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. 3:11-cv-626 – Judge Barbara B. Crabb

Corrected Brief *Amici Curiae* of the Diocese of Chicago and Mid-America of the Russian Orthodox Church Outside of Russia, the Ethics & Religious Liberty Commission of the Southern Baptist Convention, the Greek Orthodox Metropolis of Chicago, the International Mission Board of the Southern Baptist Convention, the International Society for Krishna Consciousness, the Islamic Center of Boca Raton, the New Brunswick Islamic Center, and the Serbian Orthodox Diocese of New Gracanica and Midwestern America in Support of Appellants

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RULE 26.1 DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Amici Curiae The Diocese of Chicago and Mid-America of the Russian Orthodox Church Outside of Russia, The Ethics & Religious Liberty Commission, The Greek Orthodox Metropolis of Chicago, The International Mission Board of the Southern Baptist Convention, The International Society for Krishna Consciousness, The Islamic Center of Boca Raton, The New Brunswick Islamic Center, The Serbian Orthodox Diocese of New Gracanica and Midwestern America

(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:

The Becket Fund for Religious Liberty
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(3) If the party or amicus is a corporation: (i) Identify all its parent corporations, if any; and (ii) List any publicly held company that owns 10% or more of the party's stock:

Amici have no parent corporations and issue no shares of stock.

Date: April 10, 2014

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INTEREST OF *AMICI CURIAE*

Amici are Eastern Orthodox, Hindu, Muslim, and Protestant religious groups that disagree profoundly on matters of theology, but are united by their deep concerns about the decision below.[1] That decision would have a direct, immediate, and harmful financial effect on *amici*, which rely on the parsonage allowance to provide housing to their ministers.[2] It would also needlessly entangle courts in religious questions; create discrimination among religions; and insert the government into important decisions about the relationship between a church and its ministers.

[1] The parties have consented to the filing of this brief. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting the brief; and no person other than *amici*, their members, or their counsel contributed money to fund preparing or submitting the brief.

[2] Like the tax code, *amici* use the terms "church" and "minister" to refer broadly to houses of worship and religious leaders of all faiths.

INTRODUCTION

Although the United States' brief adequately covers the basic legal issues, this brief offers a deeper analysis in three key respects. First, it thoroughly examines the "convenience of the employer" doctrine, which is crucial to understanding this case. Without a full understanding of this doctrine and how it is embodied in the tax code, it is impossible to decide whether the parsonage allowance (26 U.S.C. § 107(2)) has an unconstitutional effect.

Second, this brief offers a detailed description of the unique housing needs of ministers. This information is essential for understanding whether ministers fit within the "convenience of the employer" doctrine. And *amici*, as diverse religious organizations, are better qualified than the United States to provide it.

Third, this brief places § 107(2) within the broader context of the tax code, including numerous tax provisions designed to address the unique status of churches under the First Amendment. The district court ignored this crucial context.

When viewed in context, § 107(2) does not, as the district court said, "single out religious beliefs for preferential treatment." App28. Rather, it performs two important functions. First, it extends the "convenience of

the employer" doctrine to ministers. Part I, *infra*. This ensures that ministers are treated no worse than many secular employees who receive tax-exempt housing benefits. Second, it adapts the convenience of the employer doctrine to the unique First Amendment context of ministers. Part II, *infra*. This reduces entanglement between church and state and eliminates discrimination among religious groups. These features make § 107(2) not just permissible under the Establishment Clause, but laudable.

ARGUMENT

I. The parsonage allowance equalizes treatment of ministers and non-ministers.

There are two possible frameworks for analyzing this case. One is the three-part *Lemon* test. Appellant's Br. 42-43. Although this Court may feel bound to consider the *Lemon* factors, the Supreme Court often treats them as "no more than helpful signposts," if it applies them at all. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality); *see Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (not applying *Lemon*); *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (same).

The better approach in the tax context is to reason by analogy to *Walz v. Tax Commission of New York*, 397 U.S. 664 (1970), and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). Although both cases mention some of

the *Lemon* factors, they are not driven by a three-factor test. Rather, they focus on the nuances of the tax code and principles unique to the tax context.

This brief analyzes this case through the lens of the *Texas Monthly* plurality. Although that opinion is not controlling under *Marks v. United States*, 430 U.S. 188, 193 (1977), it offers the most stringent test for evaluating tax provisions under the Establishment Clause. Thus, if § 107(2) satisfies the *Texas Monthly* plurality, it also satisfies the *Texas Monthly* concurrence and *Lemon*.

Under the *Texas Monthly* plurality, "[w]hat is crucial is that any subsidy afforded religious organizations be warranted by some *overarching secular purpose* that justifies like benefits for nonreligious groups." 489 U.S. at 15 n.4 (emphasis added). The fit between the overarching secular purpose and the benefit for religious organizations need not be perfect. Rather, it is enough if "it can be *fairly concluded* that religious institutions *could be thought* to fall within the natural perimeter [of the legislation]." *Id.* at 17 (emphasis added).

Here, § 107(2) is part of a broad scheme of tax exemptions serving the same secular purpose: ensuring fair tax treatment of employee housing costs. Since its inception, the federal income tax system has recognized

that some housing costs are incurred primarily for "the convenience of the employer"—not for the employee's personal consumption—and are therefore not income. Many tax provisions embody this doctrine. Some provisions demand case-by-case analysis of each situation, but others establish bright lines for certain classes of workers, reducing the disputes and non-uniformity that would result from a case-by-case approach. This reduction of disputes and non-uniformity is especially vital in the context of ministers, because it fulfills the Establishment Clause's core directives of limiting entanglement between church and state and avoiding discrimination among religious groups.

A. Non-ministers receive a variety of tax-exempt housing benefits under the "convenience of the employer" doctrine.

The district court held that each of the various tax exemptions governing housing is "motivated by a purpose specific to the particular group involved," and that there is no "'overarching secular purpose' that justifies [all of them]." App35-36. Not so. Section 107(2) is part of a broad package of tax exemptions that all trace their origin to the "convenience of the employer" doctrine, which is as old as the federal income tax itself.

Rationale of the Doctrine. The convenience of the employer doctrine flows from a very basic principle about the nature of income—namely, for something to qualify as income, there "must be an economic gain, and

this gain must primarily benefit the taxpayer personally." *United States v. Gotcher*, 401 F.2d 118, 121 (5th Cir. 1968) (emphasis added). For example, a worker might receive any number of things that simultaneously benefit her *and* her employer's business—such as meals, travel, entertainment, and office furnishings. But if these things are primarily intended to further the business of the employer, rather than compensate the employee, they are not treated as income. *See* Treas. Reg. § 1.132-5(a)(1)(v); Treas. Reg. § 1.162-2(a)–(b).

The same principle applies to lodging. In general, when an employee receives ordinary lodging or a housing allowance, it does not benefit the employer other than by compensating the employee, and so the value of the lodging is treated as income. But in some cases, the lodging is provided primarily "for the convenience of the employer." Common examples include hotel managers who must live at the hotel, military officers who must live in the barracks, or commercial fishermen who must live on a ship. For these workers, the lodging is a key component of their job. As one early court put it, it is "part of the maintenance of the [employer's] general enterprise," not "part of the individual income of the laborer." *Jones v. United States*, 60 Ct. Cl. 552, 575 (1925); *see generally* J. Patrick McDavitt, *Dissection of a Malignancy: The Convenience of the Employer*

Doctrine, 44 NOTRE DAME LAWYER 1104 (1969).

In such cases, excluding the lodging from income does not confer a special benefit; rather, it avoids unjustly taxing workers on amounts they receive primarily on another's behalf. For instance, when the government assigns an employee to a place with a higher cost of living, it ordinarily provides a greater housing allowance to "equalize" real pay. But if such allowances were taxed as income, the employee would be unfairly penalized.

History of the Doctrine. The convenience of the employer doctrine was first recognized by administrative rulings in 1914, in cases involving *government employees* who received *in-kind* lodging. *Id.* at 1105 (citing T.D. 2079, 16 Treas. Dec. Int. Rev. 249 (1914)). But the doctrine quickly expanded to include *private employees* and *cash housing allowances*. In 1919, it was extended to in-kind lodging provided to private seamen. *Id.* at 1106 (citing O.D. 265, 1 Cum. Bull. 71 (1919)). In 1920, it was extended in principle to all private employees. *Id.* (citing Treas. Reg. 45, art. 33 (1920 ed.); T.D. 2992, 2 Cum. Bull. 76 (1920)). In 1921, it was extended expressly to ministers. Revenue Act of 1921, Pub. L. No. 98, § 213(b)(11), 42 Stat. 227, 239 (overturning O.D. 862, 4 Cum. Bull. 85 (1921)). And in

1925—in the first federal court case addressing the doctrine—it was extended to cash housing allowances. *Jones*, 60 Ct. Cl. 552.

Early IRS rulings also extended the doctrine to cash allowances for *volunteer charitable activities*. In 1919, it was extended to a volunteer in the American Red Cross. O.D. 11, 1 Cum. Bull. 66. And in the same year, it was extended to a clergyman under a vow of poverty. 1919-1 Cum. Bull. 82. The non-economic motivation of these activities made it relatively easy to conclude that the allowances were primarily for the benefit of the general enterprise, not a private benefit to induce performance.

Codification in the Tax Code. In 1954, Congress codified some aspects the "convenience of the employer" doctrine in § 119(a)(2). Section 119(a)(2) now excludes the value of lodging from gross income for *any* employee—secular or religious—if five conditions are met. The lodging must be furnished (1) by an employer to an employee; (2) in kind; (3) on the business premises of the employer; (4) for the convenience of the employer; and (5) as a condition of employment. Treas. Reg. § 1.119-1(b). A wide variety of employees have qualified for this exemption, including

construction workers,[3] museum directors,[4] an oil executive living in Tokyo,[5] the president of the Junior Chamber of Commerce,[6] a state governor,[7] a rural school system superintendent,[8] a prison warden,[9] and many others.

But § 119(a)(2) is not the only provision codifying the convenience of the employer doctrine. Other provisions relax the requirements of § 119(a)(2) for certain types of employees. For example, § 119(c) governs "lodging in a camp located in a foreign country." It defines "camp" in a way that eliminates the "business premises" and "condition of employment" factors. *Compare* § 119(c) *with* § 119(a)(2). The rationale is that, when the camp is in a "remote area where satisfactory housing is not available on the open market," § 119(c)(2)(A), the lodging is per se for the

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[3] Treas. Reg. § 1.119-1(f) Ex. (7); *Stone v. Comm'r*, 32 T.C. 1021 (1959).

[4] Jane Zhao, *Nights on the Museum: Should Free Housing Provided to Museum Directors Also be Tax-Free?*, 62 SYRACUSE L. REV. 427, 447-49 (2012).

[5] *Adams v. United States*, 218 Ct. Cl. 322 (1978).

[6] *U.S. Jr. Chamber of Commerce v. United States*, 167 Ct. Cl. 392 (1964).

[7] Rev. Rul. 75-540, 1975-2 C.B. 53; *See also* Rev. Rul. 90-64, 1990-2 C.B. 35 (principal representative of the U.S. to a foreign country).

[8] *Haack v. United States*, 75-2 U.S.T.C. ¶ 9847 (S.D. Iowa 1975).

[9] I.R.S. Priv. Ltr. Rul. 9126063 (June 28, 1991).

convenience of the employer.

Another per se rule applies to employees of educational institutions—such as college presidents, university faculty, or even elementary-school teachers. Under § 119(d), such employees can exclude a portion of the fair rental value of "qualified campus lodging," even if they cannot satisfy *any* of the elements of the convenience of the employer doctrine. All they need to show is that the lodging is "(A) located on, or in the proximity of, a campus of the educational institution, and (B) furnished to the employee . . . by or on behalf of such institution for use as a residence." *Id.* § 119(d)(2)–(3).

An even broader per se rule is § 134, which applies to members of the military. Under this provision, "any member or former member of the uniformed services" can receive tax-exempt housing benefits—including both in-kind lodging and cash allowances—regardless of whether the requirements of § 119(a)(2) are satisfied. 26 U.S.C. § 134. This section codifies the reasoning in *Jones*—namely, that a service member's duties "require his physical presence at his post or station; his service is continuous day and night; [and] his movements are governed by orders and commands." 60 Ct. Cl. at 569. *Every* service member is presumed to face these burdens on housing, whether living at home or abroad, on base or off,

active duty or retired.

Nor is this per se rule limited to the military. Section 912 extends the same treatment to enumerated housing allowances of *all* government employees living abroad—including Peace Corps volunteers, CIA operatives, diplomats and consular officials, school teachers, and others. This reversed previous law, which required case-by-case application of the convenience of the employer doctrine to such employees. McDavitt, 44 NOTRE DAME LAWYER at 1108 & n.40 (collecting decisions).

Section 911 extends yet another per se rule to any "citizen or resident of the United States" residing in a foreign country. Such persons need not satisfy *any* of the requirements of § 119(a)(2); living abroad is enough. They can exclude housing costs above a certain level—whether housing is provided in-kind, through a cash allowance, or even purchased with their own funds. The basic rationale is that, if an individual is working abroad, she likely has significant extra housing costs that reduce her real income compared with a domestic worker. But a foreign worker need not prove that these considerations apply in her individual case.[10]

[10] The district court said that "the purpose of § 911 is to protect American business people living overseas from *double* taxation." App36 (citing *Brewster v. C.I.R.*, 473 F.2d 160, 163 (D.C. Cir. 1972)). Not so. *Brewster* addressed a prior version of § 911 that did not cover housing allowances.

Finally, under §§ 162 and 132, anyone posted away from her normal workplace for one year or less is not taxed on cash housing allowances or in-kind lodging provided by the employer. Again, there is no need to show that the lodging is used for work; the mere fact that she has moved away temporarily, while still maintaining her permanent home and primary business location, is enough to show that the temporary lodging is for the employer's benefit.

The following chart summarizes these exemptions:

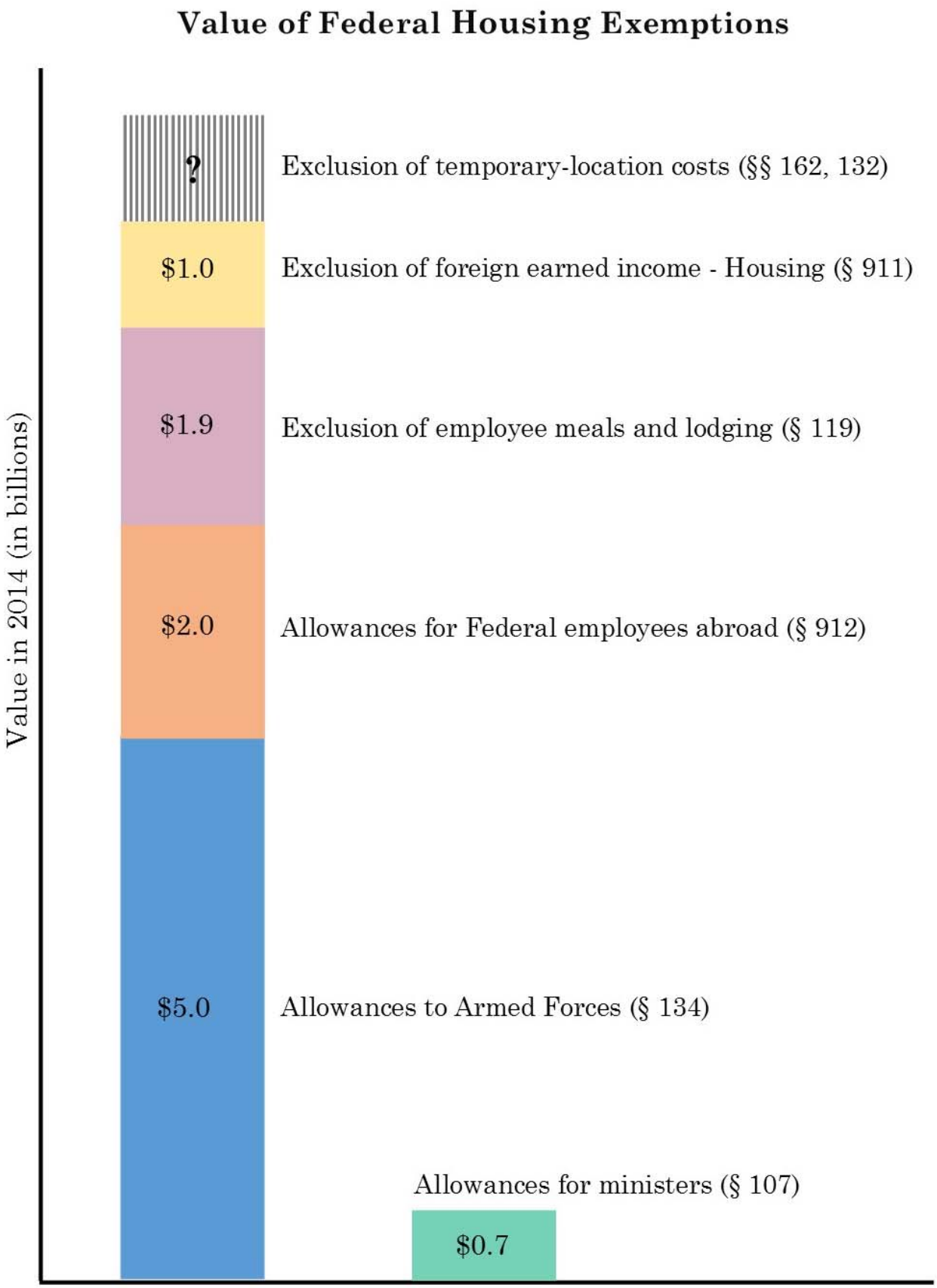
Tax Treatment of Housing Benefits

Sec.	Who is eligible?	Form?	What must be shown?
119(a)	All employees, secular or religious	In-kind	Lodging is (1) furnished by employer for employee; (2) furnished in kind; (3) on business premises of employer; (4) for convenience of employer; and (5) condition of employment.
119(c)	Any employee living in a foreign camp	In-kind	Lodging is (1) furnished by employer for employee; (2) furnished in kind; (3) as near as practicable to place of service; (4) in a remote area with no satisfactory housing; and (5) not available to the public and normally accommodates 10 or more employees.
119(d)	Any employee of an educational inst.	In-kind	Lodging is (1) on or near campus, and (2) furnished by the educational institution.
134	Any member or former member of the uniformed services	In-kind & cash	Lodging or allowance is received "by reason of such member's status or service as a member of such uniformed services"
912	Any government employee living overseas	In-kind & cash	Lodging or allowance is on a list of allowances authorized by Congress or regulation
911	Any citizen or resident living abroad	In-kind & cash	Taxpayer has a "tax home" abroad and approximately one year of overseas residence.
162 & 132	Anyone away from home for business	In-kind & cash	Temporary post is less than one year; taxpayer incurs expenses in pursuit of business away from tax home.

In short, Congress has enacted a broad package of tax benefits designed to relieve workers who face unique, job-related housing requirements. The default rule is § 119(a)(2), which establishes a demanding, case-by-case test requiring all employees to demonstrate that their lodging is provided for the convenience of their employer. But Congress also relaxed this default rule in a variety of situations where the type of work, the burdens on housing, or a non-commercial working relationship make it likely that the lodging was intended to benefit the employer.

Value of the Exclusions. The district court suggested that these exemptions apply only to "a small number of secular groups." App35. But according to Congressional estimates, the annual value of these exemptions dwarfs § 107. The following graph shows the projected value of these exemptions in 2014.[11]

[11] *See* STAFF OF THE JOINT COMMITTEE ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2012-2017 (Comm. Print 2013) at Table 1. The value of temporary-location costs under §§ 162 and 132 is unknown; it appears to be reported within the larger category of "fringe benefits," totaling $7.5 billion. *Id.* Allowances for Armed Forces and federal employees include more than just housing.


Value of Federal Housing Exemptions
Value in 2014 (in billions)
?
Exclusion of temporary-location costs (§§ 162, 132)
$1.0
Exclusion of foreign earned income - Housing (§ 911)
$1.9
Exclusion of employee meals and lodging (§ 119)
$2.0
Allowances for Federal employees abroad (§ 912)
$5.0
Allowances to Armed Forces (§ 134)
Allowances for ministers (§ 107)
$0.7

As this graph shows, § 107 represents only a small fraction of exemptions for housing. All of these exemptions are reasonable reflections of the same overarching secular purpose of the convenience of the employer doctrine.

B. Ministers fit comfortably within the "convenience of the employer" doctrine.

In light of this treatment of secular workers, the question under the plurality in *Texas Monthly* is simply stated: Can it be "fairly concluded that [ministers] could be thought to fall within the natural perimeter [of this legislation]?" 489 U.S. at 17. The district court said "no," concluding that ministers have no "'unique housing needs' . . . different from those of any other taxpayer." App35. But this conclusion ignores reality.

A comparison to the strongest case—military service—is instructive:

Required Physical Presence. First, ministers are typically required to live at or near the church to be close to those they serve. This is most obvious in the case of Orthodox Jewish rabbis, who, due to Sabbath restrictions, must live within walking distance of the synagogue. It is also obvious in the case of religious orders, where leaders often live in the same convent or monastery as the members.

But it is also true in other settings. Many churches, including Eastern

Orthodox *amici*, require priests to live within the boundaries of the parish. Muslim imams usually must live near the mosque to lead prayer five times daily. Some churches are dedicated to serving a particular neighborhood, and the minister is expected to live in that neighborhood even when the location is undesirable. Still other churches assign ministers to serve in homeless shelters, hospitals, or nursing homes where they are expected to live in close proximity to those they serve. This sort of "voluntary displacement" has deep theological roots and, in the case of Christianity, is believed to mirror the incarnation of Christ. HENRI J.M. NOUWEN ET AL., COMPASSION: A REFLECTION ON THE CHRISTIAN LIFE 60-73 (2005).

On a more practical level, ministers in many small churches are the primary caretaker of the church building. Like the caretakers of apartment buildings—who often receive tax-free housing under § 119(a)(2)—ministers must respond when the fire alarm goes off, a pipe bursts, the furnace fails, the snow needs shovelling, or the building has other needs.

Service Day and Night. Ministers are also expected to be available "at all hours of the day and night." A38. The Roman Catholic sacrament of anointing of the sick is administered only to those in danger of death.

1983 CODE c.1004 § 5. The sacrament must be administered "at the appropriate time" (CODE c.1001), and there are many "case[s] of necessity." CODE c.999, 1000 § 1, 1003 § 3. If the priest is not available at all hours, the sacrament cannot be administered. Ministers also respond at all hours to comfort grieving families, pray with congregants about emergencies, counsel spouses facing marital strife, hear confessions, and offer advice. The major life events of a congregation are not confined to regular business hours.

Use of Lodging for Their Duties. Ministers are also expected to use their homes to serve the church. In the Christian New Testament, there are two main lists of qualifications for ministers; both require them to be "hospitable." *Titus* 1:8; *1 Timothy* 3:2 (Revised Standard Version).

In practice, this means hosting various church events, like Bible studies, women's meetings, meals for new members, and the like. It also means providing temporary lodging for church members in transition, guest speakers, missionaries, and other travelers with a connection to the church—a practice frequently commended in the Christian New Testament. *See, e.g.*, *Matthew* 10:11 (lodging for apostles); *Acts* 16:15 (lodging for missionaries); *Romans* 16:2 (lodging for Phoebe); *3 John* 1:5-8 (lodging

for traveling Christians). Many congregants also expect the minister's home to be accessible for unplanned social visits.

Ministers also use their homes for church-related duties. When congregants seek comfort, prayer, counsel, confession, and advice—often at irregular hours—they often meet in the minister's home. Counseling sessions, prayer meetings, and sensitive staff meetings are often scheduled in the comfort of a home rather than a formal office. A41. Meetings with lay leaders routinely occur in the home. *Id.* Sermons are often prepared in the home. *Id.* And in small churches that lack their own building, the only place to gather for worship is often the minister's home.

Frequent Movement and Limited Choice. Ministers also face frequent movement and limited choice in their housing. This is most obvious in hierarchical denominations, such as Roman Catholic, Eastern Orthodox, or mainline Protestants, where the placement of ministers is dictated by higher church authorities. In the Russian Orthodox *amicus*, the diocesan Bishop has absolute authority to move priests from parish to parish. *See also* A42-43. Bishops can also agree to move priests across diocesan lines, including to foreign countries. Nor is frequent movement

limited to hierarchical denominations. The average tenure of Baptist and Mainline Protestant ministers is only four years.[12]

In many religious communities, the minister's home is also expected to set an example of a frugality. This is obviously true for members of religious orders who take a vow of poverty. But it also includes other religious groups, where a luxurious house may be viewed as a sin. *See* Alison Smale, *Vatican Suspends German Bishop Accused of Lavish Spending on Himself*, N.Y. Times, Oct. 23, 2013. In other cases, ministers may be obliged to live in an area with housing costs far higher than the minister would otherwise choose. Either way, the housing costs are driven by the needs of the church, not the personal consumption choices of the minister.

* * *

The point of all of this is not that ministers are exactly like military service members in every respect. It is that they are in a unique, non-

[12] *See* North American Mission Board, *Southern Baptist Congregations Today*, http://www.namb.net/namb1cb1col.aspx?id=8590001122 (four-year tenure for Baptist ministers); Barna Group, *Report Examines the State of Mainline Protestant Churches*, Dec. 7, 2009, https://www.barna.org/barna-update/leadership/323-report-examines-the-state-of-mainline-protestant-churches#.Ux3xrYWk3pw (four-year tenure for mainline ministers).

commercial employment relationship with unique, job-related demands on their housing. Given this reality, Congress could "fairly conclude[] that [ministers] could be thought to fall within the natural perimeter" of the convenience of the employer doctrine. *Texas Monthly*, 489 U.S. at 17. Accordingly, § 107(2) is constitutional.

II. To the extent that the parsonage allowance provides special treatment to ministers, it is justified by important First Amendment principles.

Of course, § 107(2) does not treat ministers identically to all secular employees in every respect. Otherwise, there would be no need for a separate provision addressing ministers. But just as Congress can adapt the convenience of the employer doctrine to employees in foreign camps (§ 119(c)), educational institutions (§ 119(d)), military service (§ 134), overseas government jobs (§ 912), overseas private jobs (§ 911), and jobs requiring temporary displacement (§§ 162 and 132), it can also adapt the doctrine to ministers—as long as it has secular reasons for doing so. In § 107, Congress adapted the doctrine in a way that reduces entanglement between church and state and avoids discrimination among religious groups. Both purposes are not just constitutionally permissible but laudable.

A. The tax code routinely provides special treatment to churches and ministers to reduce entanglement and discrimination among religions.

The district court implicitly assumed that churches and ministers are in an ordinary employment relationship, so any tax provision addressing them separately is automatically suspect. But that assumption is flawed. In many cases, the First Amendment not only permits "special solicitude" for churches, but requires it. *Hosanna-Tabor v. EEOC*, 132 S. Ct. 694 (2012). In particular, the First Amendment (1) restricts government interference in the relationship between churches and ministers, *id.*; (2) forbids government entanglement in religious questions, *Texas Monthly*, 489 U.S. at 20 (plurality); and (3) prohibits government discrimination among denominations. *Larson v. Valente*, 456 U.S. 228, 244 (1982). These three values—church autonomy, non-entanglement, and non-discrimination—are reflected throughout the tax code in specific protections for churches, none of which are available to secular non-profits.

For example, several provisions protect the relationship between churches and ministers by exempting churches from paying or withholding certain types of taxes:

- Churches are not required to withhold federal income taxes from ministers in the exercise of ministry. 26 U.S.C. § 3401(a)(9).

- Churches are exempt from Social Security and Medicare taxes for wages paid to ministers in the exercise of ministry; instead, ministers are uniformly treated as self-employed. 26 U.S.C. §§ 1402(c)(4), 1402(e), 3121(b)(8).

- Churches are exempt from state unemployment insurance funds authorized by the Federal Unemployment Tax Act. 26 U.S.C. § 3309(b)(1).

Other provisions protect church autonomy by exempting churches from disclosing information:

- Churches and certain related entities are not required to file Form 990, which discloses sensitive financial information. 26 U.S.C. § 6033(a)(3).

Still others reduce entanglement by offering unique procedural protections:

- Churches receive special procedural protections when subjected to a tax audit. 26 U.S.C. § 7611.

- Churches need not petition the IRS for recognition of their tax-exempt status under § 501(c)(3). 26 U.S.C. § 508(a), (c)(1)(A).

Still others modify tax provisions so that they apply neutrally among various church polities:

- Churches can maintain a single church benefits plan exempt from ERISA for employees of multiple church affiliates, regardless of common control, and for ministers, regardless of their em-

ployment status. 26 U.S.C. § 414(e). This is designed "[t]o accommodate the differences in beliefs, structures, and practices among our religious denominations."[13]

- Churches can include ministers in 403(b) contracts (a type of tax-deferred benefit), even if ministers do not qualify as employees. 26 U.S.C. § 403(b)(1)(A)(iii).

- Churches can provide certain insurance to entities with common religious bonds, even if those entities are not structured to meet normal common control tests. 26 U.S.C. § 501(m)(3)(C)-(D); G.C.M. 39874 (May 4, 1992); Treas. Reg. § 1.502-1(b).

Congress has been particularly careful to make sure that general tax rules do not discriminate among ministers based on the nature of their relationship with the church. For example, when Congress extended eligibility for social security to ministers in 1954, it stipulated that all ministers would be treated as self-employed, regardless of whether they were common-law employees—precisely to avoid discriminating between groups based on the status of their ministers as employees. Conf. Rep. No. 83-2679 (1954).

In short, the tax code does not treat churches and ministers as ordinary employers and employees. Rather, Congress has crafted numerous

[13] *See* 26 U.S.C. § 414(e)(3)(B), (5)(A); Miscellaneous pension bills: Hearings before the Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Committee on Finance, United States Senate, Ninety-Sixth Congress, First Session (Dec. 4, 1979), at 367 (Statement of Sen. Talmadge).

tax provisions to reduce entanglement and prevent discrimination among religions. Section § 107(2) serves the same purpose.

B. The housing allowance reduces entanglement.

The district court suggested that § 107 might *increase* entanglement because it requires the government to apply a "complex and inherently ambiguous multifactor test" to determine who is a minister. App40-41. But the district court failed to view § 107 in the context of the rest of the tax code. Viewed in context, § 107 is far less entangling than the next best alternative—which is applying the notoriously difficult standard of § 119 to ministers.

Whenever the government taxes churches and ministers, there is no completely disentangling alternative: "Either course, taxation of churches or exemption, occasions some degree of involvement with religion." *Walz*, 397 U.S. at 674. To figure out which alternative is best, it is essential to distinguish between two types of entanglement. One is called "enforcement entanglement." Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause?*, 33 CARDOZO L. REV. 1633 (2012). It occurs when the government *taxes* churches, and is therefore required to value church property, place liens on church property, and (in some cases) foreclose on church property. *Id.* This creates

"direct confrontations" between church and state and threatens church autonomy. *Id.* at 1640.

The other type of entanglement is called "borderline" entanglement. *Id.* at 1635. It occurs when the government *exempts* churches, and is therefore required to decide who qualifies for the exemption and who doesn't. For example, it may have to decide whether an entity is "religious" and whether a publication is "consistent with 'the teaching of the faith.'" *Texas Monthly*, 489 U.S. at 20. Policing the borders of a complicated exemption threatens to entangle courts in religious questions. *Walz*, 397 U.S. at 698-99 (Harlan, J., concurring).

These two types of entanglement are illustrated by *Walz* and *Texas Monthly*. *Walz* focused on "enforcement entanglement." There, the Court explained that taxing churches "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." *Id.* at 674. Exempting churches, by contrast, would "restrict[] the fiscal relationship between church and state," thus "tend[ing] to complement and reinforce the desired separation insulating each from the other." *Id.* at 676.

Texas Monthly focused on "borderline entanglement." There, all periodicals and books were subject to tax, except those that consisted "wholly of writings promulgating the teaching of [a] faith." 489 U.S. at 5. Because the government had to decide which messages were "consistent with 'the teaching of the faith,'" the exemption produced "greater state entanglement" than providing no exemption at all. 489 U.S. at 20 (plurality).

Here, § 107 reduces *both* enforcement entanglement and borderline entanglement. It obviously reduces enforcement entanglement, because the government need not value the housing benefits offered to ministers or become entangled in collecting taxes on those benefits. More importantly, it also reduces borderline entanglement because it replaces the notoriously fact-intensive standard of § 119 with the bright-line rule of § 107.

Section 119 is extremely difficult to apply to ministers, if not impossible. First, it requires the minister to qualify as an "employee" under IRS rules. This, in turn, requires the government to tax differentially depending on internal matters of church polity. If the minister belongs to a denomination that gives him broad autonomy or exposes him to significant economic risk, he may fail this test and be considered self-employed. Some decisions suggest that United Methodist Council ministers would

qualify as employees, but Assembly of God and various Pentecostal ministers would not. *See Weber v. Comm'r*, 103 T.C. 378 (1994), *aff'd*, 60 F.3d 1104 (4th Cir. 1995); *Shelley v. Comm'r*, T.C.M. (RIA) 1994-432 (1994); *Alford v. United States*, 116 F.3d 334 (8th Cir. 1997). Even if a minister qualified as an employee, a § 119 exemption would be unavailable if one entity provided the housing (such as the congregation), but a different entity qualified as the "employer" (such as the diocese)—thus pressuring churches to make ministers answerable to those paying them. *See Furhman v. Comm'r*, T.C.M. 1977-416 (1977).

Once these threshold concerns are overcome, § 119 still requires the government to decide whether a minister's housing was "furnished for the convenience of the employer" as "a condition of his employment." Treas. Reg. § 1.119-1(b). This, in turn, requires the government to decide whether the lodging is truly necessary "to enable him properly to perform the duties of his employment." *Id.* In other words, is it really necessary for the minister "to be available for duty at all times"? *Id.* Is it really necessary to live in close proximity to the church, to counsel church members at home, to host meetings at home, and to prepare sermons at home? These sorts of inquiries are extremely difficult and fact-intensive for secular employees. McDavitt, 44 NOTRE DAME LAWYER at 1139-40. They are

not even remotely constitutional for churches. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) (courts cannot "determin[e] that certain activities are in furtherance of an organization's religious mission").

Section 107, by contrast, recognizes that the government cannot decide which uses of a minister's home are "necessary" to the mission of the church and which are not. It asks only whether the employee is functioning as a minister. This is an inquiry courts have been conducting for decades—not only in the tax context, but also under the First Amendment "ministerial exception." *See McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). Indeed, it is an inquiry that the Supreme Court itself approved just two years ago. *Hosanna-Tabor*, 132 S. Ct. at 694.

This is why § 107 is easily distinguishable from the exemption in *Texas Monthly*. There, the alternative to the religious exemption for periodicals was no exemption at all—all periodicals would be taxed equally. Thus, striking down the religious exemption eliminated any possibility of borderline entanglement. Here, by contrast, if § 107 were struck down, the

alternative would be to apply § 119 to ministers. Far from eliminating borderline entanglement, that would exacerbate it.[14]

C. The housing allowance reduces discrimination.

Section § 107(2) also reduces discrimination among religions. The Supreme Court has repeatedly held that this is "[t]he clearest command of the Establishment Clause." *Larson*, 456 U.S. at 244, 246 (collecting cases). This applies not just to intentional discrimination among religions, but also to "indirect way[s] of preferring one religion over another." *Fowler v. R.I.*, 345 U.S. 67, 70 (1953). Of course, a facially neutral law is not invalid merely because it has a greater "incidental effect" on one denomination than another. *See Employment Div. v. Smith*, 494 U.S. 872, 878 (1990). But "when the state passes laws that facially regulate religious issues"—as § 107 clearly does—"it must treat individual religions and religious institutions 'without discrimination or preference.'" *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (McConnell, J.).

The leading case is *Larson*. There, a Minnesota law imposed reporting requirements on all charitable organizations. But it exempted "religious

[14] It is no answer to say that § 119 applies only to in-kind lodging. As the United States explains (at 66), cash allowances present the same entanglement problem under §§ 162 and 280A(c)(1).

organizations that received more than half of their total contributions from members." 456 U.S. at 231. This had the effect of distinguishing between "well-established churches," which received ample "financial support from their members," and "churches which are new and lacking in a constituency" and had to rely on "public solicitation." *Id.* at 246 n.23. The state defended its rule on the ground that it was "based upon secular criteria" and merely "happen[ed] to have a 'disparate impact' upon different religious organizations." *Id.* But the Supreme Court rejected this argument, concluding that the statute "focuses precisely and solely upon religious organizations" and makes "explicit and deliberate distinctions between [them]." *Id.*

Section 107(1), without § 107(2), would have the same effect. "[W]ell-established churches" with "financial support" can afford to purchase a parsonage and provide tax-free housing to ministers. *Id.* But "churches which are new and lacking in a constituency" cannot. *Id.* This creates a serious disparity between wealthy and poor denominations.

Nor is the disparity merely financial. The decision to have a parsonage is also influenced by theological considerations. In some denominations, like the Roman Catholic Church, the use of church-owned parsonages is

"hardwired into their deployment models for clergy." A42. The three Plenary Councils of Baltimore (1852, 1866, and 1884) urged the Catholic Church in America to "build[] up parishes with schools, rectories, and convents, not just houses of worship." *Id.* In part, this was because the bishops "could, and did, send ministers to different parishes according to the religious needs of the Church as a whole." *Id.*

In other denominations—typically newer and less hierarchical ones (A54-55)—there is no historical or theological emphasis on church-owned parsonages. Sometimes, this is because churches expect ministers to be bi-vocational (A47-48); other times, it is because churches may take years before they establish a permanent place of worship (A58); still other times, it is because the churches have a theological reluctance to amass large holdings of worldly property. And in some cases, ministers are expected to be itinerant, making a housing allowance the only feasible way of meeting their housing needs. Given these differences among denominations, § 107(1) discriminates along theological, not just financial, lines.

Thus, it is no surprise that equal treatment of housing allowances was first *imposed by courts*, even before Congress enacted § 107(2). This occurred in the early 1950s, when three federal courts held that cash housing allowances must be excluded from the income of ministers. *MacColl*

v. United States, 91 F. Supp. 721, 722 (N.D. Ill. 1950); *Conning v. Busey*, 127 F. Supp. 958 (S.D. Ohio 1954) (following *MacColl*); *Williamson v. C.I.R.*, 224 F.2d 377 (8th Cir. 1955). Congress then codified these decisions in § 107(2). When it did so, it expressly stated that it was seeking to "remove[] the discrimination in existing law" among various denominations. H.R. Rep. No. 83-1337, at 4040 (1954); S. Rep. No. 83-1622, at 4646 (1954).

Nor is this desire to remove discrimination unique to ministers. Congress did the same thing for government workers living overseas. In the 1950s, many overseas employees received tax-exempt, *in-kind* housing. But some did not. So Congress enacted the Overseas Differential and Allowances Act authorizing *cash housing allowances*, and § 912 excluding those cash housing allowances from income. *Anderson v. United States*, 16 Cl. Ct. 530, 534 (1989). Thus, § 912 does the same thing for overseas employees that § 107(2) does for ministers. *See id.* at 535 ("Congress intended that all federal overseas employees be treated uniformly.").

Treating cash allowances and in-kind housing equally is also logical. Although cash payments *may* be compensatory, they need not be. "[J]ust as an employee is often furnished tangible property which cannot be regarded as compensation, an employee may be furnished cash which is not

compensation." *Williamson*, 224 F.2d at 379 (quoting *Saunders v. C.I.R.*, 215 F.2d 768, 771 (3d Cir. 1954)). The question is whether the lodging is furnished for the convenience of the employer—not whether it is cash or in-kind. Thus, it is no surprise that the first court decision involving the convenience of the employer doctrine rejected a distinction between cash allowances and in-kind housing. *Jones*, 60 Ct. Cl. at 552. So did the first court of appeals decision involving ministers. *Williamson*, 224 F.2d at 379. So did early IRS rulings on charitable volunteers. O.D. 11, 1 Cum. Bull. 66; 1919-1 Cum. Bull. 82. And so did early commentators. *See* McDavitt, 44 NOTRE DAME LAWYER at 1132-33, 1138 (distinction is "artificial and formalistic" and has "no practical place in the convenience of the employer doctrine"). Indeed, § 119 is the *only* housing exclusion to distinguish between cash and in-kind housing benefits. There is no reason to import this distinction into § 107—especially when it creates discrimination among religions.

The district court rejected this rationale for two reasons. First, it argued that § 107(1), standing alone, "is not discriminatory," because it does not "single[] out certain religions for more favorable treatment"; rather, it applies a religion-neutral rule based on "the type of housing [provided to] the employee." App32. But the very same argument was made

and rejected in *Larson*. There, too, the state said that its fifty-percent rule was "facially neutral" and "based upon secular criteria" (*i.e.*, the source of donations). 456 U.S. at 246 n.23. But the Supreme Court still struck it down. *Id.* at 272. Remarkably, the district court did not even cite *Larson*, much less distinguish it.

Second, the district court said that § 107(2) "does not eliminate" discrimination "but merely shifts it"—in particular, to religions "with no permanent or specifically designated ministers." App33 (quoting a student note). But this is mistaken. Section 107(2) is not limited to "permanent" or "specifically designated" ministers—it applies to *all* ministers. And it has been interpreted flexibly to allow many who are *not* designated as ministers to receive it. *See, e.g.*, *Silverman v. C.I.R.*, 32 A.F.T.R.2d 73-5379 (8th Cir. 1973) (Jewish cantor). In that sense, § 107(2) is analogous to the First Amendment's "ministerial exception," which extends to those exercising authority in the church without regard to "ordination status or formal title." *Hosanna-Tabor*, 132 S. Ct. at 713-14 (Alito, J., concurring).

Were the IRS to interpret § 107 narrowly to exclude certain religious organizations because of their internal structure, that would raise serious problems under *Larson* and *Hosanna-Tabor*. But that has not been

alleged, much less proven, here. And if it were, the remedy would be to interpret § 107 to treat religious organizations equally—not to strike down § 107(2) and perpetuate discrimination under § 107(1).

CONCLUSION

The decision of the district court should be reversed.

Respectfully submitted.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,981 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 10, 2014, a true and correct copy of the foregoing Brief *Amici Curiae* was served electronically on the counsel named below via the CM/ECF system.

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