants Deutsch and Lippincott n11 (defendants Siegelman and Conway have not joined in this motion) assert that the plaintiffs cannot satisfy the requirement of proving actual malice, and that therefore summary judgment should be granted. They further state that such summary disposition is particularly appropriate, and in fact may be "the "rule' and not the exception," *Guitar v. Westinghouse Electric Corp., 396 F. Supp. 1042, 1053 (S.D.N.Y.1975),* in defamation actions, and is necessary so as to prevent the litigation from having any potentially chilling effect on the exercise of free speech. See *Bon Air Hotel v. Time, Inc., 426 F.2d 858, 864 (5th Cir. 1970); Oliver v. Village Voice, Inc., 417 F. Supp. 235 (S.D.N.Y.1976).*

n11. The plaintiffs assert that as a result of defects in the defendant Lippincott's moving papers, such papers should not be treated as ones for summary judgment (but simply as additions to the papers moving to dismiss the complaint.) In view of the Court's disposition of this motion, however, there is no need to reach this question.

[**12]

The Court is similarly concerned over the damaging effect a frivolous suit could have upon the exercise of First Amendment rights. The propriety of granting summary judgment where actual malice has been alleged, however, has been cast into great doubt by the Supreme Court's recent pronouncement in *Hutchinson v. Proximire, 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979).* In its decision the Court noted [*955] its doubt as to the validity of the "so-called "rule' that summary judgment is more appropriately granted in defamation actions than in other types of suits, and stated that "(t)he proof of "actual malice' calls a defendant's state of mind into question, *New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964),* and does not readily lend itself to summary disposition."

The plaintiffs have alleged that the defamatory remarks were made with actual malice and that therefore the New York Times standard can be met. While the supporting material submitted as to this point is far from convincing, the plaintiffs have managed to place the defendants' state of mind into question, and, in view of the Supreme Court's statement in Proximire, the Court does [**13] not believe it appropriate to grant summary judgment at this time. This determination is made, however, without prejudice to any future motion being made after additional discovery has been conducted. n12

n12. In light of the Court's ultimate determination as to the action against defendants Siegelman, Conway, and Lippincott, See infra, any such subsequent motion would, of course, only apply as to defendant Deutsch.

Finally, the defendants argue that even if the Court does not accept their theoretical arguments as to the free establishment and exercise clauses, or as to the lack of actual malice, it must still dismiss the complaint because the alleged defamatory statements either are not libelous, or constitute expression of opinion. In this regard it has been held that "under the First Amendment there is no such thing as a false idea," *Gertz v. Robert Welch, 418 U.S. at 339, 94 S. Ct. at 3007,* and thus an opinion, "however pernicious" cannot be the basis for an action in defamation. See *Buckley v. Littell, 539 [**14] F.2d 882, 889 (2d Cir. 1976).* Whether a particular statement is held to constitute a fact or an opinion is "a question of law," *Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 381, 397 N.Y.S.2d 943, 950, 366 N.E.2d 1299, 1306 (1977),* to be determined by the Court. See *Letter Carriers v. Austin, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974).*

The plaintiffs have alleged in their complaint the utterance of twenty-three defamatory statements by the various defendants: ten by Siegelman, Conway and Lippincott arising from the publication of Snapping, and contained in count ten; one by Siegelman, contained in count eighteen, and eight by Deutsch, contained in count nineteen, arising from the Susskind interview; and four

by Siegelman and Conway arising from the People magazine interview, and contained in count twenty-seven. After careful examination of these statements the Court finds that many of them are clearly either non-libelous, or statements of opinion, and thereby may not be the basis for an action in defamation.

Turning first to the allegations against Siegelman, Conway and Lippincott contained in count ten, the Court can find nothing in these statements capable [**15] of rising to the level of a malicious false utterance necessary for recovery in defamation. These statements are replete with opinions and conclusions about the methods and practices used by the Church of Scientology and the effect such methods and practices have, n13 recounts of what the authors had been told during the course of their investigation, n14 and some unflattering, though not [*956] defamatory, factual statements. n15 None of these statements go beyond what one would expect to find in a frank discussion of a controversial religious movement, which is a public figure, and thus none of these statements may be the basis for an action in defamation.

n13. See, e.g., P 10(d) of the complaint:

"In our opinion, however, Scientology does not lead people beyond faith to absolute certainty it leads them to levels of increasingly realistic hallucination. The crude technology of auditing is a direct assault on human feeling and on the individual's ability to distinguish between what he is actually experiencing and what he is only imagining. The bizarre folklore of Scientology is a tour de force of science fiction. . . ."

[**16]

n14. See, e.g., P 10(B) of the complaint:

"It may also be one of the most powerful religious cults in operation today: The tales that have come out of Scientology are nearly impossible to believe in relation to a religious movement that has accumulated great credibility and respect around the world in less than twenty-five years. It has also gathered an estimated 3.5 million followers. Nevertheless, the reports we have seen and heard in the course of our research, both in the media and in personal interviews with former Scientology higher-ups, are replete with allegations of psychological devastation, economic exploitation, and personal and legal harassment of former members and journalists who speak out against the cult."

n15. See, e.g., P 10(C) of the complaint:

"But for the casual customer choosing among a vast assortment of currently available techniques for self-betterment, the Scientology procedure is well-known, attractive, and inexpensive to begin. The auditing process takes place in private sessions between subject and auditor, in which the subject's emotional responses are registered on a device called an E-meter, a kind of crude lie detector. The subject holds the terminals of the E-meter in his hands, and the rise or fall of electrical conductivity in response to the perspiration emitted from the palms is explained as a measure of emotional response to the auditor's course of questioning. The average response registers in the normal range on the meter, with abnormal indicating an overreaction, "uptightness," or sign of trauma on the part of the subject.

The goal of auditing is to bring all the individual's responses within the range of normal on the E-meter. Using a technique that bears only superficial resemblance to the popular method of biological regulation known as biofeedback, the individual watches the E-meter and follows precise instructions given by the auditor to learn how to reduce his emotional response to the auditor's questions about past and painful experiences. When the individual has mastered this ability, he becomes eligible for admission to the elite club of Scientology clears."

[**17]

Similarly, the alleged utterances in counts eighteen and twenty-seven cannot survive judicial scrutiny. After examining the defamatory language attributed to Siegelman in count eighteen the Court finds it to be a statement of opinion, albeit a rather negative one, by the defendant about the plaintiff, and thus not actionable. As to the alleged defamation contained in count twenty-seven the Court once again finds the statements to be a mix of opinion and unflattering, but non-defamatory, factual statements, none of which is actionable.

Turning finally to the alleged defamatory remarks made by defendant Deutsch on the Susskind show, the Court finds that questions exist which preclude disposition at this time. The statements attributed to Deutsch are, unlike the ones attributed to the other defendants, defamatory statements of fact. Deutsch asserts as a defense both that he believes the statements to be true, and that, in any event, they were all made without actual malice. He also asserts that the statements alleged were not addressed to these plaintiffs but rather to Scientology in general, and thus that these plaintiffs were neither defamed nor damaged. Finally, he claims that the [**18] utterances in the complaint were so

edited and placed out of context as to be thoroughly misleading. These defenses, however, raise questions of fact which cannot be decided at this time. See *Proximire v. Hutchinson, 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411.*

Accordingly, the motion to dismiss of defendants Siegelman and Conway, and the motion to dismiss of defendant Lippincott, are hereby granted. The motion of defendant Deutsch is, at this time, denied. n16

n16. Although the Court feels constrained, in view of the Proximire footnote, to deny the motion of defendant Deutsch at this time, should it be ultimately determined that this suit was brought without cause, or for the purpose of harassment, the Court will not hesitate to order the imposition of counsel fees upon the plaintiff. See *Nemeroff v. Abelson, 469 F. Supp. 630 (S.D.N.Y.1979).*

Having thus disposed of the defendants' motions, the Court next turns its attention to the plaintiffs' motion to dismiss the counterclaims for Prima facie tort, abuse [**19] of process, and conspiracy to deprive the defendants of their constitutional rights, n17 which have been alleged against them.

n17. The defendant Deutsch had initially also alleged a counterclaim based upon *42 U.S.C. § 1983.* Upon the plaintiff's bringing of the instant motion, however, the defendant chose, quite correctly in view of the facts of this case, to consent to the dismissal of this claim.

[*957] It has been held that in order to be liable for a Prima facie tort a party must be found guilty of having inflicted intentional harm, resulting in damages, without legal excuse or justification, by an act or series of acts which would otherwise be lawful. *Sommer v. Kaufman, 59 A.D.2d 843, 399 N.Y.S.2d 7* (1st Dept., 1977). In the instant action, the defendants allege that the plaintiffs, acting with malice and without excuse or justification, brought this lawsuit solely for the purpose of punishing the defendants for their expression of adverse opinions about Scientology, and that as a result they have [**20] suffered monetary damages. Proof of such intentional infliction and resulting damage would establish a Prima facie tort, *Rager v. McCloskey, 305 N.Y. 75, 111 N.E.2d 214 (1953),* and would thereupon shift the burden to the plaintiffs who would have to prove that such conduct was privileged. While the facts before the Court at this stage of the litigation are sparse, it is certainly not clear, contrary to the plaintiffs' claim, that the defendants will not be able to meet their burden of proof. Accordingly, the motion to dismiss this counterclaim is denied.

The defendants' second counterclaim alleges "abuse of process" by the plaintiffs. Abuse of process has been defined as the "misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process." *Board of Education of Farmingdale v. Farmingdale Classroom Teachers Assoc., 38 N.Y.2d 397, 400, 380 N.Y.S.2d 635, 639, 343 N.E.2d 278, 280 (1975).* n18 The defendants allege that the plaintiffs so abused process when they served each defendant with a summons and complaint for the sole purpose of harassing, discouraging and intimidating them from further criticizing Scientology. Upon close examination, [**21] however, the Court believes that while such allegations may succeed in a suit for malicious prosecution (brought after a successful termination of this litigation), they are insufficient to sustain a cause of action for abuse of process. *Hoppenstein v. Zemek, 62 A.D.2d 979, 403 N.Y.S.2d 542* (2d Dep't. 1978) (the mere institution of a civil action by summons and complaint is not legally considered such process as is capable of being abused and thereby does not afford a basis for a cause of action for abuse of process). The plaintiffs' motion to dismiss the defendants' counterclaims for abuse of process is granted.

n18. In this regard it has been noted that even a pure spite motive is insufficient to show abuse of process where process is used only to accomplish the result for which it was created. See Prosser, Law of Torts, § 121 (4th ed. 1971).

The defendants' final counterclaims allege that the plaintiffs, along with other not-for-profit corporations and organizations affiliated with the Church of Scientology, [**22] have engaged in a conspiracy to deprive a class of individuals, of whom the defendants were a part, (described essentially as consisting of critics of the Church of Scientology), n19 of their constitutionally-protected rights in violation of *42 U.S.C. § 1985*(3). The plaintiffs have moved to dismiss, asserting that such class was not formed on the basis of any invidious criteria, and thus that the defendants cannot satisfy the prerequisites for maintaining a section 1985 action. *Griffin v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971); Jacobson v. Organized Crime and Racketeering, etc., 544 F.2d 637* (2d Cir.), Cert. denied, *403 U.S. 955, 97 S. Ct. 1599, 51 L. Ed. 2d 804 (1977).* Although the Court finds this to be a close issue, we conclude that this vague and amorphous alleged class was not formed on the basis of any invidious criteria. See *Rodgers v. Tolson, 582 F.2d 315 (4th Cir. 1978)* (critics of city commissioners not a valid class); *Harrison v. Brooks, 519 F.2d 1358 (1st Cir. 1975)* (residential property owners who own adjacent residential land illegally crossed by industrial access driveways not a valid class); *Kimble v. D. J. McDuffy,*

*Inc., 445 [*958] [**23] F. Supp. 269 (E.D.La.1978)* (oil industry workers who had made any prior claim for personal injuries not a valid class). n20 In addition, the defendants have not even made a minimal showing that the two plaintiffs, as opposed to the world-wide Scientology movement in general, have conspired with each other for the purpose of depriving the putative class of their constitutional rights. Accordingly, the plaintiffs' motion to dismiss the defendants' counterclaim based upon *42 U.S.C. § 1985*(3) is hereby granted.

n19. Defendant Deutsch characterized the class as consisting of members and former members, and persons disseminating information about, the Church of Scientology.

n20. For cases which have found a valid class for § 1985 purposes, See *Glasson v. City of Louisville, 518 F.2d 899* (6th Cir.), Cert. denied, *423 U.S. 930, 96 S. Ct. 280, 46 L. Ed. 2d 258 (1975); Westberry v. Gilman Paper Co., 507 F.2d 206 (5th Cir. 1975),* Vacated as moot, *507 F.2d 215 (5th Cir. 1975); Selzer v. Berkowitz, 459 F. Supp. 347 (E.D.N.Y.1978); Bradley v. Clegg, 403 F. Supp. 830 (E.D.Wis.1975).*

[**24]

Conclusion

The action against defendants Siegelman, Conway and Lippincott is hereby dismissed. The motion of defendant Deutsch is denied, without prejudice, however, to a subsequent motion upon completion of additional discovery. The plaintiffs' motion to dismiss all counterclaims is denied in part and granted in part.

The Clerk will enter judgment dismissing the action against defendants, Siegelman, Conway, and Lippincott.

SO ORDERED.

Petition of Aaron BARR for a Writ of Habeas Corpus, Petitioner-Appellee, v. Robert W. WEISE, Adjutant General, Department of the Army; Stanley R. Resor, Secretary of the Army; Macon A. Hipp, Commanding Officer, Fort McClellen, Respondents-Appellants

No. 415, Docket No. 33032

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

412 F.2d 338; 1969 U.S. App. LEXIS 11921

June 16, 1969, Decided

DISPOSITION: [**1]

Judgment Modified.

CORE TERMS: church, religious, religion, ordained minister, regular, divinity school, parishioners, membership, rebuttal, ministerial, appointment, educational, full-time, ministry, enlisted, training, duty, sect

JUDGES: Waterman, Moore and Friendly, Circuit Judges.

OPINIONBY: MOORE

OPINION: [*339] MOORE, Circuit Judge:

The petitioner, Aaron Barr, in May 1965 enlisted for a period of six years as a member of the United States Army Reserve. He served his period (actually some eighteen weeks) of active duty and upon separation was assigned to the Reserves. In March 1967 the Army promulgated new criteria and procedures for discharge if (a) "Dependency/hardship"; (b) "Religious reasons" existed. Supported by a letter from his then employer in Columbus, Ohio, petitioner in July 1967 sought discharge because he was the sales manager for "Varsity House, Inc." This request was denied. Thereafter in September 1967 petitioner reapplied for discharge on the theory that it should be granted "from the viewpoint of National Health, Safety, or Interest." In October the Army decided that petitioner's request was "for the benefit of the Company rather than NHSI" and that his employment was "not critical nor essential to the main of NHSI."

Petitioner then moved to New York and in November 1967 again applied for a discharge on the ground that he had commenced his "studies in The Church [**2] of Scientology to become a Minister." His enrollment was confirmed by a letter from the Reverend Robert H. Thomas, President of the Church, who also stated that "The Church of Scientology of New York was a duly recognized religious corporation pursuant to Articles of the Religious Corporation Law of New York," incorporated in 1955.

The Army, acting through the office of the Chief of Chaplains, concluded in January 1968 that the educational requirements for appointment of clergymen to the Army should also be applicable to discharge from the Army Reserve. Furthermore, said the office of the Chief of Chaplains, "The Scientology Center is not listed in the Educational Directory published by the Department of Health, Education and Welfare or currently recognized by that Department" and that additional information was desired to enable it to ascertain whether the educational requirements for an Army Chaplain had been met. But all this is quite irrelevant since petitioner has indicated quite convincingly that he wishes no part of the Army, even as a Chaplain in the Reserve.

The Army reviewed petitioner's previous applications ("request denied 5 Oct 67. Em encl May 65 -- ETS 17 May [**3] 71 -- comp! ACDUTRA 28 Dec 65 -- Asgn Anl Tng Con Gp 28 Dec 65 due to occupation.") and advised petitioner in February 1968 that as a theological student "your case does not meet the requirements for discharge from the United States Army Reserve."

In July 1968 petitioner decided to obtain a more sympathetic understanding of his situation from the federal courts which so frequently are forced to become the final arbiters in many divers fields. This he did via the popular habeas corpus approach to prevent his unlawful detention by the Army and to obtain a judicial review of the Army's denial of a discharge despite the fact that he possessed a "status as a full-time student of the ministry in the Church of Scientology."

The trial court analyzed the appropriate Army regulations and the H.E.W. criteria in its "Educational Directory" and concluded that, because the exclusion of the Academy of Scientology (the Church's alleged Divinity School) from the "approved list" was the sole basis for the denial, "the Army capriciously neglected to consider either the standards set by the Academy of Scientology or the established character of the Church of Scientology of New York." In support [**4] of this conclusion the court found that:

"* * * the Church of Scientology of New York is a duly recognized religious corporation under the laws of the State of New York. It has been in existence since November 15, 1955. The membership of the Church of Scientology throughout the United States has grown to between 75,000 and 100,000 parishioners. It is estimated [*340] that there are approximately 500,000 members in the various Churches of Scientology throughout the world. The duties and functions of its ministers are similar to those of the clergy of other religious denominations. Their ministers hold services every Sunday, officiate at funerals, christenings and weddings, counsel their parishioners, and conduct confessionals. The Church has three ministers duly licensed by the State of New York as well as other ministers licensed by other states. There are some 50 full-time students in the Academy of Scientology who devote approximately 35 to 40 hours per week to their training. Their course of study includes instruction in the basic tenets of their Church and its system of ethics, and on the methods of counseling parishioners as to their personal, spiritual and [**5] ethical affairs. In order to qualify as a minister, students must pass oral and written examinations."

Apparently all previous proceedings and decisions have become academic because this court has just been advised that the petitioner no longer is Private Barr but the Reverend Barr; that thanks to the decision below he was able to complete his ministerial training in one year; and that, since his appointment effective February 14, 1969 as a Chaplain of the Church in New York, the "Reverend Barr is now performing the functions of a minister in the Church."

This somewhat rapid change of status therefore requires a slightly different judicial approach. No longer are we dealing with a mere divinity student but with a full-fledged minister. The only question which remains is: Is petitioner a minister of a recognized religion?

There is no need to repeat the interesting comments and the results of the exhaustive research made by Judge Skelly Wright to be found in his very able opinion in *Founding Church of Scientology of Washington, D.C. et al. v. United States of America, 133 U.S. App. D.C. 229, 409 F.2d 1146,* D.C.Cir., 1969 (February 5, 1969). He, writing for the majority, [**6] concluded, as we plagiaristically conclude, "On the basis of the record before us, the Founding Church of Scientology has made out a prima facie case that it is a bona fide religion and, since no rebuttal has been offered, it must be regarded as a religion for purposes of this case." Judge Wright accepted the same factual background relied upon by Judge Tenney here.

However, we also adopt Judge Wright's caveat and "We do not hold that the Founding Church is for all legal purposes a religion." In this reservation we are reinforced by the decision of the United States Court of Claims in Founding Church of Scientology v. United States, 7 CCH 1968 Stand. Fed. Tax Rep., 7927, August 7, 1968, holding that the Church was not exempt from income taxes because of its substantial nonreligious and commercial activities.

Nor is it necessary to encumber the law reports with repetitions or elaborations of the discussions as to what constitutes a religion to be found in *United States v. Ballard, 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1943)* and *United States v. Seeger, 380 U.S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965).* Suffice it to say that it is not for the Army, the H.E.W., [**7] the American jury, or even the courts themselves to bestow recognition or non-recognition qua religion upon any particular religious sect. For our purposes and with respect to the Reverend Barr, it is enough, absent rebuttal, that the Church is incorporated in New York as a religious corporation, that it has a substantial membership and a functioning divinity school which ordains its ministers.

It may well be that courts and administrative agencies will have to continue to cope with mail fraud and tax exemption situations created by false prophets under the guise of pseudo-religions. The necessity of protecting a public, particularly gullible when a religious element is injected, against quack preachings, [*341] literature and mechanical devices will require such agencies as the Food and Drug Administration to be ever watchful. It is not for us to prejudge the benefits, or lack thereof, which may come to the members of the Church from being audited while holding in their hands two tin soup cans linked by an electrical apparatus. The use, if any, which the Reverend Barr may make of these E-meters, now released by virtue of Judge Wright's decision, is for the future. For [**8] the present is the Reverend Barr's status vis-a-vis the Army. Judge Tenney decreed that "petitioner be discharged from the United States Army Reserve forthwith." This decision was based upon petitioner's then status as a divinity student. Because of the representation now made that he is a minister, the

following paragraphs of Circular 135-10 would appear to apply:

"b. Religious reasons.
(1) Regular or duly ordained minister of religion.

Applications for discharge based upon religious reasons to become a regular or duly ordained minister of religion will be sustantiated [sic] by appropriate documentary evidence as follows:

(a) Statement from the appropriate authority of the church, religious sect, or organization that the enlisted member has met the requirements for recognition as a regular or duly ordained minister of religion."

Despite his period of ministerial studies and his now becoming a minister, petitioner still is enrolled in the Army Reserve. His status at the time the Army and the District Court made their rulings was that of a Ready Reservist "preparing for the ministry in a recognized [assumed for purposes of this decision] [**9] theological or divinity school." 32 C.F.R. § 125.5(b). Under these circumstances such a Reservist "shall be transferred to the Standby Reserve." However, if he wishes to seek "Separation from service," 32 C.F.R. § 561.37, and "Discharge from Reserve duty status," § 561.37(b), he must do so pursuant to this section. "Authority to discharge," § 561.37(c), is delegated to certain officers, and the procedure to obtain such discharge is set forth in § 561.37 in minute detail. Thus at the time of the decision below, § 561.37(c) (16) would have been applicable but because petitioner has now become "a regular or duly ordained minister of religion," § 561.37(c) (15) would appear to be the paragraph controlling petitioner's destiny. Therefore, because the Army did not have the facts now presented or the District Court's (and our) views as to "Scientology" as a religion before it when passing upon petitioner's case, we remand for appropriate action by respondents in accordance with this opinion and, to this extent, modify the judgment by the court below, discharging petitioner forthwith.

Judgment modified.

CHURCH OF SCIENTOLOGY OF HAWAII, Plaintiff-Appellee, v. THE UNITED STATES OF AMERICA, Defendant-Appellant

No. 71-2761

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

485 F.2d 313; 1973 U.S. App. LEXIS 8023; 73-2 U.S. Tax Cas. (CCH) P9659; 32 A.F.T.R.2d (RIA) 5784

September 6, 1973

CORE TERMS: church, refund, moot, exemption, religious, collateral, income tax, exempt, motion to dismiss, collateral estoppel, settlement, mootness, settlor, tendered, dollar, static, separable, Declaratory Judgments Act, interlocutory appeal, claim of exemption, exempt status, evidenced, eligible, Federal Insurance Contributions Act, educational purposes, operated exclusively, prior determination, plus interest, criminal case, tax exempt

JUDGES: Koelsch, Wright and Trask, Circuit Judges. Koelsch, Dissenting.

OPINIONBY: TRASK

OPINION: [*314] TRASK, Circuit Judge:

The district court denied the government's motion to dismiss in this tax refund case. Being of the opinion that the denial involved a controlling question of law and that an immediate appeal might materially advance the ultimate disposition of the case, the trial court so stated and we allowed the interlocutory appeal under *28 U.S.C. § 1292*(b). n1

n1 The question certified was as follows:

"Should the defendant's motion to dismiss, on the ground that this civil Tax refund action be rendered moot by reason of an absolute and unconditional tender to plaintiff of the amounts sued for plus interest as provided by law, be granted." Appellant's Brief at 3.

[**3]

The Church of Scientology of Hawaii (Church) was granted a charter as a nonprofit religious corporation on December 8, 1964. It filed information income tax returns for the years 1965 and 1966 claiming exemption under section 501(c) (3) of the Internal Revenue Code as a church formed exclusively for religious and educational purposes, no part of the net earnings of which inured to the benefit of any private shareholder or individual. The Internal Revenue Service denied the claim of exemption and assessed tax deficiencies for the two years. The Church paid the deficiencies, filed claims for refunds which were disallowed and then filed suit for a refund of the sums paid. The issue in all of the proceedings was the claimed exempt status under section 501(c) (3). Following discovery proceedings and a motion for summary judgment filed by the Church, the government proposed a settlement whereby a refund would be made of the amount "plaintiff would have received (other than costs) had it prevailed in this litigation." The action would then be dismissed with prejudice. This offer was rejected but the Church suggested that an offer of judgment pursuant to Rule 68 Fed. R. Civ. P. would [**4] receive favorable consideration. No such offer was made but the government caused checks aggregating $806.08 to be tendered. The tender was not accepted and the motion to dismiss was filed asserting that the action had become moot and that a justiciable controversy no longer existed by virtue of the continuing tender. The motion to dismiss was denied and this interlocutory appeal allowed.

At the outset we recognize that there must be a viable justiciable controversy before the court in order for it to act, since the court does not render advisory opinions or decide abstract propositions. *California v. San Pablo & Tulare R.R. Co., 149 U.S. 308, 314, 37 L. Ed. 747, 13 S. Ct. 876 (1893).* n2 It is also entirely clear that jurisdiction to decide questions concerning federal taxes has been expressly withheld under the Declaratory Judgments Act, *28 U.S.C. § 2201.* Apart from these settled rules there is left for consideration whether under the general rules of mootness there remains anything for the court to decide after an unconditional and continuing offer by the government to refund the amount the taxpayer has paid, plus interest. Appellee calls our

attention to several matters [**5] about the offer that it urges as significant. (1) The offer does not include any costs in the action; [*315] (2) there is a dispute as to the computation of interest, and; (3) the offer states that "the terms of settlement should not be included in the stipulation." (Emphasis in original); (4) there remain a number of unresolved questions and continuing consequences whose determination will be foreclosed by a dismissal. All of these work together, it is argued, to preserve jurisdiction against an unaccepted tender of the refund.

n2 "It is well settled that federal courts may act only in the context of a justiciable case or controversy." *Benton v. Maryland, 395 U.S. 784, 788, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969); Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3, 11 L. Ed. 2d 347, 84 S. Ct. 391 (1964).*

Appellant relies heavily upon our decision in *Mitchell v. Riddell, 402 F.2d 842 (9th Cir. 1968),* cert. denied, *394 U.S. 456, 22 L. Ed. 2d 415, 89 S. Ct. 1223 (1969),* as being dispositive of this case. In [**6] Mitchell the settlor of an inter vivos trust established exclusively for charitable purposes had attempted unsuccessfully to have the Internal Revenue Service (IRS) declare it a tax exempt organization. The service had declined to do so and persisted in its demand that the trust report its income as a taxable organization, although apparently no assessment had been made by IRS nor other legal action taken. In order to obtain a determination Mitchell, the settlor, filed a trust return, remitted the sum of ten dollars to IRS in behalf of the trust and " 'included the statement that no tax was due, . . . and calling for a refund with reasons stated. '" *402 F.2d at 844.* He thereupon filed suit in the district court to recover the ten dollars. In a second cause of action he asked that the trust operations be found to be tax exempt under the Code. The government later repaid the ten dollars to settlor and settlor accepted the money. The trial court dismissed and we affirmed. We held that the repayment mooted the first cause of action and the proscription in *28 U.S.C. § 2201* of the Declaratory Judgments Act stripped the court of jurisdiction to pass upon the second.

Some readily [**7] apparent distinctions make *Mitchell v. Riddell, supra,* a questionable precedent. The payment of the refund was not tendered, but accepted. Again, the entire litigation was contrived by settlor. No assessment for unpaid federal income taxes against the trust or its alter ego had been made. Significantly, we said:

"Appellants are not without a remedy. The Congress has provided ample machinery for the settlement of income tax controversies. In the event a tax is assessed against the Foundation, judicial review of such assessment may be sought under the provisions of *26 U.S.C. § 7422* by paying the tax and seeking a refund in the district court, or by petitioning the Tax Court of the United States, prior to paying the tax, and in the event of an adverse decision by the Tax Court by petitioning this Court to review the decision of the Tax Court." *402 F.2d at 847.*

Here there had been an assessment for claimed tax deficiencies, payment with claim for refund and detailed statement of reasons and after denial of claim, a suit to recover payments. This is the "ample machinery for the settlement of income tax controversies" to which we pointed in *Mitchell, supra [**8]* .

The government also cites four cases as authority for the proposition that in no other case has a taxpayer been able "to withstand a motion to dismiss following a tender of the amount in dispute." We consider them. In *Drs. Hill & Thomas Co. v. United States, 392 F.2d 204 (6th Cir. 1968),* the taxpayer, a professional corporation, challenged a Treasury Regulation which would eliminate taxation of income to the corporation and cause it to flow through to the individuals on a partnership basis. The Commission tendered a refund of the entire amount in dispute and the case was dismissed, the court pointing out that the identical problem was being litigated in two other circuits where no mootness defense was available. The taxpayer was thus assured of a judicial determination. In *Lamb v. Commissioner, 390 F.2d 157 (2nd Cir. 1968),* the taxpayer sought a determination of the deductibility of his law school expenses. During the pendency of [*316] the litigation a similar problem was ruled against the Commissioner, prompting him to tender the refund sought by this suit. The court dismissed the action as moot pointing out the foregoing and that further proceedings against the taxpayer [**9] for the next year were barred. Thus, there appears to have been a final determination. *A. A. Allen Revivals, Inc. v. Campbell, 353 F.2d 89 (5th Cir. 1965),* was a case where taxpayer sought exemption as a religious and educational organization. Its suit was to recover funds paid as Federal Insurance Contributions Act taxes. It tendered the money to the taxpayer but during the litigation the Tax Court held that the taxpayer was in fact organized and operated exclusively for charitable and educational purposes and no income taxes were due. IRS also ruled that the taxpayer was exempt from employment taxes. Thus, again, there had been a judicial determination of status. *Regina v. United States, 208 F. Supp. 137 (W.D. Pa. 1962),* involved an income tax based upon a valuation of corporate stock used in an exchange. A tender of the refund sought was made and the litigation held moot and dismissed. Although the merits were not judicially determined it was a non-recurring transaction

and tax with no indicated collateral involvements upon which other difficulties to the taxpayer could hinge.

In none of them, therefore, was there an even arguable reason to continue with litigation after the [**10] tender or payment was made. Thus we do not find any of the cases cited by the government as dispositive of the issues here. Looking first at the direct controversy between the parties, we note that there is nothing in the proposed refund payment to the taxpayer of sums involuntarily paid for 1965-1966 which would have assured it that the same demands would not be made for 1967 and 1968. Indeed, the contrary is strongly suggested. n3 It has long been the rule that "mere voluntary cessation of allegedly illegal conduct does not moot a case." *United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203, 21 L. Ed. 2d 344, 89 S. Ct. 361 (1968).* Prior to the Phosphate Export case, the Court had warned against the danger f dismissal for mootness when actions of governmental agencies are likely to be repeated, pointing out that broader considerations should not be defeated by short-term orders "capable of repetition, yet evading review. . . ." See also *Moore v. Ogilvie, 394 U.S. 814, 816, 23 L. Ed. 2d 1, 89 S. Ct. 1493 (1969); Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 55 L. Ed. 310, 31 S. Ct. 279 (1911).*

n3 Attached to appellee's brief was a reproduction of a letter from IRS dated September 24, 1971, sending back to appellee information returns it had filed based upon its claimed exempt status and notifying it that it was not eligible to file such a return, but must file federal income tax returns.

[**11]

The proscription of the Declaratory Judgments Act as to tax matters, *28 U.S.C. § 2201,* has no application here. Appellee had sought relief under the statute which provided a cause of action for refunds of taxes unlawfully assessed and paid. *26 U.S.C. § 7422.* It did not pretend to ask for declaratory relief. The assessment had been made by the IRS, the taxes paid and claims for refunds made and disallowed and the suit for refund then properly filed. The underlying issue at all stages was taxpayer's claim of exemption under section 501(c) (3).

Turning, then, to the appellee's arguments in opposition to mootness, we conclude that the contention that the amount of the tender is unsufficient and therefore the action may not be mooted by that tender is not well taken. Insufficient interest was claimed of $1.30; costs were not included in the tender. But no objection to the tender was made for these reasons. The rejection was based upon a letter to Mr. Wilkenfield of the Department of Justice dated May 11, 1971. It relied upon charges of collateral harassment which a [*317] cash refund would not lay to rest and a counter offer of settlement of all questions. A refusal to accept [**12] a tender for one reason waives all others. *Moore v. Investment Properties Corp., 71 F.2d 711, 717-18* (9th Cir.), cert. denied, *293 U.S. 611, 79 L. Ed. 701, 55 S. Ct. 142 (1934).* The same reason defeats appellee's argument based upon failure of the government to tender costs.

The principal reasons advanced by appellee in support of the trial court's retention of jurisdiction are that the underlying issue of the status of appellee as an exempt corporation is a continuing one. It recurs each year. In addition, the failure to resolve the legal issue results in adverse collateral consequences which would be resolved by a determination of the underlying issue.

The ongoing nature of the controversy is evidenced not only by a rejection of information returns for a later year which were filed on the basis that appellee is tax exempt and a demand by IRS for regular tax returns, n4 but is evidenced even more clearly by an IRS "Manual Supplement," a copy of which dated September 21, 1970, appears in the record. The stated purpose of the manual is to identify "Church of Scientology type religious organizations" and to provide guidelines for examining returns and for processing applications [**13] for exemption. The detailed instructions which purport to describe in part the religious philosophy of the Church appear to make such organizations a suspect group. It is couched in terms of directions for future guidance.

n4 See footnote 3, supra.

That the tender by IRS in this case of a refund of 1965 and 1966 income tax payments was not intended to be a final resolution of the tax exempt status issue is also evidenced by the fact that on March 24, 1971, officials of the Church were subpoenaed to appear at the IRS office and bring with them:

(1) Payroll records from January 1, 1967 through December 31, 1970, inclusive.
(2) W-2's for 1967 through 1970 inclusive.

The ongoing nature of the problem was also disclosed by a levy by IRS on the bank account of the Church in the First Hawaii Bank for unpaid "941 tax" on or about March 2, 1971. n5

n5 The number "941" apparently refers to Form 941 which is the form on which F.I.C.A. and income withholding taxes are reported. Treas. Reg. § 39.1-4(2) (F.I.C.A); § 31.6011(a)-4 (income tax).

[**14]

Collateral consequences are also involved. An organization exempt from income taxation pursuant to § 501(c) (3) is additionally exempt from contributing under the Federal Insurance Contributions Act, *26 U.S.C. § 3121*(b) (8) (B), under certain circumstances. There are also advantages to a church found to be exempt under other provisions of the 1954 Internal Revenue Code. n6

n6 See *26 U.S.C. § 3401*(a) (9); Treas. Reg. § 31.3401(a) (9)-1(b) (2).

An exemption is provided for certain withholding tax payments by religious organizations with such organizations being defined as having "the same meaning and application as is given to the term for income tax purposes."

Other collateral consequences of its indeterminate status include the right to certain postal rates and the right to solicit financial support on the basis that gifts will be tax deductible as religious or charitable contributions.

In *United States v. W. T. Grant Co., 345 U.S. 629, 97 L. Ed. 1303, 73 S. Ct. 894 (1953),* the resignation of a [**15] common director did not render moot an attack upon an interlocking directorate.

"Voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. . . . The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated. ' The burden is a heavy one." *345 U.S. at 632-33, 73 S. Ct. at 897,* [*318] quoting *United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2nd Cir. 1945).*

See also *United States v. Concentrated Phosphate Export Ass'n, supra.*

In criminal cases it appears clear that the payment of the penalty will not moot the case for final appeal and determination if the judgment of conviction may entail collateral consequences. *Sibron v. New York, 392 U.S. 40, 53-55, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (1968); Ginsberg v. New York, 390 U.S. 629, 633 n.2, 20 L. Ed. 2d 195, 88 S. Ct. 1274 (1968).* The rule has developed to the point where the Court stated in *Sibron, supra,* that "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences [**16] will be imposed on the basis of the challenged conviction." *392 U.S. at 57.*

Granted that a criminal case is different from a civil case in many respects, it is difficult to find a reason for distinction when considering whether a case or controversy exists under Article III of the Constitution. Certainly we find no distinction under the circumstances of this case.

Our conclusion in this respect is fortified by the judgment of the United States District Court for the Western District of Missouri in *First Federal Savings & Loan Ass'n. v. United States, 288 F. Supp. 477 (W.D. Mo. 1968).* In a fact situation quite similar to the case here, that court held that a tender (as distinguished from payment) was not effectual to moot the case and that the possibility of a continuing recurrence of the problem was sufficient to entitle the taxpayer to have the underlying legal issue determined.

We must conclude with the admonition that what we say and hold here on the issue of mootness is not intended to indicate any view upon the merits. Whether the Church is eligible and can qualify for an exemption from payment of income taxes under section 501(c) (3) of the Internal Revenue Code for its [**17] taxable years 1965 and 1966 must be determined upon the evidence presented at the trial upon that issue. We only answer the question certified by the interlocutory appeal which is that the defendant's motion to dismiss on the ground stated should be denied.

DISSENTBY: KOELSCH

DISSENT: KOELSCH, Dissenting

If a judgment on the merits would be worth the judicial time, the outlay of money, and the attorney's efforts, I would hasten to join in the court's opinion. No good purpose would be served, now that the judicial process has been initiated, to dismiss this suit only to have a similar one commenced and prosecuted at some future time. However, I am convinced that the trial, which the Commissioner seeks to avoid, will settle nothing more than the church's income tax status for the particular years under consideration -- 1965 and 1966. Why, then, should we permit litigation which bids fair to be involved and time consuming to continue?

The collateral estoppel effect of a judgment in an income tax matter is generally limited, because each year's taxes are based upon facts peculiar to that particular year, and give rise to separate claims by the Collector. Although the doctrine does operate [**18] in

the field of tax law, the factual peculiarities of the subject have limited its application.

Thus in *Tait v. Western Md. Ry. Co., 289 U.S. 620, 77 L. Ed. 1405, 53 S. Ct. 706 (1933)* the Court, concluding that the concept of res judicata was applicable in the field of tax law despite the scheme of annual tax periods, held that a prior adverse determination regarding the deductibility of an amortized proportion of the discount on sales of bonds by the taxpayer's predecessors estopped the Collector from relitigating that issue in a suit involving a later period. However, it should be noted that the allowable discount constituted a "static fact" -- one which did not derive its legal impact from events of the later period.

[*319] On the other hand, *Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 92 L. Ed. 898, 68 S. Ct. 715 (1948)* established two areas in which collateral estoppel does not operate: The first, where the legal climate changes in the interim between the suits; there, although the material fact is "static," the prior determination is not controlling. The second, where different -- in the sense of new -- facts have arisen, such as a series of contracts or [**19] directors' resolutions, although such facts may be similar or identical to facts that were peculiar to a prior year, the prior determination on the "old" facts does not control the decision regarding the legal impact of the "new."

This "separable facts" doctrine in tax cases has been criticized as being too mechanical in its operation and exalting form over substance [*United States v. Russell Mfg. Co., 349 F.2d 13 (2d Cir. 1965)]* and has been confused by lower courts; but it is still good law. See Branscomb, Collateral Estoppel in Tax Cases: Static and Separable Facts, *37 Texas L. Rev. 584, 588-97 (1959).* The doctrine has been defended as an application of the general rule that an issue must in fact be litigated before it can have an estoppel effect on a subsequent litigation [Heckman, Collateral Estoppel as the Answer to Multiple Litigation Problems in Federal Tax Law: Another View of Sunnen and The Evergreens, *19 Case W. Res. L. Rev. 230, 240 (1968)]* and on the basis that the relitigation of genuinely identical sets of facts with the same legal implications which the doctrine necessitates in tax cases may well require less judicial time than the appeals and remands involved [**20] in an erroneous determination by a trial court that collateral estoppel applies. Branscomb, supra, 37 Tex. L. Rev. at p. 591; *85 Harv. L. Rev. 1478 (1972).*

The record in the instant case makes clear that a trial would simply establish the "separable facts" of Sunnen, not the "static facts" of Tait.

Under § 501(c) (3) church is eligible for exemption if it is a corporation "organized and operated exclusively for religious -- purposes -- [and] if not part of the net earning of which inures to the benefit of any private shareholder or individual --" The Tax Regulations relating to this section of the statute [Treas. Reg. § 1.501(c) (3)-1 (1959)] set up two essential requirements for an exemption; one organizational and the other operational. Both must be met. A determination of the first requires an analysis of the corporation's charter to determine whether it was organized exclusively for religious purposes; of the second, a consideration of the actual day to day operation of the corporation. Here the Commissioner has forthrightly admitted that the church meets the organizational requirement of § 501(c) (3) and, accordingly, has made clear that his objection to [**21] church's claim of exemption is predicated solely upon operational grounds.

There are, of course, a variety of bases upon which the Commissioner can challenge a claim of exempt status, all of which involve a consideration and determination of the financial operation of the church during a given tax year. For instance, as in *Founding Church of Scientology v. United States, 188 Ct. Cl. 490, 412 F.2d 1197 (1969),* he may take the position that exemption should be denied because church income inured to the private benefit of its founder. Or he may assert that exemption is lost because church paid unreasonable salaries. However, under the "separable facts" doctrine, a determination that church has or has not violated the "inurement of benefits" clause during 1965 and 1966 would have no estoppel effect in litigation concerning the same issues with respect to subsequent years. n1 This result follows both under Sunnen and under [*320] the general principle of collateral estoppel that an issue must be actually litigated in order to have an impact in subsequent litigation of a different claim. Developments in the Law -- Res Judicata, *65 Harv. L. Rev. 818, 840 (1952).*

n1 A fortiori with respect to salaries; the dollar amounts may be precisely the same but the reasonableness will vary with changes in living standards and community mores from year to year.

[**22]

The judgment should be reversed.

Case No. 81-174 Civ T-K

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

538 F. Supp. 545; 1982 U.S. Dist. LEXIS 12091

March 16, 1982

CORE TERMS: business venture, deposition, resident, non-resident, whereabouts, long-arm, motion to quash, service of process, nonresident, concealing, strictly construed, pecuniary benefit, convincing proof, concealment, diversity, constructive service, reasonable inference, facts supporting, underlying suit, jurisdictional, corroborative, copartnership, constructive, individually, incidental, connected, secretary, conceal, revised, counter

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OPINIONBY: KRENTZMAN

OPINION: [*547] ORDER

This cause came on for hearing on January 7, 1982 upon the motion of defendants L. Ron Hubbard and Mary Sue Hubbard to quash or dismiss the effect of constructive [**2] service upon them. The Court has considered the pleadings, the matters in the file, memoranda and argument of the respective counsel, the relevant Florida statute and relevant caselaw, and upon the findings hereinafter made, is of the opinion that the motion to quash should be denied and that plaintiffs have obtained effective service of process upon said defendants.

This is a diversity suit for malicious prosecution, abuse of prosecution, and invasion of privacy. The law of Florida is applicable. The other defendants, including the Church, for purposes of this motion, have been served. On September 8, 1981 plaintiffs filed an affidavit of compliance with Florida Statute 48.181, which in relevant part is as follows:

48.181 Service on nonresident engaging in business in state

(1) The acceptance by any person or persons individually, or associated together as a copartnership or any other form or type of association, who are residents of any other state or country, and all foreign corporations, and any person who is a resident of the state and who subsequently becomes a nonresident of the state or conceals his whereabouts, of the privilege extended by law to nonresidents [**3] and others to operate, conduct, engage in, or to carry on a business or business venture in the state, or to have an office agency in the state, constitutes an appointment by the persons and foreign corporations of the secretary of state of the state as their agent on whom all process in any action or proceeding against them, or any of them, arising out of

any transaction or operation connected with or incidental to the business or business venture may be served. The acceptance of the privilege is signification of the agreement of the persons and foreign corporations that the process against them which is so served is of the same validity as if served personally on the persons or foreign corporations.

A plaintiff must state sufficient facts in the complaint to support a reasonable inference that the defendant can be subjected to jurisdiction within the state. Wright & Miller, § 1068 p. 250. If the allegations of jurisdictional facts are challenged with affidavits or other evidence, the plaintiff must then establish by opposing affidavit, testimony or documents, those material facts supporting the allegations which would justify service of process under the long-arm statutes. [**4] *McNutt v. General Motors Corp., 298 U.S. 178, 80 L. Ed. 1135, 56 S. Ct. 780 (1936); International Graphics, Inc. v. MTA-Travel Ways, Inc., 71 F.R.D. 598 (S.D.Fla. 1976); Underwood v. University of Kentucky, 390 So.2d 433* (Fla. 3 DCA 1980). A defendant must show invalidity of service by clear and convincing proof before being entitled to an order granting a motion to quash. *Travelers Insurance Co. v. Davis, 371 So.2d 702* (Fla. 3 DCA 1979).

Plaintiffs allege, in summary, that the Hubbards controlled the Guardian's Office of the Church of Scientology of California, and that it took the alleged actions against plaintiffs in Florida for the purpose of [*548] realizing a pecuniary benefit. They allege the Hubbards were residents of Florida in Late 1975 and early 1976, during which time the actions complained of arose, and that the Hubbards have become non-residents and are concealing their whereabouts. It is clear that such allegations support a reasonable inference of jurisdiction over the Hubbards.

Defendants, however, challenge these allegations with an unsworn statement indicating the Hubbards' independence of the Church of Scientology of Florida, an affidavit stating [**5] their similar independence of the Church of Scientology of Boston, two affidavits which tie the Hubbards to Florida as of early 1976 and confirm their leaving Florida thereafter, and an affidavit by the President of the Church of Scientology of California disclaiming any connection by Ron Hubbard with the Church other than as Founder and Author since 1966. No personal affidavits of the Hubbards were submitted.

The plaintiffs respond with exhibits and deposition excerpts supporting jurisdiction. The issue for the Court is whether plaintiffs' evidence sufficiently establishes those material facts supporting jurisdictional allegations in order to overcome defendants' counter evidence and to justify service of process under Florida's constructive service statute.

Construction of the Florida long-arm statutes

The constitutional standard set by the U.S. Supreme Court for enforcement of state long-arm statutes is that in order for a state to subject a non-resident to its jurisdiction, the non-resident must have certain "minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. [**6] v. Washington, 326 U.S. 310, 315, 90 L. Ed. 95, 66 S. Ct. 154 (1945).* Above this threshold due process standard, states vary in the extent to which they allow long-arm jurisdiction to extend. The Fifth Circuit has noted varying trends in Florida courts' construction of the statutes. While it applied a liberal interpretation of the state's statute in *Rebozo v. Washington Post Co., 515 F.2d 1208 (5th Cir. 1975),* on other occasions it has held that the statute should be strictly construed. See, e.g., *Spencer Boat Co., Inc. v. Liutermoza, 498 F.2d 332 (5th Cir. 1974); Costin v. Olen, 449 F.2d 129 (5th Cir. 1971).* Even if the statute is strictly construed, the Court finds that plaintiffs' evidence supporting allegations of jurisdiction herein outweighs defendants' counter evidence and justifies constructive service in Florida pursuant to Fla. Stat. 48.181.

Persons associated together

The first issue is whether plaintiffs' allegations that the Hubbards are "any person or persons individually, or associated together as a copartnership or any other form or type of association" are sufficiently supported. Significantly, plaintiffs allege that the Church was agent of the Hubbards, rather [**7] than that the Hubbards were merely non-resident officers of the resident corporate Church. Defendants submit affidavits and documents refuting the Hubbards' official status subsequent to 1966.

Thus plaintiffs are not required to establish personal involvement by the Hubbards as officers. See Wright & Miller, Sec. 1068; *Escude Cruz v. Ortho Pharmaceutical Corp, 619 F.2d 902 (1st Cir. 1980)*

The file is replete, however, with support for the allegation that the Church and the Hubbards are closely connected, including the following:

Plaintiff's allegations that the Hubbards controlled the Guardian's Office of the Church is corroborated by the findings in United States v. Mary Sue Hubbard, et al (C.A.D.C. October 2, 1981). (Exhibit B to plaintiff's opposition to defendant Lisa's motion for protective

order filed October 15, 1981. The indictment there covers the same general time span as this case.) The Court of Appeals found the Hubbards to be the first and second highest officials in the Scientology organization. Id. at 8.

[*549] Defendant Lisa was with the Guardian's Office for the Church in Florida for thirteen years. His deposition, taken October 20, 1981 and submitted [**8] as an exhibit, reveals that Mary Sue Hubbard supervised the Guardian's office as Commodore Staff Guardian (CSG) and, as such, was sent reports as late as 1981 (pp 17-20). Numerous documents attached to the deposition show a copy sent to CSG.

L. Ron Hubbard received mail addressed to him through the Church's office in Florida, according to the Church's Standing Order No. 1, in effect until January 21, 1981. He still receives gifts via the Church according to revised Standing Order No. 1 of the Church according to revised Standing Order No. 1 of the Church, and messages from him are printed regularly in Church publications.

The fact that the Church has paid for the representation of the Hubbards' attorney is corroborative of an association between Hubbards and the Church. (See e.g., Goldfarb deposition, p.19).

There is significant evidence that the Hubbards were once residents and are now non-residents. Defendants themselves submitted affidavits by Vickie Mead and Kenneth Urquhart stating that Mary Sue and L. Ron Hubbard were in Florida between December, 1975, and June and February, 1976, respectively. Both affidavits state they have not been in Florida since. The numerous [**9] efforts to serve the Hubbards at the best address known to plaintiffs indicate that the Hubbards are no longer residents of this state.

Further, the file as a whole supports the allegations that the Hubbards are concealing themselves. The file is full of certified mailings to various known addresses of the Hubbards, including that given by the Church representative returned as non-deliverable. The same is true of attempts at service of the Hubbards in 80-501 Civ T-K (hereinafter referred to as the "Burden" case) which is another case pending before this court with similar defendants, and counsel on both sides.

The Court of Appeals opinion confirms such projects as "red box", an organized effort on the part of persons within the Church to hide the whereabouts of key personnel and key documents. Exhibit 3 to Lisa's deposition is "Operation Bulldozer Leak", the stated purpose of which is to spread the rumor that L. Ron Hubbard has no control of the Church and no legal liability for it. To the extent that the Church is shown to be Hubbard's agents, these are efforts of concealment attributable to him.

Relative to the deposition in this case of Hubbards' attorney, plaintiffs [**10] in the Burden case filed a motion to compel on October 27, 1981. In the Church's response to that motion, the Church represented that one of the major objectives of the employment of Hubbards' attorney is to "assert his [Hubbard's] right to privacy and seclusion". Moreover, the Hubbards' attorney has refused to answer questions concerning the Hubbards' whereabouts or representatives' contacts with him, claiming such information was given to him in confidence, in spite of this Court's ruling elsewhere in this case and in the Burden case that such information is not protected by the attorney-client privilege.

These comprise corroborative and supportive evidence of the Hubbards' efforts and intent to conceal themselves. Accordingly, the file herein presents a showing sufficient to indicate concealment under Florida law. *Cortez v. N.Y. Capital Group, Inc. 401 So.2d 1163 (Fla. 3DCA 1981).*

Carrying on a business venture in Florida

The Court is of the opinion that the plaintiffs have adequately supported their allegation that the Hubbards, through their agent the Church, accepted "the privilege to operate, conduct, engage in or carry on a business or business venture in Florida, [**11] or to have an office or agency in the state."

The inquiry concerns the nature, not extent, of a defendant's activities in the state. Florida courts have shown a willingness to liberally construe "business venture" under Fla. Stat. 48.181. Continuous and systematic activities provide a reasonable basis for the assertion of jurisdiction. *Ford Motor Co. v. Atwood Vacuum Machine [*550] Co., 392 So.2d 1305 (Fla. 1981).* A commercial transaction for pecuniary benefit is not necessarily required. Participating in the proceeds of an uncle's estate has been held to be a business venture, *McCarthy v. Little River Bank & Trust Co., 224 So.2d 338* (Fla. 3 DCA 1969), as has contracting with an in-state hospital for services. *Maryland Casualty Co. v. Hartford et al, 264 So.2d 842 (Fla. 1DCA 1972).*

The file contains numerous documents and articles as to the extent of the activities of the Church of Scientology of California in Florida and the effect thereof. The exhibits attached to the defendant Church's motion for change of venue, and the Lisa deposition and its exhibits indicate substantial business in the state, including the purchasing of property. In addition, the

underlying suit [**12] by the Church against the plaintiffs which gave rise to the instant complaint was in Florida and sought a pecuniary award of $300,000. Arises out of the business venture in Florid.

Finally, the plaintiffs have met the burden of adequately alleging and praying that this suit arises "out of [a] transaction or operation connected with or incidental to the business or business venture." The underlying suit complained of was brought by defendants against plaintiffs in Florida It concerned statements plaintiffs made in Florida about the Church of Scientology of California's operations in Florida.

Upon consideration of the file as a whole, including but not limited to the particular evidence reviewed above, the Court is convinced that plaintiffs have met the burden of alleging and sufficiently establishing those material facts which support constructive service of process in Florida pursuant to Fla. Stat. 48.181. The requirements of the statute having been met, plaintiffs' constructive service of L. Ron Hubbard and Mary Sue Hubbard through the Secretary of State of Florida has been accomplished. Further, defendants have failed to present clear and convincing proof that the service [**13] is invalid. Accordingly, defendants' motion to quash is DENIED.

At hearing, defendants moved for certification of the Court's order pursuant to *28 USC 1292*(b). That motion was, and is, GRANTED. The Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion, of which an immediate appeal would materially advance the case.

Subsequent to the hearing, but prior to this order, the Hubbards each filed a motion to dismiss and for reconsideration on January 27, 1982, to which plaintiffs have responded. The Hubbards have joined in each others motion, and ask the Court to reconsider its denial of the motions to quash at hearing, explained herein. The argument by defendants is essentially that presented previously on the motion to quash. The motions are DENIED for the reasons given herein.

Defendants raise the new argument, however, that plaintiffs failed to allege diversity jurisdiction in that the citizenship of the Hubbards is not alleged. Plaintiffs allege that the Hubbards were once Florida residents, have become non-residents of Florida, and are concealing their whereabouts.

The diversity [**14] statute provides for jurisdiction between "citizens of a State and foreign states or citizens or subjects thereof." *28 USC § 1332* (a)(2). Plaintiffs are Canadian citizens.

The Court hereby waives the Local Rule requirement of filing a complete, amended pleading, and grants leave to plaintiff to file an amendment to the amended complaint with jurisdictional allegation within 10 days of this order. *28 USC § 1653.*

IT IS SO ORDERED at Tampa, Florida on this 15 day of March, 1982.

No. CV 78-2053-AAH(PX)

UNITED STATES DISTRICT COURT FOR THE DISTRICT CENTRAL OF CALIFORNIA

495 F. Supp. 455; 1980 U.S. Dist. LEXIS 12100

June 18, 1980

CORE TERMS: certificate, recusal, good faith, disqualification, bias, disqualify, personal bias, elevator, marshal, posters, guard, questioned, identification, above-referenced, impartiality, undersigned, timeliness, recuse, allegations contained, counsel of record, proceeded, answered, label, desk, Local Rule, Law Clerk, legally sufficient, above-entitled, truthfulness, transferred

COUNSEL: [**1]

Kaplan & Randolph by Mark Vincent Kaplan, Los Angeles, Cal., for plaintiff.

Morgan, Wentzel & McNicholas by Darryl Dmytriw, Los Angeles, Cal., for defendant.

OPINIONBY: HAUK

OPINION: [*455]

DECISION AND ORDER GRANTING PLAINTIFF'S AFFIDAVIT FOR DISQUALIFICATION AND REASSIGNMENT OF CASE AND NOTICE TO COUNSEL

This matter has now come on for hearing in the above-entitled Court on Monday, June 16, 1980, at 1:00 p.m. upon plaintiff's Motion for Recusal, pursuant to *28 U.S.C. [*456] s 144* n1; *28 U.S.C. § 455*(a) n2 and Canon 3 C of the Code of Judicial Conduct n3; the Affidavits of Muriel Yassky, n4 and Rebecca Chambers, n5 and the Certificate of Good [*457] Faith of Mark Vincent Kaplan, Esq., n6 filed May 16, 1980, together with points and authorities; and arguments of counsel; and the Court having considered all the aforesaid [*458] now makes its Order and Decision granting said Motion for Recusal.

n1. § 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

[**2]

n2. § 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

n3. C. Disqualification

(1) A judge shall disqualify himself in a proceeding in which his . . . impartiality might reasonably be questioned, ...

n4. STATE OF CALIFORNIA

ss

COUNTY OF LOS ANGELES

I, Muriel Yassky, do hereby depose and say:

On July 19, 1979, I was present on the premises of the United States District Court, Central District of California, located in Los Angeles.

I was working in a voluntary capacity for the Church of Scientology. My function as a volunteer was to perform various duties necessary to the smooth running of the Church related litigation which was ongoing at the time. I was serving in a logistic liaison capacity.

At about 10:15 a.m. I was entering the elevator at the Spring Street side of the court house building. I was accosted by a man who yelled "Who are you?" and then he yelled, "Do you work here?"

He then grabbed me by the arm and forcefully pulled me out of the elevator.

I asked him to identify himself and he did so. He identified himself as Judge Hauk.

Judge Hauk ordered me over to the Guard's table and escorted me there.

I did not have any identification with me, so Judge Hauk ordered the Guard to accompany me to the witness room where my purse was located to obtain the identification.

During the whole period of time that I observed Judge Hauk's behavior, he was very irate. He angrily recounted something about posters and stickers being put up. Apparently the posters had something about Marshals assassinating government witnesses. Judge Hauk referred to this and said he was sick of it. He asked me while at the Guard Table if I was with Scientology. I answered affirmatively. He asked me how long I'd been with Scientology. I answered fifteen years. He asked if I were a member of "this Guardian Office." I answered negatively.

While his anger was directed at me personally, he repeatedly questioned me on my connection to Scientology and intermittently made reference to the posters. Judge Hauk informed the Guard that if, while taking me to check my identification, I gave the guard any trouble to, "slap her in irons and bring her to me."

As soon as the Judge left, the Marshal walked me back to check my identification and we amicably settled the situation.

/s/ Muriel Yassky

Muriel Yassky

Subscribed and sworn to before me, this 14th day of May, 1980.

/s/ Ben Mustard

Notary Public

[seal]

[**3]

n5. MARK VINCENT KAPLAN

Attorney for Plaintiff

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NO. CV 78-2053

AFFIDAVIT OF DISQUALIFICATION OF

HONORABLE A. ANDREW HAUK

STATE OF CALIFORNIA

ss

COUNTY OF LOS ANGELES

I. Rebecca Chambers, being duly sworn, deposes and says:

1. She is the duly authorized officer of the Plaintiff in the above-entitled action.

2. The Plaintiff herein believes and avers that the judge before whom this action has been transferred and is now pending, Honorable A. ANDREW HAUK, has a personal bias and prejudice against the said Plaintiff,

NO. CV 78-2053

AFFIDAVIT OF DISQUALIFICATION OF

HONORABLE A. ANDREW HAUK

CHURCH OF SCIENTOLOGY OF CALIFORNIA.

3. The facts and reasons for the belief that such personal bias and prejudice does in fact exist are as hereinafter set forth in the Affidavit on file of MS. MURIEL YASSKY and the foregoing Memorandum of Points and Authorities, and I hereby affirm that all the information contained therein is true and correct to the best of my knowledge and forms the basis of my belief in the existence and extent of the bias of the Honorable A. ANDREW HAUK.

Dated: May 15, 1980

/s/ Rebecca Chambers

REBECCA CHAMBERS, CHURCH OF

SCIENTOLOGY OF CALIFORNIA

Subscribed and sworn to before me this 15th day of May, 1980.

/s/ Ben Mustard

NOTARY PUBLIC

[seal]

[**4]

n6. UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHURCH OF SCIENTOLOGY OF CALIFORNIA, a corporation, Plaintiff,

v.

PAULETTE COOPER, Defendants

NO. CV 78 2053 F (PX)

CERTIFICATE OF GOOD FAITH

MARK VINCENT KAPLAN certifies:

1. That I am counsel of record for the Defendant CHURCH OF SCIENTOLOGY OF CALIFORNIA in this cause;

2. That as such I am familiar with the Affidavit of MURIEL YASSKY, made and filed to attain the recusal of the Honorable ANDREW A. HAUK under *28 U.S.C. § 144.*

3. That I am familiar with the contents of said Affidavit and the reasons it is made and filed in this cause and states that said Affidavit is and was made in good faith and I have sought to examine all the participants with regard to these allegations set forth in Affidavit of Muriel Yassky and that I have found that examination and investigation fully support the veracity of said allegations and find them to be true to the best of my information and belief based on these interviews and examinations.

4. That this Certificate is made in support of the Affidavit for Recusal and is made to fulfill the express requirements of *28 U.S.C. § 144.*

Dated:

LAW OFFICES OF MARK VINCENT KAPLAN

By: /s/ Mark Vincent Kaplan

MARK VINCENT KAPLAN

[**5]

FINDINGS AND CONCLUSIONS

Since they are based upon *28 U.S.C. §§ 144* and 455 and Code of Judicial Conduct, Canon 3 C, we are required to examine plaintiff's Affidavits and Certificate to determine if they meet the tests required by the United States Code and said Canon, namely, those of (1) timeliness and (2) legal sufficiency. If they do, then the factual allegations contained in the Affidavit must be taken as true and the Court has no power or authority to contest in any way whatsoever the necessary acceptance of truthfulness of the facts alleged, even though the Court may be aware of facts which would indicate clearly the falsity of any such allegations. *Berger v. United States, 255 U.S. 22, 33, 41 S. Ct. 230, 65 L. Ed. 481 (1921); Botts v. United States, 413 F.2d 41 (9th Cir. 1969); United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969); Lyons v. United States, 325 F.2d 370 (9th Cir. 1963),* cert. den. *377 U.S. 969, 84 S. Ct. 1650, 12 L. Ed. 2d 738 (1964).* See also: *United States v. Zarowitz, 326 F. Supp. 90, 91 (C.D.Cal.1971), United States v. Zerilli, 328 F. Supp. 706, 707 (C.D.Cal.1971), Spires et al. v. Hearst, 420 F. Supp. 304, 306-307 (C.D.Cal.1976), State of California [**6] et al. v. Kleppe, 431 F. Supp. 1344 (C.D.Cal.1977),* and *Hayes v. National Football League et al., 463 F. Supp. 1174 (C.D.Cal.1979).* Cf.: *Mavis v. Commercial Carriers, Inc., 408 F. Supp. 55, 58 (C.D.Cal.1975).*

While perhaps not essential, it does seem to us appropriate, that we should now affirm that the Judge herein does not have, nor did he ever have, any personal bias or prejudice in the slightest degree for or against any of the parties to the case, cause and proceeding herein, and more particularly, does not now have and never did have any such personal bias or prejudice in the slightest degree against the Church of Scientology, plaintiff herein. Nor has the Judge ever knowingly or unknowingly given any cause for allegations of any such alleged personal bias or prejudice, or belief therein or suspicion thereof.

At the outset it might be argued with some possible justification that the plaintiff's Affidavits and Certificate are not "timely" within the meaning of *28 U.S.C. § 144,* since they were not filed until May 16, 1980, whereas the action herein was transferred to this Court from the Hon. Warren J. Ferguson on December 27, 1979. However, it should be noted that this Court's [**7] Clerk received from plaintiff's counsel, Mark Vincent Kaplan, Esq., a letter addressed to the Court dated February 4, 1980, n7 requesting the Court to recuse itself [*459] from the matter herein. The Clerk's response to this request was made in a letter from Law Clerk Brian A. Sun to Mr. Kaplan, dated February 11, 1980, n8 indicating to [*460] Mr. Kaplan that this Court would not act upon his letter because his ex-parte communication with the Court was inconsistent with and in violation of Local Rule 1.8 of the Rules of the United States District Court, Central District of California.

n7. February 4, 1980

The Honorable A. Andrew Hauk

Judge of the United States

District Court

312 N. Spring Street

Los Angeles, California 90012

Re: Church of Scientology of California v.

Paulette Cooper

Case No. CV 78-2053-F (Px)

Dear Judge Hauk:

Please be advised that I am the attorney of record for the Church of Scientology of California in the above-referenced matter. As the file in this matter will clearly reflect, I was substituted as counsel of record on or about the date of October 15, 1979. Within the last two weeks, it has come to the attention of my client and myself, that a bias exists on behalf of the Court in this matter. As will hereinafter be more fully set forth, the result of this bias compels me to request that this Honorable Court disqualify itself on the basis of the alleged bias regarding the Church of Scientology of California.

I am writing this letter on an informal basis and should the Court so desire, I will proceed, if necessary, with a formal affidavit and certificate of good faith pursuant to *28 U.S.C. § 144* and § 455, as hereinafter indicated.

Finally, I wish to state that although my attention was first addressed to the factual criteria which give rise to this letter within the last few weeks, I have awaited sufficient documentation from my client for the purposes of documenting the events which are alleged to have occurred.

As we are all aware, the transfer of this case before this Honorable Court from the Court of Judge Ferguson was a result of the elevation of Judge Ferguson to the Ninth Circuit Court of Appeals. I pursue this matter with the Court at this time inasmuch as there have been no substantive proceedings regarding the subject case addressed to this Court to date.

The factual incidents which have given rise to the opinion of my client, in which counsel joins, are as follows:

1. On or about July 19, 1979, one Muriel Yassky, a member of the Church of Scientology, was present at the United States District Court building for the Central District of California. Ms. Yassky was standing outside the elevators on the fourth floor when, it is alleged, that Your Honor ordered Ms. Yassky out of the elevator and proceeded to direct Ms. Yassky to the guard's table for the purpose of identifying herself and her purposes for being in the Courthouse building. It is further alleged that Your Honor requested Ms. Yassky to identify whether she was with Scientology and/or with "this guardian office", referring to the office of the Church of Scientology.

2. Evidently, at the time of the incident, posters had been placed upon Courthouse property indicating, in substance, that marshals were responsible for the killing of government witnesses. Ms. Yassky indicated that from the manner in which Your Honor focused upon her presence and her affiliation with Scientology, that Your Honor seemed to equate the responsibility for the posting of these anti-government slogans with members of the Church of Scientology. From the data available to the undersigned, there is no reason why the presence of anti-government posters in the Courthouse should any way have been automatically equated with the presence of Scientologists in the Courthouse. I am prepared, if necessary, to supply affidavits from the principals involved in this matter to substantiate the relevant factual allegations.

The undersigned joins in the good faith belief of my client that the facts of the subject incident indicate that there exists on behalf of the Court, a bias towards members of Scientology as well as Scientology as an organization. I would be prepared, if necessary, to file a formal affidavit and certificate of good faith placing before the Court our request for disqualification in the above-referenced matter pursuant to *28 U.S.C. § 455, 28 U.S.C. § 144,* Canon 3 C of the Code of Judicial Conduct as amended to date.

Finally, I respectfully request that this Court reassign the above-referenced matter to a different Court in accordance with local Rule 2 as well as other applicable rules and orders of this Court.

The exercise of your sound discretion will be greatly appreciated and I remain ready to proceed should the Court so desire.

Sincerely,

LAW OFFICES OF KAPLAN AND RANDOLPH

MARK V. KAPLAN

MVK/ia

[**8]

n8.
UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES COURTHOUSE

LOS ANGELES, CALIFORNIA 90012

CHAMBERS OF

A. ANDREW HAUK

UNITED STATES DISTRICT JUDGE
February 11, 1980

Mark V. Kaplan, Esq.

Law Offices of Kaplan and Randolph

11620 Wilshire Boulevard

Sixth Floor

Los Angeles, California 90025

Dear Mr. Kaplan:

In response to your letter of February 4, 1980, you should be advised that Local Rule 1.8 of the United States District Court, Central District of California, entitled "Correspondence and Communications with the Judge," clearly states that attorneys "should refrain from writing letters to the Judge" of an ex parte nature or "otherwise communicating with the Judge unless opposing counsel is present." Judge Hauk follows a policy which adheres to the aforesaid rule and would expect your request to be submitted the proper written form and notice given to all parties involved. At that time, your recusal request will be addressed by the Court.

If you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

/s/ Brian A. Sun

Brian A. Sun

Law Clerk to

Judge A. Andrew Hauk

[**9]

While the Court, therefore, has some doubt about the validity of measuring "timeliness" by the five week interval which elapsed between the date of transfer of this case from Judge Ferguson and Mr. Kaplan's February 4, 1980, letter, rather than by the five month interval between Judge Ferguson's transfer and the filing of the within Motion, the Court nevertheless finds that the herein Affidavits and Certificate were timely, and Mr. Kaplan's letter-writing efforts to bring this Motion to the attention of the Court, while not made in accordance with the Local Rules and accepted practice, were apparently made in good faith and sufficiently set forth legal "timeliness."

Now, the next question is whether or not the Affidavit and Certificate are "legally sufficient" within the meaning of the same statutory sections and Canon. Certainly they appear to be and the Court so finds. They are in proper form; they assert alleged facts and not just conclusions of law; and so, in line with the cases the Court has previously cited, they are legally sufficient. The only question left is whether facts are alleged which require the Judge to disqualify or recuse himself under *28 U.S.C. § 455*(a) and [**10] Code of Judicial Conduct, Canon 3 C.

As stated earlier, the Court recognizes that the factual allegations contained in the Affidavit must be taken as true and the Court has no power or authority to contest in any way whatsoever the necessary acceptance of truthfulness of the facts alleged, even though the Court may be aware of facts which would indicate clearly the falsity of any such allegations. In that regard, and for the record, the Court strongly takes issue with the alleged facts asserted in the Affidavits of Muriel Yassky and Rebecca Chambers, and the Certificate of Good Faith of Mark Vincent Kaplan, Esq.

The so-called "elevator incident" referred to in plaintiff's moving papers did not occur exactly as alleged. On July 19, 1979, upon Judge Hauk's driving into the Courthouse garage, Federal Protective Service Contract Guard Officer Jennifer Jackman, guarding the entrance to the Main Street Garage, told Judge Hauk that a number of stickers had been found pasted to the front door of the building, the sentry box on the Spring Street Parking level, and elsewhere, labelling the United States Marshals as assassins. She reported to Judge Hauk that she had also heard about an episode [**11] of a lady found wandering in a Judge's private hallway.

Acting in his capacity as Vice Chairman of the Security Committee, and Acting Chairman in Judge Firth's absence, and carrying out the duties delegated to him by the mandatory and unanimous Order of all [*461] of the Judges of this Federal District Court, Judge Hauk proceeded to inquire further into these reports. He checked with the United States Marshal's Office who reported that they had heard of the same incidents and told him that copies of the label were in the Federal Protective Service Office on the Main Street level. Judge Hauk proceeded there and saw one of the labels, green background with black printing, and the legend: n9

n9. [SEE ILLUSTRATION]

U. S. Marshals Are Assassinating Governments Witness."

Judge Hauk then went out into the Main Street lobby area to discuss with the Federal Protective Service Contract Guard there, Walter H. Bonner, whether or not he (Bonner) had seen any unusual or improper activities with respect to the pasting [**12] of the labels, the use, or misuse, of the Main Street garage and Spring Street parking area by any unauthorized persons, or any other activities indicating any breach of security in the Courtrooms or Courthouse. At that time, Judge Hauk noticed, standing between himself and the officer, near the officer's desk, and in the space immediately adjacent to the elevators, a young lady, apparently endeavoring to eavesdrop upon Judge Hauk's conversation with the Officer. When Judge Hauk looked at her, she turned her eyes up and pretended not to be listening or interested in what he was saying.

Judge Hauk went over and asked her what she was doing in the building and she replied "Oh, nothing in particular." He asked her again what she was doing, and she again said "Nothing in particular." The Judge asked her name, and she refused to give it to him, and said she was going upstairs "for a cup of coffee."

Whereupon Judge Hauk asked her to come over to the officer's desk, and escorted her to said desk to answer a few questions. She came over and Judge Hauk asked her name, address and telephone number, requesting the Officer to write them down as she gave them Muriel Yassky, 5959 Franklin Avenue, [**13] Apt. 407, Hollywood, California 90028, phone no. 462-0135. Judge Hauk further asked her for her I.D., which she said was "upstairs in the waiting room." At that point, the Chief Deputy Marshal, James L. Propotnick, appeared on the scene and Judge Hauk asked him to go with the young lady to the waiting room and check out the I.D. she mentioned. At no time did Judge Hauk ever state that Ms. Yassky should be "slapped in irons" if she resisted the Marshals.

Despite the problems the Court has with the factual allegations contained in plaintiff's motion, and despite the Court's firm recollection and conviction that the allegations are false, it feels compelled and bound to follow the more prudent course of granting the plaintiff's Motion for Recusal. Canon 3 C(1) and *28 U.S.C. § 455*(a) mandate that a Judge shall disqualify himself whenever "his impartiality might reasonably be questioned." The Court herein finds that plaintiff's Motion for Recusal, while indeed false and erroneous in its allegations, is based upon what Ms. Yassky and plaintiff's counsel apparently feel is reasonable. Moreover, it has been said in some cases and by some authorities that recusal should be granted, pursuant [**14] to the aforementioned Canon 3 C(1) of the Code of Judicial Conduct, and *28 U.S.C. § 455*(a), in such a situation, even when the Court is in doubt as to the "reasonableness" of an affiant's belief. This conclusion is reached on the basis of the Court's recognition of the sensitive nature of the case itself and the principles underlying the pertinent sections of the United States Code and the Code of Judicial Conduct, as well as other relevant [*462] factors governing Judicial disqualifications, having in mind that when in doubt the Court should resolve the issue in favor of the party seeking recusal. *E. g. Mims v. Shapp, 541 F.2d 415, 417 (3d Cir. 1976); Hodgson v. Liquor Salesmen's Union,*

444 F.2d 1344, 1348 (2d Cir. 1971). Of course, this does not constitute any finding or conclusion that the plaintiff's allegations are factually true or have any real substantive merit, nor does it have any bearing whatsoever upon the merits of the basic cause of action.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. That the undersigned Judge does hereby disqualify and recuse himself from any and all further matters in the within case, cause and proceeding, pursuant to *28 U.S.C. § 455*(a) [**15] and Canon 3 C(1) of the Code of Judicial Conduct, as amended to date, and pursuant, of course, also, to the Affidavits and Certificate filed herein by and on behalf of the plaintiff;

2. That the within case, cause and proceeding be and the same hereby is returned to the Clerk for random transfer and reassignment by the Clerk to another Judge of this District Court, Central District of California, in accordance with the applicable Rules and Orders of this Court, particularly General Order No. 104, filed January 18, 1971, Part Two, Section One, Paragraph I; and

3. That the Clerk serve copies of this Decision and Order forthwith by United States mail on counsel for all parties appearing in this case, cause and proceeding.

Civ. A. No. 79-2491-G

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

535 F. Supp. 1125; 1982 U.S. Dist. LEXIS 11462

March 26, 1982

CORE TERMS: church, First Amendment, religion, religious, venue, auditing, motion to dismiss, personal jurisdiction, conspiracy, Fair Labor Standards Act, conspiracy theory, religious belief, racketeering, secular, falsity, treble damage, auditor, emotional distress, free exercise, criminal acts, forum state, fraudulent, oral argument, intentional infliction of emotional distress, prima facie case, cause of action, treble damages, misrepresentations, infiltration, regulation

COUNSEL: [**1]

Thomas Greene, Michael J. Flynn, William Sheridan, Thomas Hoffman, Philip Mulvey, Boston, Mass., for plaintiff.

Nancy Gertner, Thomas Shapiro, Silverglate, Gertner & Shapiro, Boston, Mass., for defendants.

OPINIONBY: GARRITY

OPINION: [*1129]

MEMORANDUM OF DECISION AND ORDERS

This case raises a number of questions regarding the jurisdiction of this court, the adequacy of plaintiff's pleadings, and the reach of various federal statutes and constitutional guarantees. The decisions we state below follow a period of procedural maneuvering between the parties. We preface our discussion of the substantive issues presented for decision by reciting relevant portions of that history.

Procedural History

Seeking relief for herself and on behalf of a class she purports to represent, plaintiff La Venda Van Schaick, a resident of Massachusetts, brought this action originally against the Churches of Scientology of California, Nevada, Florida, Washington, D. C., and New York, and against numerous other corporate and individual defendants, on December 13, 1979. Service was made upon the five above-mentioned defendants by delivery of the summons to the director of legal affairs of the Church [**2] of Scientology of Boston. The defendant churches filed a motion to dismiss on January 16, 1980. They argued, either then or later, that the court lacked jurisdiction over the defendants, that service had been insufficient, that venue was improper, that the First Amendment [*1130] barred inquiry into the subject matter of plaintiff's complaint, that the complaint failed to state a claim upon which relief could be granted, that the plaintiff's pleadings were defective and that various parties were improperly named or joined. Plaintiff filed an amended complaint on May 22, 1980 in which she 1) dropped her claims against all defendants except the five aforementioned churches and two individuals, L. Ron Hubbard, the founder of Scientology, and Mary Sue Hubbard, the second-ranking person in the Scientology hierarchy, 2) sought to add an additional party plaintiff, Sylvana Garritano, and 3) asserted additional claims against the remaining defendants. The complaint, as first amended, asserted that defendants were liable to Van Schaick and Garritano individually for fraud (Counts IV-IX), intentional infliction of emotional distress (Counts X-XII), breach of contract (Count XIII) and violation [**3] of the Fair Labor Standards Act, *29 U.S.C. §§ 201,* 206 (Count XIV). In addition, the amended complaint sought to state a class action against defendants for treble damages under the civil remedy provision of the Racketeer Influenced Corrupt Organizations Act (RICO), *18 U.S.C. §§ 1961,* 1964 (Counts I-III). Defendants objected to plaintiff's attempt to add a party plaintiff. The court heard oral argument on September 8 and September 10, 1980 and received numerous briefs from the parties regarding plaintiff's motion to amend her complaint and defendants' motion to dismiss. n1

n1. On August 14, 1981, before disposition of these motions, Garritano moved to substitute counsel. Her affidavit cited "irreconcilable differences" with Van Schaick's attorney, who had been acting as her counsel as well. We allowed that motion on August 21, 1981.

Plaintiff moved, on September 4, 1981, for a temporary restraining order and for other injunctive relief to prevent the destruction and dissemination of material allegedly stolen [**4] by defendants from the office and trash of plaintiff's attorney and in the possession of the Church of Scientology of California and of defendants' lawyers. Plaintiffs also sought the return of those documents. We heard argument on that contested motion on the same day. At the hearing, we ruled that this court had personal jurisdiction over the Church of Scientology of California and issued a protective order from the bench. That order, the essence of which was subsequently written and entered on September 14, 1981, directed defendants' attorneys to produce for plaintiff's attorney's inspection some 800 allegedly stolen documents and directed the Church of Scientology of California not to destroy or disseminate those documents.

On September 8, 1981, plaintiff moved to amend her complaint again and filed a proposed second amended complaint. Plaintiff stated that her previous motion to amend her complaint was withdrawn. The second amended complaint dropped plaintiff's claims against all defendants except the Churches of Scientology of California and Nevada and the two Hubbards. n2 It also dropped Garritano's claims and changed various assertions presented in the first amended complaint. [**5] On September 17, 1981, we directed Garritano to file a pleading seeking either to participate or withdraw from these proceedings. Garritano subsequently advised the court that she had reached a settlement with defendants, which, after review, this court approved. Accordingly, she withdrew from the case, leaving Van Schaick the sole named plaintiff.

n2. Plaintiff has not served the individual defendants, L. Ron Hubbard and Mary Sue Hubbard.

The Church of Scientology of California moved on December 24, 1981 that we reconsider our finding of personal jurisdiction over it and that we conduct an evidentiary hearing to resolve that question. We see no point in embellishing upon that ruling at this juncture, but may, in later ruling on the motion to reconsider, discuss further the issues regarding personal jurisdiction.

This case is within the subject matter jurisdiction of this court under *28 U.S.C. § 1332, 29 U.S.C. § 206* and *18 U.S.C. § 1964*(c). We decide below some of defendants' motions to dismiss for lack [**6] of [*1131] personal jurisdiction and insufficiency of service, improper venue, failure to state a claim, and on the grounds that the First Amendment bars this action in its entirety.

Motion to Amend Complaint

Under Federal Rule of Civil Procedure 15(a) a party may amend its pleadings once as a matter of course at any time before a responsive pleading is served. Since defendants' motion to dismiss is not a "responsive pleading", *McDonald v. Hall, 1 Cir. 1978, 579 F.2d 120, 121,* plaintiff was entitled to amend her complaint without leave of court initially. Defendant objected, however, to plaintiff's attempt to add a party-plaintiff without leave of court, arguing that F.R.C.P. 21, which requires a court order to add a party, not F.R.C.P. 15, governs. And, defendants argued that the addition of Garritano as a plaintiff would fail to satisfy the tests for permissive joinder of F.R.C.P. 20. We need not decide that issue, however. Plaintiff Van Schaick now moves the court for leave to file a second amended complaint. She no longer seeks to add Garritano as a party-plaintiff, and Garritano, having reached a settlement with defendants, no longer seeks to intervene. Of course, a motion [**7] to file a second amended complaint requires permission of the court. But that permission is to be "freely given when justice so requires" under Rule 15(a), Fed.R.Civ.P. Accordingly, we grant plaintiff Van Schaick's motion to amend and consider the complaint filed September 8, 1981 as her current pleading.

Motion to Dismiss

For the purpose of this motion to dismiss, we assume that the following allegations, contained in Van Schaick's second amended complaint, are true.

Beginning in October, 1971, in Las Vegas, Nevada, Bob Harvey, an agent of the California and Nevada Churches represented to Van Schaick that auditing, the central practice of Scientology, n3 was scientifically guaranteed to have certain beneficial physical, mental, and social consequences for the plaintiff. Similar claims were shown to her in books and documents written by L. Ron Hubbard and disseminated to Nevada by the California Church through the mail. In March of 1972, in Nevada, Harvey also represented that auditing is confidential; that Scientology is a "law-abiding, religious, scientific organization," and that L. Ron Hubbard is a nuclear physicist with degrees from George Washington University and Princeton. [**8]

n3. Auditing is a process during which a Scientology employee or agent (Auditor) uses a set of questions and drills, in conjunction with a mechanical device similar to a lie detector (the Hubbard E-meter) to elicit personal information from the subject, for the alleged purpose of psychotherapy. In order to obtain auditing, the subject signs a

contract with the Church. The auditor asks questions which locate "Buttons"-a conscious or subconscious indication or response. To help locate "buttons", the auditor uses a Hubbard E-meter, a device which measures skin voltage. During auditing, the auditor pursues lines of questioning on highly personal subjects ("rundowns") to locate the subject's "buttons". The auditor then makes a written record of the disclosures made.

Based upon these representations, plaintiff paid $575 to the Nevada and California Churches for books and auditing courses between October 1971 and March 1972, and continued to purchase auditing services until January 1974. During this period, Van [**9] Schaick worked for the Nevada and California Church full time. She left Scientology in 1974.

During the summer of 1975, the plaintiff was contacted in Las Vegas, Nevada, by her auditor, Pam Bevan, who warned her that unless she returned to the Nevada Church, she would be harassed by the Church and its adherents. n4 During the same period, she [*1132] was locked in a furnitureless room for a period of two weeks against her will at the offices of the Nevada Church in Las Vegas, and was audited for alleged "crimes" committed against the Church. In response she paid approximately $3,000 to the Church and, pursuant to an order to "disconnect" from her husband, obtained a divorce. In April of 1977, the plaintiff went to Clearwater, Florida, for additional auditing, and, in April through May of that year, paid $5,000 to the Florida and California Churches for new courses, books, and auditing. Returning to Nevada in April 1977, Van Schaick remained with the Church until March 1979, when she was declared a "suppressive person" and fled to Boston, in fear of harassment from the Church.

n4. Plaintiff alleges that it is Church policy to harass ex-members, and that this policy is explicitly authorized in the "Fair Game Doctrine" which states, inter alia:

"Every S. P. (Suppressive Person) Order Fair Game. May be deprived or injured by any means by any Scientologist. May be tricked, sued, or destroyed."

For purposes of the pending motions, we ignore defense counsel's representation at oral argument that the Fair Game Doctrine had been misconstrued and was repealed in 1968.

[**10]

In Boston, Massachusetts, on or about September, 1979, the Nevada, California, and Boston Churches and L. Ron Hubbard, acting in concert, attempted to dissuade plaintiff from pursuing her legal remedies by relaying and eventually disclosing her confidential auditing information to her attorney in Boston, by sending Scientologists from New York and Nevada to threaten her, and by causing the Boston Church to harass her.

Jurisdiction under the Conspiracy Theory

The plaintiff here claims that this court has personal jurisdiction over the corporate defendants under the conspiracy theory of jurisdiction. The theory, which evolved in a number of cases alleging civil conspiracies, is based upon the notion that the acts of a conspirator in furtherance of a conspiracy may be attributed to the members of the conspiracy for establishing jurisdiction over the person. While the mere presence of a conspirator within the forum state is not sufficient to permit personal jurisdiction over the non-resident co-conspirators, certain additional connections between the conspiracy and the forum state will support the exercise of jurisdiction. These additional connections exist where (1) substantial acts [**11] in furtherance of the conspiracy are performed in the forum state and (2) the co-conspirator knew or should know that the acts would be performed there. *Leasco Data Processing Equipment Corp. v. Maxwell, S.D.N.Y., 1970, 319 F. Supp. 1256,* aff'd in part, rev'd and remanded in part, *468 F.2d 1326* (2 Cir., 1972), on remand, *68 F.R.D. 178 (1974); Gemini Enterprises, Inc. v. WFMY Television Corp., M.D.N.C., 1979, 470 F. Supp. 559, 564,* and cases cited therein.

At the outset we note that not all federal courts considering the question have accepted the conspiracy theory as a basis for asserting personal jurisdiction. See *I. S. Joseph Co. v. Mannesmann Pipe and Steel Corp., D.Minn., 1976, 408 F. Supp. 1023.* Moreover, those federal courts which have exercised jurisdiction under the conspiracy rationale have done so on the basis of the long-arm statutes applicable in the forum states, *Mandelkorn v. Patrick et al., D.D.C., 1973, 359 F. Supp. 692; Ghazoul v. International Management Services, Inc., S.D.N.Y., 1975, 398 F. Supp. 307;* and no Massachusetts decision has ever adopted the theory. We note, too, that the Court of Appeals for the First Circuit has recently declined to decide whether the [**12] Massachusetts long-arm statute contemplates the conspiracy theory. *Glaros v. Perse, 1 Cir., 1980, 628 F.2d 679, 682 n. 4.*

As the formulation stated above makes clear, plaintiff's broad, general allegations regarding the conspiratorial nature of the Scientology movement, even if proved, would not warrant the assertion of jurisdiction under the

conspiracy theory. The theory gives this court jurisdiction only over any claims which arise from acts within the commonwealth. As the Court of Appeals for the First Circuit recently observed in *Glaros v. Perse, supra,* courts which have recognized the conspiracy theory have often required the plaintiff "to pinpoint a connection between the out-of-state defendants and specific acts" in the forum state.

Although the plaintiff here does pinpoint some connection between the out-of-state defendants and occurrences in Massachusetts, she fails to submit detailed factual allegations connecting each of the nonresident [*1133] defendants with events occurring in this state. Although the courts are divided concerning the necessity of making such a showing, see discussion in *McLaughlin v. Copeland, D.Md., 1977, 435 F. Supp. 513, 529-33,* and the question [**13] has not been resolved in this circuit, *Perse, supra at 682 n.4,* we observe that the plaintiff's affidavit differs from the allegations in her complaint with respect to the nature and extent of each church's participation in the alleged conspiracy to harass her in Massachusetts, and conclude that, on the record before us, Van Schaick's reliance on the conspiracy theory is based on nothing but speculation and conjecture on the essential issue of connecting each of the corporate defendants with acts or transactions within the forum state. She simply hopes "somehow and somewhere to find enough facts to create grounds for jurisdiction." Cf. *Socialist Workers Party v. Attorney General of the United States, S.D.N.Y., 1974, 375 F. Supp. 318, 325.* We therefore conclude that there is an insufficient factual foundation for the assertion of personal jurisdiction under the conspiracy theory in this case.

Venue

The defendant churches also argue that venue is improper in this district. The controlling venue statutes are *18 U.S.C. § 1965* for the RICO claims and *28 U.S.C. § 1391*(b) and § 1391(c) for the other claims plaintiff asserts. n5

n5. Since the Fair Labor Standards Act does not contain a special venue provision, the general venue statute controls actions under the Act. *Goldberg v. Wharf Constructers, N.D.Ala., 1962, 209 F. Supp. 499, 501.*

[**14]

Venue under RICO

Title *18 U.S.C. § 1965*(a) provides that venue is proper for RICO claims where a defendant "resides, is found, has an agent, or transacts his affairs." For a corporate defendant in a private action under this section to be "found" in the district within the meaning of this section, it must be present in the district by its officers and agents carrying on the business of the corporation. *King v. Vesco, N.D.Cal., 1972, 342 F. Supp. 120.* Since the California Church is carrying on the business of the corporation in this district, both directly, through its own agents, and indirectly, through the Boston Church, venue is proper in this district under *18 U.S.C. § 1965,* as to the California Church.

It is unclear whether, or in what respects, Van Schaick intends to include the Nevada church as a defendant in her RICO counts, but, in any event, we conclude that venue is improper here with respect to that defendant. Since that defendant does not meet the test for corporate residence enunciated in *King v. Vesco, supra,* venue is improper as to it in this district under *18 U.S.C. § 1965*(a). Nor is venue proper here as to this defendant under the general venue provision, *28 [**15] U.S.C. § 1391*(b). n6 Therefore, the RICO claims, insofar as they pertain to the Nevada Church, must be dismissed.

n6. The special venue provision found in *18 U.S.C. § 1965* is not intended to be exclusive, but is intended to liberalize the existing venue provisions. Therefore, where venue is improper under § 1965(a), it is appropriate to inquire whether the action can be maintained under the general venue statute, *28 U.S.C. § 1391*(b). *Farmers Bank of State of Del. v. Bell Mortg. Corp., D.Del., 1978, 452 F. Supp. 1278, 1280-1281.* Section 1391(b) provides that venue is proper where the cause of action arose. But since almost all of the acts upon which plaintiff's RICO counts are predicated occurred outside of Massachusetts, none of her RICO claims "arose" in this district.

Venue for Diversity and Fair Labor Standards Act Claims

Since this is a court action in which the court's subject matter jurisdiction does not rest solely on diversity of citizenship, the applicable venue provision for the remaining counts [**16] is *28 U.S.C. § 1391*(b). Under these circumstances it provides that venue is proper "only in the judicial district where all defendants reside, or in which the claim arose .... Corporate residence, for venue purposes, is defined in *28 U.S.C. § 1391*(c) which states:

[*1134] A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district

shall be regarded as the residence of such corporation for venue purposes.

Since we have held that the California Church conducts business here continuously and systematically, both directly and through the Boston Church, it is "doing business" in this district within the meaning of *28 U.S.C. § 1391*(c). Therefore, venue is proper here for the California Church, the only corporate defendant over which we have personal jurisdiction with respect to the diversity and Fair Labor Standards Act claims. n7

n7. The California Church argues that even if its own business activities here are sufficiently extensive to meet the venue requirements of *28 U.S.C. § 1391*(c), venue for the entire action is still improper in this district because the venue requirements of *28 U.S.C. § 1391*(b) have not been met with respect to the individual defendants. But the defense of improper venue is personal to the party to whom it applies, and a resident defendant may not avail himself of a dismissal or transfer due to improper venue over a nonresident, unless the latter is an indispensable party. *Camp v. Gress, 1919, 250 U.S. 308, 316, 39 S. Ct. 478, 481, 63 L. Ed. 997; Vance Trucking Co. v. Canal Insurance Co., 4 Cir., 1964, 338 F.2d 943, 944; Goldberg v. Wharf Constructers, N.D.Ala., 1962, 209 F. Supp. 499, 503-504.*

[**17]

Motion to Dismiss for Failure to State a Claim

Having decided that this court has jurisdiction over the Church of California and that venue is proper in this district, we turn now to the merits of defendant's motion to dismiss each count of plaintiff's complaint. The defendant churches argued that plaintiff's first amended complaint must be dismissed because the doctrines and actions alleged as the basis for each cause of action are religious beliefs and practices. n8 The plaintiff, on the other hand, urges that although the Church of California claims to be a religious institution, it is, in fact, part of an organized commercial and criminal undertaking engaged in fraud and that, therefore, none of the First Amendment protections applicable to religions should be accorded defendant.

n8. Although defendants have not addressed themselves to plaintiff's second amended complaint, we assume, based on defendants' briefs and oral argument, that they would raise the same objections to plaintiff's most recent pleading.

[**18]

Quite clearly, the extent to which the religious clauses of the First Amendment protect the Church of Scientology is a question relevant to this case. But a review of plaintiff's pleading reveals that the court need not reach the First Amendment issues to rule on defendant's motion to dismiss some of the counts. Some of plaintiff's counts can be, and are, dismissed on grounds other than the First Amendment.

On the other hand, in some instances even the First Amendment, were it to apply, would not insulate a defendant religious organization or its members from liability. The Supreme Court has recognized that the First Amendment's protection "... embraces two concepts,- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. Connecticut, 1940, 310 U.S. 296, 303-304, 60 S. Ct. 900, 903, 84 L. Ed. 1213.* Thus even if we were to find that the California Church is a religious institution, the free exercise clause of the First Amendment would not immunize it from all common law causes of action alleging tortious activity. *Turner v. Unification Church, [**19] D.R.I., 1978, 473 F. Supp. 367, 371,* aff'd, *602 F.2d 458 (1979).* Nor does the First Amendment exempt religious groups from all regulatory statutes. See, e.g., United States v. Lee, ---- U.S. -- , *455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127, 1982; Heffron v. International Society for Krishna Consciousness, 1981, 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298; Prince v. Massachusetts, 1944, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645; Reynolds v. United States, 1878, 98 U.S. 145, 25 L. Ed. 244; The Founding Church of Scientology of Washington v. United States, 1969, 133 U.S.App.D.C. 229, 409 F.2d 1146;* [*1135] *Mitchell v. Pilgrim Holiness Church Corp., 7 Cir. 1954, 210 F.2d 879,* cert. den. 1954, *347 U.S. 1013, 74 S. Ct. 867, 98 L. Ed. 1136.* Whether or not such immunity exists depends, in part, on whether the adjudication of the claim would require a judicial determination of the validity of a religious belief, *United States v. Ballard, 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148* and, if not, on whether application of the regulation "is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Board of the Indiana Employment Security Division, [**20] 1981, 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624.* See also *Sherbert v. Verner, 1963, 374 U.S. 398, 406, 83 S. Ct. 1790, 1795, 10 L. Ed. 2d 965; West Virginia State Board of Education v. Barnette, 1943, 319 U.S. 624, 639, 63 S. Ct. 1178, 1186, 87 L. Ed. 1628; Cantwell v. Connecticut, 1940, 310 U.S. 296, 304, 60 S. Ct. 900, 903, 84 L. Ed. 1213.* Causes of action based upon some proscribed conduct may, thus, withstand a motion to dismiss even if the alleged wrongdoer acts upon a religious belief or is organized for a religious purpose.

We discuss first those counts which we dismiss on grounds independent of the First Amendment. We then turn to those claims against which the First Amendment affords no immunity.

RICO Claims

The plaintiff brings Counts I-III as class action claims for treble damages under the civil remedy provisions of *RICO, 18* U.S.C. § 1964(c), n9 on her own behalf and on behalf of all those who have paid money or property to any Church of Scientology, its employees or agents, "including defendants," as a result of violations of § 1962 of the RICO statute. The subsection of the Act on which plaintiff apparently n10 relies prohibits any person (including a corporation) [**21] employed by or associated with any interstate enterprise, from conducting the enterprise's affairs through a pattern of racketeering activity, *18 U.S.C. § 1962*(c). A "pattern of racketeering activity" is defined as the commission of two or more specific criminal acts, including extortion and mail fraud, within a ten-year period, *18 U.S.C. § 1961.*

n9. *18 U.S.C. § 1964*(c) states:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

n10. Plaintiff's complaint itself fails to specify which subsection of § 1962 defendants are alleged to have violated; however, the memoranda of law filed subsequently have made it clear that she predicates her claim on § 1962(c).

We note, at the outset, the recent opinion of the Supreme Court in *United States v. Turkette, 1981, 452 U.S. 576, [**22] 101 S. Ct. 2524, 69 L. Ed. 2d 246* which accorded RICO a more expansive reading than had some earlier lower courts. Although the Court observed "that the primary purpose of RICO is to cope with the infiltration of legitimate businesses", *Turkette, supra 101 S. Ct. at 2533,* it held that "enterprise" as defined in § 1961(4) and as used in 1962(c) refers to both legitimate and illegitimate enterprises. Thus, after Turkette, it is clear that RICO applies to persons who conduct the activities of a wholly illegitimate enterprise (whose activities affect interstate commerce) through a pattern of racketeering activity. Although Turkette removes one potential issue from our consideration, it does not establish that RICO covers the facts and allegations of this case. Indeed, we hold that plaintiff has failed to state a claim under RICO.

The theory of plaintiff's complaint ignores the express language of 1962(c) which provides that it shall be unlawful for any person "employed by or associated with any enterprise to conduct or participate ... in the conduct of such enterprise's affairs ..." through a practice of racketeering activity. To be sure, a person under RICO includes a "legal entity", [**23] *18 U.S.C. 1961*(3). And an "enterprise" may be either a legal entity or an informal association, *18 U.S.C. 1961*(4), as it was in Turkette. But RICO [*1136] quite clearly envisions a relationship between a "person" and an "enterprise" as an element of the offense which 1962(c) proscribes and for which 1964(c) would subject the "person" to treble damages.

Plaintiffs fail to specify this relationship. They several times refer to the Church of Scientology as an enterprise. They seem also to treat the Church of Scientology as the "person" from whom they seek treble damages. The Church of Scientology cannot, at once, be both the associated person and the enterprise. It is only a person, or one associated with an enterprise, not the enterprise itself, who can violate the provisions of the section.

Moreover, we believe that § 1964(c) does not extend to claims like those plaintiff asserts. That provision, which is patterned after § 4 of the Clayton Act, *15 U.S.C. § 15,* extends a treble damage remedy to any person injured in "business or property" by a violation of § 1962. Little legislative history exists on the clause. But courts which have recently considered § 1964(c) have interpreted [**24] it narrowly. See *Adair v. Hunt International Resources Corp., N.D.Ill.1981, 526 F. Supp. 736, 746; Waterman Steamship Corp. v. Avondale Shipyards, Inc., E.D.La., 527 F. Supp. 256, 1981* (available on LEXIS, Genfed library, Dist. file); *Kleiner v. First National Bank of Atlanta, N.D.Ga., 526 F. Supp. 1019, 1981; Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co., E.D.Mich., 527 F. Supp. 206, 1981,* (available on LEXIS, Genfed library, Dist. file). They have consistently concluded that § 1964(c) must be interpreted with careful attention to the provision's purpose and have avoided a slavish literalism that would escort into federal court through RICO what traditionally have been civil actions pursued in state courts. See *Adair v. Hunt International Resources Corp., supra; Waterman Steamship Corp. v. Avondale Shipyards Inc., supra; Kleiner v. First National Bank of Atlanta, supra; Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co., supra; Salisbury v. Chapman, N.D.Ill., 527 F. Supp. 577, 1981,* (available on LEXIS, Genfed library, Dist. file). Just as in the antitrust context the Supreme Court has held that the Clayton Act's treble damage provisions are available