# Nos. 18-1277 & 18-1280

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

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**ANNIE LAURIE GAYLOR; DAN BARKER; IAN GAYLOR, personal representative of the estate of Anne Nicol Gaylor; and FREEDOM FROM RELIGION FOUNDATION, INC.,**

**Plaintiffs-Appellees**

**v.**

**STEVEN T. MNUCHIN, Secretary of the United States Department of Treasury; DAVID J. KAUTTER, Acting Commissioner of the Internal Revenue Service; and the UNITED STATES OF AMERICA,**

**Defendants-Appellants**

**and**

**EDWARD PEECHER; CHRIS BUTLER; CHICAGO EMBASSY CHURCH; PATRICK MALONE; HOLY CROSS ANGLICAN CHURCH; and the DIOCESE OF CHICAGO AND MID-AMERICA OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA,**

**Intervenors-Defendants-Appellants**

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**ON APPEAL FROM THE JUDGMENT AND ORDER OF**

**THE UNITED STATES DISTRICT COURT**

**FOR THE WESTERN DISTRICT OF WISCONSIN**

**(No. 16-cv-215; Honorable Barbara B. Crabb)**

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## BRIEF FOR THE FEDERAL APPELLANTS

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## STATEMENT REGARDING ORAL ARGUMENT

In this case brought by an atheist advocacy organization and several of its members, the District Court struck down, as a violation of the Establishment Clause of the Constitution, the longstanding exclusion for a parsonage allowance under § 107(2) of the Internal Revenue Code. This issue is important to the administration of the tax laws, and counsel for the federal appellants respectfully inform the Court that they believe that oral argument is warranted.

## JURISDICTIONAL STATEMENT

### A. District Court jurisdiction

This suit against the Secretary of the Treasury and the Commissioner of Internal Revenue was brought by Freedom From Religion Foundation, Inc. (FFRF), a Wisconsin corporation with its principal place of business in Madison, Wisconsin, its co-presidents Annie Gaylor and Dan Barker, and the estate of its former president, Anne Nicol Gaylor (together, plaintiffs). (Doc. 1 at 3.)[1] The gravamen of the complaint was that § 107 of the Internal Revenue Code, which excludes from federal income taxation certain housing benefits provided to ministers (the parsonage allowance), violates the Establishment Clause of the First Amendment to the United States Constitution and the Equal Protection component of the Due Process Clause. Plaintiffs sought (i) a declaration that § 107 is unconstitutional and (ii) an injunction against the continued allowance of the exclusion. (*Id.* at 13.)

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[1] "Doc." references are the documents in the original record, as numbered by the Clerk of the District Court. "A" and "App" references are to appellants' separately bound record appendix and the appendix bound with this brief, respectively. Unless otherwise indicated, all "§" references are to the Internal Revenue Code (26 U.S.C.), as currently in effect. Pertinent statutes are set forth in the Statutory Addendum.

The individual plaintiffs also sought refunds of federal taxes paid on designated secular (non-parsonage) housing allowances paid to them by FFRF. They alleged that, before filing suit, they had filed timely administrative refund claims that had not been acted on for at least six months. (Doc. 1 at 4; *see* App6; A66-68.) *See* 26 U.S.C. §§ 6511(a), 6532(a)(1), 7422. The District Court had federal question jurisdiction under 28 U.S.C. § 1331 and tax refund jurisdiction under 28 U.S.C. § 1346(a)(1).

### B. Appellate jurisdiction

The District Court rendered a final judgment on December 15, 2017, disposing of all claims of all parties. (App52-53.) The Government filed its notice of appeal on February 8, 2018, within the 60 days allowed by Fed. R. App. P. 4(a)(1)(B). (Doc. 100.) *See* 28 U.S.C. § 2107(b). This Court's jurisdiction over the appeal rests upon 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUE

Whether Section 107(2) of the Internal Revenue Code, which provides an exclusion from income for parsonage allowances, violates the Establishment Clause.

## STATEMENT OF THE CASE

### A. Procedural overview

Plaintiffs brought this suit against the Secretary and the Commissioner, seeking (i) a declaration that § 107 violates the Establishment Clause and (ii) an injunction barring the continued allowance of the exclusion. Section 107 provides two federal income-tax exclusions to "minister[s] of the gospel": an exclusion for housing provided in kind, § 107(1), and an exclusion for cash housing allowances, § 107(2). Because plaintiffs did not themselves seek the benefits of § 107(1) for housing furnished in kind, the Government moved to dismiss the case as it related to § 107(1), contending that plaintiffs lacked standing. (Doc. 6.) The District Court granted the motion. (A1-4.) Several ministers and religious organizations representing a variety of denominations (Intervenors) moved to intervene (Doc. 21, 81), which the court granted (Doc. 35; App46). The Government and the Intervenors moved for summary judgment, contending that § 107(2) does not violate the Establishment Clause. (Doc. 43, 48.) The court struck down § 107(2) as unconstitutional, denying summary judgment to the Government and Intervenors and

granting summary judgment to plaintiffs *sua sponte*. (App46-47.) The Government and the Intervenors now appeal.

### B. Background: § 107

Section 107 is one of several statutory exclusions from gross income for employment-connected housing benefits. Taxpayers who are furnished housing by their employers may exclude the value of that housing from their gross income where (among other things) the housing is furnished for the "convenience of the employer." § 119. All taxpayers, regardless of profession, may qualify for this exclusion, so long as the taxpayer meets the criteria of § 119.[2] Taxpayers who furnish their own housing, but use it for business purposes for the "convenience of [the] employer," may deduct from income expenses related to that housing. §§ 162, 280A(c)(1). In addition, certain federal employees may exclude from gross income cash provided to them for housing purposes. § 134 (military housing allowance); § 912 (foreign

[2] To meet the criteria of § 119, the taxpayer must establish that the housing is provided (i) on the employer's "business premises," (ii) "for the convenience of the employer," and (iii) "as a condition of [the employee's] employment" such that the employee is "required to accept the lodging in order to enable him properly to perform the duties of his employment." Treas. Reg. § 1.119-1(b) (26 C.F.R.).

housing allowance for Foreign Service, the CIA, etc.). And U.S. citizens or residents living abroad may exclude the costs of housing from their gross income. § 911.

Section 107 provides an analogous exclusion for housing or its cash equivalent provided to a "minister of the gospel" by his employing church (or synagogue, mosque, etc.).[3] Specifically, when furnished or paid to him "as part of his compensation," a minister's gross income does not include "(1) the rental value of a home" or "(2) the rental allowance paid to him . . . to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home," plus utilities. § 107.

Section 107 has its origins in the Revenue Act of 1921, which created an exclusion for "[t]he rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of

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[3] Although § 107 "is phrased in Christian terms" to apply to a "minister of the gospel," "Congress did not intend to exclude those persons who are the equivalent of 'ministers' in other religions." *Salkov v. Commissioner*, 46 T.C. 190, 194 (1966) (holding that a Jewish cantor was a "minister of the gospel"). The Commissioner interprets "religion" broadly to include "beliefs (for example, Taoism, Buddhism, and Secular Humanism) that do not posit the existence of a Supreme Being." Internal Revenue Manual § 7.25.3.6.5(2) (Feb. 23, 1999). We use the term "church" in this brief to denote any religious organization.

his compensation." Pub. L. No. 98, sec. 213(b)(11), 42 Stat. 227, 239. This exclusion was carried forward in successive revenue acts and was incorporated into the Internal Revenue Code of 1939 without substantive change. *See* Section 22(b)(6) of the 1939 Code, 53 Stat. 10. When the exclusion was reenacted as § 107(1) of the Internal Revenue Code of 1954, the addition of § 107(2) allowed ministers to exclude "rental allowance[s]."

The treatment of clergy housing under prior law sheds light on the purpose of Section 213(b)(11). Immediately before its enactment, the Treasury Department had allowed some employees — but not clergy — to exclude the value of employer-provided housing from income pursuant to the "convenience of the employer" doctrine. *See Commissioner v. Kowalski*, 434 U.S. 77, 84-90 (1977) (describing history of exclusion for such employer-provided housing). Those benefiting included seamen living aboard ships, workers living in "camps," cannery workers, and hospital employees. *Id.* In 1921, the Treasury announced that ministers would be taxed on the fair rental value of parsonages provided as living quarters, O.D. 862, 4 C.B. 85 (1921), even though ministers traditionally resided in parsonages for the church's

convenience (A7-21). Shortly thereafter, Congress changed that treatment by enacting Section 213(b)(11), thereby placing ministers on an equal footing with other employees who already enjoyed an exclusion for housing provided for the employer's convenience.

When the parsonage exclusion was enacted, churches had differing traditions and practices that influenced how they provided parsonages to their ministers. (A8-27, 40-43.) Older or more hierarchical churches tended to furnish church-owned parsonages to ministers; newer churches favored providing ministers cash housing allowances. (*Id.*) But either way, the minister's housing was generally used for the church's religious purposes. (A8-32, 40-43.)

When churches that did not own parsonages provided ministers with cash housing allowances in lieu of in-kind housing, the Treasury ruled that the statutory exclusion was limited to in-kind housing and that housing allowances were includable in gross income. I.T. 1694, C.B. II-1, at 79 (1923). The Treasury noted, however, that the allowance would be deductible by the minister as a business expense, to the extent it was used for "expenses attributable to the portion of the parsonage which is devoted to professional use." *Id.* Several courts

disagreed. They held that, in order to treat similarly situated ministers equally, cash allowances must also be considered excludable under the statutory parsonage exclusion. *E.g., Williamson v. Commissioner*, 224 F.2d 377, 380 (8th Cir. 1955); *Conning v. Busey*, 127 F. Supp. 958 (S.D. Ohio 1954); *MacColl v. United States*, 91 F. Supp. 721 (N.D. Ill. 1950). Whether paid in cash or in kind, the benefits were considered provided for the church's "convenience" and therefore excludable. *Williamson*, 224 F.2d at 380.

In 1954, Congress resolved the dispute by codifying the prevailing judicial view in § 107, which excludes compensatory housing furnished to ministers in cash as well as in kind. In doing so, Congress sought to remove discrimination against ministers who were paid cash allowances, as the House and Senate Reports explained. H.R. Rep. No. 1337, at 15 (1954); S. Rep. No. 1622, at 16 (1954).

In 2002, Congress amended § 107(2) to clarify that the exclusion was limited to the fair rental value of the parsonage. Pub. L. No. 107-181, 116 Stat. 583. The bill that introduced the proposed amendment reiterated that one of the purposes of § 107 was 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." Clergy Housing Allowance Clarification Act, H.R. 4156, 107th Cong. § 2(a)(4) (as introduced April 10, 2002). In addition to preventing discrimination, § 107 was also designed, according to this legislative history, to avoid "intrusive inquiries by the government into the relationship between clergy and their respective churches" entailed by the generally available convenience-of-the-employer doctrine codified elsewhere in the Code. *Id*. at § 2(a)(5). Section 107 avoids such potential church-state entanglement by eliminating any need for the minister to demonstrate that the parsonage or allowance therefor is being used for the church's convenience under § 119 or § 280A(c)(1), respectively.

**C. FFRF and the individual plaintiffs**

Plaintiff FFRF is a nonprofit membership corporation that promotes the separation of church and state and educates on matters of "non-theism." (A36.) The individual plaintiffs are current and former officers of FFRF. Gaylor and Barker, FFRF's co-presidents, are "nonbeliever[s]" who are "opposed to government preferences and favoritism towards religion." (Doc. 1 at 3.) The now-deceased Anne

Nicol Gaylor (whose estate is represented on appeal by her personal representative, Ian Gaylor), president emerita of FFRF, also was a "non-believer" who was "opposed to government preferences and favoritism towards religion." (*Id.*) Since 2011, FFRF has provided Gaylor, Barker, and (before her death) Anne Nicol Gaylor with housing allowances not exceeding housing-related expenses. (App5; A64-65.) When filing their federal income tax returns, each individual plaintiff included the amount of the housing allowance as part of his or her reported income, which subjected the allowances to taxation. (A36-37.) Plaintiffs complained that the § 107 exclusion, being limited to "ministers of the gospel," subsidizes, promotes, and endorses religion in violation of the Establishment Clause. (Doc. 1 at 5-7.)

This is the second time that plaintiffs have challenged the constitutionality of § 107. In their first challenge, the District Court (Judge Crabbe) determined that the plaintiffs had standing to challenge § 107(2) and that the provision violates the Establishment Clause. *Freedom from Religion Foundation, Inc. v. Lew*, 983 F. Supp. 2d 1051 (W.D. Wis. 2013). On appeal, the Government argued that plaintiffs lacked standing because the individual plaintiffs had not asked for, and

been denied, the tax exclusion at issue, and, alternatively, that § 107(2) was constitutional. *Freedom from Religion Foundation, Inc. v. Lew*, 773 F.3d 815 (7th Cir. 2014). Without addressing the merits of the Government's argument that § 107(2) is constitutional, the Seventh Circuit vacated the District Court's decision. It agreed with the Government's threshold jurisdictional argument that the plaintiffs lacked standing to sue.

After their initial suit was dismissed for lack of jurisdiction, the individual plaintiffs filed claims for refund for the years 2012 and 2013, challenging § 107(2) as unconstitutional unless it applied to them. (App5; A36-37, 66.) After more than six months had passed without the IRS acting on Gaylor and Barker's refund claim for 2012 and Anne Nicol Gaylor's refund claim for 2013, plaintiffs filed the instant suit.[4] (App8-10; A66-69.) *See* I.R.C. § 6532(a)(1). The IRS later disallowed Gaylor and Barker's claim for 2012, explaining that they were not entitled to the exclusion under § 107 because they avowedly were not ministers of the gospel. (App6; A66-68.)

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[4] The IRS erroneously issued refunds to Barker and Gaylor for the year 2013. (App5-6, 12; Doc. 67 at 2 n.2.)

## D. The proceedings below

### 1. The parties' contentions

The Government moved to dismiss part of the suit for lack of subject matter jurisdiction, contending that plaintiffs lacked standing to challenge § 107(1) under Article III of the Constitution because plaintiffs did not claim, and had not been denied, an exclusion for the rental value of a home provided by their employer. (Doc. 6.) The District Court agreed, dismissing the complaint as it related to § 107(1). (A1-4.)

After that dismissal, several pastors who received housing allowances, as well as their associated religious organizations, sought to intervene in the case in order to defend the constitutionality of § 107(2). (Doc. 21.) The District Court granted their motion. (Doc. 35.)

The Government and the Intervenors then moved for summary judgment. (Doc. 43, 48.) The Government argued that § 107(2) does not violate the Establishment Clause because it has the secular purpose and effect of eliminating discrimination against, and among, ministers, and of limiting government entanglement with religion. (Doc. 47 at 2.) As the Government explained, potential church-state entanglement is

avoided by permitting ministers to exclude parsonage allowances under § 107(2). (*Id.*) Because of the exclusion, ministers need not rely on the generally available deduction for the business use of the home, which would entail intrusive inquiries into the church-minister relationship and an evaluation as to whether activities in a minister's home are religious or secular. (*Id.*)

### 2. The District Court's decision

The District Court denied the Government and the Intervenors summary judgment and granted summary judgment to plaintiffs *sua sponte*. (App3-4, 46.) The court first held that plaintiffs had standing to challenge § 107(2), finding "it is undisputed that plaintiffs Gaylor and Barker asked for the exemption and that the IRS denied the request." (App8-13.) The court further held that § 107(2) violates the Establishment Clause, reaffirming its holding from plaintiffs' previous lawsuit that § 107(2) "does not have a secular purpose or effect" and that "a reasonable observer would view the statute as an endorsement of religion." (App4.)

At the outset, the District Court invoked *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), where a plurality of the Supreme Court

struck down a sales tax exemption that applied only to religious periodicals. (App15-16.) In the court's view, § 107(2) was invalid under the plurality opinion in *Texas Monthly* because it "gave an exemption to religious persons without a corresponding benefit to similarly situated secular persons" (App15) and did so "without a corresponding showing that the exemption was necessary to alleviate a significant burden on free exercise" (App14). The court also considered § 107(2) invalid under the concurring opinion in *Texas Monthly* because a tax exemption provided only to ministers prefers religious messages over secular ones. (App15.)

The District Court further concluded that, even aside from *Texas Monthly*, "both the purpose and effect of § 107(2) were to endorse religion, in violation of the establishment clause." (App16.) It relied on statements in the legislative history as showing "that the purpose of § 107(2) was to assist a group of religious persons, which is not a secular purpose." (App17.)

The District Court first rejected the Government's contention that § 107(1) was intended to achieve parity between the clergy and laity respecting exemptions for housing furnished for the convenience of the

employer found in § 119, as well as similar exemptions for housing of Americans and federal employees working overseas (§§ 911 and 912, respectively) and members of the military (§ 134). (App20-22.) In the court's view, there was no justification for granting a "categorical tax exemption" for clergy housing when none was enjoyed by the secular groups of employees. (App23.) Despite finding "surface appeal" to the Government's argument that § 107(2) was intended to eliminate discrimination among religions, the court concluded that "a closer look reveals that the enactment of § 107(1) provides no justification for § 107(2)." (App27.) In the court's view, the exclusion for church-provided parsonages "goes beyond simply codifying the convenience of the employer doctrine for ministers," because the parsonage need not be on the employer's premises, nor must living in it be a condition of employment (as § 119 requires). (*Id.*)

The District Court then rejected the proposition that § 107(2) was designed to accord equal treatment to denominations that furnish cash housing allowances rather than housing in kind. It found "no authority for the view that the government may eliminate a perceived disparity

among religions by *creating* (or exacerbating) a disparity between religious persons and secular persons." (App28.)

The District Court went on to reject the Government's argument that § 107(2) avoids entanglement by sparing the clergy from establishing that they comply with the requirements of the "convenience of the employer" exclusion that must be demonstrated by secular employees. It commented that "defendants cite no evidence that concerns about entanglement had anything to do with § 107(2) and they cite no authority for the view that concerns about entanglement can justify preferential treatment for religious persons." (App33.)

Nor were the District Court's concerns allayed by the fact that § 107(2) grants an exemption, rather than a subsidy. It concluded that, because paying generally applicable taxes does not significantly burden religious exercise, "exemptions from such taxes cannot be viewed merely as a religious accommodation." (App39.) To the contrary, "because the government has eliminated a burden for certain ministers that is shared by millions of taxpayers, the exemption is more accurately viewed as religious favoritism." (*Id.*)

In sum, the District Court concluded that the Government's "stated concerns about treating religions equally and avoiding entanglement do not find any support in the facts or the law." (App43.) The court determined that, rather than granting refunds, the appropriate remedy was to issue an injunction nullifying § 107(2). (App50.) The court stayed the injunction, however, until 180 days after the final resolution of all appeals. (App50-51.)

## SUMMARY OF ARGUMENT

Plaintiffs — an advocacy organization (and its members) promoting atheism and its view of separation of church and state — challenge the constitutionality of § 107(2), a longstanding exclusion for a cash parsonage allowance provided by a church to its minister. That tax benefit is one of several tax benefits provided in the Internal Revenue Code for employer-provided housing. The District Court held that § 107(2) violates the Establishment Clause. That ruling is flawed.

Section 107(2) is constitutionally sound. It satisfies the prevailing test for analyzing Establishment Clause claims because it has a secular purpose and effect and because it avoids excessive church-state entanglement. The clergy have long been provided with homes at or

near their places of worship to use in connection with their ministries. Just as it has done for lay employees furnished housing for the employer's convenience under § 119, Congress has exercised the discretion that accompanies its taxing power to exempt the value of such professionally used parsonages from taxation. Extension of this "refusal to tax" to the cash equivalent of in-kind housing under § 107(2) merely "eliminates the discrimination," in the words of the drafters, that would otherwise exist against ministers, and between churches that have historically provided parsonages in kind and those that do not. Permitting ministers to exclude parsonage allowances under § 107(2), rather than forcing them to rely on the generally available deduction for the business use of the home under §§ 162 and 280A(c)(1), may also prevent more intrusive Government inquiries into the church-minister relationship, and avoid the need to evaluate whether activities in a minister's home are secular or religious. These statutory purposes comport fully with the restraints of the Establishment Clause.

In striking down the law, the District Court disregarded the reasons Congress enacted § 107 in the first place. It also failed to appreciate that providing ministers categorical, rather than case-by-

case, tax exemptions actually prevents unnecessary entanglement between church and state. Section 107's blanket exclusion for minister housing is consistent with the ministerial exception to the anti-discrimination laws recognized by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 188 (2012), and with this Court's approval of categorical religious exemptions that "avoid[ ] intrusive inquiry into religious belief and practice" in *Cohen v. City of Des Plaines*, 8 F.3d 484, 491-493 (7th Cir. 1993). Because § 107(2) is merely one component of a larger, integrated tax code, tailored to further Establishment Clause principles, Congress has by no means provided a tax benefit to religious organizations and "no one else" (App1).

## ARGUMENT

### The parsonage allowance exclusion in Section 107(2) does not violate the Establishment Clause

### Standard of review

The District Court's grant of summary judgment to plaintiffs on their Establishment Clause claim is reviewed *de novo*. *Books v. Elkhart County, Ind.*, 401 F.3d 857, 863 (7th Cir. 2005).

### A. Introduction

1. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I, cl. 1. Generally speaking, the First Amendment's Free Exercise Clause prohibits Congress from interfering with religious practices and institutions, while the Establishment Clause prohibits Congress from inappropriately advancing religion. Between the "two Religion Clauses," there is a middle ground — "room for play in the joints" — within which Congress may accommodate religion "without sponsorship and without interference" and thereby achieve "benevolent neutrality" towards religion. *Walz v. Tax Commission*, 397 U.S. 664, 668-669 (1970).

The Supreme Court has "'long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.'" *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (citation omitted); *see Cutter v. Wilkinson*, 544 U.S. 709, 719-720 (2005) (upholding Religious Land Use & Institutionalized Persons Act as a "permissible legislative accommodation of religion," even though it was not "compelled by the Free Exercise Clause"); *Gillette v. United States*, 401 U.S. 437, 450 (1971) (upholding religion-specific exemption from military draft).

Permissible accommodations of religion include laws designed to avoid discrimination among religions and laws designed to avoid entanglement with religion. *E.g.*, *Cohen v. City of Des Plaines*, 8 F.3d 484, 489-490 (7th Cir. 1993) (upholding special-use permit exemption for churches because it reasonably accommodated religion by "minimizing governmental interference with the decision making processes of a religious organization"); *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1231-1233 (10th Cir. 2017) (upholding church-plan exemption from ERISA because it reasonably

accommodated religion by "avoid[ing] entanglement with religion"); *Fields v. City of Tulsa*, 753 F.3d 1000, 1010-1011 (10th Cir. 2014) (upholding policy enacted to avoid potential claims of "disparate treatment" among religious groups).

2. To determine whether the Government's accommodation of religion is permissible under the Establishment Clause, courts generally apply the three-pronged test set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which "'remains the prevailing analytical tool for the analysis of Establishment Clause claims.'" *Doe v. Elmbrook School District*, 687 F.3d 840, 849 (7th Cir. 2012) (*en banc*) (citation omitted). In order to comport with the Establishment Clause, (i) "the statute must have a secular legislative purpose," (ii) "its principal or primary effect must be one that neither advances nor inhibits religion," and (iii) it "must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-613 (citation omitted).

A comparison of *Amos* and *Walz* (upholding religious exemptions) to *Texas Monthly* (invalidating such an exemption) illustrates the contours of permissible accommodation of religion. In *Amos*, the

Supreme Court addressed whether the exemption for religious organizations from the prohibition against religious discrimination under Title VII violates the Establishment Clause. The Court upheld the exemption as a permissible accommodation, even though it was not required by the Free Exercise Clause and even though it applied categorically to all of the religious organization's activities, including its secular activities. 483 U.S. at 335-336. The Court concluded that the exemption satisfied the *Lemon* test. First, it served the secular purpose of minimizing governmental interference "with the decision-making process in religions." *Id*. Second, it did not advance religion, but merely removed a regulatory burden imposed thereon. *Id*. at 338. Third, it avoided excessive entanglement by "effectuat[ing] a more complete separation" of church and state. *Id*. at 339. The Court expressly rejected the complaint "that [the exemption] singles out religious entities for a benefit." *Id*. at 338. As the Court explained, "[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Id*.

In *Walz*, the Supreme Court held that exempting religious organizations from a generally applicable property tax did not violate the Establishment Clause. The Court emphasized that the tax exemption served the permissible purpose of "sparing the exercise of religion from the burden of property taxation." 397 U.S. at 673-674. The exemption, moreover, by no means sponsored religion, but "simply abstains from demanding that the church support the state." *Id.* at 675. And it "create[d] only a minimal and remote involvement between church and state and far less than taxation of churches." *Id.* at 676. Although the Court observed that the property tax exemption was also available to other nonprofit organizations, its conclusion that the exemption was a "permissible state accommodation to religion" did not depend on that fact. *Id.* at 673. As the Court explained, the Establishment Clause prohibits government "sponsorship" of "religious activity," and a property-tax exemption — unlike a "direct money subsidy" — does not run afoul of that prohibition because the "government does not transfer part of its revenue to churches." *Id.* at 675.

Finally, in *Texas Monthly*, the Supreme Court addressed a state sales-tax exemption for periodicals distributed by a "religious faith" that promoted the "teachings of the faith." 489 U.S. at 5-6. A divided majority of the Court held that this differentiation of literature based upon religious content violated either the Establishment Clause (all but White, J.) or the Press Clause of the First Amendment (White, J.). *Id.* at 17-25 (Brennan, J., joined by Marshall and Stevens, JJ.); *id.* at 25-26 (White, J., concurring in the judgment); *id.* at 26-29 (Blackmun, J., joined by O'Connor, J., concurring in the judgment). Justice Blackmun's concurrence provides the rationale for the Court because it provides the narrowest grounds on which the decision is based. *See Marks v. United States*, 430 U.S. 188, 193 (1977). Justice Blackmun believed that, although "some forms of accommodating religion are constitutionally permissible" (citing *Amos* as an example), the Texas sales-tax exemption was not, because it entailed "preferential support for the communication of religious messages" without any secular justification for doing so. 489 U.S. at 28.

3. Section 107 is a permissible accommodation of religion under *Lemon*. Like the exemptions in *Amos* and *Walz*, § 107 lifts a burden on

religious practice by eliminating governmental discrimination against (§ 107(1)) — and between (§ 107(2)) — religions, and by minimizing governmental interference with a church's internal affairs, without burdening third parties. Unlike the exemption in *Texas Monthly*, § 107 does not endorse a religious message. It merely adapts the Code's general exemptions for certain types of employer-provided housing to the unique context of a church and its minister. *See* Legg, *Excluding Parsonages from Taxation: Declaring a Victor in the Duel between Caesar & the First Amendment*, 10 Georgetown J. of Law & Public Policy 269, 271 (2012) (arguing that "the parsonage exclusions are constitutional when (necessarily) viewed as one element of a larger congressional plan to extend tax relief to recipients of employer-provided housing as a principal feature of their employment").

4. Before turning to those arguments, however, we first highlight three aspects of § 107(2) that are crucial to an understanding of its constitutional soundness. First, § 107(2) is but a single provision in a larger Congressional scheme that exempts qualifying employer-provided housing from taxation. As noted above (at pp. 4-6), and described more fully below, the Code contains several tax benefits for

housing used by a taxpayer in his trade or business or for the convenience of his employer, including §§ 119, 162, and 280A(c)(1). Section 107 merely adapts those provisions to the unique church-minister context, so as to avoid the entanglement problems that could arise if ministers had to rely on those provisions to exclude or deduct the value of church-provided housing. Analyzed in its specific history and context, § 107(2) is *not* "accurately viewed as religious favoritism." (App39.) Rather, "[w]hen viewed in the context of other employer-provided housing provisions — both historic and currently-existing — [§ 107(2)] hardly singles out religion for an exclusive benefit in violation of the Constitution." *Legg*, above, at 297.

Second, § 107(2) provides an exclusion from gross income for employment benefits provided by a church to its minister. The courts have been particularly solicitous of governmental accommodation regarding the "employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 188 (2012). In *Hosanna-Tabor*, the Supreme Court held that "there is a ministerial exception grounded in the Religion Clauses of the First Amendment" that precludes the

government from applying generally applicable anti-discrimination laws to a church's minister, even though such laws may be applied to the church's other employees. *Id.* at 190. As the Court explained, the church-minister relationship concerns "the internal governance of the church," given that the minister "personif[ies] its beliefs," and a church's decisions regarding its ministers "affects the faith and mission of the church itself." *Id.* at 188-190. Indeed, this Court refers to the "ministerial exception" as the "internal affairs" doctrine because the exception is designed to prohibit governmental interference "in the internal management of churches." *Schleicher v. Salvation Army*, 518 F.3d 472, 474-475 (7th Cir. 2008) (applying doctrine to reject ministers' claim that church violated minimum-wage laws); *see Grussgott v. Milwaukee Jewish Day School, Inc.*, 882 F.3d 655 (7th Cir. 2018) (applying doctrine to reject minister's claim that religious employer violated the Americans with Disabilities Act).

Third, § 107(2) involves an exemption from tax, rather than the grant of a direct subsidy. As a general rule, the "grant of a tax exemption is not sponsorship" prohibited by the Establishment Clause, despite the "indirect economic benefit" that goes with it. *Walz*, 397 U.S.

at 674-675. Unlike a "direct money subsidy," the "government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 675. Moreover, the Government's refusal to "impose a tax" on religion does not impose a burden on third parties. *Ariz. Christian School Tuition Org. v. Winn*, 563 U.S. 125, 142-143 (2011).

### B. Section 107(2) satisfies the *Lemon* test because it is a neutral provision that tailors a generally available tax benefit to avoid Establishment Clause concerns raised by the unique church-minister context

Section 107(2) satisfies each part of the *Lemon* test and thus does not violate the Establishment Clause. Before turning to that test, we first correct the District Court's misconstruction of our argument. The Government does not contend here that § 107(2) is "compelled" (App29) by the Free Exercise Clause. We contend that § 107(2) is *permitted* by the Establishment Clause. In this regard, an exemption can be a "permissible legislative accommodation of religion" under the Establishment Clause, even if it is not "compelled by the Free Exercise Clause." *Cutter*, 544 U.S. at 719-720. Nor do we contend that § 107(2) permissibly accommodates religion by eliminating the "payment" of taxes. (App17.) Broadly speaking, applying a generally applicable tax

to a church or its minister does not substantially burden religion. *See Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943); *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629 (7th Cir. 2000). Rather, we contend that § 107(2) permissibly accommodates religion by tailoring a generally available tax benefit in order (i) to equalize governmental treatment of ministers and (ii) to avoid church-state entanglement, as demonstrated below.

### 1. Section 107(2) has a secular legislative purpose

In reviewing an Establishment Clause challenge, it is critical to consider the historical context of the statute and the specific sequence of events leading to its passage. *See Salazar v. Buono*, 559 U.S. 700, 715 (2010) (reversing determination that law violated Establishment Clause where the "District Court took insufficient account of the context in which the statute was enacted and the reasons for its passage"). The history and context of § 107(2) demonstrate that the manifest purpose of the statute is to achieve parity among clergy and denominations, irrespective of how a church and its minister decide to arrange housing, and to avoid interference in a church's internal affairs.

### a. The history and context of § 107

Church-provided housing is a tradition that dates back at least to the 13th century. Savidge, *The Parsonage in England* 7-9 (1964). The patterns of housing members of the clergy in America have deep histories in the churches of Western Europe. The most common feature of this long-held tradition is that clergy lived in housing (called a parsonage) on the church grounds or nearby on church-owned property. (A8, 38-39.) The parsonage system provided a critical means for churches to ensure that the spiritual needs of their congregations were met by housing the clergy in a place available to the congregation that could accommodate the church business conducted there. (A8-32, 40-43.)

In 1921, when Congress first enacted the parsonage exclusion, most religious denominations in the United States directly furnished parsonages to ministers. (A8-20.) The denominations that did not do so were generally very small or were newer sects. (A16, 22-29.) The latter denominations found it more convenient or feasible to furnish parsonages for their ministers by providing them with cash in lieu of the use of a church-owned building. (*Id.*)

Since a minister "will personify" his church, *Hosanna-Tabor*, 565 U.S. at 188, his residence is traditionally more than mere housing (A8-32, 40-43). It is an extension of the church itself, frequently used for "religious purposes such as a meeting place for various church groups and as a place for providing religious services such as marriage ceremonies and individual counseling." *Immanuel Baptist Church v. Glass,* 497 P.2d 757, 760 (Okla. 1972); *see* Brunner, *Taxation: Exemption of Parsonage or Residence of Minister, Priest, Rabbi or Other Church Personnel*, 55 A.L.R.3d 356, 404 (1974) (observing that "[m]ost ministerial residences can be expected to be incidentally used to some considerable extent as an office, a study, a place of counseling, a place of small meetings, such as boards or committees, and a place in which to entertain and lodge church visitors and guests"). Accordingly, whether provided in cash or in kind, the minister's housing benefit historically was considered to be provided for the church's "convenience." *Williamson*, 224 F.2d at 380; *see Eveland v. Erickson*, 182 N.W. 315, 319 (S.D. 1921) (observing that a church "furnish[es] the pastor a house" to "make efficient the religious work and purpose of the church"); Barham, *The Parsonage Exclusion under the Endorsement Test: Last*

*Gasp or Second Wind?*, 13 Va. Tax Rev. 397, 418 (1993) (observing that the "clergymember's situation is unique because by and large his home becomes the business place of his employer").

Against this historical backdrop, Congress enacted an exclusion from gross income for parsonages in 1921, just eight years after the modern federal income tax was authorized by the 16th Amendment to the Constitution. *See* Revenue Act of 1921, Section 213(b)(11). Section 213(b)(11) — the precursor to § 107(1) — excluded from income "[t]he rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation." 42 Stat. 227, 239. Immediately before the enactment of Section 213(b)(11), the Treasury Department had allowed some employees — but not clergy — to exclude the value of employer-provided housing from income under the "convenience of the employer" doctrine.[5] *See*, above, pp. 6-7. In response, Congress enacted Section 213(b)(11). Ministers were thereby placed on an equal footing with other types of employees who were

[5] The convenience-of-the-employer rationale for excluding housing furnished in kind was at first recognized only in Treasury rulings and regulations, but was ultimately codified by Congress in 1954 as § 119. *See Kowalski*, 434 U.S. 77.

already enjoying the Treasury's recognition of an exclusion for housing provided for the employer's convenience. It also spared them the prospect of undergoing an intrusive inquiry regarding the church's convenience. *See*, above, n.2.

Ministers whose churches chose to furnish them with parsonages by way of providing cash allowances for that purpose also sought to exclude the parsonage allowance under Section 213(b)(11). The Treasury determined that Section 213(b)(11) "applies only to cases where a parsonage is furnished to a minister and not to cases where an allowance is made to cover the cost of a parsonage." I.T. 1694. The Treasury advised, however, that such ministers could deduct their payments for the parsonage to the extent that the parsonage was used for "professional" rather than personal reasons.[6] *Id.*

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[6] Prior to 1976, the costs associated with the business use of the taxpayer's residence were deductible on the same terms as any other "ordinary and necessary" business expense. *E.g.*, Revenue Act of 1921, § 214(a)(1); § 162. In 1976, however, Congress enacted § 280A, which must be satisfied, in addition to qualifying as an ordinary and necessary expense of the taxpayer's trade or business under § 162, in order to deduct such expenses. Section 280A(c)(1) requires the residence to be used "for the convenience of [the] employer," just as the employer-furnished housing must be so used in order to qualify for the coordinate exclusion under § 119.

Several courts, however, rejected the Treasury's determination and permitted ministers to exclude from income the value of parsonages furnished to them in cash as well as in kind. *See*, above, pp. 7-8. As the Eighth Circuit explained, when a church provides a minister a parsonage allowance in lieu of a parsonage, it was "manifestly for the convenience of the employer," and such housing should be excluded from income, whether furnished in cash or in kind. *Williamson*, 224 F.2d at 380.

In 1954, Congress codified those decisions by enacting § 107(2) as an additional exclusion to the existing one, which was redesignated as § 107(1). The statute as a whole leaves it to churches to determine how to provide parsonages — in cash or in kind — free from any influence from the tax laws. As the House and Senate Reports explained (using identical language), the rationale for the new provision was as follows:

> Under present law, the rental value of a home furnished a minister of the gospel as a part of his salary is not included in his gross income. This is unfair to those ministers who are not furnished a parsonage, but who receive large salaries (which are taxable) to compensate them for expenses they incur in supplying their own home.
>
> Your committee has *removed the discrimination in existing law* by providing that the present exclusion is to

> apply to rental allowances paid to ministers to the extent used by them to rent or provide a home.

H.R. Rep. No. 1337, at 15 (emphasis added); S. Rep. No. 1622, at 16 (emphasis added). Congress had been alerted to the discrimination in existing law by officials from various religious denominations who complained that the existing "discriminatory" tax provision benefited some clergy and churches but not others. Hearings on Forty Topics Pertaining to the General Revision of the Internal Revenue Code at 1574-1575 (Aug. 1953) (Statement of Hon. Peter Mack) (hereinafter "1953 Hearings"). Section 107(2) was enacted "to equalize the disparate treatment among religious denominations." Legg, above, at 275.

Those purposes of preventing discrimination and preserving neutrality were confirmed in 2002, when Congress amended § 107(2) to clarify that the exclusion is limited to the fair rental value of the parsonage. 116 Stat. 583. The bill introducing the proposed amendment explained that § 107 was designed 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." H.R. 4156, 107th Cong. § 2(a)(4). The bill further confirmed that § 107 was also intended to minimize

"intrusive inquiries by the government" into a church's internal affairs by obviating the convenience-of-the-employer inquiry required by §§ 119 and 280A(c)(1). *Id.* at § 2(a)(3), (5).

### b. The history and context of the statute disclose the secular purpose of eliminating discrimination against and among ministers and of minimizing intrusion into internal church affairs

Far from seeking to provide religion a *special* benefit, Congress enacted § 107(1) and its statutory predecessors to ensure that ministers received the *same* tax benefit that similarly situated secular employees had received pursuant to the convenience-of-the-employer doctrine (now codified in § 119). All employees — religious or lay — are entitled to exclude from gross income the value of "lodging furnished to him" by his "employer for the convenience of the employer." § 119. Besides being furnished for the employer's convenience, the lodging must be situated on the employer's business premises, and living there must be a condition of employment.

When the convenience-of-the-employer doctrine was initially developed, the Treasury applied it to many secular employees, but not to ministers. By allowing secular employees, but not ministers, to

exclude employer-provided housing from income, the Treasury's 1921 ruling raised serious constitutional concerns. *E.g., McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (determining that law permitting all persons, except for "ministers," to participate in political conventions violated the First Amendment). Congress quickly reacted to that ruling by enacting Section 213(b)(11) of the Revenue Act of 1921, the predecessor of § 107(1). Consequently, § 107(1) simply levels the playing field between ministers and other types of employees.

After eliminating discrimination *against* ministers who were furnished housing in kind by their churches, Congress next eliminated discrimination *among* ministers. H.R. Rep. No. 1337, at 15; S. Rep. No. 1622, at 16. It addressed the problem that some churches furnished parsonages by providing parsonages in kind, while others did so by providing cash for that purpose. *Id.* Congress enacted § 107(2) to ensure that all ministers who were similarly situated were treated equally by the Government, tax-wise. *Id.* And, in doing so, Congress simply codified the results of litigation brought by ministers seeking equal tax treatment of parsonages and parsonage allowances. *See*, above, pp. 7-8. Because § 107(2) has the permissible, secular purpose of

avoiding governmental discrimination among religions, it furthers one of the core purposes of the Establishment Clause. *See Larson v. Valente*, 456 U.S. 228, 246 (1982) (determining that law that applied to some, but not all, religions violated the Establishment Clause by running afoul of the "principle of denominational neutrality"); *Grussgott*, 882 F.3d at 658 (rejecting an interpretation of the ministerial exception that would "impermissibly favor religions that have formal ordination processes over those that do not").

Moreover, by enacting § 107(2), Congress removed tax-related disincentives to a church's decision whether to furnish a parsonage to its minister in cash or in kind, thereby avoiding interference in the church's internal affairs. *See* H.R. 4156, 107th Cong. § 2(a)(3) (observing that one purpose of § 107 is to "minimize government intrusion into internal church operations and the relationship between a church and its clergy"). "Under the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335. Section 107(2) allows each

church to decide whether and how best to furnish a parsonage to its ministers.

Finally, § 107 also serves the secular purpose of avoiding problems of entanglement between church and state that could result from administering the convenience-of-the-employer doctrine where ministers are concerned. As Congress and the courts have recognized, the minister's home frequently is used for the "convenience of the employer," whether the home is owned by the church or its minister. *Williamson*, 224 F.2d at 380; 148 Cong. Rec. 4671 (Apr. 16, 2002) (observing that § 107 recognizes "that a clergy person's home is not just shelter, but an essential meeting place for members of the congregation"). By providing an exclusion for housing provided by churches to ministers, regardless of the form in which it is furnished, § 107 avoids the intrusive convenience-of-the-employer inquiry required by § 119 (when taxpayers seek to exclude employer-provided housing) or §§ 162 and 280A(c)(1) (when taxpayers seek to deduct the cost of housing used in the employer's business, such as "home office" expenses). *See* H.R. 4156, 107th Cong. § 2(a)(5) (observing that one purpose of § 107 is to accommodate the fact that "clergy frequently are

required to use their homes for purposes that would otherwise qualify for favorable tax treatment, but which may require more intrusive inquiries by the government into the relationship between clergy and their respective churches with respect to activities that are inherently religious"). "[T]he Supreme Court has expressly held that a purpose of avoiding government entanglement does not violate the Establishment Clause." *Medina*, 877 F.3d at 1231 (citing *Amos*). *See, e.g., Amos*, 483 U.S. at 335-336; *Cohen*, 8 F.3d at 489-490. The District Court's conclusion to the contrary (App35) conflicts with binding authority.

#### 2. Section 107(2) does not have the primary effect of advancing or inhibiting religion

To determine whether a law has the primary effect of advancing or inhibiting religion, this Court considers whether "'irrespective of government's actual purpose,'" the "'practice under review in fact conveys a message of endorsement or disapproval.'" *Sherman v. Koch*, 623 F.3d 501, 517 (7th Cir. 2010) (citation omitted). Section 107(2) does not convey a message of endorsement or disapproval of religion and therefore complies with the second prong of the *Lemon* test.

Taking steps to avoid a potential Establishment Clause violation cannot itself violate the second prong of the *Lemon* test. *Santa Monica*

*Nativity Scenes Committee v. City of Santa Monica*, 784 F.3d 1286, 1300 (9th Cir. 2015); *see Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005). Indeed, in *Mercier*, the Court observed that by selling part of a park and a monument to the Ten Commandments situated thereon in order to "end a perceived endorsement" of religion and "preempt" an Establishment Clause challenge, "the City exercised an option that served a secular purpose." *Id.* As relevant here, legislation enacted to avoid potential claims of "disparate treatment" among religious groups does not "'convey[ ] a message of endorsement or disapproval'" of religion. *Fields*, 753 F.3d at 1010-1011 (citation omitted). Similarly, legislation enacted to avoid "entanglement with religion" does "not run afoul of the second prong of the *Lemon* test" and "does not convey an impermissible message that religion is favored or preferred." *Medina*, 877 F.3d at 1231-1233.

Section 107(2) has a secular effect because it minimizes governmental interference with a church's internal affairs. The limited nature of the exclusion in § 107 — which applies only to ministers and not to all religious employees — confirms that its primary effect is not to advance religion, but to preserve the autonomy of churches. Section

107 preserves the autonomy of churches by permitting them to determine how best to furnish parsonages to their ministers (whether with cash or in kind) "under the ecclesiastical doctrine of each church," free of discriminatory tax laws and without any adverse tax consequences hinging on that determination. Legg, above, at 291. In this regard, the § 107 exclusion is similar to the "ministerial exception," or "internal-affairs doctrine," that the courts have applied to generally applicable employment laws. Like that doctrine, which minimizes governmental interference "in the internal management of churches," *Schleicher*, 518 F.3d at 475, § 107 minimizes both governmental influence on a church's decision regarding how to furnish a parsonage, and governmental evaluation of church activities that take place in the parsonage.

The effect of the § 107 exclusion must also be judged in the context of other housing-related exclusions and deductions provided in the Code. *See* Zelinsky, *The First Amendment & the Parsonage Allowance*, Tax Notes 5-8 (Dec. 2013) (critiquing the District Court's opinion in *Freedom from Religion Foundation, Inc. v. Lew*, 983 F. Supp. 2d 1051 (W.D. Wis. 2013), *vacated*, 773 F.2d 815 (7th Cir. 2014), for analyzing

"section 107 in isolation from other code provisions," and explaining how applying § 119 to religious employers creates church-state entanglement problems). Section 107 is "similar to other housing provisions in the Tax Code offered to workers who locate in a particular area for the convenience of their employers, and military personnel who receive a tax exclusion for their housing." 148 Cong. Rec. 4670 (Apr. 16, 2002). All taxpayers may exclude certain employer-provided housing from income. § 119. Likewise, all taxpayers may deduct the cost of their housing to the extent that it is used for their employer's business and convenience. §§ 162, 280A(c)(1); I.T. 1694. In addition, certain employees of the federal government are entitled to exclude their housing allowances without first demonstrating that the housing was being used for the employer's convenience. *See* § 134 (military members); § 912 (civil servants on foreign postings). Section 107 provides similar tax benefits to ministers, but does so in a way that avoids the intrusive inquiries implicit in the employer's convenience and business exigency requirements inherent in §§ 119, 162, and 280A(c)(1).

A "reasonable observer" would not view § 107(2) as "an endorsement of religion," as the District Court assumed. (App4.) A "reasonable observer" is one who is familiar with "'the text, legislative history, and implementation of the statute'" at issue. *McCreary County v. ACLU*, 545 U.S. 844, 862, 866 (2005) (citation omitted). Someone familiar with the text, history, and context of § 107(2) would understand that it is a tax exemption, not a direct subsidy to religion, and that it was designed not only to eliminate discrimination among religions, but also to avoid intrusive inquiries that §§ 119, 162, and 280A(c)(1) may entail.

If a minister had to rely on §§ 119, 162, and 280A(c)(1) to support an exclusion or deduction, as the case may be, it would raise questions regarding the church's "convenience," the scope of the church's "business premises," and the degree to which the minister's activities in the parsonage were secular or religious. By obviating the resolution of such questions, § 107 has a salutary effect. Indeed, it has long been recognized that the "blanket exclusion" under § 107 "does not 'prefer' religion but merely reduces the administrative burden of applying § 119 to clergymen." Bittker, *Churches, Taxes & the Constitution*, 78 Yale L.

J. 1285, 1292 n.18 (1969);[7] *see* Legg, above, at 292 (explaining that § 107 prevents "entanglement" problems under § 280A(c)(1) by "avoid[ing] the need to have the IRS make case-by-case determinations of whether the parsonage was truly granted 'for the convenience of the employer' based on the church's ecclesiastical doctrine or instead granted as a form of compensation not directly for the benefit of the church"); Barham, above, at 418-419 (comparing § 107(2) to § 119). If it were necessary for such questions to be answered, it might "requir[e] the Government to distinguish between 'secular' and 'religious' benefits or services, which may be 'fraught with the sort of entanglement that the Constitution forbids.'" *Hernandez v. Commissioner*, 490 U.S. 680, 697 (1989) (citation omitted). Each prong of § 107 removes the potential for entanglement by eliminating the intrusive inquiries that could arise if ministers were forced to rely upon § 119 or §§ 162 and 280A(c)(1). The statute therefore has an indisputably secular effect.

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[7] Although Professor Bittker adverted only to § 119 at this point, the same logic would also apply to claims of deductions for the minister's use of the home for church business under §§ 162 and 280A(c)(1), which are likewise infused with the employer's convenience and business exigency requirements.

### 3. Section 107(2) does not produce excessive entanglement

Section 107 does not produce excessive entanglement with religion. Indeed, the District Court did not find otherwise. (App32-35.) To "constitute excessive entanglement, the government action must involve 'intrusive government participation in, supervision of, or inquiry into religious affairs.'" *Vision Church v. Village of Long Grove*, 468 F.3d 975, 995 (7th Cir. 2006) (citation omitted). Section 107(2) is a tax exemption, and, as such, does not raise this concern. As the Court noted in *Walz*, a tax "exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches." 397 U.S. at 676. And determining whether an individual is a minister so as to qualify for the exemption is no more entangling than the determination required by the judicially created ministerial exception endorsed by the Supreme Court in *Hosanna-Tabor*. *See also Medina*, 877 F.3d at 1233 (holding that determining whether an entity is (or is affiliated with) a "religious organization" for purposes of the church-plan exemption from ERISA did not constitute "impermissible entanglement").

Moreover, by adapting the tax benefits generally available to taxpayers in §§ 119, 162, and 280A(c)(1) to the unique circumstances of ministers, § 107 prevents the entanglement that would ensue if the tax benefit were contingent on whether the minister acts for the "convenience of the employer" in using his home. By making such scrutiny unnecessary, the exclusion provided in § 107(2) avoids entanglement and promotes the statute's secular purposes.

Because § 107(2) satisfies each part of the *Lemon* test, it does not violate the Establishment Clause. For the same reasons, § 107(2) does not violate the Equal Protection component of the Fifth Amendment's Due Process Clause, an issue raised by plaintiffs but not reached by the District Court (App4). *See Amos*, 483 U.S. at 338-339 & n.16 (rejecting Equal Protection claim for the same reasons that the Court rejected Establishment Clause claim).

### C. The District Court's Establishment Clause analysis cannot withstand scrutiny

The District Court concluded that § 107(2) violated the Establishment Clause because (in its view) the statute "single[d] out religious persons for preferential treatment without a secular basis for doing so." (App44.) In so ruling, the court rejected the Government's

"stated concerns about treating religions equally and avoiding entanglement," holding that such concerns "do not find any support in the facts or the law." (App43.) The court further concluded that the "categorical tax exemption" provided in § 107(2) impermissibly endorsed religion because it provided a tax benefit to ministers without requiring them first to satisfy the convenience-of-the-employer doctrine. (App23, 26.) Finally, the court concluded that § 107(2) was analogous to the exemption struck down in *Texas Monthly*. As demonstrated below, the court's analysis cannot withstand scrutiny.

#### 1. By dismissing the Government's stated concerns about treating religions equally and avoiding entanglement, the District Court ignored § 107(2)'s history and context

In concluding that § 107(2) lacked a "secular purpose" (App17), the District Court ignored the statute's history and context, including the articulation of its anti-discrimination purpose in the 1954 House and Senate reports. H.R. Rep. No. 1337, at 15; S. Rep. No. 1622, at 16. That primary purpose has been recognized by the courts and commentators. *E.g., Warnke v. United States*, 641 F. Supp. 1083, 1087 (E.D. Ky. 1986) (observing that § 107(2) was enacted "to eliminate discrimination"); *Boyd v. Commissioner*, 42 T.C.M. (CCH) 1136, 1137

(1981) ("Section 107(2) was enacted in 1954 to equalize treatment of ministers who received housing in kind, see section 107(1), and ministers who received housing allowances"); 1 Mertens Law of Fed. Income Taxation § 7:196 n.71 (2013) (same). While the legislation's sponsor briefly opined that § 107(2) would aid in the "fight against" a "godless and antireligious world movement," 1953 Hearings, above, at 1576, this Cold War era rhetoric, although emphasized by the District Court (App32), does not alter the fact that the primary reason for the legislation was concern that the then "present tax laws are discriminatory among our clergy," 1953 Hearings, above, at 1574-1575. The District Court ignored this clear and permissible substantive premise for extending the exclusion to cash benefits, which was to eliminate discrimination between sects. In any event, whether any particular legislator might actually have wished to grant a particular advantage to churches would not have undermined Congress's legitimate anti-discrimination purpose. *See Sherman v. Koch*, 623 F.3d 501, 510 (7th Cir. 2010) (observing that "'what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law'") (citation omitted).

By enacting § 107(2), Congress intended to lift the burden of discriminatory tax treatment that had been imposed on churches and ministers by allowing all ministers to exclude the value of the parsonage from income, no matter how each church chooses to provide that housing. In providing that equal treatment, the statute by no means "'discriminate[s]' against religions that do not have ministers," as the District Court posited. (App31.) If a religion has no ministers, then, *a fortiori*, there is no taxation of a minister's housing to accommodate. *See* Legg, above, at 292 (observing that "religions without clergy have no leaders needing the benefit of the exclusion"). For this same reason, the ministerial exception recognized in *Hosanna-Tabor* — which, like § 107(2), is limited to religions with ministers — also serves legitimate First Amendment interests, rather than discriminating against religions without ministers. Nor does § 107(2) create an imbalance between ministers who receive housing in kind and those who receive a housing allowance, as the District Court further posited. (App31.) The fact that a minister who uses his housing allowance to buy a home may also benefit from the Code's deductions available to homeowners is not a consequence of § 107(2), but flows from

the minister's independent decision to use the housing allowance to buy, rather than rent, a home.

Because the stated purpose for enacting § 107(2) *was* to eliminate "discrimination" (H.R. Rep. No. 1337, at 15; S. Rep. No. 1622, at 16), the District Court's belief that "§ 107(2) was not needed to eliminate discrimination" (App17) is unfounded. Congress's concern clearly was secular. As this Court observed in *Grussgott*, there is a governmental interest in avoiding a rule that "would impermissibly favor religions that have formal ordination processes over those that do not." 882 F.3d at 658. Congress's concern regarding discrimination among sects was also well founded. Before § 107(2) was enacted, a number of ministers contacted Congress to complain about the disparate treatment of ministers who received housing in kind and those who received cash housing allowances. 1953 Hearings, above, at 1574-1576. And their complaints were validated by the courts, which uniformly had rejected Treasury's disparate treatment of these ministers. *E.g.*, *Williamson*, 224 F.2d at 380. For purposes of the first prong of the *Lemon* test, therefore, the District Court should have deferred to Congress's articulation of its secular purpose, unless it determined that purpose to

be a "sham." *McCreary*, 545 U.S. at 865. The District Court did not — and could not — find that Congress's articulated purpose here was a "sham."

Similarly lacking merit is the District Court's conclusion (App23) that there is "no evidence" that concerns regarding church-state entanglement "had anything to do with the enactment of § 107(2)." First, "evidence" of purpose is not required. Rather, this Court "will defer to [the Government's] sincere articulation of a secular purpose," especially "'when a plausible secular purpose for the State's program may be discerned from the face of the statute.'" *Cohen*, 8 F.3d at 489 (quoting *Mueller v. Allen*, 463 U.S. 388, 394-395 (1983)). For example, in *Cohen*, this Court accepted the government's "assert[ion]" of a law's "legislative purpose" despite the fact that the "sparse legislative history [of that law] reveals precious little about its purpose." *Id*. at 490. There, the Court endorsed the "legitimate purpose of minimizing governmental interference with the decision making processes of a religious organization," even though the legislative history contained no evidence that this purpose actually motivated the law's enactment. *Id*. The same legitimate purpose may be discerned from the face of § 107,

as Professor Bittker explained long ago. *See* Bittker, above, at 1292 n.18.

Second, the District Court disregarded the evidence submitted by the Government demonstrating that one purpose of § 107(2) is to avoid government entanglement under §§ 162 and 280A(c)(1). In this regard, the Government relied upon the legislative history to the law at issue in this case — § 107(2) as amended in 2002. (Doc. 47 at 15, 31.) The bill introducing the proposed amendment explained that § 107 was intended to minimize "intrusive inquiries by the government" into a church's internal affairs by obviating the inquiries required by §§ 119, 162, and 280A(c)(1).[8] H.R. 4156, 107th Cong. § 2(a)(3); *see id.* at § 2(a)(5) (observing that one purpose of § 107 is to accommodate the fact that "clergy frequently are required to use their homes for purposes that would otherwise qualify for favorable tax treatment, but which

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[8] Questioning the relevance of § 280A(c)(1) to this inquiry, the District Court noted that the provision "did not even exist when Congress enacted § 107(2)" in 1954. (App35.) That observation, however, misses the mark. Although § 280A was enacted as a reform measure in 1976 to impose certain additional restrictions on the deduction of trade or business expenses relating to the home, such tax benefits had been available long before § 280A was enacted under § 162 and its predecessor provisions. *See*, above, n.6.

may require more intrusive inquiries by the government into the relationship between clergy and their respective churches with respect to activities that are inherently religious"). This direct evidence of Congress's anti-entanglement purpose was inexplicably ignored by the District Court.

The District Court nevertheless opined that § 107(2) was intended "to assist a group of religious persons" and held that doing so could not be considered a secular purpose when like benefits were withheld from secular organizations and employees. (App17.) In so holding, the court lost sight of two critical facts. First, the original parsonage exclusion was intended to alleviate discrimination *against* ministers, who had been denied the favorable treatment extended to other, secular employees furnished with lodging for the employer's convenience. I.T. 1694, above. Second, Congress created the exclusion for cash parsonage allowances to "remove[ ] the discrimination in existing law" *among* ministers. H.R. Rep. No. 1337, at 15; S. Rep. No. 1622, at 16. The District Court accordingly erred by considering the constitutionality of § 107(2) in a vacuum, rather than in the context of its specific "history." *McCreary*, 545 U.S. at 862.

### 2. The categorical nature of the exclusions accorded by § 107 does not convey a message of endorsement

The District Court concluded (App31) that § 107 demonstrates "religious preference" and thereby endorses religion because the benefit it confers is not contingent upon the convenience of the employer. In this regard, the court observed (App23-24) that, to receive a similar tax benefit, similarly situated secular employees "must satisfy the requirements for the convenience of the employer doctrine set out in § 119 or § 280A," whereas ministers are relieved of that burden. That observation misses the mark.

First, other provisions in the Code also categorically exclude housing benefits from taxation without requiring a case-by-case analysis under the convenience-of-the-employer doctrine. *E.g.*, §§ 119(d), 134, 911, 912. Like those provisions, § 107 provides a blanket exclusion that is merited because of the nature of the specific occupation at issue. Such line-drawing is common with tax classifications. Even in Establishment Clause cases, "'[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes,'" and courts must give "substantial deference" to a legislative "judgment"

regarding a "tax" classification that is challenged under the Establishment Clause. *Mueller*, 463 U.S. at 396 (citation omitted). To be sure, § 107 confers tax benefits on ministers, a religious occupation. But ministers are provided with the exclusion because Congress reasonably concluded that their occupation — like that of members of the military and government employees living abroad — frequently requires them to use their homes for the employer's convenience, as evidenced by the relevant case law and the undisputed record evidence. *See, e.g.*, *Williamson*, 224 F.2d at 380; *Immanuel Baptist Church,* 497 P.2d at 760; *Eveland*, 182 N.W. at 319; A8-32, 40-43.

Moreover, given that the minister "personif[ies]" the church, *Hosanna-Tabor*, 565 U.S. at 188, asking whether the minister is residing in the parsonage for the church's convenience is a somewhat circular question. The church's convenience and the minister's convenience are, for all practical purposes, one and the same. That cannot be said for secular employees and their employers. The unique nature of the church-minister relationship obviates the need for a case-by-case determination whether the employer's convenience is served.

In addition, the absence of an express convenience-of-the-employer requirement in § 107 furthers — rather than thwarts — the objectives underlying the Establishment Clause. *See Amos*, 483 U.S. at 336-339 (holding that lifting a burden that potentially creates church-state entanglement problems furthers Establishment Clause objectives); *Cohen*, 8 F.3d at 490 (same); *Medina*, 877 F.3d at 1230-1231 (same). Congress eschewed the case-specific, convenience-of-the-employer qualification in § 107 not to provide ministers "favorable treatment," as the District Court wrongly assumed (App24), but for two salutary reasons. First, it wished to avoid "intrusive inquiries by the government into the relationship between clergy and their respective churches with respect to activities that are inherently religious." H.R. 4156, 107th Cong. § 2(a)(5). Second, it hoped "to minimize the involvement of the Government in the affairs of churches, that is, to keep the separation between Church and State." 148 Cong. Rec. 5106 (April 18, 2002).

The fact that applying §§ 119, 162, and 280A(c)(1) may be "intrusive" for "any secular employee who wants the exemption" (App34) by no means undermines the secular effect of § 107(2).

Intruding on the "secular" employer-employee relationship does not raise First Amendment concerns, while intruding on the church-minister relationship does. The principle of avoiding Government entanglement in religious affairs — particularly in the church-minister context — has no parallel with regard to secular organizations and their employees.

What Congress correctly recognized — and the District Court ignored — is that the First Amendment permits religion to be treated differently because religion *is* different under our constitutional design. The very presence of the Religion Clauses in the Constitution makes that clear, as the Supreme Court has repeatedly emphasized. For example, in *Walz*, both religious organizations and non-religious organizations were eligible for the property-tax exemption at issue in that case. But only the religious organizations could receive the tax exemption without first demonstrating that they served the "social welfare." *Walz*, 397 U.S. at 674. That different treatment was permissible because it served an important Establishment Clause function of avoiding Government entanglement with religious affairs. As the Court explained, to condition the exemption on the "'good works'

that some churches perform" could "introduce an element of governmental evaluation" of a church's programs "which the [First Amendment] policy of neutrality seeks to minimize" and "conceivably give rise to confrontations that could escalate to constitutional dimensions." *Id*. *See Grussgott*, 882 F.3d at 660 (categorically applying the ministerial exception to employment discrimination laws because "drawing a distinction between secular and religious" activity of a minister is "line-drawing [that is] incredibly difficult" and "impermissibly entangles the government with religion"). Accordingly, treating ministers differently by providing them categorical rather than case-by-case exemptions prevents entanglement between Church and State.

This Court has previously upheld against an Establishment Clause challenge a similar categorical grant to religious institutions of a benefit that secular entities enjoyed only on a case-by-case basis after satisfying certain requirements. In *Cohen*, the Court addressed a local ordinance that allowed churches to operate nursery schools and day care centers without first obtaining the special-use permit that secular organizations were required to obtain. 8 F.3d at 487. Citing *Walz* and

*Amos*, this Court held that the ordinance was a permissible accommodation of religion because it served the "secular purpose of minimizing governmental meddling in religious affairs" and "avoids intrusive inquiry into religious belief and practice." *Id*. at 491-493. So too with § 107(2).

There is no basis for the District Court's related suggestion that the constitutionality of § 107(2) is contingent on the Government's "provid[ing] likely scenarios in which [entanglement problems] would occur." (App34.) Courts have held that avoiding *potential* entanglement problems is a legitimate secular purpose; likely scenarios of entanglement are not required. *See Amos*, 483 U.S. at 335-336 (endorsing a categorical exemption for religious organizations rather than one limited to its religious activities, because "it is a significant burden on a religious organization to require it . . . to predict which of its activities a secular court will consider religious"); *Cohen*, 8 F.3d at 490 (endorsing categorical exemption for churches because "it is not up to legislatures (or to courts for that matter) to say what activities are sufficiently 'religious'" before deeming a rule satisfied); *Medina*, 877 F.3d at 1230-1231 (upholding ERISA's categorical church-plan

exemption based on its "plausible" secular purpose of "avoid[ing] unnecessary entanglement with religion"). As these courts recognize, the Government may prophylactically exempt all religious entities without inquiring into whether, absent the exemption, each and every entity would in fact experience an entanglement problem. Such exemptions fall into the "play in the joints" between the Religion Clauses recognized in *Walz* and *Amos*. *See also Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir. 2003) (eschewing "role to determine whether the Church had a secular or religious reason" for certain activity).

Indeed, inquiring into whether the minister is provided housing for the church's convenience, and into what church business is performed in the minister's home, would raise some of the same concerns that prompted the categorical ministerial exception adopted by the Supreme Court in *Hosanna-Tabor* and applied by this Court. Like that ministerial exception, which minimizes governmental interference "in the internal management of churches," *Schleicher*, 518 F.3d at 474-475, § 107 minimizes governmental evaluation of church activities that take place in the parsonage, as well as inquiries regarding the church's

convenience *vis-a-vis* its minister. Just as the ministerial exception does in the employment context, *see Hosanna-Tabor*, 565 U.S. at 188, § 107 accommodates the church-minister employment relationship in the tax context.

In any event, the convenience-of-the-employer requirement codified in §§ 119 and 280A(c)(1), if applied to ministers, could not avoid evaluating the church-minister relationship or drawing lines between the minister's religious and secular activities. It is the essential focus of that requirement to evaluate the purpose and nature of the employee's activities in the home and how they align with the employer's interests. This evaluation presents the specter of governmental attempts to separate to what extent the minister's duties and use of his home involves religious matters from those that are arguably secular. The "Supreme Court has been especially sensitive to an entanglement which requires the state to distinguish between and thus determine what is religious and what is secular." *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cir. 1979). *See Amos*, 483 U.S. at 335-336. This Court likewise has endorsed measures that avoid this inquiry altogether. *See*

*Alicea-Hernandez*, 320 F.3d at 703; *Cohen*, 8 F.3d at 490. Because it obviates such scrutiny, § 107(2) is salutary.

Some commentators who have analyzed § 107 in the broader context of the Code's other housing-related benefits have concluded that the categorical exemption is constitutional as a neutral provision that tailors a generally available tax benefit to avoid Establishment Clause concerns raised by the church-minister context. As Professor Bittker has explained, the "blanket exclusion" under § 107 "does not 'prefer' religion but merely reduces the administrative burden of applying [the Code's convenience-of-the-employer doctrine] to clergymen." Bittker, above, at 1292 n.18; *see* Barham, above, at 420 (observing that § 107 is constitutional because it provides tax benefits that are "very similar" to housing-related benefits provided elsewhere in "the Code," unlike the provision invalidated in *Texas Monthly*); Legg, above, at 271 (concluding that "the parsonage exclusions are constitutional when (necessarily) viewed as one element of a larger congressional plan to extend tax relief to recipients of employer-provided housing as a principal feature of their employment"); Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the*

*Parsonage Allowance Exclusion*, 33 Cardozo L. Rev. 1633, 1663 (2012) (concluding that "Section 107 is a constitutionally permissible means of managing the entanglement problems inherent in the income tax treatment of housing provided to" ministers).

In short, whether or not "all ministers" use "their home for church purposes" (App25) is beside the point. "History and common sense teach" that parsonages frequently are used for church purposes, and the provision of a blanket exclusion for cash parsonage allowances under § 107(2) ensures "government neutrality" by avoiding the Government's monitoring of a minister's use of his or her home. *Cohen*, 8 F.3d at 491. *See, e.g.*, *Williamson*, 224 F.2d at 380; *Immanuel Baptist Church,* 497 P.2d at 760; *Eveland*, 182 N.W. at 319; A8-32, 40-43. The fact that the benefit may apply to ministers who perform the "'exact same jobs'" as secular employees in no way undermines the secular purpose and effect of § 107(2), as the District Court wrongly supposed (App26 (citation omitted)). As this Court has explained, the "legitimate purpose of minimizing governmental interference with the decision making processes of a religious organization can extend to seemingly secular activities of the organization. *Amos* makes precisely this point." *Cohen*,

8 F.3d at 490; *see Amos*, 483 U.S. at 335-339 (upholding, against Establishment Clause challenge, law that exempted religious organization from anti-discrimination laws even as to employees engaged in secular rather than religious activities).

### 3. *Texas Monthly* is not controlling because it is distinguishable in crucial respects

In concluding that § 107(2) violates the Establishment Clause, the District Court relied almost solely on the *Texas Monthly* opinion. (App14-15.) Far from being "dispositive" (App16), *Texas Monthly* is readily distinguishable.

First, in contrast to the situation in *Texas Monthly*, where only religious publications could avoid the tax on periodical sales, here, all taxpayers are permitted to exclude, or deduct, the costs of housing provided by the employer for its convenience (§ 119) or by the employee for the employer's convenience (§§ 162 and 280A(c)(1)). Section 107 provides tax benefits similar to those provided in §§ 119 and 280A(c)(1), but tailors the benefit to avoid entanglement with the church-minister relationship. Section 107's "exclusions are similar to the property tax exemption at issue in *Walz* because the exclusions flow to ministers as a part of a larger congressional policy of not taxing qualifying employer-

provided housing." Legg, above, at 288. And "[u]nlike *Texas Monthly*'s narrowly tailored religious publication exemption, the parsonage exclusions in § 107 are part of a larger scheme that more closely aligns with the employer discrimination exception at issue in *Amos*." *Id*. at 290. When § 107(2) is examined as merely one component of a larger, integrated tax code, Congress has by no means provided a tax benefit to religious organizations and "no one else" (App1), as occurred in *Texas Monthly* and the other cases cited by the District Court (App15-16).

Second, unlike § 107(2), which has a long history and effect of eliminating discrimination against ministers and minimizing entanglement between church and state, the religion-specific exemption in *Texas Monthly* lacked *any* secular purpose or effect. An objective observer could only conclude that the government was endorsing the subject of the tax exemption — the promotion of a religious message. Here, in sharp contrast, by eliminating discrimination and entanglement problems, § 107(2) would be understood by an objective observer to "alleviate a special burden on religious exercise." (App2.)

Finally, § 107(2) does not require the Government to determine whether "some message or activity is consistent with 'the teaching of

the faith,'" as was true in *Texas Monthly*, 489 U.S. at 20. To the contrary, it precludes such questions from arising by eliminating inquiries into the extent to which the minister's home is used for religious rather than secular purposes.

## CONCLUSION

Because the decades-old exclusion in § 107(2) is well justified under prevailing Establishment Clause jurisprudence, the Court should reject plaintiffs' challenge to its constitutionality and reverse the judgment of the District Court as it relates to § 107(2).

Respectfully submitted,

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Dated: April 19, 2018

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I hereby certify that on April 19, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system and that fifteen paper copies were sent to the Clerk by First Class Mail. Counsel for the intervenors-appellants and the appellees were served electronically by the Notice of Docket Activity transmitted by the CM/ECF system.

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## STATUTORY ADDENDUM

**Internal Revenue Code of 1986 (26 U.S.C.):**

SEC. 107. RENTAL VALUE OF PARSONAGES.

In the case of a minister of the gospel, gross income does not include —

(1) the rental value of a home furnished to him as part of his compensation; or

(2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.

SEC. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER

(a) Meals and lodging furnished to employee, his spouse, and his dependents, pursuant to employment. – There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if —

. . . .

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

. . . .

SEC. 280A. DISALLOWANCE OF CERTAIN EXPENSES IN CONNECTION WITH BUSINESS USE OF HOME, RENTAL OF VACATION HOMES, ETC.

(a) General rule. – Except as otherwise provided in this section, in the case of a taxpayer who is an individual or an S corporation, no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence.

. . . .

(c) Exceptions for certain business or rental use; limitation on deductions for such use. —

(1) Certain business use. — Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis —

(A) as the principal place of business for any trade or business of the taxpayer,

(B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or

(C) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's trade or business.

In the case of an employee, the preceding sentence shall apply only if the exclusive use referred to in the preceding sentence is for the convenience of his employer. For purposes of subparagraph (A), the term "principal place of business" includes a place of business which is used by the taxpayer for the administrative or management activities of any trade or business

of the taxpayer if there is no other fixed location of such trade or business where the taxpayer conducts substantial administrative or management activities of such trade or business.

. . . .

## CIRCUIT RULE 30(d) CERTIFICATION

All of the materials required by Seventh Circuit Rule 30(a) are included in this appendix. All of the materials required by Seventh Circuit Rule 30(b) are included in the separately bound Appendix filed herewith.

/s/ Judith A. Hagley
Judith A. Hagley
*Attorney for Federal Appellants*

April 19, 2018

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

ANNIE LAURIE GAYLOR; DAN BARKER;
IAN GAYLOR, personal representative of
the estate of Anne Nicol Gaylor; and
FREEDOM FROM RELIGION FOUNDATION, INC.,

OPINION AND ORDER

Plaintiffs,

16-cv-215-bbc

v.

STEVE MNUCHIN, Secretary of the United States
Department of Treasury; JOHN KOSKINEN,
Commissioner of the Internal Revenue Service;
and the UNITED STATES OF AMERICA,

Defendants,[1]

and

EDWARD PEECHER; CHICAGO EMBASSY CHURCH;
PATRICK MALONE; HOLY CROSS ANGLICAN CHURCH;
and the DIOCESE OF CHICAGO AND MID-AMERICA OF THE
RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA,

Intervenor-Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

The question in this case is whether Congress may give a subset of religious employees an income tax exemption for which no one else qualifies. At issue is the constitutionality of 26 U.S.C. § 107(2), which excludes from the gross income of a "minister of the gospel" a

[1] In accordance with Fed. R. Civ. P. 25(d), I have substituted the current Secretary of the Department of Treasury for Jacob Lew.

"rental allowance paid to him as part of his compensation." (Although the phrase "minister of the gospel" appears on its face to be limited to Christian ministers, the Internal Revenue Service has interpreted the phrase liberally to encompass certain religious leaders of other faiths as well. E.g., Silverman v. Commissioner, 57 T.C. 727, 731 (1972) (applying "minister of the gospel" to persons holding equivalent status in other religions); Rev. Rul. 78-301, 178-2 C.B. 103 (applying "minister of the gospel" to those who perform "substantially all of the religious functions" of ordained minister). The correctness of the IRS's interpretation of § 107 is not at issue.)

Plaintiff Freedom from Religion Foundation, Inc. and some of its officers brought this lawsuit to challenge § 107(2) on the ground that it discriminates against secular employees and violates both the establishment clause of the First Amendment and the equal protection component of the Fifth Amendment. Plaintiffs initially challenged § 107(1), which excludes from a minister's gross income "the rental value of a home furnished to [the minister] as part of his compensation," but I dismissed that part of the lawsuit for lack of standing. Dkt. #15.

This is the second time that the foundation and its officers have challenged § 107(2). In Freedom from Religion Foundation, Inc. v. Lew, 983 F. Supp. 2d 1051 (W.D. Wis. 2013), I concluded that the provision violates the establishment clause because it provides a benefit to religious persons and no one else, even though doing so is not necessary to alleviate a special burden on religious exercise. On appeal, the Court of Appeals for the Seventh Circuit did not reach the merits of plaintiffs' claims but instead vacated the judgment on the ground that plaintiffs did not have standing to sue. Freedom from Religion Foundation, Inc. v. Lew, 773 F.3d 815 (7th Cir. 2014).

Now plaintiffs say that they followed the directions of the court of appeals to obtain standing and are challenging § 107(2) again. In a previous opinion in this case, the court allowed three ministers who receive housing allowances, along with the churches the ministers serve, to intervene under Fed. R. Civ. P. 24 to present their own view regarding why they believe § 107(2) is valid. Dkt. #35.

The case is now before the court on three motions: (1) Christopher Butler's unopposed motion to intervene as a defendant, dkt. #81; (2) a motion for summary judgment filed by the United States of America, the Commissioner of the Internal Revenue Service and the Secretary of the United States Department of Treasury, dkt. #43; and (3) a motion for summary judgment filed by the intervenor defendants, dkt. #48. Plaintiffs have not filed their own summary judgment motion, but instead ask the court in their opposition brief to enter judgment in their favor on the court's own motion. Dkt. #65 at 41. See also Ellis v. DHL Exp. Inc. (USA), 633 F.3d 522, 529 (7th Cir. 2011) ("District courts have the authority to enter summary judgment sua sponte as long as the losing party was on notice that it had to come forward with all its evidence."). None of the defendants object to this request on procedural grounds.

The motion to intervene will be granted. Butler is the new pastor of intervenor defendant Chicago Embassy Church, replacing intervenor defendant Edward Peecher, who no longer works for that church. Like Peecher, Butler receives a housing allowance. Butler's interests are identical to Peecher's, Butler is adopting the summary judgment materials filed by intervenor defendants and he is not asking to make any changes to the case. In these circumstances, it is appropriate to allow him to intervene. Intervenor defendants have not

moved to dismiss Peecher, presumably because he now works for a different church and will continue to receive a housing allowance and claim an exemption under § 107(2). Dkt. #83, ¶ 5.

As to the merits, I will deny defendants' motions for summary judgment and grant summary judgment in plaintiffs' favor. I adhere to my earlier conclusion in Lew that § 107(2) violates the establishment clause because it does not have a secular purpose or effect and because a reasonable observer would view the statute as an endorsement of religion.

Although defendants try to characterize § 107(2) as an effort by Congress to treat ministers fairly and avoid religious entanglement, the plain language of the statute, its legislative history and its operation in practice all demonstrate a preference for ministers over secular employees. Ministers receive a unique benefit under § 107(2); it is not, as defendants suggest, part of a larger effort by Congress to provide assistance to employees with special housing needs. A desire to alleviate financial hardship on taxpayers is a legitimate purpose, but it is not a secular purpose when Congress eliminates the burden for a group made up of solely religious employees but maintains it for nearly everyone else.

Under my view of the current law, that type of discriminatory treatment violates the establishment clause. This conclusion makes it unnecessary to consider plaintiffs' alternative argument that § 107(2) violates the equal protection component of the Fifth Amendment.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

## UNDISPUTED FACTS

### A. Plaintiffs

Plaintiffs Annie Laurie Gaylor and Dan Barker are co-presidents of the Freedom from Religion Foundation, a nonprofit membership organization that advocates for the separation of church and state. Before her death in 2015, Anne Nicol Gayor was a lifetime member and president emerita of the foundation. (I will refer to Annie Laurie Gaylor simply as "Gaylor" and to Anne Nicol Gaylor by her full name.)

Gaylor and Barker each receive a salary from the foundation. Since 2011, the foundation has designated part of those salaries as a housing allowance. Anne Nicol Gaylor also received housing allowances before she died. The allowance for Gaylor and Barker was $4500 in 2011; $13,200 in 2012; and $15,000 in 2013. (Plaintiffs do not say what the allowance was in subsequent years, except that it is "intended to approximate their actual housing expenses for each year." Plts.' PFOF ¶ 8, dkt. #63.)

Gaylor and Barker pay federal income taxes, as did Anne Nicol Gaylor until her death. In January 2015, Gaylor and Barker filed an amended income tax return for the year 2013. (Plaintiffs do not say so expressly, but presumably Gaylor and Barker filed a joint return because they are married.) In their amended return, Gaylor and Barker claimed the designated housing allowance as an exclusion of income and they sought a partial refund of the taxes they paid. Anne Nicol Gaylor also filed an amended return for the tax year 2013 in which she sought the same refund.

On March 2, 2015, the Internal Revenue Service allowed Gaylor's and Barker's requested refund, but did not explain why. Dkt. #60-2. On April 13, 2015, the IRS

informed Anne Nicol Gaylor that it was processing her amended return, but it never issued a decision on her request for a refund.

In March 2015, Gaylor and Barker filed an amended return for the year 2012. They stated that they are "not clergy" and that their "employer is not a church," but they believed "it is unfair that ministers can exclude housing while we cannot." In July 2015, the IRS disallowed the claim. The letter stated that "individual taxpayer[s] are allowed to claim deductions for Housing on Sch A if they have mortgage interest and property taxes, otherwise there is no deduction." Dkt. #60-4. In a response to the IRS, Gaylor and Barker cited 26 U.S.C. § 107(2). In letters dated August 20, 2015, November 25, 2015 and January 12, 2016, the IRS informed Gaylor and Barker that the agency was "working on" their amended return. Dkt. #60-5; Plts.' PFOF ¶ 19, dkt. #63.

In April 2016, plaintiffs filed this lawsuit. On June 27, 2016, plaintiff received the following response from the IRS:

> My review of the information previously submitted by you indicates your claim should be denied. Your claim appears to be based on a portion of your wages being deemed to be a housing allowance. Your letter dated 07/14/2015 states that you are aware that a housing allowance is excludable from income if you are a minister of the gospel and also avows that neither of you are ministers of the gospel. It goes on to state that this is unfair and discriminatory. It appears that your concerns are misdirected. Congress writes tax laws and it is the job of the Internal Revenue Service to implement them. In other words, Congress set the rules and the IRS has to explain how those rules are applied in different situations. IRC Section 107 specifically requires that to exclude a housing allowance from income you must be a minister of the gospel. The IRS does not have the authority to interpret this to include anyone other than those who meet this definition.

Since receiving that response, plaintiffs Gaylor and Barker have filed amended returns for tax years 2014 and 2015 in which they seek a refund of taxes paid on their designated

housing allowances. They intend to continue seeking the exemption for as long as they receive a housing allowance.

B. Intervenor Defendants

Intervenor defendant Patrick W. Malone is the rector of intervenor defendant Holy Cross Anglican Church in Waukesha, Wisconsin. He lives nine blocks from the church. The church pays Malone a housing allowance, which he excludes from his gross income when he files his taxes.

Malone may be required to perform services related to his ministry at any time of the day or night. Many church meetings and social events take place in his home. He provides temporary lodging to church members and others connected to the church.

Intervenor defendant Gregory Joyce is the rector of St. Vladimir Orthodox Church, which gives Joyce a housing allowance. The church is in Chicago, Illinois and is part of intervenor defendant Diocese of Chicago and Mid-America of the Russian Orthodox Church Outside of Russia. The diocese requires its priests to live within their parish. Clergy may use their homes to provide temporary lodging for church members and others connected to the church. Some priests may conduct services in their own homes when a parish is new and does not yet have a church building. Joyce has an office in his home that he uses for church business; he counsels church members in his home and hosts parish events there, sometimes with little notice and at any hour of the day or night.

Intervenor defendant Christopher Butler is the pastor of intervenor defendant Chicago Embassy Church, which pays Butler a housing allowance. The church is a member

of the Illinois District Council of the Assemblies of God USA.

OPINION

A. Standing

One of the jurisdictional prerequisites to filing a lawsuit in federal court is "standing," which means that the plaintiffs must suffer an "injury in fact" that is "fairly traceable" to defendants' conduct and capable of being redressed by a favorable decision from the court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). In Freedom from Religion Foundation, Inc. v. Lew, 773 F.3d 815 (7th Cir. 2014), the court concluded that plaintiffs had not suffered an injury from § 107(2) because they had not "personally claimed and been denied the exemption." Id. at 821. Now it is undisputed that plaintiffs Gaylor and Barker asked for the exemption and that the IRS denied the request.

In light of the IRS's denial, the government is satisfied that plaintiffs now have standing to sue. Govt.'s Supp. Br., dkt. #75 at 7. In particular, the government does not deny that the IRS's rejection qualifies as an injury in fact; the injury is fairly traceable to § 107(2); and the injury could be redressed if plaintiffs prevail on their claim, either by granting them a refund or invalidating § 107(2). Heckler v. Mathews, 465 U.S. 728, 740 (1984) ("We have often recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others.").

Despite the government's position, two questions related to standing remain, one raised by the court and one raised by intervening defendants. First, as noted in an order dated June 19, 2017, dkt. #72, the IRS did not send Gaylor and Barker a rejection letter

until *after* they filed this lawsuit. Because standing is part of subject matter jurisdiction and subject matter jurisdiction must be present when a plaintiff files the lawsuit in federal court, State Farm Life Insurance Co. v. Jonas, 775 F.3d 867, 870 (7th Cir. 2014); Autotech Technologies LP v. Integral Research & Development Corp., 499 F.3d 737, 742–43 (7th Cir. 2007), this raised the question whether plaintiffs brought the case too soon. I asked the parties to file supplemental materials on this issue. Second, intervenor defendants contend that plaintiffs lack standing to seek an injunction or declaration because they "have produced no evidence suggesting that they will again be denied a refund in the future." Dkt. #53 at 5.

A review of the summary judgment materials and supplemental briefs shows that both questions should be resolved in plaintiffs' favor. First, in response to the court's June 19 order, plaintiffs cite 26 U.S.C. § 6532(a)(1), which permits the filing of a federal lawsuit to challenge a decision denying a refund after "the Secretary renders a decision" *or* "the expiration of 6 months from the date of filing the claim." In this case, plaintiffs waited more than a year before filing a federal lawsuit.

A party does not necessarily have standing to sue simply because a statute says she does. Sterk v. Redbox Automated Retail, LLC, 770 F.3d 618, 623 (7th Cir. 2014). This is because Congress "may not lower the threshold for standing below the minimum requirements imposed by the Constitution." Id. (internal quotations omitted). However, Congress does have the power to "enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." Id.

Although § 6532(a)(1) does not say so expressly, it is reasonable to construe the

provision to mean that a claim is effectively denied if the IRS does not render a decision within six months. All parties agree on this point. Because denial of the claim is the injury that confers standing, I conclude that a claimant has standing to sue once the six months have passed without a decision from the IRS. Lew, 773 F.3d at 821 n.3 (to obtain standing, plaintiffs could have "paid income tax on their housing allowance, claimed refunds from the IRS, and then sued if the IRS rejected *or failed to act upon their claims*") (emphasis added). Any other conclusion would allow the IRS to deprive a party of standing indefinitely by withholding a decision. Of course, if the agency later issued a decision in the claimant's favor, that decision could moot any pending lawsuit. However, because the IRS ultimately denied Barker's and Gaylor's claim, I need not consider that issue in this case.

Second, as to the intervenor defendants' argument that plaintiffs have not shown that future harm is likely, it is true that a party seeking prospective relief generally must show a "significant" or "substantial" risk that she will be harmed again in the future. Hummel v. St. Joseph County Board of Commissioners, 817 F.3d 1010, 1019-20 (7th Cir. 2016); Sierakowski v. Ryan, 223 F.3d 440, 443 (7th Cir. 2000). But it is simply not true that plaintiffs have adduced "no evidence" of future harm.

Intervenor defendants point out that the IRS actually granted Gaylor's and Barker's first request for a refund for the taxes they paid on their housing allowance. The agency did not explain its decision, but if that had been the only agency action on the question, I would agree with intervenor defendants that Gaylor and Barker do not have standing to obtain prospective relief.

The obvious flaw in intevenor defendants' argument is that the IRS denied Gaylor's

and Barker's later refund request. Although the opposing rulings may raise some doubt about future decisions, absolute certainty is not required. In re C.P. Hall Co., 750 F.3d 659, 660-61 (7th Cir. 2014) ("[O]ften a probabilistic harm suffices for Article III standing even when the probability that the harm will actually occur is small."); MainStreet Organization of Realtors v. Calumet City, Illinois, 505 F.3d 742, 744 (7th Cir. 2007) ("[S]tanding in the Article III sense does not require a certainty or even a very high probability that the plaintiff is complaining about a real injury, suffered or threatened.").

For two reasons, the decision denying Gaylor's and Barker's request for a refund is the more reliable indicator of the way that the IRS will handle future requests. First, it is the more recent decision. Second, it is the only decision in which the IRS explained its reasoning. In particular, the agency stated that the law "specifically requires that to exclude a housing allowance from income you must be a minister of the gospel. The IRS does not have the authority to interpret this to include anyone other than those who meet this definition." Dkt. #60-6. Thus, the agency has stated its position that Gaylor and Barker are not entitled to the exemption because they are not "ministers of the gospel." Because none of the parties have pointed to any changes in Gaylor's and Barker's behavior or status that would allow them to qualify for the exemption in the future, I see no reason why they would obtain a different result for future requests.

The intervenor defendants resist this conclusion on two grounds. First, they say that the court should not consider the IRS's rejection letter because Gaylor and Barker did not receive it until after they filed this lawsuit. Second, they say that, even if the letter may be considered, it is not informative because it relies on Gaylor's and Barker's own "avow[al]

that neither of [them] are ministers of the gospel" rather than an independent determination by the agency.

Neither argument is persuasive. As to the timing of the letter, intervenor defendants rely on the principle noted above that jurisdiction is decided at the time the complaint is filed, but they are conflating issues. Although a plaintiff must have standing to sue at the time she files her lawsuit, intervenor defendants cite no authority for the view that all the *evidence* showing that standing existed for a particular form of relief must also exist at that time. As noted above, it was the IRS's denial of the refund request that gave Gaylor and Barker standing to sue. It was not the rejection letter, which was simply evidence that the IRS would reject a similar request in the future.

With respect to the argument that the IRS's letter is not a good indicator of the agency's future rulings, it is true that the letter notes Gaylor's and Barker's "avowal" that they are not ministers of the gospel in the context of explaining the decision to deny a refund. However, regardless whether the IRS conducted its own inquiry into Gaylor's and Barker's qualifications for the exemption, the letter simply reflects what is obvious. As I noted in the earlier lawsuit, "there is no reasonable interpretation of the statute under which the phrase 'minister of the gospel' could be construed to include employees of an organization whose purpose is to keep religion out of the public square." Freedom from Religion Foundation v. Lew, 11-cv-626-bbc (W.D. Wis. Aug. 29, 2012), dkt. #30 at 9. Even the government acknowledges in its reply brief that the refunds that Barker and Gaylor received for 2013 "were issued erroneously." Dkt. #67 at 2. Accordingly, I conclude that plaintiffs Gaylor and Barker have standing to seek declaratory and injunctive relief.

Because Gaylor and Barker have standing, so does the foundation, under the doctrine of organizational standing. Sierra Club v. Franklin Cty. Power of Illinois, LLC, 546 F.3d 918, 924 (7th Cir. 2008) ("An organization has standing to sue if (1) at least one of its members would otherwise have standing; (2) the interests at stake in the litigation are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires an individual member's participation in the lawsuit."). None of the defendants argue that the foundation does not have standing if any of the individual plaintiffs do.

The death of Anne Nicol Gaylor complicates the claim of her estate, but only slightly. The IRS never issued a decision on her request for a refund, which, as noted above, qualifies as a denial of her claim, so the estate has standing to seek a refund. Although Anne Nicol Gaylor's death might moot a claim for prospective relief, that has little bearing on the case in light of my conclusion that the other plaintiffs may seek such relief. Ezell v. City of Chicago, 651 F.3d 684, 696 (7th Cir. 2011) ("Where at least one plaintiff has standing, jurisdiction is secure and the court will adjudicate the case whether the additional plaintiffs have standing or not.").

B. 2013 Decision

Because plaintiffs are raising the same challenge to § 107(2) that they raised in Freedom from Religion Foundation, Inc. v. Lew, 983 F. Supp. 2d 1051 (W.D. Wis. 2013), it makes sense to review that decision, in which I concluded that § 107(2) violates the establishment clause. (For the remainder of the opinion I will refer to that decision simply

as Lew because it will not be necessary to make any further references to the court of appeals' decision, which was limited to the issue of standing.) First, I reviewed the different tests that courts have applied in cases brought under the establishment clause, including the test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971), which requires a court to invalidate a law if (1) it has no secular purpose; (2) its primary effect advances or inhibits religion; *or* (3) it fosters an excessive entanglement with religion. As the parties had done, I applied a modified version of the Lemon test that both the Supreme Court and the Court of Appeals for the Seventh Circuit have applied in more recent cases: "whether the government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement, viewed from the perspective of a reasonable observer." Lew, 983 F. Supp. 2d at 1060 (internal quotations and citations omitted).

In concluding that § 107(2) failed that test, I relied on Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989), which involved a state sales tax exemption for "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith." A majority of the court concluded that the exemption violated the establishment clause, but no single opinion in the case garnered at least five votes.

The plurality concluded that the exemption did not have a secular purpose or effect and conveyed a message of religious endorsement because it provided a benefit to religious publications only, without a corresponding showing that the exemption was necessary to alleviate a significant burden on free exercise. Texas Monthly, 489 U.S. at 14-15 (plurality opinion) ("[W]hen government directs a subsidy exclusively to religious organizations that

is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, it provides unjustifiable awards of assistance to religious organizations and cannot but convey a message of endorsement to slighted members of the community."). The plurality also concluded that the exemption fostered entanglement because it required the government to "evaluat[e] the relative merits of differing religious claims." Id. at 20. In a concurring opinion, two justices concluded that "a tax exemption limited to the sale of religious literature by religious organizations violates the Establishment Clause" because it results in "preferential support for the communication of religious messages." Id. at 28 (Blackmun, J., concurring in the judgment).

I concluded that § 107(2) was invalid under either the plurality or concurring opinion. The provision was invalid under the plurality opinion because it gave an exemption to religious persons without a corresponding benefit to similarly situated secular persons. As to the concurring opinion, "[b]ecause a primary function of a 'minister of the gospel' is to disseminate a religious message, a tax exemption provided only to ministers results in preferential treatment for religious messages over secular ones." Lew, 983 F. Supp. 2d at 1062. In addition to Texas Monthly, other Supreme Court opinions supported the more general view that the government may not provide a benefit that only a group of religious persons may receive. Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687, 708 (1994) ("[A] statute [may] not tailor its benefits to apply only to one religious group."); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708 (1985) (giving employees "unqualified" right not to work on the Sabbath violates establishment clause

because it "takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath"); Committee for Public Education v. Nyquist, 413 U.S. 756, 793 (1973) (tax exemptions for parents of children in sectarian schools violated establishment clause because "[s]pecial tax benefits . . . cannot be squared with the principle of neutrality established by the decisions of this Court").

Even if Texas Monthly and these other cases were not dispositive, I concluded that both the purpose and effect of § 107(2) were to endorse religion, in violation of the establishment clause. Two pieces of legislative history supported that conclusion. A House of Representatives committee report issued before the law was passed in 1954 noted that "a minister of the gospel" who is "furnished a parsonage" as part of his compensation receives a tax exemption for the rental value of his home under what is now § 107(1). Lew, 983 F. Supp. 2d at 1067 (quoting H.R. Rep. No. 1337, at 15, available in U.S. Code Congressional and Administrative News, 83rd Congress, Second Session, at 4040 (1954)). The committee viewed this as "unfair" to ministers who receive a housing allowance rather than a home, so the purpose of § 107(2) was to "remove[] the discrimination in existing law by providing that the present exclusion is to apply to rental allowances paid to ministers to the extent used by them to rent or provide a home." Id. At a hearing on the bill, its sponsor in the House, Peter Mack, made the following statement:

> Certainly, in these times when we are being threatened by a godless and anti-religious world movement we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight against this. Certainly this is not too much to do for these people who are caring for our spiritual welfare.

Id. (quoting Hearings Before the H. Comm. on Ways & Means, 83rd Cong. 1, at 1574–75

(June 9, 1953) (statement of Peter F. Mack, Jr.)). I concluded that both the statement and the report showed that the purpose of § 107(2) was to assist a group of religious persons, which is not a secular purpose.

The various arguments raised by the government failed to show that § 107(2) had a secular purpose and effect: (1) § 107(2) was not needed to eliminate discrimination, either among religions or between religious and secular employers; (2) other statutes that granted a tax exemption for a housing allowance to a small subset of secular employees were not instructive because each of those other statutes involved employees who bore special burdens not shared by the general population; (3) § 107(2) could not be justified as a mere "accommodation of religion" because the Supreme Court has held that the payment of a generally applicable tax does not qualify as a substantial burden on free exercise, Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 391 (1990); and (4) Walz v. Tax Commission, 397 U.S. 664 (1971), a case in which the Supreme Court rejected an establishment clause challenge to a tax exemption, was not instructive because the exemption at issue applied to both religious and secular groups. Lew, 983 F. Supp. 2d at 1063-71.

Finally, I considered the question of entanglement and concluded that Texas Monthly was instructive because both the statute in that case and § 107(2) required the government to "evaluat[e] the relative merits of differing religious claims" and created "[t]he prospect of inconsistent treatment and government embroilment in controversies over religious doctrine." Texas Monthly, 489 U.S. at 20 (plurality opinion). However, I did not decide whether § 107(2) fosters excessive entanglement because it was unnecessary to do so in light

of the conclusion that the provision does not have a secular purpose or effect. Doe ex rel. Doe v. Elmbrook School District, 687 F.3d 840, 851 (7th Cir. 2012) ("Since we conclude that the District acted unconstitutionally on other grounds, we need not address these arguments, nor must we consider the District's actions under Lemon's entanglement prong.").

In closing, I noted that Congress was "free to rewrite the provision in accordance with the principles laid down in Texas Monthly and Walz so that it includes ministers as part of a larger group of beneficiaries." Lew, 983 F. Supp. 2d at 1073.

### C. Defendants' Arguments

Having reviewed the arguments raised by the government and the intervenor defendants in their summary judgment motions, I adhere to the conclusion in Lew that § 107(2) violates the establishment clause. I considered and rejected most of defendants' arguments in the previous case, so it is unnecessary to address those again. Instead, I will address defendants' new and more developed arguments.

#### 1. Secular purpose and effect

As discussed in Lew and acknowledged by all parties, a key question under the establishment clause is whether the statute at issue has a secular purpose or can be justified on secular grounds. Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 696 (1989); Wallace v. Jaffree, 472 U.S. 38, 56 (1985); Doe, 687 F.3d at 849; Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 788 (7th Cir. 2010). The parties devote much of their briefs

to this issue, so it makes sense to focus on that as well.

a. Convenience of the employer doctrine

Some of defendants' arguments regarding possible secular justifications for § 107(2) relate to the "convenience of the employer" doctrine, so I will provide an overview of that doctrine before addressing more specific issues. The basic premise is that certain benefits may be tax exempt if the benefit or the way in which it is conferred serves the convenience of the employer. Kowalski v. Commissioner of Internal Revenue, 434 U.S. 77, 84–90 (1977). In the housing context, the Department of Treasury first applied the doctrine in 1919 to seamen living aboard a ship, using the rationale that housing should not be viewed as compensation if it is provided by the employer to enable an employee to do his job properly. Id. at 84–85. The doctrine was then applied to cannery and hospital workers who received lodging from their employer so that they could be available for work as needed. Id. at 86. See also Adam Chodorow, The Parsonage Exemption 105-06 & n.16 (Jan. 28, 2017) (forthcoming publication), dkt. #61-2 (when employees "must be on-site overnight to perform their jobs . . . providing housing is not compensatory and therefore should be excluded from income"; alternatively, doctrine may reflect "an administrative decision to exclude housing where it is difficult to distinguish between personal consumption and business necessities").

In 1954, Congress codified the exemption in 26 U.S.C. § 119, which allows an employee to exclude from his gross income "the value of any . . . lodging furnished to him,

. . . but only if . . . the employee is required to accept such lodging on the business premises of his employer as a condition of his employment." Congress has never extended § 119 to include housing allowances. In 1976, Congress made housing expenses tax deductable if the home or a portion of it is "exclusively used on a regular basis" for business purposes. 26 U.S.C. § 280A(c)(1).

Defendants devote a significant portion of their briefs to establishing the reasons why it is appropriate to grant ministers tax exemptions under the convenience of the employer doctrine. These arguments are puzzling because neither this court nor plaintiffs have suggested that the doctrine is unavailable to ministers. It is undisputed that § 119 and § 280A(c)(1) are available to anyone who can meet the relevant requirements, including ministers and any other religious employee.

The relevant question for this case is whether it was permissible for Congress to expand the convenience of the employer doctrine for ministers in a manner that eliminated *any* requirement to show that their choice of housing actually is for the convenience of the employer. This is because § 107(2) applies to *all* ministers who receive a housing allowance, regardless whether the minister's home is ever used for church purposes or whether the minister's choice of home is restricted by the church in any way.

By defendants' own assertion, historically churches provided housing to ministers near or on church property because the minister was to be available at all times; the church wanted to control the minister's living conditions so that they were consistent with church teachings; the church's ownership of the home freed the minister to focus on the religious mission rather than home maintenance and made it easier for the church to settle new

ministers. Govt.'s PFOF ¶ 20, dkt. #44; Int. Dfts.' PFOF ¶ 7, dkt. #52. However, the government fails to explain how these considerations carry over to a situation involving a housing allowance, particularly when § 107(2) includes no restrictions on the location, cost or use of a minister's home.

Thus, the question is not whether ministers may deduct housing expenses from their gross income under the convenience of the employer doctrine; they undoubtedly can under either § 119 or § 280A. The question is whether the doctrine should apply to ministers even when the reasons for applying it are absent and even though the vast majority of other taxpayers are required to justify their request for an exemption.

Defendants offer four reasons as potential secular purposes for that special treatment: (1) providing for the "unique housing needs" of ministers; (2) eliminating discrimination among religions; (3) reducing entanglement between church and state; and (4) alleviating financial hardship on ministers. I will consider each in turn.

b. Unique housing needs

Both the government and the intervenor defendants argue that § 107(2) should not be viewed in "isolation," but instead should be considered as simply one small part of a "broad" exemption that employees with "unique housing needs" receive. Dkt. #47 at 17; Dkt. #53 at 20; Dkt. #68 at 1. For the reasons explained below, I conclude that the other exemptions defendants cite do not show that § 107(2) has a secular purpose or effect.

It is clear that some of the exemptions do not provide any support for defendants' argument. The government cites § 280A, but, as discussed above, that provision is already

available to ministers, so it provides no justification for a law that benefits only ministers and under much broader circumstances.

Both the government and the intervenor defendants cite various provisions in § 119, some of which, like § 280A, could be invoked by any secular or religious employee. In any event, all of the provisions in § 119 relate to employer-provided housing rather than to housing allowances. Because § 107(1) (which relates to church-provided housing) is not at issue in this case, § 119 is not instructive.

The intervenor defendants cite 26 U.S.C. § 162(a)(2), which allows a taxpayer to deduct "traveling expenses (including amounts expended for . . . lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business" for up to one year. The language of the provision makes it clear that it applies to *business travel* expenses while a taxpayer is *away* from home. It has nothing to do with a housing allowance for a primary residence. In any event, § 162 is not limited to particular professions, so ministers are free to claim the exemption if they qualify for it.

The remaining provisions are more similar to § 107(2), but still not helpful for defendants. Defendants rely on the same exemptions the government cited in Lew, 26 U.S.C. §§ 134, 911 and 912, which give a tax exemption for housing expenses to federal employees working overseas (§ 912), other Americans working overseas (§ 911) and members of the military (§ 134). For several reasons, I disagree with defendants that § 107(2) and these provisions are part of an "overall effort" or a "broad package of tax exemptions" for "persons whose occupations often require particular housing for job-related

reasons." Dkt. #47 at 19; Dkt. #53 at 21.

First, defendants suggest that Congress considered § 107(2) and these other laws together, but they cite no evidence for that. The only other law that appears in the legislative history cited by the parties is § 107(1). In fact, it appears that Congress enacted § 134 well after it enacted § 107(2), Pub. L. 99-514, Title XI, § 1168(a), Oct. 22, 1986, 100 Stat. 2512, so § 134 could not have influenced § 107(2).

Second, defendants cite no evidence that concerns related to the convenience of the employer doctrine had anything to do with the enactment of § 107(2). Rather, as discussed in Lew and will be discussed further below, the only purposes disclosed in the legislative history are a desire to extend the benefits in § 107(1) to all ministers and provide financial assistance to those "caring for our spiritual welfare" and "carrying on . . . a courageous fight" against "a godless and anti-religious world movement."

Third, the cited laws fail to provide any potential secular justification for § 107(2) because § 107(2) cannot be fairly grouped with those other exemptions. Defendants try to characterize § 107(2) and §§ 134, 911 and 912 as setting forth a general congressional policy for providing a categorical tax exemption to a particular group of employees who "often" have work-related restrictions on their housing, dkt. #47 at 15, but that policy is not reflected in the law. There are many groups of professionals who "often" need to live near their work and be on call even when they are not working, such as certain types of healthcare providers, hotel managers, maintenance staff, funeral service directors and many others. However, none of those groups receive a categorical tax exemption for housing expenses as ministers do. Rather, if those employees wish to exclude housing expenses from their gross

income, they must satisfy the requirements for the convenience of the employer doctrine set out in § 119 or § 280A. Defendants do not even attempt to explain why ministers may be singled out for favorable treatment while similarly situated groups are excluded.

In any event, §§ 134, 911 and 912 bear no relationship to § 107(2). Those statutes do not reflect a general policy regarding employees who "often" have job-related housing requirements. Rather, they are ad hoc determinations by Congress regarding a limited number of employees in specific circumstances. Sections 912 and 134 both relate to federal employees, so the housing tax exemption they receive may be viewed simply as a benefit provided by the employer. The federal government has wide discretion in structuring the way in which it compensates its own employees, so no general policy regarding either religious or secular private employees may be inferred from those statutes. Although private citizens may invoke § 911, this includes ministers, if they are working overseas.

As I noted in Lew, it is particularly inappropriate to draw an inference of a general policy from benefits received by members of the military under § 134, who are *sui generis* as to "the level of service they give to the government and the sacrifices they make." Lew, 983 F. Supp. 2d at 1070. If anything, the fact that members of the military are the only other employees living in the United States who receive an exemption like the one in § 107(2) is strong evidence that § 107(2) demonstrates religious favoritism.

Further, all three of the statutes relate to employees whose housing is *necessarily* affected by their jobs. People who work overseas obviously are required to move for their employer and incur expenses associated with that move. As for service members, intervenor defendants acknowledge that their duties "require [their] physical presence at [their] post

or station; [their] service is continuous day and night; [and their] movements are governed by orders and commands." Dkt. #53, at 25 (quoting Jones v. United States, 60 Ct. Cl. 552, 569 (1925)).

Some ministers may be in a similar situation, including some of the intervenor defendants, but by no means are all ministers so restricted, as is demonstrated by defendants' own expert, religious historian James Hudnut-Beumler. He notes that parsonages were once ubiquitous for churches but became less common as "religious diversity . . . and residential mobility increased." Hudnut-Beumler Dec. ¶ 87, dkt. #57. (In fact, one commentator observes that 87 percent of ministers now receive cash allowances for housing. Chodorow, dkt. #61-2, at 149.) In describing modern trends, the historian stated that a minister's decision to live in a parsonage may be driven by factors such as the state of the housing market in a particular community and the convenience of the *minister*, rather than the needs of the church. Id. at ¶ 104 (at time § 107(2) was enacted, more ministers lived in housing of their own choice because "it was easier [than in previous decades] for them to get a mortgage for a home of their own and easier to sell quickly if called to a new congregation"); id. at ¶ 126 (trend is for churches to have parsonages "in those areas that are expensive"); id. at ¶ 133 (housing allowance gives minister flexibility for "accommodating family size, school district, special needs, disability access"). In fact, despite a lengthy discussion in their proposed findings of fact about past and present housing trends for ministers, defendants include no facts showing that ministers who receive a housing allowance generally are (1) restricted by their churches regarding where they can live or what kind of home they can buy; or (2) required to use their home for church purposes. Thus,

over time it appears that the factors influencing housing choices of ministers have begun to more closely resemble the factors considered by the general public. Even as to the intervenor defendants themselves, only Gregory Joyce stated that his church restricted the location of his housing.

Further, § 107(2) has been applied to employees who bear little resemblance to the intervenor defendants with respect to their duties. One commentator has noted that the IRS has granted the exemption to a rabbi working as a teacher, ministers working as guidance counselors or basketball coaches and every member of the Churches of Christ teaching at a Christian college. Chodorow, dkt. #61-2, at 114 and n. 48 (citing I.R.S. P.L.R. 1991-26-048 (Apr. 2, 1991); I.R.S. P.L.R. 2000-02-040 (Jan. 14, 2000); I.R.S. Rev. Rul. 70-549; and Jobe v. Commissioner, No. 33686-83). This shows that "ministers receive tax benefits unavailable to non-ministers performing the exact same jobs." Id.

In sum, the case is weak for the argument that ministers should receive a blanket exemption on the ground that they have unique housing needs. Even if it is true that ministers often meet the requirements for the convenience of the employer doctrine, the same could be said of other employees not covered by § 107(2) or a comparable exemption. In those other situations, the employee must actually show that she is living in housing for the convenience of the employer. I see no secular justification for eliminating as to one group of religious employees the requirement in the convenience of the employer doctrine that the employee's housing actually serves the convenience of the employer.

c. Eliminating denominational discrimination

Defendants' argument on this issue is a more developed version of the government's argument in Lew. The argument has two components. First, defendants say that Congress enacted § 213(b)(11) of the Revenue Act of 1921 (which later became § 107(1) in 1954), giving a tax exemption to ministers who live in church-provided parsonages, because the Department of Treasury was refusing to grant exemptions to ministers under the convenience of the employer doctrine. (Plaintiffs deny that the department was discriminating against ministers, but I need not resolve that dispute to decide this case.) Second, in 1954, Congress enacted § 107(2) to eliminate discrimination between ministers who lived in parsonages and ministers who received a housing allowance. H.R. Rep. No. 1337, at 15, available in U.S. Code Congressional and Administrative News, 83rd Congress, Second Session, at 4040 (1954) (purpose of § 107(2) is to "remove[]" or "correct" the "discrimination" in existing law between ministers who live in parsonages and those who receive housing allowance).

Viewed from a distance, defendants' argument has surface appeal, as both steps in the process appear to be straightforward attempts to make the law more equitable. However, a closer look reveals that the enactment of § 107(1) provides no justification for § 107(2).

As to the first step, it is apparent from the language of § 107(1) that it goes beyond simply codifying the convenience of the employer doctrine for ministers. Section 107(1) is missing the requirements in § 119 that the lodging is located "on the business premises of his employer" and offered "as a condition of his employment." Thus, the exemption in § 107(1) for ministers is broader than what most other employees receive. It seems counterintuitive to argue that, because Congress enacted one broad exemption that favored

ministers in § 107(1), it was justified in enacting § 107(2), which is an even *more* expansive exemption that provided an even greater benefit to ministers and made the disparity between ministers and secular employees that much wider.

As in Lew, § 107(1) is not at issue in this case. Accordingly, I do not consider whether § 107(1) violates the establishment clause and I will assume that defendants are correct in asserting that the purpose of § 107(1) was simply to insure that ministers received an exemption that secular employees already had. Making that assumption, however, does not help defendants justify § 107(2).

Defendants say that § 107(2) was about insuring equal treatment among all religions rather than eliminating discrimination between ministers and secular employees, but that rationale has multiple problems. First, defendants cite no authority for the view that the government may eliminate a perceived disparity among religions by *creating* (or exacerbating) a disparity between religious persons and secular persons. If Congress believed that it was unfair to treat employees with housing allowances differently from employees who live on employer-owned property, it could have enacted a statute that allowed *all* similarly situated employees, both secular and religious alike, to exclude a housing allowance from their gross income rather than targeting "ministers of the gospel" alone for more favorable treatment.

Second, as I noted in Lew, 983 F. Supp. 2d at 1068, § 107(1) did not need to be "corrected" because it does not discriminate on the basis of religious denomination. *All* statutes are "discriminatory" in the sense that each provides a benefit or imposes a restriction on some persons but not on others. However, by defendants' own assertion, the point of § 107(1) (and its precursor § 213(b)(11)) was not to give certain denominations

more favorable treatment. Rather, it simply was an attempt to extend to ministers the convenience of the employer doctrine, which recognizes that employer-provided housing may benefit the employer just as much as the employee, so the value of that housing should not be considered compensation. With respect to the vast majority of employees, Congress has not extended the doctrine to housing allowances, presumably because those employees have much greater freedom in choosing their own housing. Limiting the application of the doctrine to employees who meet its requirements is not invidious discrimination against secular *or* religious employees; it is simply a recognition that a taxpayer may not obtain a benefit in the absence of a justification for receiving the benefit.

"Under defendants' view, if one religious person received a tax exemption, then Congress would be compelled to give every religious person the same exemption, even if the exemption had nothing to do with religion." Lew, 983 F. Supp. 2d at1068. For example, churches must comply with any number of requirements and restrictions to be tax exempt under 26 U.S.C. § 501(c)(3): net earnings may not "inure[] to the benefit of any private shareholder or individual"; lobbying activities are limited; and participation in political campaigns is prohibited. Because some churches may not be able to comply with these requirements, defendants' logic suggests that Congress should eliminate them.

Intervenor defendants argue that Congress was *required* to enact § 107(2), citing Larson v. Valente, 456 U.S. 228, 230 (1982), for the proposition that the First Amendment prohibits more than just intentional religious discrimination. In Larson, 456 U.S. at 230, the Court invalidated a law "imposing certain registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from

nonmembers." Intervenor defendants say that, like the statute in Larson, § 107(1) favors "well established" and "wealthy" churches because those churches have the means to buy a parsonage. However, the Court did not adopt a "disparate impact" standard in Larson as intervenor defendants suggest. Rather, the Court found that "the history of [the challenged law] demonstrate[d] that the provision was drafted with the explicit intention of including particular religious denominations and excluding others." Id. at 253–54. In this case, defendants do not contend that Congress enacted § 107(1) or § 213(b)(11) to help some denominations or hurt others.

Intevenor defendants also cite no cases in which a court relied on Larson to either justify a statute that showed favoritism toward religious persons or invalidate a statute that required religious persons to meet the same requirements as everyone else to obtain a government benefit. Rather, the Court has cited Larson almost exclusively for the proposition that "one religious denomination cannot be officially preferred over another." E.g., Grumet, 512 U.S. at 714; County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 605 (1989). See also Lynch v. Donnelly, 465 U.S. 668, 687 n.13 (1984) (O'Connor, J., concurring) (Larson applies to "explicitly discriminatory" statutes). Section 107(1) does not discriminate on the basis of denomination, either on its face or by design.

More instructive is Hernandez, 490 U.S. at 686, in which the Court rejected an argument under Larson that 26 U.S.C. § 170 discriminates against minority religions such as the Church of Scientology by making payments to a church ineligible for a tax deduction if they were made for a particular service (in that case a service called "auditing") rather

than for membership in the church. Like the statute at issue in Hernandez, § 107(1) does not discriminate against certain religions; it is simply limiting a well-established principle of tax law to employees who meet the criteria for obtaining an exemption.

Even if I were to assume that § 107(1) discriminates against less established or wealthy churches in the sense discussed in Larson, § 107(2) was not an appropriate response to that discrimination, for two reasons. First, § 107(2) goes much further than any concern about churches who could not afford to purchase a parsonage. If that were the only concern, Congress could have created an exemption for rental housing that is provided by the church or is subject to restrictions imposed by the church. By divorcing the exemption from any connection to the convenience of the employer doctrine, Congress revealed that its true purpose was to demonstrate a religious preference. In fact, the benefit ministers receive under § 107(2) is potentially greater than that received under § 107(1) because a minister can use his housing allowance to purchase a home that will appreciate in value and he can deduct any interest he pays on his mortgage and property taxes. 26 U.S.C. § 265(a)(6); Erwin Chemerinsky, The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional, 24 Whittier L. Rev. 707, 723 (2003).

Second, as I noted in Lew, 983 F. Supp. 2d at 1068, if § 107(1) is discriminatory, then so is § 107(2), because both provisions "discriminate" against religions that do not have ministers that meet the IRS's definition of that term. The government resists this conclusion on the ground that, "if a religion has no ministers then there is no taxation of a minister's housing that needs to be accommodated," dkt. #47 at 16 n.3, but that argument is self-defeating. Regardless whether a church has a "minister" who receives a housing allowance,

it may have other employees who do and who need and deserve a housing tax exemption just as much as a minister does. The government may mean to argue that discrimination between ministers and other religious employees is not a problem because those other employees are less likely to live in housing for the convenience of the employer and therefore should not qualify for the exemption. If that is the argument, then it supports this court's conclusion that declining to extend an exemption to all ministers does not raise a constitutional red flag if the reason is simply that the minister fails to qualify for the exemption.

In short, it is simply inaccurate to say either that § 107(1) discriminates against particular religious denominations or that § 107(2) corrects any discrimination in § 107(1). Rather, Congress' statement that it was "unfair" to make ministers pay taxes on a housing allowance is simply an admission that it wanted to provide aid to a group of religious persons. That purpose is confirmed by the sponsor's statement that § 107(2) was needed to "fight against" a "godless and anti-religious world movement." Because that is not a secular purpose, it cannot justify § 107(2) under the establishment clause.

d. Entanglement

In addition to secular purpose and effect, courts deciding a claim under the establishment clause sometimes consider whether a statute fosters "excessive entanglement" between government and religion. E.g., Agostini v. Felton, 521 U.S. 203, 233 (1997); Sherman ex rel. Sherman v. Koch, 623 F.3d 501, 519 (7th Cir. 2010). In Lew, I observed that § 107(2) appeared to be similar to the exemption struck down in Texas Monthly,

because a ruling under § 107(2) involves a complex and inherently ambiguous multifactor test. Compare Silverman v. Commissioner of Internal Revenue, 57 T.C. 727, 731-32 (1972) (Jewish cantor was "minister" for tax purposes because he performed religious worship, sacerdotal training and educational functions as specified by Jewish religious tenets), with Lawrence v. Commissioner of Internal Revenue, 50 T.C. 494, 499-500 (1968) (commissioned but not ordained Baptist minister of education was not "minister" because he was unable to officiate at baptisms, preside over or preach at worship services or take part in other aspects of Baptist services). See also Lew, 983 F. Supp. 2d at 1057 (citing cases in which tax court has applied four different tests for determining whether taxpayer is a "minister"). However, I did not decide whether § 107(2) fosters excessive entanglement because it was unnecessary in light of my conclusion that the provision does not have a secular purpose or effect.

Defendants now make the opposite argument: § 107(2) does not foster excessive entanglement; it *avoids* the entanglement that would be fostered if ministers would be required to comply with the requirements for the convenience of the employer doctrine that apply to most secular employees. Defendants say that the alleged administrative advantages of § 107(2) are themselves a secular justification for the law.

Defendants have not made a persuasive argument on this point. To begin with, defendants cite no evidence that concerns about entanglement had anything to do with § 107(2) and they cite no authority for the view that concerns about entanglement can justify preferential treatment for religious persons. Also, much of intervenor defendants' argument relates to alleged difficulties with applying *§ 119* to ministers. As noted above, §

119 applies to employees who are required to live in employer-provided housing. Because the provision that applies to ministers who live in employer-provided housing, § 107(1), is not at issue in this case, § 119 is not relevant.

Other than §§ 134, 911 and 912 (all of which are discussed above), the parties identify no federal statutes that allow secular employees to exclude a housing allowance from their gross income. The government suggests that the closest analogue to § 107(2) for most employees is 26 U.S.C. § 280A(c)(1), which allows any employee (secular or religious) to deduct her housing expenses from her gross income if the home or a portion of it is "exclusively used on a regular basis" for business purposes.

Although the government argues generally that § 280A involves "intrusive inquiries," dkt. #47 at 2, it fails to explain how those inquiries are any more intrusive for ministers than they are for any secular employee who wants the exemption. Equally important, defendants make conclusory allegations that applying § 280A to ministers would require the government to answer difficult religious questions and interfere with a minister's exercise of religion, but fail to develop the argument or provide likely scenarios in which that would occur. Cf. Illinois Bible Colleges Association v. Anderson, 870 F.3d 631(neutral educational licensing requirements did not foster excessive entanglement; "allowing a religious institution to participate in secular regulatory schemes simply does not violate the Establishment Clause.") (internal quotations omitted). After all, unlike § 107(2), § 280A on its face does not require the government to make any religious determinations. Further, it seems likely that church employees who are not ministers seek exemptions under § 280A when it is applicable. Defendants do not identify any entanglement problems that have arisen in that context.

Certainly, defendants have not shown that applying § 280A is any more intrusive or difficult than applying § 107(2).

Even if it is assumed that it would be difficult to apply § 280A to ministers, it does not follow that the solution is to give them preferential treatment. Section 280A did not even exist when Congress enacted § 107(2), so it should not be viewed as the only alternative. If Congress is concerned about entanglement issues surrounding § 280A, it could enact a law that liberalized the exemption for everyone or for a class (such as nonprofit organizations) that is "broad [enough] that it can be fairly concluded that religious [persons] could be thought to fall within the natural perimeter." Texas Monthly, 489 U.S. at 17 (plurality opinion) (internal quotations omitted). Thus, regardless whether § 107(2) fosters excessive entanglement between the government and religion, any concern about avoiding entanglement does not provide a secular justification for the law.

e. Hardship on ministers

Intervernor defendants say that "[i]mposing additional taxes on ministers' housing allowances would interfere with the ability of churches to carry out their religious missions by diverting scarce resources away from their core First Amendment activities." Dkt. #53 at 15. They cite evidence regarding the potential financial effects that invalidating § 107(2) would have on them and they argue that the statute is a permissible accommodation of the free exercise of religion.

It is likely that when § 107(2) was enacted, some members of Congress shared intervenor defendants' concerns about financial hardship on ministers. Plaintiffs cite a

statement from the law's sponsor, who observed that "many . . . clergymen support families like the rest of us"and "must pay 1953 rents for a dwelling house," but "receive low income based on the 1940 cost of living." Hearings Before the H. Comm. on Ways & Means, 83rd Cong. 1, at 1576 (June 9, 1953) (statement of Peter F. Mack, Jr.).

I do not doubt that many ministers are paid significantly less than what their commitment and skill level would suggest. This is an unfortunate truth that applies to many devoted and talented employees in service professions, both religious and secular. However, the manner in which Congress alleviated a financial burden on a group of religious persons was neither required by the free exercise clause nor permitted by the establishment clause under the facts of this case.

As an initial matter, § 107(2) is not limited to ministers with a relatively low income. In 2002, in the midst of a controversial case of a minister who sought a $100,000 exemption under § 107(2), Congress limited the amount of the exemption to the fair rental value of a home. Warren v. Commissioner of Internal Revenue, 114 T.C. 343, 345 (2000); Clergy Housing Allowance Clarification Act of 2002, Pub. L. No. 107–181, 116 Stat. 583. However, the 2002 amendment placed no limit on how expensive that home may be.

As long ago as 1984, the Department of the Treasury acknowledged that one result of § 107(2) is to give "a disproportionately greater benefit to relatively affluent ministers, due to the higher marginal tax rates applicable to their incomes." U.S. Dept. of Treasury, Tax Reform for Fairness, Simplicity, and Economic Growth: The Department Report to the President, vol. II 49 (1984). Thus, an evangelist with a multimillion dollar home is entitled under § 107(2) to deduct the entire rental value of that home, even if it is not used for

church purposes. E.g., Chodorow, dkt. #61-2, at 116 n.4 ("Joel Osteen lives in a $10.5 million home and is entitled to exclude the fair rental value of that home so long as he spends that money on the home and his church allocates that amount to housing."). If Congress were concerned about lessening the tax burden on poor Americans, it could have tied the exemption to income and made it generally available to any employee who qualified rather than to all ministers who receive a housing allowance. Nyquist, 413 U.S. at 788–89 (law motivated by desire to help "low-income parents" send children to sectarian schools "can only be regarded as one 'advancing' religion").

In any event, as I noted in Lew, the mere payment of a generally applicable tax does not qualify as a substantial burden on free exercise. Jimmy Swaggart Ministries, 493 U.S. at 391 ("[T]o the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant."). Because "the burden of taxes is borne equally by everyone who pays them, regardless of religious affiliation, . . . concerns about free exercise do not justify a special exemption." Lew, 983 F. Supp. 2d at 1063. See also Tax Reform for Fairness, supra at 49 ("There is no evidence that the financial circumstances of ministers justify special tax treatment. The average minister's compensation is low compared to other professionals, but not compared to taxpayers in general."). Accordingly, the potential financial impact that the loss of a tax exemption might have on some ministers is not a factor that I may consider in assessing the validity of § 107(2).

2. Exemption versus subsidy

Defendants repeat an argument the government made in Lew, which is that tax exemptions do not raise the same concerns under the establishment clause that tax subsidies do. The parties cite dueling Supreme Court decisions on the question whether subsidies and exemptions are simply two sides of the same coin. Compare, e.g., Regan v. Taxation with Representation of Washington, 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system."), with Walz, 397 U.S. at 675 ("The 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.").

Although these cases may suggest that the Supreme Court does not always see exemptions and subsidies as identical, exemptions do not simply get a "pass" under the establishment clause, as Texas Monthly made clear. As I noted in Lew, 983 F. Supp. 2d at 1065, if one were to take defendants' argument to its logical conclusion, it would permit the government to eliminate *all* taxes for religious organizations and individuals without any secular purpose for doing so, an extreme position that defendants do not advance.

Intervenor defendants identify the appropriate standard for evaluating a religious exemption: whether the exemption "alleviate[s] significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Dkt. #53 at 14 (quoting Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987)). See also Grumet, 512 U.S. at 705 ("The Constitution allows the State to accommodate religious needs by alleviating special burdens.") (emphasis added). For example, in Amos, 483 U.S. at 335, the Court upheld a religious exemption in

an antidiscrimination law that otherwise would have required religious groups to violate their own religious beliefs, such as by requiring Catholic churches to ordain women as priests. And in Cutter v. Wilkinson, 544 U.S. 709 (2005), the Court concluded that a law requiring administrators to provide religious accommodations to persons housed in state institutions was justified by the reality of institutionalization, which is "severely disabling to private religious exercise." Id. at 720–21. "[I]n both situations, the accommodations are best described not as singling out religious persons for more favorable treatment, but as an attempt to prevent inequality caused by government-imposed burdens." Lew, 983 F. Supp. 2d at 1063.

Although intervenor defendants invoke the standard cited above for permissible religious accommodations, they fail to apply that standard to their own situation. Of course, invalidating § 107(2) could divert some of a minister's resources from endeavors that could further a church's mission, but the same would be true of *any* tax, just as taxes on secular employees divert their resources from other endeavors that are important to them. As noted above, the Supreme Court has held that generally applicable taxes do not impose a constitutionally significant burden on a taxpayer's rights under the free exercise clause. Jimmy Swaggart Ministries, 493 U.S. at 391. Thus, the payment of such taxes does not qualify as "significant governmental interference" with religious exercise and exemptions from such taxes cannot be viewed merely as a religious accommodation. Rather, because the government has eliminated a burden for certain ministers that is shared by millions of taxpayers, the exemption is more accurately viewed as religious favoritism.

3. History of religious tax exemptions

Intervenor defendants cite cases such as Town of Greece, New York v. Galloway, 134 S. Ct. 1811, 1819 (2014), for the proposition that "the Establishment Clause must be interpreted by reference to historical practices and understandings." In light of that principle, intervenor defendants say that "[o]ver 200 years of unbroken history confirm that religious tax exemptions are fully consistent with the historical meaning of the Establishment Clause." Dkt. #53 at 12.

Intervenor defendants' reliance on cases such as Town of Greece is unavailing because the history cited by intervenor defendants (which comes mostly from discussions in Walz, 397 U.S. 664) relates to church property tax exemptions, not to income tax exemptions of church employees. Bryce Langford, The Minister's Housing Allowance: Should It Stand, and If Not, Can Its Challengers Show Standing?, 63 U. Kan. L. Rev. 1129, 1163 (2015) ("[Section 107(2)] is a federal income tax exemption, and tax exemptions from federal income taxes do not have an historical and rooted tradition."). The principle in Town of Greece is limited to situations in which "history shows that the *specific practice* is permitted," 134 S. Ct. at 1819 (emphasis added), so intervenor defendants cannot generalize that all religious tax exemptions are permissible simply because one type of exemption has historical support. Particularly because defendants attempt to justify § 107(2) as part of the convenience of the employer doctrine, a doctrine that bears no relationship to church property tax exemptions, historical treatment of those exemptions is not instructive. If all religious tax exemptions were permissible as a matter of historical practice, Texas Monthly and Nyquist would have turned out differently.

Congress enacted § 107(2) in 1954, so it is not brand new. However, the question the Court asked in Town of Greece (as well as in Marsh v. Chambers, 463 U.S. 783 (1983), on which Town of Greece relies) was whether the "practice . . . was accepted by *the Framers* and has withstood the critical scrutiny of time and political change." 134 S. Ct. at 1819 (emphasis added). Section 107(2) is not entitled to any special presumptions on account of history, particularly because the statute has evaded judicial scrutiny for a variety of procedural reasons for decades. E.g., American Atheists, Inc. v. Shulman, 21 F. Supp. 3d 856 (E.D. Ky. 2014) (dismissing challenge to § 107 for lack of standing); Freedom From Religion Foundation, Inc. v. Geithner, Case No. 2:09-2894-WBS-DAD (C.D. Cal.), dkt. ##87-88 (dismissing challenge to § 107 after theory of taxpayer standing rejected by Supreme Court); Warren v. Commissioner of Internal Revenue, 302 F.3d 1012, 1014 (9th Cir. 2002) (denying taxpayer's motion to intervene to challenge § 107 after parties settled dispute); Kirk v. Commissioner of Internal Revenue, 425 F.2d 492, 495 (D.C. Cir. 1970) (declining to consider constitutional challenge to § 107 in deficiency proceeding on ground that court could not "properly consider these issues in this proceeding, particularly in view of the fact that appellants would not in any event be entitled to the exclusion" if they were successful on their claim).

4. Effect on other statutes

Finally, intervenor defendants say that invalidating § 107(2) will "endanger scores of tax provisions throughout federal and state law." Dkt. #53 at 48. Despite that broad statement, intervenor defendants discuss only one provision, 26 U.S.C. § 1402(e), which

grants an exemption for the self-employment tax to certain ministers who are "conscientiously opposed to, or because of religious principles . . . opposed to, the acceptance . . . of any public insurance."

Neither § 1402 nor any religious exemption other than § 107(2) is before the court, so I do not decide whether any of those other provisions violate the establishment clause. However, § 1402(e) is readily distinguishable from § 107(2) on two grounds, as I noted in Lew, 983 F. Supp. 2d at 1062-63. First, as is clear from the language of the provision, it applies only when paying the tax would force the minister to violate his religious beliefs, so it may be properly viewed as an accommodation of religion rather than preferential treatment. Chodorow, dkt. #61-2, at 155-56. In contrast, § 107(2) is not tied to a minister's particular religious beliefs about paying taxes and intervenor defendants do not argue that they have religious objections to paying taxes on their housing expenses.

Second, as is also clear from the face of § 1402(e), the exemption applies not simply to ministers who object to *paying* the self-employment tax but to *receiving* public insurance. Because it is unlikely that a minister claiming an exemption under § 1402(e) will receive the benefits the tax is designed to fund, the exemption may ultimately provide no net benefit to the minister. It is for these reasons that courts have upheld § 1402 against establishment clause challenges. Droz v. Commissioner of Internal Revenue, 48 F.3d 1120, 1121 (9th Cir.1995) (§ 1402 is permissible accommodation because it is "an exemption narrowly drawn to maintain a fiscally sound Social Security system and to ensure that all persons are provided for, either by the Social Security system or by their church"); Hatcher v. Commissioner of Internal Revenue, 688 F.2d 82, 84 (10th Cir.1979) ("That the principal

purpose of the legislation is not to advance or inhibit religion is evident in the mandate that those who receive the exemption forego the benefit of the program.").

D. Conclusion

Having considered all of the arguments advanced by defendants, I am not persuaded either that it was an error to conclude in Lew that § 107(2) is unconstitutional or that any new facts or law support a different conclusion. Defendants' stated concerns about treating religions equally and avoiding entanglement do not find any support in the facts or the law. Thus, any reasonable observer would conclude that the purpose and effect of § 107(2) is to provide financial assistance to one group of religious employees without any consideration to the secular employees who are similarly situated to ministers. Under current law, that type of provision violates the establishment clause.

In reaching this conclusion, I do not mean to imply that any particular minister is undeserving of the exemption or does not have a financial need for one. The important point is that many equally deserving secular employees (as well as other kinds of religious employees) could benefit from the exemption as well, but they must satisfy much more demanding requirements despite the lack of justification for the difference in treatment.

As I have discussed throughout this opinion, Congress could have enacted a number of alternative exemptions without running afoul of the First Amendment. For example, Congress could have accomplished a similar goal by allowing any of the following groups to exclude housing expenses from their gross income: (1) all taxpayers; (2) taxpayers with incomes less than a specified amount; (3) taxpayers who live in rental housing provided by

the employer; (4) taxpayers whose employers impose housing-related requirements on them, such as living near the workplace, being on call or using the home for work-related purposes; or (5) taxpayers who work for nonprofit organizations, including churches. Or some of these categories could be combined. One commentator has suggested that § 107 be amended to apply to taxpayers who work for tax exempt organizations under § 501(c)(3) and are on call at all times. Ellen P. Aprill, Parsonage and Tax Policy: Rethinking the Exclusion, 96 Tax Notes 1243 (Aug. 26, 2002).

Of course, these suggestions are not exhaustive. Congress retains wide discretion in adopting tax laws that further its legitimate policies. What Congress may not do is single out religious persons for preferential treatment without a secular basis for doing so, as it has done in § 107(2).

E. Remedy

In Lew, both the parties and the court assumed that the only available relief was declaring § 107(2) unconstitutional and enjoining its enforcement. That remains part of plaintiffs' request for relief, but now plaintiffs have raised the possibility of other types of relief as well.

First, now that the IRS has denied Gaylor's and Barker's request for a refund, plaintiffs suggest that they may be entitled to a refund and an injunction requiring the IRS to "extend benefits under the statute to those excluded." Dkt. #65 at 10. (Intervenor defendants question plaintiffs' right to obtain a refund because that request was not included in their complaint, but that argument is inconsistent with circuit law. Heitmann v. City of

Chicago, Illinois, 560 F.3d 642, 645 (7th Cir. 2009) ("Prevailing parties get the relief to which they are entitled, no matter what they ask for.").) Second, earlier in the case plaintiffs argued that "the invalidity of § 107(2) may later involve the Court in determining whether § 107(1) is, or is not, severable when evaluating any potential remedies that may be warranted," dkt. #13 at 2, suggesting that invalidating § 107(2) may require invalidating § 107(1) as well.

It seems unlikely that it would be appropriate for the court to issue an injunction directing the IRS to extend the scope of the exemption because, as noted above, there are multiple ways that the statute could be rewritten, a task generally left for Congress. Virginia v. American Booksellers Association, Inc., 484 U.S. 383, 397 (1988) ("[W]e will not rewrite a state law to conform it to constitutional requirements."). Invalidating § 107(1) along with § 107(2) also seems to stretch the limits of judicial power, particularly because a statute similar to § 107(1) existed without § 107(2) for more than 30 years. Executive Benefits Insurance Agency v. Arkison, 134 S. Ct. 2165, 2173 (2014) ("We ordinarily give effect to the valid portion of a partially unconstitutional statute so long as it remains fully operative as a law, and so long as it is not evident from the statutory text and context that Congress would have preferred no statute at all.") (internal quotations and citations omitted).

Despite my skepticism on these issues, I am reluctant to make a definitive determination regarding the appropriate remedy because none of the parties developed an argument in favor of a refund, a particular injunction or both or otherwise developed an argument regarding what the court should do in the event that it concludes that § 107(2) is unconstitutional. Accordingly, I will issue declaratory relief and give the parties an

opportunity to file supplemental materials regarding what additional remedies are appropriate, if any. In addition, the parties should address the question whether relief should be stayed pending a potential appeal.

## ORDER

IT IS ORDERED that

1. Christopher Butler's motion to intervene, dkt. #81, is GRANTED.

2. The motions for summary judgment filed by defendants Jacob Lew (now Steve Mnuchin), John Koskinen and the United States of America, dkt. #43, and intervenor defendants Bishop Edward Peecher, Chicago Embassy Church, Father Patrick Malone, Holy Cross Anglican Church, the Diocese of Chicago and Mid-America of the Russian Orthodox Church Outside of Russia and Christopher Butler, dkt. #48, are DENIED.

3. On the court's own motion, summary judgment is GRANTED to plaintiffs Freedom from Religion Foundation, Annie Laurie Gaylor, Dan Barker and Ian Gaylor as the personal representative of the estate of Anne Nicol Gaylor.

4. It is DECLARED that 26 U.S.C. § 107(2) violates the establishment clause of the First Amendment to the United States Constitution.

5. The parties may have until October 30, 2017, to file supplemental briefs on the questions whether any additional remedies are appropriate and whether relief should be stayed pending a potential appeal. Response briefs are due November 8, 2017. There will be no reply. If the parties do not respond by the deadline, I will direct the clerk of court to enter judgment without awarding any additional relief.

6. All relief is STAYED pending entry of judgment.

Entered this 6th day of October, 2017.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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ANNIE LAURIE GAYLOR; DAN BARKER;
IAN GAYLOR, personal representative of
the estate of Anne Nicol Gaylor; and
FREEDOM FROM RELIGION FOUNDATION, INC.,

OPINION AND ORDER

Plaintiffs,

16-cv-215-bbc

v.

STEVE MNUCHIN, Secretary of the United States
Department of Treasury; JOHN KOSKINEN,
Commissioner of the Internal Revenue Service;
and the UNITED STATES OF AMERICA,

Defendants,

and

EDWARD PEECHER; CHICAGO EMBASSY CHURCH;
PATRICK MALONE; HOLY CROSS ANGLICAN CHURCH;
and the DIOCESE OF CHICAGO AND MID-AMERICA OF THE
RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA,

Intervenor-Defendants.

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In an order dated October 6, 2017, I granted summary judgment to plaintiffs Freedom from Religion Foundation, Annie Laurie Gaylor, Dan Barker and Ian Gaylor as the personal representative of the estate of Anne Nicol Gaylor, and concluded that 26 U.S.C. § 107(2), which excludes from the gross income of a "minister of the gospel" a "rental allowance paid to him as part of his compensation," is unconstitutional. Specifically, I

concluded that § 107(2) violates the establishment clause of the First Amendment because it does not have a secular purpose or effect and because a reasonable observer would view the statute as an endorsement of religion. Dkt. #87. I issued a declaration, stating that 26 U.S.C. § 107(2) violates the First Amendment, but I also directed the parties to file supplemental materials regarding what additional remedies are appropriate, if any. In addition, I asked the parties to address the question whether relief should be stayed pending a potential appeal. The parties' supplemental briefing is now before the court.

All parties agree that the court should not seek to expand § 107(2) in an attempt to make it constitutional. As I stated in the summary judgment decision, I also do not think it would appropriate for the court to issue either an injunction expanding the scope of § 107(2) or an order directing the Internal Revenue Service to do so, because there are multiple ways that the statute could be rewritten and that task should generally be left for Congress. Virginia v. American Booksellers Association, Inc., 484 U.S. 383, 397 (1988) ("[W]e will not rewrite a state law to conform it to constitutional requirements.").

Additionally, all parties agree that invalidating § 107(2) does not require the court to invalidate § 107(1). I agree, particularly because a statute similar to § 107(1) existed without § 107(2) for more than 30 years. Executive Benefits Insurance Agency v. Arkison, 134 S. Ct. 2165, 2173 (2014) ("We ordinarily give effect to the valid portion of a partially unconstitutional statute so long as it remains fully operative as a law, and so long as it is not evident from the statutory text and context that Congress would have preferred no statute at all.") (internal quotations and citations omitted).

With respect to injunctive relief, both plaintiffs and defendants state that the court

should enter an injunction nullifying § 107(2) prospectively. In contrast, the intervenors argue that the court should not enter an injunction because declaratory relief would be least disruptive and would permit the government to continue applying the statute. Dkt. #89 at 6. The intervenors' position is not persuasive, as they are essentially arguing that the government should be permitted to continue allowing ministers to take advantage of § 107(2), despite the court's holding that the statute is discriminatory and unconstitutional. The intervenors cite no authority to support such an argument. Instead, they make the same arguments I considered and rejected in deciding the merits of plaintiffs' claim. Therefore, I agree with plaintiffs and defendants that an injunction nullifying § 107(2) is an appropriate remedy in this case.

Next, plaintiffs ask that the IRS be ordered to partially refund taxes they paid but which would have been reduced if they had been permitted to claim a housing allowance as an exclusion of income under § 107(2). I am denying this request. I have determined that § 107(2) is unconstitutional and should be nullified. Therefore, plaintiffs were not entitled to claim a housing allowance under § 107(2) and they are not entitled to receive a refund of taxes they paid because they were denied the allowance. Because plaintiffs cite no other basis for receiving a refund beyond § 107(2), they have not shown they are entitled to a refund.

Finally, all parties agree that any injunction should be stayed pending resolution of any appeals. Defendants and intervenors ask that injunctive relief be stayed for 180 days after the resolution of any appeals, while plaintiffs argue that the injunction should be enforced immediately upon resolution of any appeals. I agree with defendants and the

intervenors that in light of the substantial changes to tax policy and administration that will occur upon enforcement of the injunction, it is appropriate to stay injunctive relief until 180 days after the final resolution of all appeals. The additional time will allow Congress, the IRS and affected individuals and organizations to adjust to the substantial change.

ORDER

IT IS ORDERED that

1. It is DECLARED that 26 U.S.C. § 107(2) violates the establishment clause of the First Amendment to the United States Constitution.

2. Defendants Steve Mnuchin, John Koskinen and the United States of America are ENJOINED from enforcing 26 U.S.C. § 107(2). The injunction shall take effect 180 days after the conclusion of any appeals filed by defendants or intervenor-defendants or the expiration of defendants' or intervenor-defendants' deadline for filing an appeal, whichever is later.

3. The request for a tax refund made by plaintiff Freedom from Religion Foundation, Annie Laurie Gaylor, Dan Barker and Ian Gaylor as the personal representative of the estate of Anne Nicol Gaylor, is DENIED.

4. The clerk of court is directed to enter judgment accordingly and close this case.

Entered this 13th day of December 2017.

BY THE COURT:
/s/
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BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ANNIE LAURIE GAYLOR, DAN BARKER, IAN GAYLOR, Personal Representative of the Estate of Anne Nicol Gaylor, FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiffs,

v.

JACOB LEW, Secretary of the United States Department of Treasury, JOHN KOSKINEN, Commissioner of the Internal Revenue Service, UNITED STATES OF AMERICA,

Defendants,

and

BISHOP EDWARD PEECHER, CHICAGO EMBASSY CHURCH, FATHER PATRICK MALONE, HOLY CROSS ANGLICAN CHURCH, DIOCESE OF CHICAGO AND MID-AMERICA OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA, PASTOR CHRISTOPHER BUTLER,

Intervenor Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 16-cv-215-bbc

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This action came before the court for consideration with District Judge Barbara B. Crabb presiding. The issues have been considered and a decision has been rendered.

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IT IS ORDERED AND ADJUDGED that judgment is entered in favor of plaintiffs Annie Laurie Gaylor, Dan Barker, Ian Gaylor, Personal Representative of the Estate of Anne Nicol Gaylor, and Freedom from Religion Foundation.

It is DECLARED that 26 U.S.C. § 107(2) violates the establishment clause of the First Amendment to the United States Constitution.

Defendants Steve Mnuchin, Secretary of the United States Department of Treasury, John Koskinen, Commissioner of the Internal Revenue Service, and the United States of America are ENJOINED from enforcing 26 U.S.C. § 107(2). The injunction shall take effect 180 days after the conclusion of any appeals filed by defendants or intervenor-defendants or the expiration of defendants' or intervenor-defendants' deadline for filing an appeal, whichever is later.

The request for a tax refund made by plaintiffs Freedom from Religion Foundation, Annie Laurie Gaylor, Dan Barker, and Ian Gaylor, as the Personal Representative of the Estate of Anne Nicol Gaylor, is DENIED.

s/ J. Titak, Deputy Clerk
Peter Oppeneer, Clerk of Court

12/15/2017
Date