Nos. 18-1277 and 18-1280

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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 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,

Intervenor-Defendants-Appellants

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)

INITIAL BRIEF OF PLAINTIFFS-APPELLEES

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June 18, 2018

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Appellate Court No: ____________

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ANNE NICOL GAYLOR, and FREEDOM FROM RELIGION FOUNDATION, INCORPORATED

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Boardman & Clark LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None.

Attorney's Signature: s/ Richard L. Bolton Date: 2/8/208

Attorney's Printed Name: Richard L. Bolton

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** _____

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I. JURISDICTIONAL STATEMENT.

The Government's jurisdictional statement is complete and correct.

II. STATEMENT OF THE ISSUE.

Whether § 107(2) of the Internal Revenue Code, which provides an exemption from income for cash housing allowances paid only to church officials, violates the neutrality requirements of the Establishment Clause.

III. STATEMENT OF ADDITIONAL FACTS.

The Plaintiff-Appellees, Dan Barker and Laurie Gaylor, are federal taxpayers who object to the allowance of preferential and discriminatory tax benefits under § 107 of the Internal Revenue Code ("IRC"), including income tax exemptions for cash housing allowances paid as part of compensation to ministers of the gospel. (R. 60 at 1-2.) They commenced this suit after the Internal Revenue Service denied them a housing allowance exemption because they are not ministers of gospel. (R. 60 at 3-5.) Gaylor and Barker are the co-Presidents of The Freedom from Religion Foundation ("FFRF"). FFRF was co-founded by Anne Nicol Gaylor, whose estate is also a Plaintiff-Appellee in this matter. Anne Nicol Gaylor died in 2015, after the IRS also denied her a housing allowance exemption by failure to ever act on her request. (R. 60 at 2.)

Gaylor and Barker have each received a designated housing allowance from their employer, FFRF, designated by the FFRF Executive Council, n/k/a the Executive Board, FFRF's governing body, for each and every year since 2011. The FFRF Executive Council (Board) first designated housing allowances for Ms. Gaylor, Mr. Barker in August of 2011. The Executive Council (Board) designated the amount of $4,500 from each of their salaries yet to be paid in 2011. (R. 60 at 5.) In addition, FFRF designated the amount of $13,200 from each of the salaries of Gaylor and Barker to be paid in 2012 as a housing allowance. (R. 60 at 2.) The designated housing

allowances were established for each month at $1,100. (R. 60 at 2.) On October 12, 2012, the FFRF Executive Council (Board) renewed its prior housing allowance resolution, designating the amount of $15,000 to be paid in 2013 as a designated housing allowance. (R. 60 at 2.) Additional annual housing allowances have been designated for each of the tax years 2014-2017. (R. 60 at 2.)

The housing allowances designated by FFRF for Gaylor and Barker have been intended to approximate their minimal housing expenses for each year, including taxes and mortgage. (R. 60 at 2.) For example, their housing expenses for 2012 totaled approximately $26,072, including $14,522 as mortgage payments and $7,767 as property taxes. (R. 60 at 3.) Housing expenses for 2011 totaled approximately $26,136, including $14,552 as mortgage payments and $7,444 as property taxes. (R. 60 at 3.)

Gaylor and Barker long considered the exemption allowed only to ministers to be discriminatory and unfair. (R. 60 at 3.) In 2011, therefore, they joined in a lawsuit challenging the preference allowed under Internal Revenue Code for cash housing allowances provided to ministers of the gospel, or other religious clergy, contending that this discriminatory and unfair preference violated the Establishment Clause of the United States Constitution. (R. 60 at 3.) The district subsequently held that § 107(2) of the Internal Revenue Code is indeed unconstitutional, but the Seventh Circuit Court of Appeals reversed that decision on the basis of standing considerations. The Court of Appeals concluded that the Plaintiffs needed to actually be denied exemption for their housing allowances under § 107(2), in order to have standing. (R. 60 at 3.)

Gaylor and Barker, accordingly, filed amended U.S. Individual Income Tax Returns for tax years 2012 and 2013. (R. 60 at 3-4.) The amended returns claimed the designated housing

allowances for Gaylor and Barker as exclusions from income and they sought a partial refund of taxes paid. (R. 60 at 3-4.)

The IRS subsequently disallowed the 2012 claim for a housing allowance exemption, by letter dated July 16, 2015. (R. 60 at 4.) Gaylor and Barker then responded to the IRS on July 21, 2015, *citing* § 107(2) of the Internal Revenue Code as the basis for their claim. (R. 60 at 4.) Gaylor and Barker thereafter received communications from the IRS on August 20, 2015, November 25, 2015, and January 12, 2016, indicating that the IRS was still working on their request to be allowed a housing allowance. (R. 60 at 4.)

Having no substantive response to their July 21, 2015 letter, Gaylor and Barker commenced the present action in April of 2016. (R. 60 at 4.) Finally, on June 27, 2016, the IRS communicated to Gaylor and Barker denial of their refund request for tax year 2012, on the basis that they do not qualify as ministers of the gospel. The IRS stated in its letter as follows:

> 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.

(R. 60 at 4-5.)

IV. SUMMARY OF ARGUMENT.

The Government and interested amici ("Government") have little to say about neutrality, a critical requirement of the Establishment Clause, presumably because § 107(2) of the Internal

Revenue Code undeniably confers a significant tax benefit upon religious clergy that is not available to non-clergy taxpayers. Only ministers can exclude cash housing allowances, a result that is patently unfair. Thus, whereas even the Bible commands citizens to "render unto to Caesar the things which are Caesar's," the Government simply ignores basic principles of neutrality and fairness when it comes to clergy taxation. The silence of the amici is particularly noteworthy as they otherwise champion neutrality when seeking public benefits. Here, however, they confirm the extreme value of the housing allowance, while seeking to confine it to themselves.

The Government claims that Congress intended the "parsonage" allowance in 1921 to provide a clergy benefit analogous to the exclusion for in-kind housing provided for the convenience of the employer. Whether historically true as to in-kind housing, however, Congress has never *per se* excluded cash housing allowances provided to non-clergy. Section 107(2) provides a tax benefit to religious clergy that is not "analogous" to any exclusion provided to non-clergy taxpayers.

The Government also argues incorrectly that the exclusion for cash housing allowances is merely an accommodation of religion. This siren cry leads only to obfuscation because paying income taxes is a burden common to all taxpayers, rather than a burden on the free exercise of religious beliefs. Needing more money is not a substantial burden that has any constitutional significance. Governmental regulatory requirements are not comparable to tax measures as justification for religious preferences. An accommodation, moreover, must be neutral when secular groups are similar with respect to the attribute allegedly requiring accommodation, i.e., in this case, the desirability of tax-free housing.

The Government further claims unpersuasively that a blanket exclusion for cash housing allowances paid to ministers avoids government entanglement in determining whether such

compensation was provided for the convenience of the employer. The Government's argument incorrectly assumes that cash allowances are generally excludable under the convenience of the employer doctrine, which is not true. If cash allowances were not excludable for ministers, just as for non-clergy taxpayers, then no possible entanglement could occur in making "convenience of the employer" determinations. It would simply not be an issue for cash allowances. By contrast, however, the necessary determinations under § 107(2) are fraught with entanglement that greatly exceeds what is related to convenience determinations.

Section 107(2) creates eye-opening government entanglement with religion. In order to ensure that this preferential tax benefit is limited to religious officials, § 107(2) requires complex determinations relating to the tenets, principles and practices of those churches that provide their clergy with cash housing allowances. Because the tax benefits are only available to ministers of the gospel employed by the churches, the IRS must ensure that these ministers are really dispensing religion for an employing church--and not something that could be done by a layman. The IRS, therefore, must engage in fact-intensive and intrusive inquiries to ensure that the individual is in fact a "duly ordained, licensed, or commissioned" minister of the gospel; that the minister is really providing religious services "in the exercise of his ministry;" and that the employer qualifies as a church. These are not trivial or incidental determinations. Section 107(2), as a result, requires profound government entanglement with religion in order to restrict preferential tax benefits to the truly religious, and thereby denies them to Plaintiff-Appellees, who admittedly are not religious.

Finally, the Government argues that exclusion of cash allowances from income is necessary to avoid discriminating in favor of churches that allegedly provide in-kind housing. If the value of in-kind housing is deemed excludable from income in order to create parity with non-clergy taxpayers, however, as the Government claims, that would not justify providing an exclusion for

cash allowances paid only to religious clergy. In fact, the amici's complaint should logically be directed against the in-kind parsonage allowance itself rather than compounding the inequity with their own special-interest preference. The prohibition against denominational inequity does not support the creation of preferences for religion over non-religion.

The Government and amici ultimately abandon any pretense of neutrality and fairness by arguing simply that clergy who receive cash housing allowances have just as much "need" for tax benefits as those clergy who receive in-kind housing. Need, however, is not the recognized standard for conferring a religious preference under the Constitution. On the contrary, as the district court correctly explained, non-clergy employees "need" tax exclusions just as much as ministers of the gospel - - and that is the constitutional problem with § 107(2), which the Government fails to grasp. Here, the individual Taxpayer-plaintiffs-appellees ("Taxpayers") are just such non-clergy taxpayers who do not qualify for the § 107(2) preference, although they are otherwise similarly situated, except for their non-belief.

Tax-free housing for ministers is controversial because it is lucrative, and because it is not available to secular taxpayers. From the perspective of financial self-interest, ministers and churches are understandably concerned, but so are non-clergy who are denied similar benefits, including the Taxpayer-Appellees. From the perspective of the Establishment Clause, preferential tax breaks for ministers violate the fundamental principal of neutrality. Tax breaks, including exemptions and deductions, must be neutral and available on the basis of non-religious criteria. That is not case with § 107(2).

V. ARGUMENT.

A. Section 107(2) Violates The Establishment Clause Because It Is Not Neutral And Provides Significant Tax Benefits Exclusively To Ministers Of The Gospel.

The absence of neutrality is patently evident in § 107(2). It only allows ministers to exclude from their income up to the full amount of any designated cash housing allowance provided by their church. This exemption for cash payments is available only to ministers, even if they own their home as private property; other taxpayers cannot deduct similar cash allowances, even if provided for the "convenience of the employer." The § 107(2) exemption, therefore, confers a substantial financial benefit to ministers, by lessening the burden of housing costs and likewise giving a break to churches, which can pay ministers lower salaries, which the amici acknowledge. This benefit is not neutrally available to other taxpayers.

In evaluating an Establishment Clause Claim, "the touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion." *Vision Church, United Methodist v. Vill. of Long Grove*, 468 F.3d 975, 991 (7th Cir. 2007), *quoting McCreary Cnty v. ACLU*, 545 U.S. 844, 125 Sup. Ct. 2722, 2733 (2005). Thus, where a government aid program is neutral with respect to religion, and provides assistance to a broad class of citizens, the program is not readily subject to challenge under the Establishment Clause. *See Zelman v. Simmons-Harris*, 122 Sup. Ct. 2460, 2467 (2002). "The Religion Clauses have come to stand for the principle of government neutrality, meaning not only that government should not favor one religion over another, but also that government should not favor religion over non-religion." *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 124 (7th Cir. 1987), *citing Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963). *See also ACLU v. City of St. Charles*, 794 F.2d 265, 270 (7th Cir. 1986) (the Supreme Court has treated the Establishment Clause as a directive to strike down public acts that promote one religious group at the expense of others or

even promote religion as a whole at the expense of the non-religious); *Trinity Lutheran Church of Columbia v. Comer,* 137 S.Ct. 2012 (2017 (applying neutrality principle to public grant programs).

"When the government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens non-beneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion... it provides unjustifiable awards of assistance to religious organizations and cannot but convey a message of endorsement to slighted members of the community." *Texas Monthly v. Bullock*, 489 U.S. 1, 15 (1989), *quoting Bishop of Church of Jesus Christ of LDS v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., Concurring in Judgment). Here, § 107(2) is not required by the Free Exercise Clause and cannot be seen as removing a significant government imposed deterrent to the free exercise of religion.

Government programs that allocate benefits based on distinctions among religious and non-religious or non-believer status, are generally doomed from the start. The Court of Appeals explained this constitutional reality very well in *American Atheists, Inc., et al. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 289 (6th Cir. 2009):

> The most essential hurdle that a government-aid program must clear is neutrality -- that the program allocates benefits in an evenhanded manner to a broad and diverse spectrum of beneficiaries. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001); *Mitchell*, 530 U.S. at 809-13 (Plurality Opinion; *Id.* at 838 (O'Connor, J., concurring in the judgment). Phrased as an interrogatory: Does the program determine a recipient's eligibility for benefits in spite of, rather than because of, its religious character? *See Mitchell*, 530 U.S. at 809-10 Plurality Opinion); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 839-40, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).
>
> Since its earliest explorations of the Establishment Clause, the [Supreme] Court has underscored neutrality as a central, though not dispositive, consideration in sizing up state-aid programs. *See Mitchell*, 530 U.S. at 809-10 (Plurality Opinion); *Id.* at O'Connor,

> J., concurring in judgment); *Rosenberger*, 515 U.S. at 839; *Id.* at 846 (O'Connor, J., concurring); *Everson*, 330 U.S. at 17-18. What the Court has said matches what it has done. Programs that allocate benefits based on distinctions among religious, non-religious and areligious recipients are generally doomed from the start. *See, e.g., Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-15, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989) (Plurality Opinion) (Invalidating state sales-tax exemption "for periodicals published or distributed by a religious faith and consisting wholly of writings promulgating the teaching of the faith"); *Larson v. Valente*, 456 U.S. 228, 246-47, and n. 23, 255, 102 S. Ct. 1673, 72 L. Ed. 33 (1982) (Striking down state law exempting only certain "well-established churches" from various registration and recording requirements), *Sch. Dist. of Abington Twp. v. Schempp*, (Invalidating programs mandating daily Bible reading in public school). Programs that evenhandedly allocate benefits to a broad class of groups, without regard to their religious beliefs, generally will withstand scrutiny.

Federal and state courts have consistently adhered to the Supreme Court's *Texas Monthly* decision, contrary to the Government's attempt to limit the decision to its facts. Tax exemptions provided to taxpayers exclusively on the basis of religious criteria violate the Establishment Clause. The Colorado Supreme Court summarized this state of the law in *Catholic Health Initiatives of Colorado v. City of Pueblo*, 207 P.3d 812, 818 (Colo. 2009):

> The Establishment Clause mandates equal treatment of different religious and secular actors. A tax which makes distinctions based on religious belief would violate the Establishment Clause. "The risk that governmental approval of some or disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude." *United States v. Lee*, 455 U.S. 252, 263 n. 2, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (Stevens, J., concurring).
>
> The United States Supreme Court addressed the impact of tax exemptions on this perception of impartiality in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989) (Brennan, J., Plurality Opinion). In *Texas Monthly*, the State of Texas exempted religious periodicals and books from sales tax, while imposing that tax on other nonreligious publications. *Id* at 5. The Court, noting that "every tax exemption constitutes a subsidy that affects nonqualifying taxpayers" held the tax exemption violated the Establishment Clause. *Id* at 14. The Court went on to

> outline the proper, constitutionally valid approach to religious exemptions. *Id* at 14-15. It held that, when a subsidy "is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally" does not violate the Establishment Clause. *Id* However, "when Government directs the subsidy exclusively to religious organizations" in a way that "either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion," the tax exemption "provides unjustifiable assistance to religious organizations and cannot but convey a message of endorsement" of religion. *Id*
>
> Thus, in order for a sales tax exemption to comply with the Establishment Clause, it must serve a broad secular purpose. If the work of a religious organization falls within that secular purpose, it may properly enjoy the tax exemption. However, a tax exemption may not be awarded to religious organizations simply because they are religious. *Id*

Courts have consistently invalidated tax exclusions that preferentially benefit churches and religious organizations in challenges brought by parties similarly situated, but who did not get such an exemption. For example, in *Budlong v. Graham*, 488 F. Supp. 2d (N.D. Ga. 2007), the court declared that a sales tax exemption applicable to only religious organizations was unconstitutional and the court enjoined continued enforcement of those provisions.

In *New Orleans Secular Humanists Ass'n, Inc. v. Bridges*, 2006 U.S. Dist. LEXIS 20020 (E.D. La. 2006), the court also enjoined the defendant from enforcing sales and use tax exemptions provided only to religious organizations.

In *Haller v. Commonwealth of Pennsylvania*, 728 A.2d 351 (Pa. 1999), the Supreme Court of Pennsylvania again concluded that enforcement of tax exemptions provided only to religious organizations violated the Establishment Clause. The Court relied upon the United States Supreme Court's decision in *Texas Monthly* in concluding that tax exemptions that include religious organizations must have an overarching secular purpose that equally benefits similarly situated

non-religious organizations. *Id* at 296. *See also Condemnation Proceedings by the Redevelopment Authority of the City of Philadelphia*, 891 A.2d 820, 830 (Pa. Commw. 2006) (invalidating condemnation in favor of religious organization, relying in part on *Texas Monthly*).

By contrast, tax exemptions provided exclusively to churches and clergy have never been upheld by the Supreme Court, including in *Walz v. Tax Comm'n of New York City*, 397 U.S. 664 (1970). In *Walz*, the Court sustained a property tax exemption that "applied to religious properties no less than to real estate owned by a wide array of non-profit organizations." *Texas Monthly*, 489 U.S. at 11. The broad class of non-religious as well as religious beneficiaries was a critical factor in *Walz*, as well as in other cases decided by the Supreme Court. This factor is consistently emphasized by requiring that benefits to religious organizations also flow to a large number of non-religious groups. *Id*. "Indeed, were those benefits confined to religious organizations [in *Walz*], they could not have appeared other than as state sponsorship of religion; if that were so, we [Supreme Court] would not have hesitated to strike them down for lacking a secular purpose and effect." *Id.* *Walz* does not stand for the proposition that a tax exemption necessarily may be provided only to churches.

Justice Brennan emphasized in *Texas Monthly* the importance that the property tax exemption at issue flowed in *Walz* to a large number of non-religious groups. "The breadth of New York's property tax exemption was essential to our [Supreme Court's] holding that it was not aimed at establishing, sponsoring, or supporting religion." *Texas Monthly*, 489 U.S. at 12. The *Walz* decision "in no way intimated that the exemption would have been valid had it applied *only* to the property of religious groups or had it lacked a permissible secular objective." *Id* at 13, n.2. (Emphasis in original.) Justice Brennan's explanation in *Texas Monthly*, moreover, reflected the Court's own long-accepted understanding of its holding in *Walz*. *Id* at 13, n. 3.

The exemption in *Walz* also reduced potential "entanglement" issues between state and church, including the need to make determinations of property value. Section 107(2), by contrast, does not avoid entanglement. Section 107(2) requires fact-sensitive and complex inquiries into patently religious matters, such as defining "ministers of the gospel;" "sacerdotal function;" "integral agency" of a church or church denomination; and "church." Entanglement is inherent in § 107(2).

Walz also was based, in part, on a unique historical rationale relating to property tax exemptions for property used by churches themselves. Unlike in *Walz*, however, the exemption created by § 107(2) lacks this historical rationale, and involves personal income tax liability, which does not implicate the free exercise issues at play in *Walz*. The exemption in § 107(2) for cash housing allowances paid to ministers was only first enacted in 1954, and has been questioned ever since. *Cf. Kirk v. Comm'r*, 51 T.C. 66, 72 (1968), aff'd. 425 F.2d 492 (D.C. Cir. 1970).

Income tax exemptions for religious housing do not have a long historical legacy. The fallacy in the Government's argument is its equation of tax exemptions for church property, including parsonages, with personal income tax exemptions for the value of cash allowances provided for private housing which Congress first recognized in 1954. While tax exemptions for church property, therefore, may have some historical legacy, personal income tax exemptions for cash housing allowances do not have such historical precedent. The distinction is important because this is not a case about the taxation of church property. Private housing is not church property, any more than other private property owned by a minister. The Government's attempt to equate privately-owned clergy residences with church property is not persuasive.

The Government's false historical patina notwithstanding, what remains crucial in evaluating a tax exemption afforded to ministers is whether some "overarching secular purpose

justifies like benefits for non-religious groups." *Texas Monthly* at 15, n.4. "In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." *Id.* at 17, *quoting Walz*, 397 U.S. at 696.

The Supreme Court rejected in *Texas Monthly* the counter-argument that a sales tax exemption removed a government-imposed burden on the free exercise of religion. According to the Court, "it is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens claimant's freedom to exercise religious rights." *Id.* at 18. The Court concluded that payment of a sales tax did not in any way offend religious beliefs or inhibit religious activity. A significant deterrence of free exercise rights, however, is necessary in order to sustain a legislative exemption as an appropriate accommodation. *Id.* at 18, n. 8.

The Supreme Court concluded in *Texas Monthly* that the tax exemption at issue there was not mandated, or even favored, by the Establishment Clause in order to avoid excessive entanglement. "Not only does the exemption seem a blatant endorsement of religion, but it appears on its face, to produce a greater state entanglement with religion than the denial of an exemption." *Id.* at 19. The risk of entanglement existed under the exemption statute, according to the Court, because of the need to determine that a publication qualified as being religious. *Id*. Similarly, in the present case, the religious inquiries to determine qualification for the housing allowance create a ready basis for entanglement.

The Government's attempt to limit *Texas Monthly* to publications involving religious speech, moreover, is not persuasive, nor is it a distinction that favors the Government. Here, § 107(2)'s exemption for ministers is available only when a minister receives a cash housing

allowance as compensation for services performed "in the exercise of" his or her ministry. Services performed by a minister in the exercise of his or her ministry include: (1) the administration of sacerdotal functions; (2) the conduct of religious worship; and (3) the control, conduct and maintenance of religious organizations under the authority of a religious body constituting a church or church denomination. In effect, the § 107 tax break for ministers constitutes "preferential support for the communication of religious messages," every bit as much as in *Texas Monthly*. *Id.* at 28 (Blackmun, J. Concurring).

B. A Majority Of The Supreme Court Agreed On The Establishment Clause Principles In *Texas Monthly*.

The controlling principles recognized in *Texas Monthly* represented a majority of the Supreme Court. Justice Brennan, joined by Justices Marshall and Stephens, thoroughly distinguished *Walz*, while concluding that preferential tax exemptions for religion violate the Establishment Clause. Justice Blackmun concurred, joined by Justice O'Connor, and they concluded that the case could be decided on the basis that "a tax exemption *limited to* the sale of religious literature by religious organizations violates the Establishment Clause," without deciding the Free Exercise issues in the case. *Id* at 28. (Blackmun, Concurring.) In answering the decisive question, Justice Blackmun agreed with the opinion of Justice Brennan:

> In this case, by confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communication of religious messages. Although some forms of accommodating religion are constitutionally permissible, *see Corporation of Presiding Bishop of Church of Jesus Christ of LDS v. Amos*, 483 U.S. 327 (1987), this one surely is not. A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable. *Texas Monthly*, 489 U.S. at 28.

Although *Texas Monthly* is dismissively described by the Government as merely a plurality decision, it is really a binding opinion of the Supreme Court on the Establishment Clause issue. The Government dismisses *Texas Monthly* because the five justices who deemed Texas' sales and use tax exemption for religious publications unconstitutional did not sign a single opinion. *Marks v. United States*, 430 U.S. 188, 193 (1997), however, recognizes the authoritative character of Supreme Court holdings supported by separate opinions that comprise a Court majority. Using this standard, *Texas Monthly* is an easy case to read because the Court does not even count as being "fragmented" on the Establishment Clause issue.

Justice Scalia, in dissent, certainly understood the majority holding in *Texas Monthly* to prohibit preferential tax benefits provided exclusively to religion. Religious tax exemptions "of the type the Court invalidates today," including the § 107 housing exemption, "are likewise affected" by the Court's holding, according to Justice Scalia. *Texas Monthly*, 489 U.S. at 24-25. Significantly, Justice Scalia specifically identified the § 107 housing allowance as being within the scope of the Court's holding. Justice Scalia's understanding, moreover, is widely shared by scholarly commentary. *See* Rakowski, *The Parsonage Exclusion: New Developments*, Tax Notes, July 15, 2002, 429; Foster, Matthew, *Note: The Parsonage Allowance Exclusion: Past, Present and Future*, 44 Vand. L. Rev. 149, 175-176 (1991); and Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should be Declared Unconstitutional*, 24 Whittier Law Review 707, 715-716 (2003).

The requirement of neutrality and general applicability, particularly after *Texas Monthly*, also has consistently prevailed in judicial analysis of tax preferences. This conclusion is well-described by Donna Adler in *The Internal Revenue Code, the Constitution and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 Wake Forest L. Rev. 855 902

(1993), concluding that "the one factual distinction that seems to be the determinative issue is the breadth of the class benefited by the tax exemption."

The controlling authority of *Texas Monthly*, in fact, suggests that even *Walz* would have been decided differently if the property tax exemption at issue had been limited only to church properties. *Cf. In re Springmoor*, 498 S.E.2d 177 (N.C. 1998) (invalidating preferential property tax exemption for religious retirement homes). Robert Sedler makes this point convincingly in *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 Wayne L. Rev. 1317, 1391-1392 (1997).

C. Section 107(2) Provides Greater Benefits To Ministers Than Section 119 Provides To Non-Clergy Taxpayers.

Section 107(2) does not provide tax benefits to ministers that are otherwise available to all taxpayers under § 119, contrary to the Government's claim. The benefits provided by § 107(2), in fact, are provided to ministers without regard to the requirements of § 119, which is limited to in-kind housing provided for the convenience of the employer. Section 107(2) has no such limitation. That is precisely why Congress adopted § 107(2), and it is why the religious community so vigorously defends it. The requirements of § 119 are different and more limiting than the requirements of § 107(2), and for that reason, § 107(2) undisputedly provides preferential benefits to ministers that are not neutrally and generally available to a broad range of taxpayers. In fact, it is § 107(1), providing an exemption for in-kind housing provided to ministers that is more analogous to § 119.

Section 107(2) permits only ministers of the gospel performing religious services to exclude from their taxable income that portion of their "compensation" that is designated as a housing allowance or housing provided in-kind. In order to claim the housing allowance, two principal conditions must be met:

> 1. The allowance must be provided as compensation for services that ordinarily are the duties of a minister of the gospel. This condition is unrelated to any requirement that the minister's residence be used to perform the services of a minister. The Internal Revenue Service, in fact, has determined that even a retired minister of the gospel is eligible to claim the housing allowance exemption because the allowance is deemed to have been paid as part of the retired minister's compensation for past services as a minister of the gospel. Rev. Rul. 63-156, 1963-2 C.V. 79.
>
> 2. The amount of the housing allowance must be designated in advance by an employing church. The designated housing allowance must then actually be used by the minister for housing purposes. *(Id.)*

Section 107(2) undeniably provides a tax benefit that is unavailable to other taxpayers. Section 107(2) allows an employing church to designate part of a minister's cash compensation as a tax-free housing allowance. By contrast, § 119 allows no exemption for cash allowances, even if the allowances are used to provide food or housing for the convenience of the employer. *See C.I.R. v. Kowalski*, 434 U.S. 77, 98 S. Ct. 315, 54 L.Ed.2d 252 (1977). Section 107(2), moreover, has no requirement that compensation designated as a housing allowance be used for any particular housing selected by the church for its own convenience. The designated compensation paid to the minister is tax-free, unlike for other taxpayers, and the housing allowance does not have to be used for the convenience of the employer, also unlike the requirement for other taxpayers.

Ministers, nonetheless, derive an enormous financial benefit from § 107(2) by being paid in tax-exempt dollars. Professor Chemerinsky unflinchingly describes this significant tax break:

> Section 107's blatant favoritism for religion can be seen by comparing it with other provisions of the Internal Revenue Code that provide a benefit to ministers on the same terms as others in similar situations in secular institutions. For example, Section 119 of the Internal Revenue Code allows an income exclusion for the value of meals and lodging that are provided on the business premises of an employer as a convenience to the employer and as a condition of employment. Thus, a minister who is required to live on the church's premises is allowed an exclusion under this provision, but so is the head of a school who lives on the premises, or any other

> employee who is required to live in housing provided at the workplace. Section 107 is unique in that it provides a benefit to religion -- to "ministers of the gospel" -- that no one else receives.

Chemerinsky, 24 Whittier Law Review, at 712-713. (A true and correct copy of Professor Chemrinsky's article is submitted with this brief.) Professor Adam Chodorow more recently notes Treasury Department calculations of the cost of the housing allowance exemption to be $9.3 billion in foregone taxes over the next ten years. Chodorow, Adam, The Parsonage Exemption, 51 U.C. Davis L. Rev. 849, 896 (2018). (A true and correct copy of Professor Chodorow's article is submitted with this brief.)

The benefit under § 107(2) accrues only to ministers, who may use their designated housing allowance even to purchase an asset that has the potential to appreciate and increase in value. This benefit is categorically not available to other taxpayers, as described by Professor O'Neill in *A Constitutional Challenge to § 107 of the Internal Revenue Code*, 57 Notre Dame Law. 853, 864 (1982).

The preferential tax benefits of § 107(2) further differ from § 119 because the exemption is available without regard to the "convenience of the employer." Section 119 provides an exclusion for in-kind housing if: (1) The lodging is furnished on the business premises of the employer; (2) the lodging is furnished for the convenience of the employer; and (3) the employee is required to accept such lodging as a condition of his employment. Under this test, an employee must pay income tax on the value of free housing, except where the lodging meets the "convenience of the employer" requirements.

Section 119 applies only where the employer desires to have a continuous presence of the employee at the job site and to have him or her within reach at all times. As the Supreme Court held in *Kowalski*, 434 U.S. at 93, the convenience of the employer requires that the employee must

accept housing in order to properly perform his duties. This requirement, however, is not imposed as a condition of the § 107(2) exemption, including as to tax-free payments made directly to ministers. Section 107(2) provides for tax-free compensation to ministers in circumstances that are not available to other taxpayers, including under § 119, despite the Government's unsupportable claim that all clergy housing is inhabited "for the convenience of the employer." In fact, the Government's own evidence indicates that both large and small churches use the housing allowance as a method of compensation, rather as a means of ensuring job performance. The Intervenors' submissions also suggest simply that living in one's community is preferable for a minister, but this is not unique to clergy, as the district court correctly recognized.

Section 107(2) creates a false incentive for churches to designate a minister's compensation as a housing allowance in order to increase the minister's net income, while reducing the church's wage payments correspondingly. "The effect is a significant financial benefit to religion because churches and synagogues and mosques can pay their clergy much less because of the tax-free dollars. Without the parsonage exemption, religious institutions would have to pay clergy significantly more to make up this difference." Chemerinsky, 24 Whittier Law Review at 713. The Intervenors herein acknowledge this very point. Non-church employers, by contrast, cannot increase the net-compensation of their employees by designating an amount to cover their housing costs -- and therefore, they cannot correspondingly reduce their wage payments. On the other hand, the housing allowance exemption is not limited to low-income clergy or churches, as an estimated 87% of all ministers receive cash allowances as a form of pay and without regard to the exigencies of the job. *See* Chodorow, 51 U.C. Davis Law Review at 855.

Income tax exclusions for housing allowances in other sections of the Internal Revenue Code, such as for overseas government employees and military personnel, do not render § 107(2)

neutral and broad-based. These exemptions, adopted at different times and for different purposes, are not part of a comprehensive statutory scheme for excluding housing allowances from taxable income, and as Professor Chemerinsky notes, the government can give its employees a tax break as an employer. Section 107(2), in contrast, is a benefit provided only to privately-employed clergy. It is not at all about the government structuring compensation, including fringe benefits, for its own employees. *See* Chemerinsky, 24 Whittier Law Review at 728.

The Supreme Court rejected an argument similar to the Government's in *Texas Monthly*, where the State sought to justify its sales tax exemption for religious publications by citing other sales tax exemptions in its Tax Code. The Court was unimpressed by this argument, noting that other exemptions did not rescue the exemption for religious periodicals from invalidation. "What is crucial is that any subsidy afforded religious organizations be warranted by some overarching secular purpose that justifies like benefits for non-religious groups." 489 U.S. at 15 n. 4.

Professor Chodorow conducts a very useful analysis of why § 107 is not part of a broad neutral policy that exempts housing allowances from taxation. Chodorow, 51 U.S. Davis Law Review at 873 and 884-889. For example, he explains that § 911 of the Internal Revenue Code provides a housing exemption for expatriates in order to address issues of double taxation, rather than employer convenience factors. *Id*. at 884. Other provisions relating to government employee housing provisions constitute terms of employment, which Professor Chodorow describes as "again quite distinct from other housing provisions found in the Code." *Id.* at 886. In the end, Professor Chodorow finds that "such allowances [in sections of the Internal Revenue Code other than § 107] cannot be characterized as part of a coherent practice or broad, neutral policy, justifying an arguably similar allowance for ministers." *Id.* at 135. In short, as the district court correctly determined, § 107(2) does not satisfy the requirement of *Texas Monthly* that religious tax

exemptions must be generally available on the basis of neutral and non-religious criteria linked by an overarching conceptual and principled heritage.

The Supreme Court further recognized in *Texas Monthly* that in evaluating tax preferences, "the Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." 489 U.S. at 17, *quoting Walz*, 397 U.S. at 696. As this court previously has recognized, the clergy housing allowance does not fit the bill. The circumference of the housing allowance encloses only religious officials.

Section 107(2) provides an exclusion expressly intended to benefit religion alone. The exclusion for ministers is not grounded in a secular legislative policy that motivates similar tax breaks for employees of employees of secular or expressly non-religious 501(c)(3) non-profits. Section 107(2) does not provide an exclusion for cash housing allowances paid to ministers for the same reason that the government exempts housing allowances paid to the military and other overseas employees of the government. "The circumference of legislation" providing allowances to overseas government employees does not "encircle a class so broad that it can be fairly concluded" that ministers of the gospel could be thought to fall within the natural perimeter.

Section 107(2) does not exempt cash housing allowances for private employees other than ministers of the gospel. This is a substantial tax benefit that is not available to other private employees, including under § 119. The reason that § 107(2) is defended so vigorously by churches and ministers, therefore, is not because it merely mimics the exemption otherwise available to them under § 119; their concern is driven by the fact that this substantial tax benefit would not otherwise be available to them if they are held to the standards applicable to all other taxpayers.

In the end, money motivates the defense of § 107(2) by the Interveners and amici. The Intervenors acknowledge this simple fact, arguing that 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. The Intervenors do not contend, however, that taxing ministers' incomes interferes with theological principles, but rather simply that more resources are desirable. The same, of course, could be said for any church expense, but that is not the test for a constitutionally impermissible burden on religion. As the Supreme Court recognized in *Regan v. Taxation With Representation of Wash.*, 103 S. Ct. 1997, 2000 (1983), "although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." The income tax, moreover, has never been construed to be a significant burden on religion, as the Supreme Court recognized in *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 700, 109 S. Ct. 2136, 104 L.Ed.2d 766 (1989), concluding that religious belief in conflict with the payment of incomes taxes affords no basis for resisting the tax. *See also United States v. Lee*, 455 U.S. 252, 258-61, 102 S. Ct. 1051, L.Ed.2d 127 (1982) (holding that religious objection to social security tax was not a basis for resisting the tax). In short, it is not the Government's constitutional responsibility to preferentially further the financial means of churches as a government responsibility.

D. Section 107(2) Does Not Eliminate Disparity Of Treatment Between Religious And Secular Employees; It Creates Disparity.

The Government argues unpersuasively that the original in-kind parsonage exclusion, enacted in 1921, and currently codified in § 107(1), was merely intended to give ministers an exclusion equivalent to the recognized "convenience of the employer" exemption. The Government's historical analysis is suspect, but more importantly, it does not explain the

exemption of cash housing allowances, as provided by § 107(2). Such cash exclusions from taxation are not available to secular employees at all. The Government counters, however, by arguing that reducing the burden of housing costs only for ministers who receive in-kind housing is "unfair" to those ministers who have to pay cash for housing, and so Congress supposedly enacted § 107(2) in order to give an equivalent benefit to all religious ministers. The Government's claimed rationale, however, does not change the fact that the burden of housing costs for non-religious employees is equally great, but only ministers who receive cash allowances benefit from the § 107(2) relief program.

The Defendants' historical analysis is as much suspect as its logic. Section 107(1), in fact, provides tax benefits to ministers that are not generally available. Section 107(1) provides that gross income does not include the rental value of a home furnished to a minister of the gospel "as part of his compensation." Although the Government contends that this is just a restatement of § 119, which allows an exemption for lodging provided for "the convenience of the employer," § 107(1) is not equivalent to § 119.

The Defendants claim that Congress' intent with respect to the parsonage exemption is evident because the original parsonage exemption enacted by Congress in 1921 was supposedly adopted in response to the Treasury Department's refusal to allow ministers to claim the same "convenience of the employer" exclusion allowed to other employees. Even the limited evidence from 1921, however, indicates that Congress intended to create an exemption that was not the same as the exemption for lodging provided for the "convenience of the employer."

The Treasury Department in 1921 did not refuse to recognize "the convenience of the employer" doctrine as it applied to ministers. The "convenience of the employer" exemption was not claimed or explained in O.D. 862, which merely refused to recognize an exemption for housing

provided as part of the salary paid to a minister. The Treasury Department, in reaching its conclusion in O.D. 862, did not address the "convenience of the employer" doctrine as applied to ministers. There was no analysis of the convenience of the employer doctrine, but rather the Department focused on the value of the parsonage as part of clergy compensation, in circumstances where a minister is "permitted" to use the parsonage -- but not required to use it. In similar circumstances, secular employees also could not claim a "convenience of the employer" exclusion.

By contrast, the Treasury Department in other cases expressly addressed the convenience doctrine when raised by employees. For example, with respect to fish cannery employees, the Treasury Department concluded:

> Where, from the location or nature of the work, it is necessary that employees engaged in fishing and canning be furnished with lodging and sustenance by the employer, the value of such lodging and sustenance may be considered as being furnished for the convenience of the employer and deemed not, therefore, to be included in computing net income of the employees. [O.D. 814.]

The Department similarly applied the "convenience of the employer" standard to hospital employees in O.D. 915.

The "convenience of the employer" rule was intended to be narrow, as evidenced by rulings such as O.D. 915 and O.D. 814. It applied, for example, to employees living on a ship, who obviously performed work that could not be performed if they were living elsewhere. Similarly, the convenience of the employer doctrine applies to some hospital employees, but only if they are on call 24 hours a day. The narrow scope of the "convenience of the employer rule," as illustrated by O.D. 915, applies where housing benefits are not supplied by the employer as "compensation for services."

The Revenue Act of 1921, by contrast, did not merely codify and make applicable the "convenience of the employer" doctrine to ministers. The Revenue Act, instead, provided that any

free housing provided to ministers “as part of their compensation” would be exempt from income taxation. The 1921 Act also did not condition the exemption on housing provided for the “convenience of the employer,” and it thereby provided greater tax benefits to ministers. If the Revenue Act had merely been intended to apply the “convenience of the employer” doctrine to ministers, that is what the legislation would have said -- instead, it provided an exemption for “compensation” that was independent of the “convenience of the employer,” and hence it provided broader privileges.

The Government’s historical analysis of § 107(2), moreover, also does not support the conclusion that the exemption of “cash” housing allowances for ministers was based on the unique housing requirements of ministers. The Government cites a House Report indicating that the cash exclusion for housing allowances was intended simply because it seemed “unfair” to distinguish between in-kind housing provided as part of compensation and cash payments provided for housing. According to the Government’s own explanation, therefore, enactment of § 107(2) had nothing to do with the “unique housing needs” of ministers. The “unfairness” of distinguishing between in-kind and cash benefits, however, is not unique to ministers.

The historical record further indicates that § 107(2) was deliberately intended to broadcast a message of support for religion during the Cold War. Representative Peter Mack, who introduced § 107(2), urged support for an exclusion of cash housing allowances paid to ministers in House Hearings in the following manner:

> 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. (Hearings on General Revenue Revisions before the House Committee on Ways and Means, 83d Cong., 1st Sess., pt. 3, at 1576 (1953)).

Representative Mack further urged support for § 107(2) as a means to subsidize low incomes of some religious officials:

> Of our clergymen 55% are receiving less than $2,500 per year. This is some $258 less than the $2,668 annual median income for our labor force. It is well to keep in mind that many of these clergymen support families like the rest of us, and that many of these clergymen still receive low income based on the 1940 cost of living but must pay 1953 rents for a dwelling house. (*Id.*)

The history of § 107(2), therefore, does not suggest any non-religious basis for distinguishing between cash housing allowances paid to ministers and those paid to secular employees. The Government's arguments to the contrary are based on *ex post facto* rationalization, rather than historical reality. The Congressional purpose may have been to lessen the burden of housing costs, but it was not based on delineation of occupations that require particular housing. The purpose was to lessen the burden of housing costs for ministers in order to support them in the fight against a "godless and anti-religious world movement." Such preferential support for religion constitutes endorsement rather than accommodation.

The Government, nonetheless, argues that unless all ministers and churches qualify for a particular tax benefit, then the law unconstitutionally discriminates among religious groups. In other words, according to the Defendants, if the IRS provides benefits to any ministers, then it must also provide preferential benefits to all ministers. The Government's argument is perverse in that religious preferences thereby become constitutionally mandatory even if the resulting benefit is unavailable to similarly situated secular taxpayers.

The Government's argument is even more perverse in the present case. The Government first argues that the in-kind parsonage allowance for ministers was enacted in order to give ministers an exclusion similar to the "convenience of the employer" exclusion provided generally

to taxpayers. The Government proceeds, however, to conclude that if ministers are provided with an exclusion for in-kind housing that creates parity with non-clergy employees, then the exclusion should be extended preferentially to all religious clergy without regard to the in-kind limitation and the requirements of the "convenience of the employer" – but not to non-clergy.

The Government engages in bootstrap reasoning by claiming that the exclusion for in-kind housing discriminates among religions. Even if the in-kind exclusion is deemed equivalent to the "convenience of the employer" exclusion, it is not a promotion of some religions over others because it does not make distinctions between different religious organizations based on any creed or orthodoxy. The in-kind limitation, in other words, does not discriminate among religions, even though it may impact religious taxpayers differently, just as secular taxpayers are impacted differently. *Cf. Droz v. Comm'r*, 48 F. 3d 120, 124 (9th Cir. 1995). *See also Eagle Cove Conference Ctr. v. Town of Woodboro*, 734 F.3d 673, 680-81 (7th Cir. 2013) (substantial burden must effectively render religious exercise impracticable; burden must be truly substantial, lest it supplant facially neutral laws under auspices of religious freedom). By contrast, the Supreme Court's decision in *Larson v. Valente*, 456 U.S. 228 (1982), dealt with demonstrable and deliberate inter-denominational discrimination that did not affect non-religious entities. The *Larson* decision does not hold that denominational preferences can be cured by preferring religion over non-religion.

The "discrimination" that § 107(2) supposedly addresses is based on faulty reasoning. The Government presumes that no logic justifies distinguishing between ministers who receive in-kind lodging and those who receive personal cash allowances. Whether such a distinction makes sense, as Professor Chodorow concludes, it is not a distinction in any event that is unique to the housing needs of ministers. What the Government deems to be unfair to ministers is just as "unfair" for

non-clergy --the only difference being that ministers were thought to be "caring for our spiritual welfare in the courageous fight against a godless and anti-religious world movement." That is not a distinction that justifies preferential benefits for ministers, nor is it a valid constitutional distinction.

This Court has previously recognized that a claimed accommodation "cannot treat religions favorably when secular groups are identical with respect to the attribute selected for that accommodation." *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 873 (7th Cir. 2014). Neutrality remains essential to the validity of an accommodation. *Id.* In this case, the neutrality principle is obliterated by § 107(2), precisely as the District Court recognized: Secular employees are identical to clergy with respect to the attribute selected for supposed accommodation, i.e., the financial desirability of tax-free housing.

E. Section 107(2) Is Not An Accommodation In Response To A Significant Government-Imposed Burden On Free Exercise Rights.

The Government claims that § 107(2) is merely an accommodation of religion that is permissible in the case of government-imposed substantial burdens on free exercise rights. This argument lacks merit, in the first place, because the factual predicate is missing: There is no evidence that § 107(2), as enacted by Congress in 1954, was intended to relieve any government burden on the free exercise of religion. Low pay and high housing costs apparently prompted enactment of § 107(2), but these considerations are not unique to ministers and it is not a responsibility of government to abate such concerns just for ministers.

Providing ministers who are paid in cash with a tax benefit in order to "equalize" their circumstances with ministers provided in-kind housing, moreover, is constitutionally unacceptable. Professor Chemerinsky explains the problem for the Government:

> The equality argument made by the Government and several of the Amici in the *Warren* case has no stopping point. Under this reasoning, the Government could directly subsidize housing for clergy if that would equalize the benefits with those who live in housing provided by their churches. The obvious impermissibility of such a subsidy shows why the equality argument is insufficient to justify the parsonage exemption. One Amici says that the purpose of the parsonage exemption is to "equalize the impact of the federal income tax on ministers of poor and wealthy congregations." Helping poorer religions is hardly a secular purpose; surely, the Government cannot subsidize poorer religions out of a desire to help make them more equal with wealthier religions.

Chemerinsky, 24 Whittier Law Review at 724-25.

The Government's church-equity argument also has nothing to do with government imposed burdens on free exercise rights. The Supreme Court's decision in *Corp. of the Presiding Bishop of the Church of Jesus Christ of LDS v. Amos*, 43 U.S. 327 (1987), in particular, does not support the Government's argument. In *Amos*, the Supreme Court upheld the constitutionality of an exemption from anti-discrimination hiring laws as applied to religious organizations. In reaching its decision with regard to employment discrimination laws the Supreme Court said that "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." *Id.* at 335. "Where, as here, the government acts for the proper purpose of lifting a [government] regulation that burdens the exercise of religion, then an accommodation may be justified." *Id.* at 338. The Court recognized in *Amos*, however, that "at some point, accommodation may evolve into an unlawful fostering of religion." *Id.* at 334-335.

The rationale of *Amos* is inapplicable to § 107(2). Civil rights laws, as involved in *Amos*, are regulatory in nature. They regulate what conduct is prohibited, permitted or required. The application of anti-discrimination hiring rules to a church, therefore, arguably "would interfere with the conduct of religious activities." On this basis, *Amos* upheld an exemption from the anti-

discrimination laws. *See also Center for Inquiry*, 758 F.3d at 874, noting the significance of regulatory characterization of a government burden.

The Government's reliance on *Cohen v. City of Des Plaines*, 8 F.3d 484 (7th Cir. 1993), is misplaced in the present case. *Cohen* dealt with zoning regulations affecting day-care centers. The zoning ordinance at issue allowed churches to operate day-care centers in residential districts, while secular operators were required to obtain special use permits. This Court concluded that special treatment of religious day-care centers was permitted in order to alleviate a significant burden, as well as to avoid entangling inquiries as to what constituted a sufficiently "religious" day-care center. "Allowing churches to provide child-care and educational services coheres with the religious missions of most churches and thus implicates rights protected by the Free Exercise Clause." *Id*. at 492. By exempting churches, from the special use requirement, the City removed a burden on the free exercise of religion, as contemplated by *Amos*. Tax exemptions, however, are markedly different in effect.

Income tax laws are not regulatory in nature so as to constitute a significant burden on Free Exercise rights. A tax law imposes a monetary obligation, which is not a constitutionally significant burden. "To the extent that imposition of a generally applicable tax merely decreases the amount of money [the taxpayer] has to spend on its religious activities, any such burden is not constitutionally significant." *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391 (1990), *citing Hernandez v. Comm'r* , 490 U.S. 680, 699 (1989). "A preacher is not free from all financial burdens of government, including taxes on income or property." *Id.* at 386-387. In *Hernandez*, the Supreme Court concluded that the federal income tax was not a "constitutionally significant" burden on religion where the taxpayer could not claim a deduction for money paid to the Church of Scientology for religious services. *See also Bowen v. Roy*, 476 U.S. 693, 705-06

(1986) (denial of tax benefits does not burden religious practices). That being the case, the taxation of income also does not run afoul of the ministerial exception discussed in *Hosanna Tabor v. Evangelical Lutheran Church and Sch. v. E.E.O.C*, 565 U.S. 171 (2012).

The IRS fully understands that paying taxes is a burden to all taxpayers that does not constitute a recognizable burden on free exercise rights. In *Thompson v. Comm'r*, 2013 U.S. T.C. LEXIS 3 at 24-25 (2013), the court emphasized just this point:

> Paying taxes is a burden, to all taxpayers, on their pocketbooks, rather than a recognizable burden on the free exercise of their religious beliefs. *Pixley v. Comm'r,* 123 T.C. at 274. 'Constitutional protection of fundamental freedoms does not confer an entitlement to such funds as may be necessary to realize all of the advantages of that freedom.' *Id, quoting Harris v. McRae*, 448 U.S. 297, 318 (1980).

Section 107(2) similarly is not justified in order to alleviate a significant burden on the exercise of religion. As in *Texas Monthly*, therefore, § 107 cannot be justified as a means of removing an "imposition on religious activity." *See Texas Monthly*, 489 U.S. at 15, n.8. Liability for income tax is not a substantial government burden on free exercise rights.

The Intervenors, for their part, unconvincingly try to analogize the income tax exemption for housing allowances to exemptions related to the delivery of core religious services. Similarly, the Government equates the income tax exemption for housing allowances to other exemptions that go to core religious beliefs, such as draft exemptions. Such comparisons provide false analogies because taxing income simply does not place a recognized burden on free exercise rights.

In the absence of a government-imposed burden on the free exercise of religion, the Government cannot preferentially bestow benefits exclusively on religion as an accommodation. In such cases, even a purported accommodation impermissibly advances religion if it provides a

benefit to religion without providing a corresponding benefit to a large number of non-religious groups or individuals, as described in *Texas Monthly*.

F. The Government's Attempt To Distinguish Tax Exemptions From Subsidies Is Unpersuasive.

The distinction that the Government tries to make between tax exemptions and subsidies also does not provide a failsafe license to discriminate. As the district court accurately recognized, subsequent decisions, including *Texas Monthly*, routinely reject the distinction that the Government urges from *Walz*. In *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 131 S. Ct. 1101, 1109 (2011), for example, the Supreme Court expressly noted that "our decisions have repeatedly recognized that tax schemes with exemptions may be discriminatory." Applying accepted definitions of the term "discrimination," the Court explained that preferential exemptions obviously constitute discrimination:

> 'Discrimination' is the 'failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.' Black's Law Dictionary 534 (9th ed. 2009); accord, I*d*., at 420 (5th ed. 1979); see also Webster's Third New International Dictionary 648 (1976) ('discriminates' means 'to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit'). To charge one group of taxpayers a 2% rate and another group a 4% rate, if the groups are the same in all relevant respects, is to discriminate against the latter. That discrimination continues (indeed, it increases) if the State takes the favored group's rate down to 0%. And that is all an exemption is. *See West Lynn Creamery, Inc. v. Healy*, 512 U. S. 186, 210-211, 114 S. Ct. 2205, 129 L.Ed.2d 157 (1994) (Scalia, J., concurring in judgment) (noting that an 'exemption' from a 'neutral' tax' for favored persons 'is no different in principle' than 'a discriminatory tax imposing a higher liability' on disfavored persons). To say that such a tax (with such an exemption) does not 'discriminate'--assuming the groups are similarly situated and there is no justification for the difference in treatment--is to adopt a definition of the term at odds with its natural meaning.

Id. Likewise, in *Regan*, 103 S. Ct. at 2000, Court noted that "both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."

The false dichotomy between tax exemptions and cash grants urged by the Government exposes a fatal weakness in their argument, particularly the Government's argument that § 107(2) does not advance religion by creating incentives for religious activity. This argument is both legally and factually flawed as the Intervenors themselves contradict the Government by touting § 107(2) as desirable public policy because it increases the capacity for religious activity. In fact, the purpose of a tax scheme that includes tax exemptions and taxability, like the purpose of any subsidy, is precisely to promote the activity subsidized; such a scheme "seeks to achieve the same basic goal of encouraging the development of certain organizations through the grant of tax benefits." *Bob Jones Univ. v. United States*, 461 U.S. 574, 587, n. 10, 103 S. Ct. 2017, 76 L.Ed.2d 157 (1983). Here, § 107(2) accomplishes this goal with respect to religious entities, and it is that preference for religion that constitutes the problem.

Section 107(2), in short, does create incentives to proselytize by increasing capacity, which the Intervenors defend as a valid justification of § 107(2). Contrary to the arguments of both the Government and the Intervenors, however, the Tax Code cannot be used to preferentially or discriminatorily incentive the advancement of religion.

G. Section 107(2) Creates Government Entanglement With Religion.

The Government's final argument, that inquiries under § 107(2) are not entangling, is implausible and contrary to reality, particularly in comparison to § 119. Section 107(2) excludes from the gross income of a minister the cash rental or housing allowance paid as compensation,

which requires the IRS to first determine whether an individual qualifies as a "minister of the gospel." Administrative regulations implementing § 107 further require that ministers of the gospel perform specific duties, such as sacerdotal functions, conduct of religious worship, administration and maintenance of religious organizations and their integral agencies, and performance of teaching and administrative duties at theological seminaries. T. Reg. 1.1402(c)-5. What constitutes "religious worship" and "the administration of sacerdotal functions," in turn, depends on the tenets and practices of the particular religious body at issue. T. Reg. 1.1402(c)-5(b)(2)(i). Finally, in addition, a minister must be ordained, commissioned, or licensed by a "church," a requirement involving at least fourteen factors to consider.

The necessary determinations under § 107(2) require that significant evidence be marshaled to prove that an individual is in fact a minister for purposes of § 107. *See* Lloyd H. Meyer, *IRS Letter Rulings: Rendering Unto Caesar*, The Exempt Organization Tax Review (May, 1999 at 331-333). Although the Government claims that these requirements involve no doctrinal or intrusive inquiry, both common sense and reality contradict the Government's argument. The Supreme Court recognized this in *Hernandez v. Comm'r,* 490 U.S. 680, 694 (1989).

The inquiries under § 107(2) historically have always required complex inquiries into the tenets of religious orthodoxy. In *Silverman v. Comm'r*, 1973 U.S. App. LEXIS 8851 (8th Cir. 1973), aff'd 57 T.C. 727 (1972), for example, the Court of Appeals considered whether a full-time cantor of a Jewish congregation qualified as a minister of the gospel under § 107. In reaching a decision, "the significance of ordination in the Jewish religion as practiced in the United States was a central issue as to which the views of three major branches of Judaism were solicited." After examining the facts of that case against an analysis of the historical background of the cantorate in the Jewish faith, the Court concluded that the taxpayer qualified for the § 107 exemption.

Similarly, in *Salkov v. Comm'r*, 46 T.C. 190, 198-199 (1966), the court considered whether a full-time cantor in the Jewish faith was a minister of the gospel entitled to exclude a rental allowance from his gross income under § 107. The court concluded that "from the thicket of our factual and legal exploration of this issue, we emerge with the conclusion that in these particular circumstances the petitioner, a full-time cantor of the Jewish faith, qualifies as a 'minister of the gospel' within the spirit, meaning and intendment of Section 107."

The Tax Court also had to consider the tenets of the Baptist religion in *Colbert v. Comm'r*, 61 T.C. 449 (1974). The court recognized in that case that there is no formal statement of precepts that are binding on Baptist churches, but nevertheless, the term "tenets and practices" as used in the IRS Regulations include "those principles which are generally accepted as beliefs and practices within the Baptist denomination." *Id.* at 455. Determining what constitutes the official "precepts and principles" of a religion, however, necessarily involves drawing fine lines, as in *Tenenbaum v. Comm'r*, 58 T.C. 1, 8 (1972), where the court distinguished sacerdotal functions and religious worship from a minister's job "to encourage and promote understanding of the history, ideals, and problems of Jews by other religious groups."

Questions regarding church hierarchy also must be addressed frequently when applying § 107(2), as in *Mosley v. Comm'r*, 68 T.C. Memo 1994-457, where the court considered whether a particular religious organization operated under the authority or control of a church or church denomination. According to the court, this "can only be determined after reviewing all the facts and circumstances surrounding the relationship between the church denomination and the organization." The court concluded that "a religious organization is deemed under the authority of a church or church denomination if it is organized and dedicated to carrying out the tenets and

principles of a faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith."

The necessary and intrusive inquiries under § 107(2) remain ubiquitous. In *Good v. Comm'r*, T.C. Memo 2012 -- 323 (2012, for example, the IRS denied a housing exclusion under § 107(2) after concluding that the taxpayer "failed to introduce any credible evidence to support a finding that his purported ministry actually satisfied any of the criteria of a church." *Id.* at 23. In *Found. of Human Understanding v. United States*, 614 F.3d 1383, 1390 (Fed. Cir. 2010), the Court of Appeals affirmed denial of a tax exemption applying the fourteen factor and associational tests used by the IRS. Similarly, in *Chambers v. Comm'r*, T.C. Memo 2011-- 114 (2011), the Tax Court considered the fourteen criteria used by the IRS to determine whether an entity was a church. In short, while the Government may not question the validity of the indicia of religiousness, it does claim a right to know what the indicia are in deciding whether to recognize a claimed status. *See Church of Visible Intelligence That Governs The Universe v. United States*, 4 Cl. Ct. 55, 65 (1983).

The IRS must regularly make purely religious determinations in administering § 107(2). The difficulty of resolving these religious questions, and the potential for inconsistent conclusions, give rise to far more entanglement than the purely secular inquiries that underlie "convenience of the employer" determinations or business expense verification. For example, another difficult religious determination that the IRS has had to make is whether a Christian college is an "integral agency of a church." This is the subject of many private letter rulings by the IRS, prompting one commentator to conclude that "the Service has consistently ruled that ordained ministers who teach at schools that are integrally related to churches are performing services within the exercise of their ministry, <u>no matter what they teach</u>." Newman, *On Section 107's Worst Feature: The Teacher-Preacher*, 93 TNT 260-20 (emphasis added). College administrators, and even basketball

coaches, as well as teachers, can thus qualify for the benefits of § 107 if they happen to be ordained ministers. It is often difficult, however, to determine whether the criteria for "integral part of a church" are satisfied. The IRS uses the criteria listed in Rev. Rul. 72-606 and Rev. Rul. 70-549, in making these determinations. Typical rulings in this area highlight the intrusiveness of the determination. *See* LTR 9608027, 96 TNT 39-49; LTR 200002040, 2000 TNT 11-24; and LTR 200925001, 2009 TNT 117-28.

The applicability of § 107(2) to so many disparate church employees debunks the Government's argument that the § 107(2) housing allowance is simply the cash equivalent of the parsonage exemption for performing clergy. Professor Chodorow notes that even a basketball coach at a Christian college has qualified for the § 107(2) housing allowance, as well as other "integral" church employees, thereby creating the need for even more complex determinations. Chodorow, 51 U.C. Davis L. Rev. at 864. Such examples confound the Government's argument that § 107(2) merely codifies for the sake of administrative ease an implied "convenience of the employer" test for religious clergy.

The determinations required by § 107(2), in short, involve regular and complex entanglement between government and taxpayer. The inquiries involve questions that are inherently religious, subjective, intrusive and beyond the general competence of government officials. These determinations necessarily create excessive entanglement, unlike "convenience of the employer" determinations under § 119. By contrast, eliminating the exclusion for cash housing allowances under § 107(2) would also eliminate altogether the entanglement concerns expressed by Professor Zelinsky, relied upon by the Government.

H. Section 107 Violates The Establishment Clause Under The *Lemon* Test.

Section 107(2) clearly violates the Establishment Clause under the controlling test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), which the Government correctly identifies as the correct legal standard. In the first place, tax breaks for ministers that are not neutral and available generally to other taxpayers do not have a secular purpose. The exclusion for cash housing allowances paid to ministers is provided only to the clergy and it was never intended to abate any substantial government-imposed burden on religion, as Representative Mack's contemporaneous remarks clearly show. On the contrary, the Government acknowledges that § 107(2) was enacted to provide additional tax benefits exclusively to ministers, who did not receive in-kind housing from their churches. Section 107(2), therefore, by all accounts was intended to benefit religion, as the district court concluded.

The second prong of the *Lemon* test is violated by government action that has a principal or primary effect that advances religion. Government action has the primary effect of advancing religion likely to be perceived as an endorsement of religion. Tax breaks provided preferentially to ministers cannot help but be perceived as an endorsement of religion. This, in fact, was the exact conclusion of the Supreme Court in *Texas Monthly.* The Government claims that giving lucrative financial benefits to ministries and churches to reduce the burden of housing costs does not give the appearance of religious endorsement, but the Government's reasoning is not convincing; it also does not reflect the views of the Supreme Court, requiring that tax benefits for religion be neutrally and generally available on the basis of secular criteria, as articulated in *Texas Monthly*. Section 107(2) was enacted as a benefit to religion, in the heat of the Cold War, and it obviously gives real and apparent endorsement, as intended.

Section 107(2) also has the effect of fostering governmental entanglement with religion. In order to limit the tax break provided by § 107(2) to religious clergy, the IRS must make complex,

intrusive and subjective inquiries into religious matters. Unlike the situation in *Walz*, therefore, the exemption provided by § 107 actually increases the Government's entanglement with religion.

The Supreme Court's holding in *Texas Monthly* ultimately represents the controlling application of the *Lemon* test to the present case: Preferential tax benefits to religion, that are not neutral and generally available to other taxpayers on the basis of secular criteria, violate the Establishment Clause. While all taxpayers would like to have exclusions and deductions to cover their housing costs, the reality is that only ministers of the clergy now get this break. Section 107(2), therefore, violates the Establishment Clause in a most obvious way by conditioning tax benefits on religious affiliation.

The amici would ignore the inequity between religion and nonreligion by broadly expanding the historical test applied to legislative invocations in *Marsh v. Chambers,* 463 U.S. 783 (1983), and *Town of Greece v. Galloway,* 134 S. Ct. 1811 (2014). Their extrapolation is unpersuasive. In the first place, *Marsh* and *Galloway* are not applicable to income tax exemptions for cash housing allowances paid only to clergy, which practice does not have a long and unbroken pedigree. There is no basis to conclude that such discrimination was deemed to be tolerable under the Establishment Clause by the Founding Fathers.

The historical test, moreover, has only been applied to invocations because they are considered ceremonial and lacking in religious favoritism. The Supreme Court has consistently recognized legislative prayer as "symbolic expression." *Marsh,* 463 U.S. at 792. "As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society." *Galloway*, 134 S. Ct. at 1818. By

contrast, the invocation analysis has never been applied in other contexts, let alone as a justification for religious preferences in resource allocations.

The claim that the Establishment Clause is oblivious to allocative preferences for religion is belied by the principles of neutrality that the Supreme Court consistently applies to Establishment Clause disputes. As a limited exception, construing invocations as ceremonial speech does not directly implicate religious preferences. Invocations also do not concern how a government regulates private conduct, or allocates benefits. *See Center for Inquiry*, 758 F.3d at 874. The logic of *Marsh* and *Galloway*, therefore, has no application in the present case, which is properly analyzed under the *Lemon* test and its emphasis on neutrality. Section 107(2) cannot withstand scrutiny under that test.

VI. CONCLUSION.

The Court should affirm the district court's judgment.

Dated this 18th day of June, 2018.

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for the Plaintiff-Appellees, furnishes the following in compliance with F.R.A.P Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 12,793 words.

Dated 18th day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 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. Counsel for the Appellants was served electronically by the Notice of Docket Activity transmitted by the CM/ECF system.

It is further certified that: (1) all required privacy redactions have been made; and (2) the ECF submission was scanned for viruses with the Trend Micro OfficeScan 10.0 antivirus program (updated daily), and, according to the program, is free of viruses.

Dated this 18th day of June, 2018.

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