

Appeal No. 14-1152

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL,

Plaintiffs-Appellees

v.

JACOB J. LEW, ET AL,

Defendants-Appellants

On Appeal from the Judgment and Order of the
United States District Court for the Western District of Wisconsin
Civil Case No. 11-cv-626 (Honorable Barbara B. Crabb)

***AMICUS CURIAE* BRIEF OF 624 CHURCHES
IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL**

David A. Cortman
Kevin H. Theriot
Erik W. Stanley
Christiana M. Holcomb
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
Facsimile: (480) 444-0028

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. 26.1, the 624 churches listed in this brief as *amicus curiae* are all nonprofit organizations. The vast majority of these nonprofit organizations are privately incorporated, although some may fall within the corporations of their denomination, and they do not have any stock.

TABLE OF CONTENTS

| | |
|----------------------------------------------------------------------------------------------------------------------------------------------|-----|
| CORPORATE DISCLOSURE STATEMENT | ii |
| TABLE OF AUTHORITIES | v |
| IDENTITY OF AMICUS CURIAE | vii |
| SUMMARY OF ARGUMENT | 1 |
| ARGUMENT | 1 |
| I. Not all tax exemptions are subsidies because they operate differently and generally serve different legislative purposes. | 3 |
| A. Tax exemptions and direct subsidies operate differently..... | 4 |
| 1. Tax exemptions do not involve any transfer of revenue from the government to the exempt entity..... | 4 |
| 2. Tax exemptions do not create a sustained financial or administrative relationship between the government and the exempt entity..... | 5 |
| 3. Tax exemptions do not involve a perennial budget battle to ensure their continued existence..... | 6 |
| 4. Tax exemptions do not have a fixed dollar amount..... | 6 |
| B. Tax exemptions and direct subsidies generally serve different legislative purposes | 7 |
| 1. Some tax exemptions define the tax base | 8 |
| 2. Some tax exemptions and all subsidies serve as incentives to certain behavior. | 9 |
| 3. Some tax exemptions accommodate religion | 9 |
| II. Supreme Court precedent differentiates between tax exemptions and direct subsidies in Establishment Clause jurisprudence..... | 11 |
| III. Section 107(2) is a permissible accommodation of religion rather than a government subsidy | 15 |

CONCLUSION.....17
CERTIFICATE OF COMPLIANCE.....19
EXHIBIT A.....21
EXHIBIT B32

TABLE OF AUTHORITIES

Cases:

| | |
|---------------------------------------------------------------------------------------------------------------------------------|---------------|
| <i>Arizona Christian School Tuition Organization v. Winn</i> , ___ U.S. ___, 131 S. Ct. 1436 (2011) | 4-5, 14 |
| <i>Arkansas Writers' Project, Inc. v. Ragland</i> , 481 U.S. 221 (1987)..... | 13 |
| <i>Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos</i> , 483 U.S. 327 (1987)..... | 12 |
| <i>Freedom from Religion Foundation, Inc. v. Lew</i> , 11-CV-626-BBC, 2013 WL 6139723 (W.D. Wis. Nov. 22, 2013) | 2 |
| <i>Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.</i> , ___ U.S. ___, 132 S. Ct. 694 (2012) | 9 |
| <i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971)..... | 7 |
| <i>Marks v. United States</i> , 430 U.S. 188 (1977)..... | 13 |
| <i>Regan v. Taxation With Representation of Washington</i> , 461 U.S. 540 (1983)..... | 13 |
| <i>Texas Monthly, Inc. v. Bullock</i> , 489 U.S. 1 (1989)..... | 2-3, 9, 12-14 |
| <i>Walz v. Tax Commission of City of New York</i> , 397 U.S. 664 (1970)..... | <i>passim</i> |

Statutes:

| | |
|--------------------------|-------|
| 26 U.S.C. § 107 | 15-16 |
| 26 U.S.C. § 107(2) | 15-16 |

Regulations:

H.R. 4156, 107th Cong. § 2 (a)(3)-(5)16

Other Authorities:

Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285
(1969).....8

Dean M. Kelley, *Why Churches Should Not Pay Taxes* 33 (1st ed. 1977)..... 4-6

Donna D. Adler, *The Internal Revenue Code, the Constitution, and the
Courts: The Use of Tax Expenditure Analysis in Judicial Decision
Making*, 28 WAKE FOREST L. REV. 855 (1993)7

Douglas Laycock, *Towards a General Theory of the Religion Clauses: The
Case of Church Labor Relations and the Rights to Church Autonomy*,
81 COLUM. L. REV. 1373 (1981).....10

Edward A. Zelinsky, *Are Tax “Benefits” for Religious Institutions
Constitutionally Dependent on Benefits for Secular Entities?*, 42 B.C.
L. REV. 805 (2001).....8

Edward A. Zelinsky, *The First Amendment and the Parsonage Allowance*
(January 27, 2014), Tax Notes, Vol. 142, No. 4, Jan. 27, 2014.
Available at SSRN: <http://ssrn.com/abstract=2394132>..... 1-2, 13, 16-17

Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of
the Establishment Clause? The Constitutionality of the Parsonage
Allowance Exclusion and the Religious Exemptions of the Individual
Health Care Mandate and the FICA and Self-Employment Taxes*, 33
CARDOZO L. REV. 1633 (2012)10

IDENTITY OF AMICUS CURIAE¹

This brief represents the interests of 624 pastors and churches nationwide.² These pastors and churches come from diverse geographic, denominational, and cultural backgrounds, but they are united in their reliance on the minister's housing allowance and their deep concern for its future.

The hundreds of pastors and churches represented by this brief come from forty-two different states. They represent a broad spectrum of the faith community, with denominational backgrounds including Assemblies of God, Baptist, Catholic, Episcopal, Lutheran, Methodist, Nazarene, and Presbyterian, as well as many independent, nondenominational churches. These pastors and churches represent varied cultural and ethnic backgrounds, including Vietnamese and Korean ethnicities. They represent churches ranging from very few congregants to megachurches of thousands. Despite their varied backgrounds and faith traditions, each member of this broad coalition of pastors and churches relies upon the minister's housing allowance and will be directly affected should this long-standing exemption be struck down. A complete list of churches represented by this brief is attached as Exhibit A, which is bound with this brief.

¹ All parties have consented to the filing of this *amicus* brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

² *Amicus curiae* conferred with other *amici* before filing this brief to ensure that the perspective provided is unique and helpful to the Court in resolving this case.

SUMMARY OF ARGUMENT

The district court's conclusion that 26 U.S.C. § 107(2) violates the Establishment Clause turns upon one critical assumption – that every tax exemption is a government subsidy. But not all tax benefits are created equal. Exemptions and subsidies are significantly different both in how they operate and in the degree of entanglement they foster with the government. Exemptions and subsidies usually serve different legislative purposes: subsidies encourage certain behavior while exemptions may define the tax base or foster neutrality towards religion. Supreme Court precedent recognizes that not all tax exemptions are subsidies in the Establishment Clause context.

In equating all tax exemptions with direct government subsidies, the district court failed to recognize the secular purpose and effect served by § 107(2). Far from establishing religion, this permissive accommodation fosters disentanglement with religion and neutrality towards religion as it seeks to navigate the perilous waters between the Establishment Clause and the Free Exercise Clause.

ARGUMENT

The district court's conclusion that § 107(2) violates the Establishment Clause turns on one crucial legal assumption – that *every* tax exemption constitutes a government subsidy. *See* Edward A. Zelinsky, *The First Amendment and the Parsonage Allowance* (January 27, 2014), Tax Notes, Vol. 142, No. 4, Jan. 27,

2014. Available at SSRN: <http://ssrn.com/abstract=2394132> (“Critical to the [FFRF v. Lew district] court’s reasoning was the assertion of the *Texas Monthly* plurality that ‘every tax exemption constitutes a subsidy.’”).

In concluding that § 107(2) violates the Establishment Clause, the court below focused solely on whether the tax exemption³ has a secular purpose or effect, as required by the *Lemon* test. *See Freedom from Religion Found., Inc. v. Lew*, 11-CV-626-BBC, 2013 WL 6139723 *21 (W.D. Wis. Nov. 22, 2013) (hereinafter “Opinion”) (“because I have concluded that §107(2) does not have a secular purpose or effect, I need not decide whether the provision fosters excessive entanglement between church and state.”). Its analysis essentially began – and ended – with *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). *See* Opinion at *9 (“Consideration of the question whether § 107(2) violates the Establishment Clause must begin with *Texas Monthly*”); *see also id.* at *10 (“I conclude that *Texas Monthly* controls the outcome of this case.”). Although the court acknowledged that “no single opinion garnered at least five votes in *Texas Monthly*,” it nevertheless accepted without scrutiny the plurality’s premise that every tax exemption constitutes a government subsidy. *Id.* at *9-10.

³ Although the minister’s housing allowance in 26 U.S.C. § 107(2) is more precisely characterized as a tax “exclusion,” this brief employs the term “exemption” for the sake of consistency with the district court’s opinion below. *See, e.g.*, Opinion at *1 (referring to the provisions of 26 U.S.C § 107 as “income tax exemptions”).

Once the court embraced this legal assumption, the logical trajectory was fixed. Each subsidy “cannot but convey a message of endorsement to slighted members of the community” who did not receive the subsidy. *Id.* at *9 (quoting *Texas Monthly*). Under this view, only disbursement of the subsidy to various and sundry secular organizations, or a special mandate of the Free Exercise Clause, could salvage a subsidy to religious organizations from an Establishment Clause violation. *See id.* (noting that subsidies are unjustifiable if not shared with a wide array of secular groups or mandated by the Free Exercise Clause). Yet, as discussed below, the district court’s fundamental premise is flawed: not every tax exemption constitutes a government subsidy.

I. Not all tax exemptions are subsidies because they operate differently and generally serve different legislative purposes.

The district court’s assumption that all tax exemptions are government subsidies equivalent to direct expenditures rests on tenuous logic and questionable legal grounds. This expenditure theory of tax exemptions considers only one facet of the tax benefit – its economic effect. Put simply, tax exemptions are viewed as dollars in the pocket of the exempt entity that belonged in government coffers, bestowed as a matter of legislative grace.

Although this one-size-fits all approach takes little effort to apply, and may reach a just result in other contexts, equating exemptions and subsidies paints a

skewed and incomplete picture in the sensitive area of Establishment Clause jurisprudence.

A. Tax exemptions and direct subsidies operate differently.

Tax exemptions and government subsidies are operationally distinct in several ways: this brief highlights four.

1. Tax exemptions do not involve any transfer of revenue from the government to the exempt entity.

First, a tax exemption does not involve any transfer of revenue from the government to the exempt entity. As the Supreme Court noted, “[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.” *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 675 (1970); *see also* Dean M. Kelley, *Why Churches Should Not Pay Taxes*⁴ 33 (1st ed. 1977) (“In a tax exemption, *no money changes hands* between government and the organization.” (emphasis original)). Money that never passed into the government’s coffers is money that never belonged to the government. *See Ariz. Christian Sch. Tuition Org. v. Winn*, ___U.S.___, 131 S. Ct. 1436, 1448 (2011)

⁴ Dean Kelley’s book *Why Churches Should Not Pay Taxes* was highly influential after its initial printing in the 1970s. But since copies of the book are no longer easy to obtain, a relevant excerpt of the book has been scanned and attached for this Court’s ease of reference at Exhibit B, bound with this brief.

(explaining that tax benefits, such as STO tax credits, were never owed to the state and thus cannot be considered government funds).

Likewise, a tax exemption does not divert taxpayer dollars to support the entity's operations, forcing taxpayers to become indirect donors. *See Kelley, Why Churches Should Not Pay Taxes* at 33 (“A tax exemption...*does not provide one cent* to an organization.” (emphasis original)). The exempt entity must find some other source of revenue to fund its operations. *See id.* (“Without contributions from its supporters, [the exempt entity] has nothing to spend.”). By contrast, “[a] subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole.” *Walz*, 397 U.S. at 690 (Brennan, J. concurring). Subsidies involve the transfer of monies from the taxpayer, to the government, to the subsidy recipient.

2. Tax exemptions do not create a sustained financial or administrative relationship between the government and the exempt entity.

Second, because a tax exemption does not entail the transfer of public monies from the government to an exempt entity, there is no sustained financial or administrative relationship between the two. A tax exemption involves “no financial transaction with applications, checks, warrants, vouchers, receipts, accounting, or audits.” *Kelley, Why Churches Should Not Pay Taxes* at 33. Any involvement between the exempt entity and the government is “minimal” and

“remote” at best. *Walz*, 397 U.S. at 676. By contrast, “a direct money subsidy [is] a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards.” *Id.* at 675. Subsidy recipients must expend considerable energy “applying for, defending, reporting, qualifying, [and] undergoing audits and evaluations” to obtain and maintain the subsidy. Kelley, *Why Churches Should Not Pay Taxes* at 33. Tax exemptions avoid such government entanglement.

3. Tax exemptions do not involve a perennial budget battle to ensure their continued existence.

Third, a tax exemption does not involve a perennial budget battle to ensure its continued existence. Tax exemptions, once enacted, enjoy a relatively fixed and assured place in the tax code. A subsidy recipient, by contrast, must periodically struggle to “obtain, renew, maintain, or increase” the subsidy, subject to political scrutiny. *Id.*

4. Tax exemptions do not have a fixed dollar amount.

Fourth, tax exemptions do not have a fixed dollar amount. *See id.* (“there is no ‘amount’ involved in a tax exemption because it is ‘open-ended’”). The value of an exemption fluctuates in proportion to changes in the tax base value. Direct subsidies, by contrast, have a fixed dollar amount which is “determined by the legislature or an administrator.” *Id.*

Thus, tax exemptions and direct subsidies operate very differently. These two tax benefits involve differing obligations on the part of the receiving entity. They involve differing degrees of government involvement and regulations, as well as differing degrees of taxpayer association. Thus, it is inaccurate to categorically lump all tax benefits together as if they were operationally equivalent.

B. Tax exemptions and direct subsidies generally serve different legislative purposes.

Not only do tax exemptions operate very differently from direct subsidies, but equating the two either assumes these tax benefits always serve the same purpose, or assumes that any difference in purpose is inconsequential. Nothing could be further from the truth. In Establishment Clause jurisprudence, the purpose for which the legislature enacted a statute plays a key role in evaluating its constitutionality. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (“Every analysis in this [Establishment Clause] area must begin with consideration of ... a secular legislative purpose....”).

The tax code serves a plethora of purposes. “Although the primary objective of the [Internal Revenue] [C]ode is to raise revenue, it is also used as a fiscal, economic, and social policy tool.” Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 859 (1993). Not all tax benefits are created equal.

1. Some tax exemptions define the tax base.

Some tax benefits simply define the tax base. As a matter of legislative fiat, some tax exemptions and exclusions do nothing more than identify what is, and is not, taxed. “There is no way to tax *everything*.... In specifying the ambit of any tax, the legislature cannot avoid ‘exempting’ those persons, events, activities, or entities that are outside the territory of the proposed tax.” Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285, 1288 (1969). Few would argue that a state that eliminated all corporate income tax and relied exclusively on revenue from sales tax had “subsidized” religious corporations by exempting their income from taxation. See Edward A. Zelinsky, *Are Tax “Benefits” for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?*, 42 B.C. L. REV. 805, 824 (2001) (stating same). Rather, the state simply “selected sales as a tax base and excluded corporate income from taxation as a matter of base definition.” *Id.*

As Professor Bittker remarked over forty years ago: “The assertion that an exemption is equivalent to a subsidy is untrue, meaningless, or circular, depending on context, unless we can agree on a ‘correct’ or ‘ideal’ or ‘normal’ taxing structure as a benchmark from which to measure departures.” Bittker, *Churches, Taxes, and the Constitution*, at 1304. Some tax exemptions simply identify the parameters of the tax base.

2. Some tax exemptions and all subsidies serve as incentives to certain behavior.

Other tax benefits serve as incentives to certain behavior. For example, some exemptions are designed to encourage “charitable giving, engaging in research and development, and saving for retirement through employer-sponsored retirement plans.” Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 859 (1993). Most, if not all, subsidies fall within this category and are designed to promote objectives deemed desirable by the government. *See, e.g., Texas Monthly*, 489 U.S. at 14-15 (noting that subsidies convey a message of government endorsement).

3. Some tax exemptions accommodate religion.

But tax benefits may fulfill yet a third legislative purpose – accommodating religion. Religion receives “special solicitude” under the First Amendment Religion Clauses. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, ___U.S.____, 132 S. Ct. 694, 697 (2012). Between the mandates of the Free Exercise Clause and the prohibitions of the Establishment Clause, there is ample room for the government to accommodate religion without endorsing it. *See Walz*, 397 U.S. at 673 (“The limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free

Exercise Clause.”). The *Walz* Court referred to this space as “play in the joints” between the Religion Clauses. *Id.* at 669.

“Extensive contacts between modern tax systems and religious institutions is unavoidable.” Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion and the Religious Exemptions of the Individual Health Care Mandate and the FICA and Self-Employment Taxes*, 33 *CARDOZO L. REV.* 1633, 1635 (2012). But when a government body is confronted with the choice of taxing religion or exempting religion, exempting religion is the least-entangling and most-neutral alternative. Government “does not...establish religion by leaving it alone.” Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Rights to Church Autonomy*, 81 *COLUM. L. REV.* 1373, 1416 (1981). Tax exemptions create only “minimal and remote involvement” between the government and the exempt entity, which entails far less involvement than taxation, and substantially less involvement than a direct subsidy. *Walz*, 397 U.S. at 675. Thus, some tax exemptions fulfill the legislative purpose of accommodating religion, part of the “play in the joints” between the Religion Clauses which neither establishes nor inhibits religion.

In sum, “[e]ach value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to *establish* or *interfere*

with religious beliefs and practices or have the effect of doing so.” *Id.* at 669. (emphasis added). Put another way, courts cannot shirk their obligation to analyze whether each individual tax benefit has a secular purpose or effect as required under the *Lemon* test. Especially in the sensitive area of Establishment Clause jurisprudence, it is not enough simply to equate tax exemptions and subsidies, for they may serve radically different legislative purposes. Each statute must be evaluated on its own merit.

II. Supreme Court precedent differentiates between tax exemptions and direct subsidies in Establishment Clause jurisprudence.

Supreme Court precedent also recognizes that not every tax exemption is equivalent to a government subsidy in the Establishment Clause context.

In the seminal case *Walz v. Tax Commission of City of New York*, the Court considered an Establishment Clause challenge to a New York tax exemption for religious properties used solely for religious worship. 397 U.S. 664 (1970). In analyzing the constitutionality of this exemption, the Court considered the exemption’s purpose, operation, and effect. Although the exemption included a number of groups that fostered “moral or mental improvement,” the Court found it “unnecessary to justify the tax exemption on the [grounds of] social welfare services.” *Id.* at 673-74. Rather, the exemption reflected a “reasonable and balanced attempt to guard against” the dangers of entanglement entailed by taxation. *Id.* Its purpose was to accommodate religion.

Although the exemption's effect was an "indirect economic benefit," the exemption gave rise to a "lesser involvement than taxing" the entity. *Id.* at 674. Importantly, the *Walz* Court noted that the exemption did not operate like a subsidy since the "government does not transfer part of its revenue to churches" and since it did not trigger continuing government surveillance and entanglement. *Id.* at 674-76. A six-justice majority held that there "is no genuine nexus between tax exemption and establishment of religion." *Id.* at 675.

Justice Brennan, who understood the difference between tax exemptions and direct subsidies in his *Walz* concurrence, *see* 397 U.S. at 690 (Brennan, J. concurring) ("Tax exemptions and general subsidies, however, are qualitatively different"), conflated the two in authoring the *Texas Monthly* plurality opinion. *Texas Monthly* involved a sales tax exemption for religious periodicals. According to the three-justice plurality, "[e]very tax exemption constitutes a subsidy...." *Texas Monthly*, 489 U.S. at 14. Notably, the plurality emphasized the economic effect of the exemption: "it provide[s] unjustifiable awards of assistance to religious organizations." *Id.* at 15 (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987) (internal quotation marks omitted)). But Justice Brennan's sweeping equation of exemptions and subsidies did not garner support from a majority of the splintered Court.

Justice Blackmun concurred in judgment on the narrowest grounds, rendering his concurrence the holding of the *Texas Monthly* Court. *See Marks v. U.S.*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments of the narrowest grounds.” (internal quotation marks omitted)). This carefully narrowed opinion did not endorse the plurality’s sweeping condemnation of all tax exemptions as government subsidies. *See Zelinsky, The First Amendment and the Parsonage Allowance* at 420 (stating same). Rather, Justice Blackmun limited his holding to the question “whether a tax exemption *limited* to the sale of religious literature by religious organizations violates the Establishment Clause. I conclude that it does.” *Texas Monthly*, 489 U.S. at 28 (Blackmun, J. concurring) (emphasis original). Despite the district court’s attempt in its Opinion below to downplay differences between the plurality and concurrence, the subsidy discussion did not factor into Justice Blackmun’s concurrence and is therefore not binding precedent.⁵

⁵ The district court attempts to bolster its reliance on the *Texas Monthly* plurality’s equation of tax exemptions and subsidies by pointing to cases from other contexts that have also equated the two. *See* Opinion at *14 (citing *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (free press case); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) (free speech case). But as noted by Justice Scalia, the Court has “not treated [tax exemptions and subsidies] as equivalent...in the Establishment Clause context, and with good reason.” *Texas*

Regardless, the Court's most recent opinion on these issues removes any lingering doubt regarding the Court's stance on equating tax benefits and subsidies. In *Arizona Christian School Tuition Organization v. Winn*, taxpayers brought an Establishment Clause challenge to Arizona's tax credits for contributions to school tuition organizations (STOs), arguing that the "tax credit is...best understood as a government expenditure." 131 S. Ct. at 1440, 1447 (2011). The five-justice majority flatly rejected this argument. *Id.* at 1447. It noted the "distinction" between governmental expenditures and tax credits, observing that tax credits do not implicate the individual taxpayer in any alleged establishment of religion because no tax dollars were "extracted and spent." *Id.*

Tax credits and tax exemptions operate very similarly: neither extracts and spends a taxpayer's money, but rather benefits a third party. If anything, tax exemptions rest on more solid Establishment Clause ground than the tax credit at issue in *Winn*. On the tax benefits spectrum, tax credits offer to the receiving entity more direct financial support than a tax exemption, such as the minister's housing allowance.

Monthly, 489 U.S. at 43 (Scalia, J. dissenting). In contrast to *Ragland* and *Regan*, the issue in this case is not whether the federal government *must* grant the tax exemption to ministers, but whether it *may*. "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673.

The district court below summarily dismissed *Winn* as precedential only for purposes of taxpayer standing, but cited no precedent for such an extraordinary move. *See* Opinion at *14. This is a cramped reading of the precedent. While *Winn* arose in a different context, it does clearly identify the Court's position on uncritically equating tax benefits and direct government expenditures in the Establishment Clause context.

As a whole, *Winn* stands for the proposition that tax benefits are qualitatively different from government spending for Establishment Clause purposes. Supreme Court precedent has never equated tax exemptions with subsidies for all purposes under the Establishment Clause, and *Winn* continues this unbroken line of precedent. The district court's holding to the contrary is a gross misreading of Supreme Court precedent and is out of step with cases such as *Walz* and *Winn*.

III. Section 107(2) is a permissible accommodation of religion rather than a government subsidy.

This discussion of tax benefits is far from merely academic. The district court's assumption that tax exemptions always equate to subsidies in the Establishment Clause context has serious implications for thousands of pastors and churches nationwide that rely on the minister's housing allowance. Section 107(2) allows a minister to exclude from gross income "the rental allowance paid to him as part of his compensation" for housing. 26 U.S.C. § 107(2). The tax exemption

does not involve any transfer of public monies to the minister, nor otherwise divert taxpayer dollars to finance ministerial housing. The exemption triggers no sustained administrative or financial relationship between the minister and the government, nor any annual struggle to renew the exemption. Compensation that is earmarked for a minister's housing simply falls outside the parameters of taxable gross income.

Congress enacted § 107 as part of a broader legislative scheme exempting from taxation certain on-site, employer-provided housing – including parsonages. *See* 26 U.S.C. § 107, *et seq.* But because not all religious denominations provide on-site parsonages, Congress elected to exempt compensation provided to ministers for the fair rental value of their housing in order to “accommodate the differing governance structures, practices, traditions, and other characteristics of churches through tax policies that strive to be neutral with respect to such differences” and avoid “intrusive inquiries by the government.” H.R. 4156, 107th Cong. § 2 (a)(3)-(5) (as introduced April 10, 2002). Far from establishing religion, § 107(2) is designed to be neutral and accommodating to religion.

“In constitutional terms, section 107 is more convincingly perceived not as a subsidy but, according to *Walz*, as managing the inevitable entanglement caused by taxation and as accommodating the autonomy of religious institutions and actors. In a world of imperfect choices, section 107 separates rather than subsidizes.”

Zelinsky, *The First Amendment and the Parsonage Allowance* at 414. Freedom From Religion Foundation may disagree with Congress's method for managing entanglement concerns, but "courts have always been deferential to the complex and occasionally arbitrary distinctions drawn in tax law." *Id.*

Section 107(2) serves the secular purpose and effect of accommodating religion and avoiding government entanglement with religion, and therefore comports with the separation necessary to satisfy Establishment Clause concerns.

CONCLUSION

Ideas have consequences. The district court's assumption that "all tax exemptions are subsidies" has staggering implications for thousands of pastors and churches nationwide that rely not only on the minister's housing allowance, but also upon exemptions from other federal, state, and local taxes. If fiscal impact alone determines constitutionality, then no tax benefit to religion would survive.

As Mr. Chief Justice Burger wrote over forty years ago: "There is no genuine nexus between tax exemption and establishment of religion." *Walz*, 397 U.S. at 675. The district court wrongly assumed that all tax exemptions are government subsidies, and in so doing, failed to recognize the secular purpose and effect served by § 107(2). This tax exemption is not a government subsidy, nor does it establish religion. Rather, this permissive accommodation fosters

disentanglement with religion as it seeks to navigate the perilous waters between the Establishment Clause and the Free Exercise Clause.

Thus, *amicus curiae* respectfully urge this Court to reverse the district court's opinion and affirm the constitutionality of the minister's housing allowance.

Respectfully submitted this the 9th day of April, 2014.

By: s/ Erik W. Stanley

David A. Cortman

Kevin H. Theriot

Erik W. Stanley

Christiana M. Holcomb

ALLIANCE DEFENDING FREEDOM

15100 N. 90th Street

Scottsdale, AZ 85260

(480) 444-0020

(480) 444-0028

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P 32(a), I hereby certify that the foregoing document is proportionally spaced, has a typeface of 14 points or more, and contains 4,153 words as calculated by Microsoft Word.

Dated: April 9, 2014

/s/ Erik W. Stanley
Erik W. Stanley
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2014, I electronically filed the foregoing brief with the Clerk of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will electronically notify all parties of the filing. It is further certified that fifteen (15) paper copies will be sent to the Clerk by UPS delivery service.

/s/ Erik W. Stanley
Erik W. Stanley
Attorney for Amicus Curiae

EXHIBIT A**Churches Represented By This *Amicus Curiae* Brief****Alabama**

Auburn Fellowship Church, Auburn, AL
Bible Baptist of Wilton, Wilton, AL
Grace Baptist Church, Wetumpka, AL

Arizona

Anointed Word International Fellowship, Inc., Bullhead City, AZ
Arizona Assemblies of God District Superintendent (over 800 ministers and 240 churches),
Phoenix, AZ
Beth Yeshua Ha Go'el, Buckeye AZ
Bethel Baptist Church, Prescott Valley, AZ
Calvary Temple of Christ, Yuma, AZ
Catalina Foothills Church, Tucson, AZ
Centerstage Church, Apache Junction, AZ
Christ Community Church, Tucson, AZ
Christ's Church of Flagstaff, Flagstaff, AZ
Community Alliance Church, Wickenburg, AZ
Compassion Christian Center, Mesa AZ
Continental Baptist Church, Tucson, AZ
Cornerstone Bible Church, Tucson, AZ
Door Christian Fellowship Church of Scottsdale, AZ
Evident Life Church, Gilbert, AZ
Faith Community Church, Chandler, AZ
Fellowship North Church, Scottsdale, AZ
Fellowship of Grace, PCA, Peoria, AZ
First Baptist, Benson, AZ
First Baptist Church of Maricopa, Maricopa, AZ
First Christian Church, Phoenix, AZ
First Southern Baptist Church of Glendale, Glendale, AZ
Golden Shores Community Baptist Church, Topock, AZ
Grace Baptist Church, Casa Grande, AZ
Harvest Bible Chapel, Scottsdale, AZ
Highlands Community Church, Scottsdale, AZ
Highlands Church, Scottsdale, AZ
Intimacy with Jesus Church, Scottsdale, AZ
Lakeside Baptist Church, Peoria, AZ
Lakeview Community Church, Lake Havasu City, AZ
Living Christ Fellowship, Mesa, AZ
Maryvale Church of the Nazarene, Phoenix, AZ
Mountain Park Community Church, Phoenix, AZ
New Life Assembly of God, Mesa, AZ

North Scottsdale Christian, Scottsdale, AZ
Redemption Church, Gilbert, AZ
Redemption Church-Gateway, Mesa, AZ
Redemption Church-Mesa, Mesa, AZ
Rincon Community Church, Vail, AZ
Sabino Road Baptist Church, Tucson, AZ
Saving Grace Lutheran Church, Queen Creek, AZ
Set Free Christian Fellowship, Inc., Bullhead City, AZ
Shield of Faith Christian Center, Mesa, AZ
South Peoria Baptist Church, Peoria, AZ
Southeast Valley Baptist Church, Gilbert, AZ
Tri-City Baptist Church, Chandler, AZ
The Trustees of Crossroads Southern Baptist Church, Apache Junction, AZ
Turning Leaf Community Church, Glendale, AZ
Trinity Church, Mesa, AZ
Victory Lutheran Church, Mesa, AZ
VOC Church of the Nazarene, Sedona, AZ
Westpointe Baptist Church, Litchfield Park, AZ

Arkansas

Martindale Baptist Church, Little Rock, AR

California

Air Force Village West Protestant Chapel Fellowship, Riverside, CA
Bible Church of Buena Park, Buena Park, CA
Calvary Chapel East Anaheim, Anaheim, CA
Celebration Christian Center, Livermore, CA
Church of Faith and Hope, San Jose, CA
City Sanctuary Church, San Juan Capistrano, Ca
Crossroads Christian Center, Rialto, CA
Crosswind Community Church, Palmdale, CA
East Clairemont Southern Baptist Church, San Diego CA
Faith Bible Church, Northridge, CA
Faith Bible Church, San Bernardino, CA
Faith Christian Assembly, Seal Beach, CA
Faith Community Bible Church, El Cajon, CA
First Baptist Church, Taft, CA
First Fundamental Bible Church, Whittier, CA
Grace Bible Church, Hanford, CA
Grace Church, Rocklin, CA
Grace Community Church, Oceanside CA
Heritage Christian Church, Menifee, CA
Hickman Community Church, Hickman, CA
Jesus Christ Fellowship, Middletown, CA
REACH Worship Center, Stockton, CA
Royal Crown of Life Ministries, West Covina, CA

Hessel Church, Sebastopol, CA
Skyline Church, La Mesa, CA
Solid Rock Missionary Baptist Church, California City, CA
Sonship Community Church, San Marcos, CA
St. Andrew Orthodox Church, Riverside, CA
Tree of Life Messianic Jewish Congregation, Spring Valley, CA
True Life Church, Bella Vista, CA
Vallejo Bible Church, Vallejo, CA
Victor Valley Bible Church, Victorville, CA
Vietnamese Presbyterian Church of Garden Grove, Garden Grove, CA
WLA Christian Center, Culver City, CA

Colorado

Berean Fundamental Church, Sedalia, CO
Bible Center Church, Paonia, CO
Church For All Nations, Littleton, CO
Church For All Nations, Northeast, Colorado Springs, CO
Church For All Nations, Southwest, Colorado Springs, CO
Front Range Baptist Church, Fort Collins, CO
Bergen Park Church, Evergreen, CO
LifePointe Church, Fort Collins, CO
New Life Bible Church, Pueblo, CO
Rustic Hills Baptist Church, Colorado Springs, CO
Surface Creek Community Church, Austin, CO
Two Rivers Fellowship, Greeley CO

Florida

Berean Baptist Church, Okahumpka, FL
First Baptist Orlando, Orlando, FL
Freedom Life Church, Kissimmee, FL
Grace Baptist Church, Eustis, FL
Grace Outreach Ministries, Tampa, FL
MorningStar Church, Tampa, FL
My Father's Vineyard, Pensacola, FL
Praise Assembly of God, Hudson, FL
The Solid Rock Church, Winter Haven, FL
Victory Church, Apopka, FL

Georgia

Beacon Baptist Church, Albany, GA
Christ Fellowship Church, Carrollton, GA
Crestview Baptist Church, Augusta GA
Dacula First Baptist Church, Dacula, GA
Living Hope Lutheran Church, Kennesaw, GA
Sewell Mill Baptist Church, Marietta, GA

Hawaii

Grace Bible Church, Pearl City, HI
Holy Hill of Zion Thy Dwelling Place, Waianae, HI
In His House of Restoration Church, Kahului, HI
Jesus Is Alive Church, Pukalani, HI
Kaimuki Christian Church, Honolulu, HI
Kalihi Union Church, Honolulu, HI
Kawaiaha'o Church, Honolulu, HI
New Hope Christian Fellowship, Honolulu, HI
OlaNui!, Honolulu, HI
One Love Ministries, Honolulu, HI
Puna Foursquare Church, Pahoia, HI
Solid Rock Ministries Assembly of God, Kona, HI

Idaho

Desert Hills Community Church, Gooding, ID
Greenleaf Friends Church, Greenleaf, ID
Moscow Bible Church, Moscow, ID
Southwick Bible Church, Kendrick, ID

Illinois

Argyle Bible Church, Colchester, IL
Community Fellowship Church, Petersburg, IL
Cornerstone Community Church, Brookfield, IL
Crossroads Community Church, New Lenox, IL
Destiny Baptist Church of Christ, Inc., Rock Island, IL
Emmanuel Bible Church, Berwyn, IL
Faith Missionary Church, Peoria, IL
Germantown Hills Baptist Church, Metamora, IL
Harvard Bible Church, Harvard, IL
Homer Congregational Church, Lockport, IL
Liberty Bible Church, Eureka, IL
Solid Rock Free Methodist Community Church, Pontoon Beach, IL
Strasburg Baptist Church, Strasburg, IL
Swansea Baptist Church, Swansea, IL
Vietnamese Baptist Church, Chicago, IL

Indiana

Batesville Christian Church, Batesville, IN
Elkhart Calvary, Elkhart, IN
Fellowship Bible Church, Kendallville, IN
Grace Brethren Church of Elkhart, Elkhart, IN
Riverview Community Church, Tippecanoe, IN
The Bridge Community Church, Decatur, IN

Vermillion Christian Church, Alexandria, IN

Iowa

Church of the Nazarene, Shenandoah, IA
Cornerstone World Outreach, Sioux City, IA
First Presbyterian Church, Kamrar, IA
Mount Ayr Regular Baptist Church, Mount Ayr, IA
New Life Community Church, Marion, IA
Solid Rock Christian Church, Coralville, IA

Kansas

Christ Community Church, Lawrence, KS
Church For All Nations, Liberal, KS
Church of the Open Door, Leavenworth, KS
Grace Bible Church, Garden City, KS
Hoisington Bible Church, Hoisington, KS
NorthWest Christian Church, Wichita, KS
Shawnee Bible Church, Shawnee, KS

Kentucky

North Benson Baptist Church, Frankfort, KY
Russell Cave Road Baptist Church, Lexington, KY

Louisiana

Barksdale Baptist Church, Bossier City, LA
Christian Fellowship, Marrero, LA
First Baptist Church, Headland, AL
GMA-Global Mission for Asian, Shreveport, LA
Moss Bluff Bible Church, Lake Charles, LA
Unity Baptist Church, Pineville, LA
Vietnamese Hope Baptist Church, Baton Rouge, LA
Walnut Grove Baptist Church, Colfax, LA

Maine

Orrington Center Church, Orrington, ME
Outer Cape Christian Church, Truro, MA

Maryland

Hope Bible Church, Columbia, MD

Massachusetts

Abundant Life Assembly of God, Swansea, MA
Community of Faith Christian Fellowship, Brighton, MA

Michigan

Aetna Calvary Church, White Cloud, MI
Bethany Chapel, Three Rivers, MI
Byron Center Bible Church, Byron Center, MI
Covenant Community Church, Hudsonville, MI
East Bay Calvary Church, Traverse City, MI
Fellowship Bible Church, Sawyer, MI
Fowlerville Church of the Nazarene, Fowlerville, MI
Maranatha Bible Church, Comstock Park, MI
Mayfair Bible Church, Flushing, MI
Mount Calvary Lutheran Church, Greenville, MI
Nevins Lake Church, Stanton, MI
New Era Bible Church, New Era, MI
New Life Baptist Church of Addison, Addison, MI
Open Arms Lutheran Church and Daycare, Belleville, MI
RBM Ministries, Inc., Kalamazoo, MI
Trinity Baptist Church, Farwell, MI
Whole Life Christian Fellowship, Sturgis, MI

Minnesota

Advent Lutheran Church, Roseville, MN
Bemidji Baptist Church, Bemidji, MN
Campus Crusade for Christ, Burnsville, MN
New Hope Church, Minneapolis, MN

Mississippi

Liberty Church (Assembly of God), Gautier, MS
Restoration Community Fellowship, Richland, MS

Missouri

Bonne Terre Church of God, Bonne Terre, MO
Buckhorn Baptist Church, Waynesville, MO
Christ Fellowship Bible Church, St Louis, MO
Cornerstone Baptist Church, Richland, MO
First Baptist Church, Dixon, MO
First Baptist Church, Richland, MO
First Baptist Church, Saint Ann, MO
Heartland Church, Knob Noster, MO
New Hope Baptist Church, Independence, MO
Parkton Assembly of God, Barnhart, MO
People's Church, Arnold, MO
South County Bible Church, St Louis, MO

Nebraska

Bible Truth Ministries, Bellevue, NE

Nevada

Greater New Jerusalem Baptist Church, Las Vegas, NV

North Las Vegas Grace Samoan Church of the Nazarene, North Las Vegas, NV

New Jersey

Calvary Bible Church, Whitehouse Station, NJ

Calvary Chapel Old Bridge, Old Bridge, NJ

Fair Lawn Bible Church, Fair Lawn, NJ

First Presbyterian Church, Dunellen, NJ

Hope Evangelical Free Church, Wantage, NJ

Source Grammar Spiritual Living, Hackensack, NJ

Sparta Evangelical Free Church, Sparta, NJ

New Mexico

Berrendo Baptist Church, Roswell, NM

Calvary Chapel, Rio Rancho, NM

Calvary in the Meadows, Rio Rancho, NM

New Life Bible Ministries, Rio Rancho, NM

New York

Albany Sarang Fellowship Church, Watervliet, NY

Amherst Alliance Church, Amherst, NY

Berean Bible Church, Greene, NY

Boonville Alliance Church, Boonville, NY

Calvary Orthodox Presbyterian Church, Schenectady, NY

Central Baptist Church, Binghamton, NY

Christian and Missionary Alliance Church, Syracuse, NY

Christian Hope Center, Painted Post, NY

Delhi Alliance Church, Delhi, NY

Delmar Full Gospel Church, Delmar, NY

Episcopal Church of the Good Shepherd, Canajoharie, NY

Faith Alliance Church, Albion, NY

Faith Bible Church, Oxford, NY

Forestville Wesleyan Church, Forestville, NY

Grace Point Church, Vestal, NY

Harvest International Family Church, Geneseo, NY

Kenmore Alliance Church, Tonawanda, NY

Lakeview Chapel, Owego, NY

Lockport Alliance Church, Lockport, NY

New Life Bible Church, Walworth/Rochester NY

New Life Fellowship, Saratoga Springs, NY

North Country Alliance Church, Plattsburgh, NY

Parkside Bible Church, Watertown, NY

Pineview Community Church, Albany, NY

Rock Solid Church, Hudson NY
Rome Alliance church, Rome, NY
Shepherd's Heart Christian Fellowship, Rochester, NY
Maranatha Bible Chapel, Horseheads, NY
Tonawanda Free Methodist, Tonawanda, NY
Valley Alliance Church, Palatine Bridge, NY

North Carolina

Anointed Word International Church, Inc., Hendersonville, NC
Bethel Church, Willow Spring, NC
First Baptist Church, Hendersonville, NC
Gateway Baptist Church, Newton, NC
Grace Church, Southern Pines, NC
Life Church Federal, Cramerton, NC
Manna Church, Fayetteville, NC
Mt. Beulah Baptist Church, Wadesboro, NC
Three Forks Baptist Church, Taylorsville, NC
Ratio Christi, Charlotte, NC
Valley Community Church, Weldon, NC
White's Creek Baptist Church, Clarkton, NC
Zachariah A.M.E Zion Church, Walstonburg, NC

Ohio

Ambassador Baptist Church, Wadsworth, OH
Calvary Baptist Church, New Philadelphia, OH
Fellowship Baptist Church, Dublin, OH
First Christian Church, Urbana, OH
Grace Baptist Church of Brunswick, OH
Pentecostal Community Church, Jefferson, OH
Willard United Methodist Church, Willard, OH
Word of Truth Ministries Church, Cincinnati, OH

Oklahoma

First Baptist Church, Wellston, OK
First United Methodist Church, Oklahoma City, OK
Grace Baptist Church, Durant, OK

Oregon

Beaverton Full Gospel Church, Hillsboro OR
Canby Evangelical Church, Canby, OR
Church on the Hill in McMinnville, OR
Florence Church of the Nazarene, Florence, OR
Garden Valley Church, Roseburg, OR
Grace Bible Church, Talent, OR
Greater Gresham Baptist Church, Gresham OR

Jesus Over You Christian Fellowship, Aloha, OR
Living Hope Church, Oregon City, OR
Nehalem Valley Bible Church, Vernonia, OR
Pine Grove Community Church, Roseburg, OR
St. Helens Community Bible Church, Warren, OR

Pennsylvania

Bucks County Community Church, Langhorne, PA
Christian Fellowship Church, New Holland, PA
Community Bible Church, Centerville, PA
Community Bible Church, Leola, PA
Community Bible Fellowship Church, Red Hill, PA
Evangel Heights Assembly of God, Sarver, PA
Exeter Bible Church, Birdsboro, PA
Faith Baptist Church, Beaver Springs, PA
Help Ministries, Schwenksville, PA
Independent Bible Church, Willow Grove, PA
Manor Baptist Church, York, PA
New Song Christian Fellowship, DuBois, PA
OakPointe Christian Center, New Castle, PA
St. John's Evangelical Congregational Church, Annville, PA
Tabernacle Bible Church, Honesdale, PA
West Hickory United Methodist Church, West Hickory, PA
York Bible Church, York, PA

Rhode Island

First Baptist Church in East Providence, Rumford, RI

South Carolina

Calvary Community Church, West Columbia, SC
Calvary Lutheran Church, Charleston, SC
Columbia World Outreach Church, Columbia, SC
Connecting Point Church, Greenville, SC
Cornerstone Fellowship Free Will Baptist Church, Manning, SC

Tennessee

Bonne Terre Church of God, Cleveland, TN
Church of the Harvest, Grimsley, TN
Dickson Church of Grace, Dickson, TN
Real Life Community Church, Smithville, TN
The South Seminole Baptist Church, East Ridge, TN
White House First United Methodist Church, White House, TN

Texas

Calvary Baptist Church, Dumas, TX
Calvary Baptist Church, Brenham, TX
Christian Fellowship Worship Center, Beaumont, TX
Emmanuel Baptist Church, Coleman, TX
First Baptist Church Tomball, Tomball, TX
First Baptist Church, Kirbyville, TX
First Lockhart Baptist Church, Lockhart, TX
Grace Church, Houston, TX
Heritage Baptist Church, Jefferson, TX
Houston 1st Church of God, Houston, TX
Living Word Evangelical Church, Grand Prairie, TX
Sachse Vietnamese Baptist Church, Sachse, TX
theCHURCH, Rosenberg, TX
Triumph Beaumont, Beaumont, TX
Triumph Nederland, Nederland, TX
Vietnamese Baptist Church-Arlington, Arlington, TX
Westcliff Bible Church, Amarillo, TX

Utah

Grace Community Bible Church, Sandy, UT

Virginia

Bethel Baptist Church, Yorktown, VA
Calvary Christian Church, Fredericksburg, VA
Community Fellowship, Collinsville, VA
Good Shepherd Church of the Nazarene, Stuarts Draft, VA
New Kent Christian Center, New Kent, VA
New Life Anointed Ministries International, Woodbridge, VA
Oak View Christian Church (Disciples of Christ), Newport, VA
Riverview Baptist Church, Ripplemead, VA
Sherry Memorial Christian Church, Eastern, VA
Word of Grace Christian Center, Herndon, VA

Washington

Faith Family Christian Center, Longview, WA
GracePoint Fellowship, Camas, WA
Lake Sawyer Christian Church, Black Diamond, WA
Landmark Christian Assembly, Battle Ground, WA
New Life Christian Center, Vancouver, WA
Soma Eastside Church, Issaquah, WA
Sound Church, Lynnwood, WA
St. Francis Church, San Juan Islands, WA
The Church of Living Water, a Foursquare Church, Olympia, WA

West Virginia

Ambassador Baptist Church, Elkins, WV
Christian Apostolic Church, Clarksburg, WV
Faith Baptist Church, Morgantown, WV
Southside Southern Baptist Church, Parkersburg, WV

Wisconsin

Calvary Bible Church, Fond Du Lac, WI
Campus Community Church, Madison, WI
Cornerstone Family Church, Green Bay WI
Christ the King Community Church, Stoughton, WI
Crossroads Community Church, Greenfield, WI
Global Presence Ministries, Madison, WI
Evangel Life Center, Inc., Madison, WI
High Point Church, Madison, WI
Life Church Green Bay, De Pere, WI
Living Water Church, Sun Prairie, WI
My Church Metro Believers Church, Madison WI
New Hope Community Church, Junction City, WI
Northland Bible Church, Ladysmith, WI
Oakbrook Church, De Pere, WI
Range Community Bible Church, Hurley, WI

Wyoming

Calvary Chapel Cheyenne, Cheyenne, WY

Why Churches Should Not Pay Taxes

Dean M. Kelley



Harper & Row, Publishers
New York, Hagerstown, San Francisco, London

To my father,
Mark Millard Kelley

WHY CHURCHES SHOULD NOT PAY TAXES. Copyright © 1977 by Dean M. Kelley. All rights reserved. Printed in the United States of America. No part of this book may be used or reproduced in any manner whatsoever without written permission except in the case of brief quotations embodied in critical articles and reviews. For information address Harper & Row, Publishers, Inc., 10 East 53rd Street, New York, N.Y. 10022. Published simultaneously in Canada by Fitzhenry & Whiteside Limited, Toronto.

FIRST EDITION

ISBN: 0-06-064302-1

LIBRARY OF CONGRESS CATALOG CARD NUMBER: 76-62944

Designed by Sidney Feinberg

the rules applicable to them. But the new rules make the "soft money" argument softer than ever, because Congress has now authorized the political use of "soft money," within certain limitations, both by businesses and by many types of exempt organizations.

The foregoing seven fallacies or misconceptions are examples of how *not* to think about tax exemption. It would be foolhardy to suppose that this brief treatment has refuted them all in the mind of every reader. At most, it has shown them to be contested, fitting subjects for argument and dispute, which should be challenged as "sectarian" doctrines (rather than generally accepted axioms) whenever and wherever they appear. But we have not yet considered how we *should* think about tax exemption; to that subject the remainder of this book is devoted.

2

The People's Part of American Public Life

Americans tend to take for granted the rich associational life of the United States, but foreign observers have often remarked upon the unusually prominent role that voluntary organizations play in this country. Alexis de Tocqueville commented in the 1830s:

Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile, general or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons and schools. If it is proposed to inculcate some truth or to foster some feeling by the encouragement of a great example, they form a society. Wherever at the head of some new undertaking you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.¹

He distinguishes between political associations, commercial or industrial corporations, and a third group:

1. Alexis de Tocqueville, *Democracy in America* (New York: Alfred Knopf, 1966), Vol. II, Second Book, Chapter V, p. 106.

Nothing, in my opinion, is more deserving of our attention than the intellectual and moral associations of America. The political and industrial associations of that country strike us forcibly; but the others elude our observation, or if we discover them, we understand them imperfectly because we have hardly ever seen anything of the kind. It must be acknowledged, however, that they are as necessary to the American people as the former, and perhaps more so.²

In one of those telling characterizations that take the form of ethnic anecdote, it is said that Americans are the sort of beings who, if three of them fell out of an airplane, would have organized themselves into a society before they hit the ground and elected a president, vice-president and secretary-treasurer!

A trichotomy similar to de Tocqueville's is used in the Report of the Commission on Private Philanthropy and Public Needs, a prestigious private group referred to hereinafter as "the Filer Commission" after its chairperson John H. Filer:

On the map of American society, one of the least charted regions is variously known as the voluntary, the private non-profit or simply the third sector. Third, that is, after the often over-shadowing worlds of government and business.³

The Commission then proceeds to try to sketch a "chart" of this "voluntary sector":

The Internal Revenue Service lists, as of June, 1975, 691,627 exempt organizations, groups that have formally filed for and been accorded exemption from federal income taxes. But that number does not include a great many church organizations which automatically enjoy exemption from federal income taxes without filing, nor does it include numerous small organizations that never feel the need to file for tax exemption. . . . One Commission report calculated that a "core group" of traditional philanthropic organizations includes 350,000 religious organizations, 37,000 human service organizations, 6,000 museums, 5,500 private libraries, 4,600 privately supported secondary schools, 3,500 private hospitals,

2. *Ibid.* p. 110.

3. *Giving in America: Toward a Stronger Voluntary Sector*, the Report of the Commission on Private Philanthropy and Public Needs, 1975, p. 31.

1,514 private institutions of higher education, and 1,100 symphony orchestras. . . . In all, counting local chapters of regional or national groups, there may be as many as six million private voluntary organizations in the United States.⁴

Another "chart" of that sector is the *Encyclopedia of Associations*, whose 1976 edition listed 12,866 "national membership organizations" under the following seventeen categories (with the number included under each):⁵

| | |
|--------------------------------------------------------------------------|-------|
| 1. Trade, business and commercial organizations | 2,837 |
| 2. Agricultural organizations and commodity exchanges | 612 |
| 3. Legal, governmental, public administration and military organizations | 450 |
| 4. Scientific, engineering and technical organizations | 874 |
| 5. Educational organizations | 878 |
| 6. Cultural organizations | 1,254 |
| 7. Social welfare organizations | 777 |
| 8. Health and medical organizations | 1,138 |
| 9. Public affairs organizations | 835 |
| 10. Fraternal, foreign interest, nationality and ethnic organizations | 460 |
| 11. Religious organizations ⁶ | 736 |
| 12. Veteran, hereditary and patriotic organizations | 213 |
| 13. Hobby and avocational organizations | 681 |
| 14. Athletic and sports organizations | 449 |
| 15. Labor unions, associations and federations | 234 |
| 16. Chambers of commerce | 112 |
| 17. Greek letter societies (includes social, professional and honorary) | 326 |

There is an eighteenth category also: 719 "missing" organizations—those which had been listed in previous years but can no longer be located, yet are not definitely known to be defunct. This *Encyclopedia's* listing is far from complete, however, since it has no exhaustive mechanism for locating *all* national organizations, and must depend upon their willingness—once they have been identified—to supply informa-

4. *Ibid.*, p. 36.

5. *Encyclopedia of Associations*, Vol. I, 10th edition (Detroit: Gale Research Co., 1976), Table of Contents.

6. Curiously, a few national religious bodies are listed, but most are not, nor, of course, are their regional judicatories or local congregations, so that "churches" as such are hardly represented in this catalog at all.

tion. The *Encyclopedia* does give us, however, a suggestion of the breadth, diversity, and turnover in the world of organizations.

Whether the United States is unique in the proliferation of its voluntary associations, and however they may be categorized, they form a vital and dynamic element in which individuals may participate at will in order to attain objectives which neither government nor business is attaining or which, perhaps, neither *can* attain. It is in a real sense the *people's* part of American public life, for by freely combining together, self-selecting groups of like-minded persons can take the initiative to meet common needs or pursue shared interests.

Perhaps this pattern of collective self-reliance grew out of the frontier experience in American history, when settlers who had outdistanced government and industry had to rely on what they and their neighbors could accomplish together. The history of the nation would be entirely different—and incomparably poorer—without such organized voluntary efforts. It was the great voluntary movements of the nineteenth century that founded schools and colleges, organized hospitals and other charities, abolished dueling and slavery, formed labor unions, struggled for woman suffrage and other civil rights, and gave collective expression to every kind of enthusiasm, dissatisfaction, and concern.

Similar surgings of citizen initiative arise today, as in the consumer and the environmentalist movements, which have spawned dozens of important new organizations: the Sierra Club, Friends of the Earth, and so on. Whenever a need is felt, a wrong is seen, a hope is envisioned, citizens can mobilize around it and bring their shared objectives to fulfillment. Without such vigorous voluntary organizations, society would be an amorphous mass of isolated, and therefore weak, individuals—which is apparently what some people would like, for such a society would be much easier to manipulate and control.

Captains of the coal industry, for instance, would probably prefer not to have the foes of strip mining organizing themselves to protect the environment. From the viewpoint of those who benefit from the present arrangement of society, every voluntary organization is a potential troublemaker, and so should be identified, registered, scrutinized, and regulated—in the “public interest,” of course. But the real public interest runs the other way, in the direction of independent

centers of citizen initiative—the more, the merrier—for they give to democracy its vigor and reverberance. They provide the basis for resisting an oppressive government and correcting its excesses. It is not the responsibility of government to supervise the associational life of the populace; quite the contrary: it is the prerogative of the people, through their voluntary organizations, to scrutinize and stimulate, correct and countervail their government.

The willingness of citizens to “get together” to work for the betterment of the community and nation is a priceless and irreplaceable resource, which the government could not supply or synthesize even if it paid every citizen by the hour to go to meetings. But it is not necessary for government to subsidize these activities. It is enough if it simply gets out of the way and leaves them alone, which is precisely what the First Amendment requires: that “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble [that is, to associate together] and to petition the Government for a redress of grievances”—which presumably means to make their wants and expectations known to the public servants they elect and employ.

One way in which government commendably “gets out of the way” and lets voluntary organizations perform their important work is by “exempting” them from taxation. As we noted in the preceding chapter, “exemption” is a confusing term, since such nonprofit, non-wealth-producing entities are not normally part of the revenue system to begin with. But there are those who, seeing (for instance) the non-taxpaying real estate of the National Geographic Society, the National Education Association, and the American Chemical Society clustered at the intersection of 16th and M streets in Washington, D.C., begin to fulminate about taxing them. Sometimes they modulate this threat by suggesting that some of the taxes realized be returned to these organizations in the form of grants or payments for services—if, indeed, their services are worthy of public support. This, they claim, would be a more straightforward and public-spirited way to go about it. Let all pay taxes, they suggest, and then the legislature can dispense the funds to those institutions which perform services of genuine value to the whole public.

On the contrary, this would be a perniciously wrong-headed and destructive way to go about it! All *do* pay taxes already. That is, all

citizens pay what is presumably their fair share of the costs of the commonwealth. To tax them again for participation in voluntary organizations from which they derive no monetary gain would be "double taxation" indeed, and would effectively serve to discourage them from devoting time, money, and energy to organizations which contribute to the upbuilding of the fabric of democracy.

For them to receive back as grants or other payments some of the taxes thus collected in recognition of whatever activities were considered worthy of public support by those currently in office would be no great boon. When one considers the burdens that go with governmental subsidies—the detailed applications, the voluminous reports, the recurrent audits, the multiplying regulations and requirements, the periodic threat of reduction or nonrenewal—one may question whether such support is worth the price. More important, one may wonder to what extent the recipient organization remains a truly "voluntary" and independent agent of its members' interests.

Several universities have recently discovered that federal subsidies—which, a few years ago, they boasted came to them "with no strings attached"—have whole festoons of long and constricting "strings" on them after all—in the form of newly adopted regulations about admissions policies, coeducational athletic programs, restrictions on disciplining of students, etc., etc., and they will discover even more strings in the future. The effect of such requirements—each of which may be meritorious in its own right—is to make the formerly "private" university less and less distinguishable from a "public" or state university.

The only way to insure that an organization or an institution remains responsive to its members' interests is for them to pay the bills rather than trying to get someone else to pay them. There is no truer generalization in human affairs than "who pays the piper calls the tune." When a private voluntary institution accepts tax support, it is to that extent taking all of us in the taxpaying jurisdiction into partnership. It can no longer "cater" to the particular traits and interests of its self-selecting membership, but must be equally available to all.

Some social-welfare agencies have assured themselves that relying on governmental support of various kinds would not really change their character or purpose if it did not exceed 40% of their total

budget—or 60%—or 80%—or whatever their current rate of dependence happened to be—which nevertheless increased in succeeding years despite such brave resolves. But the right of government to regulate what it supports follows every tax dollar. The regulations promulgated by the Department of Health, Education and Welfare apply to every institution receiving federal money, irrespective of what proportion that money is to its total income.

The courts are currently struggling to determine what degree of subsidy makes a previously private institution in effect a part of government so that citizens as taxpayers have enforceable claims against it for violations of their constitutional rights. One court held in 1963 that a hospital's having accepted Hill-Burton grants and having participated in the state plan under which they were allotted clothed it sufficiently with the quality of "state action" that it could not exclude black physicians from use of its facilities (*Simkins v. Moses H. Cohn Memorial Hospital*⁷), but another court has held more recently that Hill-Burton grants did not sufficiently imbue a private hospital in Montana with the quality of "state action" that a citizen could claim damages against it because of its refusal to perform an operation forbidden by its code of ethics (*Taylor v. St. Vincent's Hospital*⁸). However this struggle may be resolved, it seems that the reach of taxpayers' claims against tax-subsidized private institutions, though they may not be further extended, are unlikely to be much reduced.

Private voluntary organizations which receive tax subsidies are no longer as "private" as they were, and indeed may have become quasi-public, often without recognizing that fact until too late. What is meant by "too late"? Can they not give up the "King's shilling" and recover their autonomy? That may be easier said than done, especially if—as in the case of hospitals or colleges—the grant of tax funds has been built into a wing or dormitory. Yet even if government money is only a component in the current-expense budget, it may be no easier to "swear off." Organizations grow and flourish in ways that are not too dissimilar to trees. Excavations of the root systems of trees have found them often to be clustered around various sources of water or nutrition in their vicinity (such as sewer pipes). Sudden drastic

7. 323 F.2d 959, 4th Cir. 1963.

8. 523 F.2d 75, 1975.

changes in the flow of the tree's nourishment can result in its death because it cannot regenerate a new root system overnight.

Similarly, an organization develops its shape, functions, abilities, over the years in response to certain resources and with the expectation that they will continue to flow. It is often severely traumatic—if not actually impossible—to cut off or to eschew the support from a substantial source which has nourished the work for years—not just because of the economic dislocation but because the arrangement has been so generally accepted and expected by the organization's members that they are unlikely to question it or to imagine any other way to go. Thus subsidies create strong symbiotic relationships or dependencies that are not easy to break, and in some cases (as where a "trust" or other structure has been created) may be irreversible.

The beauty of "tax exemption" as an arrangement for encouraging voluntary organizations is that it does not entail the kinds of entanglements and dependencies just described. At least it does not oblige government to examine, inspect, evaluate, compare, audit, standardize, regulate, or control such organizations, as would be the case if they were subsidized. Rather than attempting to assess their worth to the public as a basis for determining the degree of subsidy they deserve, government—by the mechanism of tax exemption—allows the *public* to make that evaluation and decision directly by the degree to which interested persons support the various organizations by their voluntary contributions. It is a wonderfully simple and self-implementing process, which avoids the necessity for another vast federal bureaucracy the size of the Pentagon: the Office for Subsidizing the Worthy Activities of Voluntary Organizations (OSWAVO).

The U.S. Supreme Court, in discussing tax exemption of churches, has clearly distinguished between exemption and subsidy:

Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. . . . The government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one

has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or employees "on the public payroll."

To summarize the operational distinctions between *subsidy* and *tax exemption*:

1. In a tax exemption, *no money changes hands* between government and the organization. There is no financial transaction with applications, checks, warrants, vouchers, receipts, accounting, or audits; ". . . government does not transfer part of its revenue. . . ."

2. A tax exemption, in and of itself, *does not provide one cent* to an organization. Without contributions from its supporters, it has nothing to spend. Government cannot create or sustain—by tax exemption—any organization which does not attract contributions on its own merits.

3. The *amount* of a subsidy is determined by the legislature or an administrator; there is no "amount" involved in a tax exemption because it is "open-ended"; the organization's income is dependent solely on the generosity of its several contributors, each of whom decides freely and individually how much he or she will give.

4. Consequently, there is *no periodic legislative or administrative struggle* to obtain, renew, maintain, or increase the amount, as would be the case with a subsidy; political allegiances are not mobilized to support or to oppose it; the energies of the organization are not expended in applying for, defending, reporting, qualifying, undergoing audits and evaluations, etc., and the resources of government are not expended in administering them.

5. A subsidy is not *voluntary* in the same sense that tax-exempt contributions are. When the legislature taxes the citizenry and appropriates a portion of the revenues as a subsidy to an organization, the individual citizen has nothing determinative to say as to the amount of the subsidy or the selection of the recipient. (Citizens may testify at hearings on such matters and even bring about the defeat of legislators with whom they disagree, but that does not make their "contribution" to the subsidized organization at the time any less compulsory.)

6. A tax exemption does not convert the organization into an agency of "state action," whereas a subsidy—in certain circumstances

9. *Walz v. Tax Commission*, 397 U.S. 644 (1970).

—may. (“No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or employees ‘on the public payroll.’”)

But there is more that government does to “get out of the way” of voluntary organizations. In addition to tax exemption, some organizations benefit from contributions which donors can deduct from their taxable income before paying income tax. Among them are the organizations that are exempt from income tax under Section 501(c)(3)¹⁰ of the Internal Revenue Code. (There are many other categories of tax-exempt organizations—Section 501(c) alone has 19 subdivisions—contributions to most of which are *not* deductible. When an organization “loses its tax exemption,” what is usually meant is *not* that it loses its *tax* exemption, since it usually qualifies for continued exemption from corporate income tax under Section 501(c)(4) or one of the other categories of Section 501(c), but that its contributors are no longer able to deduct contributions to it from their taxable income.)

Deductibility of contributions is a significant incentive to contributors, particularly those in higher income brackets, and it is justified by the consideration that they do not benefit personally from the contribution in the way that they would from dues paid to a labor union (which is itself exempt under Section 501(c)(5)), shares in a credit union (which is exempt under Section 501(c)(14)(A)), or membership fees in a chamber of commerce (Section 501(c)(5)) or a recreational club (Section 501(c)(7)). “Deductibility” means that not only does the government not claim a share of the contributions made to an organization *after* they reach the organization, but it abstains from

10. Technically, Section 170, not Section 501(c)(3), governs the deductibility of contributions. For purposes of the present discussion, however, it is important to note the various types of organizations that are exempt under Section 501(c). Section 170 makes contributions to *some* of these organizations deductible. The largest and most important group of 501(c) exempt organizations benefiting from the deductibility of contributions is the Section 501(c)(3) class, which includes churches, hospitals, educational institutions, museums, symphony orchestras and a host of other nonprofit organizations. The only type of Section 501(c)(3) organization, contributions to which are not deductible, is an organization dedicated to testing for public safety. The state and federal governments, organizations of war veterans, fraternal societies, and nonsectarian cemetery companies are not Section 501(c)(3) organizations, but contributions to them are deductible under the circumstances prescribed in Section 170(c) of the Internal Revenue Code.

taxing the donor on them *before* they reach the organization.

The Filer Commission Report gives this rationale for the charitable deduction:

. . . the charitable deduction is a philosophically sound recognition that what a person gives away simply ought not to be considered as income for purposes of imposing an income tax. There is no fixed definition of income; it is a concept that acquires meaning by the context in which the term is used. In the context of personal income taxation, the Commission believes it is appropriate to define income as revenue used for personal consumption or increasing personal wealth and to therefore exclude charitable giving because it is neither. . . . We think it entirely appropriate, in other words, for the person who earns \$55,000 and gives \$5,000 to charitable organizations to be taxed in exactly the same way as the person who earns \$50,000 and gives away nothing.¹¹

In order to strengthen the voluntary sector, in fact, the Commission recommended that even greater incentives to charitable giving be written into the tax code, such as permitting the many taxpayers who take the “standard deduction” rather than itemizing all their deductions to claim deductions for itemized charitable contributions over and above the standard deduction. The Commission also recommended that families with incomes under \$15,000 a year be allowed to deduct *twice* the amount of their charitable contributions, and families with incomes between \$15,000 and \$30,000 be allowed to deduct 150% of what they contribute to charities, a proposal that doesn’t entirely square with the Commission’s rationale outlined above—that charitable contributions are not truly “income.” Under this recommendation, if written into law, donors in the lower income brackets would not only be able to exclude contributions from taxable income (which they can do now), but could exclude an additional amount as well—a kind of “matching” tax credit, in which the government would match each dollar contributed with another dollar on which the donor would otherwise have to pay taxes.

The Filer Commission may not see all of its recommendations written into law, but its prestigious report may serve as an “anchor to windward” to prevent the elimination of some of the present incen-

11. *Giving in America*, p. 128.

tives to charitable giving and encouragements of voluntary organizations. The theme of this chapter is one that supports the basic concerns of the Filer Commission in urging every just and legitimate encouragement which the nation's tax policy can give to voluntary organizations.

Some aspects of the tax deductibility of charitable donations are designed to be particularly appealing to affluent persons capable of making "pace-setting" contributions to large fund-raising campaigns. These aspects include the special treatment of gifts of appreciated property (such as stock or real estate), which, under certain circumstances, are deductible at current market value rather than at the original cost to the donor. There are also provisions for deferred giving, such as "charitable remainder trusts" (Section 664 of the Internal Revenue Code), under which money or property can be put in trust by a donor to go to a charitable organization at death, with the interest or an annuity paid to the donor during his or her lifetime. This book does not concern itself with such arrangements, and neither advocates nor opposes them.

3

The Special Claims of Churches

The main focus of this book is on the unique status of churches in American tax law. We have approached the subject by way of the broader category of voluntary nonprofit organizations as a whole, since many of the considerations that apply to them also apply to churches, such as the right to assemble (associate) freely. But churches, in addition to the rights and freedoms they share with voluntary organizations, have special claims to make that are peculiar to themselves and that are based upon considerations that do not apply to other organizations. What those considerations are, and why they justify the churches' claims, will occupy the next two chapters. But it may be helpful in focusing upon the churches to visualize where they fit within the broad "chart" of tax-exempt entities we considered in the preceding chapter.

As we approach the scene, we see the figure of "government" standing astride two solid blocks of revenue, one representing individuals and the other profit-making corporations. Nearby grows a fragile flower, which represents non-taxed entities that are by their very nature not part of the revenue base, though they are nourished by the effluvia of voluntary contributions from the individuals and corporations in that base.

Some people may be distressed by references to "government" as something separate and apart from the populace in general. "In a democracy," they protest, "*we are* the government. It is not our