# No. 14-1152

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

**FREEDOM FROM RELIGION FOUNDATION, INCORPORATED, ANNIE LAURIE GAYLOR AND DAN BARKER,**
*Plaintiffs-Appellees,*

v.

**JACOB J. LEW,** in his official capacity as Secretary of the Treasury, and **JOHN A. KOSKINEN,** in his official capacity as Commissioner of Internal Revenue,
*Defendants-Appellants.*

On Appeal from the United States District Court
for the Western District of Wisconsin
(No. 11-cv-0626 – Hon. Barbara B. Crabb)

## BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"), AGUDAS HARABBONIM OF UNITED STATES AND CANADA, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA, TORAH UMESORAH, AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, IN SUPPORT OF APPELLANTS

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, The National Jewish Commission on Law and Public Affairs, Agudas Harabbonim of the United States and Canada, Agudath Israel of America, National Council of Young Israel, Rabbinical Alliance of America, Rabbinical Council of America, Torah Umesorah, and Union of Orthodox Jewish Congregations of America, certify that they do not have parent corporations and that no publicly-held corporation owns 10% or more of stock.

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**BRIEF *AMICUS CURIAE* OF COLPA, ET AL.,**
**IN SUPPORT OF APPELLANTS**

## INTEREST OF THE AMICI[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") is an umbrella organization that speaks for a coalition of American Orthodox Jewish groups before United States courts, legislatures, and administrative agencies.

[1] All parties have consented to the filing of this *amicus* brief.

COLPA has filed more than 30 *amicus curiae* briefs in the Supreme Court of the United States and dozens of such briefs in lower federal and state courts.

In this case, COLPA represents the interests of the organizations listed below, all of which recognize that Orthodox rabbis and cantors – who qualify under Section 107(2) as "ministers of the gospel" – are required, by the very nature of their professions and their service to America's Orthodox Jewish community, to reside in very close proximity to the synagogues at which they lead daily and Sabbath and Holiday services and where they teach and provide pastoral counseling. This requirement grows out of observances that are followed by Orthodox Jews and are compelled by the dictates of our faith. Rabbis and cantors – as well as ministers of other faiths that are similarly restricted in their choice of domicile – should not be required to treat housing allowances granted by their congregations as disposable taxable income. We acknowledge that our rabbis and cantors must follow the convenience of their Orthodox congregations and reside where they can easily walk to the synagogue and where their congregants can easily visit their homes. Consequently, we endorse the policies that underlie Section 107(2) as a matter of equity and fairness. And we believe that Congress could and should have enacted this provision with no intention to favor or benefit religion.

The organizations that join in this *amicus* brief are:

■Agudas Harabbonim of the United States and Canada is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

■Agudath Israel of America ("Agudath Israel"), founded in 1922, is a national grassroots Orthodox Jewish organization. Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel intervenes at all levels of government – federal, state, and local; legislative, administrative, and judicial – to advocate and protect the interests of the Orthodox Jewish community in the United States in particular, and religious liberty in general.

■The National Council of Young Israel ("NCYI") is the umbrella organization for over 200 Young Israel branch synagogues with over 25,000 families within its membership. It is one of the premier organizations representing the Orthodox Jewish community, its challenges and needs, and is involved in issues that face the greater Jewish community in North America and Israel.

■Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

■The Rabbinical Council of America ("RCA") is the largest Orthodox Jewish rabbinic membership organization in the United States comprised of nearly one thousand rabbis throughout the United States and other countries. The RCA supports the work of its member rabbis and serves as a voice for rabbinic and Jewish interests in the larger community.

■ Torah Umesorah (National Society for Hebrew Day Schools) serves as the pre-eminent support system for Jewish Day Schools and yeshivos in the United States providing a broad range of services. Its membership consists of over 675 day schools and yeshivos with a total student enrollment of over 190,000.

■The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the largest Orthodox Jewish umbrella organization in the United States. The Orthodox Union represents nearly 1,000 synagogues throughout the United States, which collectively represent hundreds of thousands of individual Jews. The Orthodox Union participates in various federal and state litigations, largely through the submission of *amicus* briefs that relate to matters of concern to the Orthodox Jewish community.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Section 107(2) of the Internal Revenue Code was held unconstitutional by the District Court because the District Judge found that "the point of the law was to assist a subset of religious groups." Opinion, p. 31. These *amici* challenge that conclusion. We submit that "the point of the law" underlying Section 107(2) is that persons engaged in a particular profession – those who conduct religious services and lead worship services or teach religious texts in a church, synagogue, mosque or similar facility – are obliged to find a residence at or near the religious facility ***for the convenience of their congregations***.

These *amici* can attest most cogently to the secular justification for such a policy. Jewish practice and tradition effectively denies to practicing rabbis and cantors the option that most Americans have – *i.e.*, to choose where they wish to reside. For a variety of reasons, congregational clergymen of the Orthodox Jewish faith and most Conservative rabbis must live in close proximity to the synagogues that they serve.

In its entry on "Rabbi, Rabbinate" in Volume 17, page 17, of its Second Edition (2007), the authoritative *Encyclopedia Judaica* notes, "The status and role of the contemporary rabbi in North America exhibit some unique features which can best be understood in the light of ***the historical development of the synagogue as the central institution in the Jewish community*.**" (Emphasis added.) The entry

also makes the following observation relevant to the central issue discussed in this *amicus* brief (p. 17):

> The place of worship became a center around which gravitated social and cultural activities which previously had been the functions of societies and clubs of a strong ethnic flavor. In the Jewish community particularly, many of the functions previously performed by Hebrew communal schools, Zionist youth movements, philanthropic activities, and social action committees, became increasingly centered in the synagogue which developed into the comprehensive Jewish Center. The latter often was the only functioning Jewish institution in the community with adequate building, constituency, and professional leadership.

The *Encyclopedia Judaica* describes the development of the modern American rabbi as follows (*id.*): "Besides being spiritual leader, interpreter of Jewish law, and preacher, the rabbi tended more and more to become the senior Jewish professional in the community." See also Hayim Halevy Donin, To Be A Jew, pp. 195-197 ("Synagogue Personnel" – "The Rabbi" and "The Cantor") (1972). This multiplicity of roles, centered on the synagogue, requires the contemporary American Orthodox and most Conservative rabbis to reside a very short distance from the synagogue of the congregation that employs them for a number of reasons:

*First*, Jewish observance prohibits use of automobiles or public transit on Sabbaths and many Jewish Holidays. Rabbis and cantors must live within walking distance of their synagogues in order to lead Friday evening, Sabbath morning, and

Sabbath afternoon services, as well as similar services on Jewish Holidays when driving or public transportation is prohibited.

*Second*, even on days when automobile transportation is permitted, rabbis lead and attend *Shachrit* (morning) services every weekday morning, *Mincha* services every afternoon, and *Ma'ariv* services every evening. Morning services are often held shortly after the break of dawn, and evening services may be held after nightfall. This duty of frequent and regular attendance at the synagogue even on weekdays requires rabbis to live no longer than a very short drive from the synagogue they are serving.

*Third*, by Jewish tradition, the synagogue also serves as a House of Learning. Rabbis are expected to engage in study of the Bible and the Talmud at the synagogue during the week. Congregants enlist for study that is often conducted daily ("*Daf Yomi"* – the Daily Page of the Talmud). Many congregants who come to the synagogue to study with the local rabbi squeeze a brief study period into a day otherwise filled with family and occupational obligations. It is, therefore, essential that the rabbi be punctual in the hours of his class and not reside a substantial distance from the synagogue where his punctuality might be affected by traffic.

*Fourth*, most pulpit rabbis attend to pastoral counseling in offices at their synagogues. If rabbis were to reside a substantial distance from the synagogue, their availability for such spiritual counseling would be greatly limited.

*Fifth*, rabbis must serve congregants by ready access to the congregants' homes in case of illnesses, deaths, or other emergencies requiring religious assistance. Orthodox Jews generally choose residences within walking distance of the synagogues they attend so that they can come to services without violating Sabbath and Holiday travel restrictions. In order to serve congregants in their homes, rabbis must live in the same vicinity – *i.e.*, very close to the synagogue.

*Sixth*, rabbis must often open their homes to congregants for counseling and study sessions. In order to facilitate congregants' visits to the rabbis' homes, the rabbis must reside in the same neighborhood as their congregants. For the reasons previously stated, members of Orthodox Jewish congregations who abide by Sabbath and Holiday travel restrictions live within walking distance of the synagogues they attend. Rabbis must, therefore, do the same.

Because of these factors, a rabbi's choice of residence is severely limited and is, essentially, very near the synagogue ***for the convenience of his employers – the members of his congregation***. Since American Jewish congregations have no tradition of building a rabbi's home on the synagogue's premises, rabbis have not been housed at "parsonages" that are a part of a synagogue building. Hence they

have not been provided in-kind homes that qualify under Section 107(1) as tax-free lodgings. It is only fair and equitable to permit them, because of their very restricted choice of dwelling, to treat funds they receive from their congregations for "lodging" as comparable to in-kind lodging provided pursuant to Section 119 when it is for the "convenience of the employer" and similar to housing allowances for military and federal-government employees stationed abroad.

We do not contend that the Congress that enacted Section 107(2) in 1954 scrutinized the required functions of Jewish clergymen when they enacted the provision that is being challenged in this case. We do note, however, that several of the duties described above, although singularly important to the Jewish faith, are present in other faith communities. "Ministers of the gospel" in various churches frequently do not have the freedom to choose where they want to live. The "convenience" of their employers severely limits their choices.

We do not believe it is necessary to rely on the argument made by the Government that Section 107(2) is an "accommodation" to religion in order to defend the constitutionality of the tax-free parsonage allowance. See Brief for the Appellants, pp. 46, 49-73. In our view, Congress' decision to permit clergy to exclude from gross income any reimbursement provided by their congregations for the cost of their housing is a legitimate and constitutional legislative decision based entirely on secular considerations. Orthodox Jewish congregations require their

rabbis and cantors to reside in close proximity to the synagogue for reasons we have outlined above. Hence Congress could properly conclude that the expense of such rabbis' housing should not be taxed as income to the rabbi because the location of the rabbi's home is determined by the needs of the congregation. It is, in this regard, comparable to the exemptions provided for housing allowances given members of the military under Section 134 of the Internal Revenue Code and to civil servants posted abroad under Section 912. See also Section 280A(c)(1) of the Internal Revenue Code.

In *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2593-2601 (2012), Chief Justice Roberts, for a majority of the Supreme Court, upheld the constitutionality of the Affordable Care Act on the ground that the "individual mandate" was permissibly within Congress' taxing power. The Chief Justice acknowledged that Congress had not invoked its power to tax in enacting the "individual mandate" of the Affordable Care Act, and that the sanction for failure to comply with the "individual mandate" was statutorily defined as a "penalty" and not as a "tax." Nonetheless, applying a "functional approach" (132 S. Ct. at 2595) and the lesson of *Hooper v. California*, 155 U.S. 648, 657 (1895), "that every reasonable construction must be resorted to in order to save a statute from unconstitutionality," the Chief Justice, speaking for a Supreme Court

majority, sustained the Affordable Care Act even though Congress "used the wrong labels." 132 S. Ct. at 2597.

What "labels" Congress invoked when it considered and enacted Section 107(2) in 1954 is, by the same token, irrelevant in determining whether the constitutionality of the parsonage allowance is to be sustained today. If there are "ministers of the gospel" – such as the overwhelming majority of American Jewish Orthodox clergymen today and others similarly situated in other faith communities – whose choice of residence is severely limited by the convenience of their employers, Congress may constitutionally recognize their lodging allowances as being similar to the lodging of uniformed servicemen or foreign service officers stationed abroad and not substantively different from in-kind lodging under Section 119. Congress' choice in this regard is not – as the District Court hypothesized – a bounty granted to "a subset of religious groups." It is an acknowledgement of the fact that "ministers of the gospel" frequently have a very limited choice of residential options. Hence the Congressional decision not to tax as income rental allowances of ministers of the gospel rests on a valid "secular purpose" – preventing persons in a particular profession from being taxed on funds they receive and can utilize only with many strings attached by their employers.

Finally, to the extent that there may be "ministers of the gospel" who have largely unfettered freedom to choose where they live, Congress could legitimately

have decided that it would not assign to officials of the Internal Revenue Service the duty of examining the tenets of individual religious faiths to determine whether their clergymen must live near their sanctuaries. Such close scrutiny and evaluation would plainly intrude on the constitutionally mandated independence of faith communities and their churches, synagogues, and mosques. That would violate the "entanglement" prong of the still viable three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and the independence of church determinations recently confirmed in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Comm'n*, 132 S. Ct. 694 (2012) . In enacting tax laws, Congress has wide discretion – so long as it does not cross into areas proscribed by constitutional provisions – to draw lines that include some and exclude others that may appear to be indistinguishable. The Supreme Court said in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1997): "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes." This Court has frequently ratified Congress' broad authority to draw lines when it enacts tax laws, and that authority permits Congress to draw the line in Section 107(2) that excludes the plaintiffs in this case.

## ARGUMENT

## I.

## AT ITS CORE, SECTION 107(2) EXCLUDES FROM GROSS INCOME PARSONAGE ALLOWANCES FOR CLERGY WHO PERFORM SERVICES IN OR NEAR A CONGREGATION'S SANCTUARY

We begin by noting that the Internal Revenue Service and the courts have given Section 107(2) a construction that supports the conclusion that the tax treatment it provides is designed primarily to cover clergy who perform services in and around a congregation's sanctuary. Cases involving rabbis and cantors particularly prove this point.

In *Salkov v. Commissioner*, 46 T.C. 190 (1966), and in *Silverman v. Commissioner*, 57 T.C. 727 (1972), the Tax Court considered whether full-time cantors could claim the rental allowance exclusion provided by Section 107(2). The court in *Salkov* observed that the cantor "officiates, along with the rabbi, at the following public worship rituals: the major Jewish festivals, 'high holidays,' weddings, funerals, and the regular weekly Sabbath services conducted each Friday evening and Saturday morning." 46 T.C. at 191. It emphasized that that cantor's duties were "sacerdotal functions or religious worship" and that the cantor "is more in the pulpit of the synagogue than the rabbi." 46 T.C. at 192, 193. The rabbi and the cantor, said the Tax Court, "visit the sick at home or in the hospital, when notified by a member of a family" and "[t]hey are available for counseling at

hours which may be arranged by a telephone call." 46 T.C. at 193. Consequently the Tax Court concluded that the cantor's duties "clearly fall within the phrase 'sacerdotal functions' as applied to the liturgical practices of the Jewish faith." 46 T.C. at 195.

The Tax Court applied a similar analysis in *Silverman.* It described the cantor's duties as follows: "[P]etitioner's principal duties revolved around his conduct of the Jewish liturgy. Petitioner officiated with the rabbi at virtually all of the synagogue's services; he co-officiated with the rabbi at weddings and funerals; he participated with the rabbi in the conduct of services in homes of mourning; he trained boys in the congregation for their entrance into adult Jewish life; and he controlled the entire musical program of the congregation which was under the direction of a choir director." 57 T.C. at 728. The court also relied on the cantor's control over "sacerdotal functions and religious worship." 57 T.C. at 729. It summarized the record as follows: "Cantor Silverman performed the ministerial duties required of him in his official position as cantor; he conducted religious worship; he administered sacerdotal functions; he performed marriages and officiated at funerals and services at houses of mourning, and he directed organizations within the congregation." 57 T.C. at 731.

By contrast, the Tax Court rejected a Section 107(2) claim made by an ordained rabbi who did not serve at a synagogue. The taxpayer in *Tanenbaum v.*

*Commissioner*, 58 T.C. 1 (1972), was a national director of the American Jewish Committee and a member of many rabbinical organizations. He worked in close association with representatives of churches and synagogues and occasionally performed religious functions for employees and members of the American Jewish Committee. 58 T.C. at 2-4. He was given a $5000 annual "parish allowance" and sought to treat it as excludible from gross income under Section 107(2). The Tax Court held that since he did not perform "sacerdotal functions," did not conduct "religious worship," and was not assigned to any "church," the parsonage allowance provided to him did not qualify under Section 107(2). 58 T.C. at 8-9. See also *Kirk v. Commissioner*, 425 F.2d 492 (D.C. Cir. 1970); *Warnke v. United States*, 641 F. Supp. 1083 (E.D. Ky. 1986).

The Tax Court similarly denied the claim to a Section 107(2) parsonage allowance made by a synagogue administrator who asserted that he was a "religious functionary." *Haimowitz v. Commissioner*, T.C. Memo. 1997-40, 1997 WL 27077 (1997). The Tax Court said that "with the sole exception of conducting services for mourners, petitioner did not regularly perform those duties that ministers of the Jewish faith customarily perform." These were enumerated by the Tax Court at page 3 of its opinion as "[c]onducting religious worship, administering sacerdotal functions, performing marriages, officiating at funerals,

leading services at houses of mourning, and directing organizations within the congregation."

In *Knight v. Commissioner*, 92 T.C. 199 (1989), the Tax Court identified five factors as determinative of ministerial status for purpose of Section 107(2). The first three –"(1) administers sacraments, (2) conducts worship services, (3) performs services in the 'control, conduct, and maintenance of a religious organization'" – require presence at the congregation's physical sanctuary.

The cantors in *Salkov* and *Silverman* had to reside near the synagogues whose congregations employed them. They were required, as a condition of their employment, to conduct and participate in Sabbath and Holiday services which they could attend only on foot, and in daily services each morning and evening. The rabbi who provided religious guidance in *Tanenbaum* and the "religious functionary" in *Haimowitz* had no similar limitations. They were able to choose residences at any convenient location. The different results in these cases were attributable, we submit, to the true rationale for the treatment afforded by Section 107(2) to "ministers of the gospel" – that their choice of residence is determined by the convenience of their employers.[2]

[2] Some IRS Revenue Rulings support a broader application of Section 107(2) to clergy performing other religious functions, and the parties to this *amicus* brief agree with those Rulings. Their validity is not in issue in this case.

## II.

## RABBIS AND CANTORS WHO MUST BE ON DUTY AROUND-THE-CLOCK NEAR THEIR SANCTUARIES ARE LIMITED IN CHOOSING THEIR RESIDENCES JUST AS ARE MEMBERS OF THE MILITARY AND CIVIL SERVANTS ASSIGNED TO FOREIGN POSTS

Sections 134 and 912 of the Internal Revenue Code exclude from gross income residence allowances given to members of "the uniformed services of the United States" and their dependents and similar allowances given to "civilian officers and employees" of the federal government stationed in foreign countries. Section 280A(c)(1) also authorizes a taxpayer to treat dwelling expense allowances as nontaxable if the premise's "exclusive use" is "for the convenience of his employer." The rationale for this tax treatment is that in each of the instances the residence whose cost is underwritten by the housing allowance is for "the convenience of the employer" and not a free choice of the employee. See "Exclusion of Meals and Lodging from Gross Income Under 'Convenience of the Employer' Rule," 84 A.L.R.2d 1215 (1962).

In *Commissioner v. Kowalski*, 434 U.S. 77, 87-94 (1977), the Supreme Court reviewed the history of the "convenience of the employer" standard that had governed the taxability of food and lodging allowance before the enactment of the Internal Revenue Code of 1954. A majority of the Court concluded in *Kowalski* that the limitation of Section 119 to in-kind meals and lodging effectively

overruled judicial decisions that had permitted cash allowances to be excluded from gross income if they were "not for [the taxpayer's] personal convenience, comfort or pleasure, but solely because he could not otherwise perform the services required of him." *Benaglia v. Commissioner*, 36 B.T.A. 838 (1937); see also *Williamson v. Commissioner*, 224 F.2d 377 (8th Cir. 1955), and *Jones v. United States*, 60 Ct. Cl. 552 (1925), decided under the pre-1954 tax laws.

Notwithstanding the modification of tax policy described in the *Kowalski* opinion, the 1954 Code carried over the "convenience of the employer" rationale when it prescribed the exclusions from gross income of cash allowances identified in Sections 134 and 912, and authorized deduction of expenses of a location used exclusively "for the convenience" of an employer pursuant to Section 280A. The very same tax policy that Congress relied upon for excluding from gross income the military and foreign-service cash allowances described in Sections 134 and 912 applies to the situations of rabbis and cantors. The legislative policies that are the foundation of Sections 134 and 912 govern the parsonage allowances described in Section 107(2), at least as they might apply to Orthodox and many Conservative Jewish clergy. Rabbis and cantors must reside so close to their sanctuaries that their residences are as much mandated by the convenience of their employers as the residences of taxpayers who benefit from the provisions of Sections 134 and 912.

Contrary to the conclusion of the District Court and the claim made by the plaintiffs, these national tax policies do not raise constitutional issues under the Establishment Clause because their purpose is ***not*** to aid religion generally or religious functionaries. The rule of tax law in Sections 107(2), 134, and 912 results from wholly secular considerations regarding the very restricted residence choices available to foreign-based military personnel, to foreign-service officers stationed abroad, and to rabbis, cantors, and similarly situated clergy. Section 107(2) is, accordingly, constitutional because it embodies tax policies that are secular, and it grants tax relief to individuals who are employed in a profession that severely limits where they may live.

## III.

## CONGRESS HAS BROAD POWER TO DEFINE THE CLASS OF TAXPAYERS THAT BENEFIT FROM A TAX LAW

The plaintiffs maintain that it is inequitable and discriminatory to permit ministers of recognized religions to benefit from Section 107(2) while denying the same beneficial tax treatment to atheist leaders such as the plaintiffs. It is, however, well established that "arguments of equity have little force in construing the boundaries of exclusions and deductions from income many of which, to be administrable, must be arbitrary." *Commissioner v. Kowalski*, 434 U.S. 77, 95-96 (1977).

This Court said in *Estate of Cowser v. Commissioner*, 736 F.2d 1168, 1171 (7th Cir. 1984): "Tax relief designed to induce a certain type of behavior generally involves a tradeoff of lost revenue for the federal treasury. It is the elected members of Congress and not the members of this court that must decide where to strike the appropriate balance." Later in its *Estate of Cowser* opinion this Court said (736 F.2d at 1173): "Congress' power to categorize and classify for tax purposes is extremely broad. [Citations omitted.] . . . A tax classification rationally related to a legitimate governmental interest will not be disturbed unless the classification is invidious or unjustifiably infringes a fundamental right." See also *Estate of Kunze v. Commissioner*, 233 F.3d 948, 954 (7th Cir. 2000) (quoting from *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983) – "[l]egislatures have especially broad latitude in creating classifications and distinctions in the tax statutes").

## IV.

## SECTION 107(2) IS CONSTITUTIONAL IF CONGRESS *COULD* HAVE BASED ITS JUDGMENT ON A WHOLLY SECULAR POLICY, WHETHER OR NOT IT ACTUALLY DID SO

The District Court found that the supporters of Section 107(2) were motivated by "a desire to assist disadvantaged churches and ministers" (Opinion, p. 34) and not "by a purpose specific to the particular group involved" (Opinion, p. 36). On this account, the District Court determined that Section 107(2) failed at

least two prongs of the tripartite constitutional test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See Opinion, pp. 15-37. The District Court also held that Section 107(2) was unconstitutional under *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), because, in the District Court's view, it "provides a benefit to religious persons and no one else." Opinion, p. 2.

The legislative history of Section 107(2) is not as conclusive as the plaintiffs and the District Court contend. For the reasons previously outlined in this *amicus* brief, Section 107(2) provides tax relief to individuals who, because of their unique service they are required to perform, lack the freedom to select where they wish to reside. But even if the history of the law's enactment supported the conclusion that the plaintiffs and the District Court assert, it would not doom the statutory provision to constitutional invalidity.

A majority of the Supreme Court sustained the constitutionality of the Affordable Care Act in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2593-2601 (2012), even though a Court majority determined that the law could not be approved under Congress' professed basis for enacting it. It was sufficient, said the Court majority through the Chief Justice, if the Court found a tenable constitutional basis for enacting the law even if Congress did not invoke that authority, and the theoretical basis for enacting the law was first discovered during litigation. Since the "individual mandate provision" of the Affordable Care

Act was a permissible taxing measure – even though Congress had called the payment required by the law a "penalty" and not a "tax" – the Act was deemed by a Supreme Court majority to be a constitutional exercise of Congress' taxing authority.

By the same token, Section 107(2) should not be measured by whether it was a permissible "accommodation" to religious institutions. If it ***could*** have been lawfully enacted as a means "to alleviate special burdens experienced by certain taxpayers as a result of their living situation" (Opinion, p. 37) – a totally secular purpose and effect – the statute is constitutional regardless of the "label" that the legislative history indicates Congress attached to the law.

The Affordable Care Act decision has been invoked to support the conclusion that "Congress need not understand the constitutional theory that sustains its legislation." *Wagner v. Federal Election Commission*, 901 F. Supp.2d 101, 111 (D.D.C. 2012). That principle governs this case and controls the constitutionality of Section 107(2). Even if it were true that Congress believed it could accommodate religious interests by granting tax-free status to a parsonage allowance – a factual assertion regarding Congress' intent that we believe does not withstand close scrutiny of the law's legislative history – and even if that legislative objective were constitutionally impermissible – another assertion which we contest – the law would withstand constitutional challenge under *NFIB v.*

*Sebelius* because Congress ***could have*** enacted Section 107(2) in order to provide tax relief to a class of professionals who, like military and foreign-service personnel, must reside, for their employer's convenience, in close proximity to a location selected by their employers.

## V.

## CONGRESS COULD TREAT ALL CLERGY IDENTICALLY IN ORDER TO AVOID IMPERMISSIBLE "ENTANGLEMENT"

To be sure, not all religious denominations require their "ministers of the gospel" to reside as close to their sanctuaries as does the Orthodox Jewish faith. In this age of easy vehicular transportation, clergy of faith communities that are not as centered on their sanctuaries as are Orthodox Jews and are not prevented on certain prescribed days from riding to their place of employment might be totally free to choose where they wish to live. It could therefore be argued that Congress should not have painted with so broad a brush in Section 107(2) and granted tax-free status to allowances for all "ministers of the gospel." Congress could have assigned to the administrators of the federal tax law – the Internal Revenue Service – the duty of determining whether, in each individual instance, considering the church's ideology, a "minister of the gospel" is so severely restricted in his choice of residence that "convenience of the employer" has effectively determined where he will live (as is true of foreign-based military and foreign-service personnel).

Such a possible delegation of authority to make fact-findings regarding the religious dictates of particular denominations would, however, have thrust the federal bureaucracy into constitutionally prohibited areas. This Court has observed that "intrusive government participation in, supervision of, or inquiry into religious affairs" would "constitute excessive entanglement." *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 631 (7th Cir. 2000), quoted with approval in *Vision Church v. Village of Long Grove*, 468 F.3d 975, 995 (7th Cir. 2006). See *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 674 (1970). If governmental officials were to make judgments in individual cases based on the religious principles that control each denomination's rules for the residence of its clergy, the result would be the "detailed monitoring and close administrative contact" that the Establishment Clause forbids. *Aguilar v. Felton*, 473 U.S. 402, 414 (1985); see *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 393 (1970).

The Supreme Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694 (2012), re-emphasized that secular authorities may not undertake "the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals." 132 S. Ct. at 705, quoting from *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696, 720 (1976). If Congress had authorized the

Internal Revenue Service to make case-by-case determinations regarding the limitations imposed on individual "ministers of the gospel" by their religious denominations, government would have become enmeshed in religious controversy in violation of the Establishment Clause.

The deleterious consequences of case-by-case appraisals by the Internal Revenue Service were summarized in comprehensive analyses by Professor Edward A. Zelinsky. See Zelinsky, "Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion and the Religious Exemptions of the Individual Health Care Mandate and the FICA and Self-Employment Taxes," 33 Cardozo L. Rev. 1633 (2012); Zelinsky, "The First Amendment and the Parsonage Allowance," Tax Notes 5 (December 2013).

Consequently, if Congress concluded, as we believe it could have and did, that some housing allowances provided for clergy such as rabbis and cantors should be treated like similar allowances for foreign-based uniformed members of the military and United States government employees assigned to foreign posts, Congress acted wisely and constitutionally in permitting ***all*** "ministers of the gospel" to exclude such allowances from gross income. Section 107(2) is, therefore, constitutional as written.

## CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed with instructions to enter judgment in favor of the respondents and declare Section 107(2) constitutional.

April 9, 2014

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, I hereby certify that, by the word count of the word-processing system used to prepare this Brief, it contains 5,551 words exclusive of those portions that are excluded under Rule 32(a)(7)(B)(iii).

Pursuant to Rules 32(a)(5) and 32(a)(b), this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

By /s/ *Nathan Lewin*

Dated: April 9, 2014

## CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2014, I electronically filed the foregoing brief with the Clerk of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By /s/ *Nathan Lewin*