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
(Case No. 11-cv-0626; Honorable Barbara B. Crabb)

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, ON BEHALF OF DEFENDANT-APPELLANTS, IN SUPPORT OF REVERSAL

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April 9, 2014

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

COMES NOW *Amicus Curiae* Foundation for Moral Law by its attorney John A. Eidsmoe and hereby moves and requests that the Court grant leave to file an *Amicus* Brief after the filing deadline of April 9, 2014.

In support of this Motion *Amicus* states that Attorney Eidsmoe was duly admitted to the Court of Appeals for the Seventh Circuit on June 21, 2010, but apparently was not registered with PACER to e-file documents with the Seventh Circuit. When Attorney Eidsmoe learned this through a telephone conversation with the Clerk of the Seventh Circuit about 4:35 PM April 9, 2014, he immediately called PACER and registered for filing with the Seventh Circuit. That registration was accepted on April 10, 2010. The *Amicus* Brief is attached to this Motion.

Respectfully submitted this 9th day of April, 2014.

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April 9, 2014

CORPORATE DISCLOSURE STATEMENT

FREEDOM FROM RELIGION FOUNDATION, INCORPORATED, ANNIE LAURIE GAYLOR and DAN BARKER,
Plaintiff/Appellee,

v.

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

Amicus curiae Foundation for Moral Law is a designated Internal Revenue Code 501(c)(3) non-profit corporation. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*. No other law firm has appeared on behalf of the Foundation in this or any other case in which it has been involved.

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John A. Eidsmoe

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law (the Foundation),[1] is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God. The Foundation believes the United States Constitution should be interpreted strictly according to the intent of its Framers.

The Foundation believes the Framers favored religious freedom and opposed an official state church. But they also recognized that religion plays an important role in the life of the nation and in the lives of individuals within the nation, and they would have strongly opposed the kind of radical separation advocated by some today.

To this end, the Foundation hosts a website (morallaw.org), and its officers and employees frequently write and lecture about issues related to religion and law. Also to this end, the Foundation files numerous *amicus* briefs in cases involving the United States Constitution, religious liberty, and related matters.

[1] Pursuant to Rule 29(c)(5), Fed. R. App. P., *Amicus* states: No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

The Framers opposed an official state church like that of England in which, after the days of King Henry VIII, there was one official Church of England of which the king was the head. But they recognized that religion plays a major and benevolent role in the life of the nation and in the lives of individuals, and they wanted to encourage and strengthen that role.

In recent years it appears to have broadened the concept of what constitutes a religion. At times the Court has said it cannot favor "religion" over "irreligion," but it appears to have spoken of "religion" in the more narrow theistic sense. The trial court was concerned that a housing allowance for pastors violated the equal protection rights of atheists. But if the term is used in the broader sense to include theistic and nontheistic religions (including atheism), a pastor's housing allowance for pastors of all religions would not violate either the original meaning of the First Amendment or the Court's current Establishment Clause jurisprudence.

The Internal Revenue Code provides that a housing allowance may be claimed for a "minister of the Gospel." However, the IRS has routinely granted housing allowances for those who serve in a pastor's capacity for Buddhist, Unitarian, Jewish, Muslim and other religious entities. The issue is not whether Mr. Barker of the Freedom from Religion Foundation is entitled to a housing allowance. The fact that the FFRF is an atheist organization does not make it an

atheist church. *Amicus* Foundation for Moral Law is a Christian organization, but it makes no claim to be a church. The issue is whether a pastor's housing allowance would be available to an officer of an atheist organization if the organization plays the role for atheists that a traditional church plays for theistic believers and if that officer plays a role for that organization and its adherents similar to the role a pastor plays for a traditional church and the members thereof.

Amicus also believes that the *Marsh v. Chambers*, 463 U.S. 783 (1983), historical precedent test is an appropriate framework for the analysis of this case. Although there was no Internal Revenue Service and no personal income tax in the United States until the ratification of the Sixteenth Amendment in 1916, but the *Marsh v. Chambers* test should be applied broadly. Exempting religious institutions and officials from various forms of taxation has been a common practice throughout American history from colonial times through the present. It was also the practice in England under the common law, going back to the Magna Carta and before. Roman law exempted pagan priests from taxation, the Song Dynasty of Chine exempted Buddhist property from taxation, and similar exemptions have been common throughout the ancient, medieval, and modern world. Nothing in the history or language of the First Amendment indicates that Congress intended to terminate this time-honored practice.

ARGUMENT

I. THE PASTOR'S HOUSING ALLOWANCE IS CONSISTENT WITH A BROAD INTERPRETATION OF THE TERM "RELIGION" IN THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

A. The Court has given a broad interpretation of the term "religion" as used in the First Amendment.

Torcaso v. Watkins, 367 U.S 488 (1961), involved a Maryland statute that required notaries to swear to a belief in God. Maryland contended that a requirement that one affirm a belief in God was not an establishment of religion because all religions believe in God.

But the Supreme Court disagreed, holding at 495 that

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs. (Footnote omitted).

The Court spoke of "religions based on a belief in the existence of God" in contrast to "those religions founded on different beliefs." Clearly, the Court used the term "religion" very broadly to include not only different denominations within Christendom but also religions outside Christendom and even religions founded on

different beliefs from those based on a belief in God. The Court's Footnote No. 11 is especially instructive:

> Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others. See *Washington Ethical Society v. District of Columbia,* 101 U.S. App. D.C. 371, 249 F.2d 127; *Fellowship of Humanity v. County of Alameda,* 153 Cal. App. 2d 673, 315 P.2d 394; II *Encyclopaedia of the Social Sciences* 293; 4 *Encyclopaedia Britannica* (1957 ed.) 325-327; 21 id., at 797; Archer, *Faiths Men Live By* (2d ed. revised by Purinton), 120-138, 254-313; 1961 *World Almanac* 695, 712; *Year Book of American Churches for 1961,* at 29, 47.

Id. at 495 FN 11.

B. The Court's concerns about favoring "religion" over "irreligion" are satisfied if the Court broadly interprets the term "religion."

Justice Black, writing in *Everson v. Board of Education,* 330 U.S. 1 (1949), said at p. 15 that government has no power "to pass laws which aid one religion, aid all religions, or prefer one religion over another." And in *Abington School District v. Schempp,* 374 U.S. 203, 217 (1963), the Court said the Establishment Clause forbids "every form of public aid or support for religion." In the case at hand, the District Court expressed the central concern that the housing allowance did not treat religious and nonreligious people equally. But if religion is used in a broad sense to include nontheistic religions such as atheism, the Court's concerns about showing favoritism to some over others are satisfied without prohibiting the pastor's housing allowance. Such an approach would also avoid the hostility

toward religion and discrimination against religion that would result from a policy that permitted housing allowances for others who live in certain housing for the convenience of their employer or those whose occupations require them to move frequently, while prohibiting a similar allowance for pastors whose homes are often an extension of the churches they serve and who frequently face involuntary reassignment and relocation.

In Congress passed the Residence Act which authorized President Washington to appoint commissioners to draw plans for the capital city that would later be known as Washington D.C. Washington appointed Major Pierre Charles L'Enfant, a French engineer who served the American cause during the War for Independence. On June 22, 1791, L'Enfant presented his plan which included space for "a great church for national purposes," "intended for national purposes, such as public prayer, thanksgiving, funeral orations, etc., and assigned to the special use of no particular Sect or denomination, but equally open to all. ...likewise a proper shelter for such monuments as wee voted by the late Continental Congress, for those heroes who fell in the cause of liberty, and for such others as may hereafter be decreed by the voice of a grateful Nation." Congress adopted most of the L'Enfant plan, including the space for the church, although the location of the church was eventually changed to the space which is now the

National Cathedral.[2] Appropriating space for "a great church for national purposes" caused no controversy in Congress, because Americans then recognized that although there was to be no official national church, churches were to play a prominent role in the life of the nation.

Washington, who served as President of the Constitutional Convention in 1787 and as President when the First Amendment was passed by Congress and ratified by the states, understood the role religion plays in the life of the nation. As he said in his Farewell Address,

> Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports. ... And let us with caution indulge the supposition that morality may be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.[3]

Joseph Story, Harvard Law Professor and U.S. Supreme Court Justice, whose *Commentaries on the Constitution of the United States* (1833) were the leading exposition of the Constitution in the first half of the nineteenth century, wrote:

> Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general, if not the universal sentiment in America was, that Christianity ought to receive

[2] http://www.nationalcathedral.org/support/nca-history.shtml.
[3] George Washington, Farewell Address, September 17, 1796; quoted by John C. Fitzpatrick, *George Washington Himself* (Indianapolis: Bobbs Merrill, 1933), P. 229.

> encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. ...
>
> The real object of the First Amendment was not to countenance, much less to advance, Mohammedanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.[4]

Two decades later, Congress considered a challenge to the military chaplaincy. Both the Senate Judiciary and the House Judiciary Committee conducted exhaustive studies of the First Amendment, and their conclusions were similar. The Senate Judiciary Committee reported in 1853:

> The clause speaks of "an establishment of religion." What is meant by that expression? It referred, without doubt, to that establishment which existed in the mother country, its meaning is to be ascertained by ascertaining what that establishment was. ...
>
> Our fathers were true lovers of liberty, and utterly opposed to any constraint upon the rights of conscience. They intended, by this amendment, to prohibit "an establishment of religion" such as the English church presented, or anything like it. But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends; they did not intend to spread over all the public authorities and the whole public action of

[4] Joseph Story, *Commentaries on the Constitution of the United States* 2nd Ed. (Boston: Charles C. Little and James Brown, 1851) II: Sections 1874, 1877, pp. 593, 594.

> the nation the dead and revolting spectacle of "atheistical apathy." Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world, and an habitual reliance upon His protection of the righteous cause which they commended to His care.[5]

Thomas Cooley, federal judge and Harvard law professor, is often considered the leading constitutional scholar and expositor of the latter half of the nineteenth century, just as Justice Story was the leading expositor of the first half. In his work titled *The General Principles of Constitutional Law in the United States of America* (1880) he stated,

> It was never intended that by the Constitution the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects. The Christian religion was always recognized in the administration of the common law; and so far as that law continues to be the law of the land, the fundamental principles of that religion must continue to be recognized in the same cases and to the same extent as formerly.[6]

Must the courts discard the clear earlier statements of the meaning intent of the First Amendment and employ only modern interpretations that have arisen in

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[5] *The Reports of Committees of the Senate of the United States for the Second Session of the Thirty-Second Congress*, 1852-53 (Washington, D.C.: Robert Armstrong, 1853), pp. 1-4.

[6] Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* (Boston: Little, Brown & Co., 1880), pp. 205-06.

the past half century? *Amicus* suggests that the courts' concern about discriminating in favor of the "religious" can be reconciled with the Framers' intent if the term "religion" is given a broad interpretation.

Thomas v. Review Board, 450 U.S. 707 (1981), is instructive. Thomas, a Jehovah's Witness, worked in an iron foundry, and he was terminated because he refused to build tank turrets. He claimed his refusal was based on his religious beliefs which forbade participation in warfare. Because the Jehovah's Witnesses prohibit military service but do not specifically prohibit working on tank turrets, the Indiana Supreme Court concluded that Thomas's objection was personal and philosophical rather than religious and therefore not protected by the Free Exercise Clause.

But the U.S. Supreme Court reversed, noting at 714 that "The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."

The Indiana court had noted Thomas's willingness to work in the foundry generally and found that position inconsistent with his professed objection to

working on tank turrets. But the U.S. Supreme Court said at 715,

> But Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.

As for another Jehovah's Witness who did not object to working on tank turrets, the Court said at 715-16,

> Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Precedent clearly exists for giving the First Amendment term "religion" a broad interpretation. As this Court stated in *Kaufman v. McCaughtry,* 419 F.3d 678, 681-82 (7th Cir. 2005),

> We address [the prisoner's] claim under the Free Exercise Clause first. An inmate retains the right to exercise his religious beliefs in prison. *Tarpley v. Allen County,* 312 F.3d 895, 898 (7th Cir.2002). The problem here was that the prison officials did not treat atheism as a "religion," perhaps in keeping with Kaufman's own insistence that it is the antithesis of religion. But whether atheism is a

> "religion" for First Amendment purposes is a somewhat different question than whether its adherents believe in a supreme being, or attend regular devotional services, or have a sacred Scripture. ... A religion need not be based on a belief in the existence of a supreme being (or beings, for polytheistic faiths), see *Torcaso v. Watkins,* 367 U.S. 488, 495 & n. 11, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961); *Malnak v. Yogi*, 592 F.2d 197, 200-15 (3d Cir.1979) (Adams, J., concurring); *Theriault v. Silber,* 547 F.2d 1279, 1281 (5th Cir.1977) (per curiam), nor must it be a mainstream faith, see *Thomas v. Review Bd.*, 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Lindell v. McCallum*, 352 F.3d 1107, 1110 (7th Cir.2003).
>
> Without venturing too far into the realm of the philosophical, we have suggested in the past that when a person sincerely holds beliefs dealing with issues of "ultimate concern" that for her occupy a "place parallel to that filled by ... God in traditionally religious persons," those beliefs represent her religion. *Fleischfresser v. *682 Dirs. of Sch. Dist. 200,* 15 F.3d 680, 688 n. 5 (7th Cir.1994) (internal citation and quotation omitted); see also Welsh v. United States, 398 U.S. 333, 340, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970); *United States v. Seeger,* 380 U.S. 163, 184-88, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965). We have already indicated that atheism may be considered, in this specialized sense, a religion. See *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir.2003) ("If we think of religion as taking a position on divinity, then atheism is indeed a form of religion."). ...
>
> The Supreme Court has recognized atheism as equivalent to a "religion" for purposes of the First Amendment on numerous occasions, most recently in *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545U.S. 844, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005). The Establishment Clause itself says only that "Congress shall make no law respecting an establishment of religion," but the Court understands the reference to religion to include what it often calls "nonreligion." In *McCreary County,* it described the touchstone of Establishment Clause analysis as "the principle that the First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion." Id. at *10 (internal quotations omitted).

C. The Court has defined the term "religion" broadly as the term is used in statutes.

The Court's broad use of the term "religion" is found in the way the Court has interpreted the term in various statutes. For example, *United States v. Seeger,* 380 U.S. 163 (1965), involved a claim for conscientious objector status under sec. 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. 456(j)(1958 ed.). The Act exempted from military service those who "by reason of their religious training and belief are conscientiously opposed to participation in war in any form. Seeger claimed that he was a conscientious objector based on religious belief, but

> he preferred to leave the question as to his belief in a Supreme Being open, "rather than answer 'yes' or 'no'; that his "skepticism or disbelief in the existence of God" did "not necessarily mean lack of faith in anything whatsoever"; that his was a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." R. 69-70, 73. He cited such personages as Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity "without belief in God, except in the remotest sense."

Id. at 166. Seeger argued that the Act was unconstitutional because (1) The section did not exempt nonreligious conscientious objectors in violation of the Establishment and Free Exercise Clauses of the First Amendment, and (2) The section discriminated between different forms of religious expression in violation of the Due Process Clause of the Fifth Amendment.

The Court noted that the Act defines the term "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving

duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." *Id.* at 165. The Court concluded at 165-66

> ...that Congress, in using the expression "Supreme Being" rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not.

So, by giving the term "religion" a broad interpretation, the Court can achieve a just and egalitarian result, not preferring those who believe in God over those who do not, but also not overruling the centuries of jurisprudence that have recognized the prominent role religion plays in the life of the nation.

D. The term "Minister of the Gospel" in the Internal Revenue Code has been interpreted broadly to include ministers of nontheistic religions.

The issue is not whether an officer of the Freedom from Religion Foundation is entitled to a pastor's housing allowance. Even if the FFRF is not a "church" within the meaning of the Internal Revenue Code does not mean there could be no atheistic organization that qualifies as a church. Many Christian organizations are not churches. *Amicus* Foundation for Moral Law is an avowedly

Christian organization, but the Foundation does not claim to be a church.[7]

For purposes of 501(c)(3) status, the Internal Revenue Service commonly uses a 14-point test to determine whether an entity is a church, emphasizing that these are only guidelines and there is no "passing score:"

- A distinct legal existence
- A recognized creed and form of worship
- A definite and distinct ecclesiastical government
- A formal code of doctrine and discipline
- A distinct religious history
- A membership not associated with any other church or denomination
- Ordained ministers ministering to the congregation
- Ordained ministers selected after completing prescribed courses of study
- A literature of its own
- Established places of worship
- Regular congregations (usually more than immediate family)
- Regular religious services
- Sunday schools for the religious instruction of the young
- Schools for the preparation of ministers[8]

The IRS emphasizes that these are only guidelines that may no apply in all cases and that there is no "passing score." But none of these guidelines, even if applied individually as ironclad rules, would disqualify an atheist group.

The term "minister of the Gospel" for housing allowance purposes has been routinely applied to "ministers, rabbis, cantors, priests and other religious officials

[7] The District Court's extended discussion of the eligibility of FFRF and Mr. Barker for a housing allowance is not directly on point because its discussion pertained to standing rather than to the constitutionality of the housing allowance.
[8] IRS Manual Sec. 7.26.2.2.4(4), http://www.irs.gov/irm/part7/ir.

who work as leaders of religious organizations."[9] Internal Revenue Service Publication 517, under "Ministers," states that "Most services you perform as a minister, priest, rabbi, etc., are ministerial services."[10] In *Salkov v. Commisioner of Internal Revenue*, 46 T.C. 190, 194 (1966), the Tax Court approved an exemption for a Jewish cantor (one who sings and leads in prayer), construing "Gospel" to mean "glad tidings or a message, teaching, doctrine, or course of action having certain efficacy or validity." *Amicus* knows of no instance in which the IRS has refused to allow a clergy housing allowance for any atheist group that meets the criteria of a church.

II. BECAUSE TAX EXEMPTION FOR RELIGIOUS INSTITUTIONS IS AN UNBROKEN TRADITION THAT PRECEDES THE ADOPTION OF THE FIRST AMENDMENT, THE *MARSH V. CHAMBERS* HISTORICAL PRECEDENT TEST IS AN APPROPRIATE FRAMEWORK FOR THE ANALYSIS OF THIS CASE.

A. *Marsh v. Chambers* should be given a broad interpretation.

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court upheld the employment of a Presbyterian clergyman as the Chaplain of the Nebraska unicameral legislature. Noting that the colonial legislatures employed chaplains and the same Congress that adopted the First Amendment approved the provision of congressional chaplains, the Court reasoned at 792 that

[9] "Taxes for Clergy by Clergy," Medows CPA, PLLC, http://www.clergytaxescpa.com.
[10] United States Internal Revenue Service, Publication 517, "Ministers,"

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Marsh v. Chambers is consistent with original-intent jurisprudence. In essence, it means the Establishment Clause should not be construed to prohibit practices that its framers did not intend to prohibit by it.

And *Marsh* has not been limited to cases involving legislative prayers. In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Court used in part the *Marsh* historical-precedent analysis to uphold a Ten Commandments display on the Texas Capitol grounds. In *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988), the Seventh Circuit applied *Marsh* to an Illinois House Resolution providing for a prayer room in the State Capitol, calling the district court's view that *Marsh* was a one-time departure from the *Lemon* test "much too crabbed." *Id.* at 1219. In *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), the Sixth Circuit applied *Marsh* for the proposition that high school graduation invocations and benedictions are constitutionally permissible (although the Court also concluded on

other grounds that the invocations and benedictions in this case were not sufficiently neutral).

Other cases not involving legislative prayer that have cited *Marsh* include *Kong v. Scully*, 341 F.3d 1009 (9th Cir. 2008) (constitutional challenge to Medicare and Medicaid amendments permitting payments for nonmedical care of persons whose religious convictions forbade medical services); *Books v. City of Elkhart, Indiana*, 235 F.3d 292 (7th Cir. 2000) (Ten Commandments monument held unconstitutional without mentioning *Marsh;* dissent relied on *Marsh*); *American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Board*, 243 F.3d 289 (6th Cir. 2001) (Ohio State Motto "With God all things are possible" upheld); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (religious exemption for Native American religious use of peyote upheld); *Freethought Society of Greater Philadelphia v. Chester County*, 334 F.3d 247 (3rd Cir. 2003) (Ten Commandments display upheld using *Lemon* test; *Marsh* cited); *Newdow v. Rio Linda Union School District*, 597 F.3d 1007, (9th Cir. 2010) (Pledge of Allegiance upheld using *Lemon* test; *Marsh* discussed for historical context even though Pledge was not composed until 1892; Court noted at 1035 concerning *Marsh*, "There, as the [Supreme] Court observed, the nation's historical practices can outweigh even obvious religious concerns under the Establishment Clause.").

When considering tax exemption for churches or clergy, *Marsh* should be read in conjunction with *Walz v. Tax Commission of the City of New York,* 397 U.S. 664 (1970). Chief Justice Burger, speaking for the majority upholding tax exemption for churches, wrote at 669 that "The First Amendment ... does not say that in every and all respects there shall be a separation of Church and State."[11] He further wrote that such exemption need not be justified on the basis of social welfare or good works that some churches perform, noting at 675 that

> Churches vary substantially in the scope of such services; programs expand or contract according to resources and need. ... The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.[12]

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[11] See *Zorach v. Clauson,* 343 U.S. 306, 313 (1952). *Amicus* observes that the increasing involvement of government at all levels with the lives of the American people makes an absolute separation of church and state even more difficult than it was in 1789, and attempts to enforce an absolute separation are likely to marginalize the church and show "hostility to religion" in violation of *Abington Township v. Schempp.* 374 U.S. 203, 225 (1963).

[12] Space does not permit *Amicus* to discuss the "excessive entanglement" issue except to note that when the District Court discussed the three prongs of the *"Lemon* test" she failed to note that in *Agostini v. Felton,* 521 U.S. 203, 232-34 (1997), the Supreme Court concluded that, rather than treating excessive entanglement as a third prong of the *Lemon* test, entanglement issues should be

The Chief Justice also noted at 674 that "Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."

In a concurring opinion, Justice Harlan noted that exemptions differ from subsidies in that, although their economic effect may be similar, subsidies "must be passed on periodically and thus invite more political controversy than exemptions." *Id.* at 699. "Moreover," he wrote, subsidies usually "are granted on the basis of enumerated and more complicated qualifications and frequently involve the state in administration to a higher degree." *Id.*

Justice Brennan concurred, declaring that "History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation. Rarely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming." *Id.* at 681.

Justice Brennan noted that Virginia's 1777 exemption for property of colleges, houses for divine worship, and seminaries which was reaffirmed

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considered as only one factor in the totality of circumstances determining whether the statute has the primary effect of advancing or inhibiting religion.

immediately before and after ratification of the First Amendment. Brennan wrote at 683, "It may reasonably be inferred that the Virginians did not view the exemption for 'houses of divine worship' as an establishment of religion." New York in 1799 exempted churches, colleges, and schools from taxation. *Id.* at 683. Thomas Jefferson was President when tax exemption was first given churches in Washington D.C., and James Madison was a member of the Virginia General Assembly that voted for exemptions for churches. There is no record of either man objecting to these exemptions, and Justice Brennan wrote at 685, "It is unlikely that two men so concerned with the separation of church and state would have remained silent had they thought the exemptions established religion." Justice Brennan summarized at 686,

> Mr. Justice Holmes said that "(i)f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.... *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31, 43 S.Ct. 9, 10, 67 L.Ed. 107 (1922). For almost 200 years the view expressed in the actions of legislatures and courts has been that tax exemptions for churches do not threaten "those consequences which the Framers deeply feared" or "tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent," *Schempp*, supra, 374 U.S., at 236, 83 S.Ct., at 1578 (Brennan, J., concurring.)

Putting *Marsh* and *Walz* together, it is clear that the historical-precedent test is not limited to legislative prayer but also applies to tax exemption and perhaps other issues as well. It is equally clear that the test must be applied broadly to the

issue of tax exemption in general, not simply to a clergy housing allowance which did not begin until 1921 simply because there was no federal income tax until 1913. The FFRF has failed to demonstrate any valid reason for treating a clergy housing allowance differently from church property tax exemption for constitutional purposes.

B. Tax exemption for religious institutions and religious officials has an unbroken historical precedent, both in the United States and in other parts of the world.

The pastor's housing allowance cannot be traced back to 1789, because the federal income tax dates only to the ratification of the Sixteenth Amendment in 1913. But shortly thereafter Congress adopted the Revenue Act of 1921 with virtually no opposition. and this Act authorized clergy to exclude from taxable income housing that was furnished by their respective churches.[13] In 1954, to eliminate the disparity between pastors whose churches owned parsonages and those whose churches did not own parsonages, Congress amended the tax code to permit pastors to exclude from their taxable income a stipend provided by their churches for housing purposes.[14]

[13] Justin Butterfield, Hiram Sasser, and Reed Smith, *The Parsonage Exemption Deserves Broad Protection,* 16 Texas Review of Law & Politics Vol. 2, 251-272 (2013).

[14] *Id.* The 1921 parsonage exclusion is codified as Sec.107(1) and the 1954 housing allowance is codified as Sec. 107(2). The FFRF originally challenged both 107(1) and 107(2) but subsequently narrowed their claim to only 107(2). *Amicus* notes

But the practice of exempting religious institutions and religious personnel from various forms of taxation goes back much further and precedes the adoption of the First Amendment. In 1791, when the First Amendment was ratified, four states had constitutional provisions either requiring or allowing the exemption of church property from taxation, and all of the remaining states exempted church property from taxation either by law or by practice.[15] As Butterfield, Sasser, and Smith note, "Those states without a codified exemption almost certainly did not believe codification to be necessary."[16] In 1899 the Court of the Third Judicial District of Connecticut Court observed in 1699 the estates of "settled ministers" were exempted from taxation," *Yale University v. Town of New Haven*, 42 A. 87, 91, 71 Conn. 316, 331 (Conn. 1899). The Court further observed that "public buildings, whether belonging to the State or to some trustee appointed by the State, occupied as colleges, school-houses and churches, were not specifically named in the tax laws as exempted, because they were not included in 'ratable estate' as taxable property," and that such buildings were "untaxed, as they had been for nearly two hundred years without any legislative declaration, because they are not

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that if 107(2) is struck down but 107(1) remains standing, the disparity or discrimination against pastors whose churches do not own parsonages will be reinstated, thus violating the basic equality principle that the FFRC and the District Court say underlies the Establishment Clause. *Amicus* notes further that the local church's decision whether to provide a parsonage or a housing allowance is sometimes based upon denominational and/or doctrinal positions. *Id.* at 258-61.

[15] *Id.* at 255.

[16] *Id.* at 255.

'ratable estate'; because they had been placed in that class of property which ought not to be taxed, by virtue of a public policy too clear to be questioned, and which had been followed without any specific legislation by our government from its very beginning." *Id.* 331-32. The Court concluded,

> The reason of such a public policy is apparent. The principle that property necessary for the operation of State and municipal governments, and buildings occupied for those essential supports of government, public education and public worship, ought not to be the subject of taxation, has been with us accepted as axiomatic. It has been incorporated into the constitutions of several states. It has been inseparably interwoven with the structure of our government and the habits and convictions of our people since 1638.

Id. at 332.

Nor was this tradition of tax exemption for religious institutions unique to New England. South Carolina and Pennsylvania adopted new constitutions in 1790 (while the First Amendment was being ratified by the States) and continued previous provisions exempting religious property from taxation.[17] Virginia provided much of the inspiration for the Bill of Rights including the First Amendment, but in1913 the Virginia Supreme Court noted that "the policy of the state has always been to exempt property of the character mentioned and described in Sec. 183 of the Constitution...[A]s to such property exemption is the rule and taxation the exception." *Commonwealth of Virginia v. Lynchburg YMCA,* 80 S.E.

[17] Butterfield 255.

589, 590) (Va. 1913). Likewise, Washington D.C. has always exempted religious property from taxation even though the District of Columbia has always been bound by the Establishment Clause.[18]

And this practice of exemption was not limited to America. Priests and/or religious property were exempt from taxation in ancient Egypt (Genesis 47:26), and in the Roman Empire, Persia, and India.[19] The Song Dynasty of China (960-1127 AD) exempted Buddhist property, including income-producing property, from taxation.[20]

The very first Article of the Magna Carta (1215) began,

> 1. In the first place we have granted to God, and by this our present charter confirmed for us and our heirs forever that the English Church shall be free, and shall have her rights entire, and her liberties inviolate; ...[21]

In the centuries that followed, no clear pattern emerges: clergy and churches were sometimes taxed, sometimes not taxed, sometimes taxed at a different rate from other classes, and sometimes taxed only as their clergy councils approved

[18] Butterfield 256, citing Chester James Antieau et al., RELIGION UNDER THE STATE CONSTITUTIONS 122 (1965).
[19] Butterfield 254, citing Antieau 121-22.
[20] Craig G. Benjamin, *Foundations of Eastern Civilization Course Guidebook* (Teaching Company 2013) Lecture 34 p. 241.
[21] *The Magna Carta (The Great Charter)* (1215) Article I, http://www.contitution.org.

taxation.[22] On at least one occasion (1296) King Edward tried to impose a tax on the English clergy, and in *Clericis liacos* Pope Boniface VIII forbade English officials to impose taxes and forbade English clergy to pay the tax upon penalty of excommunication.

As for medieval Europe in general, Simon Newman writes that "The priests in the middle ages were exempted from paying taxes because their work was considered noble."[23] Whether the reason for exemption was the character of their work, the benefit of their work upon society, or the jurisdictional limits of the authority of the State over the church, there is a strong medieval precedent for the exemption of churches and clergy from taxation, both from a Roman law and from a common law background.

When one considers the ancient roots of the practice of exempting religious institutions and religious officials from taxation and the continuance of the practice through medieval times, the colonial era, the Founding era, and on through American history up to the present time, it is clear that the intent of the Framers of

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[22] Thomas Pitt Taswell-Langmead, *English Constitutional History from the Teutonic Conquest to the Present Time, 10th ed.* (Houghton Mifflin 1946) 71, 155, 157, 160-61, 258; Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund 1966, 1985) 75-76, 77-80.

[23] Simon Newman, "Priests in the Middle Ages," *The Finer Times: Excellence in Content*, http://www.thefinertimes.com

the First Amendment was not to abolish tax exemption for churches and clergy. Because of this unbroken tradition, *Marsh v. Chambers* should control this case.

CONCLUSION

The clergy housing allowance is part of a time-honored tradition that does not violate the Establishment Clause. *Amicus* urges this Court to reverse the District Court and uphold the housing allowance.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,891 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in *Times New Roman* size 14.

CERTIFICATE OF DIGITAL SUBMISSION

I certify that (1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and (2) the digital submissions have been scanned for viruses with the most recent version of AVG Anti-Virus, version 10.0.1209, updated on April 7, 2014, and are free of viruses as reported by the software program.

Respectfully submitted this 9th day of April, 2014.

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CERTIFICATE OF SERVICE

I certify that on April 9, 2014, I transmitted a digital submission of the foregoing to the Court for filing and transmittal of Notice of Electronic Filing in compliance with the Court's Emergency General Order of October 20, 2004, as last amended March 18, 2009: In Re: Electronic Submission of Documents and Conversion to Electronic Case Filing.

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