UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

TERRY LEE HINDS, Plaintiff, v. "UNITED STATES" GOVERNMENT, Defendant.	Case No. 4:17-CV-750-JAR

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO DISMISS

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The United States respectfully moves to dismiss Plaintiff's amended complaint (ECF No. 44) pursuant to Rule 12(b)(1) for lack of jurisdiction and pursuant to Rule 12(b)(6) for failure to state a claim on which relief can be granted. As to jurisdiction and the merits, Plaintiff's claims fail both because of insufficient factual allegations and as a matter of law.

First, Plaintiff has not established a waiver of sovereign immunity, and this action must be dismissed on that basis alone. Second, even if Plaintiff were to establish a waiver of sovereign immunity, the suit should be dismissed because relief is not available. The operative complaint does not request any relief. Plaintiff's other filings suggest that he seeks unspecified declaratory and injunctive relief, but that relief is precluded by statute. The Court has construed Plaintiff's amended complaint to seek damages for constitutional violations, but Congress has not waived sovereign immunity for such a claim against the United States. Third, even if Plaintiff were able to overcome all of these hurdles, this suit should still be dismissed because Plaintiff fails to satisfy the pleading standard for stating a claim for a violation of either of the First Amendment's religion clauses and controlling precedent forecloses such a claim in this case.

PROCEDURAL POSTURE

Plaintiff originally filed a 547-page (at least 4,451-paragraph) complaint, together with a brief in support and a 26-page exhibit list, identifying more than five hundred exhibits. The Court stuck this complaint for failure to comply with Rule 8 and ordered Plaintiff to file an amended complaint by March 20, 2017 (ECF No. 8).

On June 14, 2017—after dozens of Plaintiff's motions, notices, exhibits, and other documents, three additional court orders, and one ultimately unsuccessful appeal—Plaintiff filed two sets of seven documents each. Plaintiff labeled the documents in the

first set "Revelation #1" through "Revelation #7" (ECF No. 44) and the second set "Religiosity of Facts" #1 through #7 (ECF No. 45). The United States moved to strike these fourteen documents for failure to comply with Rule 8 (ECF No. 51). Nothing in these fourteen documents requested any relief.

The Court granted the motion in part and denied it in part (ECF No. 55). The Court construed Plaintiff's Revelations #1 through #7 (ECF No. 44) as an amended complaint, even though they fail to comply with the Court's order that Plaintiff file a short and plain statement in accordance with Rule 8. (Mem. & Order 2.) However, the Court struck the references in Plaintiff's amended complaint to the original complaint and exhibits. (*Id.*) The Court construed the amended complaint to assert "violations of Plaintiff's constitutional (i.e. civil) rights, which may be brought under 42 U.S.C. § 1983." (*Id.* at 3.) But the amended complaint did not request damages.

Plaintiff has not further amended his complaint, and his operative pleading therefore still fails to set forth any request for relief. However, Plaintiff has filed other documents,[1] some of which assert that Plaintiff generally seeks declaratory and injunctive relief. (*See, e.g.*, Memo. of Law & Br. in Supp. of Pl.'s Mot. to Reconsider the Court's Ruling of July 11, 2017, at 12, ECF No. 57 ("Plaintiff's case is seeking 'DECLARATORY JUDGMENT, INJUNCTIVE AND OTHER APPROPRIATE RELIEF' . . . ."); 7th Decl. of Terry Lee Hinds ¶ 3979, ECF No. 75 ("One aspect of Plaintiff's [Q.U.E.S.T.] and his mission is the total disestablishment of the IRS and [THE CODE] through the United States legal

[1] In particular, Plaintiff has filed three motions for reconsideration (ECF Nos. 56, 64, 80). The Court denied the first of these motions (ECF No. 66). The Court also ordered the Clerk of Court to assign to this lawsuit a nature of suit code of 950: Constitutional-State Statute, and a cause of action code 28:2201 Constitutionality of State Statute(s). The remaining two motions for reconsideration are pending.

system in the [Commanding Heights].")). Yet, neither the amended complaint nor any of Plaintiff's subsequent filings specifies what declaration(s) Plaintiff seeks or what Plaintiff wishes to enjoin the United States from doing (or not doing).

NATURE OF THE CASE

Plaintiff characterizes his suit as arising under the Establishment and Free Exercise clauses of the First Amendment. (Revelation #1, ¶ 1, ECF No. 44.) Plaintiff's conclusions are broad. Plaintiff's amended complaint appears to assert that the Internal Revenue Code (Title 26 of the United States Code) as a whole is unconstitutional. (*See* Revelation #1, ¶¶ 4, 37, 49. [2])

But Plaintiff's factual allegations are narrow. The only government action Plaintiff identifies is the requirement that taxpayers file returns, including that they be on the IRS's forms and pursuant to the IRS's published guidance. Plaintiff alleges that, "when a person believes in, practices or makes a proper return to the Internal Revenue Service ("IRS") and their path of life, beliefs and practices it manifests Worship of Argumentative Wealth, Words & Wants of Materialism." (Revelation #1, ¶ 9; *accord id.* ¶¶ 17-20, 30-31, 62, 89.) Plaintiff also alleges that "Defendants' [sic] activities and conduct with Publications, Instructions & Forms of THEIRS or to 'see' their stepping stones of enlightenment values in advances as a Govspel of THEIRS." (*Id.* ¶ 16; *accord id.* ¶ 46.)

The remainder of the amended complaint (to extent it is comprehensible) consists largely of unsupported conclusions and Plaintiff's attempts to incorporate by reference

[2] Some of the language in the amended complaint suggests an even broader argument. (*See, e.g.*, Revelation #1, ¶ 10 ("Plaintiff [believes] Worship of Argumentative Wealth, Words & Wants of Materialism is manifested as a system of Worship." (alteration in original)); *accord id.* ¶¶ 21, 34.)

the stricken exhibits to the original complaint. The amended complaint identifies no other provisions of the Internal Revenue Code and no other IRS actions.

ARGUMENT

Pursuant to Rule 12(b)(1), a court must dismiss a claim when the court lacks subject-matter jurisdiction. Fed. R. Civ. Proc. 12(b)(1). The plaintiff bears the burden of establishing, over a contrary presumption, that subject matter jurisdiction exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A Rule 12(b)(1) motion takes two general forms, a "facial attack" and a "factual attack." *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993); *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). In a facial challenge such as this, "all of the factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Titus*, 4 F.3d at 593. Here, the amended complaint is required to allege the jurisdictional prerequisites necessary to maintain this suit, but it fails to plead facts showing that the Court has jurisdiction over the amended complaint.

To withstand a Rule 12(b)(6) motion to dismiss for failure to state a claim on which relief can be granted, a complaint must contain enough facts to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). For purposes of this motion, the well pled facts in the amended complaint are taken as true. *Id.* at 678. But "labels, conclusions, formulaic recitations, naked assertions and the like" are not presumed true. *Twombly*, 550 U.S. at 555-57. The Court is also "not required to accept as plausible wholly unrealistic assertions." *Brown v. Medtronic, Inc.*, 628 F.3d 451, 461 (8th

Cir. 2010). The claim for relief is plausible if the facts allow the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. The amended complaint fails to state a plausible claim for relief.[3]

I. SOVEREIGN IMMUNITY BARS PLAINTIFF'S CLAIMS AGAINST THE UNITED STATES BECAUSE HE HAS NOT ESTABLISHED A WAIVER.

The United States is immune from suit except where Congress has expressly permitted a suit against the government. *United States v. Dalm*, 494 U.S. 596, 608 (1990). A waiver of sovereign immunity cannot be implied; it must be unequivocally expressed in an act of Congress. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Where Congress has provided for a specific waiver of sovereign immunity, the "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano v. United States*, 352 U.S. 270, 276 (1957).

"Sovereign immunity is jurisdictional in nature." *FDIC v. Meyer,* 510 U.S. 471, 475 (1994). "Absent a waiver, sovereign immunity shields the United States and its agencies from suit." *Id.* The plaintiff bears the burden of establishing a waiver of sovereign immunity. *V S Ltd. P'ship v. Dep't of Housing & Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000); *see generally Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375,

[3] Plaintiff, as a *pro se* litigant, is entitled to a liberal construction of his pleadings. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *Stone v. Harry*, 364 F.3d 912, 914 (8th Cir. 2004). But "they still must allege sufficient facts to support the claims advanced." *Stone*, 364 F.3d at 914.

377 (1994) ("[T]he burden of establishing [jurisdiction] rests upon the party asserting jurisdiction.").

Here, Plaintiff has not met his burden to establish a waiver of sovereign immunity. The amended complaint alleges that jurisdiction is based on 28 U.S.C. §§ 1331, 1346(a)(2) (the Little Tucker Act), and 2201-02 (the Declaratory Judgment Act).[4] (*See* Revelation #2, ¶¶ 1-2, 4.) But none of these statutes waives sovereign immunity for Plaintiff's action. Section 1331 is a general jurisdictional statute that does not waive the United States' sovereign immunity. *Hagermeier v. Block*, 806 F.2d 197, 202-03 (8th Cir. 1986). The Little Tucker Act does not waive sovereign immunity for this action because the First Amendment does not "mandate[e] compensation by the Federal Government." *United States v. Testan*, 424 U.S. 392, 400 (1976) (discussing Tucker Act); *accord United States v. Bormes*, 568 U.S. 6, 10 (2012) (same for Little Tucker Act); *see Russell v. United States*, 78 Fed. Cl. 281, 288 (2007) (citing *United States v. Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983) ("The First Amendment does not mandate the payment of damages for its breach and cannot be construed as a money-mandating source."). And the Declaratory Judgment Act only expands the remedies available in district courts; it neither provides jurisdiction nor waives sovereign immunity. *Skelly Oil Co. v. Phillips Petro. Co.*, 339 U.S. 876, 671-72 (1950) ("[T]he Declaratory Judgment Act is procedural only."); *Peterson v. United States*, No. 2:12-cv-64, 2013 WL 12085470, at *2 (D.N.D. Aug. 20, 2013) ("[T]he Declaratory Judgment Act has not waived the United States' sovereign immunity."). Because Plaintiff has not met his burden to

[4] The amended complaint also references state law claims. *See* Revelation #2, ¶ 3. But the Constitution of the State of Missouri could not provide a waiver of federal sovereign immunity.

establish a waiver of sovereign immunity, the amended complaint should be dismissed for lack of subject matter jurisdiction. *See Peterson*, 2013 WL 12085470, at *3 (dismissing claim for lack of subject matter jurisdiction).

II. EVEN IF PLAINTIFF COULD IDENTIFY A WAIVER OF SOVEREIGN IMMUNITY, IT WOULD NOT APPLY IN THIS CASE BECAUSE RELIEF IS PRECLUDED.

As explained above, Plaintiff has not identified any waiver of sovereign immunity allowing this action. But even if Plaintiff were to identify a relevant waiver for his First Amendment challenges, the suit would still be precluded because Plaintiff cannot obtain the relief at issue. While the amended complaint does not request any relief, Plaintiff has elsewhere suggested that he seeks unspecified declaratory and injunctive relief, and the Court has construed the amended complaint to seek damages. In either case (or both), such relief is precluded. Thus, this action should still be dismissed for lack of subject matter jurisdiction.

A. The United States Has Not Waived Sovereign Immunity for Plaintiff's Claims for Declaratory and Injunctive Relief.

Although the amended complaint does not request any relief, Plaintiff appears to seek unspecified declaratory and injunctive relief.[5] To the extent the declaratory relief requested is with respect to taxes and the injunctive relief for the purpose of restraining the assessment or collection of any tax, such relief is precluded by the tax exception to

[5] (*See* Revelation #2, ¶ 4, ECF No. 44-1 (alleging the Court generally has jurisdiction to grant declaratory and injunctive relief); Memo. of Law & Br. in Supp. of Pl.'s Mot. to Reconsider the Court's Ruling of July 11, 2017, at 12, ECF No. 57 ("Plaintiff's case is seeking 'DECLARATORY JUDGMENT, INJUNCTIVE AND OTHER APPROPRIATE RELIEF' . . . ."); 7th Decl. of Terry Lee Hinds ¶ 3979, ECF No. 75 ("One aspect of Plaintiff's [Q.U.E.S.T.] and his mission is the total disestablishment of the IRS and [THE CODE[through the United States legal system in the [Commanding Heights].").)

the Declaratory Judgment Act and by the Anti-Injunction Act, respectively. *See Roberts v. United States*, 3 F. App'x 570, 570 (8th Cir. 2001) (unpublished) (per curiam).

Declaratory relief is barred by the tax exception to the Declaratory Judgment Act. In 28 U.S.C. § 2201(a), Congress precluded claims seeking declaratory relief "with respect to federal taxes." This prohibition is broad and includes constitutional challenges to taxation. *See, e.g.*, *Wyo. Trucking Ass'n v. Bentsen*, 82 F.3d 930, 933-34 (10th Cir. 1996); *Willis v. Alexander*, 575 F.2d 495, 496 (5th Cir. 1978); *Bell v. Rossotti*, 227 F. Supp. 2d 315, (M.D. Pa. 2002) (dismissing claim for declaration regarding application of First Amendment to tax issues); *Klingler v. Exec. Branch of Union Known as U.S.*, 572 F. Supp. 589, 590-91 (M.D. Ala. 1983) (dismissing suit where "it is clear that his requested relief, if granted, would prohibit the processes of federal tax collection"). Accordingly, any request for declaratory relief is precluded, and the claim should be dismissed for lack of jurisdiction. *See E.J. Friedman Co. v. United States*, 6 F.3d 1355, 1359 (9th Cir. 1993) ("Because the case at bar involves federal taxes, declaratory relief is unavailable, and § 2201 cannot serve as a waiver of sovereign immunity.").

Similarly, injunctive relief is precluded by the Anti-Injunction Act. The Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421, prohibits lawsuits "for the purpose of restraining the assessment or collection of any tax."[6] The reach of the AIA is broad,

[6] The Anti-Injunction Act provides for certain statutory exceptions, none of which Plaintiff invokes in the amended complaint or is otherwise relevant here. *See* § 7421(a).

In addition to the statutory exceptions to the Anti-Injunction Act, there is a narrow judicially created exception to the Anti-Injunction Act. *See Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1 (1962). The *Williams Packing* exception allows a suit for injunctive relief where the plaintiff clearly shows that the government cannot prevail, the plaintiff has established that no other legal remedy is available, and, if the government is not enjoined, the taxpayer will suffer irreparable harm. *See id.* at 6, 8; *Hansen v. United States*, 744 F.2d 658 (8th Cir. 1984). But Plaintiff does not allege any facts supporting

barring any injunctions related to tax assessment or collection. *Gulden v. United States*, 287 F App'x 813, 816 (11th Cir. 2008) ("[T]he Anti-Injunction Act bars not only suits that directly seek to restrain the assessment or collection of taxes, but also suits that seek to restrain IRS activities which are intended to or may culminate in the assessment or collection of taxes." (internal quotation marks omitted)). Indeed, the AIA precludes constitutional claims related to taxes—whether they challenge IRS actions[7] or statutes.[8] Therefore, any claim for injunctive relief is barred and should be dismissed for lack of subject matter jurisdiction. *See Bob Jones Univ.*, 416 U.S. at 749.

B. If Plaintiff's Amended Complaint Is Construed to Assert a *Bivens* Claim, the Claim Should Be Dismissed.

While the amended complaint does not request damages, to the extent it might be construed to seek damages under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971),[9] that claim should be dismissed. *Bivens* is not applicable here because (1) there

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findings that the government cannot prevail. To the contrary, as explained in Section III, below, the amended complaint should be dismissed for failure to state a claim on which relief can be granted.

[7] *See Bob Jones Univ. v. Simon*, 416 U.S. 725, 748-49 (1974) (holding the AIA barred constitutional claims related to the plaintiff's tax-exempt status); *Bell*, 227 F. Supp. 2d at 318-19 (holding AIA precluded claim that IRS investigation violated the First Amendment).

[8] *See Wyo. Trucking*, 82 F.3d at 933-34 (holding AIA precluded challenge to constitutionality of federal tax laws); *Willis*, 575 F.2d at 496 (holding AIA precluded challenge to constitutionality of the Tax Court and questions on a tax return); *Klingler*, 572 F. Supp. at 590-91 (holding AIA precluded challenge by plaintiff who "maintained that he is concerned less with preventing the collection of a federally imposed tax than with remedying what he perceives as a breach by federal officials of the United States Constitution").

[9] As a threshold matter, any damages claim against federal officials could only be brought as a *Bivens* action, not under 42 U.S.C. § 1983. The Court has construed Plaintiff's amended complaint to assert "violations of Plaintiff's constitutional (i.e. civil) rights, which may be brought under 42 U.S.C. § 1983." (Mem. & Order 3, ECF No. 55.) Section 1983 "entitles an injured person to money damages if a **state** official violates his or her constitutional rights." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017) (emphasis added). Thus, "§ 1983 'is inapplicable when a person acts under color of federal law.'"

has been no waiver of sovereign immunity for a *Bivens* action against the United States and (2) even if Plaintiff attempted to assert a *Bivens* action against an unnamed individual, no *Bivens* claim exists for challenges to tax assessment and collection.

The United States has not waived sovereign immunity for constitutional violations. *Meyer*, 510 U.S. at 477-78. Thus, a plaintiff "may not bring a *Bivens* claim against . . . the United States," as "his only remedy lies against the individual."[10] *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001); *accord Patel*, 515 F.3d at 812 ("*Bivens* allows for a cause of action for damages against federal officials, not federal agencies.").

Jones v. U.S., 16 F.3d 979, 981 (8th Cir. 1994). Because the amended complaint does not allege any actions under color of state law, § 1983 is inapplicable. However, while "Congress did not create an analogous statute for federal officials," the Supreme Court, in *Bivens* . . ., recognized an implied cause of action against **federal** officials for injuries resulting from violations of the Fourth Amendment's prohibition against unreasonable searches and seizures. *Ziglar*, 137 S. Ct. at 1854 (emphasis added). Thus, to the extent the amended complaint is construed to seek damages, it could only assert such a claim under *Bivens*, not § 1983.

It is unlikely that the *Bivens* remedy applies in this case because Plaintiff alleges violations of the First Amendment. While the Supreme Court has expanded the *Bivens* implied cause of action to certain violations of the Fifth and Eighth Amendments, it has since that time held that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Ziglar*, 137 S. Ct. at 1857 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)). The Court "ha[s] not found an implied damages remedy under the Free Exercise Clause." *Iqbal*, 556 U.S. at 675 (assuming without deciding that such a claim exists). Indeed, the Supreme Court rejected the only attempted expansion of the *Bivens* remedy to violations of the First Amendment on which it has ruled. *See Bush v. Lucas*, 462 U.S. 367, 390 (1983). The Eighth Circuit has stated that, "We have never found a *Bivens* action to extend to a Free Exercise claim, and it is doubtful that we would do so." *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 n.6 (8th Cir. 2008). However, this Court need not resolve whether to extend the *Bivens* remedy, because, as will be shown, Plaintiff's amended complaint does not assert a *Bivens* claim.

[10] Similarly, § 1983 does not create a claim against states, because "'in common usage, the term "person" does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.'" *Will v. Mich. Dep't of St. Police*, 491 U.S. 58, 64 (1989) (alternations in original) (quoting *Wilson v. Omaha Tribe*, 442 U.S. 653, 667, 99 S.Ct. 2529, 2537, 61 L.Ed.2d 153 (1979)).

Here, the only defendant Plaintiff has named in this action is the "'United States' Government." Thus, any *Bivens* claim must be dismissed for lack of jurisdiction.

Even if Plaintiff were to name an unidentified federal official as a defendant, no *Bivens* action would exist because the Internal Revenue Code provides adequate remedies for claims relating to assessment and collection of taxes. *Bivens* creates a cause of action only where adequate remedies are otherwise unavailable. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). The Internal Revenue Code provides adequate remedies for taxpayers who wish to "challenge overzealous tax assessment and collection activities." *Vennes*, 26 F.3d at 1454 (citing remedies created by 26 U.S.C. §§ 7422, 7432-33). Accordingly, the Eight Circuit has foreclosed the possibility of a *Bivens* action for claims arising out of allegedly wrongful assessment or collection of taxes. *See Searcy v. Donelson*, 204 F.3d 797, 798 (8th Cir. 2000). To the extent Plaintiff's claims arise out of the IRS's assessment and collection of taxes, Plaintiff has no *Bivens* claim because, under *Vennes*, as a matter of law, the Internal Revenue Code provides Plaintiff with adequate remedies.[11] *See Searcy*, 204 F.3d at 799 (finding *Bivens* action against IRS agents to be "lacking in merit and frivolous").

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[11] The amended complaint does not specifically allege that the remedies provided by the Internal Revenue Code are themselves unconstitutional. But, to the extent Plaintiff might argue that the remedies Congress created in the I.R.C. violate the Free Exercise Clause or the Establishment Clause, numerous courts have rejected similar outlandish arguments. *See generally Land v. Comm'r*, 955 F.2d 47 (Table), 1992 WL 31328, at *1 (9th Cir. Feb. 19, 1992) (finding religion clauses of the First Amendment did not provide reasonable cause for failure to file tax returns); *United States v. Studley*, 783 F.2d 934, 940 (9th Cir. 1986) ("We have also held that the Internal Revenue Code was validly enacted by the Congress and is fully enforceable."); *Crowe v. Comm'r*, 396 F.2d 766, 767 (8th Cir. 1968) ("The constitutionality of income tax laws, enacted pursuant to the Sixteenth Amendment, adopted in 1913, has long been established." (citing *Brushhaber v. Union Pac. R.R.*, 240 U.S. 1 (1916))); *Parker v. Comm'r*, 365 F.2d 792, 795 (8th Cir. 1966) ("We believe it is constitutionally permissible to tax the income of religious

III. THE AMENDED COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM BECAUSE PLAINTIFF HAS NOT PLED A VIOLATION OF THE FIRST AMENDMENT.

Even if Plaintiff could establish a valid waiver of sovereign immunity to allow this action to proceed for some relief, Plaintiff has not alleged **facts** capable of establishing a violation of the First Amendment's Establishment Clause or Free Exercise Clause. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. With regard to both clauses, the amended complaint alleges only wholly unrealistic conclusory statements, not facts.

The amended complaint does not allege facts to establish a violation of the Free Exercise Clause. The amended complaint does not cogently allege any specific religious beliefs at issue. Nor does Plaintiff allege how any government action burdens his beliefs. *See Sherbert v. Verner*, 374 U.S. 398, 403-06 (1963), *overruled by Emp't Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990); *see also* 42 U.S.C. § 20000bb-1(b). He does not allege unequal treatment based on his religion. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). And Plaintiff does not allege any particular federal tax requirements are not neutral and generally applicable. *See Smith*, 494 U.S. at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

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organizations."); *Russell v. Comm'r*, 60 T.C. 942, 946 (1973) ("There are few, if any, governmental activities to which some person or group might not object on religious grounds.").

Similarly, the amended complaint does not allege facts to establish a violation of the Establishment Clause. The amended complaint does not allege any facts to show (1) that the Form 1040 has a non-secular purpose, (2) that its principal or primary effect advances any religion, or (3) that it fosters any entanglement with any religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 563 (8th Cir. 2009) (applying *Lemon* test). Indeed, ignoring conclusory statements, *Iqbal*, 556 U.S. at 678, and wholly unrealistic assertions, *Medtronic*, 628 F.3d at 461, the amended complaint does not plead any connection between the Form 1040 (or the I.R.C.) and any religion or religious belief or practice.

Because of its failure to plead facts stating a claim for a First Amendment violation, the amended complaint should be dismissed. *See Iqbal*, 556 U.S. at 678. Moreover, Plaintiff will be unable to remedy these failures by further amending his complaint. Whatever burden the general requirements to pay taxes and file tax returns impose on the Plaintiff, they do not violate his right to free exercise of religion. *See Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) (rejecting free exercise claim because "the guiding principle is that a tax 'must be uniformly applicable to all, except as Congress provides explicitly otherwise'" (quoting *Lee*, 455 U.S. at 261)); *Lee*, 455 U.S. at 260 ("Because the broad public interest in maintaining a sound tax system is of such a high order, religious beliefs in conflict with the payment of taxes affords no basis for resisting the tax."); *United States v. Rosnow*, 977 F.2d 399, 412 (8th Cir. 1992) ("First Amendment protection is 'not so absolute as to protect speech or conduct which otherwise violates or incites a violation of the tax law.'" (quoting *United States v. Citrowske*, 951 F.2d 899, 901 (8th Cir.1991))); *Welch v. United States*, 750 F.2d 1101,

1108 (1st Cir. 1985) ("[N]oncompliance with the federal tax laws is conduct that is afforded no protection under the First Amendment."). And the requirements that taxpayers file returns, including that they be on the IRS's forms and pursuant to the IRS's published guidance, does not establish a religion or otherwise violate the First Amendment. *See Garner v. United States*, 424 U.S. 648, 660 (1976) ("'[I]ncome tax return[s] (are) neutral on their face and directed at the public at large.'" (quoting *Albertson v. SACB*, 382 U.S. 70, 79 (1965))); *Borgeson v. United States*, 757 F.2d 1071, 1073 (10th Cir. 1985) (holding perjury clause of Form 1040 did not violate Free Exercise Clause); *Willis*, 575 F.2d at 496 (rejecting contention that questions on the individual income tax return are unconstitutional).

CONCLUSION

The allegations in Plaintiff's amended complaint fail to establish a waiver of sovereign immunity. They also fail to state a claim for a violation of either of the First Amendment's religion clauses. Moreover, Plaintiff's claims fail as a matter of law, both because any relief is precluded and on the merits of Plaintiff's First Amendment claims. Accordingly, this action should be dismissed for lack of jurisdiction or, in the alternative, for failure to state a claim on which relief can be granted.

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Dated: September 11, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 11, 2017, I filed this memorandum with the Court through the CM/ECF system and caused a copy to be mailed to:

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